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HELEN E. COLE, APPELLEE, V. JESSE GERSTENBERGER, ADMINISTRATOR, ET AL., APPELLANTS.

FILED JUNE 23, 1914. No. 17,774.

1. **Municipal Corporations:** OBSTRUCTING SIDEWALK: NEGLIGENCE: SUFFICIENCY OF EVIDENCE. The evidence, indicated in the opinion, is found sufficient to support the verdict and judgment.

2. **Trial:** REFUSAL OF INSTRUCTIONS. The refusal of the court to give certain requested instructions is justified by the instructions given on the court's own motion, which substantially and correctly stated all material issues submitted to the jury, including the matters suggested by the requested instructions.

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

Morning & Ledwith, for appellants.

E. C. Strode and *M. V. Beghtol, contra.*

SEDGWICK, J.

The defendants were contractors for a definite part of the work on the Y. M. C. A. building, located on the corner of Thirteenth and P streets, in the city of Lincoln. With the permission of the city authorities they erected a fence on the asphalt pavement in the street, several feet from the curb line, to keep the traveling public from dangerous places in the construction. After their work was completed they removed the fence, and they testify that they removed the materials which they had deposited on the street within the inclosure. A few days later the plaintiff was passing along the street where this inclosure had been, and fell and received a serious personal injury. The evidence shows that a nail or spike protruding an inch and a half or two inches from the pavement was the cause of her fall. She brought this action in the district court for Lancaster county against these defendants, alleging negligence in causing the spike to be placed where it was

and failing to remove the same. She recovered a verdict and judgment, and the defendants have appealed.

1. The defendants contend that the evidence is not sufficient to support the judgment. It appears that there were other independent contractors who employed a large number of men in the construction of this building, and that they also deposited materials upon the pavement in the vicinity of this accident, and the contention of the defendants is that the evidence wholly fails to show that it was these defendants, rather than some other of the contractors, who caused this nail or spike to be driven in the pavement. The decisions of this court in *Union P. R. Co. v. Fickenscher,* 72 Neb. 187, and another case of the same title, 74 Neb. 507, are cited, with other cases, and the rule stated by the supreme court of Wisconsin in *Musbach v. Wisconsin Chair Co.,* 84 N. W. 36 (108 Wis. 57) is quoted and relied upon: "Where there were two possible causes of an accident, only one of which would render the defendant liable, the burden of proof was on plaintiff to show that the accident arose from that cause." There is no doubt that the law is substantially as thus stated. The question is whether the proof in this case is sufficient to justify the jury in finding that the defendants caused the nail or spike to be so placed and negligently failed to remove the same. The evidence shows that in erecting this fence the defendants first nailed the planks upon the asphalt pavement to keep the fence in place. In doing so they used what are called 16-penny spikes, which are a little less than 4 inches in length. These spikes were driven through the planks, which were about 1½ inches in thickness, and into the asphalt pavement. There is no evidence that any other contractor drove any spikes into the pavement, or had any occasion so to do. If these defendants drove this spike into the pavement in fastening their planks, it was, of course, their duty to remove it when they removed the fence. This duty they assumed to perform, and they testify that they cleared the pavement after they removed the fence, and did not discover any nail or spike remaining in the pavement. We think that the find-

ing of the jury that these defendants caused this nail or spike to be driven into the pavement, and failed to remove the same when they removed the fence, is not so wholly unsupported by the evidence as to require this court to reverse the judgment for that reason.

2. The defendants contend that the court erred in instructing the jury, and in refusing to give instructions requested by them. The court on its own motion gave the jury 18 several instructions, which appear to quite fully cover all of the issues presented in the case. The defendants requested 10 different instructions, some of them quite lengthy and complicated. The contention is that the third, sixth and seventh instructions requested by the defendants should have been given. These requests presented to the jury the defendants' contention that some other of the contractors might have caused the nail or spike to be placed where it was, and that, when the evidence upon that point is so uncertain that it might reasonably be found that the injury complained of is due to the negligence of other contractors, "then the jury would not be justified in finding against these defendants, unless a preponderance of the evidence was sufficient to satisfy them that the said nail was placed or left there as a result of the negligence of one or both of these defendants, or some of their servants or employees, and not as a result of the negligence of some other person who was engaged in work not embraced in the general contract of these defendants, and not under their direction or control." These requests of the defendants are quite lengthy, and, without quoting them at length here, it is sufficient to say that the instructions given by the court appear to fully present all of the material points suggested in these requests. The eighth, ninth and tenth instructions requested by the defendants present to the jury the proposition that, although the defendants caused the nail or spike to be placed in the pavement, still they would not be liable, "in the absence of evidence showing that it was negligently placed or left there." The evidence, of course, fails to show that it was negligently placed in the pavement. They were author-

ized by the city authorities to place the fence where it was, and there is no evidence that the manner of doing so was in any respect improper. But, having placed the spike there, it was their duty to remove it when they removed the fence, and, if they failed to do so, it requires no evidence to show that they were negligent in such failure. These requests were therefore properly refused.

The plaintiff was seriously injured, and there is no suggestion that the verdict is excessive. We have found no error in the record requiring reversal, and the judgment of the district court is

AFFIRMED.

ROSE, FAWCETT and HAMER, JJ., not sitting.

OCCIDENTAL BUILDING & LOAN ASSOCIATION, APPELLEE, V. JAMES W. ADAMS ET AL., APPELLANTS.

FILED JUNE 23, 1914. No. 17,791.

1. **Judgment:** JOURNAL ENTRY: POWER TO CORRECT. The district court has jurisdiction at any time after decree is pronounced, and before it is complied with, upon motion and satisfactory evidence, to correct an error in the journal entry of the decree.

2. **Appeal:** THEORY OF CASE. If the motion to correct the journal entry is ambiguous, and is treated by all parties and the court as a motion to review the evidence and modify the decree, it will be so considered in this court.

3. **Appeal in Equity:** EVIDENCE. In an action in equity which this court must try *de novo* without reference to the findings and decree of the trial court, if the evidence of two witnesses who testified orally before the trial court is conflicting or contradictory, and it appears from the record that the trial court might have believed one of them rather than the other, this court will consider that fact in weighing the evidence of such witnesses.

4. **Judgment:** MOTION TO CORRECT JOURNAL ENTRY: SUFFICIENCY OF EVIDENCE. The evidence indicated in the opinion is *held* sufficient to support the order of the trial court refusing to modify or change the decree.

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

W. S. Morlan and *J. L. White,* for appellants.

C. S. Polk and *L. H. Cheney, contra.*

SEDGWICK, J.

Upon the trial of an action to foreclose a real estate mortgage, the district court for Frontier county made findings of the amount due the plaintiff, and pronounced a decree of foreclosure. About a year afterwards the defendants filed a motion, which they now consider in their brief as a motion to correct the record of the judgment so pronounced, so as to make the record comply with the judgment of the court. Upon the trial the court found that the journal entry of the judgment was correct, and overruled the motion, and from this order overruling the motion the defendants have appealed.

The wording of the motion was "to correct the judgment and decree entered in the above entitled cause on the 29th day of March, 1910, so that the journal and records of this court, when so corrected, shall state accurately the amount of the plaintiff's recovery against defendants in said case, and comply with the order and decree as at the time made." The plaintiff construes this as a motion to modify the decree, and his brief is made upon that theory. The motion was not to correct the record of the decree, but to correct the decree itself; but, as it refers to the decree "entered" in the cause, and specifies that the object of correcting it is that it "shall state accurately the amount of plaintiff's recovery, * * * and comply with the order and decree as at the time made," it would seem that it might have been treated simply as a motion to correct the record in accordance with the decree actually pronounced. It appears that the court took some evidence on the part of the plaintiff, and in the absence of the defendants, at chambers outside of the county where the trial was had, but this seems to have been ignored as beyond the jurisdiction of the court, and a formal trial of the

motion was had in the proper county. At this trial the defendants appear to have first introduced their evidence, and in doing so attempted to show the amount that was actually due the plaintiff as the case was submitted in the original trial. This evidence was received by the court without objection, and after the defendants had rested the plaintiff introduced evidence at large showing the condition of the issues and evidence and the amount that was actually due to the plaintiff at the time of the trial. The defendants made formal objection to this evidence, or at least to some of it, but did not specify the particular objection that, as they now claim, this was purely a motion to correct the record of the judgment pronounced, and not a motion to correct the judgment itself. While the objection entered by the defendants was the usual one, and was sufficient in form to have raised the question, it appears from the evidence offered in the first instance by the defendants, and from other matters in the record, that defendants themselves assumed that the amount actually due upon the mortgage was in controversy upon this motion. The personnel of the court had changed after the original trial and another judge heard the motion. It was stipulated between the parties that the affidavit of the judge who tried the cause might be taken and might be read in evidence as a deposition, which was done, and his affidavit, as well as other evidence in the case, tends to show that the journal of the court does not correctly set out the decree actually pronounced. The evidence was that in the original trial the court and the parties found some difficulty in computing the amount due the plaintiff. The plaintiff's attorney had prepared a journal entry, leaving a blank for the amount to be found by the court, and, all parties being present in court, he inserted in the blank left for that purpose the amount which he understood the court to pronounce as the amount of the decree. The judge then signed the draft for the journal entry and it was duly entered in the journal by the clerk. This was all done in open court, and there is no doubt shown in the record that the plaintiff's attorney

acted in good faith in the matter, supposing that he had entered the amount pronounced by the court.

There were two actions for foreclosure of real estate mortgage pending in the court between these same parties. The action that we are considering followed immediately after the other upon the judge's trial docket, one being term number 22 and the other term number 23. The amount found due in the former was entered upon the trial docket, 1,600 and some odd dollars, and the judge also entered upon the trial docket of this case the amount found to be due, $1,620. In his affidavit, made a year later, he states that his memory is that the amount of the decree in this case was $1,620. If his memory is accurate and he has not confused these two cases, this evidence is, of course, of great importance.

It seems clear from the whole record that the judge who heard this motion and the attorneys who presented it considered that the amount actually due the plaintiff was an issue being tried upon this motion. We think, therefore, this court should now so consider it. One of the defendants testified to the payment that had been made upon the mortgage, and that he had made a computation of the amount due at the time of the original trial, and stated that amount to be something more than $200 above the amount which he contends was the amount of the decree. The note and mortgage provided for 6 per cent. interest per annum, and also provided for a weekly payment of premium. The payments that the witness testified to were substantially the same as those conceded by the plaintiff, but he stated that he figured the interest at 6 per cent. and took no account of the premiums, as he did not have the necessary papers with him at the time to compute the amount. The plaintiff produced a witness who was familiar with the whole transaction, and who testified to the dates and amounts of payments, and also to the amount of the premiums, which, together with the 6 per cent., would make the actual amount of the interest something over 9 per cent. per annum. The court found that the interest on the loan was 9 per cent. and a fraction, and this differ-

ence in the rate of interest would partly account for the different results obtained. The trial court saw these witnesses upon the stand and heard them testify, and seems, so far as their testimony conflicted, to rely upon the testimony of the plaintiff's witness. We cannot say that the trial court was in error in so doing. Indeed, the evidence of this witness impresses us as more consistent and reliable than the evidence of the witness produced by the defendants.

The evidence is not as satisfactory as could be wished, and the case is not free from doubt; but, upon the whole record, we do not feel justified in reversing the judgment of the trial court.

AFFIRMED.

TRINIDAD ASPHALT MANUFACTURING COMPANY, APPELLANT, v. BUCKSTAFF BROTHERS MANUFACTURING COMPANY, APPELLEE.

FILED JUNE 23, 1914. No. 17,811.

Pleading: AMENDMENT: CAUSE OF ACTION. In an action on contract for the manufacture and sale of an article, an amended petition, which contains the same allegations of the making of the contract and performance by plaintiff, pleads the same cause of action, although it alleges a different breach of the contract by defendant.

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

Mockett & Peterson, for appellant.

C. Petrus Peterson, contra.

SEDGWICK, J.

The plaintiff began an action in the district court for Lancaster county to recover the contract price for the manufacture of roofing, and obtained a judgment, which was reversed by this court upon appeal. *Trinidad Asphalt*

Mfg. Co. v. Buckstaff Bros. Mfg. Co., 86 Neb. 623. It alleged the manufacture and delivery of the roofing according to the contract and asked for the contract price. The record showed that defendant countermanded the order and refused to receive the goods, and the trial court had instructed the jury that the contract price was the measure of damages, and it was held: "Where the seller in an executory contract for the sale of goods which were delivered to a carrier for the buyer receives notice that the buyer will not accept the goods, and, notwithstanding such notice, brings an action against the buyer for goods sold and delivered, it is error to instruct the jury that, if they find for the plaintiff, he is entitled to recover the purchase price of the goods." Upon reversal the court gave leave to plaintiff to amend its petition "to correspond with the facts." An amended petition was filed alleging that defendant refused to receive the roofing, and asking for damages. The defendant demurred on the ground that the petition stated a new cause of action and the statute of limitations had run against it before filing the amended petition. The demurrer was sustained and the action dismissed, and the plaintiff has appealed.

We think the court was in error in sustaining this demurrer. The defendant says in the brief: "The cases lay down various tests to determine whether or not the identity of a cause of action as originally pleaded is maintained in an amended petition. These tests are: (1) Does the same evidence support both petitions? (2) Is the measure of damages the same? (3) Is a judgment as to one a bar as to the other? (4) Is the allegation of each subject to the same defense?"

To recover on either petition, the plaintiff must prove the making of the contract, the full performance on his part, and the refusal of defendant to perform. Precisely the same proof would be required as to the making of the contract and performance by plaintiff. It is true that the proof of defendant's failure to perform would not be precisely the same. But some variance would result from any amendment of the petition. There could never be any

object in making the amendment unless it would admit of additional or different proof. The action is still upon the contract, although the plaintiff alleges a different breach. Because the action after amendment would depend upon the same contract and plaintiff's performance according to its terms, this court upon reversal allowed the amendment. There are many cases discussing the identity of a cause of action after amendment with the cause as stated in the original petition. Some of the older cases seem quite technical, but the best considered modern cases are in harmony with our view in this case. When the claim of plaintiff upon contract is not substantially changed, to allege a different breach of the contract on the part of defendant is not to allege a new cause of action. *Schuyler Nat. Bank v. Bollong,* 28 Neb. 684.

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

REVERSED.

LETTON and ROSE, JJ., not sitting.

CHARLES BOWERS, APPELLANT, V. JAMES RAITT ET AL., APPELLEES.

FILED JUNE 23, 1914. No. 17,956.

1. **Appeal:** TIME FOR FILING TRANSCRIPT. When there is a motion for new trial alleging errors of law occurring at the trial in an action in equity, the transcript on appeal to this court may be filed within six months from the overruling of such motion.

2. **Appeal in Equity:** CONFLICTING EVIDENCE. When two witnesses relate the details of a conversation and transaction between them, and materially disagree as to what was said and done by them, it is of great advantage in determining the truth of the matter to hear their testimony and observe their demeanor and surroundings while testifying. When the trial court has this advantage, and the record shows which of the two witnesses the trial court relied upon, and does not show that the court was wrong in so doing, this court will consider the action of the trial court in weighing such testimony.

3. **Vendor and Purchaser:** EXCHANGE OF PROPERTY: RESCISSION. If the plaintiff is under no disability, and has all the opportunity he desires to investigate property offered him in exchange, and relies upon his own judgment of value, and makes a contract of exchange of property with defendant, he cannot afterwards rescind the contract on the ground that the property he exchanged was of greater value than the property he received.

Rehearing of case reported in 94 Neb. 567. *Judgment of affirmance adhered to.*

SEDGWICK, J.

The nature of the case is stated in the former opinion. 94 Neb. 567. Upon the motion for rehearing some doubt was felt as to the sufficiency of the evidence to support the decree. New briefs have been filed, and we have reread the record. The trial court made no special finding of fact, but found generally for the defendants, and entered a decree accordingly.

Upon the rehearing the objection that this court has no jurisdiction of the appeal is strenuously insisted upon. It appears, as stated in the former opinion, that after the decree was entered in the district court a general motion for new trial was immediately filed, and some time afterwards a second motion for new trial was filed on the ground of newly discovered evidence, which was supported by affidavits. We are satisfied that the effect of this newly discovered evidence was properly considered in the former opinion. The objection to the jurisdiction was not there discussed. We think, however, there is no doubt of the jurisdiction of this court upon this appeal. The statute provides that an appeal may be taken "within six months from the rendition of such judgment or decree or the making of such final order or within six months from the overruling of a motion for a new trial in said cause." Rev. St. 1913, sec. 8186. It is contended that no motion for a new trial is necessary in equity causes, and therefore in such case the transcript must be filed within six months after the entry of the decree, but this court has held that a motion for a new trial is necessary in such cases, if it is

desired to review alleged errors of law occurring at the trial. *Farmers Loan & Trust Co. v. Joseph,* 86 Neb. 256; *Brady v. McGinley,* 94 Neb. 761. The general motion for a new trial in this case raised such questions, and the appeal was docketed in this court within the six months after that motion had been overruled. The plaintiff could not know that an appeal would be necessary until that motion for a new trial had been passed upon. We think that the statute should be literally construed in such case, and the six months' limitation runs from the overruling of the motion.

The question whether the decree of the district court is right upon the whole evidence is a more difficult one. The plaintiff exchanged a quarter section of land in Holt county and a real estate mortgage securing $11,500 and bearing 5 per cent. interest for the mill property in question. There is some evidence that, in order to realize upon the mortgage, it would be necessary to discount it slightly; but it is clear that the mortgage was substantially of the value of $11,500. There is perhaps some little conflict in the evidence in regard to the value of the mill property. Several witnesses, who appear to be disinterested, or at least not interested in behalf of the plaintiff, and who had bought and sold this property, and had owned it for some years, and appear to be familiar with the property and competent to estimate its value, place it at from $5,000 to $7,000. Not long before this transaction, new machinery had been placed in the mill and other improvements made at an expense of $5,393.15, and the money that had been invested in the property, or the replacement value, would be nearly, if not quite, the amount that the defendants estimated it in the exchange. The evidence shows that these facts furnished no basis for determining its value as a going concern, in that locality, under existing conditions. Several witnesses were offered in behalf of the defendants, who, when they were asked if they knew the value of the mill property at the time of this transaction, answered that they did not. These witnesses appear to be reliable and competent. They testify to the

cost of the property and to the replacement value, and afterwards, in reply to questions more or less leading, state an opinion as to what it should be considered to be worth; but the evidence of these witnesses is of very little, if any probative force as to the real market value of the property. It is very clear that the value of this mortgage which the plaintiff exchanged for this mill was at least $5,000 more than the value of the mill property which he received in the exchange. If the plaintiff himself was innocent in the matter, and was induced by fraud or misrepresentation on the part of the defendants to make the exchange, the decree of the district court is wrong. The Holt county land which the plaintiff was to convey to the defendants was incumbered by mortgage, which amounted at the time to about $1,700. The defendant claims that the plaintiff represented this mortgage to be $1,400 only; but he insists that he told them the true amount of the mortgage, and agreed to pay $300 of it himself, which was due at the time. The plaintiff's equity in this land was estimated in this exchange as of the value of $5,000. From the evidence it appears that it was of very little, if any, value. Evidently the plaintiff supposed that the defendants were valuing this land in the exchange at about $5,000, and the plaintiff relied upon that fact as a safe margin of profit in the deal. The misrepresentation and fraud on which the plaintiff relies as a ground for relief are testified to only by himself. He testifies that the defendant Raitt, who was the agent who made the contract with the plaintiff, told him that the mill property was worth $20,000, and also told him that the mill had continuously been operated at a profit, and that the net profits realized were about $4,000 in the last few years. Mr. Raitt denies that he made such statements, and testifies that he told the plaintiff that he (Raitt) had no personal knowledge in regard to the mill property; that he and his principal, Mr. Lyon, valued the property at $20,000 in the exchange in which they received it, and also told the plaintiff that certain men, whom he named, were familiar with the property, and had told him that there had been

profits realized in the last few years; that he considered those men reliable, but that the plaintiff ought to examine the property for himself, and might also talk with the men named, if he desired to do so. In some particulars, in which he disagrees with plaintiff, he is supported by the testimony of other witnesses.

The record is a large one; there is a great amount of testimony, and it is impracticable to attempt, within the limits of this opinion, to analyze the evidence in detail. So far as we can see from the record of the evidence, the plaintiff and the principal witness, Raitt, have not purposely misstated the facts as they understood them. Therefore, in order to determine with any certainty the fine questions of fact that are at issue between these two witnesses, it would be of great advantage to hear them testify and to observe their demeanor and the surrounding circumstances while they were giving their testimony. This advantage the trial court had. If the evidence of the witness Raitt is to be believed as he intended it should be understood, no substantial misstatements of facts that could impose upon an intelligent man, competent to attend to his own business, was made with the purpose and intention of defrauding him of his property. We cannot say from this record that the trial court was wrong in so regarding this testimony. The plaintiff was not competent to judge of the value of such property. He had made a few trades in land and horses, and may have had an undue confidence in his ability to take care of himself. If the trial court is right in relying upon the evidence of Raitt, the plaintiff must have assumed from the appearance of the property, and from such statements of opinion and estimates as sellers of property are justified in making and the law does not consider fraudulent, that the mill property was of much greater value than his mortgage, and that the party with whom he was trading considered the Holt county land to be of substantial value, and so the plaintiff estimated that he was succeeding in disposing of his Holt county land very favorably. Under these circumstances the plaintiff's unfortunate loss is the result of

his cupidity, his willingness to get something for nothing, and his mistake in relying upon appearance and upon his own judgment without sufficient investigation. Under these circumstances, unfortuante as it is for himself and his family, it does not appear that the law can afford him any relief. We cannot see that the decree of the district court is wrong, and our former judgment is therefore adhered to.

AFFIRMED.

ROSE, J., dissenting.

According to my understanding of the record in this case, after a thorough investigation, defendants defrauded plaintiff out of a large amount of property which ought to be restored to him in a court of equity. This conviction is so clear and distinct in my own mind that I am unwilling to concur in the contrary opinion of the trial court or of the majority of this court. I therefore dissent.

ADOLPH VOIGHT, APPELLEE, V. FERDINAND VOIGHT, APPELLANT.

FILED JUNE 23, 1914. No. 17,679.

1. **Compromise and Settlement:** ACTION FOR CONSIDERATION. Defendant, who was the owner of a farm, was sued by plaintiff for labor performed thereon and for other considerations. An agreement was entered into, by the terms of which defendant agreed to turn over to plaintiff certain specified articles of personal property, rent his farm to plaintiff for a term of years at an agreed rental, and pay to plaintiff $2,000 in money when defendant sold said land, in consideration for which plaintiff was to dismiss his action against defendant. Defendant turned over to plaintiff the specified articles of personal property and put him in possession of the farm. Plaintiff dismissed his action against defendant. Soon thereafter defendant repudiated his agreement, refused to sell his farm, and evicted plaintiff therefrom, and also refused to pay the cash consideration of said agreement. *Held*, That such acts on the part of defendant rendered the cash consideration of the agreement at once due and payable.

2. ———: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* to sustain the verdict and judgment.

APPEAL from the district court for Platte county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Critchfield & Rose and *Albert & Wagner,* for appellant.

A. M. Post and *Reeder & Lightner, contra.*

HAMER, J.

This case involves a controversy between three brothers. They were farmers and lived together. Each was beyond the age of 60 years. The defendant was the owner of a farm in Platte county. His brothers came to live with him on this farm. He was a bachelor. One of the brothers, Adolph, was married. He brought his wife with him to live on the farm. The three brothers lived together on the brother's farm until shortly before the quarrel. The two brothers brought actions against the defendant. The wife of the plaintiff also brought an action against the defendant. Adolph Voight brought this action in 1908 against Ferdinand Voight in the district court for Platte county, alleging that he had entered into a contract with the defendant by which he (Adolph) and his daughter, Lena Voight, and his other daughter, Annie Voight, and his son, Christian Voight, and his other son, Henry Voight, should work for the defendant on the farm then owned by the defendant, which was near Genoa, Nebraska; that they were to work for defendant as long as it was mutually agreeable, and that they were to receive for their labor a fair and just compensation; that on the 26th day of October, 1908, the said defendant repudiated the said agreement, and ordered the plaintiff and his children to leave the place, and refused to pay any sum whatever to the said Adolph Voight and his children for the labor which they had performed; that the said Ferdinand Voight was indebted to the plaintiff because of the plaintiff's services and the services of his children in the sum of $9,530; that

Fritz Voight, one of the said brothers, brought an action in the district court for Platte county against the said Ferdinand Voight, alleging that he had worked for the defendant under an agreement that he should be paid a reasonable compensation for his services, and that said Ferdinand had failed to pay him, and that the said Ferdinand Voight was indebted to him for such services in the sum of $7,200; that Margaret A. Voight had brought suit against the defendant Ferdinand in the district court for Platte county, in which she charged that on or about the 4th day of April, 1908, said Ferdinand Voight had made an assault upon her, and had struck her a blow with his fist, and had thrown her with force and violence against a table, and by reason of such assault the said plaintiff, Margaret A. Voight, had been seriously injured, and had been compelled to submit to a surgical operation, and had been confined in the hospital, and that she had suffered injuries to the extent of $5,000 for the assault. It was also charged in the said action that the said Ferdinand Voight had abused and vilified the plaintiff in said case and had called her by vulgar and abusive names; that after the bringing of the said cases the pastor of the said brothers got the parties together and compromised their differences; that, as a result of the compromise, the defendant gave the two brothers a lease of the farm, and also made a bill of sale of a considerable amount of personal property; that the two brothers and the plaintiff's wife joined in a release of all claims that they had against the defendant, and that pursuant to this settlement they entered into possession of the farm and of the personal property. The parties appear to have made a settlement by which Ferdinand Voight promised to Adolph and Fritz Voight that he would rent his farm to them for five years at $1,000 a year, and that they might have the farm so long as he owned it; they to settle and to withdraw their suits against him. Ferdinand was to give to the brothers all of the personal property, including horses, cattle, hogs, and machinery, and also a cornfield containing from 700 to 1,000 bushels of corn, and 60 bushels of wheat, and 600

pounds of flour in the mill, and was to pay the brothers in money $2,000 each, to Adolph Voight $2,000 and to Fritz Voight $2,000. *The money was to be paid when he sold his farm.* He was also to pay Henry Voight, the son of Adolph Voight, $200. Ferdinand Voight reserved to himself the wheat in the granary, the corn in the crib, the fat hogs, the buggy team with the two gray horses and harness, and reserved to himself three rooms in the house when he should come to visit.

The instant case was brought for $2,000 promised to Adolph on the agreement. It was brought March 22, 1910. It is said that a similar suit is still pending in the district court for Platte county in which Fritz Voight is plaintiff against the defendant. It is said also that, after the pastor, Rev. Klatt, had put the agreement in writing it was read to the parties, and thereupon they got upon their knees and offered thanks to God that their difficulties had been settled.

The paper prepared by the pastor was not signed, and the parties seem to have contemplated that other papers might possibly be drawn so as to put their intention in an improved legal form. For this purpose they met in St. Edward on November 12, 1908, and certain papers were then prepared to be signed. It is claimed by the appellee that the Rev. Klatt was to go with the parties to St. Edward, but that he was prevented from doing so by Ferdinand. After the papers had been submitted, but before they were delivered, it is claimed by the appellee that one of the brothers spoke up and said that we have also got to have a writing, and that Ferdinand said to keep still about that; that, if the attorneys found out that, they would want a percentage, and that he would rather give it to the brothers than to give it to the attorneys down at Columbus. In any event the result was that there was no promise in writing to pay each of the brothers $2,000, as it was agreed upon, and as it had been written down in the unsigned agreement prepared by the Rev. Klatt. A lease of the farm was made, but it seems only to have been made for a little more than one year, instead of five.

The lease made was from the 11th day of November, 1908, until the 1st of March, 1910. There was an agreement between all of the parties "to be good and kind to Ferdinand Voight, we will never make him any trouble or costs. If he is on the place we will board him free, and attend to his pony team when he is away and take good care of them until his return." The lawsuits then seem to have been settled. A bill of sale was made by Ferdinand Voight to Adolph Voight for the consideration of one dollar and conveying to Voight five horses, one mule, a farm wagon, a truck wagon, a top buggy, 25 hogs, one-half interest in steam threshing machine, one-half interest in all farm implements on the Voight farm, and four milch cows.

The petition in the instant case alleges that the plaintiff, Adolph Voight, is the father of Emma Voight, aged 14 years, Lena Voight, aged 16 years, Annie Voight, aged 19 years, Christian Voight, aged 20 years, and Henry Voight, aged 22 years. The age of each is set forth as it was November 1, 1908. It is alleged that said children have always resided with the plaintiff and his wife, and that the said children and the plaintiff and his wife constituted one family; that in the month of May, 1889, at the special instance and request of the defendant, the plaintiff and his said children took up their abode with the defendant, and entered into his employ as farm laborers with the agreement that they should labor for the defendant as long as it was mutually agreeable, and at the termination of said employment plaintiff was to be paid a fair, just and reasonable compensation for the labor performed by him and his said children during their minority, and that they continued to work for the defendant under the said agreement until about November 1, 1908; that on or about said 1st day of November, 1908, certain goods and chattels were turned over by said defendant to the plaintiff in part payment of the work and labor so performed by him and his minor children as aforesaid, and on said day an account was stated between said plaintiff and the defendant of a balance still due and unpaid to the plaintiff for said work and labor, which was ascertained and fixed

at $2,000, and that the defendant then and there agreed to pay to the plaintiff said sum of $2,000 so found due, and when he should sell his farm in the western part of Platte county upon which the parties were then living; and he agreed to put said farm upon the market and sell it within a reasonable time thereafter; that, within a few days after stating said account and entering into said agreement, the defendant repudiated the same and refused to sell his farm or to pay said sum of money; that a reasonable time has elapsed since stating said account and entering into said agreement, yet the defendant has failed and refused to sell his farm or to pay said amount of money, although payment has often been demanded, and there is due and owing from the defendant to the plaintiff upon said agreement and statement of account the sum of $2,000, with interest thereon at 7 per cent. from November 1, 1908, for which amount and costs the plaintiff prays judgment.

To this pleading there was an answer in which Ferdinand Voight made a general denial. For a further answer he alleged that the plaintiff was his brother, and that in the year 1893 the plaintiff was homeless and without means of support, and that it was agreed between the plaintiff and the defendant that the plaintiff and his family should enter the defendant's home and become members thereof, and should assist the defendant in his work upon the farm, and that the defendant was to furnish the plaintiff and his family board and lodging and medical attendance and clothing; that the plaintiff and his family entered the defendant's home and assisted the defendant in his work upon the farm, and that the defendant furnished them with board and lodging and clothes, and kept and performed all his part of the agreement, and in addition thereto supplied the plaintiff with money; that the same, with certain other considerations, exceeded in value the value of said services of the plaintiff and his family rendered to the defendant under said agreement; that said relationship continued until about the 1st of November, 1908; that on or about the 1st day of November, 1908, a controversy arose between the plaintiff and the defendant,

wherein the plaintiff claimed that the defendant was indebted to him on account of his services on the said farm and on account of the services of plaintiff's family, and wherein divers other claims against the defendant were put forward by the plaintiff; that about the 12th day of November, 1908, the plaintiff and the defendant had a full and complete settlement of all matters and differences and mutual claims and demands, including the subject matter of this suit, whereupon it was mutually agreed by and between them that the defendant should transfer and convey to the plaintiff five head of horses, one mule, one farm wagon, one truck wagon, one top buggy, four milch cows, four calves, 25 head of hogs, one-half interest in all the farm implements on the defendant's said farm, one-half interest in the steam threshing machine, and one-half of all straw and hay which the defendant had on said place at said date, which property was of the fair and reasonable value of $3,000, and in addition the sum of $100 in cash, and in consideration whereof that the plaintiff should release and acquit the defendant of all debts, dues, demands, and claims of every kind and character, including the subject matter of this suit; that the defendant fully kept and performed all the terms and conditions of the said agreement on his part to be kept and performed, transferred and conveyed the said property to the plaintiff, and paid the plaintiff the said sum of $100, whereupon they mutually released from all debts, dues, demands, and claims of every kind and character by an instrument in writing in the words and figures following: "St. Edward, Neb. Nov. 12, 1908. Agreement by and between Adolph Voight, Henry Voight, and Christian Voight and Ferdinand Voight, witnesseth that all lawsuits and claims of Adolph Voight, Henry Voight, and Christian Voight against Ferdinand Voight are hereby fully settled and satisfied, and that Adolph Voight, Henry Voight, and Christian Voight hold no claims whatever against Ferdinand Voight for any act or deed done or committed prior to this date. (Signed) Adolph Voight. Ferdinand Voight. E. E. Fellers, wit-

ness. Taken and acknowledged in my presence this 12th day of November, 1908. E. E. Fellers, Notary Public."

The answer alleges that the agreement is in full force and effect and binding upon the plaintiff and defendant.

In the reply of Adolph Voight there is a general denial, except touching such matters as are alleged in the second amended petition. There is the admission that Ferdinand Voight transferred certain personal property to the plaintiff and to Fritz Voight, alleged to be of the value of $1,000. There is a denial that said property was received in satisfaction of the cause of action, or in satisfaction of the services rendered; that the plaintiff admits the execution of the instrument above quoted, but denies that he released the defendant from the obligation of the agreement described in his said petition, alleges that he was induced to execute said instrument without any consideration, and by the fraudulent representations of the defendant; that on or about the 12th day of November, 1908, the defendant represented to the plaintiff that it was necessary to execute said instrument as a written memorandum of the agreement in said petition alleged, the same having been by defendant previously dictated to and prepared by his agent; that upon the signing, and before the delivery of, said instrument, the plaintiff proposed the execution of an additional writing evidencing the defendant's aforesaid allegation to him, whereupon the defendant assured the plaintiff that such writing was unnecessary, but that he would thereafter execute any necessary or appropriate memorandum of said agreement, and at said time again promised to keep and perform all of the conditions of said agreement, and that the plaintiff being ignorant of the legal import of such instrument, and relying upon said statement for his protection, consented to the delivery of said instrument.

Upon the trial there was a verdict for the plaintiff for $2,235. Judgment was rendered on this verdict, and the defendant appeals.

Perhaps a true construction of the contract would make a termination of the lease and the payment of the $2,000

contemporaneous acts. A careful examination of the contract, in the light of the circumstances concerning the parties, indicates that the brothers, Adolph and Fritz, were to have a home on the farm until it was sold, and, when sold, each was to have his $2,000. As soon as their right to a home on the farm ceased, then they would need the money to establish a home elsewhere. If the brothers remained on the farm as the defendant's tenants, it might be unreasonable to require the defendant to pay at as early a date as the commencement of this suit, but, when he terminated the tenancy and evicted his brothers, it was time for him to pay. The sum of $2,000 was then due to the plaintiff, and the verdict is fully sustained by the evidence.

When a debt is in fact due (and that is so in this case), and it is agreed that it shall be paid upon the happening of a future event, and the event does not happen, it is held that the law implies a promise to pay within a reasonable time. 9 Cyc. 615; *Crooker v. Holmes,* 65 Me. 195, 20 Am. Rep. 687; *Works v. Hershey,* 35 Ia. 340; *Nunez v. Dautel,* 19 Wall. (U. S.) 560; *Hicks v. Shouse,* 17 B. Mon. (Ky.) 483; *Randall v. Johnson,* 59 Miss. 317, 42 Am. Rep. 365; *Button v. Higgins,* 5 Colo. App. 167. The defendant had no right to oust his brother from the home he had so long occupied without giving him the money which he honestly owed him, so that he might provide a shelter for his family elsewhere. It was reasonable to contemplate that it was in the minds of the parties that the money should be due and payable in case of eviction. When the defendant refuses to keep his contract and puts his brother out of possession, he should be made to pay.

Parol evidence explanatory of the contract was properly received under all the circumstances of the transaction. *Barnett v. Pratt,* 37 Neb. 349; *Fire Insurance Ass'n v. Wickham,* 141 U. S. 564; *Komp v. Raymond,* 175 N. Y. 102.

The consideration for the alleged agreement may be shown to include other matters as a part thereof, if the same is not inconsistent therewith. 17 Cyc. 638, 648, and

citations. *Wolf v. Haslach,* 65 Neb. 303; *Andrews v. Brewster,* 124 N. Y. 433.

We have carefully read the evidence, and have also studied the instructions. We are unable to find any substantial error.

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

AFFIRMED.

SEDGWICK, J., not sitting.

MARY M. BOHRER, APPELLANT, V. MANSELL DAVIS ET AL., APPELLEES.

FILED JULY 11, 1914. No. 17,222.

Rehearing of case reported in 94 Neb. 367. *Former judgment adhered to.*

PER CURIAM.

On rehearing, our judgment (94 Neb. 367) is adhered to.

HAMER, J., dissenting.

I regret that I feel obliged to dissent from the majority opinion which, adhered to by the court's present action, becomes *Bohrer v. Davis,* 94 Neb. 367. Mary M. Bohrer brought an action in the district court for Greeley county against Mansell Davis and other defendants. There was a decree for the defendants, and the plaintiff appeals. The defendant Mansell Davis was the brother of decedent, Ansel A. Davis, who was also called Abner Davis. Anna Davis was the widow of Ansel A. Davis. Other defendants are the children of the brother of Ansel A. Davis. This brother is deceased. His name was Orsell Davis. Mary R. Davis is the wife of the defendant, Mansell Davis. When Ansel A. Davis died, March 3, 1892, he owned 160 acres of land. He had no children, no father, and no

mother, and died intestate. There was a mortgage of $1,000 on the land. The widow of Ansel A. Davis, Anna Davis, made application to the county court under the statute known as the "Baker decedent law." The county court caused the land to be appraised under the application, and it was found to be worth $2,000, and was assigned to the widow as her homestead *in fee*. The purpose of this proceeding was doubtless to give her *title to the land in fee*. She was the widow of Ansel A. Davis when she died in February, 1906. This action was commenced by the plaintiff in 1910. The purpose of this action is to quiet the title in Mary M. Bohrer to 80 acres of the original 160. The widow understood at the time, and probably everybody else did, that she had a *good title to the whole quarter section*. To pay off the mortgage she sold the 80 acres in controversy to the plaintiff for $1,000, and executed and delivered to her a warranty deed for the 80-acre tract that she bought. Anna Davis executed and delivered the warranty deed to the plaintiff in December, 1902. When the plaintiff received this deed she received it with notice of the fact that the said Anna Davis was the rightful occupant of the premises and was then claiming to own the same. Anna Davis had been in possession of the premises with her rights undisputed for the period of about 10 years. The action was not brought by the plaintiff until in 1910. *A period of 17 or 18 years elapsed during which the title to the widow, Anna Davis, and her grantee was unassailed, as also their right of possession.*

It may be admitted that the plaintiff's grantor had a life estate in the premises. She had it under the law and without effort, but the fact need not have prevented her from taking possession and holding possession under any *other* meritorious claim of right, if she had it. And without any *claim of right* she might have taken possession. If she was the possessor of different claims, she had a right to prefer the one she liked best, and to risk her case on that one. She also had a right to present all her claims and to get out of them their full value. She also was permitted to assert her alleged right to the title and own-

ership without any actual right to assert. She was free to be wrong. Acquiring title by adverse possession contemplates that such possession continuously asserted and maintained without interruption for the period of 10 years from the time it begins will be deemed rightful, however wrongful and unfounded it may have actually been at the commencement. Then, what was there to prevent her from saying: "(1) I rely upon 'Baker's decedent law' and the proceeding under it; (2) I rely upon the fact that no one attempted to disturb me for 10 years from the time I began to claim possession; (3) the statute began to run as against the remaindermen (a) as soon as I began to claim the right of possession by whatever authority I claimed it, or without any authority, (b) and the remaindermen were bound to assert and establish their rights to a judgment of the court, and within ten years from the time such action could have been lawfully commenced by them to protect their interest as remaindermen."

When the plaintiff began her action to quiet title, she and her grantor had been in the undisturbed possession of the premises for 17 or 18 years. Was there anything which compelled the plaintiff to take notice that the defendants had rights in these premises which she was bound to recognize? Did the widow have any less rights with which to maintain her possession because of the *one undisputed* right which she had—that of a life estate?

One may be estopped when he acts in the light of the actual facts. The first principle of estoppel is that the person estopped shall understand the relation of his conduct touching the matter concerning which he is estopped. Estoppel cannot possibly apply to the plaintiff in this case, because at the time the 80-acre tract was sold to pay the mortgage of $1,000 everybody supposed that the land belonged to the widow, and all parties *acted under the Baker decedent law.* The widow was in possession of the land under a judgment of the county court. It is immaterial that the Baker decedent law was unconstitutional and void. The widow was rightfully entitled under the law to a life estate in the property. But she *was not compelled*

to rely upon that alone. If without any right of that kind she had remained in the undisturbed possession of the land for 10 years asserting her *title to the fee,* that would have been sufficient. She and her grantee held possession for 17 or 18 years, and she was *all the time* claiming to own the fee.

John K. Bohrer, the husband of plaintiff, testified that he knew Mansell Davis; that he knew the Ansel Davis homestead. "Well, I met him in the road, and I told him I had been talking to Tom, that was her son, and old Annie herself, we always called her old Annie, talking about buying that land, 'Well,' he says, *'if you buy it it would help her out on that mortgage.'* That's why they wanted to sell it for to redeem and release that mortgage on that eighty. Q. You may state, Mr. Bohrer, what was the first thing you did with this land after this deed was procured; what was the first work you did on the land? A. Repaired up what little fence there was there and put some new fence on. Q. About when was that? A. That was in the spring of 1893."

Mansell Davis advised the purchase of the land by Mrs. Bohrer, because "it would help her out on that mortgage," meaning thereby that it would enable Anna Davis to pay off the mortgage. He knew that the purchase was being made. He knew that Anna Davis was selling that land *herself,* and as her own land, so that she would have the *remainder of the tract free* from debt. He knew that the fence was built, the well dug, the windmill put up, and other improvements made, such as one does *not* make on land where his possession is only temporary. Mrs. Bohrer put her deed on record. *It was notice to the Davis brothers that she owned the land that Mrs. Anna Davis had sold to her.*

The deed made by Anna Davis to Mary M. Bohrer recites that Anna Davis is a widow. The deed is dated December 26, 1892. It was acknowledged on the same day. The mortgages to the Lombard Investment Company were two. One of them was for $125.02, and the other for

$1,000. The money was used toward the payment of these mortgages.

In *Hobson v. Huxtable,* 79 Neb. 340, it is said in paragraphs three and four of the syllabus: "(3) The heirs aforesaid may, during the life estate, maintain an action under sections 57-59, ch. 73, Comp. St. 1905, for the purpose of quieting their title or removing a cloud therefrom." "(4) If a remainderman, not being under any legal disability, fails for 10 years *after his cause of action accrues* to commence his suit, he is barred by the statute of limitations from maintaining his action to quiet title, and the fact that a remainderman owning an undivided interest in real estate may be under a legal disability will not toll the statute as to the *other* remaindermen not within the exception." It is said in the body of the opinion: "It is asserted that an action to quiet title cannot be maintained by the heirs during the lifetime of the surviving spouse. Our statutes plainly give the right. Comp. St. 1905, ch. 73, secs. 57-59. Section 59 is surplusage unless it extends that right to the remainderman: 'Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this act.'" This court held the action could be maintained before the surviving spouse departs this life. *Holmes v. Mason,* 80 Neb. 448. It also held in said case that the statute of limitations *bars* that right unless exercised within 10 years of the time the cause of action *accrues*; the heirs being adults. If the defendants were adults at the time the plaintiff's grantor set up her claim to the homestead, they had the right to commence an action for the protection of their interests. While it might be true that they could bring no action for the *possession* of the property while the plaintiff's grantor owned a life estate therein by reason of her survivorship, yet there is a distinction made between the two kinds of actions, the one for *possession* and the other to *quiet title. The latter they could bring.* The remainderman has a right which he may protect as soon as it exists. It is enough that *he is a remainderman.* The grantor and the plaintiff to-

gether occupied the land 17 or 18 years under the claim that they *held the legal title.* It was for the remaindermen to defend themselves against *this claim of legal title.* If they failed to do so for more than 10 years after their rights *accrued,* then *they are barred.* This doctrine is ignored by the majority opinion.

If the plaintiff's grantor, Anna Davis, asserted that she was the owner of the property and claimed the property as *her own* by title ever *so inadequate,* the statute of limitations began to run *at that time.* It should not be forgotten that she *did have possession and that she was claiming a title in fee.* Mansell Davis was not estopped because of his conversation with the plaintiff's husband, because what he did was done *without knowledge touching the subject.* Mansell Davis thought the widow owned the land. The brothers of Ansel A. Davis were possible heirs of Ansel A. Davis. When Anna Davis asserted title to the property, *claimed to own the fee,* then they were bound to protect their inheritance or to lose it by reason of the asserted rights of the widow and the statute of limitations. Although she actually got no legal title by the proceedings under the "Baker decedent law," *yet she claimed the legal title by that act and she published it to the world.* She also made a long struggle to redeem the land from tax liens. She did it as owner of the fee. She also sold half of the land and conveyed it by warranty deed to the purchaser, Mrs. Bohrer. She did this as the owner of the fee, and Mrs. Bohrer was put in possession. Anna Davis also paid off the mortgage and put it on record as evidence of the fact that *her title was cleared up.* After she paid off the mortgage she went right along living on the remaining 80 acres, *improving it and asserting her ownership over it.* The Davis brothers *stood by and saw her make this* struggle. She spent her money and her time in this litigation, and these brothers *let her proceed.* Mansell Davis talked it over with plaintiff's husband as a good thing to do *on the widow's* account.

The brothers, Mansell Davis and Orsell Davis, were adults, and the statute began to run as to them when-

ever Ansel A. Davis died. They had the right immediately to protect their ownership by commencing an action to quiet title.

It is my contention that, Anna Davis being shown by the evidence to have claimed the ownership in fee of the land, and to have taken possession immediately after her husband's death and to have continued in such possession along with her grantee under such claim of ownership for a period exceeding 10 years, the statute of limitations must run in her favor and in favor of her grantee, Mrs. Bohrer, and against all the heirs who are adults. And, where she claimed the right of possession and ownership as against all the world, it was not for another to put into her mouth, against her will, a claim for a less interest in the land than that which she alleged.

In *Hall v. Hooper,* 47 Neb. 111, there were remaindermen to follow after a life estate, the tenant of which was not a party to the suit. There was a void foreclosure. The purchaser entered into actual possession under the sale taken in the foreclosure case. The foreclosure was void. "The proof showed that the proceedings were void as to the life tenant as well as to the plaintiffs. *Held,* That the mortgagee's possession was *adverse to the plaintiffs,* and *not merely for the life estate.*" In the body of the opinion it is said: "The statute does begin to run after the debt matures from the time the mortgagee enters into open, notorious, and actual possession under claim of ownership. * * * *Anonymous,* 3 Atk. (Eng.) 313; *Dexter v. Arnold,* 1 Sumn. (U. S.) 109; *Knowlton v. Walker,* 13 Wis. 295 (*264); *Montgomery v. Chadwick,* 7 Ia. 114. The action was therefore barred whether the four or the ten-year statute applies, and the defendant pleaded the bar. * * * We have already held that under our law this action may be maintained by a *remainderman during the term of a tenant for life.* * * * Everything shows that Hooper's possession has been under a claim derived from the foreclosure, and not as life tenant. * * * The plaintiffs are not entitled to relief against it (the mortgage) as against the mortgagee, in pos-

session *under a void foreclosure sale, without offering to redeem.* They have not so offered, and, their right to redeem being barred by the statute of limitations, we cannot now permit an amendment for that purpose." *The effect was to hold that the statute of limitations applied.* Applying the rule laid down in that case to the instant case, the defendants are beaten by the adverse possession of Anna Davis and her assertion of ownership, coupled with that of her grantee, Mrs. Bohrer.

In *Holmes v. Mason, supra,* the plaintiff commenced an action to quiet the title. There was an answer by Nancy E. Mason claiming a life estate in the land and possession during the remainder of her natural life. The other defendants filed cross-petitions alleging ownership in fee subject to the life estate of their codefendant, and prayed for a decree quieting their title. The result was a judgment by which the plaintiff was given the life estate of the first-named defendant; the other defendants were adjudged to be the owners of the fee; their title was quieted, and they were awarded possession *after the extinguishment of the life estate.* The plaintiff appealed. William B. Mason died intestate in Harlan county on the 20th day of October, 1881. After his death his widow was appointed administratrix of his estate, and in September, 1882, she applied to the district court for a license to sell all the real estate for the payment of the debts of the intestate. A license was granted, and she sold it. Deeds were made to the purchaser. When the action was commenced from which the appeal was prosecuted, three of the defendants, Ida E. Rowley, Henry L. Mason and Effie I. Harroun, were *more* than 10 years past their majority, while the other defendants, when their cross-petitions were filed, were a little less than 10 years past that age. The plaintiff's first contention was that the bar of the statute was complete as to these defendants who were more than 10 years past their majority when the action was commenced. The trial court held that the plaintiff was the owner of the life estate of the defendant Nancy E.

Mason. This court held that, as no complaint had been made as to the correctness of that part of the decree, it followed that as against him a possessory action could not be maintained; that the "defendants were compelled to proceed, if at all, under the provisions of section 59 to have their remainder established and their title thereto quieted." This court held: "The statute of limitations as to each of the several defendants commenced to run when he arrived at his majority. So as to the defendants who were more than 10 years past their majority at the time this action was commenced, the bar of the statute of limitations was complete. Therefore, so much of the decree of the trial court as granted any relief to those defendants was erroneous. As to them the action should have been dismissed, and the title to three-fifths of the land in controversy should have been quieted in the plaintiff"—citing *Foree v. Stubbs,* 41 Neb. 271; *Hall v. Hooper,* 47 Neb. 111; *First Nat. Bank v. Pilger,* 78 Neb. 168; *Lyons v. Carr,* 77 Neb. 883; *Hobson v. Huxtable,* 79 Neb. 334. *Because of the statute of limitations this court then reversed so much of the judgment of the district court as granted any relief to the defendants who were 10 years past their majority.* In this kind of a case a claim of right of Mrs. Davis must be based upon her conception of its magnitude, and not upon the actual fact, and she cannot be restricted by the court and by her adversary to a *less claim* than that of *ownership* if she is in *possession under a claim of ownership* and asserts her exclusive right to the fee title. And whatever right she obtained by reason of her assertion of title was conveyed to her grantee when she made and delivered the deed.

In the former opinion in this case (94 Neb. 367), it is said to be "a general rule, well supported both by reason and authority, that no one can be in default in not bringing an action which it was impossible for him to have maintained if brought, and that no statute of limitations can commence running until the period arrives when the person claiming title or right of possession can successfully vindicate his claim and right by some appro-

priate action." *The opinion leaves out of the case a discussion of the duty of the remainderman in relation to the application of the statute of limitations.*

If the heirs neglect to assert their rights within 10 years after attaining their majority, then the court may not hear them. If the doctrine in *Holmes v. Mason, supra,* is to be applied to the instant case, then the plaintiff should have judgment quieting the title to the land claimed by her, except as to such heirs as had not attained their majority at the expiration of 10 years from the time the adverse possession of Anna Davis began, commencing with her assertion of ownership of the fee title and possession of the premises.

As I understand it, the syllabus adopted in the original case (*Bohrer v. Davis,* 94 Neb. 367), and consisting of three paragraphs, avoids in the first paragraph the statement of any legal principle presented for the consideration of this court or in any way before it, while the second paragraph attempts to decide something not before the court, and the third paragraph asserts an erroneous and unjustifiable conclusion against Mansell Davis and estops him because he talked in the dark about a subject of which he knew nothing. The criticism seems to be invited by an inspection of the paragraphs, the last of which announces estoppel of one who spoke supposing he knew the facts when he was ignorant of them, the second of which announces that a remainderman cannot enforce a forfeiture of a life estate where the life tenant has conveyed her rights to the grantee, a matter not sought to be questioned, and the first of which alleges that the remainderman has no right of possession until the particular estate is terminated, and no right of action depending upon the right of possession until entitled to possession, when the real question was whether the remainderman was obliged to protect his title by an action against one in adverse possession under a claim of absolute ownership of the title in fee in order to prevent the running of the statute of limitations, so as to be a bar to his rights as a remainderman.

EUGENE VAN HOVE, APPELLANT, V. MARIA LEONIA VAN HOVE ET AL., APPELLEES.

FILED JULY 11, 1914. No. 17,254.

Rehearing of case reported in 94 Neb. 575. *Judgment of affirmance adhered to.*

PER CURIAM.

On rehearing, our judgment (94 Neb. 575) is adhered to.

LETTON, J., dissenting.

One of the main points urged in this case is not mentioned in the opinion. It is that Eugene Van Hove was legitimated in Belgium under the laws of that country and that this fixed his status and his right to inherit. In 1 Wharton, Conflict of Laws (3d ed.) ch. 5, the subject of legitimation is exhaustively discussed, and it is shown that if, by the law of the country where the father is domiciled, and the marriage takes place, the subsequent marriage of the parents of an illegitimate child has a legitimatizing effect upon the child, this fixes his status, and this status is not lost by the subsequent removal of the parents and child to another state.

Articles 331, 333 of Livre I, Titre VII, ch. 3, Civil Code of Belgium provides: "Art. 331. Children born out of wedlock, other than those born of incestuous or adulterous communion, may be legitimated by the subsequent marriage of their father and mother, when these have legally recognized them before their marriage, *or shall recognize them in the act of marriage.*"

"Art. 333. Children legitimated by subsequent marriage have the same rights as if they were born from that marriage."

The duly authenticated record of the marriage in Belgium of August Van Hove and Maria Leonia Audenaert introduced by defendants themselves recites: "The above

named husband and wife agreed taking as their lawful children, *and to recognize them as such*: Eugene Audenaert, born at Sinay the 9th of March, 1880, Joanna Audenaert, born at Lokeren the 29th of September, 1882, and Maria Audenaert, born at Antwerp the 2d day of July, 1885."

In my judgment this settled the status of Eugene Audenaert Van Hove both in Belgium and in this country, and the oral testimony of his mother, 30 years afterwards, when the father was dead, when the son's conduct had estranged her, and when it was to her financial advantage to deny his paternity, should not be received in the attempt to impeach the legal effect of their solemn act, by denying that August Van Hove was the father of the plaintiff.

I therefore dissent from the judgment of the majority.

ROMA LOVE, APPELLANT, V. HOWARD C. PARK ET AL., APPELLEES.

FILED JULY 11, 1914. No. 17,556.

OPINION on motion for rehearing of case reported in 95 Neb. 729. *Rehearing denied.*

PER CURIAM.

The brief upon the motion for rehearing urges that a surety can only be held to the letter of his contract, and that, not being liable for the debt itself, no equity can arise against the surety requiring him to pay the debt in order to insist upon his legal rights as a surety. There is, of course, no doubt about this proposition of law. The authorities seem to be unanimous, and are quite fully cited and clearly stated in the brief. It follows that, if the plaintiff, Roma Love, was a surety only, our decision is wrong.

It does not seem that she can claim to be, strictly speaking, a mere surety in this action. The contract is not in

form a contract of suretyship, but is a pledge of personal property. The stock which was pledged was issued to this plaintiff in her name. She indorsed her name upon the back in blank, thus making it partake of the character of negotiable paper, and placed it in the hands of her brother-in-law to be used by him as a pledge for collateral security. She testified that his agreement with her strictly was that he should pledge it only for the $2,500 which he expected to borrow, and not for his then existing liability to the bank. The trial court correctly found that this contention of hers was true. She did not, however, notify Mr. Park of this limitation on the power of her brother-in-law. Under these circumstances, Mr. Park had the same right in the pledge as though it had in fact been the property of the pledgor. He was an innocent holder of the pledge in good faith, and cannot be compelled in equity to resign the pledge without the payment of his claim which it was given to secure.

The motion for rehearing is

OVERRULED.

ALFRED E. NELSON, APPELLANT, V. AUGUST REICK ET AL., APPELLEES.

FILED JULY 11, 1914. No. 17,465.

1. **Injunction:** PLEADING AND PROOF: SUFFICIENCY. The issues and evidence are examined, and found not sufficient to sustain the decree of the trial court.

2. **Highways:** DEDICATION. A public road was established along and on a certain half-section line. A portion of the traveling public followed along and near the line designated in the establishment of the highway, but not directly upon the line, and, as the adjacent land was not inclosed nor cultivated, a portion of the travel left the half-mile section line and passed diagonally over the adjacent land. Some nine or ten years before the trial the then owner of the land constructed a fence along and near the then traveled road, but at a greater distance from the half-section line than one-half the width of a public

road. There was no other evidence of an intention on the part of the owner of the land to dedicate to the public all the land between his fence and half-section line; the use of the roadway being only permissive. *Held,* not sufficient to prove a dedication.

APPEAL from the district court for Boone county: GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

Albert & Wagner and *H. C. Vail,* for appellant.

C. E. Spear and *F. J. Mack, contra.*

REESE, C. J.

This action is for an injunction to restrain the defendant, the road district overseer, from tearing down and destroying plaintiff's fence erected on or near the east line of his land, which is the southwest quarter of section 23, township 20 north, of range 8, in Boone county. It is alleged in the petition that plaintiff and his grantors have been in possession of said premises for more than 20 years prior to the commencement of the suit; that the public has traveled over and across plaintiff's said land on or near the east line thereof, and are using the same as and for a wagon road; that plaintiff fenced his said premises at or near the east line thereof; that some one entered the premises and cut down and destroyed his said fence; that defendant, as road overseer in the district in which the land is situated, threatens to tear down and destroy any fence that may be constructed along the said east line of plaintiff's land, and threatens to open up and work a public highway over and across the same at or near said line, notwithstanding the fact that no legal highway has ever been established there; and that said overseer will do so unless restrained, whereby plaintiff will be damaged, etc. The prayer is of the ordinary form for injunction. The defendant filed no answer, but made default.

A number of other persons, owners of lands abutting on and nearby the line of the alleged road in question, applied to the court for leave to intervene in the cause as defendants, and, having received permission so to do, filed their joint answer and cross-petition, in which it is al-

leged that for more than 20 years last past the strip of land in question has been a public highway; that they each are the owners of lands abutting thereon, and use the said road for the purposes of ingress and egress to and from their said lands; and that the closing of said road will work irreparable injury to them. There is no other issue presented in the cross-petition. The plaintiff replied by a general denial, except the admission that the road overseer had not answered. The cause was tried to the court, the trial resulting in a decree in favor of the defendants, and dissolution of the injunction. Plaintiff appeals.

We have carefully read the pleadings, bill of exceptions, abstract, and briefs, and are persuaded that, in part, the evidence does not sustain the findings and decree of the district court.

It appears that some 25 years ago a county road was duly established on and along the half-section line between the southwest quarter of section 23 (now owned by plaintiff) and the southeast quarter of the same section, owned by another; that the lands at that time were unoccupied and uncultivated; and that, while the general direction of the established road was followed by a part of the public, yet a great portion of the public in passing over that part of the country paid little attention to the exact line of the road, and often deviated a considerable distance from the line and passed over the adjoining land, diagonally crossing the tract now owned by plaintiff. The true line of the roadway has been followed by a portion of the public, but, in fact, little attention was paid to the exact location of the road. At one time a fence was constructed by the then owner of the land, which now belongs to plaintiff, and which fence seems to have been constructed with reference to the then traveled road; but we find no sufficient evidence that there was any intention on the part of the owner to dedicate all the land between his fence and the half-section line to the public. The fence was constructed some nine or ten years before the trial, but had been removed by plaintiff about one year

before the trial. A considerable part of the testimony bears upon the time of its construction and its relation to the then traveled road, which, as we view the case, is of minor importance. Prior to the commencement of this suit, plaintiff commenced the construction of another fence, having reference to the half-section line upon which the road had been legally established, leaving half the width of the established road, but which impinged upon the traveled roadway. A preliminary injunction was issued enjoining the defendant, the road overseer, from molesting the "new" fence. Should the road be held to have been established, either by use or dedication, as now traveled, it would, to some extent at least, result in a practical abandonment of the established road, and cut from plaintiff's land a wedge-shaped strip, thus depriving him of his property. Under the evidence in this case, we do not think this should be done. It is within the common knowledge of all the earlier settlers of this state that, until wild lands were inclosed by some method known to the law, the traveling public paid little heed to "laid out" roads. This seems to have been the case with the road in question. But as land has become more valuable, the landowners, by common consent and legal right, are cultivating and improving to their lines, preserving, of course, the legitimate rights of the public in its established roads. It requires more than a passive permission to have the effect of a dedication and surrender of a private right to public use of one's property. The highway is where it was legally established, and slight deviations from the true line will not have the effect of an abandonment thereof and the establishment of a highway nearby, unless more is shown in the way of physical conditions or longer continued use than in this case. The legal highway is on the half-section line where the road was established, and plaintiff has the right to inclose his land to the margin of such highway.

The decree of the district court is reversed and the cause is remanded to that court, with directions to enter a decree reinstating the injunction, rendering it perpetual.

REVERSED.

HIRAM E. WALDO, APPELLEE, V. CHARLES W. LOCKARD ET AL., APPELLANTS.

FILED JULY 11, 1914. No. 17,486.

1. **Specific Performance:** EXCHANGE OF PROPERTIES. In an action for the specific performance of a contract for the exchange of real estate and personal property, where plaintiff had performed the contract on his part, and defendant had partly performed the same on his part, the fact that the part which he was to perform, but refused to do, consisted of the mutual invoice of a stock of goods, lumber and coal would not of itself deprive plaintiff of the right to a decree of specific performance.

2. ———. Where a substantial compliance with a contract for the exchange of real estate and personal property had been made by both parties to the contract, it is within the jurisdiction and power of a court of equity to decree the completion of such contract by a decree for specific performance.

3. ———. The written memorandum of a contract contained no provision that the deeds to the land involved in the litigation should be subject to certain mortgages on each party's land, and the parties thereafter met, and, in the presence of each other, dictated to a scrivener the deeds to be executed, and executed them accordingly, leaving them with a third party in escrow for delivery upon the completion of the invoice and delivery of the property to be invoiced, the same being in furtherance of the contract of exchange. The fact that the liens upon the land, excepted in the deeds, were not referred to in the written contract will not, in the absence of fraud or mistake, avail defendant as a defense to an action for specific performance.

APPEAL from the district court for Wheeler county: JAMES R. HANNA, JUDGE. *Affirmed.*

Albert & Wagner and *A. L. Bishop,* for appellants.

H. C. Vail and *J. R. Swain, contra.*

REESE, C. J.

This is an action for the specific performance of the exchange of properties between plaintiff and defendant. The pleadings are of considerable length, and we will make no effort to set them out in full. A written memorandum

of an agreement was entered into between the parties, as follows:

"Agreement. Sale of Real Estate. This indenture made this 9th day of September, 1910, by and between C. W. Lockard, party of the first part, and H. E. Waldo, party of the second part, witnesseth: That the party of the first part has this day sold to the party of the second part the following described real estate, to wit, described in Memo B herewith attached, together with all appurtenances thereto attached, for which the party of the second part agrees to pay the sum of one dollar and other consideration described in Memo A herewith attached. The party of the first part is to furnish a warranty deed, a good and sufficient abstract of title, pay all taxes assessed against said land, and will give possession according to Memo B. In testimony whereof, the parties aforesaid have subscribed their names to (the date) above mentioned. C. W. Lockard, H. E. Waldo. Witness, Fred A. Cuscaden.

"Memo B. It is agreed that in invoicing each party choose an invoicer and all questions of unmarked goods to be left to said appraisers. Bldgs. 2 lots, 7 and 8 and 10 and lots 5-6 in block 8—6000.00. W back lots—100.00. Lumber at invoice price. General merchandise at invoice price. Hardware at invoice price, freight added. Coal at invoice price. Possession of property to pass at invoice time, not earlier than Oct. 10, 1910, or soon thereafter. Waldo agrees to furnish relinquishment, in case he cannot, then he agrees to pay $2,500 forfeit to C. W. Lockard. I agree to this stated inventory. H. E. Waldo. Witness, Fred A. Cuscaden.

"Memo A. 2 sec. of land 1 deed as follows, Sec. 25-22-9, 1 relinquishment, S. ½, S. ½, Sec. 13, N. ½, Sec. 24 and S. E. ¼ Sec. 24, all in 22, 9; 4 head horses, 2 brood mares, 2 mare colts, 10 head young cows, harness, all machinery belonging to place, consisting of 2 mowers, 2 rakes, 1 sweep, 1 stacker, 1 riding cultivator, 1 walking cultivator, 2 disks, 1 harrow, 1 wagon, 2 hayracks, feed grinder, small forge, also all of the hay except 10 ton, and all my share of the corn, except 500 bu. to be husked by Waldo, C. W.

Lockard to deliver share of corn on school section to lessee (1/3) of crop. C. W. Lockard."

A short time after signing of the agreement, the parties agreed to execute deeds and leave them in escrow with the Ericson State Bank, to be delivered by the bank to the proper grantees upon the completion of the invoice and delivery of the personal property. The deeds were accordingly executed September 26, 1910. It is alleged that plaintiff has performed all the conditions on his part to be performed, including the release of the homestead of 640 acres of land, and the filing thereon by defendant; that he caused his deed, together with the personal property mentioned in the contract, to be tendered to defendant, and demanded an invoice and a like transfer by defendant, but that his demand was refused. The prayer of the petition is for specific performance of the contract.

Defendant answered denying all unadmitted allegations of the petition; admitting the execution of the agreement for the exchange of properties, that plaintiff procured a relinquishment of the homestead entry of 640 acres of land, and defendant filed his homestead entry thereon, that the deeds were executed as alleged and placed with the Ericson State Bank to be held subject to the orders of the parties; alleging that defendant Mary C. Lockard executed the deed signed by her without any consideration therefor, that lots 7 and 8, in block 8, in Ericson, are and were the family homestead of defendants, and the deed therefore is, for that reason, void, and that the said agreement for the exchange was not signed by her. A trial was had to the district court, which resulted in a number of special findings, all of which are in favor of plaintiff, followed by a decree for specific performance. Defendants appeal.

It is not deemed necessary to set out the findings and decree at length, as it would extend this opinion beyond the usual and necessary limits. Among other things, it is ordered that the personal property be invoiced and the invoice returned into court within 30 days, which, it is claimed. is unusual and beyond the power of the court.

Other provisions and findings of the decree are objected to, which will be briefly noticed. It is contended by appellants that "the contract shown by the evidence is not sufficiently definite and certain to sustain the decree," and 6 Pomeroy, Equity Jurisprudence (3d ed.) sec. 746, is quoted to the effect that "for specific performance is required that degree of certainty and definiteness which leaves in the mind of the chancellor or court no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is to compel done." So far as this proposition is concerned, there is no specific stock on plaintiff's then farm particularly described; but the evidence of plaintiff is to the effect that the stock on the farm was known by defendant, and the number of head of horses and cattle specified in the contract, and of the known quality, were left upon the farm when plaintiff was ready to surrender possession and when he actually removed therefrom, so that in that regard plaintiff complied with his contract. It is true that the defendant's stock of goods and other personal property in and about his store, lumber and coal yards were not invoiced; but the stocks were particularly named, and the quantity of each were to be subject to invoice for the purpose of ascertaining the value, the surplus of value, if any, to be paid for by plaintiff, and, if the invoice fell short of the agreed value, the deficiency to be made up by defendant. The contract was entered into the 9th day of September, 1910. The method of making the invoice was agreed to, and it was stipulated that the possession was to pass upon the completion of the invoice, not earlier than October 10 of the same year. The value of the real estate of both parties was agreed upon. Plaintiff agreed to release to defendant his homestead entry on 640 acres of land, the same to be taken by defendant, and to deed to him a section of land to which he held the title. Plaintiff duly released his homestead entry, and defendant filed thereon, and, so far as is shown by the record, still holds his homestead right to the land. The deeds were subsequently executed, leaving blanks for the statement of the consideration to be

filled in after the completion of the invoice, both parties being present at the notary's office when the deeds were written, and each signed and acknowledged before the notary (each party and his wife signing the deed to be executed by them), and the deeds were placed in the bank in escrow for final delivery upon the completion of the invoice and filling the blanks as to consideration. This was done in furtherance of the agreement of September 9.

As to the contention that the contract is not definite and certain to warrant the decree of the district court, it must be admitted that it is not what such a contract should be, but the parties appear to have understood it fully, as shown by their subsequent conduct, and, since it has been performed by plaintiff and partly performed by defendant, and he has received and retained a part of the consideration, we are not at liberty to say that the contract is so indefinite as to prevent its enforcement by the courts.

The next proposition presented by defendant is that the evidence fails to show that plaintiff has performed or offered to perform his part of the contract. This is based upon the contention that (1) "he never delivered or offered to deliver the personal property which was part of the consideration moving from him, but delivered it to a stranger without authority." To this we cannot agree. It is conceded that he released the homestead right to 640 acres of land, and that defendant accepted the release and filed upon the land; his right thereto never having been questioned. Plaintiff testified that at the time he was removing from the farm he notified defendant of his intention to vacate the property, and that they agreed upon a suitable person to be left in charge, which was done as agreed. This was denied by defendant upon the witness-stand. The district court by its decree found that such an arrangement had been made, and, from all the evidence and circumstances shown, we are persuaded that the finding was correct. Certainly we cannot reverse the decree upon that ground. (2) "He never offered to invoice the stock," which, we assume, refers to the stock of goods,

lumber and coal named in the contract. Upon this part of the case, we must conclude that plaintiff was not acting under proper advice, for he procured his invoicer, but did not exercise all the care which he might have done, had he been acting under directions. It is true he, with another, went to the store twice, one time found it closed, the other time open, but no one in charge, at least no one answered their calls. Defendant was absent from home much of the time, and plaintiff failed to see him. It seems to be assumed that it was the duty of plaintiff to offer to make the invoice, but the duty was, in reality, upon the defendant. Nothing could be plainer than that he did not intend to make the invoice. (3) "He never surrendered, or offered to surrender, possession of the section of land he had agreed to convey to defendant. On the contrary, about March 1, 1911, and after the contract was made, he leased the land, and the personal property, to a third party for a year, and the tenant was in possession when the suit was tried." The conclusion here must rest upon the decision of the district court, as well as our own, that the plaintiff and defendant agreed that one Hemingway should be placed in charge for defendant. This being found to be true, there was no legal objection to Hemingway remaining on the land until defendant discharged him or terminated the possession. Acting upon the rule that it was plaintiff's duty to so care for the property as to make the damages as light as possible, he left Hemingway in possession. He agreed with him on the terms of possession, but subject to defendant. It was, to say the least, rather an unusual course to pursue, yet, as plaintiff was aware that defendant was seeking to repudiate the contract, it is difficult to say what else he should have done. Reasonable care and common fairness would seem to require that some action on the part of plaintiff would be necessary in order to protect the property as nearly as might be in its then condition.

It is said that in the memorandum agreement there is no provision for the conveyance of any of the land subject to mortgages, yet, in the deeds as executed, plaintiff

takes his real estate subject to a mortgage of $900, and the one made by plaintiff to defendant is subject to a mortgage for $2,500. As we have seen, all parties were present at the time of the writing and execution of both deeds. They were well understood and acceptable to both parties at that time, and, no doubt, according to the previous agreement, which was not stipulated in the writings. Otherwise, objections should have been made when the deeds were read. The deeds, containing the clause referring to the mortgages, were dictated to the scrivener in the presence and hearing of all. We cannot see that the objection can avail defendants.

Finding no error in the decree of the district court, it is

AFFIRMED.

JESS RIMBY V. STATE OF NEBRASKA.

FILED JULY 11, 1914. No. 18,488.

1. **Assault and Battery:** CONFLICTING EVIDENCE. Plaintiff in error was prosecuted for the crime of committing an assault with intent to inflict great bodily injury. The evidence submitted to the jury was conflicting, with the preponderance, in some respects, in favor of the state. On examination of the evidence, the substance of which is stated in the opinion, it is found that the evidence sustains the verdict finding defendant guilty.
2. **Instructions.** The instructions given and refused are examined, but not set out in the opinion, and no prejudicial error is found therein.

ERROR to the district court for Madison county: ANSON A. WELCH, JUDGE. *Affirmed.*

H. F. Barnhart, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

An information was filed in the district court for Madison county charging Jess Rimby, plaintiff in error, whom,

for convenience, will be referred to herein as defendant, with the crime of committing an assault upon Anna Rimby with intent to inflict great bodily injury upon her. Upon arraignment, he entered a plea of not guilty, was given a jury trial; the jury returning a verdict of guilty. After a motion for a new trial was filed and overruled, an indeterminate sentence of confinement in the penitentiary of not less than one year nor more than five years was pronounced. He alleges error, and presents the cause to this court for review.

The person, Anna Rimby, upon whom defendant is alleged to have committed the assault, was his wife, who was the only witness that testified to the alleged facts of the assault, although she was supported by other witnesses, who detailed facts and circumstances, which tended in some respects to strengthen and support her version of the affair. Briefly stated, the substance of her testimony is that, owing to some differences between them, she and defendant were not living together; that she had a room in an upper story of a building in Norfolk, the lower story being occupied by a saloon. She was working in a restaurant as table waiter, and on her return to her room, after darkness had set in, she seated herself upon a trunk near the foot of her bed in the room, when defendant crawled out from under the bed, saying, "I have you now," struck her, knocking her down, and began to beat her. It being dark in her room, she could not see if he used any weapon, but a rather deep gash was cut in her temple, which required the use of stitches to close it up. During the time of the assault she screamed and called for "help," when two men—bartenders in the saloon below—ran up to her room, and as they entered defendant made his escape through a window, lighting upon a roof of an adjoining building. The two men, who were employed in the saloon, testified that they heard a noise in the room above and some one screaming and crying for help, when they ran up to Mrs. Rimby's room, opened the door, and met her in the act of falling, her face bloody, and a deep cut or

gash upon her head. They caught her, preventing her from falling, and at that time saw the feet and legs of some one going out through a window. Dr. Pilger testified that he was called upon to attend Mrs. Rimby, and found a deep gash or cut on the side of her head, in which it was necessary to take a couple of stitches, thereby bringing and holding the parts together; that the wound required care for a short time. Two policemen testified that they pursued defendant toward the river near the city, and found him near a thick growth of underbrush in the edge of the water; that he was arrested and taken to the jail, when one of the officers asked him why he did the act, when he answered that his intention was to put her out of business, or words to that effect; that, upon questioning him as to what he had done, he said he had "just beat hell out of her."

Defendant admitted being in the room of his wife on the occasion referred to, but denied being under the bed; that he sat upon the foot of the bed, and was sitting there when his wife came to the room. He testified that he did not strike her at all, but that she caught her foot on a rug and fell, striking her head on the corner of the trunk; that as soon as she saw him she started to run, crying "Help!" and "Murder!" He admitted that he made his escape from her room through a window, as stated by his wife and the two witnesses who came into the room, but gave as his reason for so doing that he knew she was mad and going to have him arrested, "as she had threatened to before."

This conflict in the evidence, created by the testimony of the defendant, presented to the jury the question as to which should be believed. They found the testimony of Mrs. Rimby to be true, and with that the court could not interfere. Defendant's conduct and statements added strongly to her version of the affair. Considering her testimony to be true, it presented an aggravated case of assault and battery, or an assault with felonious intent. Of this, the jury were the judges, and we cannot say that the verdict is not sustained by sufficient evidence, as claimed by defendant's counsel.

It is contended that the verdict is contrary to certain instructions given by the court; that certain instructions given were erroneous; and that certain instructions asked by defendant were erroneously refused. It would extend this opinion to an unreasonable length, without accomplishing any beneficial results, were we to present any analysis of each. It must be sufficient to say that we have carefully examined all instructions, both given and refused, and find that the law applicable to the case was fully and fairly given, each right of the defendant carefully guarded and protected. The instructions asked by defendant and refused were given, in substance, in the instructions already given, and we are unable to detect any error in the action of the court in that behalf.

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

AFFIRMED.

ROSE, J., not sitting.

CLARENCE CLAWSON V. STATE OF NEBRASKA.

FILED JULY 11, 1914. No. 18,545.

1. **Criminal Law:** PRELIMINARY EXAMINATION: WAIVER. Where it is shown by the transcript of the examining magistrate's court, that a complaint was filed charging the accused with murder in the first degree, that upon his arrest he was taken before the magistrate for preliminary examination, that he was arraigned and entered a plea to the complaint of not guilty, and waived examination, whereupon he was held to appear before the district court, this is a sufficient compliance with the law requiring preliminary examinations in felony cases.

2. ———: APPEAL: SUFFICIENCY OF EVIDENCE. Where, in a jury trial, the evidence upon a material part of the case is conflicting, and there is sufficient to sustain the verdict, the finding of the jury thereon must be final; they being the sole judges of the weight of the testimony of the witnesses.

3. **Homicide:** SUFFICIENCY OF EVIDENCE. The evidence is examined, and stated in the opinion in part, and *held* to sustain a verdict of guilty of murder in the second degree.

4. ———: TRIAL: INSTRUCTIONS: QUESTIONS FOR JURY. Where the information charged defendant with the crime of murder in the first degree, the questions of premeditation and deliberation were for the jury to decide, but, where they found him guilty of murder in the second degree, those questions were eliminated, and were therefore unimportant.

5. **Criminal Law:** EXPERT EVIDENCE. If there is any element of science, or skill, in a matter being investigated before a trial jury, it is not reversible error for the court to admit expert testimony thereon, even though the element of science was slight.

6. ———: INSTRUCTIONS. It is not reversible error, where instructions are asked by defendant, and given by the court, for them to show that they are given at the request of the defendant.

7. **Instructions** to the jury given by the court are examined, and found not to be erroneous.

8. **Homicide:** SENTENCE. The term of imprisonment imposed by the sentence of the court is not found to be excessive under all the circumstances of the case.

ERROR to the district court for Saline county: LESLIE G. HURD, JUDGE. *Affirmed.*

Bartos & Bartos, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

REESE, C. J.

Plaintiff in error, who will be referred to as defendant, was informed against in the district court for Saline county, charged with the crime of murder in the first degree in the killing of one Ross McKinzey. There was a jury trial, which resulted in a verdict of murder in the second degree being returned against him, and on which he was sentenced to confinement for 15 years in the state penitentiary. He alleges error, and brings his cause to this court for review.

One of the alleged errors insisted upon, which was presented in the district court in a motion to quash the information, was that defendant had no preliminary examination. The transcript of the county judge, before whom defendant was taken upon his arrest, contains the follow-

ing recital: "Defendant, Clarence Clawson, present in court, was duly arraigned and plead not guilty to the complaint. Examination thereof was waived. On consideration of the files, I find there is probable cause to believe that the said defendant Clarence Clawson committed the offense charged in the complaint. It is further found that said offense charged is not bailable, and defendant is remanded to the custody of the sheriff until the next term of the district court of Saline county, Nebraska." This is sufficient to give the district court jurisdiction. The law requiring a preliminary examination before an examining magistrate was enacted for the benefit of the accused, and he may waive it, if he so desires. *Reinoehl v. State,* 62 Neb. 619; *Latimer v. State,* 55 Neb. 609. Where the record of the filing of a complaint before an examining magistrate against a defendant, his arrest and arraignment, and that he waived examination, is shown, this is a sufficient compliance with the law. *Korth v. State,* 46 Neb. 631.

It is insisted that the evidence adduced at the trial does not sustain the verdict of murder in the second degree, and, at most, does not show the commission of a higher crime than manslaughter. This requires an investigation of the evidence submitted to the jury. There is no contention that decedent was not killed by defendant, but it is contended that, under the circumstances shown, the verdict could not legally have been guilty for so great a crime as found. It appears that the tragedy occurred in the city of Wilbur, in the night, during a street fair or carnival; that defendant's wife and another woman were there for immoral purposes; that defendant at the time was not with them, but was so located as to act as solicitor for his wife, and so that she could bring and deliver to him the money received by her for her debauchery, and which he received, she returning to her crimes. Decedent (McKinzey) approached the other woman upon the street, asking her if she was there for money, to which she gave an affirmative answer. They turned into an alley, where defendant's wife joined them. Decedent became involved

in a dispute with the other woman and struck her, knocking her down, following up the assault by further violence. She called to defendant's wife for help. Defendant's wife caught him by the shoulder, and ordered him to cease striking the other woman, whereupon he arose and assaulted her, striking her in the face with his fist. She called for defendant, and when he went to her relief he saw decedent strike his wife the second time. He interfered, and an altercation occurred between them, followed by blows. Defendant had a razor, which he used on decedent, cutting his throat so that he soon thereafter died. There is but little conflict in the testimony as to many of these facts. However, there is some conflict as to the details of what occurred immediately before and at the time of the cutting of decedent's throat. The woman, who gave her name as Craft, testified on the part of the state that, when defendant's wife called for her husband, McKinzey struck her twice, at which time defendant came, and McKinzey said: "Who are you?" Clawson, the defendant, said: " 'Don't hit that woman. I will fix you so you will never hit another.' Then they sprang together, McKinzey taking Clawson by the throat and by the wrist; then they fell apart again. There were some words passed, but I don't remember what they were. Then they came together again. I saw Clawson's arm shoot out; McKinzey stagger back, putting his hand to his throat. Clawson says, 'Come, let's make our get-away from here.' We turned and left." In another part of her testimony, she was asked: "Q. Now, when they fell apart, what happened? A. They went back together again, Mr. Clawson's hand shot out. Q. Where were McKinzey's hands at that time? A. His hands didn't go out. Q. What do you mean by that? Just describe how they were, if you know? A. As far as I saw, his hands were hanging to his sides. Q. And then what happened? A. Clawson's hand shot out and McKinzey put his hand to his throat and staggered back. Q. And then what happened? A. We left there then. Q. What did Clawson say, if anything? A. He says, 'Come, let's get away from here.' "

While the defendant had the perfect legal right to defend himself and wife from assaults by McKinzey, yet, if the jury believed the testimony of this witness, the danger of further assaults had apparently passed, and the conflict was between the two men. If she told the truth, defendant became the aggressor in the use of the razor, and would have to be held responsible for his act, in the use of the deadly weapon, no matter what his intentions may have been. The evidence all tends to show that all the parties to the transaction were of the most debased of human kind, little, if any, above the dumb brutes—one apparently no better than the other. The testimony of defendant and his wife, if believed by the jury, might place the act of the killing in a less criminal light; but, the jury being the sole judges of the weight of the testimony, we must accept their verdict as final upon that question. This being true, the verdict of guilty of murder in the second degree will have to be sustained.

It is insisted that the evidence adduced did not show premeditation and deliberation on the part of defendant, which would be necessary to constitute murder in the first degree, and the jury should have been so instructed. The information charged murder in the first degree. The question of premeditation and deliberation were for the decision of the jury, and therefore it was proper for the court to instruct on that phase of the case, leaving it for the jury to decide. They found defendant guilty of murder in the second degree, which eliminated the subjects of deliberation and premeditation. We find no just ground for complaint in this part of the case.

It is complained that there was error in the exclusion of offered testimony as to the condition of McKinzey as to whether he was excited at and during the time of his assault upon the woman Craft. In this there was no error, as that episode had passed and the woman was on her feet before defendant appeared upon the scene. The proposed evidence lacked the element of materiality.

It is next contended that the court erred in permitting evidence tending to show that defendant had been guilty

of crimes other and disconnected with the one charged in the information. There is no question but that both defendant and his wife had been leading the most abandoned and criminal lives, and that without shame or remorse. This was shown throughout the whole case by both. The evidence of defendant's arrest at one time was brought out in his cross-examination. His wife testified that she had never known him to be engaged in a fight. She was asked on cross-examination if he had not had a fight with a policeman in Lincoln. Her answer was that for an insult he had hit a policeman, but there was no fight. The cross-examination was proper enough, but barren of results, having brought out no fact to the disparagement of defendant; therefore, even if erroneous, could not have been prejudicial.

Defendant testified, in substance, that when he made use of the razor upon McKinzey, he intended to cut him, thus inflicting a wound, but did not intend to reach his throat, nor cause his death; that when he struck at McKinzey with the razor McKinzey thew up his arm, thus striking and elevating defendant's arm and causing the razor to strike the throat and inflicting a wound not intended. Dr. Dodson was called to see McKinzey after the infliction of the wound and before his death. The doctor made a careful examination of the wound, and, upon the witness-stand, gave a detailed description, showing the point of commencement and termination of the wound, its curvature, its line of direction, the smoothness of the cut, etc. He had also seen and heard the demonstration of the tragedy as given and made before the jury by defendant. He was called as an expert on rebuttal, and was asked, in substance, if that wound could have been made in the manner described by defendant, and he gave it as his opinion that it could not. This was objected to as not involving any question of science or skill, and that the conclusion was for the jury, and not for the witness. It must be conceded that the question presented is close to the line, and there is some degree of force in the contention by defendant's counsel, yet, taking all the circumstances into

consideration, we are not prepared to say that the decision of the court was erroneous. In part, at least, the doctor's observation of decedent may have been, and probably was, sufficient to justify him in forming an expert opinion as to the manner in which the wound was inflicted. It is perhaps true that any layman could form some opinion as to the question propounded, but it is probably equally true that, under the circumstances, the doctor's expert opinion would be of greater value in conveying the truth.

Certain instructions to the jury were asked by defendant, and given by the court, the court stating thereon that they were "asked by defendant." Exceptions appear to have been taken upon that ground. We do not understand that there is any well-defined rule upon that subject with the district courts of the state, and can see no ground of prejudice to defendant resulting from the action of the court. It is thought by some practitioners that it is preferable to have the jury informed that the instruction is from the party offering them, that it will thereby have the greater weight, etc. While it is perhaps better practice to let all instructions given as being by the court, we know of no hard and fast rule upon the subject. We find no prejudicial error in the action of the court in this behalf.

The instructions given by the court to the jury are criticised, but they are too long to be set out here. We have carefully examined them, and find that they are not open to the criticisms made.

It is insisted that the confinement imposed by the sentence is excessive. Defendant is a young man. He had fallen into a life of crime. The trend of rational modern thought is that penalties imposed by the criminal law are are not for revenge or the infliction of punishment, but for the protection of society and the reformation of the guilty party. It is to be hoped that defendant may determine to abandon all thoughts of his course of criminal conduct, and, should he prove himself worthy of executive clemency, that clemency can be granted to him after a suitable time, but we do not see it to be our duty to inter-

fere with the judgment of the district court, which is hereby

AFFIRMED.

ROSE, J., not sitting.

LETTON, J., concurring in part.

I think the trial court erred in overruling the objection to the question propounded Dr. Dodson.

"It is necessary in the examination of all such witnesses that questions should be so framed as not to call on the witness for a critical review of the testimony given by the other witnesses, compelling the expert to draw inferences or conclusions of fact from the testimony, or to pass on the credibility of the witnesses, the general rule being that an expert should not be asked a question in such a manner as to cover the very question to be submitted to the jury." Rogers, Expert Testimony (2d ed.) sec. 26, p. 61.

"The questions to him must be so shaped as to give him no occasion to mentally draw his own conclusions from the whole evidence or a part thereof, and from the conclusion so drawn express his opinion, or to decide as to the weight of evidence or the credibility of witnesses; and his answers must be such as not to involve any such conclusions so drawn, or any opinion of the expert, as to the weight of the evidence or credibility of the witness." *McMechen v. McMechen,* 17 W. Va. 683, 694.

But this error could not be prejudicial to defendant. He testified that he intended and attempted to cut McKenzie with a razor, and the deceased in attempting to ward off the blow struck his hand and sent the razor where it cut his throat. Assuming that this theory had been established by the evidence, it would constitute no defense against the charge of which the defendant was convicted. His intention was malicious, and the fact that the assault that he made with the razor with the intention to cut the deceased resulted in a graver injury than he actually contemplated does not excuse him from the result of his unlawful act. 1 Bishop, New Criminal Law (2d ed.) secs. 328-330.

I concur in the opinion in all respects except as to this ruling of the court, and concur in the affirmance of the judgment.

SEDGWICK, J. I agree with the concurring opinion of Judge LETTON.

HAMER, J., dissenting.

I regret that I am unable to agree with the majority opinion in this case. I do not think that the evidence is sufficient to sustain the judgment of the court below. It is not strong enough to support a verdict higher than manslaughter.

The second paragraph of the syllabus seems to be objectionable because it takes from the jury the exercise of its proper functions. It attempts to confer upon the jury power not contemplated by the constitution and laws of the state.

It was bad for the defendant to use a razor. It should be remembered, however, that the man who was killed had the defendant by the throat very shortly before the razor was used.

In reading the evidence of Dr. Dodson, I find the statement that there were two cuts. The doctor testified: "I said it appeared to me that after the cut had been made there had been a stab wound in the same cut." There is testimony that when the man's throat was cut the defendant's arm went out suddenly. If there was a cut and afterwards a stab wound in the same cut, it is important how much time elapsed. If the deceased had the defendant by the throat, and the defendant drew the razor to compel the deceased to let loose and made the first wound, if there was a wound, in attempting to get the deceased to let loose, it is highly important what time elapsed between the making of the first wound and the making of the second wound. Of course, there is a good deal of uncertainty in the doctor's testimony. The doctor testified: "He first said that he went out there and they got into a fight, and

this fellow had him by the neck with his right hand, and he had a hold of him with his other hand. Q. Who did? A. McKinzey, a hold of his left hand, and he was choking him, and he said he pulled out his razor and he made a slash at him, and when he slashed at him the other fellow threw up his arm and hit him on the under side of the arm, hand, here, and that threw his hand up, he said, and threw it into his throat; that was his statement." The doctor comes to the conclusion that it was impossible to do it in that way. "Q. Now, what difference does it make? Can't I make the same cut at you, this position, as if it was this way? A. No, sir; you cannot reach back that far and make that cut; no other man can. If you was in the front of him you would not; you have got to reach around. Q. What angle do I have to stand beside of you to make that cut? A. You could stand at any angle you wanted to. * * * Q. Now, if I am on the side of you, then how did it produce that big gash there, the one that you said was more of a stab? A. It didn't produce it at that first move, I say that my opinion is there was a second strike there, sir, and I have said that all the time. Q. And you still stick to it? A. Yes, sir; I do. I believe it, and all the testimony I have heard there don't change my mind a bit."

In *People v. Fritch,* 170 Mich. 258, the defendant was prosecuted for causing death by a criminal operation. The state's case was contained in hypothetical questions asked of and answered by medical experts. In that case it was held improper for a medical expert to give his opinion of whether a criminal operation had been performed; it being the province of the court, and not of expert witnesses, to advise the jury concerning the facts necessary to establish a crime. In the same case it was held that a hypothetical question was improper which asked a medical expert for his opinion as to whether the deceased was pregnant, supposing she had taken cotton root, possessed a catheter, had made an appointment with the defendant to perform an operation upon certain terms; these things included in the hypothetical question were held to be non-

scientific data which the jury were able to comprehend and estimate without the aid of expert witnesses. It will be seen that case is very much like the instant case so far as the testimony of Dr. Dodson relating to the wound is concerned. Because of the length of the discussion it is impossible to fully report it.

The Michigan supreme court quotes Mr. Justice Campbell in *Evans v. People,* 12 Mich. 27, where he says that, when a scientific witness testifies to matters within the comprehension of ordinary witnesses, he stands on the same footing with them as to all such testimony, and as to such matters can only give his opinions where any other observer might do so. Let that idea be applied to the instant case for a moment, and we will see that Dr. Dodson's testimony should not have been taken. It was for the jury to determine whether that which Dodson testified to was true or not. A mere ordinary bystander would not be allowed to form his opinion and testify to it, because, if he did so, he would be crowding the jury out. The matter was one for the jury to determine. The Michigan court say: "It does not require argument to prove that no medical witness called in the case at bar should have been asked for or permitted to give the opinion that a criminal operation had been performed. To say that in this case any operation must have been criminal does not meet the objection. It was the duty and province of the court, not that of expert witnesses, to advise the jury concerning the facts necessary to establish a crime."

The Michigan court further proceeds: "The second hypothetical question, set out in the statement of facts herein, called upon the witness to state who, in his opinion, committed the criminal act, and, by necessary inference, from all data supplied by the question itself, called upon the witness to state, in substance and effect, that respondent was guilty as charged. The court interposed and the question was not answered. But the hypothetical question first above set out is little less objectionable. Undoubtedly, it was competent to include in the premises for an expert opinion the fact that the girl supposed herself

to be pregnant, having passed two monthly periods, because that fact, like a statement of it made by the girl as patient to the witness as her physician, might properly be considered. So all the evidence afforded by observation of the body of the deceased, considered with respect to the probable time when she died and the immersion of the body in water, should have been included in the premises stated. But how is it possible for a scientific opinion in the case to be aided by the facts that bricks were placed in the sacks with portions of the body, that deceased had taken cotton root, possessed a catheter, had made an appointment with respondent about an operation upon terms stated, that the body had been carried in an automobile from respondent's office to Ecorse creek, that her body was dismembered in the office of the physician consulted by her? It was to data and observations impossible to lay before the jury and be comprehended by them, and such connecting and incidental data as afforded a basis for scientific opinion and deduction, *that the experts should have been confined.*"

The Michigan case is very recent, and may be consulted with profit because intended to be fair, and it is instructive as well as apparently fair and the result of much labor.

The defendant had the same right to defend his wife from assault that he would have had if she had been a moral woman and he had been a moral man.

I think that what the deceased said and did was properly part of the *res gestæ,* and shows the provocation suffered by the defendant, and that it was error to exclude it.

MARGARET E. PIERCE, APPELLANT, V. SCHUYLER B. PIERCE, APPELLEE.

FILED JULY 11, 1914. No. 17,780.

Divorce: SUFFICIENCY OF EVIDENCE: ALIMONY. Evidence examined, and found sufficient to sustain the judgment of the district court granting plaintiff a divorce. *Held,* further, that plaintiff was entitled to a judgment of $8,500 permanent alimony in lieu of $6,000 awarded her by the district court.

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

B. F. Good and *A. J. Sawyer,* for appellant.

C. S. Polk, contra.

BARNES, J.

The plaintiff brought this action in the district court for Lancaster county, charging the defendant with extreme cruelty toward her, and praying for a decree of divorce and alimony. A trial was had, and the court rendered a decree in favor of the plaintiff granting her a divorce, and requiring the defendant to pay her the sum of $6,000 as her permanent alimony. The plaintiff, not being satisfied with that amount, has brought the case to this court by an appeal. The defendant has filed no cross-appeal, and only contends that the judgment of the district court was right and should be affirmed.

The bill of exceptions discloses that plaintiff and defendant were married near Emerson, Iowa, in October, 1879, and immediately moved to a rented farm near Shenandoah in that state. At the time of their marriage the plaintiff had what was necessary to commence housekeeping, and one mare, which became the dam of a number of colts. Her household furniture, with the mare and some poultry, were worth about $300. The defendant had a team, which was worth about $200, a set of harness and five heifers, for which he paid about $100. The fore-

going was practically all the property possessed by both plaintiff and defendant. With this outfit they began housekeeping. The plaintiff milked the cows, made butter and sold the same at the market town, fed and cared for the poultry, did her housework, and aided the defendant some in his work on the farm and in the garden. In fact, she performed the duties of a good industrious housewife. She was a good manager, and sold the proceeds of the poultry and other things produced on the farm, and at the end of the first year she had a credit at the store of $12 over and above their living expenses. On March 6, 1881, their son Winfield was born, and on this account plaintiff did not do as much outside work as she usually did. A hired man was employed for the season of 1881, and for the next year things went on much the same as before. In September, 1882, plaintiff and defendant came to Nebraska and purchased the southwest quarter of section 25, township 11, range 5, in Elk Creek precinct, near the city of Lincoln. This was unimproved prairie land, and defendant entered into a written contract agreeing to pay therefor the sum of $2,650. Of the first payment plaintiff, who had inherited some money from her father's estate, paid about $300. The second instalment was for $1000, of which plaintiff testified she paid $350 out of her own funds, and the defendant paid the remainder. The following spring they moved to Nebraska, and defendant farmed a tract of land which had been purchased by the plaintiff's mother, and cornered with the land which they had theretofore purchased.

Both plaintiff and defendant appear to have been industrious, hard-working people. They prospered, and soon paid the remainder due on the contract, and defendant received a deed for the land purchased by them, and on which they resided up to the time of their separation. They engaged in farming extensively, and acquired quite a number of full-blooded Jersey cattle, with which they started a dairy. It appears that the plaintiff was fond of cattle and had a good idea of how to conduct a dairy. She did much of the purchasing of the stock, and kept the

records and pedigrees of the animals which they purchased and raised. For a number of years they lived in an old house on the farm, but later on, at the solicitation of the plaintiff, the defendant built a very comfortable home costing about $5,400. They continued to improve the farm, built two barns thereon, and brought the land to a high state of cultivation. The plaintiff appears to have taken great interest in the cultivation of flowers, fruits and shrubs, and everything that enhanced the beauty and productiveness of their home. The defendant meanwhile did his full share in making the improvements and enhancing the value of the property, so that, at the time when this action was tried, a fair consideration of the testimony showed the value of the farm improvements to be about $21,000. It also appeared that the defendant, at that time, was possessed of personal property consisting of horses, cattle, farm implements, and such other things as were necessary and convenient for use on the farm, of the value of about $1,500; that he was indebted to divers and sundry persons in the sum of $900, and his net worth, at the time of the commencement of the plaintiff's action, was about $21,000.

It appears from the evidence that, notwithstanding the fact this couple prospered in the way of property accumulations, the plaintiff, owing to her age and condition of ill health, became somewhat faultfinding and dissatisfied with the property arrangements, and her affection for her husband gradually turned to dislike and hatred. The defendant, on his part, was no doubt somewhat exacting, and in time became somewhat cruel toward the plaintiff. Things seem to have gone from bad to worse, until finally the plaintiff abandoned the home and commenced this action for a divorce. The district court was evidently of the opinion, however, that such a feeling of hostility had arisen between the parties that there was no prospect of a reconciliation, and in view of all of the facts the plaintiff was entitled to a divorce.

We have carefully read the evidence, and are satisfied that the court did not err in its findings and judgment so far as that matter was concerned, and we therefore affirm so much of the decree as granted the plaintiff a divorce.

It appears that the district court allowed the plaintiff temporary alimony to the amount of $750, suit money amounting to $50, attorneys' fees $500; plaintiff has received household goods of the value of $700, an organ worth $80, incubators and brooders of the value of $65. The allowances thus made out of the property of the defendant are of the value of $2,145. This amount deducted from the defendant's property leaves the net value thereof, still possessed by him, at about the sum of $18,855. He was also required to pay, and has paid, $50 a month, allowed by this court, as temporary alimony, which now amounts to the sum of $1,100. A substantial allowance was made by this court to pay for the bill of exceptions and for briefs and attorneys fees, and there are other expenses connected with this litigation, so that defendant, at its termination, will have unincumbered property of the value of about $17,000. As we view the testimony, the plaintiff was entitled to receive one-half of the net value of their accumulations. It follows that the decree of the district court granting the plaintiff $6,000 permanent alimony should be, and is hereby, reversed. We find that the plaintiff should receive the amount of $8,500 in lieu of the $6,000 decreed to her by the district court.

The cause is therefore remanded to the district court for Lancaster county, with directions to that court to render a judgment in harmony with the views expressed in this opinion.

JUDGMENT ACCORDINGLY.

ROSE, FAWCETT and HAMER, JJ., not sitting.

GLEN EARL VANDERVORT ET AL., APPELLEES, V. ANDREW C. FINNELL ET AL., APPELLANTS.

FILED JULY 11, 1914. No. 17,792.

1. **Judgment:** VALIDITY: CONSTRUCTIVE SERVICE. Where, in an action to foreclose a mortgage against the surviving husband of the deceased owner of the mortgaged premises and her nonresident minor heirs, neither the record nor the files in the case furnish proof that a notice for constructive service on the minor heirs was ever published, the judgment in such proceedings is subject to collateral attack.

2. ———: ———: RECITALS. A recital in the judgment that "the court finds that due and legal notice of the filing and pendency of the action was given the defendants" will not supply the lack of the facts necessary to confer jurisdiction.

3. **Mortgages:** FORECLOSURE SALE: INTEREST CONVEYED. The sale of an interest in real estate on the foreclosure of a mortgage can only convey the interest of the mortgage debtor, and, where he owns only a life estate, that is all that is sold, although the purchaser may have supposed he bought and acquired the whole title.

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

W. S. Morlan, for appellants.

Lambe & Butler and *E. P. Pyle, contra.*

BARNES, J.

This is an appeal from a decree of the district court for Frontier county quieting plaintiffs' title to the southwest quarter of section 21, township 5 north, of range 28 west of the 6th P. M., situated in that county.

It appears that one John H. Vandervort owned the land in question at the time certain notes secured by a mortgage thereon were given to one John Amidon; that later Vandervort conveyed the premises to his wife, Ella S. Vandervort, who owned the same at the time of her death, which occurred July 1, 1890; that the plaintiffs in this action were her minor heirs. It further appears that the

mortgage above mentioned was sold, assigned and delivered to one Carrie E. Havens, and on or about the 1st day of February, 1893, she filed her petition in the district court for Frontier county against John H. Vandervort, Ella S. Vandervort, and Burton & Harvey to foreclose her mortgage. Summons was issued and returned served on John H. Vandervort. The return also showed that Ella S. Vandervort was not found in Frontier county. On April 3, 1893, a decree of foreclosure was rendered, but on the 5th day of June of the same year it was set aside, and a summons was issued for May Vandervort, Glen Earl Vandervort, Gertrude Vandervort, Typhosia Vandervort, John J. Vandervort, and James Vandervort, minor heirs of Ella S. Vandervort, and John H. Vandervort, their guardian. The return showed that none of the defendants named were found except John H. Vandervort, who accepted service. On August 1, 1893, an amended petition was filed which named the heirs of Ella S. Vandervort as parties defendant. On August 28, an affidavit was filed for service by publication as to the minor heirs of Ella S. Vandervort, deceased, alleging their nonresidence. A decree of foreclosure was entered November 8, 1893, and a stay was taken by John H. Vandervort. The premises were sold to the plaintiff Carrie E. Havens on October 3, 1894, for the sum of $670. The sale was confirmed November 11, 1895. A sheriff's deed was issued to the purchaser December 20, 1896, and she, by quitclaim deed, in 1899, conveyed the premises to the defendant Andrew C. Finnell, who has since that time been in possession thereof.

The questions presented by this appeal are: Did the plaintiffs, who are the children and heirs of Ella S. Vandervort, deceased, have constructive notice of the pendency of the foreclosure action? Did the court in the foreclosure proceedings have jurisdiction to render judgment against them, and, if no service was obtained upon them in that suit, what are the respective rights of the parties in the present action?

It appears from the evidence that the clerk of the district court was unable to find from the records and papers that any summons requiring the plaintiffs in this action to answer in the foreclosure suit was ever published. It is contended by the defendant that the evidence on this point is insufficient to support the judgment, for the reason that in the foreclosure decree there was a recital of service of summons and the entry of a default as to all of the defendants. The question thus presented was decided in *Duval v. Johnson,* 90 Neb. 503, where it was held:

"Where * * * neither the record nor the files in the case furnish proof that a notice for constructive service was ever published, a judgment in such proceedings is subject to collateral attack."

"A recital in the judgment that 'the court finds that due and legal notice of the filing and pendency of this action was given the defendants' will not supply the lack of the facts necessary to confer jurisdiction."

In that case the authorities are collected and commented on, and the rule above announced was there promulgated. In the case at bar no one was able to testify that service by publication had been made on the minor heirs of Ella S. Vandervort. The attorney who conducted the case stated that he had no recollection of the proceedings, or that he had ever been an attorney in the foreclosure suit at all. Following the rule in *Duval v. Johnson, supra,* we are constrained to hold that the evidence contained in the record in the instant case is sufficient to sustain the decree in plaintiffs' favor. The conditions in the case at bar are practically the same as though the plaintiffs herein had never been made parties to the foreclosure proceeding. Construing the rights of the parties in the instant case, it seems clear that the interest purchased by Carrie E. Havens at the sale under the mortgage foreclosure decree was simply the life estate of John H. Vandervort.

In *Currier v. Teske,* 93 Neb. 7, it was said: "The sale of an interest in real estate on foreclosure of a mortgage can convey only the interest of the mortgage debtor, and where he owns only a life estate that is all that is sold,

although the purchaser may have supposed he bought and acquired the whole title."

It appears in the case at bar that John H. Vandervort, who was the only person served with a summons in the foreclosure case, was the owner of a life estate in the premises in question. Under the rule announced above, the purchaser at the foreclosure sale acquired only the said life estate, and by her quitclaim deed she conveyed to the defendant Finnell only the estate which was purchased at the foreclosure sale. When Finnell obtained his deed he went into possession of the premises, and has ever since that date enjoyed such possession, has made improvements on the premises, and has paid the taxes thereon. It follows that the defendant Finnell should be held to be a mortgagee in possession. This was the holding of the trial court, which was clearly right.

In the accounting the district court found that the plaintiffs should be required to pay to defendant Finnell the sum of $693.36, with interest from the date of the decree. The evidence clearly shows that there is at least that amount due upon defendant's mortgage. Plaintiffs are satisfied to pay that amount, and have asked that the judgment of the district court be affirmed. They being the only parties who can complain, the decree of the district court is

AFFIRMED.

ROSE, J., not sitting.

MARTHA O'KIEFFE, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLEES.

FILED JULY 11, 1914. No. 17,648.

1. **Waters:** DRAINAGE: INJUNCTION. An injunction will not be granted at the suit of a landowner to restrain the construction of ditches and drains for the purpose of draining a small lake unless the evidence clearly shows that the water drained will flow upon the land of the plaintiff.

2. ———. *Davis v. Londgreen*, 8 Neb. 43, followed.

APPEAL from the district court for Grant county: JAMES R. HANNA, JUDGE. *Affirmed as modified.*

William Mitchell, for appellant.

Byron Clark, Sullivan & Squires and *Boyd & Barker, contra.*

LETTON, J.

On a portion of section 19, township 43, range 36, in Grant county, there is a shallow and swampy lake covering from 160 to 300 acres. The depth varies; in some years the water is five feet deep in the deepest portions, while in the dry seasons the water recedes and the area of the water is much reduced. There is usually, however, from one to four feet of water in the lake. In at least one of the years since that portion of the state was settled the lake bed became entirely dry. Grass and rushes cover the shallow or dry portion of the lake as the waters recede.

The plaintiff is the owner of a tract of land about two miles east of this lake and lying at a lower elevation. The track of the Chicago, Burlington & Quincy Railroad Company crosses the lake upon an embankment. The water standing upon each side of the track makes it difficult to keep in repair. Defendant Moran owns the greater part of the land covered by the lake. He desired to increase his hay grounds. Moran entered into a contract with the defendant railroad company by which it was to furnish the tile, and Moran was to furnish the labor, to drain this lake through tile and open ditches upon the right of way of the railway company to a point upon the land of one Carpenter, who owns the tract adjoining plaintiff on the west, and who had given his consent in writing to the railroad company that this might be done. It is shown that Carpenter's land at the point where this water would be discharged was about 21 feet higher than a portion of plaintiff's land which is used as a hay meadow, and which she claims would be flooded if this drainage scheme is carried out. The town of Whitman lies about a mile east of the lake. It is shown that it is necessary to excavate the

ditch on the right of way about 13 feet at that point in order to lay the tile at the depth proposed in the plan of drainage. The testimony on behalf of plaintiff is to the effect that the water in the lake would be required to be four feet higher than it is now before it could flow eastward through Whitman. The defendants' testimony seems to indicate that about ten years ago there was a slight swale curving through the town of Whitman, through which, after the lake was full to the rim, its overflow waters might run to the eastward, but that soon after the construction of the railroad, about 18 or 20 years ago, this lower space was filled in by the inhabitants and the railroad company. Plaintiff's evidence tends to prove that, judging from the size of the lake and the capacity of the drain pipe, her meadow land would be completely submerged; while defendants' proof is to the effect that by the use of a ten-inch drain tile the drainage would be carried on so slowly that the evaporation and the percolation from that portion of the route where the water is carried in open ditches and is broadened out in wide depressions would be so great that no water would ever reach the plaintiff's land. It is also to the effect that it would take at least two years to drain the lake through a ten-inch tile as contemplated, and that much less than one-tenth of an inch would be spread over Carpenter's land. The plaintiff brings this action to restrain the defendants from discharging the waters of the lake upon her land by means of the tile and open ditches contemplated. The district court found for defendants, and dismissed her action.

As we have shown, the testimony is conflicting. The plats and profiles clearly show that the general slope of the ground from the town of Whitman is to the eastward; but we are not convinced that before the railroad was built there was any natural channel or waterway through which the flood waters of the lake, if any, would have reached the plaintiff's land. If, therefore, the waters of the lake are carried by the drains and ditches two miles to the eastward and artificially discharged upon the plaintiff's land to her damage, the rule in *Davis v. Londgreen*,

8 Neb. 43, *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb. 545, *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138, and *Jacobson v. Van Boening*, 48 Neb. 80, governs, and the principles laid down in *Todd v. York County*, 72 Neb. 207, *Aldritt v. Fleischauer*, 74 Neb. 66, and *Arthur v. Glover*, 82 Neb. 528, do not apply.

On the other hand the evidence as to evaporation and percolation through the sandy soil is such that it seems very probable that the water will never reach plaintiff's land, and we think it has not been established that the plaintiff will ever suffer any damages from the completion of the work.

The judgment of the district court, however, should be and is modified so that it be without prejudice to the rights of plaintiff to maintain an action for damages, if any, which may result to plaintiff from the construction of the ditches and drains, and, as so modified, is affirmed, at appellant's costs.

AFFIRMED AS MODIFIED.

ROSE, FAWCETT and SEDGWICK, JJ., not sitting.

CONSOLIDATED STONE COMPANY, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

FILED JULY 11, 1914. No. 17,763.

Mechanics' Liens: SUFFICIENCY OF EVIDENCE. In 1910, A, the owner of stone quarries in Indiana, furnished rough stone blocks to B, a dealer in cut stone at Galesburg, Illinois, who had contracted to supply cut stone to C, a building contractor who was erecting a building at Omaha. The rough stone shipped was piled in the yards of B at Galesburg, and the blocks were cut as required by the plans for different contracts. Stone from other quarries was also in the pile. No record was kept by A of the respective buildings in which the stone was to be used, although he had been informed it was to be used in the Omaha building. The purchase price was charged to B in a general running account which had run for several years; freight paid and other payments made by B were credited upon this run-

ning account. Part of the blocks furnished by A were cut and planed and used at other points than Omaha. There was some stone of this description in stock in the yard both before and after the Omaha contract was filled. The stone cut for use in the Omaha building was taken from the stock in the yard, and there is no definite proof that it was all furnished by A. A statement of account and affidavit for a lien upon the Omaha building was filed by A, which included shipments of stone to Galesburg prior to the Omaha sale, and other stone, as to which there is no definite proof that it ever reached the Omaha building. *Held,* That the statement of lien filed was not sufficiently definite and certain as to the stone which entered into the Omaha building, and that the facts in evidence are insufficient in law to establish a lien upon the building.

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

Greene, Breckenridge, Gurley & Woodrough and *Montgomery, Hart & Smith,* for appellant.

Mahoney & Kennedy, McGilton, Gaines & Smith, Edson Rich, A. G. Ellick and *John A. Sheean, contra.*

LETTON, J.

In 1910 the Union Pacific Railroad Company had let the contract for the erection of an office building in Omaha to James Stewart & Company. The cut stone was furnished by Alexander King & Company, stone cutters of Galesburg, Illinois, under a contract with Stewart & Company. This action was brought to foreclose a lien claimed by plaintiff on account of stone furnished to Alexander King & Company to be used in the Union Pacific building. The petition alleges the facts as to ownership, the contract with James Stewart & Company; that Alexander King & Company had a contract with James Stewart & Company for the furnishing of stone to be used in the building; and that plaintiff furnished stone which was used by Stewart & Company. An itemized account of the stone claimed to be furnished is attached to the petition. Alexander King & Company answered with a general denial. Stewart & Company filed an answer containing a general denial, a plea that the affidavit was not filed within the statutory

time, that the account is largely in excess of any balance owing by King & Company to plaintiff, and fails to give credit for payments made. It further pleads that the stone mentioned in the account as delivered on September 15, 1910, and thenceforward to and including November 11, 1910, was under one contract, and that all stone sold and delivered from and after January 27, 1911, was sold and delivered under a separate and independent contract, and that the affidavit filed was false and untrue in several particulars.

The relevant and material facts as established by the evidence seem to be as follows: The plaintiff is the owner of quarries at Dark Hollow near Bedford, Indiana. Alexander King & Company are stone cutters, taking rough quarry stone and at their plant in Galesburg, Illinois, cutting, sawing or planing it ready for use in buildings, according to plans furnished. Alexander King & Company agreed to furnish the contractors a large quantity of blue Bedford stone. A sample from the quarries of plaintiff was submitted to the architect and was approved by him, and on September 10, 1910, Alexander King & Company ordered from the plaintiff 13,000 cubic feet of Dark Hollow blue Bedford stone, in large unscabbled blocks, to be shipped at the rate of a car-load a day to their plant at Galesburg, Illinois. Alexander King & Company maintained a stone-yard at the plant where rough stone blocks received from various quarries were usually kept in stock. These were piled up in one end of the yard. The blocks were taken to the gang saws as needed, where they were sawed into slabs and pieces, according to the dimensions of particular pieces required. Sometimes a block would be sawed into a number of pieces in order to use the stone economically, and these parts would be distributed to different jobs. Of the 13,000 cubic feet shipped to Galesburg under the order of September 10 about 1,200 cubic feet were used in a residence at Monmouth, Illinois, and over 2,900 cubic feet were used in a church building at David City, Nebraska. There is some evidence tending to prove that the stone supplied by the plaintiff was known

to the trade as Dark Hollow Bedford stone; that it was darker in color and closer in texture than other blue Bedford stone; that each block for this contract was marked; and that only the stone from plaintiff's quarry was used in the Union Pacific building. The shipping book of Alexander King & Company shows that 14,434.11 cubic feet of stone were shipped by that company to the building in Omaha. On the other hand, a number of witnesses testified for the defense that blue Bedford stone coming from the various quarries in that locality is of substantially the same quality and texture, although it all varies in shade. There is also evidence that blue Bedford stone from the plaintiff's and other quarries was in stock in the yards at the time the order of September 10 was given, and that the blocks were not specially marked, but were taken to the saws indiscriminately. It is also shown that stone was sold locally from the yard, and that at this time stone was being supplied to other buildings. The superintendent of construction for Stewart & Company testified that there are a few pieces of buff Bedford stone in the Union Pacific building, and that during construction he had complained several times to King & Company that the color of the stone was not uniform. It was also proved that a number of pieces of blue Bedford stone from other quarries of like color had been supplied by a local stone dealer in Omaha to supply omissions. From all the evidence we draw the conclusion that the blue Bedford stone supplied by the plaintiff was not so distinct in color and character from that of other quarries of that region, nor was it so marked, that it did not mingle with the mass of stone in the Galesburg yard, and that it is impossible to determine with certainty the origin of every stone supplied to Stewart & Company under this contract. No doubt the general bulk of the stone supplied came originally from the plaintiff's quarries, but it was a finished product that was shipped to Omaha, and not the rough stone sold by plaintiff. Having been merged in a mass at Galesburg and its identity not preserved either by segregation or distinctive marking, we cannot determine with any certainty—even

if a lien were granted by law under such a transaction as here presented—the amount of material furnished by the plaintiff. *Rinzel v. Stumpf,* 116 Wis. 287.

But there is another difficulty in the plaintiff's way. While in the orders given by King & Company to plaintiff it was mentioned that the stone was for the Union Pacific job, the purchaser exercised the right, with the tacit consent of the plaintiff, to use it in such other and different places as it deemed most to its advantage. As we have seen, part of the stone purchased was used in David City, Nebraska, part in Monmouth, Illinois, part in Omaha, and there is testimony that a small part of it was sold and delivered in Galesburg. King & Company had an open account with plaintiff running for several years back. The stone shipped was charged in this general account. No entry was made in any of plaintiff's books indicating the buildings in which the stone was to be used, and all payments made were credited upon this general account, and not upon special contracts. It seems clear that the stone was sold upon the general credit of Alexander King & Company and not to be used exclusively for the Union Pacific or any other building. Apparently the credit and financial standing of the buyer were such that no care was taken to identify and itemize the stone furnished for each separate structure. Under such a state of facts, no lien can be successfully claimed. Phillips, Mechanics' Liens (3d ed.) secs. 122-124; *Frost v. Falgetter,* 52 Neb. 692, and cases cited. And this applies with more force to persons most remote from the owner or principal contractor. Phillips, Mechanics' Liens (3d ed.) sec. 125.

The district court found that at the time of the commencement of the action King & Company were indebted to plaintiff in the sum of $5,074.40, being the balance of an open account; that the affidavit and account filed in the office of the register of deeds for the purpose of obtaining a lien was not a true or just account of the material furnished, but that a large amount of material furnished for other buildings was included, for which plaintiff was not entitled to a lien, which plaintiff well knew at the time

of filing, and by reason of the false and untrue statement of account the plaintiff was not entitled to a lien. The authorities seem to be uniform that, where a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust, either by including items not furnished for the particular building or by failure to give credit for payments made, the law will not aid him in enforcing his lien. On the other hand, if the errors are trifling and immaterial, or if they are readily explainable as the result of mistake, and no element of wilfulness appears, regard will be had for the imperfections of human machinery, and the recovery of a just debt will not be denied where nothing but fair dealing was intended.

We have some doubt, when the evidence of the plaintiff's bookkeeper as to how the erroneous statement came to be prepared is considered, whether the reasons assigned for the judgment of the district court are sound; but, even if unsound, the result reached is warranted by the evidence, and a proper judgment will not be reversed on account of an erroneous reason being given for its rendition.

The judgment of the district court is

AFFIRMED.

FAWCETT and SEDGWICK, JJ., not sitting.

MARY D. LYDICK, APPELLEE, V. HENRY ROLFS, APPELLANT.

FILED JULY 11, 1914. No. 17,798.

Justice of the Peace: APPEAL: OBJECTIONS: WAIVER. "When an appeal from a justice of the peace to the district court is taken in the time prescribed by law, and both parties appear in the appellate court and without objection file pleadings, and the cause is noticed for trial, it is then too late for the appellee to object to the validity of the appeal." *Claflin v. American Nat. Bank*, 46 Neb. 884.

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

R. J. Millard, for appellant.

Wilbur F. Bryant, contra.

LETTON, J.

This suit was begun before a justice of the peace. Plaintiff recovered judgment, and defendant appealed to the district court. On July 9, 1910, the defendant filed in the justice court an instrument purporting to be an appeal bond, but which was defective in form and substance. On July 14, 1910, defendant filed the transcript in the district court. On August 11, 1910, the plaintiff filed his petition therein, and on March 11, 1911, the defendant filed his answer. On the 17th of November, 1911, the case was assigned for trial as the first civil case for trial at the next regular term of the district court. On March 9, 1912, the plaintiff filed a motion to dismiss the appeal for the reason that the appeal bond was insufficient. After this motion was filed, and before it was ruled upon, the defendant offered in open court to give an additional bond, which offer was overruled, and the court sustained the motion to dismiss.

Defendant contends that the motion to dismiss the appeal came too late, and that he should have been allowed to give the additional bond. Plaintiff's position is that there was no error in refusing defendant's request, because the instrument was not sufficient to constitute a bond, and because it had never been approved. While these objections may have been good, if taken in time, it will be observed that plaintiff voluntarily appeared in the district court and filed his petition; that an issue was subsequently made up by the filing of defendant's answer, and the cause was set for trial; and that not until several months afterwards did the plaintiff file the motion to dismiss the appeal.

The motion was filed too late. It was not filed until more than a year after the plaintiff had appeared in the district

court and had filed his petition, and nearly four months after the case had been assigned for trial. The third paragraph of the syllabus in *Claflin v. American Nat. Bank*, 46 Neb. 884, is as follows: "When an appeal from a justice of the peace to the district court is taken in the time prescribed by law, and both parties appear in the appellate court and without objection file pleadings, and the cause is noticed for trial, it is then too late for the appellee to object to the validity of the appeal." The same principle is announced in *Minneapolis Harvester Works v. Hedges*, 11 Neb. 46; *Goodrich v. City of Omaha*, 11 Neb. 204; *Asch v. Wiley*, 16 Neb. 41; *Steven v. Nebraska & Iowa Ins. Co.*, 29 Neb. 187. We are content to adhere to the rule announced in these cases.

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

REVERSED.

MAX WOOLFSON, APPELLANT, V. C. W. MEAD, APPELLEE.

FILED JULY 11, 1914. No. 17,817.

1. **Exemptions:** NONRESIDENTS. In order to entitle a judgment debtor to the benefit of the $500 exemption of personal property provided for in section 521 of the code, it must appear that he is a resident of this state, the head of a family, and that he has no lands, town lots or houses subject to exemption as a homestead under the laws of this state. The $500 exemption is in lieu of the homestead, and nonresidents of the state are not entitled to this exemption.

2. *Kriesel v. Eddy*, 37 Neb. 63, distinguished.

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

J. E. von Dorn, for appellant.

De Bord, Fradenburg & Van Orsdel and *Francis P. Matthews, contra.*

LETTON, J.

Plaintiff obtained a judgment against defendant under which garnishment proceedings were instituted against the Omaha Gas Company, which answered that it had in its possession $50 belonging to defendant, being wages earned by him while employed as a clerk. Defendant then filed an affidavit, claiming the $50 as exempt to him under the laws of this state, which recited that defendant is the head of a family, a nonresident of this state, living in Council Bluffs, Iowa; that he had no land, town lots or houses subject to exemption as a homestead; that, including the $50 mentioned, the defendant did not own or possess personal property to the amount of $500, and that the $50 was earned by him within 30 days from the date of the garnishment proceedings. The court found that 90 per cent. of the wages was absolutely exempt, and that the balance of the money was exempt as a part of the $500 exemption allowed to heads of families, and ordered the money released. Plaintiff appeals.

The question presented is whether a nonresident is entitled to the benefit of the $500 exemption provided for by sections 521-523 of the code. The language of the statute is: "All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead under the laws of this state, shall have exempt from forced sale on execution the sum of $500 from personal property." Code, sec. 521. Sections 522 and 523 provide for the manner in which the exemption may be obtained.

In *Williams v. Golden,* 10 Neb. 432, Judge Cobb said, speaking of the legislature: "Evidently it was their intention to give the landless debtor an exemption of personal property in lieu of the more wealthy debtor's homestead exemption." This court has frequently repeated that the $500 exemption is "in lieu of the homestead exemption." *Mann v. Welton,* 21 Neb. 541; *Widemair v. Woolsey,* 53 Neb. 468.

In *First Nat. Bank v. Lancaster,* 54 Neb. 467, the second paragraph of the syllabus is: "It is the duty of an

officer who has seized under an order of attachment property claimed to be exempt under section 521 of the code of civil procedure to cause such property to be appraised when the attachment defendant, being a resident of the state, the head of a family, and without any homestead exemption, files with such officer, or in the court from which the writ issued, the proper inventory and affidavit." Judge Sullivan, writing the opinion, says: "It follows from what has been said that the plaintiff was entitled to the peremptory writ only upon due proof that he filed with the sheriff in connection with the inventory an affidavit setting forth that he was a resident of the state, the head of a family and had neither lands, town lots, nor houses exempt as a homestead. Having failed to furnish such proof, the judgment of the district court is reversed." This is followed in *Johnson v. Bartek,* 56 Neb. 422. The history of the legislation with respect to this subject is set forth in the opinion in this case.

It will be seen that these decisions are consistent in holding that the $500 provision is in lieu of the homestead, and that in order to obtain the same it must appear that the applicant is a resident of the state, and the head of the family, and has neither lands, town lots, nor houses subject to exemption. The only case in which language is used somewhat inconsistent with this idea is *Kriesel v. Eddy*, 37 Neb. 63. In this case the affidavit, while inartistically drawn, showed that Kriesel had no other property than that which had been seized. The opinion says: "If the affidavit under the statute should have shown that the affiant owned neither lands, town lots, nor houses, which we do not now determine, such requirement was fully met by the above language." The affidavit implied, and the evidence at the trial showed, that Kriesel was a resident of Omaha. As to this point it is said: "Such statement in the affidavit for exemption is nowhere required." This is the only point upon which the opinion is not in harmony with the later opinions of this court. While section 522 does not require in direct terms that the residence of affiant be stated in the affidavit, the fact

of residence must appear, and the proper practice is laid down in *First Nat. Bank v. Lancaster, supra.* So far, therefore, as it is inconsistent with the opinion in the latter case, *Kriesel v. Eddy, supra,* cannot be regarded as authority.

It seems clear that this is the only rational rule of construction to be given to this statute. If defendant's contention is sound, a fraudulent debtor doing business in this state and owning a valuable homestead in an adjoining state, for instance, in Council Bluffs, Iowa, might truthfully make an affidavit in the language of the statute that he was the head of a family, and had "neither lands, town lots or houses subject to exemption as a homestead under the laws of this state," and would be entitled to have set apart to him, not only the specific exemptions of tools, wages, etc., but also the $500 exemption, while a citizen of this state, having the most humble home, could obtain the specific exemptions only in addition to his homestead. It is unreasonable to believe that the legislature intended to give a nonresident debtor privileges which it denies to the residents of this state. We adopt and approve the rule stated in *First Nat. Bank v. Lancaster, supra.* Since the defendant's affidavit shows that he is not a resident of the state, he is not entitled to any part of the $500 exemption.

The order of the district court allowing him a portion of the money as a part of the $500 exemption is reversed, and the cause remanded for further proceedings.

REVERSED.

ROSE, J., not sitting.

HENRY H. BARTLING, APPELLANT, V. ADDISON WAIT, SECRETARY OF STATE, APPELLEE.

FILED JULY 11, 1914. No. 18,611.

1. **Statutes:** REFERENDUM: PETITION. Under the provisions of section 2335, Rev. St. 1913, it is not required that the full text of an act of the legislature which it is desired to submit to the people for a referendum vote shall be printed on the face of the referendum petition if the referendum is sought as to the entire act, but if it is desired upon a portion of the act only, that portion which the petitioners desire submitted must be printed upon the petition.

2. **Evidence:** JUDICIAL NOTICE. The court will take judicial notice that certain cities and villages named in the petition are situated within this state.

3. **Statutes:** REFERENDUM: APPROPRIATION FOR ARMORY. Under the provisions of section 1c, art. III of the constitution, a referendum cannot be ordered upon acts of the legislature "making appropriations for the expenses of the state government, and state institutions existing at the time such act is passed." The expense of maintaining the national guard of Nebraska, which is a part of the state government, and, in one sense, a state institution, may not be made the subject of a referendum, but an appropriation to erect a building for a memorial armory is not an "expense" under the meaning of this clause, is not within the exception, and may be made the subject of a referendum.

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

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

Grant G. Martin, Attorney General, George W. Ayres and *A. W. Richardson, contra.*

LETTON, J.

Action for an injunction, which was denied. Plaintiff appeals.

On April 16, 1913, an act was passed and approved, entitled "An act to establish a memorial armory at Nebraska City and to provide for the payment of the construction

thereof." Laws 1913, ch. 128. This act provided, in substance, for the establishment in Nebraska City of an armory building to be known as the "Fort Kearney Memorial Armory" to be located on the ground originally occupied by old Fort Kearney, and that when so constructed it should be used and occupied as an armory building by that company of the regular state militia then or afterwards located at Nebraska City; that the building should be constructed under the supervision of the commissioner of public lands and buildings after the land on which it was to be built should be conveyed to the state in fee simple without cost or expense. By section 5, $20,000 was appropriated from the general fund of the state for the purpose named.

The petition alleges that the plaintiff is a citizen of the state and a resident of Nebraska City; that there is now in plaintiff's hands a deed conveying the fee simple title to the site of old Fort Kearney, with an abstract of the record title thereto, with instructions from the grantor to deliver the same to the state of Nebraska for the purpose contemplated by the act; that he has tendered the conveyance and abstract to the governor of the state, but acceptance has been refused for the reason that there has been filed in the office of defendant secretary of state of Nebraska a petition under the provisions of article XIX, ch. 20, Rev. St. 1913, demanding that the act be submitted to the legal voters of the state at the general election to be held in November, 1914. It is also alleged that the secretary of state, notwithstanding the insufficiency of the petition in fact and law, as defendant is preparing to submit the act to the voters of the state for approval or rejection at the next general election, and to print the title of the act and a statement of its provisions upon the ballot to be submitted to the voters. It is alleged that the defendant has no power so to do, for the reason that by section 1c, art. III of the constitution, it is provided that the referendum cannot be ordered upon acts of the legislature "making appropriations for the expenses of the state government, and state institutions existing at the

time such act is passed," and that such act is within the exception; that there is and has been continually for 25 years past a regular company of the state militia enlisted and organized and having its headquarters in Nebraska City, which is a part of the national guard of the state; that the regularly organized state militia is a part of the government of the state of Nebraska, and an appropriation for its maintenance is an appropriation for the expenses of the state government; and that the national guard is a state institution which was in existence at the time of the passage of the act.

A large number of irregularities in the petitions filed are also alleged, and it is alleged that the signers do not equal 10 per cent. of the legal voters of the state at the last regular election, and that when illegal signatures are deducted there would be less than 5 per cent. of the legal voters in each of two-fifths of the counties of the state. An injunction is prayed to prevent defendant from printing the title and numbers of the act upon the ballot, and from proceeding with the submission of the question of the approval or rejection of the act. The attorney general answers, admitting the passage of the act as alleged, the facts alleged with reference to the site of old Fort Kearney, the tender of the deed to the governor and its refusal, and that the defendant intends to submit the question to the people. The other allegations in the petition are denied. After a hearing, the court found in favor of defendant and denied the injunction.

At the trial the allegations as to the continuous existence of a company of the national guard at Nebraska City, and that the names upon the petitions represented more than 10 per cent. of the votes cast for governor at the preceding election, and more than 5 per cent. in each of more than two-fifths of the counties of the state were admitted. It is also stipulated that of the 26,891 names 1,852 are signed, and their post office address is shown only by the city or village in which the signer purports to live, but neither the county nor state in which they live appears upon the face of the petition, except that which ap-

pears upon the other side of the face of the petition, and that each of the 1,852 names was subscribed to the petition under the printed form. Copies of this and of the back of the petition were in evidence.

It is first argued that the petition is insufficient because, while the statute requires a full and correct copy of the act proposed to be submitted to the vote of the people to be printed upon each petition circulated, the record shows that the word "originally" in the second section was omitted. The act provides that the building should be constructed "upon the ground originally occupied by old Fort Kearney," while the purported copy reads that the buildings shall be constructed upon the ground occupied by old Fort Kearney. The statute provides (Rev. St. 1913, sec. 2335): "The following shall be substantially the form of petition for ordering the referendum against any act or any part of any act passed by the legislature of the state of Nebraska. * * *

"PETITION FOR REFERENDUM.

"To the Honorable———, Secretary of State for the state of Nebraska: We, the undersigned citizens and legal voters of the state of Nebraska and the county of ———, respectfully order that the Senate (or House) Bill No. ——— entitled (title of act, and if the petition is against less than the whole act, then set forth here the part or parts on which the referendum is sought)."

The form provides for printing the title of an act only when a referendum is sought as to the whole enactment. It is only "if the petition is against *less than the whole act*" that it is necessary that the part or parts on which the referendum is sought shall be set forth. There is a distinction between section 2337 providing for the initiative, which plaintiff cites and relies upon, and that for the referendum. The initiative petition must set forth "a full and correct copy of the title and text of the law or amendment to the constitution so proposed by the initiative petition." Rev. St. 1913, sec. 2337. Section 2337 is there-

fore inapplicable, and the omission of the word "originally" does not impair the validity of the petition.

It is claimed that the petition is defective because 1,852 signers of the petition did not give their complete post office address; that the address is shown only by the city or village in which the signer purports to live, but neither the county nor state in which they live appears on the face of the petition, except that each appears on the other side of each petition. Taking the Antelope county petition as an example, there is a certificate to each sheet to the effect that each of the persons signed his name in the presence of affiant, and that he believes each has signed his name and post office address correctly, and that each signer is a voter of the state of Nebraska and county of Antelope. The post office address of the respective signers are given "Elgin," "Petersburg," and "Oakdale." The argument is that "John Smith, writing merely 'Aurora' after his name, does not give his post office address." The implication is that each signer must give his street and number and his state. Even without the proof upon the back of the petition, it is a fact of which the court will take judicial notice that there are cities and villages of the names appended, in this state; that the free delivery system is not in force in all the cities and villages in the state, and that in such case a street address is unnecessary and unusual. Furthermore, it is a well-known fact that even in cities and towns the usual post office address of many is merely the name of the city without addition. The petition, therefore, is not vulnerable to these objections.

We have no difficulty in reaching the conclusion that the national guard of the state is a part of the state government. The governor of the state is the commander-in-chief, and in times of peace the adjutant general and his assistants are paid a salary by the state, and an office is furnished for them in the state capitol. The statutes provide for the organization and administration of the national guard as the military arm of the state. In times of insurrection or internal disorder it is the instrument by which the executive maintains peace and good order. All

public property belonging to the national guard is required to be kept in armories or other properly designated places; appropriations for armories and lockers have been made for many years, and the legislature of 1913, in the act making appropriations "for the current expenses of the state government" for the biennium ending March 31, 1915, appropriated $68,000, for the Nebraska national guard, $30,000 of which was for "armory rentals and lockers."

The organized militia may also be considered to be a "state institution" in one sense. Of course, the words "state institution" in this connection may have two meanings, one the corporate, or in some instances the associated, body which carries on the activities for which it is organized, the other meaning the building or buildings in which that body exercises its proper functions and activities. It is in this latter sense that the words "state institution" are ordinarily used, and a reference to the "State Hospital for the Insane" or "State Industrial School," or like institutions, is usually understood to mean the building occupied by the institution as distinguished from the managing body. 4 Words and Phrases, 3662. But the determination that the national guard is a part of the state government, and that in one sense it may be termed a "state institution," does not dispose of the question presented. The constitution as amended provides: "The referendum may be ordered upon any act except acts making appropriations for the expenses of the state government, and state institutions existing at the time such act is passed." It seems to us that the legislature in submitting the amendment to the constitution providing for the initiative and referendum, and the people of the state in adopting the same, intended that the administration of the state government, and the functions and activities of existing state institutions, should not be interfered with or crippled by the uncertainty and delay which would surely result if appropriations for their expenses should be submitted to a referendum vote, but that the people of the state reserved the right to decide whether appropriations for the expenses of new state institutions should be

made. The vague and general rumors as to legislative log-rolling that have been in circulation for years may have had something to do with this determination, but, of course, this we cannot say, and are not concerned with the motive.

The question is a novel one, and is of great importance, since similar inquiries may arise in future with reference to the erection of buildings for the state government or for existing institutions. Our attention has been called to cases in other states where a somewhat similar view has been taken. *McClure v. Nye,* 22 Cal. App. 248, and cases cited; *State v. Commissioners,* 21 Kan. 419. But it is said that in each of these instances the word "expenses" has been prefaced by some adjective such as "current expenses," or "the usual current expenses," or "ordinary expenses," and it it said that by reason of the omission of these qualifying words the legislature and people must have meant that appropriations for expenses of every nature should not be subject to referendum. We are unable to take this view. If immense appropriations should be made for the purpose of erecting buildings at various localities for the state government and for existing state institutions, buildings which might well take years to erect, could it reasonably be said that such appropriations were for the "expenses" of the institutions? Would they not rather be of the nature of permanent investments? Holding these views, therefore, the word "expenses" as used in this section of the constitution must be construed to mean the ordinary running expenses of the state government and existing state institutions, and not to include money to be paid for the erection of new and permanent buildings. We do not wish to be understood as holding that appropriations made for the necessary upkeep, improvement, repair, and maintenance of existing public buildings (such as the appropriation made by the legislature of 1913 for "improvements, repairs, and care of the capitol building") or for minor structures appurtenant thereto made necessary by stress of circumstances, are subject to a referendum. But we are of opinion that

such an act as that under consideration is not within the exception, and that the secretary of state should not be restrained from carrying out the prayer of the referendum petitioners.

The judgment of the district court is

AFFIRMED.

REESE, C. J., and ROSE, J., not sitting.

ELIZABETH MECK, ADMINISTRATRIX, APPELLEE, V. NEBRASKA TELEPHONE COMPANY, APPELLANT.

FILED JULY 11, 1914. No. 17,645.

1. **Telephone Companies:** EMBANKMENTS IN STREETS: LIABILITY. It is the duty of a telephone company making excavations and embankments in public streets under a license from a city to conform to city ordinances requiring proper guards, signals and barricades for the protection of the public, and a failure so to do is evidence of negligence.

2. **Municipal Corporations:** EMBANKMENTS IN STREETS: SIGNALS. Three red lights in a street, two a block apart and one between, do not, as a matter of law, warn a pedestrian in the night, when the ground is covered with snow, that there is a continuous embankment along the block.

3. **Telephone Companies:** EMBANKMENTS IN STREETS: NEGLIGENCE: QUESTION FOR JURY. In an action for alleged negligence resulting in the death of a pedestrian who fell from an embankment in a street and was run over by a street car, whether there was negligence on the part of defendant in permitting the embankment to remain longer than necessary and in failing to furnish proper guards, lights and barricades, *held* questions for the jury.

4. **Damages** in the sum of $9,000 for causing the death of a healthy man 27 years old, who was earning over $100 a month, with a fair prospect of promotion, *held* not excessive.

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

Hall & Bishop, for appellant.

Stewart, Williams & Brown, contra.

ROSE, J.

This is an action to recover damages in the sum of $25,000 for alleged negligence resulting in the death of William B. Meck. Defendant is a corporation conducting a telephone business. It uses the streets of Lincoln for underground conduits and wires. The city is crossed from north to south by Twenty-seventh street. Along the west side of that thoroughfare, two feet or more from the curb, defendant dug a trench across intersecting streets R and S, throwing earth from the excavation on the east side, thus creating an irregular, sloping embankment about two feet high. A street railway with double tracks occupies 15 feet in the center of Twenty-seventh street, where there is a paved roadway 40 feet wide. The space between the embankment and the west rail varied from one foot to three feet. Meck was a locomotive fireman on the Chicago, Burlington & Quincy Railroad. While on his way to his work in the darkness, a few minutes before 6 o'clock on the morning of January 3, 1911, he fell from the embankment, and was run over by a street car and fatally injured. His wife, as administratrix of his estate, is plaintiff. In a petition stating a cause of action it is alleged, among other things, that defendant was negligent "in creating the said dangerous embankment in said public street, and in causing and permitting the same to be and remain in said street an unreasonable and unnecessary length of time, and without any guards or signals to warn and protect persons using said street, and without constructing and maintaining safe passageways over said ditch and through said embankment." Defendant denied negligence on its part, and pleaded that Meck's injuries, if they occurred while he was near to or attempting to cross the trench and the embankment, resulted from his own negligence. The jury rendered a verdict against defendant for $12,000. To prevent the granting of a new trial plaintiff filed a remittitur for $3,000, and, from a judgment in her favor for $9,000, defendant has appealed.

It is argued by defendant that the petition fails to state a cause of action, and that the evidence does not sustain a finding that negligence on the part of defendant was the proximate cause of Meck's death. The petition is not successfully assailed. There is proof tending to show the following facts, conditions and circumstances: Meck lived four blocks east of Twenty-seventh street at 3120 Vine street. According to his custom, in going to work, he left his home at 5:40 in the morning and started west on Vine street, intending to board at Twenty-seventh street what is described as an "owl car," which left Holdrege street at 5:45, running straight south on Twenty-seventh street and crossing Vine, T, S and R streets on its way down-town. His wife watched him going west on Vine street until he disappeared. It was a dark morning. The ground was covered with snow, and the temperature was 16 degrees below zero. The street lights had been extinguished at 1 o'clock. The owl car was two or three minutes late in leaving Holdrege street. The motorman said that, while he was running 10 or 12 miles an hour, he saw Meck on the embankment 4 or 5 feet southwest of the car, and that he appeared to be overbalanced; that he put one foot on the fender; that the side of the car at the front end struck him; that he fell; that the car ran over him; that his body was found on the embankment with his legs across the west rail of the west track. There was blood on the rail between S and R streets about 60 feet south of the crosswalk on the south side of S street. How Meck reached the fatal spot is not definitely shown. It is certain he did not wait in the cold for the car at Vine street, but walked where it would overtake him. He could see its light for more than half a mile. According to the story of the motorman, what he saw of Meck before he was injured occurred "in a flash." He did not see Meck until he was within four or five feet of the car. That he crossed over the trench and the embankment from the west sidewalk is uncertain. One witness said he found human footprints between the sidewalk and the embankment, but another testified to finding none. Meck reached Twenty-sev-

enth street at Vine street ahead of the car. It may fairly be inferred that he either crossed the street railway tracks to the west side and walked south on the sidewalk, or remained in the street, following the west side of the track, where he could signal and board the approaching car. The crosswalks at S street were covered by the embankment, the only approach to Twenty-seventh street from the west side being a narrow passageway in S street. It was customary for all south-bound cars on Twenty-seventh street to stop at the south side of intersecting streets for passengers, and for the owl car leaving Holdrege street at 5:45 to receive passengers on the west side anywhere along the track. It might also be inferred that Meck crossed to the west side of Twenty-seventh street at Vine street; that he walked south on the sidewalk to the opening through the embankment at S street; and that he went in the street along the west side of the railway track to the place of the injury. Meck had a lawful right to pursue any of the courses indicated in using the public streets and sidewalks, and for the purposes of this case it is immaterial which inference the jury drew from the evidence and surrounding circumstances.

In making the excavation and the embankment defendant acted under a license obligating defendant to conform to city ordinances making it unlawful to permit the excavation to remain open longer than was actually necessary, and requiring licensee to guard the excavation carefully while being made or used, and to maintain such barricades, guards, lights and signals as will protect the public from injury or loss. As early as Thursday defendant tore up the pavement, obstructed a portion of the street and left the excavation open, knowing that work would be suspended Sunday and Monday; the former being the first day of the new year and the latter being observed as a holiday. The collision occurred before daylight on Tuesday morning following. From the evidence it cannot be held, as a matter of law, that the excavation, with the resulting embankment, was not allowed to remain open longer than was actually necessary.

During Monday night a watchman occupied a little, improvised tent on Twenty-seventh street near S street, but he assumed no duty to protect the public further than to see that red lights were kept burning. There was no barricade except around a manhole at S street. As already stated, there were no street lights after 1 o'clock at night. There is a dispute about the number of red lights along the trench, but a disinterested witness, who waited for the owl car at R street and who boarded it where it stopped after the collision, testified that he saw three only, one at the south end of the embankment by R street, one at the north end by S street, and one between. If his observations were accurate, red lights on Twenty-seventh street at R and S streets and one near the alley between, when the ground, on a dark night, had been covered by recently fallen snow, would not, as a matter of law, warn a pedestrian that there was an embankment along a 300-foot block between S and R streets. *City of Oklahoma City v. Welsh*, 3 Okla. 288, 41 Pac. 598. The space between the obstruction in the street and the west rail of the street car track varied in width from one to three feet. Where Meck was struck the intervening space was a foot wide. He had a right to walk along this space at night, until the owl car, which stopped for passengers without regard to the place, approached. He had a right either to step to the west out of the way of the car or to have notice or warning that there was an embankment to prevent him from doing so. Whether he got on the embankment in this manner or whether he attempted to cross it from the sidewalk is uncertain, but there is evidence tending to show that he was overbalanced by the obstruction. It was the duty of the city to keep the streets in a reasonably safe condition for travel, or to give warning signals, or to protect the public from the trench and resulting embankment by railings or by other means. These duties, under the license mentioned, extended to defendant also.

Whether there was negligence on the part of defendant in permitting the excavation, with the resulting embankment, to remain open longer than was actually necessary,

and in failing to properly guard the excavation, and in failing to maintain sufficient barricades, guards, lights and signals were all questions of fact for the jury. *City of Wyandotte v. Gibson,* 25 Kan. 236; *Fugate v. City of Somerset,* 97 Ky. 48; *Hyatt v. Trustees of the Village of Rondout,* 44 Barb. (N. Y.) 385; *Pettengill v. City of Yonkers,* 39 Hun (N. Y.) 449; *City of Rockford v. Russell,* 9 Bradw. (Ill.) 229; *Alexander v. City of Big Rapids,* 70 Mich. 224; *Fox v. City of Chelsea,* 171 Mass. 297; *Crowther v. City of Yonkers,* 15 N. Y. Supp. 588; *Hyde v. City of Boston,* 186 Mass. 115; *City of Baltimore v. Maryland,* 166 Fed. 641; *Grider v. Jefferson Realty Co.,* 116 S. W. (Ky.) 691. This assignment of error is therefore overruled.

A formidable argument is directed to the proposition that contributory negligence of Meck was the proximate cause of his death, and that therefore there was error on the part of the trial court in refusing a peremptory instruction requested by defendant. On this branch of the case, the theory of defendant seems to be that Meck knowingly ran headlong from the sidewalk into the moving car. It is insisted that he was warned by the cluster of lanterns at the manhole and by the red lights along the trench; that he crossed piles of brick and sand taken from the pavement and ran onto the embankment with a momentum which hurled him against the car. This contention is overcome by the fact that a different deduction may properly be drawn from the evidence. Even if defendant is not mistaken in assuming Meck approached the embankment from the sidewalk, that fact alone would not establish contributory negligence as a matter of law. Knowledge of existing conditions in the street does not alone preclude a recovery. Want of such care as a prudent man would exercise in view of the danger is the test of contributory negligence. The question is usually one for the jury. *Nicholson v. City of South Omaha,* 77 Neb. 710; *City of Beatrice v. Forbes,* 74 Neb. 125. This assignment is likewise overruled.

Complaint is also made because an excessive recovery was permitted and sustained. Meck was 27 years old and

was in good health. He had regular employment, with an earning capacity exceeding $100 a month. He had a fair prospect of promotion. Plaintiff sued as administratrix of his estate, and was entitled to recover compensatory damages in that capacity for the benefit of those entitled thereto. It has not been shown that the recovery was excessive.

In view of the conclusions reached on the questions discussed, there was no prejudicial error in giving or in refusing instructions.

No reversible error has been found in the record, and the judgment is

AFFIRMED.

CONRAD SCHNEIDER, ADMINISTRATOR, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED JULY 11, 1914. No. 17,705.

1. **Fraternal Insurance:** BENEFICIARY. Under the provisions of section 94, ch. 43, Comp. St. 1911, in force when the cause of action in this case arose, payment of death benefits to a member of a fraternal beneficiary association could only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon a member; and where one within the class designated, who was named as beneficiary in the certificate of membership in suit, died before the member, such certificate thereby became payable to the legal surviving heirs of such member.

2. ———: BENEFITS: RIGHT OF ACTION. And upon the death of such member his certificate of membership did not become an asset of his estate, nor in any manner liable for the payment of his debts; and no action can be maintained by the administrator of his estate upon such certificate.

3. **Principal and Agent:** RATIFICATION. The acts of a self-constituted agent may be ratified by the one for whom such agent has assumed to act, as of the date when the acts were performed.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

96 Neb. 35

Benjamin D. Smith and *Nelson C. Pratt,* for appellant.

F. W. Button, contra.

FAWCETT, J.

Defendant is a fraternal beneficiary society. As such it issued a certificate of membership to one John M. Maask, whom we will designate as the assured. In the certificate the mother of the assured was named as beneficiary. The certificate provided that, in case of the mother's death before that of the assured, the certificate should be payable to the assured's legal heirs. The mother predeceased the assured. Upon the subsequent death of the assured, plaintiff was appointed administrator of his estate, and as such brought this action in the district court for Dodge county to recover upon such certificate. From a judgment in his favor, defendant appeals.

Plaintiff in his petition recites that he "brings this action to recover said sum of $1,000 for the use and benefit of the legal heirs of said John M. Maask, deceased." The petition also alleges the facts above set out, and further alleges that, "under the terms of said certificate, the said sum of $1,000 is now due and payable to the legal heirs of said John M. Maask." This allegation, alone, is sufficient to defeat plaintiff's right to maintain the action. The plaintiff is not a legal heir of the assured, but is the administrator of his estate. As administrator he has absolutely no interest in the membership certificate upon which the action is based. It is not an asset of the estate of John M. Maask, deceased. No part of it can be applied to the payment of his debts or to the costs of administration of his estate. The administrator is a stranger to this certificate, and has no more right to maintain an action upon it than if Mrs. Fringel, the mother of the assured and the beneficiary named in the certificate, were still living. If she were living and were neglecting to take steps to collect the certificate, that would be none of the administrator's concern. She being dead, and the certificate being payable to the legal heirs of Mr. Maask, instead of to her,

the relation of the administrator to the certificate is in no manner changed. Under the provisions of section 94, ch. 43, Comp. St. 1911, and under the provisions of the by-laws of defendant society, the only persons interested in the beneficiary certificate are the legal heirs of the assured. They are therefore the only persons who can prosecute an action upon the certificate. If they see fit to neglect to do so, that is their matter, and is no concern of the administrator. The petition alleges who the legal heirs are, gives their names, and states their relationship to the assured, thus showing that they were known to the plaintiff when the action was commenced, and that they are the ones to whom the certificate belongs and is payable. The petition alleges that plaintiff brings this action "for the use and benefit of the legal heirs of said John M. Maask," but it nowhere alleges that it does so at the request of or by the authority of such legal heirs. He has no right to incur expense of litigation without the consent of the heirs. If they desire to have the matter litigated, they have the right to incur their own expenses and employ their own counsel. If plaintiff should be permitted to recover in this action, who would have to bear the expense of litigation? Plaintiff, as administrator, could not charge it up against the estate of Mr. Maask any more than he could charge the expense of any other purely private litigation to the estate. If he should collect the money upon a judgment rendered in this action and fail to pay it over to the heirs, the judgment would be no protection to the defendant in another action brought by the rightful owners of the certificate. If he should collect the money and squander it, neither the owners of the certificate nor the defendant could recover from his bondsmen as administrator, for the reason that, in everything done in relation to the bringing of the action and as to all proceedings thereunder, the court would be compelled to hold that he had acted clearly outside of his duties as administrator, and that for such acts his bondsmen could not be held liable. Suppose the administrator had found among the papers of

Mr. Maask, a note payable to Carl Schneider, whom the petition names as one of the present legal heirs. Could the administrator bring an action upon that note against the maker, in his petition allege that Carl Schneider was the owner of the note, fail to allege that the decedent had any interest in it at the time of his death, and maintain such action over the maker's plea that the plaintiff was not the real party in interest? We think not. We are unable to see any theory upon which plaintiff can maintain the present action.

It is conceded by defendant that it should pay the amount of the certificate to some one, but it insists that it should only be required to make payment to the actual beneficiaries. The evidence shows that the plaintiff, after the death of the assured, gave defendant the notices and proofs of death required by the by-laws of the association. While plaintiff, as administrator, cannot maintain the present action, the heirs for whom he assumed to act may ratify his acts in giving defendant notice and furnishing it proofs of death, as required by the by-laws, on the theory that in giving those notices and furnishing the proofs of death plaintiff was acting as the agent of the heirs for that purpose. The fact that at the time of so acting he may have been a self-constituted agent does not prevent their ratifying his unauthorized act. 31 Cyc. 1246, and note 92, also page 1283, and note 38; Mechem, Law of Agency, secs. 124, 128.

The judgment is therefore reversed and the cause remanded to the district court, with directions to permit the substitution of the real parties in interest, if they so move within a reasonable time to be fixed by the court, as plaintiffs, as of the date of the commencement in that court of the present action, and for further proceedings according to law.

REVERSED.

SEDGWICK, J., dissenting.

It seems to me that the opinion of the majority is somewhat inconsistent in holding that the administrator had

no more right to bring the action than he would have to sue upon a note belonging to an entire stranger, and also allowing the heirs to be substituted as plaintiffs as of the commencement of the action. If one who has no interest whatever in a note volunteers to bring an action thereon in his own name as owner, after the action has been appealed to this court and reversed because the plaintiff has no interest therein, can the owner of the note be substituted as plaintiff "as of the date of the commencement of the action," and so charge the defendant with a large bill of costs which were unlawfully made? It is said in the majority opinion that if the plaintiff had recovered the defendant would still be liable to the heirs. If so, it was necessary for it to defend, and yet it is charged with the costs so incurred. In *Shea v. Massachusetts Benefit Ass'n,* 160 Mass. 289, it was held that when the beneficiary named had died before the insured, and the heirs therefore became entitled to the fund, the administrator could maintain an action for the heirs, citing several cases. The Massachusetts cases and cases from other courts holding the same rule are cited by this court with approval in *Warner v. Modern Woodmen of America,* 67 Neb. 233.

In the syllabus of the majority opinion it is said: "Where one within the class designated, who was named as beneficiary in the certificate of membership in suit, died before the member, such certificate thereby became payable to the legal surviving heirs of such member. And upon the death of such member his certificate of membership did not become an asset of his estate, nor in any manner liable for the payment of his debts." This is stated as the reason that the administrator cannot maintain the action for the benefit of the heirs.

This court undertook to state the rule for determining in whose name the action should be brought, in these words: "The right of recovery (by the administrator) under the enactment to which we have just alluded would arise alone from the party standing in such relationship to the deceased as to be entitled to his estate, or a share of

it, by virtue of heirship. Under this statutory law in relation to damages the right of any party thereto is dependent upon the degree of kinship to the deceased, which must be such as to confer the right to inherit the estate." *Fitzgerald v. Donoher,* 48 Neb. 852. That is, if the right to damages depends upon heirship, the action must be by the administrator. This is because the administrator represents the heirs as well as the creditors in our state. And so, if heirs only can recover, the administrator must bring the action, unless the statute otherwise provides. When the death of a person is caused by a wrongful act of another the party injured may recover damages. Rev. St. 1913, sec. 1428. The damages go directly to the heirs or next of kin, and the creditors have no interest whatever in the matter. This court has uniformly held that such action must be brought in the name of the administrator. The case is exactly the same as the one at bar so far as this point is involved. In the cases reported the courts were generally discussing who was ultimately entitled to the money, and not the technical question of practice which is now being decided. If the administrator was claiming and suing for the money in behalf of the right party—that is, the party ultimately entitled to the money—the courts held that he could maintain the action; but, if he was claiming the money for the creditors, or for the estate generally, so that the creditors would ultimately get it if necessary to pay their claims, and the money really belonged to the heirs, then the courts held that he could not maintain such an action, and they have not discussed the technical question as to when the administrator could maintain the action in favor of the parties really entitled to the money, and so this decision is a new and leading case upon this point. In the case which we have decided (*Warner v. Modern Woodmen of America,* 67 Neb. 233) the administrator was claiming that the money belonged to the estate, so that the creditors would get it as against the heirs, and we held that he could not maintain such an action; but we expressly approved those cases which held

that the administrator could maintain the action when he was prosecuting it for the benefit of the parties who were really entitled to the money. There are few, if any, cases where any court has decided that the administrator, if he is claiming for the right party, either the heirs or the creditors, whichever is entitled to the money, cannot maintain the action. When the administrator has claimed the money for the wrong party, the courts have discussed the question as to what party is entitled to the money, and then have said that an administrator could not maintain that action, and these are the cases relied upon in the majority opinion. In all similar cases decided by this court the judgment of the district court upon this point was affirmed, and, if it had been necessary, I believe the court would have allowed an action to be brought by either the administrator or the person injured, in order to sustain the judgment and prevent the uselessness of another trial when the parties interested were consenting to the action and it was clear that the proceeds would go to the right party.

I think that the plaintiff did right in bringing this action. The decedent had invested his money in this certificate, and was interested in preserving its validity. His administrator represents him; the certificate was found among the assets of the decedent, and so came into the plaintiff's care as a part of the estate. There were known to be heirs, but it was not known where they were. The administrator should take such steps as were necessary to preserve the validity of the certificate and the investments made by his decedent, and both himself and the sureties on his official bond would be liable for his neglect if he failed so to do. They would also be liable for the proper disposition of the funds if collected by such suit. Modern law does not require us to enforce an immaterial technicality, thereby causing a great loss to innocent parties. The substitution of one plaintiff for another, who never had any interest in the litigation, after reversal upon appeal, and at the costs of the defendant, is something new, and is a radical departure from the ordinary practice.

ST. PAUL HARVESTER WORKS, APPELLANT, V. HENRY B. HUCKFELDT, APPELLEE.

FILED JULY 11, 1914. No. 17,727.

Mortgages: FORECLOSURE: DECREE: DORMANCY. A decree of foreclosure of a mortgage in this state is not a judgment within the meaning of section 482 of the code of civil procedure, and does not become dormant by a failure to issue an order of sale within five years.

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

J. A. Gardiner, for appellant.

John Snider and *W. F. Button, contra.*

FAWCETT, J.

In 1884 defendant sold the north half of section 19, township 7, range 11, in Adams county, to one William Gardiner, and executed and delivered to him a warranty deed therefor. In 1885 the nominal plaintiff in this proceeding, St. Paul Harvester Works, commenced a suit to foreclose a mortgage upon the land described, which had been executed by defendant. Gardiner, to protect his interests in the land, first took a nine months' stay, and then paid the decree which had been entered in the foreclosure suit. Nothing further appears to have been done until June, 1909, when Gardiner filed a motion in the original foreclosure suit "to revive the judgment." A conditional order of revivor was entered, to which defendant answered. Upon hearing the matter, the district court dismissed Gardiner's application for revivor, from which order of dismissal this appeal is prosecuted.

In the briefs counsel on both sides concede that the only question before us on this appeal is whether a decree of foreclosure is a judgment within the meaning of section 482 of the code, which becomes dormant at the expiration of five years, and which may be revived in the same

manner as judgments under that section. It is needless to spend time discussing this proposition. It is foreclosed against Mr. Gardiner's contention in *Beaumont v. Herrick,* 24 Ohio St. 445, 457, and *Moore v. Ogden,* 35 Ohio St. 430, which cases are cited and followed by this court in *Herbage v. Ferree,* 65 Neb. 451, holding that a decree of foreclosure of a mortgage in this state is not a judgment within the meaning of section 482 of the code, and does not become dormant by a failure to issue an order of sale within five years.

AFFIRMED.

CHARLES R. BURGESON, APPELLEE, V. STEPHEN SCHULTZ, APPELLANT.

FILED JULY 11, 1914. No. 17,742.

Pleading: SUFFICIENCY ON APPEAL. "A petition which is attacked for the first time in this court, on the ground that it does not state a cause of action, will be liberally construed." *Omaha Nat. Bank v. Kiper,* 60 Neb. 33.

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

J. W. James, for appellant.

McCreary & Danly, contra.

FAWCETT, J.

This action originated in the county court of Adams county, was appealed to the district court, where issues were made up by petition, answer, and reply. At the conclusion of the trial to a jury, the court directed a verdict in favor of plaintiff for the full amount of his claim, upon which judgment was entered, and defendant appeals.

The controversy is over a written contract entered into by and between the parties over the sale of a certain make

of automobiles in Phelps and Gosper counties, Nebraska. At the time the contract was entered into, plaintiff paid defendant $500, which, in the language of the contract, constituted "a deposit." As fast as plaintiff would sell a car, $25 of this deposit was credited as part payment thereon. The contract contained the following clause: "This contract expires October 1, 1910, or may be canceled by either party upon thirty days' written notice given through the usual course of mail or otherwise." After having sold three machines, plaintiff in writing canceled the contract. This action is to recover the $500 deposit, less $25 on each of the three machines sold.

The appeal is lodged in this court upon the transcript alone. Three errors are assigned: First, in overruling the motion of defendant for an instructed verdict; second, in instructing the jury to find for the plaintiff; third, that the petition does not state facts sufficient to constitute a cause of action. As no bill of exceptions has been furnished, we cannot consider the first two assignments. The only question therefore is: Does the petition state a cause of action? The contract is set out in full in the petition, and the contention of defendant is that this contract shows an absolute sale of 20 machines with a payment of $25 to apply on each machine, and that by canceling the contract, as plaintiff was permitted to do by its terms, he did not thereby become entitled to a return of the cash payment which he had made upon 17 machines not sold. The contract is not clear and explicit by any manner of means. There is language in it which would bear the construction that it was an absolute contract of sale, while there is other language which implies that it was simply a contract of agency for a limited territory under an agreement by the agent that he would sell a stated number of machines. It is contended by plaintiff, in effect, that if we had the bill of exceptions before us we would be able to see from that just how the parties themselves had construed the contract, and would thus be advised that the court was right in directing a verdict for plaintiff, as was

done. The probabilities are that this contention is true. The transcript from the county court is in the record. The entire record shows that neither in the county court nor before the district court was the sufficiency of the petition assailed. That contention is made for the first time in this court. In the light of our oft-repeated holding that in such case the petition will be liberally construed, we cannot, on the record before us, say that the petition is insufficient.

AFFIRMED.

WILBUR F. BRYANT, APPELLANT, V. WILLIAM MOSHER ET AL., APPELLEES.

FILED JULY 11, 1914. No. 17,790.

1. **Deeds:** PERSONAL COVENANTS: RIGHT OF ACTION. "Where a covenant is broken at the time of the conveyance, it does not run with the land. The obligation is merely personal, and is limited to the parties to the covenant, and confers no right of action on subsequent purchasers of the estate." *Chapman v. Kimball*, 7 Neb. 399.
2. ———: ———: ———. A covenant in a deed that the grantors "are lawfully seized of said premises, that they are free from incumbrances, that we have good right and lawful authority to sell the same," if untrue, is broken when made, and a right of action thereon at once accrues.
3. **Attorney and Client:** CONTINGENT FEE: RIGHT OF ACTION. Record examined, its substance set out in the opinion, and *held* not to present any theory entitling plaintiff to recover.

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

Wilbur F. Bryant, pro se.

Clarence B. Willey, contra.

FAWCETT, J.

This action was instituted in the district court for Cedar county to recover attorney's fees. At the conclusion of

the trial the court directed a verdict in favor of the defendants and entered judgment thereon. Plaintiff appeals.

The record shows that on October 20, 1904, August Huwaldt and Minnie, his wife, sold a quarter section of land, in Pierce county, to the defendant J. L. Chapman, and executed and delivered to him a deed in the usual form of a warranty deed, except that in the general warranty clause the word "whomsoever" was erased and there were substituted therefor the words "claiming by, through or under us." Chapman entered into possession of the land under this deed, and on February 24, 1905, conveyed the same by a deed of general warranty to defendant Mosher. Mosher entered into possession, but on February 11, 1907, was ousted. In his petition plaintiff alleges that on January 9, 1908, the defendants entered into a contract with him by the terms of which plaintiff agreed to prosecute in a suit or suits at law "a certain claim of the defendant Sir William Mosher, in which the defendant, Joseph Lamont Chapman, had a pecuniary interest, against one August Huwaldt and one Minnie Huwaldt; that, by the terms of said contract, the plaintiff was to receive the amount of 25 per cent. of the sum recovered, either by suit or compromise, and the plaintiff was to be consulted before any compromise should be made; that said claim against said August Huwaldt and Minnie Huwaldt was founded upon a breach of covenant in the terms of a certain warranty deed; that by the terms of said oral contract between the plaintiff and defendants, the defendants agreed to pay all costs and personal expenses of the plaintiff incurred in such prosecution." Plaintiff then alleges that under his employment he commenced in the district court for Cedar county an action against the Huwaldts, in which, it appears from a copy of the petition, defendant Mosher was made the sole plaintiff. That action was subsequently dismissed by the district court for want of jurisdiction, and on appeal to this court the judgment of the district court was affirmed. *Mosher v. Huwaldt,* 86 Neb. 686. Some correspondence then passed between plaintiff and

the defendants as to the commencement of another action in Pierce county where service could be obtained upon the Huwaldts. The petition alleges that thereupon plaintiff prepared a petition to be filed in Pierce county and sent the same to the defendants by United States mail, postage prepaid, for filing in Pierce county; that since that time defendants have refused to correspond or confer with plaintiff, and have discharged plaintiff from their employment without sufficient cause; that plaintiff is not informed, and consequently is unable to aver, whether or not the matter in which he was employed has been compromised or abandoned, but that plaintiff has been at all times ready and willing to perform everything on his part to be performed under his contract of employment, and that if the matter in which he was employed had been prosecuted to a final termination the defendants would have recovered the full amount sued for in their suit, amounting to $5,175.39, and that the amount of plaintiff's contingent fee would be $1,293.85. The petition also avers that the services performed by plaintiff are reasonably worth the sum of $1,293.85.

The petition which plaintiff prepared for filing in Pierce county was also prepared with defendant Mosher as the sole plaintiff, and against the Huwaldts. It alleges the deed from the Huwaldts to Chapman, and only pleads the covenant: "And we do hereby covenant with the said J. L. Chapman and his heirs and assigns that we are lawfully seized of said premises, that they are free from incumbrances, that we have good right and lawful authority to sell the same"—then alleges possession taken by Chapman, the sale by him to defendant Mosher, and that on February 11, 1907, defendant Mosher was "ousted and dispossessed of said premises by due course of law, it appearing that the said defendants did not have a good and sufficient title to said premises at the time they executed and delivered said deed to said Joseph L. Chapman." It will be seen that we are not advised as to the precise ground upon which defendant Mosher was ousted, but it

does appear, in the paragraph just above quoted from the petition prepared for filing in Pierce county, that defendant Mosher was ousted by due course of law, "it appearing that the said defendants (the Huwaldts) did not have a good and sufficient title to said premises at the time they executed and delivered said deed to said Joseph L. Chapman." If so, then the covenant in the deed, which plaintiff set out, was broken at the time of the conveyance. That being true, the obligation was merely personal, limited to the parties to the covenant, viz., the Huwaldts and Chapman, and conferred no right of action on Mosher, who was a subsequent purchaser. *Chapman v. Kimball*, 7 Neb. 399. The petition prepared for filing in Pierce county was verified August 10, 1910, which was more than five years after the conveyance from the Huwaldts to Chapman. In *Webb v. Wheeler*, 80 Neb. 438, we held: "A covenant in a deed that 'I hold said premises by good and perfect title,' if untrue, is broken when made, and right of action at once accrues thereon." Without pursuing the matter further, it seems to us plain that if the petition referred to had been filed in Pierce county it would have been demurrable on two substantial grounds appearing upon the face of the petition: (1) That Mr. Mosher had no right to maintain the action; and (2) that, even if it had been prosecuted by Chapman, it was barred by the statute of limitations. It is also clear that the defendants never recovered anything as the result of the services performed by plaintiff, which by the terms of their oral contract would alone constitute a right to recover for such services. In short, we are unable to discover any theory upon which plaintiff can recover.

AFFIRMED.

STATE, EX REL. JOHN WILLIAMS, APPELLEE, V. HARLEY G. MOORHEAD, APPELLANT.

FILED JULY 11, 1914. No. 18,241.

1. **Elections**: REGISTRATION: DUTIES OF REGISTRATION OFFICIALS. Chapter 36, laws 1913, examined, its important points set out in the opinion, and *held*: That the registration officers in cities covered by the act, in registering voters under the provisions of section 12*a*, act ministerially; that they are concluded by the answers of an applicant for registration, and that the record to be made under subdivision 10 of this section is to be determined by two of the supervisors of registration from the answer of the applicant to subdivision 7, and the evidence submitted or presented by him in answer to subdivisions 8 and 9.

2. ———: ———: ACTS OF ELECTION COMMISSIONER. That the acts of the election commissioner under the last paragraph of section 10, ch. 36, laws 1913, and under section 13, are quasi-judicial in character.

3. ———: ———: CHALLENGE: EVIDENCE. That when the commissioner enters or causes to be entered the word "challenge" opposite the name of a voter on the registration register, as provided in section 10, the proof necessary to be furnished by the voter, in order to have such challenge withdrawn, is the proof specified by section 10, viz., the filing of his affidavit setting forth facts showing the correctness of his registration, verified by two regularly registered voters of his election district, which proof is not required to be the production of his naturalization papers or a certified copy of the record of the court in which such voter was naturalized; but the affidavit must be treated as sufficient, if the facts stated therein are sufficient in substance, so that reasonable minds would draw the conclusion therefrom that the registration is correct.

REHEARING of case reported in 95 Neb. 80. *Former judgment of reversal vacated, and judgment of district court affirmed.*

FAWCETT, J.

This case is before us on rehearing. For a statement of the nature of the case reference is made to our former opinion in 95 Neb. 80. That the respondent is a conscientious official who desires to faithfully discharge the duties

of his office, according to law and not otherwise, and that he has a due regard for the public importance of his office, is shown by the opening statement in his brief, wherein he says: "The respondent welcomes a judicial interpretation of his official powers and functions as election commissioner. To protect the purity of the ballot and the elective franchise was the purpose of the act creating this office by the late legislature. The entire state of Nebraska and all citizens who have regard to civic honor are interested in its enforcement. In assuming the responsibility of the office, being desirous to perform the duties and exercise only the legitimate powers and functions imposed, this respondent respectfully submits his reasons, and what he considers as the law governing his action, in refusing to register, as a qualified voter, the relator." Recognizing the force of everything the respondent has above said, we have carefully considered the entire act (laws 1913, ch. 36), but will refer only to such sections as we deem pertinent to this investigation.

Section 8 provides: "The election commissioner, the chief deputy commissioner and such other deputies and employees as the election commissioner shall designate as supervisors of registration shall be supervisors of registration in said cities and shall serve as the election commissioner may direct." By this section it will be seen that the legislature recognized the fact that in a city of the size of Omaha there are a large number of election districts which, under the general supervision given to the election commissioner, would necessitate providing that officer with many deputies and assistants. The section also provides: "The election commissioner shall appoint an inspector for each election district." The section then goes into detail and provides that the inspector shall be present in the polling booth during all elections, acting as the personal representative and deputy of the election commissioner in the election district to which he should be assigned by the commissioner; makes it the duty of such inspectors to enforce the laws relating to elections, to see

that all proceedings are in accordance with instructions, rules, regulations and laws, and to challenge any voter "whose name does not appear on the election register or who he has reason to believe is impersonating a person whose name appears on the register or is attempting to vote illegally;" to see that the judges and clerks obey the law in every particular and conduct the canvass of the votes as provided by law and make prompt returns to the election commissioner.

Section 9 provides: "The election commissioner, starting as soon as practicable after this law becomes effective and again on the first day of September of every year in which is held a general state election, by the aid and assistance of deputy commissioners appointed by him as herein provided, not to exceed one for each district, shall visit every building in each city within said county wherein registration is required, and after diligent inquiry make true lists by streets, wards and voting districts of the name, age, occupation, place of occupation, residence and period of residence, at the time of taking of the canvass, of every male person twenty-one years of age or upward or who is or will be at the next ensuing general election a qualified voter. Said commissioner shall designate in such lists all buildings used as residences by such male persons, in their order on the street where they are located by giving the number or other definite description of every such building so that it can be readily identified and shall place opposite the number or other description of every such building, the name, age, and occupation of every such male person residing therein at the time of the canvass, which lists shall be used for checking, revising and correcting registration."

It scarcely needs comment to demonstrate the purpose of this important section. After faithfully complying with its terms, the commissioner and his corps of deputies would have in the office of the commissioner accurate data prepared by themselves of the actual residence of every voter in the city at the time of making their canvass. This

data would be of valuable assistance to them in the discharge of their further duties as provided in the next ensuing section. It would effectually put a stop to wholesale registration by illegal voters on vacant lots and at street numbers that have no existence.

Section 10 provides that as soon as he completed the canvass, required by section 9, the election commissioner should provide for a new general registration of all voters in the county who may be required by law to register; that is to say, no attention should be paid to former registrations made prior to the enactment of chapter 36. He is required by this section to furnish the necessary records, "which records shall be known as the permanent registration register." He is required to keep this register in duplicate marked respectively "original" and "duplicate;" the original to remain in his office and the duplicate to be the one taken to and used in the various election districts for election purposes. It also provides that any person properly registering as a voter shall not be required to again register unless he changes his residence. Such change of residence it is provided shall operate as a cancelation of his registration, and he must again register before he can be permitted to vote. It also provides that the office shall remain open during the usual business days of the entire year for purposes of general registration and for the transaction of the business of the office. The last paragraph of section 10 will be referred to after we have considered section 12*a*.

Section 11 empowers an election commissioner, deputy commissioners, judges of election, supervisors of registration, and election inspectors to administer all oaths and affirmations required or necessary in the administration of the act.

Section 12 makes it the duty of the commissioner to cause records to be prepared for the registration of names and facts required by the act, these records to be known by the general name of registers, and to be so arranged as to admit of the entering under the name of each street

or avenue of each election district the number of each dwelling on any such street, the registers to be ruled so as to have columns entitled so as to cover all the points of information required to be set out in making the registration of the voter.

Section 12*a* provides: "The election commissioner or the deputy commissioner acting for him shall receive the application for registration of all such legal voters as shall personally apply for registration at the office of the commissioner or other places designated for registration, who then are, or on the day of election next following the day of making such application will be, entitled to vote. Any person serving as supervisor of registration shall administer to all persons who may personally apply to register the following oath or affirmation, viz.: You do solemnly swear or affirm that you will fully and truly answer all such questions as shall be put to you, touching your place of residence, name, place of birth, your qualifications as an elector, and all other questions provided for by the laws of this state affecting your right to register and vote therein. They shall then examine the applicant as to his qualifications as an elector, and, unless otherwise provided herein, shall immediately, in the presence of the applicant, enter in the registers the statements and acts as above set forth, and in the manner following, viz.:" First. The residence. Second. The name of the applicant in full, and providing that the name shall be kept by streets and avenues as far as the same can be done. "Third. Under the column 'Sworn' the word 'Yes' or 'No' as the case may be. Fourth. Under the column of 'Nativity' the state, country, kingdom, empire, or dominion, as the facts shall be stated by the applicant." Fifth. The color of the applicant. Sixth. The term of residence at the place indicated. "Seventh. Under the column 'Naturalized' the word 'Yes' or 'No' or 'Native' as the fact may be stated. Eighth. Under the column 'Date of Papers' the date of naturalization if naturalized, as the same shall appear by the evidence of citizenship or presented by the applicant

in compliance with the requirements of this article. Ninth. Under the column 'Court' the designation of the court in which, if naturalized, such naturalization was done, as the same shall appear by the evidence of citizenship presented or submitted by the applicant in compliance with the requirements of this article. Tenth. Under the column 'Qualified Voter' the word 'Yes' or 'No' as the facts shall appear and be determined by at least two (2) of the said supervisors. * * * Eleventh. Under the column 'Date of Application,' the month, day, and year when the applicant presented himself for registration. Twelfth. Under the column 'Signature of Voter' the applicant for registration shall be required to sign his name on both original and duplicate registers."

Section 13 provides: "The commissioner shall, upon the personal application of any person entered upon the registration record, correct any error therein, or whenever informed of any such error and after due investigation he may correct such error, and for said purpose may summon witnesses and compel their attendance to appear before said election commissioner at his office to give testimony pertaining to the residence, qualifications, or any other facts required to be entered in said registration list, which testimony shall be transcribed and become a part of the records of his office." It further provides that, if through any error of the election commissioner the name of any properly registered qualified voter failed to appear upon the election register of his election district, the inspector of election shall at the polling booth of such election district issue a certificate to such person which shall recite the facts and authorize the judges of election to receive his vote.

We will now give the concluding paragraph of section 10. We give it here for the reason that the duties therein enjoined upon the election commissioner are duties which are to be performed subsequent to the registration of the voters as provided by section 12*a*. It provides: "It is hereby made the duty of the election commissioner to ver-

ify the registration in each election district, through the various inspectors, within the ten days next preceding each and every general state and regular city election and at such other times as the election commissioner may deem necessary, and he shall thereupon enter or cause to be entered the word 'challenge' opposite the name of any voter reported by said inspector as unlawfully registered, and such entry shall not be canceled nor the person so challenged permitted to vote without evidence being produced in writing and filed with said commissioner or inspector showing the correctness of his registration, which evidence shall be in the form of an affidavit, the filing of which shall be entered thus 'affidavit' opposite the name of the voter so challenged, which affidavit shall be signed by the person challenged and by two regularly registered voters of the district and shall state facts sufficient to show the correctness of his registration. Whereupon such commissioner or inspector shall make entry 'challenge withdrawn' opposite the name of such voter. Upon the entry of any such challenge against a person whose name appears upon the registration records, the commissioner shall send a notice over his signature, through the mail, duly stamped, to all such persons against whose names a challenge has been entered, at the address given upon said registration records, requiring such person to appear before the election commissioner or inspector to verify his registration under oath, and upon his failure so to appear within one year thereafter, or to file with said commissioner an affidavit setting forth a good and sufficient reason for not appearing in person, and setting forth facts showing the correctness of such registration verified by two registered voters of the same district as such voter, the said registration shall be canceled. Two copies of the registration record of each district as it shall be made up and appear ten days before any election, shall be provided by said commissioner for the use of judges and clerks of election in their respective districts on election day, said copies to be known as election registers."

Considering these various sections of the act in the order in which we have set them out, we think the intention of the legislature is made clear, and that the point urged in the briefs, as to whether the commissioner acts judicially or ministerially, is also made clear. In the performance of the duties prescribed by section 12*a* he or his deputy commissioner acts ministerially. In the performance of the duties prescribed by the last paragraph of section 10 his acts are quasi-judicial; and the same is probably true when acting under that portion of section 13 above quoted. The controversy in this case arises under subdivisions 7, 8, 9 and 10 of section 12*a*. So far as the record before us discloses, the transaction of July 12, 1913, when the relator appeared at the office of respondent for registration, was a very informal affair. No record was made of the application for registration or of the reasons why it was denied; nor was the oath administered by the commissioner. The evidence taken in the district court shows that the relator told the respondent that he was born in Ireland, that he came to this country with his father while still a minor, that his father was naturalized before he was 21, and that he himself was naturalized in Boston, Suffolk county, Massachusetts; that he told respondent that his papers were lost and had been for many years; that he lost them before he came to Omaha about 35 years ago; that he did not tell respondent when he was naturalized; that respondent asked him no questions about it; that when he told respondent that his naturalization papers were lost respondent stated to him that he could not register him without his papers, and for that reason refused. His testimony further shows that he had lived in Nebraska 36 years and had voted at all state, county and city elections during those years; that he had registered every year since the law requiring registration was first adopted; that he had never during any of those years been required to produce any documents of citizenship or declaration to become a citizen.

The question then is: What is the construction which should be placed upon subdivisions 7, 8, 9 and 10 of sec-

tion 12*a*? We think the fair construction is that, when the applicant answers subdivision 7 "Yes," the officer taking his answers to the questions being propounded is concluded by his answer. The fact that the applicant may not be able to give the exact date when or the precise court in which he was naturalized, as contemplated by subdivisions 8 and 9, is not sufficient to destroy the force of his affirmative answer to subdivision 7. There are undoubtedly thousands of old men in this country who were naturalized in the early days of its settlement, but who have since lost their "papers" and could not now state when or by what court they were naturalized; and there are undoubtedly hundreds of thousands of men whose fathers were naturalized many years ago and before they were 21 years of age who have never seen their fathers' naturalization papers and have not the remotest idea of when and where they were naturalized, but do know that years before their fathers died they had been voting as citizens of this country. We think the answer to subdivision 10, under the column "Qualified Voter," so far as the act of registration is concerned, must be based upon the answer to subdivision 7; that when the applicant, who is under oath, answers that he is a naturalized citizen, the record under subdivision 10 should show the answer "Yes" to the question as to whether or not he is a qualified voter, *unless,* in answering subdivisions 8 and 9, the evidence "submitted or presented" by the applicant, *itself,* shows that the answer to subdivision 7 is untrue. It is also clear from the wording of subdivision 10 itself that the determination of the question as to whether the word "Yes" or the word "No" shall be entered is not for the determination of the commissioner alone. That fact must be determined by at least two of the supervisors. It was argued by counsel for relator that the commissioner cannot act in this capacity at all, but in this we think they are in error, as shown by the quotation above from section 8. The reason of the legislature for providing that this fact shall be determined by at least two of the supervisors becomes apparent when we

consider the requirements of section 4 of the act, which provides that the election commissioner shall appoint a chief deputy commissioner who shall be a member of a political party other than the one with which the election commissioner affiliates. That section also provides that the commissioner shall appoint such other deputies, inspectors of election, supervisors of registration, peace officers to serve at election, and such other assistants as may be necessary for the performance of the duties of his office, the registration of voters and the conduct of election in such counties, with the proviso that "such employees shall be divided between all political parties as nearly as practicable in proportion to the number of votes cast in said county at the preceding general election for the office of governor by said parties, respectively." Briefly, therefore, we think that under section 12*a* the registration officers are acting ministerially; that they are bound to record the answers as given by the applicant and enter under the column "Qualified Voter" "Yes" or "No" in accordance with the answers given by the applicant. If the answers of the applicant are falsely or fraudulently given, so that he has secured a registration to which he is not entitled, the inspector for the election district, in which the applicant's registration shows him to be a resident, has from then until the time the election commissioner is called upon to verify the registration in each election district, which shall be within ten days next preceding each general election, to reach a conclusion as to whether there is any doubt as to the applicant's right to vote. By the last paragraph of section 10 quoted above, it is made the duty of the election commissioner, through his various inspectors, to verify the registration, and when he has performed that duty through his inspectors, if he has doubt about the right of any person whose name appears upon the registration lists to vote, it is his duty to "enter or cause to be entered the word 'challenge' opposite the name of any voter reported by said inspector as unlawfully registered." When that word is entered opposite the name

of any voter, it then becomes the duty of the commissioner to send the voter challenged a notice over the signature of the commissioner, through the mail, duly stamped, requiring such person to appear before the election commissioner or inspector to verify his registration under oath, etc., and until the voter has made the showing required, so as to cause the entry "challenge withdrawn" to be made opposite his name, he cannot vote. Thus careful provision is made for the protection of the purity of the ballot, and a safeguard furnished against unlawful registration.

This brings us to the crucial point in the case, viz.: When a naturalized citizen fails to produce his naturalization papers or a certified copy of the record of his naturalization, may the election commissioner refuse to withdraw the "challenge" entered opposite his name? It is argued that the rule of the best evidence obtainable is the one to be applied, and that the fact of naturalization cannot be proved by parol. *State v. Boyd,* 31 Neb. 682, 710, with other cases, is cited in support of that contention. It is true that our opinion in that case so holds, and Governor Boyd was ousted from the office of governor by this court; but our judgment was reversed by the supreme court of the United States in *Boyd v. State of Nebraska,* 143 U. S. 135, in which the citizenship of Governor Boyd was sustained upon oral proof, as shown in that opinion. While the rule contended for may be and unquestionably is the rule in proceedings before a court of judicature, in the absence of a statute on the subject, it does not apply here, for the reason that the legislature, by the act under consideration, has determined the kind of proof required. By section 10, above set out, it will be seen that, when the commissioner has caused the word "challenge" to be entered opposite the name of any voter, such entry shall not be canceled nor the person so challenged be permitted to vote without evidence being produced in writing and filed with the commissioner or inspector, showing the correctness of his registration, "which evidence shall be in the form of an affidavit, the filing of which shall be entered

thus 'affidavit' opposite the name of the voter so challenged, which affidavit shall be signed by the person challenged and by two regularly registered voters of the district, and shall state facts sufficient to show the correctness of his registration. Whereupon such commissioner or inspector shall make entry 'challenge withdrawn' opposite the name of such voter." This section goes on and provides further that when the entry of such challenge appears upon the registration records and the commissioner has sent notice, as shown by the quotation above given, for the voter to appear before him to verify his registration under oath, and he fails so to appear within one year thereafter, or to file with the commissioner an affidavit setting forth a good and sufficient reason for not appearing in person, "and setting forth facts showing the correctness of such registration verified by two registered voters of the same district as such voter, the said registration shall be canceled." So that in two places in this section it is provided that upon the filing of an affidavit setting forth facts showing the correctness of such registration, verified by two registered voters of the district, the challenge *shall* be withdrawn.

The proof thus required does not call for furnishing either his original naturalization papers or certified copies of the record thereof. It simply calls for the furnishing of an affidavit stating the facts that entitle him to vote, which, in the case of one not native born, would be that he has been naturalized or has declared his intention to become a citizen. The proof that his affidavit is true is not required to be the furnishing of his papers, but the affidavit of two regularly registered voters of his district. But, it may be asked, what are the facts that must be sworn to by the voter in his affidavit and verified by two regularly registered voters in his precinct, which should be considered "sufficient to show the correctness of his registration?" Of course, the applicant may attach to his affidavit his naturalization papers; or he may state in his affidavit that his naturalization papers are lost and

attach a certified copy of the record of the court in which he was naturalized. In either of such cases the proof would be conclusive. If, however, he is unable to furnish this documentary evidence, his affidavit should so state, and then set out such facts as are sufficient to satisfy a reasonable person that he is a citizen and entitled to vote. When such proof is furnished, the applicant would be able to protect himself against any erroneous refusal of the election commissioner to withdraw the challenge, by proper proceedings prosecuted in a court of competent jurisdiction. We are unable to see how proof of this character will open the door to fraud where a naturalized citizen is attempting to register, any more than it would if one claiming to be native born were making application. If upon his verification of the registration the inspector should report to the election commissioner that A. B., who is registered under section 12*a* as "native," is not entitled to vote, for the reason either that he is not native born or that he has not lived in the state, county or precinct for the required length of time, it would be the duty of the commissioner to "challenge" him in precisely the same manner as he would challenge the naturalized citizen, in which case each would be required to purge himself of the challenge in precisely the same manner, viz., by filing his affidavit signed by himself and by two regularly registered voters of his district. The only redress the state can have, or has ever had under similar laws, as against illegal registration and illegal voting, is under the criminal laws of the state.

This brings us to the judgment entered by the district court, which was that a peremptory writ of mandamus issue therein against the respondent commanding him, as election commissioner in and for Douglas county, Nebraska, "forthwith, on the application of the relator, to receive the oral testimony, under oath, of said relator, for the purpose of establishing the relator's citizenship by naturalization under the naturalization laws of the United States, and that the respondent accept said oral statements,

under oath, as competent and sufficient evidence to establish the relator's naturalization for the purpose of registering as an elector under the laws of the state of Nebraska." The effect of this judgment is simply that the respondent is required to proceed under section 12*a* by administering the oath to the relator, taking his answers to the questions required by that section, and, for the purpose of registration, to accept his statements under oath as true and to register him as a voter. This judgment will not and does not attempt to preclude the respondent and his inspectors from investigating the relator's right to register, or from challenging his right to vote, as provided in section 10, above set out.

After a careful consideration of the case, we are convinced that the judgment of the district court is right. Our former judgment is therefore vacated, and the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

LETTON, J., concurring.

While I think that part of the judgment of the court commanding the respondent to accept the oral statements of the relator under oath as sufficient evidence goes too far, under the construction of the law laid down in the opinion, this is really immaterial, since the judgment was not superseded, and it was stated at the hearing that it had been executed. In other respects the district court properly held for the relator. He was entitled to be sworn and to have his answers to the queries of the registration officers taken down, considered, and a record made. Whether the judgment of the district court is affirmed or reversed merely relates to the matter of costs, and, since the relator was entitled to much of the relief sought, the respondent should bear this burden.

SEDGWICK, J., dissenting.

The majority opinion decides that, when the election commissioner reaches the final conclusion as to whether

the applicant for registration is a legal voter, if the facts, which they say can be shown only by affidavit, "are sufficient in substance, so that reasonable minds would draw the conclusion therefrom that the registration is correct * * * sufficient to satisfy a reasonable person that he is a citizen and entitled to vote," the applicant must be regarded as a qualified voter. This, of course, contemplates that the commissioner will ascertain and decide whether the facts proved are sufficient, and in doing this he must use a reasonable discretion, so that in the final determination of the matter he is not concluded by the unsupported oath of the applicant as to his naturalization. This was the decision in the former opinion. 95 Neb. 80. It was there expressed in these words: "The relator understands this statute to mean that these preliminary answers under oath are conclusive upon the commissioner, so that, if the applicant in that examination says that he is naturalized, the matter is thereby concluded. We do not so understand the statute." The majority opinion nevertheless affirms the judgment of the district court, but that judgment clearly is that, even in doubtful cases, when reasonable minds might conclude from the facts in evidence that the applicant had never been naturalized, the commissioner is concluded upon that fact by the oath of the applicant.

The petition for the writ of mandamus asks that the respondent be commanded "to receive under oath his (the relator's) oral statements for the purpose of establishing his citizenship, and to accept such oral statements under oath as competent to establish citizenship under the election and registration laws of the state of Nebraska." The alternative writ commands the respondent "to register said relator as a legal voter in the city of Omaha, Douglas County, Nebraska, in accordance and conformity with the registration and election laws of this state." The finding of the trial court was "that the election commissioner has no authority to require naturalized citizens to produce their naturalization papers or other documentary

evidence of their citizenship," and the judgment was: "Now, therefore, it is considered, ordered, adjudged and decreed by the court that a peremptory writ of mandamus issue herein against the respondent commanding him, as election commissioner in and for Douglas county, Nebraska, forthwith, on the application of the relator to receive the oral testimony, under oath, of said relator, for the purpose of establishing the relator's citizenship by naturalization under the naturalization laws of the United States, and that the respondent accept said oral statements, under oath, as competent and sufficient evidence to establish the relator's naturalization for the purpose of registering as an elector under the laws of the state of Nebraska."

The majority opinion and the decree consider all of these proceedings are for the purpose of a preliminary or tentative list of voters. This judgment, it assumes, can and really must be corrected by a challenge. The commissioner must send out his inspectors, and they must report if there is any doubt about the applicant's naturalization, and a challenge must then be entered upon this supposed preliminary register. The applicant may then attach his naturalization papers or a certified copy of the record of his naturalization, if he has them. If not, he and his two neighbors, "legally registered voters" of his district, must state the facts within their knowledge, and, if the commissioner finds that the facts stated ought to "satisfy reasonable minds," he withdraws the challenge and relator can vote; but, if he finds that the facts are not sufficient to satisfy reasonable minds that relator has been naturalized, he will not withdraw the challenge and the relator cannot vote, notwithstanding the prayer of his petition and the finding and decree of the court, which is now affirmed. This surely is inconsistent. By these findings and decree he is commanded to receive relator's oath as proof of naturalization, and, if the commissioner should challenge him or otherwise refuse to qualify him as a voter on the ground that the facts in evidence were not suffi-

cient to "satisfy a reasonable person that he is a citizen and entitled to vote," he would be in contempt of court. And so it would seem that, under the law as finally stated in the opinion, the judgment of the district court should be reversed.

That fraud has been perpetrated in elections in the large cities of the country is notorious. A foreign-born resident taking no special interest in an election, and brought to the polls by those who were especially interested, could answer that he had been naturalized, and without doubt many such votes were improperly received. The legislature in the act of 1913 (laws 1913, ch. 36) attempted to remedy this and many other evils in elections in the city of Omaha. The act is a comprehensive one. It creates the office of election commissioner, and, as pointed out in our former opinion (95 Neb. 80), clothes him with unusual and extraordinary powers, and imposes upon him onerous and exacting duties. To analyze the act and ascertain with precision the powers and duties of the election commissioner as intended by the legislature is a tedious and in some respects an unusually difficult labor. To settle one of the important questions that arise as to the power and duties of the commissioner it was thought best to bring this test case. The election commissioner, who appears to have no motive other than to perform his duty as the law intends, and Mr. Williams, who appears to be a frank and honorable citizen, interested in good government and the just enforcement of the laws of his adopted country, and other good citizens, appear to have been in doubt whether the practice which had obtained of taking the unsupported oath of a foreign-born resident as final and conclusive proof that he had been naturalized was still the law under this new act. This was the question which they sought to raise and present to the courts. In the briefs the relator says: "The appellant (the election commissioner) contends that under subsections 8 and 9 he finds authority to demand documentary evidence (of naturalization)." And the respondent stated

the question to be: "Can the respondent, as registrar of voters, demand the production of naturalization papers as the best evidence of citizenship?" If, in raising this important question as to the duty of the election commissioner to exercise his discretion, they had selected a relator who was an "undesirable citizen," and who had probably never in fact been naturalized, but was ignorant and apparently willing to impose upon the election commissioner with a false oath, instead of selecting a desirable citizen, in whose favor the discretion of the commissioner ought and ordinarily would be exercised, there might be no temptation to suggest the old saw that a hard case makes bad law. As it is, the opinion of the majority is that the election commissioner must receive the "oral testimony, under oath," of the applicant for registration "for the purpose of establishing the relator's citizenship by naturalization under the naturalization laws of the United States, and that the respondent accept said oral statements, under oath, as competent and sufficient evidence to establish the relator's naturalization for the purpose of registering as an elector under the laws of the state of Nebraska." This construction of the statute, it seems to me, is not without some difficulties. The opinion of the majority then says that this is required by section 12*a* of the act, and that the election commissioners may then challenge the voter under section 10. Is the record required by section 12*a* the "permanent registration register?" Is the provision of section 10 intended as a review of the decision of the election commissioner in registering the applicant as a voter? Answers to these two questions appear to present great difficulties in the way of holding that the election commissioner is bound in all cases by the oath of the applicant.

The election commissioner is required to make several distinct records; one of them is the "permanent registration register." He first, with the assistance of his deputies investigates the whole field for himself. He visits every building in each city in the county and makes "true

lists" of the facts specified in section 9 as he and his deputies find them to be. He next makes the record described in section 12, "known by the general name of register." This is the record of the statements of the applicant for registration of the details of the facts in regard to his qualifications. He is first sworn and his answers are taken down as he makes them. This is, of course, the record intended in section 12*a*. Any person serving as a supervisor of election shall question the applicant and "immediately in the presence of the applicant" enter in the register his statements, and when it is done the applicant signs it as his statement. There is a slight discrepancy, in that section 12 provides for a column entitled "Date Registry Approved," and 12*a* assumes the title to be "Qualified Voter;" but as 12*a* says that these answers shall be entered "in the registers," and does not require any other register for that purpose than the one provided for and defined in section 12, "to be known by the general name of register," as distinguished from the "permanent registration register," it is apparent that "approving the registry" and entering under the word "qualified" the word "Yes" are one and the same thing, and as this may all be done by "any person serving as supervisor" without consulting the commissioner of election, and even without his knowledge, and no other evidence on any matter is taken or allowed except the personal statement of the applicant himself, it is impossible that this record could be considered authoritative or final, or in any respect take the place of the "permanent registration register." Two supervisors, possibly of different political parties, are required to be present, and know that the record is properly made, and that all required questions are properly answered, so that the record on its face shows the applicant qualified. These statements of the applicant and the preliminary lists of facts as entered by the election commissioner are before the election commissioner when he receives evidence and ascertains whether the applicant is a legal voter and makes the "permanent registration register" provided for in sec-

tion 10. Sections 13 and 14 of the act also contemplate that there shall be "election registers." There is to be one of these for each election district. They are not the "permanent registration register" provided for in section 10, nor the records "to be known by the general name of register," provided for in sections 12 and 12*a*. There are only an original and one duplicate of the "permanent registration register." The number of the record "known by the general name of register" is perhaps uncertain, but there is to be an "election register" for each election district.

The election commissioner next receives applications for registration, passes upon them, and, if he finds them to be voters, registers them in the "permanent registration register." The permanent registration registers shall be kept in duplicate and marked respectively "Original" and "Duplicate." How, then, can the election commissioner be required to "proceed under section 12*a* by administering the oath to the relator, taking his answers to the questions required by that section, and, for the purpose of registration, to accept his statements under oath as true and to register him as a voter?"

It was not the purpose of this test case to raise questions as to the form of the record of the applicant's answers to the questions which the law requires shall be put to him, "known by the general name of register." The purpose was to test the question whether the election commissioner in determining who are legal voters might in any case require a foreign-born applicant for registration to "submit or present" his naturalization papers, or whether the personal oath of the applicant is conclusive upon that question. This is stated in the briefs by both parties to be the point involved in the litigation.

The opinion says: "This judgment will not and does not attempt to preclude the respondent and his inspectors * * * from challenging his right to vote, as provided in section 10, above set out." This judgment, then, will not in practice accomplish much. The election commis-

sioner is compelled to register the applicant as a voter if he states that he has been naturalized; but the election commissioner may at once challenge him, and then his own oath is not sufficient. He must prove that he has been naturalized by two witnesses. It will probably not often happen that there are two "regularly registered voters of the district" who were witnesses to his naturalization and can swear to the fact that the applicant was naturalized. Unless there are two such witnesses, the challenge is not withdrawn and the party is not allowed to vote, and so this action and this decision, in most cases at least, will not help the proposed voter. This unfortunate result leads us to the question above proposed: Is the challenge provided for in section 10 intended as a review of the decision of the election commissioner that the applicant is a legal voter, after hearing evidence and after he has registered him as a voter on the "permanent registration register?"

The election commissioner is required to send out his inspectors before each general election, and at other times if he deems necessary, who are to report any voter "unlawfully registered." Such voter must be challenged, and must then furnish proof by his own oath and the oaths of two other "regularly registered voters" of the same election district with himself "showing the correctness of his registration." Does this mean that he must re-establish in this manner the facts that were investigated when he was admitted as a voter and duly registered on the "permanent registration register?" There are apparent difficulties in the way of such a conclusion. Why limit him to two "regularly registered voters" of his own election district? Why not allow the election commissioner to call witnesses generally, as he does when he determines that he is a legal voter and registers him as such, and as provided in section 13? It seems that in trying the challenge no oral evidence is allowed. The opinion says that his naturalization papers may be attached. The evidence taken by the election commissioner on the first hearing is not preserved and is excluded. Is it reasonable to suppose that the legislature

intended that the election commissioner should first determine upon satisfactory evidence that the applicant had been naturalized, and, if afterwards there was doubt of that fact, the question should be so summarily retried and the evidence taken in the formal investigation go for nothing, unless the applicant could bring two regularly registered voters of his district who knew and could swear to the fact of his naturalization?

It would seem more reasonable to suppose that these inspectors are sent out before each election to ascertain whether any changes have taken place that would disqualify any voter, such as change of residence, conviction of felony, or perhaps some minor matter that would be required to be recorded so that the voter might be identified and could not be impersonated. His neighbors would be more likely to know the facts in regard to such disqualifications than to know the facts in regard to his naturalization, which he might assert had happened many years before. It seems to me that the majority opinion places the conclusion on impossible grounds. The election commissioner ought to exercise a reasonable discretion, and when the facts, well established, are such that all reasonable minds must agree that the applicant of foreign birth has been duly naturalized, that should be sufficient; but when a vagrant of foreign birth, who apparently is ready to swear to anything that would permit him to vote, especially in regard to a matter which he places so remotely in the past, and which in the nature of things it would be practically impossible to disprove, and so can be sworn to with safety, the conditions being such that all reasonable minds must refuse to believe him, the election commissioner ought not to be compelled to register him as a voter, but might in his discretion require him to "present or submit" his naturalization papers.

CHARLES F. MCKENNA, APPELLEE, V. GEORGE W. PLEASANT ET AL., APPELLEES; ALFRED C. COLLEDGE, APPELLANT.

FILED JULY 11, 1914. No. 17,549.

1. **Judgment:** RECORD: CONSTRUCTIVE SERVICE. When the complete record of a foreclosure of a real estate mortgage fails to show that an affidavit for publication of the summons was filed in the case, and no such affidavit appears in the files, it must be found that no such affidavit was filed, in the absence of any affirmative proof of that fact.

2. **Process:** CONSTRUCTIVE SERVICE. Publication of summons against a nonresident owner of the fee in the land is void, and will not constitute service, unless an affidavit for service by publication has been duly filed before such publication is made.

3. **Mortgages:** FORECLOSURE: PURCHASE BY MORTGAGEE: LIMITATIONS. If a mortgagee purchases the land at the sale in foreclosure of the mortgage and immediately takes such possession of the land as its condition will admit, it being wild, uncultivated and unfenced land, and pays all taxes thereon, and his title under the foreclosure fails because of some irregularity in the service of summons, he will become a mortgagee in possession, and the statute of limitations will not run against the lien of his mortgage.

APPEAL from the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

W. K. Hodgkin and *Struble & Struble*, for appellant.

Arthur F. Mullen and *J. A. Donohoe, contra.*

SEDGWICK, J.

In August, 1887, one Frank P. Brown was the owner in fee simple of the quarter section of land involved in this litigation, and then executed and delivered to Parrish & Potter his mortgage deed whereby he conveyed the land to secure the payment of a loan of money at that time made to him by the said parties. Afterwards, the said mortgagor being in default, the said mortgagees began an action in the district court for Holt county to foreclose the mortgage, and obtained a decree of foreclosure

therein. Pursuant to the decree of foreclosure the land was duly advertised and sold by the sheriff to this defendant, Alfred C. Colledge, on the 27th day of December, 1897. Colledge also purchased an outstanding tax title. The land was then uncultivated and unfenced and the defendant, believing that the foreclosure and sale were legal in all respects, and that he had good title and was the lawful owner of the land by virtue of his purchase, took such possession of the land as the circumstances would admit, and paid the taxes thereon, and paid subsequent taxes thereon regularly, as the same became due, until in 1908, after the commencement of this action. The plaintiff, Charles F. McKenna, claiming to be the owner of the land by mesne conveyances from the said Frank P. Brown, in July, 1907, filed his petition in this action in Holt county, alleging his title as before stated, and asking that the same be quieted and confirmed, alleging that the mortgage given by Brown to Parrish & Potter was "outlawed and entirely barred by the statute of limitations," and that the tax title was invalid, and asking that they be adjudged to be no lien upon the premises. The defendant Colledge was a nonresident of this state, and service was obtained upon him by publication, decree was entered therein, and afterwards he made application under the statute to open the decree and be allowed to defend. With this application he filed his answer in the case and cross-petition, alleging the said mortgage and the foreclosure thereof and the tax lien, and that he was a purchaser of the land under the foreclosure, and had taken possession thereof and paid the taxes thereon, as before stated. He asked for a decree affirming his title through the said purchase, and, if for any reason his title was found to be imperfect through the foreclosure, that he might have a foreclosure of the said mortgage, and such other relief as is just and equitable. With this answer he filed a notice of *lis pendens*. While this answer and notice of *lis pendens* were on file the plaintiff, it is alleged, sold the land to the intervener, Antona Lorenz. The purchaser thereupon intervened in the action

and claimed to be an innocent purchaser of the land. It appears that at the original foreclosure under which the defendant Colledge claims his title the service of summons was published, and the plaintiff and the intervener alleged that no affidavit for service by publication was filed, as the statute requires.

The decree of the court recited that there was due service upon the defendants, but the complete record of the foreclosure, which was put in evidence, does not show the filing of any affidavit for service by publication, and, that being the case, this record furnishes sufficient *prima facie* evidence that no such affidavit was filed, in the absence of any affirmative evidence of the filing of the same. It appears that no other service was had upon the owner of the legal title at that time, and the proceedings therefore would be insufficient to foreclose that title. The trial court entered a judgment in favor of the plaintiff quieting his title in the land as against the lien of the defendant's mortgage. In this we think the court was mistaken.

The mortgagees purchased the land at the foreclosure sale in good faith, supposing that the title was complete. That title having failed, the mortgage was wholly unpaid, and the purchasers at that sale and their grantee, having taken such possession as the circumstances would admit, and having paid the taxes thereon for more than 10 years prior to the commencement of this action, must be considered as mortgagees in possession. The owner of the legal title cannot cancel the lien of a mortgagee in possession without payment of the mortgage.

The judgment of the district court is reversed and the cause remanded, with directions to allow such amendments and take such further evidence as may be necessary, and ascertain the amount of the mortgage and interest of the defendant Colledge and his tax lien and subsequent taxes paid by him, and enter a decree foreclosing his lien for the same, with interest thereon, and adjusting and determining the rights of the other parties to this litigation.

The costs of this court will be taxed against the plaintiff McKenna.

REVERSED.

REESE, C. J., dissents.

ROSE and FAWCETT, JJ., not sitting.

F. F. BYINGTON ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL., APPELLANTS.

FILED JULY 11, 1914. No. 18,227.

1. **State Railway Commission:** APPEAL: REVIEW. Appeals from the orders of the state railway commission directly to this court, under section 7, ch. 90, laws 1907, as amended by chapter 94, laws 1911 (Rev. St. 1913, sec. 6132), are to be considered and determined in the same manner as appeals from a judgment of the district court upon trial by jury in civil cases. Such orders will not be reversed unless it affirmatively appears from the record that they are clearly wrong.
2. **Carriers:** RATES: EVIDENCE. Evidence that rates charged by a railroad company for shipments to a particular point are higher than rates charged between the initial points and two other points will not of itself support a finding and order reducing and readjusting the rates. It must be alleged and proved that the rates complained of are unreasonable, unjust, or discriminatory.

APPEAL from the State Railway Commission. *Reversed.*

Jesse L. Root, Byron Clark and *Holmes & De Lacy,* for appellants.

Morning & Ledwith, contra.

SEDGWICK, J.

These complainants made complaint before the state railway commission against the Chicago, Rock Island & Pacific Railway Company, Morris Transportation Company, Lincoln Traction Company, Chicago, Burlington & Quincy Railroad Company, Union Pacific Railroad Company, Missouri Pacific Railway Company, and the Chi-

cago & Northwestern Railway Company, and asked for an order of the commission "including the village of College View within the switching limits of the city of Lincoln, upon equal terms with University Place and Bethany Heights, and that the car-load rate charged by said Morris Transportation Company be reduced to such reasonable sum as will pay to said company only a fair and reasonable return for the service rendered, and will permit said railroads to absorb the same as a part of the switching charge incurred in switching cars from other roads to College View, and that said roads be required to absorb such switching charges, including that portion which shall go to the Rock Island and Burlington roads, as well as that portion which shall go to the said Morris Transportation Company, and for such other and further and different orders as shall be necessary to correct the conditions herein complained of, and to place College View upon an equality with Bethany Heights and University Place as to rates and switching facilities." The Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company filed separate answers before the commission. Evidence was taken upon the issues joined. The commission made an order granting substantially the relief asked for, and the two answering railroad companies have taken appeals from the order of the commission directly to this court under the provisions of chapter 94, laws 1911; Rev. St. 1913, sec. 6132.

The complaint before the railway commission alleged: (1) That the complainants are residents of College View, and "are each engaged and employed in a business which is unfavorably affected to a substantial degree by the matters and freight rates hereinafter complained of. * * * That said College View is an organized village duly incorporated under the laws of this state, having a population of about 1,500, and is one of the college suburbs of the city of Lincoln, and is immediately adjacent thereto, being connected with the city of Lincoln by two street railway lines which form a part of the street railway sys-

tem of said city of Lincoln, which system is owned and operated by the Lincoln Traction Company, and said village is also connected with the telephone system existing in said city, and the inhabitants talk over said telephone system without any toll charges therefor; that said village also gets all the electric current for lighting said village and for the use of its inhabitants from one of the lighting plants in the city of Lincoln, and the sanitary sewer of said village is connected with the sewer system of said city; that the territory lying between the city of Lincoln and said village is practically all laid out into lots and blocks and suburban residences and is purely urban in character, and that in every sense of the word said village is distinctly a suburb of said city of Lincoln, and the civic life and business interests of said city and said village are intimately connected and interdependent; that in the above mentioned particulars, as well as in point of distance from said city, the relations of said village to said city are substantially similar to those of University Place and Bethany Heights, and in fact said College View is much more closely and intimately connected with said city and sustains a much more distinctly suburban relation to said city than does the village of Bethany, and that there is shipped to said village of College View approximately 400 cars of freight per annum in car-load lots.

"(2) Complainant alleges that University Place is not upon any line of railroad other than a spur from the Rock Island road which was recently extended to said University Place, and the nearest line of railroad to the village of Bethany is the Missouri Pacific road, which passes near the south boundary line of said village of Bethany at a distance of little over a mile from the business section of said village, said railway maintaining no depot nor station other than a flag station and siding for the accommodation of said village of Bethany at about said distance from said business section, while, on the other hand, both the Chicago, Burlington & Quincy Railroad and the Chicago, Rock

Island & Pacific Railway pass the said village of College View at a distance of a little over a mile from the business section, the said Burlington line being actually within the corporate limits of said village at one point and having two sidings for the setting out of cars at said point, and said Rock Island road passes within a few feet of the west line of the corporate limits of said College View, and has a siding for the setting out of cars at said point, and also a spur which actually extends into the corporate limits of said village and connects with the Lincoln Traction Company's line which enters College View and affords switching facilities by which loaded freight cars from said Rock Island line can be switched and transferred into the very center of the business section of said village and is actually used for that purpose.

"(3) That the success of the business represented by these complainants, as well as that of all others engaged in business at said village, as well as the upbuilding, growth, and prosperity of said village, depend to a large extent upon the ability of the business interests of said village of College View to be placed upon an equality with other suburbs of said city of Lincoln, and especially with University Place and Bethany Heights, in the matter of freight rates, shipping facilities, and switching privileges and advantages, in order that car-load freight may be shipped to said College View upon the same terms as those afforded said other suburbs, and that, if these rates and privileges be denied to said village, said College View will be illegally and unjustly discriminated against in those particulars, and great and irreparable injury will result to said village, and to the business interests and inhabitants thereof.

"(4) That prior to the organization of this commission the several railroads involved herein, by an illegal, unfair combination and agreement between them, created a switching district, and established switching limits for said city of Lincoln, which limits included the city of University Place and the village of Bethany Heights, but ex-

cluded the village of College View, and said switching limits are still unlawfully maintained by said railroads, to the great damage and injury of said last named village. That said Missouri Pacific Railway Company has extended a spur from its road at about Thirtieth and Y streets in said city of Lincoln, to and connecting with the interurban electric line operated and maintained by the Omaha, Lincoln & Beatrice Railway Company between Lincoln and Bethany Heights, and by some agreement between said Omaha, Lincoln & Beatrice Railway Company, and the several railroad companies hereinbefore named, the said loaded cars of freight are transferred and switched from all of said railroads over said Missouri Pacific Railway Company's track from the switch-yards in the city of Lincoln, over said Missouri Pacific Railway Company's line and its said spur, and thence over said interurban line to the business section of said Bethany Heights, and a like-switching service is furnished to the business section of University Place by transferring loaded freight cars from all of said railroads to the Rock Island road and moving the same over said line and its University Place spur into said business section of University Place, and by means of this switching district and the agreement maintained between said several roads and said Omaha, Lincoln & Beatrice Railway Company, all of said switching is done without cost to the shippers of freight to University Place, or the consignees thereof, and the said University Place and said Bethany Heights are given the benefit of the Lincoln freight rates, save in those instances where the regular freight charges on such cars are less than $15, and the switching charges which are paid to the Missouri Pacific Railway Company, the Omaha, Lincoln & Beatrice Railway Company, and the Chicago, Rock Island & Pacific Railway Company are paid by the initial carrier or road whose cars are so switched, and are absorbed by such road in its income or freight revenue account.

"(5) That by reason of the fact that College View is outside of said switching limits, so unjustly and arbitra-

rily fixed and established by said railroad companies, said village is denied the switching privileges and the Lincoln freight rates over said several railroads which are furnished and accorded to the said city of University Place and said village of Bethany Heights, and it is impossible for said College View and shippers located at that point to ship goods over other railroads than the Burlington and the Rock Island roads and have the same consigned direct to College View, but the same must be consigned to the city of Lincoln and then reassigned over the Burlington or the Rock Island roads from Lincoln to College View, and the shipper is obliged to pay exorbitant and arbitrary local freight tariffs to said Burlington and Rock Island roads from Lincoln to College View on such shipments, in addition to the regular Lincoln freight rates, and even then this merely places cars so rebilled upon the team tracks of said Burlington and Rock Island roads at College View, a distance of a little over one mile from the business section of College View, unless the car is sent from Lincoln over the Rock Island road and transferred over the Rock Island spur or transfer track to the Lincoln Traction Company's line, and thence to the business section of College View, and, if this is done, the shipper is obliged to pay the Morris Transportation Company, lessee of the said traction company's express and freight transportation privileges, another excessive, exorbitant, and in most cases prohibitive rate of $7 per car, and thus College View is discriminated against on all freight shipped in car-load lots over other roads than said Burlington and Rock Island, as compared with the city of Lincoln and said other suburbs, to the extent of the local freight from Lincoln to College View plus the charges of the Morris Transportation Company of $7 per car. That, by reason of the matters aforesaid, College View is practically excluded from territory not adjacent to the Burlington and Rock Island roads in the matter of shipping such freight as lumber, coal, hay, potatoes, apples, sand, brick, cement, and all other similar articles, greatly to the prejudice of said village. Com-

plainants allege that the charge of $7 per car, made by said Morris Transportation Company for each car taken from the Rock Island road over the Lincoln Traction Company's line to the sanitarium in the business section of College View, a distance of a little over one mile, is unreasonable and excessive and is prohibitive, and shippers find it much more economical to haul their freight from said Rock Island road by team rather than have the same brought in over said traction company's line at the rate aforesaid."

The answer of the Chicago, Rock Island & Pacific Railway Company alleges: "That the village of College View, in Lancaster county, Nebraska, is not located upon the line of railroad of the said respondent company, but is distant therefrom a mile and a half; that at a point where the Lincoln Traction Company intersects and crosses this respondent's line of railroad, your respondent maintains a spur that connects with the said traction company's street railway line at a point distant from said village of College View a mile and a half, as aforesaid; that said connection with the traction company's railway was made under and pursuant to a private agreement whereby this respondent was to set cars upon the spur herein referred to, to be disposed of and hauled to the said village of College View by the said traction company under a special and private contract made and entered into by the said traction company and the sanitarium, maintained, owned and operated by the Seventh Day Adventists' Association located in said village." It denied any combination to fix rates or switching district.

The answer of the Chicago, Burlington & Quincy Railroad Company alleges: "That this railroad designates its own switching limits without consultation or consent of any other railroad, except in that part of Lincoln where the possession of the territory is in common, or is parallel to each other, and where the facilities are such that immediate and economical exchange can be made of traffic, and that College View and the complainants herein are not

within any territory so occupied by said railroads, and denies that any combination or agreement has ever been made between this defendant and other railroads in the city of Lincoln with reference to switching which is illegal or unlawful, or discriminates against any person, particularly complainants. This defendant further alleges that the conditions at College View are entirely different from those at University Place and Bethany Heights, in that the latter points of delivery are within the switching limits of Lincoln upon the Chicago, Rock Island & Pacific Railway and the Missouri Pacific Railway. The Rock Island has a station outside of Lincoln limits called University Place, and a spur track which is used for handling car-load freight to and from University Place, which spur track is within the Lincoln switching limit. Bethany Heights is on the Missouri Pacific Railway within the Lincoln switching limit of that line, the switching charge in each case being $5 per car, which the tariffs of this company provide it will absorb with certain restrictions. College View is outside the switching limits of both the Rock Island Railway and this defendant, it being 5.9 miles from Lincoln by the line of this defendant, and no switching rates are published between College View and Lincoln by either line. The rates to College View and Lincoln are the same, and car-load freight only being handled at College View. The switching charge of the Lincoln Traction Company from the Rock Island west to the Nebraska Sanitarium is $7 per car."

In *Hooper Telephone Company v. Nebraska Telephone Company, ante,* p. 245, the practice in case of appeal directly from the railway commission to this court was considered. It was there pointed out that the original act (laws 1907, ch. 90) recognized three different methods of questioning the orders of the railway commission. Subdivision *e,* sec. 5, refers to the proceeding in equity which was allowed in the absence of any statute and prescribes the manner of proceeding in such case. Section 11 of the act provided for proceeding in the district court to en-

force the orders of the commission. This section provided that the court should "proceed to hear and determine the matter speedily as a court of equity * * * in such manner as to do justice in the premises." It contemplated that the court would hear evidence and try the case as ordinary cases in equity. Section 7 provided for appeals by the railway commission, or any person affected thereby, to the district court. It provided that upon the appeal the action "shall be tried and determined as other civil causes in said court." This, of course, contemplated the taking of evidence and full investigation of the whole matter in a court of justice. It also provided that either party might appeal to this court from the judgment of the district court, and that in the trial under this section the burden of proof should rest upon the plaintiff—that is, the party appealing—and that the order of the commission shall "be received in evidence, that said order (made by the commission) is *prima facie* just and reasonable." This section providing for an appeal and trial in the district court was the only section amended by the act of 1911 (laws 1911, ch. 94). By that act section 7 was repealed and a new section enacted in its place. The change made by this amendment was radical. It provided for a review of the proceedings before the commission by proceedings in this court to "reverse, vacate or modify the order complained of." These were the words used in the former statute providing for proceedings in error in this court to review the judgments of the district court in civil actions at law, and the section as amended further provided that the procedure "to obtain such reversal, modification or vacation of any such order or regulation made and adopted, upon which a hearing has been had before said commission, shall be governed by the same provisions now in force with reference to appeals and error proceedings from the district courts to the supreme court of Nebraska." It also provided for superseding the order of the commission until the matter could be reviewed in this court. It takes the place of the former section in the act, and is, of course,

affected by the provision of subdivision *b*, sec. 10 of the act, which provides that when proceedings are begun affecting the decision of the commission the order of the commission shall be held in abeyance until finally determined by the court. In the *Hooper Telephone* case it was decided that under this amendment appeals from the orders of the commission directly to this court are to be considered and determined in the same manner as appeals from judgments of the district court upon trial by jury in civil cases. It has uniformly been held by this court that in such cases the judgment of the district court will not be reversed unless it affirmatively appears from the record that it is clearly wrong. We have already determined in the case above referred to that when upon such appeal the record fails to disclose affirmatively that the order of the commission is clearly wrong, and the order is therefore affirmed by this court, it then becomes a final order. The Burlington company contends in its brief that there is no allegation in the record that its "commodity or class rates on articles transported by it between Lincoln and College View are unjust, or excessive," and that there is no evidence submitted to prove such fact, and that "by order of the commission every schedule and rate concerning transportation in car-load lots between Lincoln and College View is amended without any reference having been made thereto in the complaint or in the evidence." The complaint counts principally upon the allegations that there is a discrimination, on the part of the railroad companies centering in the city of Lincoln, between the village of College View on the one part and Bethany Heights and University Place on the other. The brief of the complainant is wholly devoted to this proposition that there is an unlawful discrimination, and that College View should be placed by the various railroad companies in the Lincoln "switching district." No reference is made in the brief to any evidence supporting this contention, and no attempt made to assist the court in ascertaining whether the facts will justify compelling these va-

rious railroad companies to form a "switching district" which will include the village of College View. The contention of the railroad company that there is no allegation or evidence that their charges upon shipments to College View are excessive or unreasonable is not controverted by the complainants in the brief. Their position seems to be that, without regard to the reasonableness of the charges for the services rendered, each of these defendants should be compelled to reduce its charges to the lowest charge for like shipments through the city of Lincoln to Bethany Heights and University Place.

"A finding that the rates charged by railroads for shipments to a particular point are unreasonable in themselves, and in violation of section 1 of the interstate commerce act (24 Stat. 379; U. S. Comp. St. 1901, p. 3154) cannot properly be based on evidence which only tends to show that they are too high as compared with the rates charged between the initial points and one or two other points." *Interstate Commerce Commission v. Nashville,* C. & St. L. R. Co., 120 Fed. 934.

"A reduced rate upon a particular commodity cannot be said to be reasonable and just when it is established without regard to whether the existing rate is high or low, as compared with rates on other commodities, and without regard to whether it will pay the cost of the service rendered, or yield a fair return to the carrier upon the capital invested." *Morgan's L. & T. R. & S. S. Co. v. Railroad Commission,* 53 So. 890 (127 La. 636).

"An order of the railroad commissioners that defendant railroad company transfer cars delivered to it by another company, from its station to another point, as a switching service and at switching rates, will not be enforced where such point is beyond the yard limits, and the service rendered is on the main line, and is done under orders, as in case of trains, and not under the direction of the yardmaster." *State v. Chicago, M. & St. P. R. Co.,* 55 N. W. 331 (88 Ia. 445). This last case cited was approved by this court in *State v. Sioux City, O. & W. R. Co.,* 46 Neb.

682, and the Louisiana case was cited with approval in *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission,* 85 Neb. 818.

It is conceded that the line of the Rock Island road does not pass through the village of College View. It runs near the corporate limits of the village, and a mile or more from the business part thereof, and the company maintains a side-track at that point upon which it places cars for unloading, upon request. This side-track is connected with the street railway, operated by the Lincoln Traction Company, and it appears that the Morris Transportation Company, through some traffic arrangement with the traction company, transfers cars from this side-track over the line of the traction company, under a contract which it has with a private company in College View, at a fixed charge, as agreed between the College View party and the Morris Transportation Company. It is also conceded that the line of the Burlington company passes through the corporate limits of the village of College View about one and a quarter miles from the business part of the village and maintains two sidings at that point, but has no station or office of any kind at or near the village of College View. These sidings are seven or eight miles from its Lincoln station and from its transfer facilities with other roads. The Rock Island road has a station and side-tracks at University Place, but does not pass through Bethany Heights, and the Missouri Pacific railroad maintains a flag station at Bethany Heights, but not in University Place. It seems clear that under these conditions the fact that the charges for the delivery of intrastate freight in car-load lots through the city of Lincoln to Bethany Heights or University Place are less than charges for the same services over the Rock Island and by way of the traction company's lines to College View, and is less than the same services over the Burlington lines at a distance of seven or eight miles from its station and transfer grounds, is not sufficient of itself to justify the order of the commission.

The findings of the commission show quite in detail the charges on freight in car-load lots to College View as com-

pared with charges from the same initial points to Bethany Heights and University Place. It appears that in some instances there is a considerable difference. The order, as before stated, grants substantially all the relief asked for, and does much more. It adjusts the rates on the several roads affecting College View and provides what they shall be for the future. It changes the contract price to be paid the Morris Transportation Company by the College View Sanitarium under their contract. It requires the Burlington and the Rock Island roads to receive cars from the other roads at the transfer yards in Lincoln and deliver them at the points on those roads nearest to College View, and fixes the charges therefor, and determines many other things not included in the complaint, and, so far as has been suggested or we have observed, not covered by the evidence. It is quite possible that there are existing conditions that ought to be corrected, but we are of opinion that the complaint and the evidence do not justify the order complained of.

The order complained of is therefore reversed and the cause remanded, without prejudice to further proceedings before the commission, if the parties are so advised.

REVERSED.

ROSE, J., not sitting.

FROTUNATO ZANCANELLA, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JULY 11, 1914. No. 18,440.

1. **Appeal:** MISCONDUCT OF JURY. Misconduct of the jury without the knowledge or consent of the parties interested will not require a reversal, unless it appears that it might have affected the verdict.

2. **Pleading:** AMENDMENT. Amendment of a pleading should be allowed when it is in "furtherance of justice." Such terms should be imposed as are reasonable and just. Under the circumstances in this case, the court erred in refusing the requested amendment of the answer.

3. **Street Railways:** NEGLIGENCE: EVIDENCE. If a plaintiff in an action for damages alleged to have been caused by the negligence of defendant, a street railway company, testifies that he stood by the side of the railway track, on which a car was approaching at a speed of 25 or 30 miles an hour, and looked and listened, but, because of the darkness of the night and the absence of a headlight on the car, he neither saw nor heard the car until, upon stepping upon the track, he was struck thereby, and afterwards saw the car at a distance of about two blocks, such evidence is so impossible in the nature of things as to have no probative force.

4. ———: ———: ———. The evidence in this case, indicated in the opinion, fails to prove that negligence on the part of the defendant was the proximate cause of plaintiff's injuries.

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

John L. Webster and *W. J. Connell,* for appellant.

George W. Cooper and *T. W. Blackburn, contra.*

SEDGWICK, J.

This case was once before in this court. On this last trial the plaintiff again recovered a verdict, and the defendant has appealed. There was considerable additional evidence taken, some of which will be referred to, but it is not thought necessary to repeat the statement of the uncontroverted facts, which may be found in the former opinion. 93 Neb. 774.

1. The defendant alleges that there was improper conduct on the part of the jury; some of them in the hall of the courthouse during an intermission conversed with Miss Hamilton, a nurse who took care of the plaintiff after his injury. She was an important witness on the trial, and her evidence appears to be wholly disinterested and reliable. Her affidavit was filed upon the motion for a new trial, in which she testified that one or two of the jurors in the presence of others asked her questions about the testimony she had given. She described a juror who questioned her as a "Jew or Dago," and shows that he and other jurors manifested a very unusual interest in the

cause of the plaintiff. The plaintiff himself was present at the time and appears to have addressed some remarks to the witness, but none of a nature that would ordinarily, perhaps, be regarded as objectionable. This was clearly misconduct on the part of the jury, and, if the plaintiff had encouraged it, would be sufficient ground to set aside the verdict. The plaintiff, perhaps, in view of the circumstances, and on account of his unfamiliarity with the language, is excusable for not having taken measures to prevent this misconduct. Misconduct of this nature on the part of the jury without the knowledge or consent of the parties interested would not be sufficient ground for setting aside the verdict, unless it appears that it might have affected their conclusion.

2. Plaintiff testifies that he took the car at Farnam street for South Omaha; that he informed the conductor that he wanted to leave the car at Twenty-fourth and G streets, and when it arrived at G street the conductor notified him; that it was then about 12 o'clock at night; that it was an open car; that he was sitting on the second seat from the rear and got off on the west side; he immediately passed around the back end of the car, intending to cross the parallel track and go east on G street; that, after the car on which he had arrived had left, he stepped between the two tracks and looked both north and south and listened, but did not see nor hear any approaching car; he then stepped onto the east track and was immediately struck by a north-bound car. His foot was crushed, and he was otherwise injured, and he says that he crawled on his hands and knees along between the tracks toward H street, about half a block, and then crossed over the west track, and became unconscious, and so remained until about 10 o'clock of the next day, when he found himself in the hospital in South Omaha. He says he did not see the approaching car until it struck him, and then saw it again after it had gone about two blocks. The defendant insists that it is impossible that he should have been injured in the manner which he describes; that his story

is proved by testimony of other witnesses to be untrue; that the trial court erred in excluding testimony that the plaintiff was intoxicated at the time, and also erred in not instructing the jury to find a verdict for the defendant. He testifies that his errand to South Omaha was to see his friend Candanella, who resided on G street in South Omaha. His friend had given him the number of his residence, which he had on a piece of paper in his pocket. It was a dark and stormy night. There was no light at the crossing at G street. Several witnesses testified that the plaintiff attempted to return to Omaha. The conductor and motorman and a passenger on a south-bound car testified that the plaintiff stopped the car and asked them if it was going to Omaha. They told him that the cars going to Omaha went in the other direction. Others testified that he stopped a north-bound car and made a similar inquiry, and was told that that car was not going to Omaha; that he should take the next car. He had never been to South Omaha before.

It was claimed by the defendant that the plaintiff was in an intoxicated or semi-drunken condition, so that he was unable to form any definite purpose, or to properly take care of himself. The conductor of the car on which he rode to South Omaha and the police officer who was on the car at the time testified that the plaintiff was asleep all of the way from Omaha, and the defendant offered to prove by these two witnesses that the plaintiff was intoxicated, and was unable to walk steadily, and also offered to prove, by the physician who saw him a few minutes after the accident, that the plaintiff had been drinking intoxicating liquors, and made similar offers of proof by other witnesses. This evidence was excluded by the court, on the ground that there was no allegation in the answer that the plaintiff was intoxicated at the time. The defendant asked leave to amend the answer and include that allegation. The court refused to allow such amendment. Under the circumstances of the case, and in the condition of the evidence and record at the time, we think

that this ruling of the court was erroneous and was highly prejudicial to the defendant. "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by * * * inserting other allegations material to the case." Rev. St. 1913, sec. 7712. This statute has been many times construed by this court, and the rule is that amendment should be allowed when it is "in furtherance of justice" to do so. In the former trial of this case, evidence that the plaintiff was intoxicated at the time was received by the court, and all of the parties knew that it was a substantial and important feature of the defense. The petition alleged that the accident happened "without fault on his part," and, if it is thought that evidence of the plaintiff's intoxication at the time was not competent under a general denial, the amendment should have been allowed upon such terms as the court should find were reasonable and just under the circumstances. The plaintiff could not have been surprised at the offer of this testimony. He made no showing that he was unprepared to meet it.

3. The plaintiff's allegations of negligence on the part of defendant rest entirely upon his own unsupported testimony. He says that, after the car on which he was riding had gone on, he stood between the two tracks and surveyed the situation. The car was approaching then at the rate of 25 or 30 miles an hour, but he heard no sound, although his hearing was good at the time. He saw the car after it struck him, and saw it again two blocks farther on, but he did not see it approaching. He says that it had no headlight, and we are to infer from his evidence that it contained no light of any kind that could be seen. He is, of course, mistaken in saying that a street car approaching at that rate of speed made no noise that could be heard by one who was listening.

It is urged in plaintiff's brief that, it having been held in the former decision of this case that the evidence justified submitting the case to the jury, that holding be-

comes the law of the case, and will control the decision on this appeal. This would perhaps be the rule if it clearly appeared that the evidence was the same upon both trials, but that is not the case here. In the first trial the plaintiff testified that when he left the car upon its arrival at G street he walked around the north end of the car and went east on G street, and was struck by a north-bound car which was passing the other car at great speed, 25 or 30 miles an hour. In the last trial his testimony was that, after he had left his car and the car had gone on, he stepped over the first track and stood between the two tracks and looked both ways and listened, but neither saw nor heard the approaching car, with evidence as to the speed of the car, and his ability to see it after it had passed him, as before stated. The story he now tells is impossible, and the manner of his injury is wholly unexplained. Several witnesses testify that all of the street cars on that line had headlights that night at that hour. Three witnesses testify that when the plaintiff left the car on which he rode he went immediately west to the side of the street. Two of these were the conductor and motorman of the car. It is suggested that they were under the influence of the defendant, and were therefore not to be believed as against the plaintiff. The third witness was a police officer on the car, and none of these three witnesses appears to be more interested in the result than the plaintiff himself. The plaintiff testifies that, after his foot was crushed, he crawled along between the tracks to the middle of the block, about 150 feet. He does not know why he did that, instead of going to the walk on the side of the street, and several witnesses who found him within a few minutes after the accident testify as to his condition, and to circumstances which strongly indicate that he was injured at or near the place where he was found, and are wholly inconsistent with the plaintiff's story. The plaintiff was a young man of foreign birth, about 23 years of age. He has suffered the loss of a foot and other terrible injuries, and seems to believe that he was in some manner

injured by one of defendant's cars, and that he ought to be compensated for such injury, but he fails to prove any negligence on the part of the defendant that could have been the cause of his misfortune. It is manifest that the plaintiff has failed to prove that negligence of defendant was the proximate cause of his injuries, as alleged, and has therefore no cause of action.

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

REVERSED AND DISMISSED.

FRANK C. BEST ET AL., APPELLANTS, V. HARLEY G. MOORHEAD, APPELLEE.

FILED JULY 11, 1914. No. 18,639.

1. **Counties:** COMMISSIONERS: TERM OF OFFICE. Chapter 46, laws 1905, fixes the term of county commissioners of counties having a population of more than 150,000 at four years. Commissioners elected under and pursuant to that act, as amended, hold the office for four years and until their successors are elected and qualified.

2. ———: ———: ———: STATUTE: VALIDITY. *State v. Plasters*, 74 Neb. 652, and subsequent cases following that decision are overruled so far as they hold that act invalid to fix the term of county commissioners at four years.

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

W. T. Thompson, W. W. Slabaugh and *H. A. Reese,* for appellants.

George A. Magney and *Charles Haffke, contra.*

SEDGWICK, J.

These plaintiffs, Frank C. Best and August C. Harte, were duly elected to the office of county commissioner of the third and fifth commission districts of Douglas county,

at the general election in 1911, and were duly qualified and entered upon the duties of the office in January, 1912. They contend that they were elected for the term of four years and that their respective terms will not expire until January, 1916. The defendant is election commissioner of Douglas county, and plaintiffs allege that the defendant is about to, and unless restrained by decree in this case will, "receive nomination papers and petitions from several parties seeking to become candidates" for said office "now represented by plaintiffs," and will file the same and "will place the names of such parties on the official primary ballot to be voted for and nominated to the said offices at the primary election to be held in Douglas county on the 18th day of August, 1914, * * * and will thereby create a useless and unnecessary expense" to the county and taxpayers thereof. They asked that defendant be enjoined from so doing. The defendant filed a general demurrer to the petition, which was sustained and the cause dismissed. The plaintiffs have appealed.

The sole question presented on this appeal is as to the length of the terms to which plaintiffs were elected. The plaintiffs insist that under the statute the term is four years, and the respondent insists that it is three.

The statutes governing this question are conflicting and inconsistent and cannot be literally enforced. Prior to 1905 the statute provided for five commissioners in Douglas county and fixed the term at three years. The act of 1905 (laws 1905, ch. 46), under which these plaintiffs were elected in 1911, contained the provision for five commissioners, but attempted to fix the term at four years. If this act is constitutional and has not been superseded and its terms are such as to be capable of being enforced, the plaintiffs are right in their contentions.

The constitutional amendment of 1912 provided: "The general election of this state shall be held on the Tuesday succeeding the first Monday of November in the year 1914 and every two years thereafter. All state, district, county, precinct and township officers, by the constitution or laws

made elective by the people, except school district officers, and municipal officers in cities, villages and towns, shall be elected at a general election to be held as aforesaid. * * * Provided, that no office shall be vacated thereby, but the incumbent thereof shall hold over until his successor is duly elected and qualified." Const., art. XVI, sec. 13. In 1913 the legislature enacted a general statute repealing former acts and by which it was intended to harmonize the statutes with the constitutional amendment quoted above. Rev. St. 1913, ch. 20. Section 17 of the act (laws 1913, ch. 149; Rev. St. 1913, section 1955) provided: "In counties not under township organization having five commissioners, three commissioners shall be elected in the year nineteen hundred and fourteen, and every fourth year thereafter." Construed literally, this would vacate the office of any commissioner whose term did not otherwise terminate on or before January, 1915. This, of course, the legislature could not do, as the constitution provided that "no office shall be vacated" on account of the change made by that amendment. The legislature will not be presumed to have intended a violation of the constitution, and this provision of the act of 1913 must be construed as intended to apply only when such offices were or would become vacant before or at the time the terms of those elected in 1914 would begin. It could not therefore apply to these plaintiffs if the term to which they were elected was for four years. The petition alleges that two commissioners were elected in the year 1910. Their successors will therefore be elected in 1914. One was elected in 1912. His term of office will be until January, 1917. The act of 1913 (Rev. St. 1913, sec. 1955) provides that three commissioners shall be elected in 1914 and every four years thereafter. This requires that three commissioners shall be elected at the end of four years from 1914; that is, at the election of 1918. It cannot be effective as to the election of 1914, since the terms of only two commissioners will expire in January, 1915.

Was the act of 1905, under which these plaintiffs were elected, constitutional? Defendant's counsel insists that

it is not, and cites *State v. Plasters,* 74 Neb. 652, *State v. Galusha,* 74 Neb. 188, *State v. Drexel,* 76 Neb. 299, *State v. Furley,* 95 Neb. 161, as conclusive upon that point.

In *State v. Plasters, supra,* the question was whether the act there considered could have the effect to extend the terms of the incumbents of office of register of deeds in the several counties for another year beyond the term for which they were elected, and it was held that the legislature could not so extend the terms of office of the incumbents. This was the question mainly discussed in the opinion and the only question necessary to determine in that case. In the syllabus it is said that the legislature cannot "by an act wholly for that purpose extend the terms of such officers." Similar language is used in the opinion, which would indicate that the court considered that the sole object of the act therein questioned was to extend the terms of certain registers of deeds. It is manifest that this was not the sole object of the act. The object of the act was to change the time of the election of the registers of deeds in the state from the odd-numbered years to the even-numbered years, and the provision fixing the length generally at four years and extending the terms of the incumbents was incidental to that purpose. There is no doubt that the legislature has the power to change the date of the election and fix the length of the term generally, and it was not necessary to declare the whole act unconstitutional, as appears to be stated in the second paragraph of the syllabus.

State v. Drexel, 76 Neb. 299, appears to have involved the same question, the attempt being "to extend for definite periods the terms of office of two of the county commissioners of Douglas county," and that case was determined upon the authority of *State v. Plasters, supra.*

In *State v. Galusha,* 74 Neb. 188, it was held that the general act of the legislature of 1905 (laws 1905, ch. 65) was unconstitutional because it attempted to change the terms of constitutional officers that were fixed by the constitution itself. Chapter 46, laws 1905, was not involved

nor considered in that decision. The earlier decisions were predicated entirely, and *State v. Furley,* 95 Neb. 161, partially, upon the statement of the second paragraph of the syllabus of the decision in *State v. Plasters, supra.* That statement of the law, as we have already said, was not necessary to the decision in the *Plasters* case, and was therefore not authoritative and ought not to have been followed. Chapter 46 is an act complete in itself and separate from chapter 65. It has several times since its enactment been considered constitutional by the legislature and is in harmony with the amendment to the constitution of 1912. This amendment was adopted after the legislature had several times reenacted chapter 46, and is therefore in some sense a recognition of the validity of that act. The only ground upon which chapter 46 could be held unconstitutional is that chapter 65 was an inducement to its passage. That point we expressly refused to decide in *State v. Plasters, supra,* and no authority has been cited holding that one act of the legislature should be regarded as an inducement to the passage of a separate and distinct act. If we should so hold in this case, it would lead to confusion and render many acts of the legislature incapable of application.

We therefore conclude that chapter 46, laws 1905, is not wholly invalid. It and subsequent acts of the legislature fix the term of county commissioners of Douglas county at four years, and plaintiffs were elected under and pursuant thereto. It follows that the plaintiffs' terms of office are four years and will not expire until January, 1916.

The decree of the district court is therefore reversed and the cause remanded, with instructions to enter a permanent injunction as prayed.

REVERSED.

REESE, C. J., and ROSE, J., not sitting.

IOWA RAILROAD LAND COMPANY, APPELLANT, V. GEORGE COULTHARD, APPELLEE.

FILED JULY 11, 1914. No. 17,532.

1. **Boundaries:** NAVIGABLE STREAMS: CHANGE OF CHANNEL. Where a stream which is a boundary from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; the boundary remains as it was in the center of the old channel, although no water may be flowing therein. *State of Nebraska v. State of Iowa,* 143 U. S. 359.

2. ———: ———: ———. If the change in the stream is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel has formed, the original thread of the stream continues to mark the limits of the two estates. Gould, Waters (3d ed.) sec. 159.

3. **Adverse Possession:** SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* to support the finding and judgment of the court below.

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

E. B. Carrigan and *Sanford H. Cochran,* for appellant.

W. C. Walton and *J. S. Dewell, contra.*

HAMER, J.

This is an appeal from Washington county. There was a petition in equity to quiet title to about 500 acres of land. The answer sets up want of jurisdiction, accretion, and adverse possession. There is a reply and an affirmative plea of avulsion.

The United States made its survey in Iowa in 1852 and in Nebraska in 1856. It is claimed by the Iowa Railroad Land Company that between the United States survey of 1852 and the survey of 1856 the Missouri river gradually cut to the north until it cut away all of section 34 in Iowa, and that it was running along near the north line of sec-

tion 34 in April, 1857; that by reason of the breaking up of an ice gorge the Missouri river suddenly changed its channel, and shot into Nebraska and left a body of land between the Missouri river and Soldier river; that before said avulsion the lands had been added to the Nebraska side and were embraced within the government survey of 1856. The trial court seems to have specially found that the change was caused by an avulsion; that the title to the land was legally in the Iowa Railroad Land Company, and but for the plea of adverse possession the company would be entitled to all the lands in controversy. The particular 160 acres is said to be located in the north half of section 21 under the Nebraska survey. The court found for the defendant as to his plea of adverse possession to 160 acres of the land. The appeal involves this tract of 160 acres. The special finding of the trial court as to the changes of the Missouri river is set forth in the decree, and reads: "And the court, being fully advised in the premises, finds especially at the request of the plaintiff that the Missouri river on or about March 5, 1857, ran east along or near the north line of section 34, township 79, range 45 west 5th P. M.; that about April 10, 1857, the said Missouri river suddenly abandoned its channel and made a new channel to the south and west, by which it left the land in question north and east of it, and between it and the Soldier river; and the courts of Nebraska have jurisdiction of all lands within the United States survey of 1856 without regard to the enabling act by which Nebraska was admitted into the Union, except such lands, if any, as may have accreted to the Iowa bank before the said avulsion occurred. And the court further finds that all of the land described in the petition of the plaintiff is within the state of Nebraska and the county of Washington, and this court has jurisdiction of the subject matter of this action. And the court further finds that the north half of section 21, township 19 north, range 12 east, if extended, and the south half of section 34, township 79, range 45 west 5th P. M., if extended, are substantially the same

tract. And the court further finds that the plaintiff is the owner of and has a legal estate in all the lands described in its petition in this action, except those lands described as situated in the said section 34, township 79, range 45 west 5th P. M., as said section would exist if extended to the full limits and extent of one mile square as specifically described in defendant's answer, and the title thereto is forever quieted in this plaintiff. And the court further finds that the defendant George Coulthard has been in the open, notorious, exclusive, uninterrupted adverse possession under color of title, and claiming to be the owner thereof, of all lands described in plaintiff's petition, situated in said section 34, township 79, range 45 west 5th P. M., as claimed by plaintiff to be situated in the north half of said section 21, for more than ten years prior to the commencement of this action, and was, at the commencement of this action, the owner thereof and in the actual possession of the same, and the plaintiff was not and is not the owner thereof and had no estate therein, at the commencement of this action. * * * It is therefore considered and decreed by the court that as to all the lands situated and lying in said section 34, township 79, range 45 west 5th P. M., and set forth and described in defendant's answer, the plaintiff not being the owner thereof at the commencement of this action, the said suit in relation thereto is hereby dismissed at the cost of the plaintiff taxed at $——."

The land in dispute, under the evidence and special findings of the trial court, is in Nebraska. The evidence of Chambers Hester justifies the conclusion that section 34, originally in Iowa by the Iowa survey, had been cut away by the river so that the river ran along near the north boundary of that section. "Q. Where was the Missouri river running with reference to the north line of section 34 at the time it made its change into Nebraska? A. Why, it ran right along the line pretty close to it. Q. What did it do in the spring of 1857, by way of changing its channel? Describe to the judge how the Missouri river acted

in the spring of 1857 about changing its channel to Nebraska, if it did. A. It changed its channel onto the Nebraska side and cut around quite a body of land." It appears that the avulsion changed the course of the stream so that it ran over into Nebraska, and the Soldier river seems to have declined to run toward the new channel of the Missouri, and it kept along the old channel and more or less occupied it. At the time of said avulsion the greater part of said section had become a part of Nebraska. The plaintiff's lands do not appear to have been within the original boundary of fractional section 34 in Iowa. It will be seen that the line of these surveys probably conflict. It will be seen that the boundary between the states was more or less uncertain by reason of the fact that it changed with the accretion which displaced it. It had no certain stopping place.

The boundary between the states, if the surveys did not overlap, was the central thread of the Missouri river. This central thread changed as the stream changed. When the stream cut its way into the north side of section 34, the central channel changed farther and farther over to the Iowa side. When the avulsion occurred (to which all parties agree) the channel of the Missouri river, about half a mile in width, suddenly changed and went over into Nebraska. Because of the sudden change the dividing line between the states remained where it was. It then remained in what had been the central thread of the Missouri river. An examination of the litigation touching this subject shows apparently some uncertainty. See *State of Nebraska v. State of Iowa,* 143 U. S. 359; *Coulthard v. Davis,* 101 Ia. 625.

It is contended by the appellant that the appellee made application to the state of Iowa to have the land in the abandoned channel of the Missouri river surveyed and to purchase the same, and it is argued that because he did so therefore his claim now is without merit. We do not so regard it. He might have sought this method of terminating a troublesome and uncertain litigation. He was at

liberty to maintain what he conceived to be his rights by any lawful method. The brief of appellant graphically sets forth the uncertainty of conditions affecting the title. "We find in the record of evidence that the Missouri river, since the United States survey of 1852 in Iowa, has made many changes in the vicinity of this land; that the original government lines and corners were obliterated; that a perfect jungle existed in many parts of this great body of land now located between the Soldier river in Iowa and the present Missouri river; that squatters have roved over it from point to point sojourning for a time and removing to some other part."

In *Coulthard v. Davis,* 101 Ia. 625, is a discussion touching the Missouri river and where it ran. It is said in the opinion: "The evidence in this case quite satisfactorily shows, that in 1856, when the land adjoining the Missouri river in Iowa was surveyed by the general government, the main channel of said river was a mile and a quarter, or more, east of its present location. Since said time there has been added to the Iowa side the tract of land in controversy, as well as other land, embracing in all several hundred acres. Whether this land has been added in such a way as to be accretion, or whether it has been added by a sudden and entire change in the river, detaching this body of land from the west bank of the river, and attaching it to what was formerly the east bank of the river, in such a way as that it is capable of identification, is the question we are called upon to determine." There is then a discussion of the condition of the land, from which the court concludes that it was not added by accretion; that the soil was too rich; that it had cottonwood trees upon it from 15 inches to 2 feet in diameter; and that these trees would not have been produced within the time elapsing if the land had been added by accretion. The conclusion of the court therefore was that the judgment of the court below should be affirmed. All the evidence tends to show an avulsion by which the Missouri river left its old channel and came over into Nebraska

leaving land on the east side included in the survey of the government when the Nebraska survey was made.

The evidence as to adverse possession of the 160 acres by defendant is not as certain as we could wish. It is of such a character that we cannot say that the finding and judgment of the district court are wrong. The judgment is therefore

AFFIRMED.

JOHN F. COAD, JR., ET AL., EXECUTORS, APPELLANTS, V. GEORGE W. E. DORSEY ET AL., APPELLEES.

FILED JULY 11, 1914. No. 17,677.

1. **Limitation of Actions:** FRAUD. An action for relief on the ground of fraud must be commenced within four years after the discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery. *Parker v. Kuhn,* 21 Neb. 413.

2. ———: PLEADING AND PROOF. The pleadings and proofs examined, and *held* not to establish a cause of action.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

D. L. Johnson, Frank Dolezal and *S. O. Cotner,* for appellants.

E. F. Gray and *George L. Loomis, contra.*

HAMER, J.

The petition in this case, filed May 18, 1911, seeks to subject certain property alleged to be the property of George W. E. Dorsey, to the payment of a judgment in favor of Mark M. Coad rendered on the 11th day of February, 1905, in the district court for Dodge county, Nebraska, against said Dorsey. The basis of the action is

alleged fraud, the inception of which is charged to be May 6, 1893, when said Dorsey made certain conveyances claimed to be in fraud of creditors. At the commencement of this action it is claimed that there was due on said judgment a little more than $19,800. It is alleged that the property in question is real and personal property standing in the names of the defendants Laura H. Dorsey and Maria Louise Dorsey. It is charged by the plaintiffs that the conveyances complained of were made to the immediate members of George W. E. Dorsey's family, members either by marriage or blood-relationship. On the 6th day of May, 1893, certain conveyances were filed for record in Dodge county, Nebraska: (a) A mortgage to the Farmers & Merchants National Bank of Fremont conveying about 75 lots and tracts of land in the city of Fremont to secure $25,000; (b) a mortgage to Emeline Benton conveying 13 lots and tracts of land in and about the city of Fremont to secure the sum of $14,300; (c) a deed conveying to Cornelia Bunnell 46 acres and certain other lots for an alleged consideration of $5,800; (d) a deed conveying to the United States National Bank of Omaha certain properties in and about the city of Fremont described by metes and bounds, and certain other lots, for the named consideration of $7,000; (e) a deed conveying certain other property alleged to be the remainder of George W. E. Dorsey's real estate in Dodge county to Charles S. Davis of Massachusetts, the consideration, as shown by the deed, being $5,000.

It is plaintiffs' contention that, the mortgages to the Farmers & Merchants National Bank and Emeline Benton having been filed for record on the 6th day of May, 1893, and the Rochester Loan & Banking Company, the South Omaha National Bank, and others on the 10th day of May, 1893, having filed attachments on the mortgaged property, therefore the failure occurred at that time. September 25, 1893, the bank filed a petition to foreclose its mortgage, and Emeline Benton filed her cross-petition praying to foreclose upon her mortgage. A decree was taken April

14, 1894, and on the 13th day of June, 1894, the property covered by the bank's mortgage was sold to the bank, and the property covered by the Benton mortgage was sold to Emeline Benton. There was a judgment for a deficiency for $9,726.63 in favor of the bank and against Dorsey. There was also a judgment for a deficiency amounting to $3,504.57 in favor of Emeline Benton which was also taken against Dorsey. In due time there were sheriff's deeds issued to the purchasers, who took possession of the property thereunder. It appears that George W. E. Dorsey married Emma E. Benton for his first wife. She was the sister of Maria Louise Benton, who married H. H. Dorsey, and who was George W. E. Dorsey's brother. Maria Louise Dorsey (formerly Benton) is one of the defendants in this case. Emeline Benton was the mother of Emma E. Benton, Maria Louise Benton, and Edward A. Benton. Emma E. Dorsey, formerly Emma E. Benton, died March 12, 1903. George W. E. Dorsey on the 19th day of April, 1905, married Laura H. Hodge, as his second wife, who is one of the defendants. The petition in the instant case was filed May 18, 1911. George W. E. Dorsey died June 12, 1911, less than a month after the petition was filed. Cornelia Bunnell was the aunt of Edward A. Benton and the Benton sisters; Jennie A. Gibson is the sister of Emma E. Benton. The Western Realty & Investment Company is a corporation organized and existing under the general laws of Nebraska, having its principal place of business at Fremont, Nebraska. The Farmers & Merchants National Bank of Fremont is a corporation, as is also the Fremont National Bank of Fremont.

The petition alleged the death of Mark M. Coad on the 4th day of January, 1911; the admission of his will to probate by the county court of Dodge county on the 30th day of January, 1911; that the plaintiffs are executors appointed by the court on said 30th day of January, 1911, and that they bring the action as executors. The indebtedness of George W. E. Dorsey prior to the 14th day of October, 1893, to the decedent Coad is set up. This pro-

ceeding is based on that old indebtedness. On the 18th day of May, 1911, the plaintiffs caused an execution to be levied upon certain real property described as the property of George W. E. Dorsey. A specific description of each parcel is set forth in the petition, but it is not alleged in whose name the property is held. There is the allegation that the property is not held in the name of said George W. E. Dorsey, and that it appears in the name of Maria Louise Dorsey, Emma E. Dorsey, deceased, Jennie A. Gibson, Jennie Christia Benton, and Laura H. Dorsey; that said George W. E. Dorsey has no property or assets outside of the foregoing property subject to levy on execution, and that whatever property and assets he may have he keeps concealed so that the same cannot be found by his creditors; that prior to the 14th day of October, 1893, the said George W. E. Dorsey contrived to place the property then owned by him and such as he might thereafter acquire in secret trust in the names of other persons to hold for him so that his ownership might be concealed; that Laura H. Dorsey, after her marriage to the said George W. E. Dorsey, joined him in his fraudulent schemes of keeping his property concealed from his creditors; that some of the property held by the said Maria Louise Dorsey was conveyed to the said Laura H. Dorsey without any consideration being paid by her to the said Maria Louise Dorsey, and that said property is so held in secret trust as the property of the said George W. E. Dorsey; that all of the aforesaid property so levied upon now stands in different parts and parcels, respectively, in the names of Maria Louise Dorsey, Laura H. Dorsey, and Jennie A. Gibson, in her maiden name of Jennie Christia Benton, and is the property of said George W. E. Dorsey held for him in secret trust. The petition concluded with a prayer that the deeds and will be set aside, and the property declared to be the property of George W. E. Dorsey, and that the persons *holding title to the same shall be* declared to hold the same in trust for said George W. E. Dorsey. The description of the particular property claimed

to be held by *each person* is not set forth in the plaintiff's petition.

The defendant Laura H. Dorsey in her answer describes the real property which she owns, and alleges that she, by herself and her immediate devisor and grantors other than George W. E. Dorsey, has been in the actual, exclusive, continuous, uninterrupted, notorious, and peaceable possession, occupation and use of said property adverse to all the world for more than ten years before the commencement of this action; that she is the owner of 43 of the shares of stock of the Farmers & Merchants National Bank of Fremont, Nebraska; that she has been the owner of said stock for more than ten years prior to the commencement of this action; that as to all of said property, real and personal, the alleged causes of action stated in the plaintiff's petition did not accrue within four years next before the commencement of the action, nor within ten years before its commencement, and that said alleged causes of action are each and all barred by the statute of limitations of the state of Nebraska. The prayer attached to the defendants' answer asks that her title in the premises shall be forever quieted.

The answer of Maria Louise Dorsey contains, first, a general denial, then a specific description of the property which she claims to own, and similar allegations to those contained in the answer above quoted. She also sets up that a large part of this property which she describes has been sold or contracted for sale to many persons who have made payments thereon. She prays that her title to the land shall be forever quieted.

The Farmers & Merchants National Bank alleges its organization as a bank, and pleads that the cause or causes of action did not accrue within four years, nor within ten years, next before the commencement of the action. The Fremont National Bank makes a similar answer. The defendant Jennie A. Gibson sets up the fact that the will of Emma E. Dorsey was duly probated, and that the defendant, Laura H. Dorsey thereafter became the wife of the

said defendant George W. E. Dorsey; there is then the defense that the cause of action did not accrue within four years next before the commencement of the action, nor within ten years. There is also an answer made by the administrators of the estate of Emma E. Dorsey. They plead the statute of limitations both as to four years and ten years.

In their replies the plaintiffs allege that they "did not discover said fraud until within one year next before the beginning of this action." This is given as an excuse for disregarding the statute of limitations both with respect to the four years and the ten years next before the commencement of this action. If the trial court was not fully satisfied of the truth of the excuse so made, it could readily find against the plaintiffs on that issue. The decree of the district court is in favor of the defendants. The pertinent language of the decree is:

"And the court, being now fully advised herein, does find generally upon the issues joined in favor of all of the defendants and said administrators and heirs, and, as well, in favor of said Maria Louise Dorsey and Laura H. Dorsey, on their respective cross-petitions or counterclaims, wherein they seek to have their respective titles to the real property described in their respective answers quieted against the claims of the plaintiffs, and for injunction against the plaintiffs thereto. The court further finds that the said Maria Louise Dorsey and Laura H. Dorsey are entitled to decree, respectively, quieting their titles to their said respective real properties, and for injunction as by them respectively prayed in their respective cross-petitions or counterclaims; and that all of the defendants are entitled to decree dismissing the plaintiffs' petition."

The plaintiffs' action was dismissed, and by an appeal plaintiffs have brought the case to this court.

Where husband and wife by their joint labor increase the extent and value of the wife's property without taking anything from the creditors of the husband, such creditors have no right to complain. Both of the Mrs. Dorseys had property of their own.

It appears that Mark M. Coad lived at Fremont for many years before the commencement of this suit. He must have known of the material facts alleged in his petition for many years, and the evidence does not show any want of knowledge on his part. More than 20 years elapsed between the creation of the debt and the commencement of this case. In the meantime three of the principal witnesses had died—Emma E. Dorsey, Emeline Benton, and Cornelia Bunnell. George W. E. Dorsey died within less than a month after the filing of the petition, and before any testimony had been taken. Four important witnesses are now dead. These persons, if living, could probably testify to the actual facts. They certainly knew them. These women, Maria Louise Dorsey and Laura H. Dorsey, should not have taken from them the property that they have been in adverse possession of for more than ten years before the commencement of the case. It must be remembered that there is no affirmative evidence in the record of any trust agreement or of any purchase of property by the above named defendants to be held by them for the benefit of George W. E. Dorsey or any other person.

The statutes provide that an action for relief on the ground of fraud must be commenced within four years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and prudence on an inquiry, which, if pursued, would lead to such discovery. *Parker v. Kuhn*, 21 Neb. 413. In *Parker v. Kuhn* will be found a learned discussion on the application of the Nebraska statute of limitations in cases where fraud is charged. The learned Justice adopts, with approval, the language of Mr. Justice Clifford in *Godden v. Kimmell*, 99 U. S. 201, to the effect that courts of equity hesitate to enforce stale demands, and that, if relief be sought in such cases, plaintiff should set forth in his bill the reasons for the long delay in prosecuting an action.

A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and, if he had the means of discovery

in his power, he will be held to have known it. *Wood v. Carpenter,* 101 U. S. 135.

As was above stated, Mark M. Coad lived in the city of Fremont. He and George W. E. Dorsey were neighbors. It would seem that he should have discovered the frauds charged more than four years before the commencement of the action, if there were any frauds. We find no sufficient reason for the delay in commencing the case. It is shown that the plaintiffs' testator knew, or should have known, of the transfers of the property complained of, and he knew, or should have known, the facts pertaining to the allegations of fraud. And he knew, or should have known, those things more than four years before the commencement of this suit. On the pleadings and proofs the action is barred by the statute of limitations.

We are unable to say that the finding and judgment are wrong, and the judgment of the district court is therefore

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

ALBERT N. ORCUTT, APPELLANT, V. JAMES H. MCGINLEY ET AL., APPELLEES; ALFALFA IRRIGATION DISTRICT, APPELLANT.

FILED JULY 11, 1914. No. 18,011.

1. **Judgment:** RES JUDICATA: IRRIGATION BONDS. Where the complainant, one Thomas, filed his bill in the circuit court of the United States, alleging that he was a citizen of the state of Iowa, a taxpayer in Keith county, Nebraska, and that Keith county, its treasurer, the board of county commissioners thereof, and the board of directors of the Alfalfa Irrigation District, and said Alfalfa Irrigation District were proper parties defendant to the bill, and setting forth that W. O. Rogers, one of the defendants, had received certain of the bonds of the district in payment for work done in the construction of a ditch for said irrigation district, and that Elizabeth O. Rogers had also received certain of the bonds in payment for certain addi-

tional work which she had done on the said ditch, and it further appeared that one M. S. Collins, who was then an owner of certain lands mentioned in the bill as being within said district, sought to be protected from an assessment and levy of taxes to pay said bonds, and that said Collins and the other landowners in the district had assented to and acquiesced in the construction of the said ditch and the delivery of the bonds, and had accepted the benefit to their lands arising from the construction of said works, and on the trial it was held by the said United States circuit court that the said bonds were void in the hands of the said contractors to whom they had been delivered, and they were ordered to be canceled, and thereafter said cause was appealed to the United States circuit court of appeals for the Eighth judicial circuit, where the judgment of the said United States circuit court was reversed and the said bonds declared valid in the hands of such contractors, and thereafter the plaintiff in this case, one Orcutt, filed his petition in the district court for said Keith county, in which he alleges that he is a taxpayer in the said irrigation district, and that he owns the same lands described as the property of said Collins, and sets up substantially the same facts that were adjudicated in the United States circuit court and in the United States circuit court of appeals, and makes the said officers of said county and the said Alfalfa Irrigation District and its officers parties defendant, and introduces evidence tending to prove the same facts shown at the former trial, it will be held in this court on appeal that the case is *res judicata*, and that the new plaintiff may not, by reason of the fact that he is a new purchaser of the lands of said Collins in said district, become entitled to maintain his action and to relitigate the facts in said case.

2. **Waters:** IRRIGATION BONDS: VALIDITY. "Where an irrigation district, organized under the laws of a state and expressly authorized to issue bonds, sells the same to the highest bidder after advertisement, and to use the proceeds for the construction of irrigation works, issued bonds which it had voted at par directly to a contractor in payment for work which he had performed, its action was at most no more than an irregular exercise of its power, and, where neither the district nor any taxpayer questioned the validity of the bonds until eight years after their issuance and after the right of the contractor to maintain an action at law to recover for his work was barred by limitation, a subsequent purchaser of property in the district cannot then maintain a suit to have them declared void because of such irregularity." *Rogers v. Thomas*, 193 Fed. 952.

3. **Equity:** LACHES. Courts of equity in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which governs courts of law in like cases.

4. **Judgment:** CONCLUSIVENESS: MUNICIPAL CORPORATIONS. A judgment against a municipal corporation is equally conclusive upon such

corporation and its taxpayers. *Owens v. City of South Omaha*, 2 Neb. (Unof.) 466.

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

Hoagland & Hoagland and *J. G. Beeler*, for appellants.

A. H. Burnett, Brome & Brome and *Wilcox & Halligan*, *contra.*

HAMER, J.

This is an action brought by Albert N. Orcutt, the plaintiff, and now one of the appellants, against James H. McGinley, the county treasurer of Keith county, the Alfalfa Irrigation District, the First National Bank of North Platte, and others. We will omit a statement of the contents of the pleadings, giving only such parts as may seem necessary to a general understanding of the case.

The plaintiff alleges the ownership of certain land within the Alfalfa Irrigation District, part of which he asserts may not be irrigated. It is his purpose (1) to set this land outside of the district, (2) to cancel the irrigation taxes against the plaintiff's land for the year 1896 to and including 1909 because of certain alleged irregularities in the issue of the bonds, (3) to cancel the irrigation bonds issued by the Alfalfa Irrigation District of the date of July 1, 1895, in the sum of $22,000, also, to enjoin the different owners of such bonds from asserting any claim against the district and against the plaintiff's land on account of such bonds. The Alfalfa Irrigation District was formed in the year 1895. On May 14, 1895, the petition was filed in the office of the county clerk of Keith county looking to the organization of the "Alfalfa Irrigation District." The boundaries of the proposed district were set forth in the petition. On June 8, 1895, an election was held, and the district was declared to be organized. On July 13, 1895, there was an election to issue $22,000 of the bonds of the district for the construction of irrigation works, said bonds to mature in 20 years from their date.

Before any of the bonds of the district were issued and before any construction fund was created for the building of an irrigation canal, the defendant W. O. Rogers, on or about August 21, 1896, submitted a bid in writing for the construction of the canal, and the same was let to him at 8 cents a cubic yard payable in bonds. The board accepted his bid and entered into a contract with him to deliver the bonds of the district in payment for the labor and at the rate of 8 cents a cubic yard, and thereafter delivered the bonds of said district from November, 1896, until some time in 1898. In August, 1895, a special proceeding was instituted in the district court for Keith county, Nebraska, by the board of directors of the said district, in which a confirmation of the action of the inhabitants of the district in organizing and voting and issuing the bonds was sought. The validity of the organization of the district was challenged, as also its right to issue the bonds. On the 31st day of August, 1895, a decree was entered in that proceeding in the district court for Keith county finding and adjudging that the said Alfalfa Irrigation District was lawfully organized, and the bonds issued as the law directed. There was an appeal from this judgment. This court affirmed the decree of the district court, and the bonds were declared to be valid obligations of the said Alfalfa Irrigation District. *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb. 411.

After the decree of the district court confirming the organization of the district, the then officers of the district, M. A. Daugherty, president, and H. C. Anderson, secretary, signed up and held in the office of the secretary the $22,000 of bonds, being the same bonds offered in evidence in the confirmation suit. On the 18th day of September, 1896, the said Alfalfa Irrigation District entered into a contract with said W. O. Rogers, by which he (Rogers) agreed to excavate the canal under the supervision of the engineer employed by the district. W. O. Rogers died in March, 1898. Prior to his death he had constructed the canal, and his work had been accepted by the district and

approved by its engineer. At the time of his death he was the owner of $14,000 of the bonds. These bonds became the property of his widow and minor children, who are appellees in this case. In the spring of 1898 a contract for an extension or completion of the said irrigation system was entered into by the said Alfalfa Irrigation District with the appellee Elizabeth O. Rogers, the widow of W. O. Rogers. She performed her contract with the district and received from it bonds to the amount of $3,100. From the time of the issuance of these bonds down to 1906 the district made assessments and levied taxes upon land in the district for the purpose of paying interest on these bonds. The name of W. O. Rogers was written on the bonds as payee. The evidence shows that Rogers authorized the bonds issued to be destroyed and new bonds to be issued payable to bearer. The new bonds in the form in which they are now held by the defendant Rogers were executed by the then officers of the district. The new bond issue of $22,000 was printed by order of the officers, bearing date July 1, 1895, and the bonds were signed in the name of the district by the persons who were the officers thereof. The said bonds with the coupons thereto attached were disposed of by the officers of the district for labor performed on the ditch. It is not denied that the ditch was constructed. It is not denied that water was used in the ditch and was applied by the irrigators. Elizabeth O. Rogers and her children own of the bonds issued about $17,500.

On September 4, 1906, William H. Thomas, a citizen and resident of the state of Iowa, began a suit in the circuit court of the United States for the district of Nebraska against the last named appellees and the bondholders, the Alfalfa Irrigation District, the county of Keith, and the officers of the irrigation district charged with the management of its affairs, and the county treasurer of the said county of Keith. The purpose was to enjoin the district and the officers of the county from levying taxes upon the land in the district to pay the interest on these bonds

and to require the bondholders to surrender their bonds for cancelation. In the suit it was alleged that the said Alfalfa Irrigation District was not properly organized; that the statutory notice was not published in a proper manner; that the boundaries of the district were improperly changed; that the notice of the election was not published as required by law; that the election was not held within the limits of the proposed district; that the proposition submitted was defective because it did not set forth the terms and conditions of the same; that no estimate had been made of the amount of money necessary to construct the canal. The proceeding in the district court to declare the district organized, and which had been affirmed by this court, was assailed because of the lack of proper notice and because the decree of the district court had been obtained by collusion and fraud; that no construction fund had been created by the sale of the bonds at the time the contract was made with Rogers; that the contract made with Rogers contemplated that he should be paid for his work in bonds and not in cash; that the bonds delivered to him and devised to his widow and children were executed and delivered by the said Alfalfa Irrigation District in payment for the work performed by him under the said contract. There were the same averments respecting the contract with the defendant, Elizabeth O. Rogers. Similar averments were made respecting the portions of this issue of $22,000 of bonds not held by the appellees, and that the district court had been guilty of a large number of irregular acts in and about the levying of taxes and the payment of interest on said bonds. The plaintiff in that suit, as a landowner of the district, sought to relieve his land from the payment of taxes levied and assessed against it, and to have the bonds declared void and surrendered up and canceled.

The permanent relief sought in the said bill of complaint was an order restraining and enjoining the said James H. McGinley, county treasurer of said county of Keith, from collecting any of said taxes upon lands of the

complainant, William H. Thomas, in said irrigation district for the payment of principal and interest upon said bonds, and restraining and enjoining the directors of said Alfalfa Irrigation District and their successors from levying or certifying any amounts as interest upon the said bonds or the principal thereof, or any part thereof, to be charged as taxes upon the lands of the complainant in said irrigation district, and restraining and enjoining the said Henry L. Gould, Charles Sautters, and James Burns, county commissioners of said county of Keith, and their successors in office, from assessing or levying the amount of principal or interest on said bonds, or causing the same to be charged as taxes upon the lands; that upon a final hearing the said injunction be made perpetual; and that it be decreed by the court that the taxes aforesaid levied upon and against said lands of the complainant in said irrigation district are void, that the same be canceled; and that it be decreed that said bonds and the coupons attached thereto are void and of no effect, and that the same be canceled; and that the said James H. McGinley, treasurer of said county of Keith, and his successors in office, be by the said decree ordered to cancel the said bonds and coupons and taxes upon the books of the said county of Keith; and that the title of the complainant to the lands aforesaid be quieted in said complainant free from any lien of taxes charged against said lands for the payment of interest upon said bonds and otherwise; that the complainant have such other and further relief in the premises as the circumstances of the case require and as may be just and equitable.

To the foregoing bill of complaint of the said William H. Thomas there were filed answers of the Alfalfa Irrigation District, Elizabeth O. Rogers, Elizabeth O. Rogers as guardian of Erwin F. Rogers and Hazel D. Rogers, John W. Welpton, Charles P. Ross, Exchange Bank of Ogalalla, and the First State Bank of Ogalalla, and others, which denied the material things alleged therein, and pleaded the validity of all the proceedings and of the bonds.

The case came on for trial on the said bill of complaint and the answers thereto in the United States circuit court for the district of Nebraska, before the Honorable William H. Munger, district judge. The case was determined and a judgment rendered therein on the 18th day of November, 1908, declaring the bonds issued and not in the hands of innocent purchasers to be void. The cause was appealed to the circuit court of appeals, and on or about the 24th day of November, 1911, that court rendered its decree in said case, reversing the judgment of the United States circuit court. It is said in the opinion of the circuit court of appeals:

"The record shows that the lands mentioned in the bill were purchased by the appellee from one M. S. Collins on the 14th day of July, 1906, *nine years after the bonds had been delivered to W. O. Rogers and more than seven years after the bonds were delivered to Elizabeth O. Rogers under their contracts.* During all of this time Collins, the then owner of the lands mentioned in the bill, as well as all other landowners in the district, assented to and acquiesced in the construction of the irrigation ditch, the sale of the bonds, accepted the benefits to their lands arising from the construction of their works, Collins being, as the record shows, the first man to take water from the ditch and apply it to his land. In addition to this, the record further shows that for three years he was an officer of the irrigation district, and necessarily was thoroughly familiar with the entire transaction. During all of that time the validity of the bonds was not questioned by the irrigation district or by any taxpayer therein. Neither is it suggested in the pleadings that the price agreed to be paid for the work was excessive, or that there was any failure to complete the project in compliance with the terms of the contract between Rogers and the irrigation district. * * * After an advertisement for bids for the sale of bonds, and no bids having been received, the irrigation district on September 18, 1896, entered into a contract with Rogers for the construction of the irrigation works,

wherein the irrigation district agreed to pay 8 cents per cubic yard for the excavation, and no reference is made to the bid, nor is there any provision in the contract requiring the district to give, or Rogers to accept, bonds in payment, so that upon the face of the contract the payments were to be made in cash. The record shows, however, that the payments were made in bonds, he taking the bonds at par value. From the fact that in the bid Rogers offered to do the work for 8 cents per cubic yard payable in bonds, and that the contract provided for the payment of 8 cents per cubic yard, and the further fact that bonds were delivered in payment for the work done under the contract, it is insisted that it affirmatively appears from the record that the board of directors accepted the second proposition contained in the bid, and that the contract must be read as though that provision was contained therein, and, further, that, as a construction fund was not created by the sale of the bonds of the district for cash in the manner contemplated by the statute, the bonds are void." *Rogers v. Thomas,* 193 Fed. 952.

We will hereafter refer to the argument of the learned judge who delivered this opinion. A decree was rendered by the district court of the United States for the district of Nebraska in conformity with the opinion and memoranda dismissing the bill of complaint.

The validity of the said bonds has been determined in favor of the bonds, and the proper organization of the said Alfalfa Irrigation District has also been determined in favor of the district. Although said bonds have been declared to be valid by the said courts and the said Alfalfa Irrigation District has been declared to be properly organized under the laws of the state of Nebraska, yet the said plaintiff in this case, regardless of the judgments and decrees of the said courts herein recited, seeks to relitigate all the matters heretofore determined and to have such matters determined adversely to the validity of said bonds and against the proper organization of said district, and to that end recites in his petition the facts alleged in the

pleadings of the cases mentioned, and prays for the relief sought in said petition and in the said bill of complaint. The thing sought to be done is to try the several matters adjudicated all over again the same as if said proceedings and trial had not been had and said judgment and decree had not been rendered. The plea of *res judicata,* if good, obviates the necessity for an examination of the other questions involved, and must be conclusive upon the parties, even though we do not agree with the reasoning of that opinion upon which the judgment 's based, and even though we might decline to follow the decision in the case as an authority.

It is urged by the plaintiff, Orcutt, that such decree is not binding on him, first, because he was not a resident of the district, and was not then an owner of land within the "Alfalfa Irrigation District;" and he urges, second, that the matter is not *res judicata* as to the district or to the landowners within it because the owner of the bonds, the defendants Rogers, were sought to be enjoined along with the district, and the district asserted no rights adverse to the defendants Rogers. Considering the first ground of objection—that is, that the judgment is *res judicata* as to the plaintiff because he was not a party to it—it is a fundamental rule that the *inhabitants or taxpayers of a municipality are bound by any judgment against the municipality.* This arises out of the necessity of government, and because, if it were not so, a judgment against a municipal corporation could never be made binding upon the inhabitants of the municipality. If a different rule prevailed, then, when new inhabitants or new taxpayers became interested in the city, the whole matter could be litigated over again. Nothing would be settled by a trial. 1 Herman, Estoppel and Res Judicata, sec. 155, uses this language: "Thus where the validity of a tax is determined, without fraud, in an action against the officers of a county to compel its collection that decision is a bar to an action by the taxpayers of such county to enjoin its collection." The plaintiff in this case, Orcutt, and all the

other taxpayers of the district are bound by the decree of the circuit court of appeals. The matter becomes *res judicata* by reason of the decree of that court, and whether we would adopt its reasoning or not. The syllabus reads: "(1) Where an irrigation district, organized under the laws of a state and expressly authorized to issue bonds, sells the same to the highest bidder after advertisement, and to use the proceeds for the construction of irrigation works issued bonds which it had voted at par directly to a contractor in payment for work which he had performed, its action was at most no more than an irregular exercise of its power, and, where neither the district nor any taxpayer questioned the validity of the bonds until eight years after their issuance and after the right of the contractor to maintain an action at law to recover for his work was barred by limitation, a subsequent purchaser of property in the district cannot then maintain a suit to have them declared void because of such irregularity. (2) Courts of equity in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which governs courts of law in like cases, and this rather in obedience to the statute than by analogy."

In *Owens v. City of South Omaha,* and *Shannahan v. City of South Omaha,* 2 Neb. (Unof.) 466, it is said in the syllabus: "(1) A judgment recovered in an action upon a judgment cannot be collaterally assailed upon the ground that the last mentioned judgment was fraudulently obtained. (2) A judgment against a municipal corporation is equally conclusive upon the city and its taxpayers." In the language of commissioner Ames, who prepared the opinion: "The questions involved in both cases are identical, and for these reasons both will be disposed of as one and in a single opinion." Case No. 10,989 was for a writ of mandamus to compel the levy of a tax by the city of South Omaha upon the taxable property within that city, and the issuance of warrants to pay a certain judgment rendered in the district court for Douglas county on the 11th day of April, 1896, in favor of one Catherine Dris-

coll and against said city for the sum of $2,500 and costs. In case No. 10,988, John D. Owens and others appeared as plaintiffs and appellees to enjoin the levy of a tax, the issuance of warrants, and the payment of the same judgment. In both cases it appears that prior to the 11th day of April, 1896, there was pending in the district court for Douglas county an action by Catherine Driscoll against the city of South Omaha to recover $3,000 damages for personal injury alleged to have been sustained because of the negligence of the city; that on said 11th day of April, 1896, the city of South Omaha, defendant, by an attorney employed by the mayor and city council and specially authorized resolution, confessed judgment in said action in favor of the plaintiff therein, Catherine Driscoll, in the sum of $2,500; that shortly after the rendition of said judgment there was filed in said cause an assignment of said judgment to Mary G. Madden; and that soon after that Catherine Driscoll died intestate, and that John M. Shannahan was appointed administrator of the estate of said Catherine Driscoll, deceased, and qualified and entered upon the duties of his office. Case No. 10,989 starts out with an application for a writ of mandamus to compel the levy of a tax by the city and the issue of warrants. The thing contemplated in that case was the payment of a judgment against the city. Case No. 10,988 was brought to enjoin the levy of a tax, to enjoin the issue of warrants, and to enjoin the payment of the same judgment. Catherine Driscoll had sued the city for damages sustained because of a personal injury alleged to have been occasioned through negligence of said city. The attorney employed by the city confessed judgment in favor of the plaintiff and against the city for $2,500. Right afterwards Catherine Driscoll, the plaintiff, assigned her judgment to Mary G. Madden, and the assignment was filed in the cause. Then Catherine Driscoll died, and John M. Shannahan was appointed administrator of her estate. He commenced a suit in equity as such administrator in the district court for Douglas county against said city of

South Omaha and said Mary G. Madden, alleging that the assignment to the latter had been obtained by fraud of Catherine Driscoll's attorney acting in collusion with the said Mary G. Madden. By his prayer Shannahan sought the payment to himself as the administrator of the estate of said Catherine Driscoll of the full amount of said judgment. The district court decreed the city should pay one-half of the full amount to Shannahan as administrator. The city of South Omaha did not enter its appearance, and Mary G. Madden answered that she had sold her interest to Thomas Hoctor, who appeared and was substituted in her place as a defendant. He alleged purchase from Mary G. Madden, denied all allegations of fraud in procuring the assignment from Catherine Driscoll, and prayed for a dismissal of the plaintiff's petition and for equitable relief. Then Shannahan, as administrator, and Hoctor, on his own account, stipulated that the city should pay half of the judgment and interest to each. There was a default taken against the city. Before the levy of taxes for 1898, Shannahan, as administrator, and Hoctor, in his individual capacity, made demand upon the city to levy the tax necessary to pay the judgment and to issue warrants to Shannahan for one-half, and to pay the same. There was a failure to comply with the demand, and Shannahan commenced the mandamus case No. 10,989, setting forth that the city of South Omaha was a city of the first class, having between 1,000 and 25,000 inhabitants; that it had a mayor and members of the city council and a city clerk, all of whose names were set forth, the rendition of the judgment, the filing of the assignment, the final decree in the equity suit against the city and Mary G. Madden, the intervention and substitution of Thomas Hoctor, the entry of the decree in that suit relating to said Shannahan in his capacity as administrator, and finding him entitled to one-half of said judgment, that said decree was not appealed from and was conclusive upon said city and said Hoctor, and that demand had been duly made for the levy of said tax and the issuance of said war-

rants according to the terms of said decree. Upon the petition being filed, an alternative writ issued commanding the said city through its proper officers to provide for the payment of said judgment or show cause why a peremptory writ should not issue.

The officials of the city answered in the mandamus case admitting the corporate character of the city, the official capacity of the defendants, the rendition of the judgment in favor of Catherine Driscoll, the assignment of the same to Mary G. Madden, the rendition of the decree in favor of Shannahan, as administrator, in the equity suit brought by him to set aside the assignment and compel payment to himself, admitting said decree was in force, but denying that it was binding upon the city of South Omaha, upon the grounds that the original judgment against the city in favor of Catherine Driscoll was obtained by fraud, and that the decree in the equity case which adjudged one-half of the judgment to be paid to Shannahan, administrator, was also obtained by fraud and before the case had come on for hearing. At the time of filing the answer in the mandamus case, the city attorney of South Omaha prepared and filed the petition of Owens and others against the city and its officials and Shannahan, administrator, for the purpose of enjoining the payment of the Driscoll judgment. That petition alleged the same grounds of fraud in respect to the original judgment against the city, and the decree in the equity case which required the city to pay one-half of the judgment to Shannahan as administrator, and also sought to have the judgment in the law action and the decree in the equity case set aside and held for naught, and the judgment perpetually enjoined. After reversing these two judgments, the cases were brought to this court, one upon appeal and one upon petition in error.

It is said in the opinion: "The only question which we think it is necessary to consider or decide is whether the city of South Omaha and its taxpayers were bound by the decree of October, 1897, in the case of *Shannahan v. City of South Omaha.* The petition in that case pleaded the

judgment rendered in favor of Mrs. Driscoll, and made that judgment the basis or cause of action in the equity suit. It also alleged the assignment to Madden and charged that that assignment was procured by fraud. It then prayed that the assignment be set aside; that the city be adjudged and decreed to pay the full amount of the judgment to the plaintiff in his capacity as administrator; that he recover costs; and for such other and further relief as he may be in law and in equity entitled to. * * * The decree, among other things, provided: 'It is further considered, adjudged and decreed by the court that the said defendant, the city of South Omaha, pay to the plaintiff herein in his capacity as administrator, or to such assignee of the plaintiff as the county court of Douglas county may, by proper order of distribution of the assets of the estate of said Catherine Driscoll, direct and order, one-half of the full amount of the aforesaid judgment in the said case of *Catherine Driscoll v. City of South Omaha,* together with legal interest thereon from the date of the rendition of the judgment.'" The opinion continues: "Whether there was or was not fraud in the obtaining of the original judgment in the law action is *not open to inquiry* if the decree in *Shannahan v. South Omaha* is valid." The opinion then cites Freeman, Judgments (4th ed.) sec. 215, where the rule is thus stated: "The entry of a judgment or decree establishes, in the most conclusive manner, and reduces to the most authentic form, that which had hitherto been unsettled, and which had, in all probability, depended for its settlement upon destructible and uncertain evidence." In the opinion 1 Herman, Estoppel, sec. 52, is cited, where he says: "When judgment is taken by default, the adjudication will be conclusive of the existence and validity of the right or demand for which suit is brought." *Corcoran v. Chesapeake & Ohio Canal Co.,* 94 U. S. 741, is also cited, where it is said the supreme court of the United States held that, where a party has an opportunity to make a defense, the decree of the court is conclusive upon him *upon every defense*

that he might have made to the matters alleged against him. It is further said in the *Shannahan* opinion: "When the suit of Shannahan against the city of South Omaha was commenced in the fall of 1896 the basis of the relief sought was the judgment previously rendered in favor of Mrs. Driscoll, and it was so alleged in the petition. The relief sought was a decree directing its payment to Shannahan, administrator. * * * If there was any reason, grounded on fraud, on account of which the judgment could have been attacked and held invalid, the city should have made answer to Shannahan's petition and questioned the legality of the judgment, and sought to have it avoided as being obtained by fraud. Instead of doing so the city made no appearance whatever. * * * The decree was according to the allegations of the prayer of the petition, and that decree forever afterward bound the city as to the validity of the original judgment and cut off all defense based upon any fraud perpetrated in obtaining it." The opinion further says: "There can be no question that the judgment is equally conclusive upon the city and its taxpayers. A judgment against a municipal corporation would be of no value, if matters of defense to the action, which were available to the city before its rendition, might be relitigated at the suit of individuals."

This would seem to be conclusive in the instant case. There are two judgments, one rendered in the district court and affirmed by the supreme court, the other rendered in the United States circuit court of appeals. If the case is not fully adjudicated now, it never can be. Any new settler coming into the district and purchasing land within it may continue to enjoin the proceedings if the present action can be maintained. This would be a travesty on the efficiency of judicial proceedings. It would leave the decree of a court without the power of settlement and adjustment.

Taking up the second reason urged by plaintiff for holding the judgment in this case of *Rogers v. Thomas, supra,* not to be *res judicata* of the right of the district, an exam-

ination of the record discloses that no issue adverse to the interest of the Rogers family was actually asserted by the Alfalfa Irrigation District. The district in that case did not deny the validity of the bonds, but asserted that the same were valid, making the same defense made by the Rogers family. The interest of the district and the interest of the Rogers were adverse. The reasons for holding the bonds invalid alleged by said Thomas, the complainant, in his bill of complaint, asking an injunction against the collection of the bonds, could have been alleged by the answering district. Apparently the then officers of the district did not care to repudiate what they believed to be just obligations of the district. It is a well-known rule that a judgment is not only *res judicata* of those things actually litigated, but of all things which might properly have been litigated. If one has a defense which he neglects to make, it is at his peril, and this is as true where adverse interests exist between codefendants as between plaintiff and defendant and the rights of the defendants are involved in the determination of the controversy. It is open to the district to assert the invalidity of the bonds; the suit was one in equity. The rights of all parties could be determined. The Alfalfa Irrigation District was a necessary party. The steps taken to organize the district were presented to the court and held sufficient. If under the issues presented it was necessary to consider these alleged irregularities, the litigation could have been completely determined without making it a party. The rights of the Rogers family against the district were to be determined as well as the rights of Thomas. Under the issues it was necessary for the court to find whether the requisite steps to organize the district as a district had been taken. This fact was found affirmatively. It was necessary to determine whether the district had power to issue the bonds. It was determined that it had such power. It was necessary to determine whether the statute of limitations was a bar to the action. It was determined that neither the district nor a taxpayer in the district could maintain the

action. This was an adjudication against the district as well as against Thomas because the question might have been litigated by the district even if it were not such an issue as could have been determined by the district because it had an opportunity in a forum of competent jurisdiction in a case where the issues made it proper to present every reason in existence against the validity of the bonds held by the Rogers.

Courts of equity have the power to determine the rights of codefendants as between themselves as well as with reference to the complainant. Ordinarily, if the plaintiff in such a case waits until the contractor doing the work is barred by the statute of limitations and may not successfully bring an action to recover for the work done, then he is in no condition to assert that the defendant is without the right to hold the bonds.

The evidence sustains the finding, and judgment of the district court. The judgment is therefore

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

FANNIE WETZEL, ADMINISTRATRIX, APPELLEE, V. OMAHA MATERNITY & GENERAL HOSPITAL ASSOCIATION, APPELLANT.

FILED JULY 14, 1914. No. 17,580.

1. **Hospitals:** NEGLIGENCE OF EMPLOYEES: LIABILITY. A hospital, incorporated and conducted for private gain, is liable in damages to patients for the negligence of nurses and other employees.

2. ———: TORTS: LIABILITY. The general principle that a master is responsible for the torts of a servant in the scope of his employment applies to hospitals incorporated and conducted for private gain.

3. ———: IMPLIED OBLIGATIONS. A patient is generally admitted to a hospital, conducted for private gain, under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require.

4. ———: NEGLIGENCE: QUESTION FOR JURY. In an action against a hospital, conducted for private gain, to recover damages for negligence in caring for a delirious patient whose death resulted from his jumping from an unprotected, unfastened, and unguarded window in absence of an attendant, the issue of negligence *held* to be for the jury, where the evidence tended to show that he was knowingly admitted to the hospital under an implied obligation that he should receive such reasonable care and attention for his safety as his mental and physical condition required, and that the nurse in charge, at the time of the accident, had been absent for a period estimated by one witness to be less than five minutes and by another to be about an hour.

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

William Baird & Sons and *De Bord, Fradenburg & Van Orsdel,* for appellant.

Sullivan & Rait and *John O. Yeiser, contra.*

ROSE, J.

This is an action to recover $20,000 for alleged negligence resulting in the death of Alva J. Wetzel. Plaintiff is the administratrix of his estate. The Omaha Maternity & General Hospital Association, defendant, is a corporation conducting at Omaha a hospital for private gain. When Wetzel was ill with typhoid fever, he became a patient, occupying a room on the third floor of the hospital. In absence of a nurse or other attendant, he opened a window and jumped out, falling to the pavement. From resulting injuries death ensued. In the petition it is alleged that he was knowingly admitted as a patient when in a delirious condition, being constantly under some hallucination impelling him to leave his bed, to inflict self-injury, and to commit other irrational acts; that he was accepted as a hospital patient under an implied obligation on the part of defendant to furnish "all the care, nursing, attention, control, oversight and medical treatment necessary, suitable or appropriate to his condition;" that, while he was suffering from mental derangement as a result of typhoid fever, he was negligently permitted to remain for

a long time entirely free, unrestrained, unattended, unguarded and uncontrolled in his room on the third floor of the hospital, defendant well knowing that the window of his room was unbarred, unlocked and unfastened; that the facts pleaded constitute a negligent omission of duty and a breach of defendant's implied undertaking to furnish and supply him with all the care, nursing, medical treatment and oversight necessary, suitable and proper for him in view of his physical and mental condition. Defendant denied negligence, and pleaded that Wetzel became a patient under a contract to give him general care only, and that he received such care. The answer also contains a denial that defendant undertook or promised to furnish Wetzel with all the care, nursing, attention, control, oversight and medical treatment necessary, suitable or appropriate to his condition. The jury rendered a verdict in favor of plaintiff for $5,500. From a judgment for that sum, defendant appealed.

The principal assignment of error is directed to the overruling of a motion by defendant for a peremptory instruction in its favor; the ground of the motion being that there is no evidence of actionable negligence. In support of the position thus taken, defendant insists that hospital patients were received under two forms of agreement, one for "special care" at the rate of $25 a week, and the other for general care at the rate of $10 a week; that special care required constant attention of a nurse in a separate ward; that general care required defendant to provide the patient with a bed in a ward with other patients, all under the charge of a single nurse; that Wetzel was entitled to and received general care; that there is no evidence to support the allegation that he was negligently permitted by defendant to remain for a long time entirely free, unrestrained, unattended, unguarded and uncontrolled in his room; that the nurse in charge of decedent had also the care of another patient in the same room and a patient in another room; that she had not been absent to exceed five minutes when Wetzel escaped; that when

she left there was nothing to indicate a tendency on his part to inflict self-injury; that the attending physician was selected by Wetzel or his friends; and that the nurse obeyed all of the physician's instructions. It is argued that the facts narrated were established without contradiction, and that therefore a verdict for defendant should have been directed.

There is testimony tending to prove the following facts: Wetzel had typhoid fever in his own home, but was taken to the hospital for better care and attention. The attending physician was selected by him and treated him both before and after his removal to the hospital. He had been intermittently in a delirious condition from fever before he became defendant's patient, and remained so. A member of a fraternal lodge, under authority from Wetzel and his wife, called the hospital by telephone to make financial arrangements for decedent's care, and was told in answer to inquiries that arrangements had already been made for general care at $10 a week, which was sufficient for a patient in his condition. Somebody in the hospital office had authority to answer telephone calls and to make arrangements for receiving patients, though the general manager testified he had not been informed of any telephone call on Wetzel's behalf. On cross-examination he was asked: "In view of the known condition of the patient, you expect to give him the care that the condition requires?" He answered: "I will say yes, as far as that condition is known, for the time being." The hospital was advised in advance that he had been delirious. To protect him from harm the hospital nurse, on her own initiative, but with the subsequent approval of the physician, kept him for a time strapped to his bed. Though his fever remained high and his delirium continued, the straps were released by direction of the physician to permit frequent change of position, made necessary by premonitions of hypostatic pneumonia. The lower sash of the window was movable, unfastened and unprotected, when he jumped out. The nurse in charge at the time was an em-

ployee of defendant. Though she testified she had not been gone five minutes, the other patient in the same room said, in substance, that she had been gone nearly an hour. The nurse knew his condition. A day or two earlier he had been delirious the greater part of one night, and the clinical record of the hospital so recited. That record stated also that he seemed dazed on the morning of his injury, and that he afterward jumped out of the window.

Defendant was incorporated to conduct a hospital for private gain, and as such it is liable in damages to patients for the negligence of its nurses and other employees. *Hogan v. Hospital Co.,* 63 W. Va. 84, 59 S. E. 943; *Fawcett v. Ryder,* 23 N. Dak. 20; *Arkansas Midland R. Co. v. Pearson,* 98 Ark. 399, 135 S. W. 917; *University of Louisville v. Hammock,* 127 Ky. 564, 106 S. W. 219; *Brown v. La Société Francaise,* 138 Cal. 475; *Croupp v. Garfield Park Sanitarium,* 147 Ill. App. 7; *Stanley v. Schumpert,* 117 La. 255, 41 So. 565, 6 L. R. A. n. s. 306; *Galesburg Sanitarium v. Jacobson,* 103 Ill. App. 26; *Sawdey v. Spokane Falls & N. R. Co.,* 30 Wash. 349; *Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n,* 32 Utah, 46, 8 L. R. A. n. s. 1161; *Phillips v. St. Louis & S. F. R. Co.,* 211 Mo. 419, 111 S. W. 109, 17 L. R. A. n. s. 1167.

The rule of law stated rests on the general principle that a master is responsible for the torts of a servant in the scope of his employment. This doctrine applies to a hospital receiving for special care delirious patients, who on account of temporary conditions produced by fever or other ailments are not accountable for their own acts or conduct.

A patient is generally admitted to a hospital, conducted for private gain, under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physicial condition, if known, may require. *Hogan v. Hospital Co.,* 63 W. Va. 84, 59 S. W. 943; *Fawcett v. Ryder,* 23 N. Dak. 20; *University of Louisville v. Hammock,* 127 Ky. 564, 106 S. W. 219. Any other rule would be a reproach to the law and to hospital manage-

ment. In the present case the evidence is sufficient to justify a finding that decedent was received under circumstances entitling him to the benefit of the principle stated. Duties which a hospital as such owes to a patient cannot be evaded by proof that the hospital nurse obeyed the instructions of the physician employed by him. Nurses necessarily have charge of delirious patients during the absence of physicians, while the responsibility of the hospital continues. In the present case the nurse knew that the patient was in danger from delirium. For his protection she had strapped him to his bed and the patient's physician had approved her act. A clinical record made by her shows that the patient was in a dazed condition a few hours before he left his bed. Under the circumstances, self-injury may well have been foreseen. The patient was left near a movable, unfastened, unprotected window sash in a room three stories above the pavement. He, in fact, committed an irrational act resulting in his death. It cannot be said, as a matter of law, that there was no proof of negligence on her part or on the part of her employer. A nurse's absence of five minutes may amount to negligence. *Croupp v. Garfield Park Sanitarium,* 147 Ill. App. 7. Under the circumstances of this case, as already outlined, the question of negligence was an issue of fact for the jury. *Phillips v. St. Louis & S. F. R. Co.*, 211 Mo. 419.

Plaintiff made a case entitling her to damages in some amount, upon a finding by the jury in her favor, and the question of an excessive recovery is not properly raised.

Rulings in giving and in refusing instructions are challenged as erroneous; but, in view of the conclusion reached in regard to the evidence and the law applicable thereto, there is no error apparent in the charge to the jury or elsewhere in the record.

AFFIRMED.

SEDGWICK, J., dissenting.

It is said in the majority opinion: "A patient is generally admitted to a hospital, conducted for private gain, under an implied obligation that he shall receive such rea-

sonable care and attention for his safety as his mental and physical condition, if known, may require. * * * Duties which a hospital as such owes to a patient cannot be evaded by proof that the hospital nurse obeyed the instructions of the physician employed by him. Nurses necessarily have charge of delirious patients during the absence of physicians, while the responsibility of the hospital continues. In the present case the nurse knew that the patient was in danger from delirium." The decision seems to be based upon these propositions. The opinion assumes without discussion that notice to the nurse was notice to the hospital authorities, and that those authorities would be guilty of negligence if they did not discover the errors in the instructions of the physician and overrule those instructions.

There is no doubt that hospitals conducted for gain ought to be held to a very high degree of diligence in guarding the safety of helpless patients confided to their care. They should be compelled to respond in damages for any injury caused by the negligence of the employees under their control. With the advance in medical science and skill the necessity for special equipment and conveniences for caring for the sick becomes more apparent. It has been stated in recent periodical publications that the number of hospitals in the United States has doubled within the last three years. It is therefore not only important that these institutions should be diligent in caring for their patients, but it is also equally important that they should not be held responsible either for accidents beyond their control, or for the irresponsible acts of a patient that no human precautions could have anticipated, or for the mistakes of others not under their control. For the purpose of this discussion we may consider that there are three general classes of hospitals: First, hospitals established as a pure charity caring for the unfortunates without charge; second, private hospitals for gain, which furnish accommodations, appliances and medical treatment; third, those that furnish rooms and appliances for

physicians who take their patients there, select the rooms appropriate to the conditions of their patients, employ nurses and instruct them as to the care needed, and treat their patients there professionally. The responsibility of a hospital of the second class, the patients' rooms, care and professional treatment all being furnished by the same authority, is well defined in the law. The three cases cited in the majority opinion, *Hogan v. Hospital Co.*, 63 W. Va. 84, 59 S. E. 943, *Fawcett v. Ryder*, 23 N. Dak. 20, and *University of Louisville v. Hammock*, 127 Ky. 564, 106 S. W. 219, are of that class. Such hospitals receive their patients "under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physicial condition, if known, may require." The mistake of the majority opinion, as it seems to me, is in treating the case at bar as one of that class. The responsibility of a hospital of the third class is more analogous to the liability of a hotel than to the liability incurred by a hospital which assumes the entire care and treatment of a patient. Such hospital is responsible for what it undertakes as is a hotel. Negligence of employees under its control in performing the duties of the hospital is negligence of the hospital. But the physician is independent of the hospital, and it is not responsible for his negligence, nor for the negligence of those who are under his control and act in accordance with his instructions. A patient should have a room and care suited to his condition. One violently insane may require a padded cell or manacles. One dangerously delirious, or inclined to self-destruction, might require that his door should be kept locked and his windows protected with iron bars to prevent his escape. To so treat a patient with fever might be so annoying as to endanger his life. Such matters are determined by the attending physician, who knows the patient's condition, and who may be mistaken, but is the only person at all qualified to judge what treatment and care of the patient will be most likely to succeed. The question then is whether the death of the deceased was caused by the negligence of the defendant.

It appears that the deceased, a young man between 20 and 30 years of age, became ill with typhoid fever at his rooms where he was residing with his wife, and was in the professional care of Dr. Pinto, a physician and surgeon. The physician advised that he be removed to the defendant hospital. The deceased and another patient in the same room and a third patient in another room were all under the care of the same nurse. The deceased, before his removal to the hospital, and while he was in the hospital, showed signs of delirium, which is a common accompaniment of the disease from which he suffered. Two or three days before the accident the nurse had discovered a tendency on the part of the patient to leave his bed, and had fastened his ankles with straps to the bed frame to prevent his doing so. The physician visited him each day, and when he ascertained that the nurse had used these straps he approved of her doing so, but on a following day he discovered that a complication, which the physicians describe as hypostatic pneumonia, had developed, and instructed the nurse to remove the straps in the daytime so that the patient could frequently be turned in the bed. This the nurse did, and on the morning of the accident, after the patient had been given his usual alcohol bath, she left the room for the purpose of making, as she said, the record of the patient's condition, and while she was gone, and before she had completed the record, the accident occurred.

It is urged that it was negligence on the part of the nurse to leave the room, under the circumstances, while the patient was not confined, and so permit the accident. In this connection it is insisted that there was a special contract on the part of the friends of the patient with the authorities of the hospital that the patient should have such care and attention as the circumstances and his condition should require; that he should have constant attention and should not be left alone; and that the act of the nurse in leaving him alone as she did was negligence. It appears that the deceased was a member of the "Yeomen

Lodge," presumably a fraternal organization, and that members of that lodge made the arrangements with the hospital authorities for his reception at the hospital. Mr. Wardlow testified that he "belonged to the Brotherhood of American Yeomen, and that Wetzel belonged to the same;" that he (the witness) called the hospital, and, "when they answered the 'phone, he told them he wanted to talk to somebody that he could make financial arrangements with about the care of the patient;" and that somebody then came to the 'phone, and the witness told him that he understood that a patient had been cared for there, and that "the lodge guaranteed the financial end of it; * * * and that he would like to make some such arrangement as that." They told him he could make such arrangement, and he testified that Gorton Roth made the arrangements. The witness also testified: "That he talked with a party over the 'phone in regard to care and attention, asked them what they would cost; and they said arrangements had been made for $10 a week general care; and he asked them if that was sufficient to care for a patient in his condition, and they said it was. He said to them, if it was not enough to care for a patient in his condition, that he would want to have better arrangements made; that he didn't want anything to go lacking on account of the care of the patient; * * * that he said he understood that Mr. Wetzel was in a delirious condition some of the time, and that the doctor said he must not get on his feet, and the man replied that about two-thirds of the patients under general care at that time were typhoid patients; * * * that they said in general care there were sometimes two or three, maybe four, patients in one room; and private care, patients had a room by themselves." The evidence is that the hospital authorities were never informed as to the condition of the patients in regard to the necessity for general or special care; that such matters were left entirely to the friends of the patients as advised by the physician, and that special care involved the use of a special room and the attention of

such special nurses as the physician advised, sometimes two or three, or even more, and that to have the continual, undivided attention of a nurse would require the employment ordinarily of three nurses, who would each serve for 8 hours out of the 24. These conditions and the authority of the physician in the matter appear to have been assumed by both Mr. Wardlow and the person at the hospital with whom he talked; Mr. Wardlow's object being, principally at least, to assure the hospital authorities that the bills would be paid. The evidence of the authorities at the hospital and of the physician, is conclusive that the responsibility to determine the condition of the patient and what service was necessary for his care and safety rested entirely with the physician, and was so understood by the nurses, who relied entirely upon the physician for instructions in that regard. Even if this were not so, it is difficult to understand how the physician and nurse could be charged with negligence in the care of this patient. The nurse testified directly and positively that she had not left this patient five minutes when the accident occurred. In the brief the plaintiff attempts to discredit this testimony by computation of time based upon the testimony of another patient who was in the room at the time, who testified that he was dozing, and that the first that he knew about any part of the transaction was that the patient arose from his bed and undertook to appropriate some of the witness' clothing; that the witness called for the nurse, and as the nurse, or one of the attendants, came into the room the patient escaped from the window. The testimony of this witness comes far short of discrediting the evidence of the nurse, who appears to be a creditable and reliable witness.

It was insisted that the defendant is responsible for the mistake of the nurse, if it was a mistake, in removing the straps, knowing as she did that the patient would at times be left without an attendant. It appears that the hospital furnished the room and its furniture and the necessary appliances, and also supplied nurses as desired.

The evidence is without contradiction that the nurses who waited upon the respective patients were always under the direction of the physician in charge, and in this case the nurse took her directions entirely from Dr. Pinto. The doctor testifies that she followed his directions explicitly, and that the patient had good care. Moreover, as I understand the evidence, it fails to show any negligence on the part of the physician or the nurse in removing the straps that confined the patient. The evidence is that the development of hypostatic pneumonia in a patient suffering from typhoid fever is a very dangerous complication; that because of accumulations in the lungs it is absolutely necessary that the position of the patient should be frequently changed, and that if he was allowed to remain continually in the same position the result would undoubtedly be fatal.

The court instructed the jury that the charge of negligence in the petition was: "That defendant was negligent in leaving the deceased at the time unrestrained, unattended, unguarded and uncontrolled, and that said negligence was the proximate cause of deceased's death." The court also instructed the jury: "You are instructed Dr. Pinto was the doctor and agent of the said deceased, and for that reason it was the duty of the defendant hospital and the said nurse to obey said doctor in carrying out his directions while attending said deceased, and you are not to consider the removal of the foot restraints by the said nurse as an act of negligence." The jury were also instructed: "If the defendant accepted Wetzel as a patient and undertook to give him such care, nursing and attention as was reasonably necessary in view of his known condition, and failed to keep and perform its undertaking, then and in that case the defendant is liable if the death of Wetzel resulted proximately from such failure, and your verdict should be in favor of the plaintiff, providing you find that said deceased would have recovered from said sickness had he not jumped from said window." This instruction was clearly erroneous. The evidence would not

justify submitting to the jury the question whether the defendant "undertook to give him such care, nursing and attention as was reasonably necessary in view of his known condition." As I have already shown, all these matters were entirely for the attending physician, and the defendant had no knowledge nor means of knowledge as to "his known condition" or what care, nursing and attention was reasonably necessary in view of such condition. When the physician ordered the confining straps removed, he best knew the patient's condition, and he judged that such removal was necessary in view of that condition. The evidence establishes that the probability that the patient in the condition he then was would do violence to himself was very remote. The nurse might confidently rely upon the judgment of the physician. The physician knew that the patient was receiving what was commonly known as general care, and that he was not being continuously attended by a special nurse. If such special attention was necessary, it was for the physician to ascertain that fact and to give directions accordingly. In the absence of such directions from the physician, the nurse was fully justified in continuing as she had been doing with the knowledge and approval of the physician.

TILLIE BROZ, ADMINISTRATRIX, APPELLEE, V. OMAHA MATERNITY & GENERAL HOSPITAL ASSOCIATION, APPELLANT.

FILED JULY 14, 1914. No. 17,583.

1. **Evidence:** MORTALITY TABLES. As data or evidence tending to show expectancy of life, mortality tables are not conclusive, but they are competent to aid the jury in determining the probable duration of life, when that question is in issue, and may properly be submitted with other evidence.

2. **Trial:** MORTALITY TABLES: PROBATIVE EFFECT: QUESTION FOR JURY. The probative effect of mortality tables, if any, is a question for

the jury, but proof of the good health of the person whose expectancy of life is under consideration is not essential to their admissibility.

3. **Evidence:** MORTALITY TABLES: ADMISSIBILITY. Proof of disease or of ill health or of hazardous employment may impair or destroy the effect of mortality tables as evidence, but does not make them inadmissible.

4. ———: ADMISSIONS. Where the head nurse of a hospital, while in the performance of her duties, is asked how a patient got poison, from the effects of which he is suffering, and refers the inquirer to the patient, with directions to go to his room and ask "how and where he got it and what it was," and afterward assents to statements by the patient, in answering those questions, that he got the poison in his room and took it thinking it was medicine, when promptly repeated to the nurse by the inquirer, who followed her directions, the statements may be admitted in evidence as admissions or declarations tending to prove negligence on the part of the hospital.

5. **Hospitals:** NEGLIGENCE OF EMPLOYEES: LIABILITY. A hospital conducted for private gain is liable to a patient for the negligence of nurses, while acting within the scope of their employment.

6. **Physicians and Surgeons:** NEGLIGENCE OF HOSPITAL EMPLOYEES: LIABILITY OF PHYSICIAN. Where a patient in a hospital is treated by a physician who does not manage or control the hospital, he is not liable for the negligence of hospital nurses or internes, if he had no connection with any negligent act.

7. **Hospitals:** IMPLIED OBLIGATIONS. A patient is generally admitted to a hospital, conducted for private gain, under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require. *Wetzel v. Omaha Maternity & General Hospital Ass'n, ante,* p. 636.

8. **Evidence:** PRESUMPTIONS: TEMPORARY AILMENT. A mere fitful or temporary mental disorder will not be presumed to continue.

9. **Hospitals:** NEGLIGENCE: QUESTION FOR JURY. Whether a hospital was negligent in allowing a patient, while suffering from a fitful, mental disorder, access to a sinkroom, in the night, without an attendant, where poison was kept, *held* a question for the jury.

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

William Baird & Sons and *E. M. Morsman, Jr.,* for appellant.

Duncan M. Vinsonhaler and *W. C. Fraser, contra.*

ROSE, J.

This is an action to recover $40,000 for alleged negligence resulting in the death of Adolph F. Broz, a farmer who, with his wife and two children, had resided on a farm in Saline county. Plaintiff is the administratrix of his estate. The Omaha Maternity & General Hospital Association, defendant, is a corporation conducting at Omaha a hospital for private gain. Broz was a patient therein from April 18, 1910, until June 21, 1910, paying for his room and care $15 a week. In the petition it is alleged that Broz was knowingly admitted as a patient when suffering from a mental disorder which caused at times a delirious condition impelling him intermittently to leave his bed and otherwise to act irrationally; that while a patient of defendant he took poison, the result being fatal; that defendant was negligent in permitting him to remain for a long time unattended and unguarded in his room and in the hallways of the hospital, and in negligently leaving in an exposed and unguarded place the poison which he took; that, after defendant was apprised that he had taken poison, it negligently failed to administer proper remedies and antidotes; that the facts pleaded constitute a negligent omission of duty and a breach of defendant's implied undertaking to furnish and supply him with all the care, nursing, medical treatment and oversight necessary, suitable and proper for him in view of his known physical and mental condition. In its answer defendant denied negligence, but admitted that Broz was affected with a mental disorder when taken to the hospital; that about midnight June 19, 1910, he was found in his room dangerously ill, and nurses then on duty were soon afterward apprised that he had taken poison; that he died June 21, 1910. The jury rendered a verdict in favor of plaintiff for $7,000. From a judgment for that sum defendant has appealed.

The first assignment of error is directed to the admission in evidence of standard tables of expectancy of life. On this point defendant says: "As a matter of fact Broz

was suffering from a mental disorder of such a nature that he could never fully recover, and his chances of a partial recovery were none too good. The probable duration of the life of a person in such a condition is very uncertain and cannot be shown by the introduction in evidence of the ordinary life tables, for those tables are applicable only to persons in good health." In support of this argument, *City of Lincoln v. Smith,* 28 Neb. 762, and *Roose v. Perkins,* 9 Neb. 304, are cited. The question now presented was not involved in either of those cases. While good health was shown, neither opinion contains the statement that mortality tables are inadmissible in absence of proof of that fact. As data or evidence, tending to show expectancy of life, mortality tables are not conclusive. *City of Friend v. Ingersoll,* 39 Neb. 717; *Vicksburg & M. R. Co. v. Putnam,* 118 U. S. 545; *City of Joliet v. Blower,* 155 Ill. 414; *Central R. Co. v. Crosby,* 74 Ga. 737; *Scheffler v. Minneapolis & St. L. R. Co.,* 32 Minn. 518. They are competent evidence to aid the jury or court in determining the probable duration of life when that question is in issue, and may properly be submitted with other evidence, showing health, age, existence of disease, physical and mental condition, vocation or employment, and other pertinent facts.

As evidence, the effect of mortality tables, if any, is determinable by the triers of fact. *City of Friend v. Ingersoll,* 39 Neb. 717; *City of South Omaha v. Sutliffe,* 72 Neb. 746. Proof that the person whose expectancy of life is under consideration conforms to the standards of health and vigor adopted in compiling mortality tables is not essential to their admissibility.

Evidence of disease or of ill health or of hazardous employment may impair or destroy the probative effect of tables of expectancy of life, but it does not make them inadmissible. *Arkansas M. R. Co. v. Griffith,* 63 Ark. 491; *Greer v. Louisville & N. R. Co.,* 94 Ky. 169; *Birmingham M. R. Co. v. Wilmer,* 97 Ala. 165; *Mary Lee Coal & R. Co. v. Chambliss,* 97 Ala. 171; *Coates v. Burlington, C. R.*

& N. R. Co., 62 Ia. 486. In the *Arkansas* case cited the court said: "The question is whether we can still make the tables of service in making the calculation, notwithstanding it is shown that plaintiff's condition and health were below the average, and that, in fact, he was not an insurable risk. This is an element of uncertainty that must necessarily be found in the case of one of feeble health and not insurable, in all cases, whether we call to our aid the mortality tables or not. When we do so, however, when, by reason of enfeebled physical condition, the standard tables are not strictly applicable on that account, yet they are more or less efficient aids in arriving at an approximation of the truth, and that is the best that can be hoped for after all." This assignment of error is therefore overruled.

Another assignment of error challenges the admissibility of statements by Broz that the poison was on a table in his room, and that he took it, thinking it was his medicine. Over objections of defendant, statements of this nature were proved by Dr. Mares. There is testimony tending to show: Dr. Mares was a brother-in-law of Broz. The poisoning was discovered before midnight. About 8 o'clock the next morning Dr. Mares was notified, and promptly went to the hospital. Upon his arrival he conversed with the head nurse. He testified: "I asked the head nurse what happened, and she told me that Mr. Broz took poison, and that it was bichloride of mercury. I asked her how could she tell it was bichloride of mercury, and she told me she could tell by the symptoms; and I asked her, 'How did he get it?' She told me to go in his room and ask how and where he got it and what it was." Dr. Mares went to the room of the patient, interviewed him, and reported the conversation to the head nurse, who said: "That is what I thought." The statements of Adolph F. Broz were thus reported by Dr. Mares in his own language, as follows: "When I came in the room I said, 'Adolph, what did you do, and what did you do it for?' and he said, 'I did not do anything.' He said, 'I

took four tablets off of the tray on the table.' He pointed at the table, and he said he thought it was his medicine, and I asked him what kind they were, and he said they were blue in color, and a little smaller than usual. And then he told me that he took them because lately they were changing medicine on him, and so he thought it was his medicine, and I asked him if he used to take so many, and he said, no, he only took two, and sometimes only one, and those were grayish in color and a little bit larger. And then he also told me that he drank a glass full of something that tasted oily. I asked him, 'Did it make you sick?' and he said, 'No, not right away,' but in a few minutes he started to get cramps and pains in his stomach and started to vomit."

The question is: Did the trial court err in admitting this testimony and other proof of a similar nature? It is argued that defendant is not bound by such statements; that Broz was under the care of his own physician, and that the latter's instructions were obeyed by the nurses and other employees of the hospital; that Broz, under specific directions of his physician, was allowed the freedom of his room and of the halls in the hospital; that bichloride of mercury was used in the hospital as an indispensable disinfectant, and that it was kept for that purpose in a sinkroom, where Broz found the tablets; that he took the poison with suicidal intent, there being at the time no reason to suspect that he would do so. Defendant adduced proof in support of the positions thus taken. If, however, the statements of Broz were properly admitted, there is evidence of negligence on the part of defendant. Intermittent mental infirmities of the patient were pleaded in the petition and admitted in the answer. The pleadings, evidence and circumstances justify a finding that he was admitted to the hospital under an implied obligation that he should receive such reasonable care and attention for his safety as his mental and physical condition required. The physician employed by him did not relieve the hospital of responsibilty for negligence on its part, if any. The patient was under the personal obser-

vation of his physician only a small portion of the time. In the latter's absence and during emergencies he was under the care of the nurses and the interne who were employees of the hospital. Within the scope of their employment their employer is legally responsible for their negligence to a patient. *Wetzel v. Omaha Maternity & General Hospital Ass'n, ante,* p. 636. The patient's physician did not manage nor control the hospital, and he is not liable for the negligence of hospital nurses and internes, if he had no connection with any negligent act. *Harris v. Fall,* 177 Fed. 79, 27 L. R. A. n. s. 1174, and note. In absence of the physician employed by Broz, and in absence of the latter's wife, and of his relatives and friends, while he was under the exclusive care of hospital nurses, he took bichloride of mercury and died as a result. These facts are indisputably established. Several hours after the poison had been taken, the hospital authorities in the meantime having had ample time to make an investigation, Dr. Mares called upon the head nurse, and, according to his testimony, was told that the patient had taken poison. "How did he get it?" was then asked. This was a proper inquiry by the patient's brother-in-law. It was directed to the head nurse, an employee of defendant. She was the person who would be most likely to know the truth. The inquirer had a right to know the fact. The nurse, instead of fully answering the question, directed the inquirer to go to the patient's room and ask how and where he got the poison and what it was. Dr. Mares did as she directed, returned, and told her what the patient said. She replied: "That is what I thought." This is the story of Dr. Mares. Were the statements of the patient, in connection with what the head nurse said, admissions binding on defendant? The expression, "That is what I thought," may fairly be construed to imply previous knowledge on part of the head nurse and to indicate the approval of the patient's version of what he took and where he obtained it. An eminent text-writer says: "The admissions of a third person are also receivable in evidence, against the party who has expressly referred

another to him for information, in regard to an uncertain or disputed matter. In such cases, the party is bound by the declarations of the persons referred to, in the same manner, and to the same extent, as if they were made by himself." 1 Greenleaf, Evidence (16th ed.) sec. 182.

Even if no reply had been made by the head nurse to the statements tending to show negligence on the part of defendant's employees, silence might be considered an admission, under the circumstances, since the head nurse would naturally deny statements implying negligence, if untrue. 16 Cyc. 956. Defendant is a corporation and could only act through officers, agents or servants, and it is bound by what they do in the performance of their duties. Where a hospital patient takes poison at night in the absence of his physician and friends, while he is under the exclusive care of nurses and internes, harsh and technical rules of evidence should not be enforced to exclude proper testimony tending to throw some light on material facts which, on account of the pecuniary interests and the reputation of the hospital, there might be a temptation to conceal. The conclusion is that there was no error in overruling objections to the admissions or declarations proved.

It is further contended that there was no evidence of negligence on the part of defendant in treating the patient after he had taken the poison, and that the trial court erroneously submitted the question to the jury. At night, during the absence of the patient's physician, it was clearly the duty of the hospital interne, who was a physician, and the nurses in charge, to give such treatment and attention as the emergency demanded, when known. Defendant was prepared for such an exigency. One of the purposes of a hospital in assuming control of a patient, for private gain, is to furnish promptly modern equipment, facilities and treatment. To avail himself of these advantages the patient left his farm in Saline county and entrusted himself to the care of defendant. The duties which such a hospital owes to a patient are commensurate with the responsibilities assumed. The approved rule is that a pa-

tient is generally admitted to a hospital, conducted for private gain, under an implied obligation that he shall receive such reasonable care and attention for his safety as his mental and physical condition, if known, may require. *Wetzel v. Omaha Maternity & General Hospital Ass'n, ante,* p. 636. Within the meaning of this rule, the interpretation which the trial court put upon the proof of negligence on the part of defendant in treating Broz, after he had taken bichloride of mercury, is approved upon an examination of all of the circumstances of the case, and error in submitting the question to the jury is not affirmatively shown. It may fairly be inferred from all of the proofs relating to this subject that nurses were promptly apprised of the taking of the poison and that proper treatment was negligently delayed.

Another reason urged as a ground for reversal is the absence of evidence that Broz would have recovered, with an earning capacity justifying the verdict. A mere fitful or temporary mental disorder will not be presumed to continue. *Turner v. Rusk,* 53 Md. 65; *People v. Francis,* 38 Cal. 183; *Hall v. Unger,* 2 Abb. (U. S.) 507; *Leache v. State,* 22 Tex. App. 279; *Ford v. State,* 71 Ala. 385. In the present case there is proof tending to show that the mental disorder was temporary and that the patient would have recovered, had he not taken poison. An earning capacity sufficient to support the judgment is also shown. On these issues the credibility of the witnesses and the weight of the evidence were questions for the jury, and in the respects mentioned no sufficient reason for setting aside the verdict has been suggested.

A direction to the jury submitting the question of negligence on the part of defendant in leaving Broz unattended in his room and in the halls is criticized as erroneous. In this connection it is insisted that the physician employed by Broz instructed defendant to allow him the freedom of his room and the halls, that employees of defendant did so, and that it is not chargeable with negligence for complying with instructions. The directions of the physician should be considered with the duty of the

hospital to give the patient such reasonable care and attention for his safety as his mental and physical condition required. Defendant was not instructed to allow the patient, who had been suffering from a fitful mental disorder, access to a hospital sinkroom, where poison, in the form of medicine tablets, were kept. Whether there was negligence in allowing the patient access to such a place in the night, while unattended, was a question for the jury.

The views taken in regard to the proofs and to the law applicable thereto result in the conclusion that there was no prejudicial error in giving or in refusing instructions to the jury.

AFFIRMED.

SEDGWICK, J., dissenting.

The facts of this case are in some respects identical with those in *Wetzel v. Omaha Maternity & General Hospital Ass'n, ante,* p. 636. This defendant was also defendant in that case, and it appears that it was organized to own and conduct a hospital for profit, and that the hospital is not an eleemosynary or charitable institution and is liable for negligence in the performance of duties undertaken by it.

The court submitted the case to the jury with the following instruction: "The plaintiff bases her right to recover in this action upon two specifications of negligence on the part of the defendant: (1) That the defendant was negligent in permitting Adolph F. Broz to remain for a long time unattended and unguarded in his room, and in the hallways of the hospital, and in negligently leaving in an exposed and unguarded place the poison which Adolph F. Broz took. (2) That after the employees and agents of the defendant were apprised that Adolph F. Broz had taken poison, it negligently failed to administer proper remedies and antidotes for the relief of said Adolph F. Broz." The issues so stated were substantially the issues tried by the parties.

The theory of the defendant is that the deceased left his room and went to the sinkroom, and there found the bichloride of mercury which he took with suicidal intent, and that in such case the defendant would not be liable. The theory of the plaintiff is that he found these tablets on the table near his bed in his room, and that he took them by mistake, supposing they were medicine prescribed for him. By the above quoted instruction the court submitted both of these theories to the jury. It appears to be conceded that, if the deceased was in his right mind so as to be responsible for his acts and took this poison with the purpose and intention of destroying his own life, there would be no liability on the part of the defendant. One of the contentions of the defendant is that there was not sufficient evidence to justify submitting to the jury the question whether these bichloride tablets were found upon the table in the patient's room. The evidence of Miss Thimling, his nurse, was clear and positive that when she left his room a few minutes before he took the poison there were no tablets or medicine of any kind on the table, and that she never saw any of the tablets in his room, and these tablets were never taken to the sick rooms. Her testimony was supported by the positive testimony of many witnesses and must prevail, unless there is substantial evidence to the contrary. Some of the defendant's evidence upon this point will be further stated in another connection. The only evidence tending to prove that they were found there by the patient is the evidence of the plaintiff and her brother, Dr. Mares, that the patient made declarations to that effect. This evidence was objected to as incompetent and hearsay.

There was substantial evidence that the deceased had gone to this sinkroom and had taken this bichloride of mercury for the purpose of taking his own life. The next morning, about nine hours afterwards, Dr. Mares visited the patient in his room, and upon the witness-stand he was asked: "Now, doctor, you may state what Adolph Broz said to you in that room that morning?" This was objected to on the ground that it was incompetent and

hearsay. The objection was overruled, and the defendant answered: "When I came in the room I said, 'Adolph, what did you do, and what did you do it for?' and he said, 'I did not do anything.' He said, 'I took four tablets off the tray on the table.' He pointed at the table, and he said he thought it was his medicine, and I asked him what kind they were, and he said they were blue in color, and a little smaller than usual. And then he told me that he took them because lately they were changing medicine on him, and so he thought it was his medcine, and I asked him if he used to take so many, and he said, no, he only took two, and sometimes only one, and those were grayish in color and a little bit larger. And then he also told me that he drank a glass full of something that tasted oily. I asked him, 'Did it make you sick,' and he said, 'No, not right away,' but in a few minutes he started to get cramps and pains in his stomach and started to vomit." The defendant then moved to strike out this evidence because it was incompetent and hearsay, and the motion was overruled. This evidence was, of course, incompetent as a dying statement, since evidence of dying statements is allowed only in criminal cases. It is contended that it is competent as a part of the *res gestæ*. The modern rule as to what is and what is not a part of the *res gestæ* is aptly and carefully stated in *Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397. This case is of the more importance and interest because it considered and determined no other question and because two of the justices dissented, and the question is quite elaborately and thoroughly discussed in the dissenting opinion. The law is stated in the syllabus: "The *res gestæ* are the statements of the cause made by the person injured almost contemporaneously with the occurrence of the injury, and those relating to the consequences made while the latter subsisted and were in progress." That is, in an injury of this kind there are two things to be considered, the cause and the consequences of the injury. If it is desired to prove the cause of the injury, statements "made by the person injured almost contemporaneously with the occurrence" are *res ges-*

tæ, the things done that constitute the cause of the injury.. If it is desired to prove the consequences of the injury, then statements made by the injured person while the consequences subsist and are in progress may be evidence of the *res gestæ,* the things suffered as the consequences of the injury. And so, in this case, if it was desired to prove the condition in which the physician found the patient, it would be competent to prove the questions of the physician and the answers of the patient as to his suffering and such matters as would enable the physician to determine his condition. In the case cited Mrs. Mosley testified that her husband left the bed "between 12 and 1 o'clock; that, when he came back, he said he had fallen down the back stairs, and almost killed himself; that he had hit the back part of his head in falling down-stairs; * * * she noticed that his voice trembled; he complained of his head, and appeared to be faint and in great pain." His son testified: "That, about 12 o'clock of the night before-mentioned, he saw his father lying with his head on the counter, and asked him what was the matter; he replied that he had fallen down the back stairs and hurt himself very badly." From this it appeared that in a very short time after the deceased left his bed he was found injured and made these declarations as to its cause, which brings them within the rule announced in the syllabus, as statements of the cause made by the person injured almost contemporaneously with its occurrence.

It will be observed that the declarations testified to by the witness in the case at bar related wholly to the cause of his injury, the taking of the poison, and not to the consequences of the injury. They were made, not almost contemporaneously with the cause to which they related, but some nine hours thereafter. He was asked by his brother-in-law: "What did you do, and what did you do it for?" He had had ample time to consider his action, and had suffered very much from its consequences. He knew that his brother-in-law would disapprove of his taking poison purposely. His answer tended to shield himself from blame, and was in no sense contemporaneous with the act

that it is supposed to explain. This same witness was allowed to testify to a conversation that he had with the deceased at about 10 o'clock on the following night, nearly 24 hours after the cause of the injury, which declarations related wholly to the cause of his injury and had nothing to do with the consequences of the injury; that is, the condition in which the physician found him.

The plaintiff first saw her husband after the accident about 4 o'clock the following afternoon. She testified that when she went into the room the nurse was treating Broz, and that she asked the nurse what her husband took, and the nurse said, "He took some poison pills," and that while she was in the room the nurse was there. "He (Broz) was pointing to the table, and he said: 'I took them on that table, on the little tray, I thought they were my medicine;'" that the nurse told her to ask him and she asked him, and that his statement was an answer to her question, and that after her husband had made that statement the nurse did not say a thing. It seems clear that this evidence was not admissible as part of the *res gestæ*.

It is said that this evidence was competent as admissions of the nurses which would be binding upon the defendant. The physician testified that he was requested by the head nurse of the hospital to ask these questions of the patient, and that he reported to the nurse what the patient had said, and that the nurse replied: "That is what I thought." If we consider that the doctor's evidence in regard to these declarations was competent as proving admissions on the part of the hospital authorities, the supposed admission of the nurse was so indefinite as to be of little value. Her expression, "That is what I thought," might have related to the fact of his having taken poison, or it might have related to the manner of his taking it, as shown by the alleged declaration. Such evidence is not of sufficient importance to overcome the evidence on this point which is further stated in the discussion of the following contention. The contention that these tablets were found on the table in the patient's room should not have been submitted to the jury.

The defendant contends that there is no evidence of negligence on its part in the treatment of Broz after the discovery of his condition. The evidence shows that, if the patient had swallowed a large quantity of bichloride of mercury, a delay of a half hour, and probably a much shorter time, in administering antidotes would generally, if not always, prove fatal. The interne and nurses were not physicians. This was understood by all parties. The physicians were employed by the parties and their friends. Negligence therefore, could not be imputed to the defendant because of not keeping a competent physician in continual attendance. It was the duty of the defendant to furnish attendants of ordinary prudence and caution.

Miss MacRea testified that she and Miss Thimling were in the hall not far from the patient's room, and when she heard the moaning and vomiting in the patient's room she went there immediately and found him upon the floor, etc., and called his nurse, Miss Thimling, who came at once. They together returned the patient to his bed, and Miss MacRea questioned him as to the cause of his condition, and he told her that he had taken tablets from the sinkroom. She ran to the sinkroom and obtained some of the bichloride tablets and showed them to the patient, and asked him if that was what he took, and he answered that it was; that he knew he never would get well, and that he didn't want to live any longer, and that was the reason he took the tablets. She then ran immediately to the head nurse and to Dr. Parsons, the interne. She says this was done instantly and didn't take her more than a minute, and they told her to give him some milk and the whites of eggs, and she and Miss Thimling gave him the milk and whites of eggs before Dr. Parsons arrived, which was almost immediately, and that then, under Dr. Parsons' directions and with his help, they gave him a large quantity of milk and at least three whites of eggs. The witness called Dr. Coulter and informed him of the condition and what they had done. He gave them some additional directions which they proceeded to comply with.

Miss Thimling, who was in charge of the patient at the time, testified that she was in the hall and heard groaning and vomiting in the patient's room. Miss MacRea was with her and went at once to the patient's room, and she followed almost immediately. She gave him his medicine at about 9 o'clock that night and was frequently in his room afterwards and before the accident occurred. He came out into the hall several times and she took him back. He complained that his room was hot and that he couldn't sleep. She testified that Miss MacRea went to his room first and she followed immediately after, and that when she reached the room he was telling Miss MacRea what was the matter with him, and said that he had taken blue pills, and she asked him where he got them, and he told her, "Out of the little room, out of a bottle," and she asked him what he took them for, and that was the last she heard. She was called out of the room to attend to another patient and returned immediately. When she went back to the room Miss MacRea had gone to call the head nurse and the doctor, and when Miss MacRea returned they gave him a glass of milk and the white of an egg. After they had given him that he refused to swallow, and Dr. Parsons, the interne, had come by that time, and they gave him two quarts of milk and the whites of two eggs through the stomach tube; that Dr. Parsons talked with him, and he "told the same thing that he told Miss MacRea." She never heard him say anything else as to where he got the tablets. She testified that the bichloride tablets were kept in the sinkroom, and that she had never seen any in any place in the hospital except in the sinkroom, operating room, and the drug room; that when she had given him his medicine she washed the glass and placed it on the table beside his bed, and that there was no medicine on the table, and that she never saw any medicine in his room during the time that she waited on him, except when she administered it to him.

Dr. Parsons also testified that when he was called by Miss RacRea he went at once to the patient's room, and he corroborates her fully in regard to the treatment and in

regard to Broz's statements as to the cause of the accident.

If these witnesses are to be believed, Mr. Broz procured these tablets from the sinkroom. It was not discovered that he had taken poison until it had already taken effect and he was suffering severely therefrom. Then the nurses placed him upon the bed and got their instructions from the head nurse and Dr. Parsons and administered the proper antidotes without any delay. The proper treatment must have been administered within a very few minutes, not more than three or four, probably within two minutes after he was found. This evidence is without contradiction. The allegation of negligence in the care of the patient after the poison was taken is not supported by the evidence and should not have been submitted to the jury.

The evidence of the plaintiff and the witness Mares as to declarations of the deceased were incompetent, and the allegations of negligence in leaving the poison tablets in the patient's room and in neglecting proper remedies after it was discovered that he had taken poison were not sustained, and those issues should not have been submitted to the jury.

LETTON and HAMER, JJ., concur in this dissent.

FELIX J. MCSHANE, JR., APPELLEE, V. DOUGLAS COUNTY, APPELLANT.

FILED JULY 14, 1914. No. 18,260.

1. **Statutes:** CONSTITUTIONALITY: FEEDING PRISONERS. That part of chapter 53, laws 1907, which provides for letting contract to feed prisoners in counties having more than 100,000 population was *held* unconstitutional and void in *State v. McShane*, 93 Neb. 46. That provision being an inducement to the passage of the act, and not separable, the whole act is unconstitutional.

2. **Counties:** ALLOWANCE FOR FEEDING PRISONERS. It is the duty of the county board to allow a reasonable compensation to the sheriff for feeding prisoners confined in the county jail.

Rehearing of case reported in 95 Neb. 699. *Judgment of district court reversed.*

SEDGWICK, J.

After the former opinion in this case (95 Neb. 699) a rehearing was allowed, and the case has been again exhaustively briefed and argued.

Prior to the act of 1907 the statute fixed the fees of sheriffs in detail, and added a proviso: "For boarding prisoners per day, not exceeding seventy-five cents per day, nor more than three and one-half dollars per week, when the prisoners are confined more than six days." Comp. St. 1905, ch. 28, sec. 5. This part of the proviso was considered by this court as early as *Lancaster County v. Hoagland,* 8 Neb. 36. It was then held to leave the matter to the discretion of the county board to pay a reasonable amount for feeding the prisoners, and the law remained with this construction until the act of 1907. The act of 1907 (laws 1907, ch. 53) reenacted the detailed provision for the fees of sheriffs in general without change. In lieu of the general proviso for boarding prisoners, above quoted, it contained the following: "For boarding prisoners fifty cents per day, provided, that in counties having by the last preceding national or state census a population in excess of one hundred thousand (100,000) the sheriff shall receive for boarding prisoners, including jail supplies, thirty-nine cents per prisoner per day until January 1, 1908, and it shall be the duty of the board of county commissioners to advertise on or before December 1, 1907, and annually thereafter, for proposals for furnishing meals to prisoners in the county jail according to specifications set forth in said advertisement and on or before the first day of January in each year to contract with the lowest and best bidder for feeding prisoners in the county jail." Thus the only changes made in the section were to require quarterly reports of fees and provide absolutely 50 cents a day for the state at large, instead of the maximum compensation, and to make a special provision for counties having a population in excess of 100,000 (Doug-

las county). The provision that the feeding of the prisoners in Douglas county should be let by contract to the lowest and best bidder was held unconstitutional in *State v. McShane,* 93 Neb. 46. This cause of action arose before the revision of 1913 took effect. It seems clear that the provision of this statute relating to Douglas county and fixing the amount to be paid the sheriff for boarding prisoners in that county was an inducement to the act. The section amended by the act covers all of the fees of the sheriff. It is a very long section and occupies nearly a page of the Compiled Statutes (Comp. St. 1905, ch. 28, sec. 5) and no other change is made in this long section by the amendment except the changes above indicated. It is entirely manifest that the legislature did not intend by this amendment to provide that 50 cents a day should be paid to the sheriff in Douglas county. There are two substantial reasons for saying that the legislature did not so intend, either one of which would sufficiently show that the provision in regard to Douglas county was an inducement for the passage of the act: First, the section provides that from the time of the taking effect of the act the amount to be paid in Douglas county shall be 39 cents a day until the 1st day of the next succeeding January, and in the meantime the county commissioners shall make preparations for letting the contract in January, thereby effectually precluding the sheriff from getting 50 cents a day in Douglas county for any time after the act took effect; second, it also seems clear that the provision for letting to the lowest bidder was the most important part of the whole amendment and the principal inducement for the passage of the act.

The history of the enactment of the statute of 1907 indicates it. Senate File No. 319 was a bill for "An act to amend section 5, of chapter 28, of the Compiled Statutes of Nebraska for the year 1905, and to repeal said section." The only change made in the amended section was to provide for the filing by the sheriff of quarterly reports of fees collected by him. It was referred to the judiciary committee, and it reported an amendment chang-

ing the cost for boarding prisoners from "not exceeding 75 cents per day" to 50 cents per day. When it was first considered in the committee of the whole senate it was amended by adding the provision that in counties having 100,000 population the feeding of prisoners should be let by the county after January 1, 1908, and in the meantime compensation in such counties should be 39 cents a day. The house concurred in this important change in the bill, and added some minor amendments, which were rejected by a conference committee, and the bill was passed and approved by the governor with the provision that in the most important counties of the state, so far as population is concerned, the feeding of prisoners should be let by contract.

It cannot be supposed that the legislature would have enacted a general statute providing for the feeding of prisoners and omit from its provisions the largest counties of the state. The inducement to the act was to provide for this service in all the counties of the state, and the provision for counties having 100,000 population was a part of that inducement. The wording of the statute itself shows this. "Fifty cents per day, provided (except)" that for Douglas county a different provision is made. When that provision was held to be unconstitutional the whole act was annulled. The former statute is in effect, which has been decided by this court, to leave the matter to the discretion of the county board to fix a reasonable compensation. Unfortunately, however, it was stated in the opinion in *State v. McShane, supra,* that "after eliminating the unconstitutional portion of it, the remainder of the act is complete in itself, and capable of enforcement." This statement was wholly unnecessary in the case, and should be disregarded. However, we considered that the subsequent case of *McShane v. State,* 93 Neb. 54, was a reaffirmance of the statement that the remainder of the act could be enforced. This latter opinion would seem upon first reading to have that meaning, but upon careful examination it is not a reaffirmance of the dictum in the former opinion. In the latter case the opinion

says: "The record contains a stipulation that the question presented for determination in this case is identical with the one recently decided by this court in *State v. McShane,* 93 Neb. 46." This is not saying that it is in fact the same, but the question in the latter case was considered to be the same as in the former case, acting on the stipulation that it should be so considered. It seems that in former decisions this court had made a distinction between state prisoners and county prisoners, and the latter opinion related to state prisoners only, and not county prisoners. It was, perhaps erroneously, considered that this distinction still existed, and consequently the question as to the constitutionality of that part of the act of 1907 which provided 50 cents a day for feeding county prisoners was not considered in the opinion. The district court had decided that McShane was "bound by the terms of the contract between the county board of Douglas county and Gardipee & Flanagan," and this court held that, that contract being void, the plaintiff was not bound by the terms of the contract. The opinion, however, contains a repetition of the dictum of the former case in these words: "He was clearly entitled to the compensation mentioned in that part of chapter 53 remaining in force, by which it is declared that the sheriff shall receive the sum of 50 cents a day for furnishining meals to such prisoner." 93 Neb. 54. It is beyond question that the legislature intended that in Douglas county the sheriff should only have 39 cents a day until the county board could put in force the provision for letting the contract to the lowest bidder, and that was the reason for fixing the compensation at 50 cents a day in the other counties of the state, and the legislature never intended so to fix the compensation at 50 cents a day in Douglas county.

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

REVERSED.

ROSE, J., not sitting.

BARNES, J., dissents.

HAMER, J., dissenting.

I want to make the inquiry of any and all the members of this court who give the majority opinion their support whether they think an act which has been declared unconstitutional by this court in a case where it had jurisdiction to determine the matter ever becomes a constitutional and valid act without being reenacted by the legislature as the constitution of the state provides a new act shall be created? By the opinion which is presented as the majority opinion the members of this court are asked to say that this may be done. What is now section 3539 of the Revised Statutes of 1913 was, in its original form, wiped out as unconstitutional by the decision of this court in *Lancaster County v. Hoagland,* 8 Neb. 36. This section has never since been reenacted. Therefore, it has never been born again. Once unconstitutional, always unconstitutional. That section was put in Cobbey's statute, but that does not make it law unless you gentlemen resolve to put everything out of sight and out of recollection, and in addition you destroy the case of *Lancaster County v. Hoagland,* 8 Neb. 36, so that no one may see it.

I think we should hesitate to fix the fees of the sheriff for keeping prisoners in the jail. That should be done by the legislature. We are a court. We have delivered three opinions touching the matter under consideration. The opinions are in *State v. McShane,* 93 Neb. 46, *McShane v. State,* 93 Neb. 54, and *McShane v. Douglas County,* 95 Neb. 699. Believing that these opinions are correct, I think that they should be adhered to. We have no right to overrule them without a reason, and we are not offered any reason. Judge Barnes prepared the two former opinions, and Judge Letton the latter.

Section 2441 of the Revised Statutes of 1913 is the live section. Section 3539 is the dead section. It was possible and natural to amend the live section. Douglas county undertook to get an amendment through that would specially apply to Douglas county. That special amendment was to let the contract for boarding the prisoners in the

jail to the lowest bidder. The decisions of this court in the cases cited knocked out that effort of Douglas county. It was made to apply to those "counties having by the last preceding national or state census a population in excess of 100,000." As Douglas county is the only county of that kind in the state, of course it applied to Douglas county. The only trouble about it was that it was not contemplated by the section sought to be amended that there should be a public letting whereby the boarding of the prisoners would be taken from the sheriff. The only difficulty was that there was an error in the method by which it was attempted to be done. The other counties have a rate which gives the sheriff 50 cents a day for boarding the prisoners. Because of the unfortunate attempt to get in the Douglas county amendment, the law is just the same for Douglas county as it is for any other county. If the amendment had been offered in the right way, it might have been done, but it was attempted to be done in the wrong way, and therefore it failed.

By chapter 53, laws 1907, it was sought to amend what is now section 2441 of the Revised Statutes of 1913 so that it would read: "Where there are prisoners confined in the county jail, $1.50 per day shall be allowed the sheriff as jailer. For boarding prisoners 50 cents per day, provided, that in counties having by the last preceding national or state census a population in excess of 100,000 the sheriff shall receive for boarding prisoners, including jail supplies, 39 cents per prisoner per day until January 1, 1908." And then comes the Douglas county provision providing for advertising for bids and letting the contract to "the lowest and best bidder." Of course this last provision goes out under the decisions. Then the act reads: "Provided further, that the sheriff shall, on the first Tuesday in January, April, July and October of each year, make a report to the board of county commisioners or supervisors under oath showing the different items of fees except mileage collected or earned, from whom, at what time and for what service, and the total amount of fees collected or earned by such officers since the last re-

port, and also the amount collected or earned for the current year, and he shall then pay all fees earned to the county treasurer." It is directly said by the syllabus in *State v. McShane,* 93 Neb. 46: "So much of chapter 53, laws 1907, as authorizes the county boards of counties having more than 100,000 inhabitants to contract with the lowest and best bidder for feeding prisoners in the county jail is violative of the provisions of section 11, art. III of the constitution." The opinion was delivered in a case brought to compel McShane, as the sheriff of Douglas county, to let *Gardipee & Flanagan* into the *jail for the purpose of furnishing meals to the prisoners.* The district court allowed the mandamus, and this court reversed its judgment and dismissed the case. In *McShane v. State,* 93 Neb. 54, there was an appeal from the judgment of the district court for Lancaster county sustaining the action of the auditor of public accounts in disallowing a portion of a claim presented by McShane to the auditor for allowance against the state. The claim was for "board of prisoners from date of conviction, August 27, 1912, to August 30, 1912, 4 days, at 50 cents a day, $2."

The foregoing claim was allowed at 19 cents a day, and from the disallowance of a part of the item above set forth the plaintiff appealed to the district court and the state filed a demurrer to the plaintiff's petition, which was sustained, and thereupon judgment was rendered against the plaintiff dismissing the action, and from the judgment the plaintiff prosecuted an appeal. It will be observed that this last case was to compel payment for the keep of state prisoners. The amount allowed was only 19 cents a day. This court said: "The provision in chapter 53, laws 1907, by which the legislature attempted to authorize the county commissioners in counties having more than 100,000 inhabitants to let contracts for feeding prisoners in the county jail to the lowest and best bidder, is unconstitutional and void." It is said in the opinion: "It follows, therefore, that the plaintiff was not bound by the terms of the contract between the county board of Douglas county and Gardipee & Flanagan, which was upheld by the district

court; and, plaintiff having furnished the meals in question to a state's prisoner, which fact was admitted by the demurrer, he was clearly entitled to the compensation mentioned in that part of chapter 53 remaining in force, by which it is declared that the sheriff shall receive the sum of 50 cents a day for furnishing meals to such a prisoner." The judgment of the district court was reversed and the cause remanded for further proceedings. A glance at the section as it is left amended with the unconstitutional part stricken out shows that, omitting the last proviso concerning a report to the county treasurer and the payment of fees to him, the section reads: "For boarding prisoners, 50 cents per day, provided, that in counties having by the last preceding national or state census a population in excess of 100,000 the sheriff shall receive for boarding prisoners, including jail supplies, 39 cents per prisoner per day until January 1, 1908." As there is a limitation as to the time for the payment of 39 cents a day which fixes January 1, 1908, as *the end of that rate*, it follows that there is no rate provided except the 50 cents a day mentioned at the commencement of the section. It must be clear that the opinions cited fixed the rate at 50 cents a day.

In *McShane v. Douglas County*, 95 Neb. 699, this court said in the syllabus: "The question presented here was argued and decided in *McShane v. State*, 93 Neb. 54. The legislature had been in session since the decision, and, having made no change in the amendment to the statute, the construction given therein is adhered to." In the body of the opinion there is a discussion of the two decisions of this court above cited, and the court said: "These excerpts from the brief clearly show that the questions raised in this case were expressly raised and decided in the former case, and that, if any relief is to come, it must come through the legislature. The legislature has been in session since the decision in the former cases, and has taken no steps to change the rule of the decisions. We are not inclined to interfere with their prerogative."

In section 2285 of the report of the commission for revision of the general laws of Nebraska, it is said: "The several sheriffs shall charge and collect fees as follows, to wit: Serving *capias* with commitment or bail bond and return, one dollar. * * * Where there are prisoners confined in the county jail, $1.50 per day shall be allowed the sheriff as jailer. *For boarding prisoners, 50 cents per day; Provided,* it shall be the duty of the county board to advertise on or before December, annually, for proposals for furnishing meals to prisoners in the county jail according to specifications set forth in said advertisement, and on or before the first day of January in each year to contract with the lowest and best bidder for feeding prisoners in the county jail; *Provided, further,* the sheriff shall, on the first Tuesday in January, April, July and October of each year, make a report to the county board under oath showing the different items of fees except mileage collected or earned, from whom, at what time, and for what service, and the total amount of fees collected or earned by such officer since the last report and also the amount collected or earned for the current year, and he shall then pay all fees earned to the county treasurer."

The report of the above commission was adopted and approved February 14, 1913, and "made of force as the Revised Statutes of the state of Nebraska of 1913." Laws 1913, ch. 3 (House Roll No. 1). Both of the opinions of this court prepared by Judge Barnes (*State v. McShane,* 93 Neb. 46; *McShane v. State,* 93 Neb. 54) were filed January 31, 1913, and, therefore, when the report of the commission was adopted with the unconstitutional part eliminated from the act by these decisions so that it would read, "for boarding prisoners 50 cents per day provided, that in counties having by the last preceding national or state census a population in excess of 100,000 the sheriff shall receive for boarding prisoners, including jail supplies, 39 cents per prisoner per day until January 1, 1908," as there is a limitation as to time for the payment of 39 cents a day—it fixes January 1, 1908, as the

end of that rate—it follows that there is no rate provided except the 50 cents a day mentioned at the commencement of the section.

The initiation of the report of the commission begins with chapter 166, laws 1911. The second section of that act provides that the said commissioners in performing their duties shall omit "obsolete or repealed matter and such *as has been declared to be invalid by the courts having jurisdiction thereover.*" And the commission is expressly forbidden to make any change "which may have the effect of giving a different construction," etc. When these commissioners were expressly forbidden to put in their report any matter that had been declared unconstitutional, can they put it in anyway? It would seem that if they were forbidden to put it in by the act which initiated their existence and provided for it, then if they do put it in it is as if they had *undertaken to vitalize mere rubbish.*

The report above referred to is not the "Revised Statutes of Nebraska." It was, and is, an antecedent volume. It was intended to gather up the *laws of the state.* The "Revised Statutes of 1913" is another book. It is provided by House Roll No. 875, entitled "An act to provide for the editing, annotating, indexing, preparing of manuscript and publication of the general laws of the state as a statute; for the authentication, the sale and distribution thereof, and to repeal sections 6987, 6992, 6994 and 6999x3 of Cobbey's Annotated Statutes of 1911 (C. S., ch. 95, art. 2, sec. 4; art. 3, sec. 4; art. 4, sec. 4); to provide an appropriation therefor and to declare an emergency." Laws 1913, ch. 241.

Section 1 of the act continues the commission for eight months for the purpose of editing and preparing the laws of Nebraska for publication as statutes to be known and cited as the "Revised Statutes of Nebraska for 1913."

Section 2 of that act provides that the Revised Statutes shall be published in the same form and on the same plan as the report of the commission, and "shall contain the matter of such report with all acts of a general nature enacted by the thirty-third session of the legislature, omit-

ting therefrom all matter that may have been repealed by this session of the legislature and substitute amendatory acts or parts thereof for those amended."

Section 3 of the act provides for the incorporation of amendments, and that "all laws of a general nature that shall be in force at the conclusion of this session of the legislature shall be incorporated in the Revised Statutes."

Section 7 of the act provides: "All acts of a general nature, as revised and reported to the thirty-third session of the legislature by the commission for the revision of the laws, as soon as such report shall be approved and adopted by the legislature, shall be construed as a continuation of such laws and not as new enactments."

Section 8 provides that the members of the commission shall collate and arrange "the Revised Statutes for publication as contemplated by this act." They are then directed "to supply any apparent omissions, mistakes or inaccuracies and to correct errors or mistakes in number or reference to sections, articles or chapters, or parts of any acts or laws in the report."

Section 2441, Rev. St. 1913 reads: "Where there are prisoners confined in the county jail, $1.50 per day shall be allowed the sheriff as jailer. For boarding prisoners, 50 cents per day."

Then comes the provision that the sheriff shall make a report on the first Tuesday in January, April, July and October of each year showing the different items of *fees* collected, except mileage, and the total amount collected, and shall pay all the fees earned to the county treasurer. Before leaving the section under consideration, it is well to note that the provision contained in the report of the commission touching the letting of the contract to the lowest bidder is left out. It was no doubt left out because it had been held unconstitutional. It was eliminated by the decisions first above quoted, and it was left out of the Revised Statutes by the commission and by the legislature because it had been eliminated. Is there any one who will say that that provision is in force notwithstanding the fact that it has been left out? As section 3539 of the

Revised Statutes of 1913 is still unconstitutional, it offers no serious obstacle to the enforcement of section 2441 of the same statutes after taking out the unconstitutional part relating to Douglas county. If the commission omitted to include in its report or in the Revised Statutes of 1913 any valid statute or part of a statute, would that statute be invalid because the commission left it out? Would it not still be the law? Can the commission by including unlawful and unconstitutional statutes in its report reenact them as a part of the law of this state without consulting the people and their representative agencies? The law that was held unconstitutional certainly cannot be made valid and constitutional by including it in the report of this commission. This commission had a right to codify and classify. It did not have a right to legislate or to interpret. The Revised Statutes of 1913 are valid in so far as they codify the laws and classify them. *The three commissioners cannot make the law.*

"A title, 'An act to revise the code of civil procedure of the state of California,' does not sufficiently comply with a constitutional provision that every act shall embrace but one subject, which subject shall be expressed in its title, at least, where the act deals with a vast variety of subjects, many of which are totally distinct from each other, many of them having no relation to civil procedure." *Lewis v. Dunne,* 55 L. R. A. 833 (134 Cal. 291).

The legislature cannot by adopting the report of this commission add to or subtract from the laws as they stood before the commission made its report. The Nebraska constitution, by section 11, art. III, provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." That the legislature appoints a commission and that commission makes a report does not abrogate the constitutional provision regarding the requisites necessary to pass valid legislation. Every safeguard thrown around the passage of legislation would be de-

stroyed if a commission could be appointed for the purpose of classifying and codifying our laws *as they stand* and with special instructions to leave our laws declared to be unconstitutional by the courts and it then goes ahead and inserts whatever it sees fit and omits whatever it dislikes, and changes the statute in every way at its own whim and caprice. Suppose these gentlemen are desirous of applying their experiments to the commonwealth and they incorporate their peculiar views in the report which they make. This would do away with constitutional government. This would mean anarchy.

If we go to the statute of 1913, the title to the act contains a plurality of subjects. It reads: "An act to approve, adopt and make of force the general laws, the code of civil procedure, and the code of criminal procedure." Will it be seriously urged that the mistakes of the commission and the blunders of the legislature shall give the people something that the commission never contemplated and that the legislature never understood? The commission under the authority given to it might rewrite a section, might rearrange a chapter, might gather together in one place the various statutory provisions regarding a particular subject, and, these expressing the meaning as previously agreed upon before the commission existed, it would permit the use of such a statute. But there must be no change of a substantial character in the language used or a different construction than that heretofore given by the court. In that event the original section passed by the legislature and interpreted by the court would bind as it was written and intended by the legislature and as interpreted by the court.

In *Nicholson v. Mobile & M. R. Co.,* 49 Ala. 205, the court held that, where the codifier was forbidden to change "the substance or meaning of any statute to be included therein," the original statute might be consulted, and that it would control the language of the revision.

In *State v. Stroschein,* 99 Minn. 248, the supreme court of Minnesota said: "The rules for the interpretation of revised statutes or codes resolve themselves into one in-

quiry, applicable alike to the construction of all legislative enactments, viz, the legislative intent. If the language of the revised statutes be plain and free from doubt, the will of the lawmakers must be ascertained therefrom, unaided by prior statutes on the subject." Should we compel the appellee to hunt for another rule of law after we have solemnly announced one by three decisions?

The majority opinion is reached upon the theory that the provision to let the contract is not separable from the other parts of the act. That is not a proper foundation. When something foreign to the subject under consideration is gathered up and brought into the act, *the foreign matter is always separable* and can be eliminated from the act without injury to its proper purpose. It should be remembered that the purpose of the constitutional provision is to prevent surreptitious legislation. It is to prevent the legislator from *stealing something into the bill* of which his associates are not aware. These provisions are in the constitutions of nearly or quite all of the states. What the adroit and dishonest legislator would do would be to prepare a bill with five or six sections in it about some matter concerning which it would be proper to legislate, and he would reflect the subject matter in the bill and then he would put in a vicious section entirely foreign to the matter under consideration in the five or six sections and in the title. It is uniformly held that, where this provision is violated by an act, a part of which is not expressed in the title, such part of the act as is broader than the title, being in conflict with the constitution, is absolutely void, and, as such part is not a valid expression of the legislative will, it fails. Part of such an act, being a valid expression of the legislative will, must stand, and be enforced, if separable from the void portion and capable of enforcement apart from that which is void, unless the parts of the act, of the body, are so intimately related, in substance and purpose, that it cannot be said when the purpose is contemplated that the legislature would have acted and passed the act but for the void portion. Thus, suppose an act should be entitled "A bill for 'An act to

amend section 10, of chapter 20, of the Compiled Statutes for the year 1901, and to repeal said section,' " and suppose that section 10 of chapter 20 relates to the government of *townships,* and contains a complete scheme for the government of townships, and that the amendatory act contains five paragraphs all dealing with the government of *townships,* and a sixth paragraph dealing with the government of *cities of 5,000 population,* no notice of this last mentioned subject is given by the title, for section 10 of chapter 20 does not deal with *cities,* but with *townships.* The paragraph is therefore void—unconstitutional. But must the whole act fail? Five of these paragraphs deal with the townships, a subject entirely disassociated with cities, and containing a complete scheme for their government expressed in an act properly entitled. Must these five paragraphs fail? The five paragraphs, being valid, complete and enforceable without the sixth, stand as a *valid expression of the legislative authority on the subject of townships.* These things are to be determined from the *act itself, contemporaneous legislation, matters of general common knowledge,* indeed by all these things which a court may take into consideration in construing an act of doubtful meaning. *Redell v. Moores,* 63 Neb. 219.

And because the purpose of the constitutional provision is to prevent surreptitious legislation, its provisions are not violated in upholding such parts of an act partly void as are reflected in the title, if such parts are complete and capable of enforcement, embraced in the scheme or plan distinct and separate from the void portions. Then they should be permitted to stand, because such parts, being reflected in the title, receive legislative attention, while those parts *unnoticed by the title are forbidden consideration.*

The question first and last is, as with all questions touching the constitution: What did the legislature intend? What was the object and purpose of the act? The act as originally introduced was to fix the fees of all sheriffs throughout the state. It was properly entitled to accomplish this purpose "An act to amend section 5, of chapter 28, of the Compiled Statutes of Nebraska for the year

1905, and to repeal said section." *This section dealt entirely with fees.* The bill fixed the charge for feeding prisoners with certainty, and provided for a report from the sheriffs of fees and payment by the sheriffs of fees collected into the treasury. As part of the same plan a bill was introduced which became a law at the same session. This bill put the sheriff's office on a salary. It was the purpose of both acts to put the sheriff's office on a salary. Both acts were a part of the same general plan. The proviso affecting the powers of the county board to let the contract to the lowest bidder, and which is the objectionable and unconstitutional feature reflected by the title, was not a part of the general plan, and was incorporated into the act while the bill was on its passage by way of an amendment. The general plan was broad and comprehensive and state-wide, the unconstitutional part is separable from it in plan and in purpose and insignificant in scope, and ought not to defeat the portion of the concededly constitutional parts of the act under the uncertain rule which names it an inducement to the passage of the act. Under the majority opinion no rule is laid down by which the unconstitutional part can be held to be the moving power to occasion the bill to be adopted. The thing which the legislature undertook to do under the title of "fees" was to provide that the county might let out the contract to anybody for feeding the prisoners. Under an amendment which related only to the section concerning fees nobody would be apprised of the fact that the bill contemplated a matter utterly foreign to the subject of "fees." Perhaps it would be best to say that, if the thing sought to be done is *foreign* to the matter *under consideration,* the legislature were *not* thinking about it, because it was *not in the title,* and not in the *subject matter of the bill,* and therefore there was nothing which particularly called the attention of the legislature to it. If a rule shall be applied which puts out of consideration matter that is in no way suggested by the title or by the section amended, then we have some sort of guide. *We are not guessing at it.* I think that such a rule as this may be inferred from

the cases. If we apply such a rule as this to the instant case, we will say that the proposition to let the contract to the lowest bidder was wholly foreign to the consideration of the subject concerning what should be paid the sheriff per day for feeding the prisoners. That part of the act which seems to me to be the inducement for its passage provides that the sheriff *shall make a report* to the board of county commissioners on the first Tuesday in January, April, July and October of each year; that in this report he shall *show* the *different* items of fees collected or earned, and from *whom,* and for *what service,* and "also the amount collected or earned for the current year, and he shall then pay all fees earned to the county treasurer." It may be remembered that there was an effort to put many officers on salaries instead of on fees, and this effort was along that line. It was not unconstitutional, however, for the reason that it related to the *fees* of the sheriff and what should be done with them, and was therefore clearly within the purview of section 5, ch. 28, Comp. St. 1905, which it undertook to amend. It should be remembered that this provision for making the report and for paying over the fees to the county treasurer was a new provision. It was a very urgent provision under the view taken by the introducer of the bill and his supporters, and a most important matter. Laws 1907, ch. 53, sec. 1, p. 226.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1914.

DOUGLAS COUNTY, APPELLEE, V. FRANK A. BROADWELL ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1914. No. 17,781.

1. **Judgment:** VACATION. A judge of the district court has the right and power to set aside and vacate any judgments or orders made by him during the term at which the vacating order is made. Such vacating order may be made upon the court's own motion, if satisfied that an error has been made.

2. **Fees:** CLERK OF DISTRICT COURT: ACCOUNTING. The defendant was the clerk of the district court of D. county. By virtue of his office as clerk of said court, he was a member and the clerk of the board of commissioners of insanity for said county. He refused to account for the fees and compensation received for his services on said board, claiming that the fees were not the fees of the clerk of the district court. In a suit against him on his official bond, it is *held* that under the statute, and the decision in the case of *Boettcher v. Lancaster County,* 74 Neb. 148, it was his official duty to report and account for the receipt of such fees.

3. ———: ———: ———: COMPROMISE. Where, after a suit against such clerk for an accounting and payment of said fees, a compromise was had between him and the county board, by which a less amount was agreed upon and accepted than was due according to law, it is *held* that there was no question to be compromised, but it was the plain duty of such clerk to report and account for the fees received, and therefore such compromise was void.

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

Smyth, Smith & Schall, Stout, Rose & Wells and *J. H. Van Dusen,* for appellants.

George A. Magney and *Charles Haffke, contra.*

John P. Breen, amicus curiæ.

REESE, C. J.

On the 5th day of March, 1907, a petition was filed in the district court for Douglas county in an action wherein that county sought to recover from Frank A. Broadwell, a former clerk of the district court for Douglas county, and the American Bonding & Trust Company, his surety, on his official bonds, the purpose of which was to recover from Broadwell the amount of certain fees, some of which he had collected, and some of which he had not collected, while clerk of the district court. There were three classes of claims contained in the petition, to wit: (1) Fees earned by such clerk, but not collected; (2) fees earned and collected for issuing naturalization papers under the federal laws; (3) fees received by him as a member and clerk of the board of insanity. To this petition certain motions were filed for more specific statements of the causes of action, but which seem not to have been ruled upon. On the 20th of December, 1909, the following stipulation was filed in the case: "It is hereby agreed by and between the parties hereto that, as a settlement and compromise of all matters in dispute herein and of all matters referred to in the plaintiff's petition, judgment shall be taken in favor of the plaintiff and against the defendants in the sum of $1,250 and costs of this action." This stipulation was signed by the county attorney for plaintiff and the attorneys for defendants. On the 21st day of December of the same year, judgment was rendered on the stipulation in favor of plaintiff county, and against defendants, for the said sum of $1,250 and costs of suit, and which defendant Broadwell paid. On the 3d day of February, 1910, and during the same term of court, William G. Ure asked leave to intervene in the case. Leave was not granted, but

the court entered an order vacating its former judgment, as follows:

"It appearing to the court that the subject matter of this litigation involves the compensation of the defendant Broadwell, as clerk of this court, and that such compensation was fixed by the statute, and that the board of county commissioners was and is without power to increase or diminish the same, and was and is without power to compromise this controversy, it not being contended that the defendants or either of them are insolvent: Now, therefore, on its own motion, it is by the court ordered and adjudged that the judgment heretofore entered herein, to wit, on December 20, 1909, be, the same is, hereby vacated and set aside, and this cause is hereby retained for trial. To which order of the court plaintiff and defendants severally except. It is further ordered that the moneys paid and assignment delivered by the defendant Broadwell in pursuance of the agreement and stipulation of compromise be returned to said Broadwell or held subject to his orders, to which order of the court plaintiff and defendants severally except."

On the 19th day of May, 1910, plaintiff filed its amended petition consisting of six counts, or causes of action, a count for each year of defendant's service as clerk of the district court for which he collected and received fees for services as member and clerk of the board of insanity of said county. The claims for fees collected for services rendered in the other capacities, as charged in the original petition, appear to have been abandoned.

Defendants answered, admitting that for the time named in the several causes of action defendant Broadwell was the clerk of the district court for Douglas county, that he was a member and clerk of the commission or board of insanity, that, as such member and clerk of such board, he collected fees for such services, and that they are still retained by him; alleging that the claims for all such fees received by him were duly verified, audited, allowed and paid by the county board, that no appeal was ever taken from such allowance, and therefore the right of plaintiff

to question the right of defendant Broadwell to said money was fully and finally adjudged, adjudicated and determined, that claims for other services rendered on said board, the fees for which amount to more than $3,000, have also been presented to the county board for allowance and payment, but said board has neither allowed nor disallowed said claims, and they are still pending. The fact of the compromise of the matters and things alleged in the petition, the stipulation and judgment, hereinbefore referred to, together with the correspondence and opinion of the county attorney to the county board, as well as the payment of the judgment and costs, are pleaded in apt language, and the averments of which need not be set out in this part of this opinion. It is further alleged that at the time of the said compromise there was a *bona fide* dispute and contention, between plaintiff on the one hand and these defendants on the other, as to the right of the county to collect from the defendant Broadwell any of the moneys referred to in the petition, and a *bona fide* controversy as to the right of defendant Broadwell to receive from the county the moneys due upon the claims filed and pending before the county board for the services rendered by him as aforesaid; that for the purpose of compromising, settling and adjusting all of said controversies, disputes and differences, and for the purpose of avoiding expensive litigation, the compromise was entered into and the moneys paid, as herein above stated, the same being a final and complete adjustment of all of said differences, and therefore plaintiff is not entitled to recover anything in this action. Prayer for dismissal of the action and for judgment for costs. Neither the transcript nor abstract shows any reply to the answer.

The cause was tried to the court, who found the facts and conclusions of law in favor of plaintiff, and rendered judgment against defendants for the sum of $9,528.86. Motions were filed by defendants to set aside the findings of fact and conclusions of law, and for a new trial, all of which were overruled. Defendants appeal.

The cause was tried upon an agreed statement of facts, which is of too great length to be set out in full, but will be fairly stated in condensed form. It is stipulated that defendant Broadwell was the clerk of the district court for Douglas county for the time alleged, with the defendant American Bonding & Trust Company as his surety; that during the time of defendant's incumbency in said office the bonds of said company were of binding force and effect; that during the time defendant held said office he was one of the commissioners of insanity, was the clerk of said board, performed the duties thereof, and earned the fees and compensation for said services provided by law, payment on account thereof being made during the years 1900 to 1905, inclusive, as follows: 1900, $915.65; 1901, $796.10; 1902, $1,166.60; 1903, $1,109.80; 1904, $1,173.90; 1905, $797.75; that at various times during said years defendant filed with the board of county commissioners claims covering the fees and compensation for said services, when said claims were allowed, warrants therefor issued and paid; that no appeal was ever taken by the county or any person from the allowance of said claims; that, covering the fees and compensation for said services for the years 1906 and 1907, defendant filed his claims with said board, but they have never been allowed, nor disallowed; that defendant has at all times since he first entered upon the duties of his office refused to enter upon his fee book and report to the said county commissioners the fees earned by him as a member and clerk of said board of insanity, but has at all times claimed that said fees and compensation were not fees of the office of the clerk of the district court for which he was required to account and report to the county board; that the suit was brought for the purpose of recovering from defendant and his surety the sums above stated, with interest thereon, received by him on account of said so-called insanity fees; that while the suit was pending, and about the month of September, 1909, negotiations for a settlement of the controversies and disputes between said county commissioners and defendant, regarding said insanity fees and other matters, were in-

augurated, and in the course thereof the defendant submitted to said board a proposition of settlement, the same being referred to in the stipulation as exhibit A, attached; that at that time there was a *bona fide* dispute and contention between the county of Douglas and the defendant as to the right of the county to collect from defendant any of the money referred to in the petition, and a *bona fide* controversy as to the right of defendant to receive from the county any money on account of the several claims he had then on file against the county for services rendered by him as a member and clerk of the board of insanity during the years 1906 and 1907; that after the receipt of the letter (exhibit A) P. J. Trainor, chairman of the committee of the whole of the board of county commissioners, by direction of said board, sent to George A. Magney, deputy county attorney, on September 25, 1909, a letter, as set forth in exhibit A1; that on October 2, 1909, said deputy county attorney answered the communication and sent to the board the letter, as shown by exhibit A2; that on the 10th of December, 1909, the board of county commissioners adopted a resolution, as set forth in exhibit B; that thereafter defendant accepted said proposition and delivered to the county authorities an assignment for the uncollected fees earned by him, referred to in said resolutions, and executed and delivered to said authorities a release of all claims held by him against Douglas county on account of fees earned by him as a member and clerk of the board of insanity, which had not been paid, and, in pursuance of said compromise, a judgment was by the court entered in this cause against defendants in the sum of $1,250 and costs, which said judgment and costs were thereafter paid by defendants to the clerk of said district court, and said money is at this time being retained by said clerk; that shortly thereafter the matter of said compromise and settlement was brought to the attention of the court in this action by a petition filed by one William G. Ure for leave to intervene herein, for the purpose of attacking and contesting the validity of said compromise and settlement, and, while said court refused to permit said

Ure to intervene, the court, on its own motion, decided that the board of county commissioners were without power to make said compromise and settlement, and that the same was ineffective, and said court, on its own motion, on the 3d day of February, 1910, and during the same term, to wit, October, 1909, term, of said court, entered an order vacating the judgment which had been entered in this cause on December 20, 1909, in pursuance of said settlement, and ordered that this cause be retained for trial, and that the moneys paid and assigned and delivered by defendant, in pursuance of said agreement of compromise, be returned to said defendant or held subject to his order. A copy of the order is attached to the stipulation, marked exhibit C. The amount of recovery, should the court find in favor of plaintiff, is stipulated, and which is in accordance with the allegations of the petition above stated. It is stipulated that during defendant's incumbency he collected a large amount of fees; that he deducted therefrom the necessary and proper expenses of the office, including the sum allowed by law for his services as member of the board of insanity, and has accounted for and paid over all the surplus except said insanity fees (if they are to be determined fees of said office) for which he is required to account; that he has never reported, accounted for, nor paid to the county the fees received by him in insanity cases, but has always claimed that the same were not the fees of the clerk's office for which he was required to account, while the county claims that the amount of said fees so collected and received by him constitutes surplus fees of said office, after the deduction of expenses, salaries, etc., as aforesaid, and which the law requires him to pay over to said county. It is provided that "in making this agreement the parties are not to be considered as waiving the right to object to any of the above facts on the ground of immateriality." (Signed by the attorneys for plaintiff and defendants.)

The exhibits referred to in the foregoing stipulation were attached thereto, and, with the exception of exhibit

C; being the order of the district court vacating its first judgment, heretofore copied herein, are as follows:

"Exhibit A.

"Omaha, Neb., Sept. 24, 1909.

"To the Honorable, the Board of County Commissioners, of Douglas County, Nebraska. Gentlemen: The litigation that is now pending between Douglas county and myself as clerk of the district court has been expensive both for Douglas county and myself. The suit was originally instituted to recover a large amount of uncollected fees in civil cases, to recover from me money the county paid to me while serving as a member of the board of insanity, and money paid to me in connection with the naturalization of foreigners under a recent act of congress. The decision of the supreme court of this state in the case against Judge Vinsonhaler would seem to dispose of the controversy over the uncollected fees. Mr. Howell, special attorney for the county, in his recent statement before the members of your board, conceded that there was no legal claim growing out of fees paid on account of services rendered in issuing naturalization papers. Such being the case, the controversy is now narrowed down to the claim based on statutory compensation paid me for services rendered as a member of the board of insanity.

"I think I am perfectly justified in the statement that until after the moneys were paid to me, which it is now sought to recover, no one questioned the right of the clerk of the district court to receive and retain the compensation paid to him as a member of the board of insanity. Everybody believed the clerk had the right, under the law, to receive and retain that compensation. I have been advised by my counsel that under the law I have the right to collect for such services, and that I am not called upon to account for it in my settlement with the county. The county board audited and allowed the claims I filed for these services and paid me about $5,000. The records in the auditor's office will show that I have on file, and which

I have not been paid, claims aggregating more than $3,000 for services rendered as a member of the board of insanity.

"If the county should prevail in this suit against me and my bondsmen, and the supreme court should determine that I must turn the compensation over to the county, then I would be liable for something over $5,000 and interest, and judgment would go against me for that amount. On the other hand, if the supreme court should decide this controversy in my favor, then Douglas county would be required to pay me something over $3,000 and interest, that being the amount of the unpaid bills on file. I would be very glad if this litigation could be terminated and the matter amicably adjusted. None of us can tell just what will be the result of this litigation until after the supreme court has finally passed upon it. In order to effect a compromise, I beg to submit to you the following proposition: I will pay to Douglas county in cash $1,000 in full and complete settlement of all claims I have against the county, release all claims on account of money earned while a member of the board of insanity that have not been paid to me, and the county is to receive (receipt?) in full for all claims it has against me. I submit this proposition to your respectful consideration and ask that you advise me of your conclusion.

"Yours very respectfully,
"(Signed) Frank A. Broadwell."

"Exhibit A1.

"Omaha, Neb., Sept. 25, 1909.

"George A. Magney, Deputy County Attorney, City. Dear Sir: Enclosed please find a communication from Frank A. Broadwell, former clerk of the district court, Douglas county, addressed to the board of county commissioners, stating that he would like to compromise the differences in accounts between him and the county. The communication came up for consideration before the committee of the whole, and they instructed me to have you

prepare an opinion, whether or not the board of county commissioners could compromise with Mr. Broadwell upon any terms, and also an opinion as to the chances of Douglas county winning the suit for the collection of the insanity fees. Any figure or statement that you need in this matter can be obtained from Mr. Solomon, county comptroller.

"Yours respectfully,

"(Signed) P. J. Trainor, Chairman Committee of the Whole."

"Exhibit A2.

"Omaha, Neb., Oct. 2, 1909.

"Hon. P. J. Trainor, Chairman Committee of the Whole, Omaha, Neb. Dear Sir: I have your inquiry of September 25, relative to the suit of Douglas county against Frank A. Broadwell, former clerk of the district court. You ask if the board of county commissioners have the authority under the law to compromise this suit with Mr. Broadwell upon any terms, and you also desire an opinion as to the chances of Douglas county in securing a judgment against Mr. Broadwell in this suit for insanity fees collected and retained by him. In reply will say in my judgment there can be no question about the legal right of the board to compromise a suit of this character, if it is determined that a compromise is in the interest of the county.

"The other question is more difficult. Our supreme court has held that the clerk must report and account for all fees collected by him. So far as I am able to learn, the court has at no time definitely decided the question of the fees earned by the clerk, as a member of the board of insane commissioners. The statute makes the clerk of the district court, the clerk of the board of insane commissioners and fixes the fees he may receive as such clerk, but the statute does not require the clerk of the insane commission to account for his fees, as such, to the county. In my opinion there is a chance that the court would hold that Mr. Broadwell should account to the county for all

fees collected by him as a member of the insane commission, and yet there is room for serious doubt as to what the result of the suit now pending may be. Because of the uncertainty involved in this question, I think the board of county commissioners would be justified in using their discretion as to whether this suit should be compromised or not. The county may win, and it may lose, and I think no one can at this time state with any degree of certainty what the final outcome of the suit may be.

"Very truly yours,

"(Signed) Geo. A. Magney, Deputy County Attorney."

"Exhibit B.

"Whereas, an action is now pending in the district court for Douglas county, Nebraska, wherein the county of Douglas is plaintiff and Frank A. Broadwell et al. are defendants, in which the county of Douglas seeks to recover from the said Frank A. Broadwell, as former clerk of the district court, certain sums on account of uncollected fees earned in his office as clerk of the district court and also moneys paid to him as a member and clerk of the board of insanity:

"And, whereas, the said Frank A. Broadwell has pending before this board claims for fees earned by him as a member of said board of insanity and which claims have not been allowed by this board:

"And, whereas, a proposition has been made by the said Frank A. Broadwell to assign to Douglas county all claims for uncollected fees earned by him as clerk of the district court, to waive any claim for fees earned by him as a member and clerk of the board of insanity, and to release the county from any such claims, and to pay to the county the sum of $1,250 in full payment and satisfaction of all claims of Douglas county against him or his bondsmen:

"Now, therefore, for the purpose of fully settling and compromising all claims held by the county of Douglas against the said Frank A. Broadwell, as clerk of the district court, and settling all claims of the said Frank A.

Broadwell against Douglas county, be it resolved that the county attorney is hereby directed as follows:

"(1) To take from the said Frank A. Broadwell an assignment for all uncollected fees earned by him as clerk of the district court.

"(2) To take a release from said Frank A. Broadwell of all claims held by him against Douglas county on account of fees earned by him as a member and clerk of the board of insanity, and which have not been paid to him.

"(3) To accept judgment in the district court for Douglas county in the sum of $1,250 and costs in the action pending in said county, which said judgment shall be in full of all claims of said Douglas county against the said Frank A. Broadwell; and upon the execution of said assignments, releases, and the payment of said judgment, all claims against the said Frank A. Broadwell, as clerk of the district court, shall be and hereby are fully satisfied, compromised and discharged.

"(Signed) P. J. Trainor,
"(Signed) L. W. Bruning,
"(Signed) John Grant,
"(Signed) C. J. Pickard,
"(Signed) Jeff W. Bedford."

The cause was tried to the court without the intervention of a jury. An order was made by the court holding that the petition for intervention be denied, and finding that the subject matter of this litigation involves the compensation of the defendant as clerk of the district court; that such compensation is fixed by the statute; and that the board of county commissioners was and is without power to compromise this controversy, it not being contended that the defendants or either of them are insolvent. By request the court made special findings of fact and conclusions of law. The findings of facts are in accord with the stipulation of facts, and need not be set out here at length, but, among which, it is found, in the matter of the compromise, that at that time there was a *bona fide* dispute and contention between the county of

Douglas and defendant as to the right of the county to collect what are called "insanity" fees from defendant, and as to his right to receive from the county any money on account of the claims for such fees then pending before the county board, and that it was for the purpose of settling the dispute that the compromise was entered into; that after the compromise was concluded, and after the judgment thereon enforcing the same, defendant complied with all its terms, including the payment into court of the $1,250 agreed upon and the costs of the suit, the money being still retained by the clerk; that defendant had never accounted to plaintiff for said fees, but has at all times claimed that they were not the fees of the clerk's office for which he was required to account and report to the county. The conclusions of law are to the effect that the fees in dispute were moneys that came into defendant's hands by virtue of his office as clerk of the district court; that he should account for the same; that his failure to do so constituted a breach of conditions of his bond; that the allowance of the claims presented was formal and ministerial only, and constitutes no defense to this action; that the attempted settlement and compromise made by the board was beyond the power of said board, and was ineffective and void; that plaintiff is entitled to recover of defendant the several sums received by him, with interest thereon from the time of payment, amounting in all to the sum of $9,528.86, for which judgment was rendered.

Two principal questions are presented for decision: First, Is defendant liable upon his bond for the fees and compensation collected and received by him from the county? Second, If so, has the compromise any legal or binding force?

It is also insisted as a third contention that the court exceeded its legitimate authority in setting aside and vacating its former judgment, but we are unable to detect any serious legal question here. It must be conceded, for it is well-settled law, not only of this state, but of all others, that during the term at which a judgment or order is made the court has the power and authority to recon-

sider any question, order or judgment decided, ordered or adjudged during that time. In other words, the judge has full control of his docket during the term, and has full authority to amend, correct or vacate any orders made or judgments rendered. In this he is not bound to await the motion of counsel, but may on his own motion take any action he might have taken when the case was submitted to him or at any time thereafter. The court had full power to vacate the former judgment and direct that the case be heard upon its merits.

It is said, both by the court and counsel, that there was a good-faith dispute and contention between the county and defendant as to defendant's liability for the fees and compensation received by him. It is the well-settled rule of law that, ordinarily, in case of a dispute between persons, whether natural or artificial, a compromise and adjustment of the differences will, in the absence of fraud, collusion or mistake, be binding upon the parties. That the law favors settlements is a common and well-understood maxim; but it is contended by plaintiff that in this case there was nothing to compromise; that the law fixed the *status* of the parties, and, if it was the official duty of defendant to report and account for the fees, there could be no question to compromise.

In view of the statute and our past decisions, we cannot adopt the contention of defendants, and are of opinion that the law was and is well settled that it was the duty of defendant to account for the fees in controversy, and that there was not, and could not be, any legal or reasonable ground for dispute or controversy over the subject.

It is clear, and conceded by defendant, that, if the fees in dispute were to be considered the fees of the office of the clerk of the district court, there could not well be any question as to the duty of defendant to report them. The question then arises as to defendant's official relation to the county, for the law is clear that all fees of the clerk's office should be reported.

Section 17, ch. 40, Comp. St. 1911, provides: "In each organized county of the state there shall be a board of com-

missioners, consisting of three (3) persons, to be styled commissioners of insanity, two (2) of whom shall constitute a quorum; the clerk of the district court shall be *ex officio* (by virtue of his office) a member of such board, and clerk of the same; the other members shall be appointed by the judge of said court; one of them shall be a respectable practicing physician, and the other a respectable practicing lawyer," etc.

Section 18, ch. 40, Comp. St. 1911, provides that before entering upon the duties of their office the persons so appointed shall take and subscribe to the usual oath of office. By this it is made plainly to appear that but two members of said commission are to be appointed by the judge creating the board, or commission. The clerk of the district court, by virtue of his office as clerk, is to be the other member. The two appointees are required to take the official oath. The clerk is not, because he is already under oath and bond. So far as his place upon the commission is concerned, he is entirely beyond the reach of the judge making the appointments. If he is clerk of the district court, he is thereby a member of the commission—so declared by law. While he is clerk of the commission, he is such by virtue of being clerk of the district court, and the duties are imposed upon him as such clerk of the district court. It would seem to follow that his compensation is not increased thereby.

It may be further noticed that as early as June 8, 1905, in *Boettcher v. Lancaster County,* 74 Neb. 148, the identical question here presented was decided by this court, and it was there held that "a clerk of the district court is required to account for the fees earned by him as a member of the board of commissioners of insanity." As that decision was made long before any suit was brought in this case or before any effort at a compromise was inaugurated, it would seem that all doubt as to defendant's liability was effectually put at rest, and there was nothing which was the subject of compromise, it being defendant's clear legal duty to report the fees and account for them.

It cannot be said that in making the alleged compromise the county board acted judicially. Nor had the board any power to increase the compensation of defendant, as was thereby done. The duty of reporting and accounting for the fees collected was imposed by statute, and which could not be changed by any order the board might make, or by any agreement into which the board might enter. *Mitchell v. Clay County,* 69 Neb. 796; *Otoe County v. Dorman,* 71 Neb. 408. In *Logan County v. Doan,* 34 Neb. 104, in discussing a claim made by a sheriff, in which it is held that the sheriff must discharge the duties of his office for the compensation provided by law, we said: "Nor has the county board the power to allow a public officer a compensation in excess of that allowed by statute." See, also, *State v. Roderick,* 25 Neb. 629; *Kemerer v. State,* 7 Neb. 130. If the board has not the power to allow compensation in excess of that allowed by statute, such an act must of necessity be void, and the board cannot do by indirection, by way of compromise, or otherwise, that which it has not the power to do directly. If the agreement of compromise was void for want of power to make it, it never had any binding force, and might be attacked collaterally. If the order was void, it was no order. *Fremont County v. Brandon,* 6 Idaho, 482; *Village of Fort Edward v. Fish,* 156 N. Y. 363.

We are not unmindful of the many cases cited by counsel, but the citations cannot be referred to and discussed in this opinion. We are satisfied with a review of the statute of this state and the decisions of this court.

It follows that the judgment of the district court must be and is

AFFIRMED.

HAMER, J., dissents.

ROSE and FAWCETT, JJ., not sitting.

CHARLES H. POTTER, APPELLEE, V. MADS SORENSEN, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,805.

1. **Appeal in Equity:** CONFLICTING EVIDENCE: FINDINGS. This cause in equity was submitted to the district court on the oral testimony of all the witnesses. The testimony was squarely conflicting on every material element in the case. The evidence given by one side or the other was necessarily untrue. The trial court had the opportunity to observe the demeanor, conduct and apparent truthfulness of the testimony of each witness. In such case, while the findings and decree of the district court are not binding upon this court, yet such findings are proper subjects for consideration by the appellate court.
2. **Contract:** REFORMATION. The evidence is examined, and no reversible error is found.

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

Claude A. Davis, for appellant.

E. P. Clements, contra.

REESE, C. J.

This is an action to reform a written contract for the sale of real estate, and to decree its specific performance as reformed. The decree was in favor of plaintiff, and defendant appeals.

We find that the case was submitted to the district court upon the most direct and positive conflicting evidence upon all the material issues in the case. It is alleged in the petition that on the 13th day of January, 1911, plaintiff was the owner of the real estate in question, and which is described therein (but as it is a very irregular tract, and can only be described by the statement of many courses and distances, we do not deem it necessary to set out the description here). The land is situated south of and immediately adjoining the town plat of the city of Ord in Valley county. It is a long, irregular and

in part a narrow strip, tapering to a point at the south end; the north end of greater width abutting on the plat of the city of Ord. It is further alleged that on the date named plaintiff and defendant entered into an oral contract by which plaintiff agreed to sell and defendant to purchase the land for the sum of $3,150, of which $1,000 was paid, the remaining $2,150 to be paid upon the 1st day of April of the same year; that defendant presented to plaintiff a written contract for his signature, but which plaintiff was unable to read, owing to defective eyesight, defendant stating to plaintiff that it was in accordance with their agreement, and plaintiff signed it, relying on defendant's representations, and believing that it was so written; that the instrument was retained by defendant, and permission for plaintiff to see it refused, but plaintiff is informed that it does not correctly and truly state the contract, and that defendant either misread it to him with fraudulent intent, or has fraudulently changed it since it was signed, for the purpose of obtaining the land for a less price than agreed upon; that plaintiff tendered to defendant a deed and demanded payment of the remainder of the alleged purchase price, but defendant refused to comply with the demand; that about said 1st day of April defendant took possession of said land and holds the same. Prayer for reformation of the written agreement to correspond with the contract as made, and for its enforcement as reformed.

Defendant answered, setting up the written agreement as made; alleging that it truly stated the contract between him and plaintiff, its signing and acknowledging by both plaintiff and his wife; alleging in a very extended answer that the agreement was fully understood by plaintiff and his wife; denying all fraud, misrepresentation or change in the written agreement; alleging that the oral contract between him and plaintiff was correctly stated in the written agreement; and denying generally all allegations of the petition, except that of the purchase and possession of the land. The tender of the purchase price according to the written agreement and its refusal by plaintiff are also

alleged. The prayer is: (1) For the dismissal of plaintiff's petition; (2) or that the court order plaintiff and wife (the wife being made a party at defendant's request) to execute and deliver to him a warranty deed conveying the full title to the land, upon the payment of the sum of $105 an acre therefor for such number of acres as the tract contains; and (3) for general equitable relief.

Plaintiff replied, denying the correctness of the description of the land stated in defendant's answer, and giving what he claims is a true description, followed by a general denial of all other averments of the answer, which do not admit the allegations of the petition.

The contract as set out in defendant's answer is in writing and in the form of a warranty deed, although not complete in the description of the land. The principal contention is as to the statement of the consideration, or price to be paid for the land. It is stated as follows: "For and in consideration of the sum of one hundred five no/100 ($105) dollars per acre"—and near the close is the acknowledgment of the receipt of $1,000 in part payment; balance of purchase price to be paid on or before April 1, 1911. It was signed by plaintiff, and the next day defendant procured the county judge, and they, accompanied by Rudolph Sorensen, went into the country some seven miles to where Mrs. Potter was teaching school, procured her signature and acknowledgment, and upon their return to Ord the acknowledgment of plaintiff was taken by the county judge. It is claimed by plaintiff, and so testified to by him, that the contract price agreed upon was $3,300 in gross; that he refused to sell by the acre and never agreed thereto; that, if the clause as to the price was in writing when he signed it, it was misread to him by defendant. Mrs. Potter testified that, when the instrument was presented to her at the schoolhouse, she read the whole carefully, and neither this clause nor the one referring to the advance payment of $1,000 was therein, while defendant testified as positively that both were there, having been written there in the presence of plaintiff before it was signed by him. Judge Gudmundsen, the county judge, was

present at the time the instrument was signed by Mrs. Potter, but, unfortunately, he did not read the contract nor give any attention to its contents. About all he could testify to was that on the way out to the schoolhouse defendant told him he was paying $3,150 for the land. Lars Sorensen, a relative of defendant, testified that he saw the contract the same evening after defendant came from plaintiff's house, that he "read the price through," and it was stated as it is now. Rudloph Sorensen, a brother of defendant, testified to substantially the same, as to having seen the instrument that night with the words there as now. He also sustains the testimony of Judge Gudmundsen, which is practically admitted by defendant, as to the statement by defendant that he bought the land at about the price of $3,150, and that nothing was then said about the measurements of the land, and that before Mrs. Potter signed the instrument she sat down and read it. It fully appears that Thomas Sorensen, the uncle of defendant, was present at the home of Mr. Potter at the time the contract of purchase was made, and signed the contract as a witness, but for some unexplained reason his testimony was not taken. Plaintiff seems to have had the impression that there was "close to" or about 30 acres in the tract, but said he had bought it in gross, had never had it surveyed, and insisted upon selling it in the same way; that he had it listed with agents for sale at $3,300, and would take no less, except that he allowed defendant the usual commission, which amounted to $150, leaving the price to defendant at $3,150. It is conceded that the $1,000 was not paid until the next day. If the statement as to its receipt was in the contract when written, it was written there the night before the payment was made. At the time the sale was made, there was snow on the ground and it was very cold. It seems that by a subsequent survey it was found that the tract consisted of a little over 15 acres. There was no homestead right in the land. We find no evidence as to its value in the bill of exceptions. Defendant was dealing in lands, both on his own behalf and as agent for others. It was shown by his testimony

that he had acquired a knowledge of the rules of law governing the sales of real estate. He had not paid the $1,000 advance payment. If he considered that he was paying a reasonable price for the land, we are at a loss to understand why he was so anxious to obtain the signature of Mrs. Potter to the contract as to procure a handcar and transport the county judge through the cold to the schoolhouse for the purpose of securing it. All the evidence submitted to the court was by oral testimony in open court. The learned trial judge had the opportunity to observe the demeanor, conduct and apparent candor of each witness. We have frequently held, and it is no longer necessary to cite cases, that in such case of conflicting evidence the decision of the district court, while not binding upon the conscience of this court, will be considered where the court has knowledge of the witnesses and observes them in giving their testimony. If we give any consideration whatever to the findings and decree in this case, an affirmance of the judgment must follow.

We have considered the contention of defendant, as well as his many cases cited in favor of the proposition, that where land is sold by the tract or in gross, if the measurement shows an error of much magnitude in the quantity of land, the courts will apply a remedy and make the loser whole. But where the difference in quantity is slight, under a conveyance containing the words "more or less" or of similar import, the courts will not interfere, nor apply any remedy. This is no doubt the law, but we cannot see that it has any application to this case. The issues are: Did plaintiff make the contract set up in the writing? Was it changed after he signed it? Was he made aware of its contents, as claimed by defendant, when he signed it? In other words: What was the real contract? The court having found that the contract was as claimed by plaintiff, there was nothing to do but correct it and enforce it. Had plaintiff sought a rescission of the contract and the return of his $1,000 paid, an entirely different question might have been presented.

As the case is presented to this court, the decree of the district court must be and is

AFFIRMED.

WILLIAM P. MILES, APPELLANT, V. CHEYENNE COUNTY ET AL., APPELLEES.

FILED SEPTEMBER 26, 1914. No. 18,465.

1. **Counties:** EMPLOYMENT OF ATTORNEY: CONTINGENT FEE. A contract between an attorney and a board of county commissioners, by which the attorney for a contingent fee undertakes to collect a dormant judgment of long standing, is not necessarily void solely because of the contingent character of the fee provided for.
2. **Attorney and Client:** CONTINGENT FEE: REASONABLENESS. The evidence is examined, and it is *held* that the contingent fee provided for by the contract is not so unreasonable as to render the contract void as matter of law.

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

Miles & McIntosh, Nolan & Woodland and *Wilcox & Halligan,* for appellant.

R. W. Devoe, F. E. Williams, D. L. Johnson and *A. L. Timblin, contra.*

REESE, C. J.

This action is for an injunction to restrain Cheyenne county, its county board, Alva L. Timblin, and Daniel L. Johnson, from executing and carrying out a contract entered into between the county board and the defendant Timblin on the 18th day of October, 1912. It appears that in the years 1888, 1889, Frank B. Johnson and another, now deceased, were engaged in the banking business at Sidney, in Cheyenne county, and the then county treasurer deposited county funds in said bank to the extent of $17,357.40. The bank failed, and the money thus depos-

ited, with the exception of the sum of $3,000 subsequently paid, was, for the time, lost to the county, but leaving Johnson liable therefor. Later, Mr. Johnson resided in Douglas county, when suit was brought against him in the district court for that county for the balance remaining unpaid. His defense was sustained in the district court, but, upon review in this court, the judgment was reversed, and he was held liable. *McIntosh v. Johnson,* 51 Neb. 33. Upon the cause being remanded to the district court, and on April 14, 1898, judgment was rendered in favor of the plaintiff and against Johnson for the sum of $13,638.89. So far as is shown by the record, no attempt was made to collect the amount of the judgment, probably owing to the supposed insolvent condition of Johnson, and it became dormant. Defendant Timblin is an attorney of the Douglas county bar. In 1910 the county commissioners of Cheyenne county entered into a contract with Timblin, by which he was employed upon an agreement for a contingent fee to collect the judgment. He entered upon the employment, calling defendant Daniel L. Johnson to his assistance. They investigated Frank B. Johnson's affairs, and, after reviving the judgment, instituted a suit, in the nature of a creditors' bill, in the district court for Douglas county, for the purpose of uncovering certain property claimed by them to belong to Johnson, when it was concluded that the contract with the county board was invalid for the reason that it was not entered into upon the petition of ten freeholders of the county. Accordingly such a petition was presented, and on the 18th day of October, 1912, the contract involved in this action was entered into. There is no copy of the first or original contract in the record, but it is plainly inferred that the two contracts were the same in their terms and provisions. The new contract is as follows:

"This agreement, made in duplicate, by and between the county of Cheyenne, in the state of Nebraska, by and through its duly elected, qualified and acting board of county commissioners, of the first part, and Alva L. Timblin, of Omaha, Nebraska, of the second part, witnesseth:

"That, whereas, on the 14th day of April, 1898, the said county of Cheyenne recovered a judgment in the district court for Douglas county, Nebraska, in the action therein pending, wherein James J. McIntosh, as treasurer of said Cheyenne county, was plaintiff and Frank B. Johnson, of Omaha, was defendant, in the sum of $13,638.89, with costs of suit, which action is found in appearance docket 34, at page 295, of the records of Douglas county, and said judgment bearing interest at the rate of 7 per cent. per annum from its date:

"And, whereas, the said judgment is wholly unpaid and the said county of Cheyenne is desirous of collecting the same:

"And, whereas, on the 26th day of November, 1910, said county of Cheyenne, through its board of county commissioners, made and entered into a contract, with said Alva L. Timblin, for the collection thereof, and that said Alva L. Timblin, acting under said contract, has performed a great amount of work toward the collection of said judgment, and has caused said judgment to be revived, and has had proceedings, in the nature of examination of the debtor, and has collected much evidence, pertinent and necessary to the collection of said judgment, and has instituted action in the name of said Cheyenne county, in the district court for Douglas county, against said Frank B. Johnson and others, seeking to subject certain property to the payment of said judgment, which action is now pending and ready to be tried:

"And, whereas, some question has been raised, as to the regularity of such employment, of the said Alva L. Timblin, and the county of Cheyenne is desirous of avoiding any possible question, as to the regularity of such employment.

"It is hereby agreed, by and between the said county of Cheyenne and the said Alva L. Timblin, that the said county does hereby employ said Timblin, to proceed with the collection of said judgment and to maintain, in the name of the county of Cheyenne, any actions or proceed-

ings, which may be now pending, and to institute or bring, in the name of the county of Cheyenne, any actions or proceedings, for the collection of said judgment, which, in his opinion, may be advisable for that purpose, and to do all acts and things, in and about the collection of said judgment, which, under the laws of Nebraska, an attorney at law is empowered to do, but no settlement or compromise shall be made, before submitting the proposition to the board of county commissioners of Cheyenne county, Nebraska, for their approval, and the said county of Cheyenne hereby agrees to and with the said Alva L. Timblin that he shall receive for his services, as herein set forth, the one-half of all sums collected upon said judgment, not exceeding two thousand dollars and one-fourth of all sums, so collected, in excess of two thousand dollars; said sums to be in full compensation for the services of said Timblin and any associate or assistant he may retain, on his part.

"And the said Alva L. Timblin hereby agrees to and with the said county of Cheyenne that he will use his best efforts, toward the collection of said judgment and faithfully perform all the duties and obligations resting upon him, under this agreement and the laws of the state of Nebraska, and to accept the compensation herein agreed upon, in full satisfaction and payment of his services and expenses, if any there be, for himself and any assistant he may retain: And further agrees that he will promptly remit, to the treasurer of Cheyenne county, any money that may come into his hands, from the proceeds of said judgment, less such sums, as may be due, to the said Timblin, as his compensation, as herein set forth.

"In witness whereof, the county of Cheyenne has caused this agreement to be signed by its board of county commissioners, and its county seal attached, and attested by its county clerk, at Sidney, Nebraska, and the said Alva L. Timblin has hereunto set his hand. All done, this 18 day of October, 1913 (1912)."

The objections alleged in the petition to the contract are numerous, and which may be summarized as follows:

(1) That it gives to Timblin authority to institute actions in the name of the county for the collection of the judgment, which, in his opinion, might be advisable. (2) That by the contract he has authority to settle and compromise the said judgment, after submitting the same to the commissioners of the county. (3) That he is authorized to receive payment or compromise of said judgment, and retain for his services 50 per cent. of the first $2,000, and 25 per cent. on all money collected in excess of $2,000, the same to be in full compensation for his services and personal expenses and for any associates or assistants, whom he may retain in the collection of the judgment, thus giving him authority to employ and retain, on behalf of the county, other and different counsel, at his option, without the consent of the county, and that he will remit to the county treasurer the proceeds of said judgment, less his compensation, as provided for in the contract. (4) That, in pursuance of said contract, Timblin has employed defendant Daniel L. Johnson, an attorney at law, for and on behalf of the county, and who is now appearing for the county in prosecuting a certain action now pending in the district court for Douglas county, the said Daniel L. Johnson not having been employed by the county commissioners of Cheyenne county. (5) That Timblin intends to and will employ other counsel without the consent of the commissioners of Cheyenne county, contrary to law, and prosecute said pending action on behalf of the county. (6) That, at the time of the alleged employment of defendant Timblin, there was and still is a duly elected and acting county attorney of Cheyenne county, who is competent, able and willing to conduct any litigation on behalf of the county, necessary and proper in the collection of said judgment, but that the county commissioners, in violation of the statutes, have refused and neglected to consult him in relation to said collection, and have neglected to instruct him to proceed with the case. (7) That in the employment of Timblin the county commissioners have acted entirely independent of the county attorney, and without any consultation with him in rela-

tion thereto. (8) That the contract with Timblin is null and void, for the reason that it authorizes Timblin to employ counsel for the county without the consent of the commissioners, and, unless he is restrained, he will employ other counsel on behalf of the county in the collection of said judgment. (9) That the said judgment is a liquidated claim, and the commissioners have no right to compromise the same, or take in full payment thereof any sum less than is due thereon; that it is the intention of Timblin to compromise and satisfy the judgment for a much less amount than what is due thereon. (10) That Cheyenne county is solvent and amply able to pay for any services by any attorney who is legally and properly employed; that the contingent contract for fees for the collection of a liquidated claim is contrary to public policy and void; that the amount provided for in said contract is upward of $8,000, which is excessive and unreasonable, and therefore void. (11) That under said contract Timblin is authorized to receive all moneys collected, and, before accounting to the county of Cheyenne therefor, deduct therefrom his unlawful contingent fees of upwards of $8,000, and pay the remainder thereof to the county treasurer, which is void for the reason that the statutes of this state provide that all claims against the county must be duly verified and filed with the county commissioners and allowed by them, and paid by warrants upon the proper fund, with the right of any taxpayer to appeal therefrom; that under the contract Timblin does not account to the county commissioners, but retains, out of the moneys so collected, such amounts as may, to him, seem due him, paying the remainder to the county treasurer, thus depriving the taxpayers of the county all opportunity to appeal from any allowance of such claims; that Timblin is under no bond to the county, is a nonresident, is insolvent, and wholly irresponsible financially, and plaintiff has no remedy at law in the premises. The prayer is for injunction restraining the county commissioners and Timblin and Johnson from further proceedings under the contract.

A general demurrer to the petition was filed, and overruled, when defendants answered, still insisting that the facts stated in the petition are insufficient to constitute a cause of action. The allegations as to the making of the contract are admitted. It is alleged that the contract was entered into with the knowledge, consent and approval of the county attorney; denies that Daniel L. Johnson is employed at the expense of Cheyenne county, but alleges that he is associated with defendant Timblin as an assistant, but wholly without expense to the county, and without authority to appear for the county in any way. The several paragraphs of the petition referring to the provisions of the contract are admitted or denied, but, as the contract must speak for itself, these issues need not be noticed. It is alleged that the judgment against Frank B. Johnson, which Timblin has undertaken to collect, is of many years standing, was dormant when the contract was made, no part had been paid, no execution had been issued, and was of doubtful value; that the judgment debtor claimed to be insolvent; that defendant had caused the judgment to be revived, had issued execution, and in aid of execution had filed a creditors' bill, caused a referee to be appointed, had taken testimony before a referee; that much time had been occupied in investigating the business transactions of the judgment debtor for 20 years; that the action then pending in the district court for Douglas county stands ready for trial, but the trial is delayed by these proceedings; that the judgment debtor is, and for many years has been, a resident of the city of Omaha, which is some 400 miles from Sidney; that he has business interests there, but claims to be insolvent and without property or assets; that the proceedings on the creditors' bill have been instituted for the purpose of ascertaining what, if any, property the debtor may have subject to levy under execution; that such proceedings may be futile; that the distance from Sidney to Omaha is so great as to render it practically impossible for the county attorney of Cheyenne county to make the investigations and conduct the proceedings, and

it was necessary that the matter be in the hands of an attorney residing in Omaha. The reply is a general denial.

The cause was tried to the district court, resulting in a decree in favor of defendants, vacating the injunction, and dismissing the suit. Plaintiff appeals.

The averments of the petition as to the provisions of the contract hardly agree with the contract itself. When we examine the terms of the written agreement, we find scarcely any provision which is inconsistent with the law as to the powers and duties of an attorney under general employment. There is nothing therein which gives to defendant the power to employ other counsel at the expense of the county, but Timblin would have the right, as would an attorney in any case, to call to his aid at his own expense any attorney of his choice to assist him in case he found it necessary. It is not necessary for us to inquire whether the county commissioners would have the power to compromise with the judgment debtor. That question might arise if such compromise were attempted. It is apparent on the face of the contract that Timblin himself is deprived of the right. So far as the powers conferred upon the attorney, as such, by the contract, we are unable to detect anything in violation of the usual powers of an attorney at law in the management of a cause committed to his care.

As we understand the contention of plaintiff, there are but two questions involved in this case. First. Had the county commissioners authority under the statutes to employ an attorney at all on a contingent fee to attempt to collect the judgment against Frank B. Johnson? Second. Is the contract so improvident as to the compensation to be allowed Timblin, in the event of his success in collecting the judgment, or any part thereof, as to render the contract invalid as against public policy or good morals?

As to the first proposition, the power of the county board to employ counsel in civil matters as they may deem necessary appears to be settled by section 9550, Ann. St. 1911. The section provides for the employment of counsel "to prosecute or defend, on behalf of the county or any of its

officers, such civil actions or proceedings as the interests of the county may in their judgment require, and shall receive such reasonable compensation in each case as the board and such counsel may agree upon." It will be observed that, if in the judgment of the board it is necessary to employ counsel, they may do so. This lodges a discretion in them, and the choice of such counsel is not a subject of review by the courts. *Lassen County v. Shinn,* 88 Cal. 510. And the person employed "shall receive such reasonable compensation in each case as the board and such counsel may agree upon." This leaves the question of compensation to the discretion of the parties, with the limitation that it must be reasonable.

The evidence taken upon the trial was largely confined to the one question of the reasonableness of the compensation provided for by the contract. The testimony was very brief and conflicting. However, it is claimed by plaintiff that a contingent fee is never a reasonable one, and that the county commissioners, by force of the statutes, could not legally enter into such a contract. It must be conceded that, applying the rule stated in *Platte County v. Gerrard,* 12 Neb. 244, *Storey v. Murphy,* 9 N. Dak. 115, and *County of Chester v. Barber,* 97 Pa. St. 455, in the matter of the collection of taxes, the rule contended for applies. This may be, and doubtless is, founded upon the provisions of the statutes, which give an easy and effective method for the enforcement of their collection by specific and well-defined rules of procedure, and that, these being followed by the county officers, the burden is thrown upon the owner of the property to show why the tax should not be collected. *State v. Board of Commissioners of Dickinson County,* 77 Kan. 540, 16 L. R. A. n. s. 476. If this is correct, it would not require much reasoning to cause one to arrive at the conclusion that the doctrine of the cases cited might not be conclusively applied to cases like the one before us. A contingent fee is one which is made to depend upon the success or failure in the effort to enforce a supposed right, whether doubtful or not. We know of no settled law in this state which forbids such

contracts in an ordinary lawsuit. We can conceive of no reason why, in such a case, a municipal corporation—a county—may not enter into such a contract, upon condition, of course, that it must be "reasonable."

The evidence being in conflict, we must inquire whether the contract is so unreasonable as to render it void in law. The inquiry must be based upon the particular facts of the case. As we have seen, Johnson was largely indebted to Cheyenne county. A judgment was rendered for the amount of the debt in 1898. He, to all appearances, was insolvent, and, no doubt, for that reason no effort was made to collect the amount due or any part of it. The life of the judgment was not perpetuated by the issuance of execution. It was allowed to become dormant and remain so. It is evident that all prospects or hope of realizing upon it had been abandoned by the county and its officials, and no thought or purpose of making a collection was indulged in by the county officers. True, he seems to have been actively engaged in various lines of business in Omaha, but nothing appears to have come to the surface as property owned by him. The first step in an effort to collect must be an effort to revive the judgment, which must be done on notice to him, which might enable him to shift his assets, if any, and thus prepare for what might follow. The next step would be the institution of a suit in the nature of a creditors' bill for the purpose of bringing to light whatever property might be secreted, all involving much labor, time and expense. Timblin was willing to make the effort. He procured the first contract from the county commissioners, and entered upon it, which required a long line of investigation. If he was a competent lawyer, he realized what was before him if he made the effort. No question of taxation or collection of taxes was involved. The case presented a course of litigation as any other lawsuit of its kind would. Before proceeding with the case, he discovered another claim against the debtor by which he could tie up such assets as might be reached, if he succeeded in his effort to revive, and the successful termination of the creditors' bill. After his litiga-

tion had progressed to the proper stage, he procured the appointment of a referee, and evidence, covering some six months of time, was taken, and the cause was ready for final trial, when this suit was commenced, the injunction issued by the county judge of Cheyenne county, and all the proceedings to collect the judgment thereby suspended until this action could go through with the tedious process of litigation. In view of the apparent conditions existing at the time the contract was made, and the certainty of litigation that would follow an effort to collect the judgment, we cannot say that the contract was unreasonable. It is shown that, at the time of and before the commencement of the proceedings, a number of shares of the capital stock, of the value of $10,000, of a solvent corporation, of which Johnson was an officer and manager, was carried upon the books of the corporation in his name, and it is claimed that this stock could have been reached by execution under the provisions of the statutes, and that, for that reason, the contract is unreasonable. It must be remembered that, at the time the contract was first entered into, this fact was not known by either Timblin or the county board, and was not discovered until by the later proceedings, when the debtor claimed he was not the owner of the stock, but held it in trust. We are impressed by another fact which appears upon the record. The fact of the making both of these contracts was open to the public, the latter one, for the purpose of correcting an oversight, upon the petition of 20 freeholders of Cheyenne county, and, after all the time given and labor performed in the effort to collect the judgment, it would seem inequitable to deprive defendant of the apparent results of his labors and destroy what he has done, as well as to deprive the county of any reasonable prospects of ever realizing anything on its judgment. The county attorney appeared for the county commissioners in this case; all insisting upon the validity of the contract.

As we view the case, the judgment of the district court is right, and it is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

ROSE, J., not sitting.

HENRY ALT, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,799.

Waters: FLOOD WATERS: ACTION FOR DAMAGES: DIRECTION OF VERDICT. Action to recover damages alleged to have been sustained by the negligent construction of the defendant's railroad yards and grades, which it was claimed held back the flood waters of Salt creek and threw them over the plaintiff's premises and into his dwelling-house. It appearing from the evidence that when the flood reached its maximum height the defendant's tracks and grades were entirely submerged, and the water formed a lake in the Salt creek basin of such depth as to stand three feet deep in plaintiff's dwelling, defendant's motion to direct a verdict in its favor should have been sustained.

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

Byron Clark, Jesse L. Root, Strode & Beghtol and *Barton L. Green,* for appellant.

Wilmer B. Comstock, contra.

BARNES, J.

Action in the district court for Lancaster county to recover damages to plaintiff's real estate, consisting of lot B, block 1, of Mechanics addition to the city of Lincoln, and personal property situated thereon, alleged to have been sustained by damming up and displacing the waters of Salt and Middle creeks by the embankments and grades of the defendant railroad company.

The construction of defendant's railroad tracks and grades was not disputed. By defendant's answer it was alleged that on the 5th and 6th days of July, 1908, an unusual and excessive rainfall prevailed over that part of Lancaster and other counties drained by the waters of Salt creek, Middle creek, Oak creek, Little Salt creek, Stevens creek and Antelope creek, which converged into the Salt basin west of and adjoining the city of Lincoln, where plaintiff's property was situated, and caused a flood of excessive and unusual volume—one which ordinary prudence and suitable and proper railroad construction could not have prevented or avoided; that plaintiff's damages were caused thereby, and by the act of God, without any fault or negligence on the part of the defendant. Plaintiff's reply was in effect a general denial. On the issues thus joined plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that plaintiff's property is situated in what is known as the Salt basin in the western edge of the city of Lincoln, and south of what is called defendant's J street grade. The record discloses that before the trial commenced the defendant made an application for a change of venue, alleging that a fair and impartial trial of the cause could not be had in Lancaster county on account of the fact that there was a large number of suits pending in the district court for said county growing out of the flood in question. It is not necessary to determine this contention, as the case must be disposed of on the question of the sufficiency of the evidence to sustain a verdict for the plaintiff.

At the conclusion of the plaintiff's evidence, and again when all of the evidence was introduced, the defendant requested the court to direct the jury to return a verdict in its favor. The requests were denied, and defendant duly excepted, and alleges error in overruling its motion. It also alleges that the evidence does not sustain the verdict, and these assignments will, for convenience, be considered together.

The evidence discloses that the greater part of the city of Lincoln lies east of Salt creek, which flows north and south through Lancaster county, and rises near the southwest corner of the county about 23 miles from the city of Lincoln, at an elevation of 1,500 feet above sea level. The head of Middle creek is four miles west of Pleasant Dale in Seward county, at an elevation of 1,500 feet. Oak creek heads at Brainard in Saunders county, at an elevation of 1,660 feet. The three streams converge in what is called the Salt creek basin in the valley at the western edge of the city of Lincoln, where the elevation is only 1,140 feet above sea level. In the last 11 miles above defendant's J street grade, Salt creek falls 70 feet, Middle creek falls 20 feet in the last 3 miles of its course; Oak creek has a fall of 420 feet, 40 feet of which is in the last 5 miles before it enters Salt creek. A short distance below the mouth of Oak creek, Antelope creek, with a total fall of 300 feet in 9 miles, empties into Salt creek, Little Salt creek, with a total fall of 410 feet, and a fall of 70 feet in the last 7 miles of its course, empties into Salt creek, and Stevens creek, also a considerable stream, joins Salt creek below the mouth of Antelope creek, while the fall of Salt creek northward from the city of Lincoln is only about 8 feet in 12 miles of its course.

It appears that on the 5th and 6th days of July, 1908, a heavy rainstorm raged over the 681 square miles of area above referred to, unusual in its extent and intensity. At Palmyra, in Otoe county, southeast of Lincoln, 4.8 inches of rain fell in 24 hours. During the same period of time, at Crete, 2.81 inches of rain fell. At the same time 5.13 inches of rain fell on the campus of the University in the city of Lincoln. At Woodlawn on Oak creek, 5 miles from Lincoln, on the morning of July 6, the 6-inch rain guage was found to be running over. Eight miles west of Lincoln on Middle creek 8 inches of rain fell during this storm. When the rain began falling the ground was already saturated with water, and the result of this unprecedented rainfall is described by the witnesses in part as follows:

One Dwyer, a farmer living in the Salt creek valley, just north of the mouth of Antelope creek, testified that he noticed the high water at daylight on the morning of July 6; that Little Salt creek enters the larger stream some two miles north of his residence. At daylight the water was backing up from the north, and so continued for about two hours, until two different waves three feet and four feet high, respectively, came down Salt creek. The witness and his family escaped by swimming and pushing a mattress upon which his wife and children had taken refuge, for his horses were drowned in attempting to cross his cornfield. The witness testified that he was five feet and ten inches in height, and that he could only just touch bottom in his cornfield. This condition existed about two miles north of the defendant's embankment and grades.

Henry Pennaker testified, in substance, that he lived at 431 First street, just north of defendant's J street grade; that at 6 o'clock on the morning of July 6, 1908, the water was near the top of the grade upon the south side; that it went over the grade at about half past 6 o'clock, and in 15 or 20 minutes it filled up the basin north of the grade, and from that time the water was all over the tracks both north and south, and was over the J street grade.

John Reger testified, in substance, that for a time the water was higher on the south side of the J street grade than it was on the north side, but he could not tell how much higher it was.

H. G. Helger testified that when he first saw the water it was higher on the south side of the track than it was on the north side, but it soon got to be the same height on both sides of the grade, and was from 9 to 12 feet deep.

Philip Schmill testified that the water came over the grade between 8 and 9 o'clock on the morning of the 6th of July, and in two hours it was as high on the north side as it was on the south side of the grade, and the water did not commence to recede until the middle of the afternoon.

Jacob Groth testified that the water first ran to the north until about 10 o'clock, when the current ran back

to the south, and at about 5 o'clock in the afternoon it again ran to the north.

John Styles stated, among other things, that when the water was the highest it was all over the Middle creek valley, and extended up that creek as far as one could see.

R. M. Phillips testified that at 11 o'clock the water was all over the valley as far as he could see. There was nothing but water all over the grades. The water in Salt creek started to back up when the flood came down Middle creek.

Henry Wuester testified that the water first came over the J street grade at about half past 8 o'clock in the morning; that when it commenced to flow over the grade it was about three feet higher on the south side than it was on the north side. This witness also stated that he testified in the Albers case that in 15 or 20 minutes the water was the same height on both sides of the grade.

The plaintiff's property, as above stated, was situated on the south side of the J street grade, and it must be conceded that according to the testimony of some of the witnesses, when the flood first came down Salt creek, for a short time the Denver grade and the J street grade held back the water and threw it upon the plaintiff's premises; but, when the flood came down Middle creek and the other tributaries of Salt creek, the Salt basin was completely filled up, and defendant's grades and tracks were submerged, and the whole country west of the main part of the city of Lincoln was a vast sea of water which stood in plaintiff's house for several hours before it commenced to recede. It was therefore established beyond dispute that the flood was so great that plaintiff's damages could not be charged to the defendant's construction of its tracks or grades, and plaintiff's injuries would have occurred if the defendant's tracks and grades had not been constructed in the Salt creek valley. It is impossible to see how any unprejudiced mind could have consented to a verdict for the plaintiff.

It was not alleged that any particular part of plaintiff's damages was caused by the flood waters of Salt creek

which were at first obstructed by defendant's Denver and J street grades, and there was no separate count in the plaintiff's petition for damages occurring before the main flood covered his property. It was conclusively shown that when the flood was at its height all of the defendant's grades were covered, and most of the damage to plaintiff's property was then sustained.

As we view the evidence, it was wholly insufficient to sustain the verdict. Many other errors are assigned by defendant, but it is unnecessary to consider them.

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

REVERSED.

REESE, C. J., and ROSE and FAWCETT, JJ., not sitting.

STATE, EX REL. JULIUS HAHLER, RELATOR, V. HANSON M. GRIMES, DISTRICT JUDGE, RESPONDENT.

FILED SEPTEMBER 26, 1914. No. 18,794.

1. **Injunction:** JURISDICTION. A judge of the district court having both common law and equity jurisdiction has the power to allow a temporary order of injunction in a proper case pending in his court, notwithstanding the amendment of the statute as contained in section 7793, Rev. St. 1913.

2. ———: ADVERSE POSSESSION: RAILROADS: RIGHT OF WAY. A temporary injunction should not be allowed which takes the possession of real estate from one of the litigants and awards it to another; but the title of the Union Pacific Railroad Company in its right of way granted by the act of congress is for the benefit of the public, and prior to June 24, 1912, could not be divested either by conveyance or adverse possession, and no one by occupancy thereof could obtain such title or possession as will be protected by the courts.

3. **Mandamus:** DISSOLUTION OF INJUNCTION. The judge of the district court having jurisdiction to allow a temporary order of injunction will not be compelled by mandamus to dissolve or set aside his order, unless it clearly appears that he has abused his discretion or exceeded his jurisdiction.

Original proceeding in mandamus to compel respondent to dissolve a temporary injunction. *Alternative writ quashed, and action dismissed.*

Hoagland & Hoagland, for relator.

A. Muldoon, Wilcox & Halligan, Edson Rich, Myron L. Learned and *B. W. Scandrett, contra.*

BARNES, J.

This action was commenced in the supreme court as an original application for a peremptory writ of mandamus directed to Hanson M. Grimes, as judge of the district court for Lincoln county, to compel him to dissolve a temporary order of injunction allowed by him as such judge in an action pending in his court in which the Union Pacific Railroad Company is the plaintiff and the relator herein is the defendant.

In support of his application the relator contends that, under section 7793, Rev. St. 1913, as amended, the district court has no jurisdiction to grant a temporary order of injunction. The district court has both common law and equity jurisdiction, and, in the absence of any statutory restriction, has jurisdiction and power to award either a restraining order, a temporary writ, or a permanent writ of injunction in a proper case involving its equity jurisdiction. 1 High, Injunctions (4th ed.) secs. 11-15.

An alternative writ was allowed and served, and by the return of the respondent thereto, the original application, and the affidavits filed in its support, it appears that the action in which the temporary order of injunction was allowed was commenced by the Union Pacific Railroad Company to prevent the defendant therein, who is the relator in this case, from interfering with the railroad company in constructing a service track located wholly on a strip of land 400 feet in width, as granted by the act of congress of July 1, 1862, for the location and construction of the Union Pacific Railroad over and across the public lands of the United States. This fact is not disputed by

the relator, but it is his contention that this land is not a part of the right of way, and, even if it is, that he has acquired title to that part of the company's right of way which he or his grantor had enclosed with a fence as a part of his own lot adjoining such right of way, first, by adverse possession for more than 30 years; and, second, by the conveyance to his grantor, which he claims has been construed, or ought to be construed, to convey title thereto.

It is also relator's contention that the respondent had no power, jurisdiction or authority to allow a temporary order of injunction which has the effect to dispossess the relator of his real property. In support of this contention the relator cites *State v. Graves*, 66 Neb. 17; *Calvert v. State*, 34 Neb. 616; *Warlier v. Williams*, 53 Neb. 143; *Wehmer v. Fokenga*, 57 Neb. 510; *Coppom v. Forman*, 74 Neb. 275. The rule announced in those cases seems to accord with the relator's contention, but as we view the undisputed facts of this case the rule does not apply. The relator has missed the real question. It appears in the present action that in the case in which the temporary order of injunction was allowed the railroad company had filed a petition in equity in which, among other things, it was prayed that the relator be restrained from interfering with the company in the construction of a side or service track upon its right of way. The order complained of followed the prayer of the petition, and was allowed on notice after a full hearing on the application therefor, in which the relator presented all of his objections to the allowance of the writ. The application and the conceded facts show that the tract of land to which the relator claimed title was a part of the railroad company's right of way granted to it by the act of congress of July 1, 1862, and was a strip 100 feet wide and 264 feet long, which lay wholly within the company's right of way, which was 400 feet in width, as granted by that act. The courts have construed the act of congress to give the company an easement in its right of way which the company itself could

not sell, or in any way alienate, for the reason that it was granted for a public purpose which the company could not defeat, and the company was entitled to reclaim every part of the right of way at any time when it became convenient or necessary to construct its tracks thereon. *St. Joseph & D. C. R. Co. v. Baldwin,* 103 U. S. 426; *Rider v. Burlington & M. R. R. Co.,* 14 Neb. 120; *Jamestown & N. R. Co. v. Jones,* 177 U. S. 125; *Bybee v. Oregon & C. R. Co.,* 139 U. S. 663; *Northern P. R. Co. v. Hasse,* 197 U. S. 9; *Stuart v. Union P. R. Co.,* 227 U. S. 342; *Union P. R. Co. v. Snow,* 231 U. S. 204; *Kindred v. Union P. R. Co.,* 225 U. S. 582.

It has been further held that by the grant the width of the railroad company's right of way was conclusively determined, and its right thereto could not be defeated by adverse possession. *Northern P. R. Co. v. Smith,* 171 U. S. 260; *Northern P. R. Co. v. Townsend,* 190 U. S. 267; *McLucas v. St. Joseph & G. I. R. Co.,* 67 Neb. 603, 612; *Northern P. R. Co. v. Ely,* 197 U. S. 1; *Webb v. Board of Commissioners,* 52 Kan. 375; *Grand Trunk R. Co. v. Richardson,* 91 U. S. 454.

It is contended, however, by the relator, that the railroad company is estopped to construct its service track because it had permitted the respondent to fence and occupy a part of its right of way. In *Union P. R. Co. v. Ely,* 197 U. S. 1, it appears to have been held by the supreme court of the United States that, it being beyond the power of the company to alienate any portion of its right of way, no right therein could be acquired by any one by adverse possession, and therefore no one could acquire any right therein by an estoppel. It would therefore follow that the relator's acts were merely permissive; that he had never acquired any title to the tract of land in controversy either by conveyance or by adverse possession. If this be true, then the allowance of the temporary injunction did not, as a matter of fact, or in effect, oust the relator of possession of the land in question or transfer the possession of it to the railroad company, for the rail road company was, and at all times had been, in the constructive possession at least of all of its right of way. The

relator's occupancy had been simply permissive, and, when the company proposed to construct its switch or service track thereon, the relator, if he interfered with such construction, was entitled to no more rights than an ordinary trespasser.

It also appears that the relator's contention that the right he claimed to the land by reason of what he insisted he had obtained by a construction of the conveyances was not sufficiently established to deprive the court of jurisdiction to issue the temporary injunction. The conveyance through which relator claims describes the land conveyed by metes and bounds as follows:

"A part of the southeast quarter of section No. thirty-three (33) in township No. fourteen (14) north of range No. thirty (30) west of the sixth principal meridian, bounded as follows, viz.: commencing at the southeast corner of said section, thence north 1,700 feet, more or less, on the east line of section to intersection of a line 200 feet south of and parallel to the main track of the Union Pacific Railroad, thence westerly along said line 210 feet, more or less, to the northeast corner of block No. 108 of the town of North Platte, thence southerly on east line of blocks No. 108, 109, 138, 139 and 168, 1,750 feet, more or less, to the south line of the section, thence east 510 feet, more or less, on line of section to place of beginning, containing, according to the United States survey, 14 80/100 acres, more or less, reserving, however, to the said Union Pacific Railroad Company all that portion of the land hereby conveyed (if any such there be) which lies within lines drawn parallel with and 100 feet, on each side, distant from the center line of its road, as now constructed, and any greater width, if necessary, permanently to include all their cuts, embankments, and ditches and other works necessary to secure and protect their main line.

"This conveyance is also upon the condition that the grantees herein, their heirs, and administrators and assigns, shall erect and maintain a lawful fence between that portion of the premises hereby conveyed adjoining

the road of said company (if any such there be) and the road of said company upon a line 100 feet distant from the center line of such road, and parallel therewith in all cases in which such fence is required by law, or may be required by said company."

It thus appears that the land in dispute is not included in the description of the land conveyed by that instrument. The conveyance, however, contains a recitation which, it is contended, creates an ambiguity therein, and that the subsequent conduct of the parties shows that they construed it to convey the land in question. The reservation clause, however, plainly shows upon its face, and by the connection in which it is used, that it was intended to apply only when there was no definite provision in the conveyance which would reserve a right of way, and it has no application where the land conveyed as described in the deed does not include the right of way, as clearly appears to be the fact in this case.

In *Keplinger v. Woolsey,* 4 Neb. (Unof.) 282, *Agnew v. City of Pawnee City,* 79 Neb. 603, and *Ballinger v. Kinney,* 87 Neb. 342, it was held that injunction is the proper remedy to prevent an interference with the enjoyment of an easement. The relator's contention that the act of congress of June 24, 1912, aids him is of no force, for the courts have held that that act was not retroactive in its effect. *Union P. R. Co. v. Laramie Stock Yards Co.,* 231 U. S. 190; *Union P. R. Co. v. Snow,* 231 U. S. 204; *Union P. R. Co. v. Sides,* 231 U. S. 213. It therefore follows that the respondent had jurisdiction to allow the temporary order of injunction of which the relator complains.

From an examination of the application, the writ, and the return of the respondent, together with the affidavits and the evidence of the parties, it cannot be said that the respondent was guilty of any abuse of discretion in the premises. The alternative writ of mandamus is quashed, and the relator's action is

DISMISSED.

ROSE, J., not sitting.

STATE, EX REL. HUDSON J. WINNETT ET AL., RELATORS, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, RESPONDENT.

FILED SEPTEMBER 26, 1914. No. 17,596.

1. **Street Railways:** VALUATION: STATUTES: CONSTRUCTION: "RAILROAD:" "RAILWAY." The words "railroad" and "railway" as used in the physical valuation act (laws 1909, ch. 107), *held* not to include street railways.

2. ———: ———: ———: ———: "PUBLIC SERVICE CORPORATION." Since such act declares that "the term 'public service corporation' when used in this article shall mean and embrace" certain named classes of such corporations, no other class of public service corporation is within its terms.

3. **Statutes:** CONSTRUCTION. The proper object of a court in construing a statute is to give effect to the intention of the legislature, and where the language used in an act is ambiguous, resort may be had to the history of its passage through the legislature, if this throws any light on the meaning of the language used therein.

4. ———: ———: PUBLIC SERVICE CORPORATIONS: VALUATION. Where the legislature has, upon the effort being made therein, refused to include certain classes of public service corporations in a physical valuation statute, the court will not include them therein by construction.

Original proceeding in mandamus to compel respondent to file an inventory of its property with the state railway commission. *Writ denied.*

Grant G. Martin, Attorney General, and *George W. Ayres,* for relators.

John L. Webster, contra.

LETTON, J.

This is an original application to this court made by the state railway commission for a writ of mandamus to compel the Omaha & Council Bluffs Street Railway Company to forthwith file with that body a detailed inventory of its property under the provisions of sections 26-36, art VIII,

ch. 72, Comp. St. 1911, commonly known as the "Physical Valuation Act." It is alleged that the relators ordered the respondent to file such an inventory within 60 days from the date of the order; that it was duly notified of this order, but that it has neglected and refused to furnish the commission with any information whatever regarding the amount, reproduction cost, or value of its property. The defense is that a corporation operating a street railway is not embraced within the terms of the act referred to. The cause was submitted upon the pleadings and upon a stipulation of facts which recites that portions of the line of the respondent run, in one instance, for a distance of about three blocks, and, in another, for a distance of about six blocks, in public highways, outside of the corporate limits of any incorporated city or village, and that in Iowa a portion of the line operated by the company under a lease runs for a distance of about one and one-fourth miles through territory outside of any corporate limits. It is also stipulated that it will cost respondent the sum of $7,500 to furnish the information requested if report is made in the manner requested by the relator.

The determination of the controversy depends upon the scope to be given the provisions of ch. 107, laws 1909 (Rev. St. 1913, secs. 786-795) known as the "Physical Valuation Act." The title of the act is "An act to provide for the physical valuation of railroads and other public service corporations in Nebraska, and to define such corporations, and to provide for the employment of clerical and expert help, and the manner in which expenses incurred in carrying out this bill shall be paid, and to provide penalties for the violation of this act." Sections 1, 2 and 3 are as follows:

"Section 1. The term 'railroad' as used herein shall mean and embrace all corporations, individuals, associations of individuals, their lessees, trustees or receivers (appointed by any court or lawful authority whatsoever) that now or may hereafter own, operate, manage or control any railroad or part of a railroad as a common carrier in this state, or cars or other equipment used thereon, or bridges,

terminals or side-tracks used in connection therewith, whether owned by such railroad or otherwise.

"Section 2. The term 'public service corporation' when used in this act shall mean and embrace every railroad, railway, telegraph, express, telephone, and the railroad transportation property of stock-yard companies.

"Section 3. It shall be the duty of the state railway commission to ascertain forthwith, upon the taking effect of this act, the physical value of each railroad and public service corporation in this state within the meaning of this act. The physical value so ascertained shall be the physical value of each of these properties on the first day of July, of the year in which such valuation is ascertained. Provided, that steam railroads shall first be valued according to the provisions of this act, and thereafter other public service corporations in such order to be valued as shall be determined by the state railway commission."

Section 4 prescribes the manner in which the physical valuation in case of railroads shall be made and what it shall include. The property of railroads is divided by the section into nine different classes or descriptions, and it is provided: "This section shall apply to each railroad in this state separately, and the finding of the commission shall show the total value of each railroad, the number of miles of road and the average value per mile of track," etc.

Section 5 provides for the manner of estimating the "physical value of each telegraph, telephone, express and the railroad transportation of stock-yard companies."

The question presented is whether a street railway company is embraced within the definition of "railroad" or of "public service corporation" as used in the act. The relator concedes that the word "railroad" does not at all times and under all circumstances include within its meaning street railways, and that whether or not they are included within the terms "railway" or "railroad" is to be determined from the context and from the purpose of the act in which the term is used, but contends that, since in fixing rates it is necessary that the commission shall have

a reasonably accurate knowledge of the value of the property, the necessity for a statement from the company of the property of the street railway company exists just as much as in the case of any other common carrier. Evidently the first section of the act does not define the term "railroad," but uses that word to designate all kind or classes of persons who may be known to operate, manage or control any railroad, or equipment, or bridges, or terminals or side-tracks used in connection therewith. This section, therefore, throws no light upon the problem. Neither does section 2, defining "public service corporation," aid in solving the question. It includes within its definition certain classes of public service corporations, but excludes other classes of such corporations, such as gas, electric light, heating, power and water companies. It does, however, include "every railroad, railway, telegraph, express, telephone, and the railroad transportation property of stock-yard companies." It is to be presumed that the legislature in using language in a statute will give it the same significance that has already been accorded it by the constitution and laws of the state, unless a different meaning is provided in the enactment itself or must be drawn from its context. The question whether street railways are included within the term "railroad" as used in the constitution and statutes of Nebraska had been decided a number of times by this court prior to the enactment of this law.

In *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672, in considering the question whether street railway companies were included in the statute providing that "every railroad company" should be liable for all damages inflicted upon the person of passengers while being transported over its road, this court considered this question, pointed out a number of differences between a street railway and a railroad, and, after quoting and citing authorities, held that such statement had no application to street railways. This was followed in *Omaha Street R. Co. v. Boesen,* 74 Neb. 764. In *State v. Lincoln Traction Co.,* 90 Neb. 535, the question is again considered in construing section 3, art.

XI of the constitution, which forbids the consolidation of the stocks, property, franchise, etc., of two or more railroad corporations owning competing or parallel lines, and it was held that the word "railroad" as used in the constitution does not purport to, and does not as a matter of law, relate to street railways. In a case involving the regulation of rates of this respondent by the interstate commerce commission, a similar question was presented to and so decided by the United States supreme court, with respect to the respondent. *Omaha & C. B. Street R. Co. v. Interstate Commerce Commission,* 230 U. S. 324. While there is a conflict of authority, the cases holding as this court did seem to be in the majority. *Board of Railroad Commissioners v. Market Street R. Co.,* 132 Cal. 677; *Kansas City, O. B. & E. R. Co. v. Board of Railroad Commissioners,* 73 Kan. 168; *Cedar Rapids & Marion City R. Co. v. City of Cedar Rapids,* 106 Ia. 476; *Massillon Bridge Co. v. Cambria Iron Co.,* 59 Ohio St. 179; *Township of Ecorse v. Jackson, A. A. & D. Ry.,* 153 Mich. 393; *In re New York District R. Co.,* 107 N. Y. 42; *Sears v. Marshalltown Street R. Co.,* 65 Ia. 742; *State v. Milwaukee B. & L. G. R. Co.,* 116 Wis. 142; *Gould v. Merrill R. & L. Co.,* 139 Wis. 433.

An investigation of the history of the act in its passage through the legislature shows that at one stage "street car, interurban railway, interurban railroad, stock-yard, electric light, water works and gas company" were all included in the definition of "public service corporation" in section 2. These were afterwards stricken out and the act passed as it now stands. This conclusively shows that it was not the legislative purpose to compel the valuation of such corporations.

WRIT DENIED.

ROSE, J., not sitting.

THOMAS J. YONDA, APPELLEE, V. ROYAL NEIGHBORS OF AMERICA, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,796.

1. **Insurance:** APPLICATION: FALSE STATEMENTS. An applicant for insurance, who in response to a question whether within the last seven years the assured "had consulted any person, physician or physicians in regard to personal ailment" answered "No," did not make a false and untrue answer which will nullify the contract, even though it be shown that on one or two occasions she had consulted a physician for minor and temporary disorders.

2. ———: ———: ———. Such an applicant answered "No" to a question as to whether she ever had any of a list of diseases, among which was named "la grippe." The evidence shows that upon one occasion when a doctor had been called to attend her children he, upon the suggestion of another member of the family, gave her medicine for what he in his evidence named variously "influenza, la grippe, a common cold." *Held*, That this did not establish a defense based upon the alleged falsity of the answer.

3. **Evidence:** RECORDS AND BY-LAWS OF FRATERNAL BENEFIT ASSOCIATION: PROOF. The records and by-laws of a fraternal beneficiary association must be proved in the same manner as those of other private corporations.

4. **Appeal:** RECORD: REVIEW. Where the appellant complains of errors committed with respect to a defense based upon the existence of certain by-laws, and there is no competent proof in the record of such by-laws, such alleged errors will not be considered, even though a printed pamphlet, said to contain such by-laws, had been admitted in evidence by the trial court.

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

Wilcox & Halligan, U. A. Screechfield and *E. A. Enright,* for appellant.

Hoagland & Hoagland, contra.

LETTON, J.

Annie Yonda on January 24, 1910, applied for insurance in the defendant, a fraternal beneficiary insurance asso-

ciation, naming the plaintiff, her husband, as beneficiary. A physical examination was made by defendant's medical examiner, the application approved, a certificate issued, which was not delivered until April 6, 1910. She died on November 18, 1910. Defendant refused payment, alleging that the applicant made false answers to certain questions in the application, which she warranted to be literally true, and that the certificate was never in effect by reason of the facts that certain by-laws of the order provided that, if not delivered while the applicant was in sound health, and, if a woman, not pregnant, liability should not attach, and that the applicant was not in sound health, and was pregnant at the time of delivery. The answers to the following questions are specifically alleged to be false: "17-A. 'Are you now of sound body, mind and health and free from disease or injury?' 'Yes.' 18-A. 'Have you within the last 7 years consulted any person, physician or physicians in regard to personal ailment?' To which question the said Annie Yonda answered 'No.' 25. 'Have you ever had any disease of the following named organs or any of the following named diseases or symptoms: Bronchitis, consumption, diseases of stomach, lungs, la-grippe, pneumonia?' To which questions the said Annie Yonda answered 'No' in each instance. 27-A. 'Have you ever lived in the family with or nursed any person who was afflicted with or died from consumption?' To which question the said Annie Yonda answered 'No.' 31-A. 'Have you any relatives who have been afflicted with consumption?' Answer: 'No.' 34-K. 'Are you now pregnant?' To which question the said Annie Yonda answered 'No.' "

The record convinces us that Mrs. Yonda apparently, and so far as she knew, was of "sound body, mind and health and free from disease or injury" on January 24, 1910, at the time she was examined. There is no proof that she had ever consulted a physician within seven years for a personal ailment, except that, several years before, a doctor had prescribed for a swollen breast while she was nursing a child, and that in April, 1909, when a doctor had been called to the home for her children he, at the sugges-

tion of another member of the family, gave Mrs. Yonda some medicine for a cold which had temporarily suppressed her menses. Her answers to the other questions were true, at least the defense has failed to show to the contrary, unless the slight ailment referred to, and which was variously termed by the doctor "influenza," "la grippe," and "an ordinary cold," for which he only gave medicine once, must be considered as a "disease." We cannot consider that this is a reasonable construction to be given the language of the application. Such a slight indisposition is not in ordinary parlance so termed. The language used in these questions should be taken as understood by ordinary individuals who may apply for insurance, and not in a highly technical sense. Moreover, a lapse of memory as to consulting a physician within seven years for such trifling ailments not material to the risk should not be held to vitiate the contract. To so hold would be unreasonable, unfair and unjust. *Modern Woodmen of America v. Wilson,* 76 Neb. 344; *Blumenthal v. Berkshire Life Ins. Co.,* 134 Mich. 216. We are convinced that Mrs. Yonda was not pregnant at that time, and that her answer as to this condition was literally true.

The second defense depends upon certain provisions which are alleged to be contained in the by-laws of defendant. We find it unnecessary to consider this defense, for the reason that there is no competent evidence in the record as to the existence of any such by-laws. The deposition of the supreme recorder of defendant was offered in evidence. After testifying that she was the custodian and keeper of the records of the order, and of its by-laws, and had been such since the 5th of July, 1911, she was asked: "Q. Are you the custodian of the by-laws of the Royal Neighbors of America that were in force during the year 1910? A. I am. Q. Will you produce the by-laws that were in force throughout the year 1910 up to and including the 18th day of November, 1910, mark same 'Defendant's Exhibit A,' and hand them to the notary now taking your deposition, to be attached thereto as a part thereof? A. I will, and herewith hand to the notary, now

taking my deposition, the by-laws of the Royal Neighbors of America that were in force throughout the year 1910, and up to and including the 18th day of November, 1910. I have marked same 'Defendant's Exhibit A,' and they are to be attached to this, my deposition, as a part thereof."

At the trial the plaintiff objected to the exhibit purporting to be the by-laws as "incompetent, immaterial and irrelevant, and there is no proper foundation laid for the exhibit, and for the further reason that the said exhibit shows upon its face that it is not what the witness testifies it to be, but that said exhibit shows that it is a purported publication or printed copy of some purported by-laws of the Royal Neighbors of America alleged to have been adopted May 12, 1908, with no certificate of any officer of the organization showing that it is the official by-laws of the organization; that the witness shows that she was not the recorder and keeper of the records of said society during the period of time in controversy in the action herein, but has become such officer since the plaintiff's cause of action accrued, and no foundation is laid for the offer of the purported by-laws in evidence." The objection was overruled.

A fraternal beneficiary association is a private corporation, and its organization, books and records must be proved in the same manner as those of other private corporations. As against a general denial of such an allegation in an answer, the best evidence as to the adoption or existence of by-laws by a private corporation is the production of the original record duly authenticated by the testimony of the proper custodian. If it is shown that the books themselves should not, for any good reason, or cannot conveniently, be attached to the bill of exceptions, then a printed copy duly authenticated by the testimony of one who has compared it with the original may be received and attached thereto. The mere production of a printed pamphlet which shows upon its face that it is not the original record, and as to which there is no testimony that it has been compared or examined with the original record, is not sufficient. It is obvious that the pamphlet produced is not an

original record, and the testimony of the supreme recorder that the printed papers produced "are the by-laws in force" during certain years is of no more weight than that of any other person. When it is sought to defeat the payment of a claim by reason of some provision in a by-law, the fact that the by-law exists must be established by the best attainable evidence. It was also attempted to show the fact that this printed pamphlet contained the by-laws in force in 1910 by the evidence of Mr. Enright, who testified that he was a member during that year of the beneficiary committee of the order, and that these were the by-laws in force at that time. This was also objected to, for like reasons. This evidence was vulnerable to the same objection, because the statement by a third person that a printed pamphlet contains by-laws in force during a certain year is nothing more than parol evidence as to a fact of which the records of the corporation are the best evidence. We think this principle is elementary. 3 Jones, Commentaries on Evidence, secs. 515, 522; *Atlantic Mutual Fire Ins. Co. v. Sanders,* 36 N. H. 252; 1 Bacon, Benefit Societies and Life Insurance (3d ed.) sec. 79; *Durbrow v. Hackensack Meadows Co.,* 77 N. J. Law, 89; *Dennis v. Joslin Mfg. Co.,* 19 R. I. 666; *Independent Order of Foresters v. Zak,* 136 Ill. 185, 29 Am. St. Rep. 318; *Quick v. Modern Woodmen of America,* 91 Neb. 106; 3 Elliott, Evidence, secs. 1943, 1947.

Defendant relies upon certain language used in the opinion in *Supreme Lodge Knights of Pythias v. Robbins,* 70 Ark. 364, 67 S. W. 759, in which the printed pamphlet offered was subject to like infirmities. In that case the court said: "This pamphlet is not such a publication as proved itself. Its correctness must be established by evidence, and, instead of so much circumlocution, the witness should have stated that he had compared it with the record of these laws, and that it was a true copy of the same." This is the correct rule, and confirms our holding in this case. The court, however, proceeds to indicate in a tentative manner, as follows: "If he had stated that he was the keeper of these records, and knew their contents,

this, in connection with his other testimony, might have been sufficient; or, if he stated that this pamphlet had been published by the authority and under the sanction of the supreme lodge of the order for the guidance of the subordinate branches of the order and the members thereof, even this might have been sufficient to raise a *prima facie* presumption that it was a correct copy, as against a member of the order or a benficiary of its policy. But he does not do this. On the contrary, he endeavors to show the terms of the law, and that it had been legally enacted, by parol, and then refers to a printed pamphlet, which he says is an official publication of the constitution and general laws of the endowment rank." These are the expressions upon which defendant relies. They are not applicable to the testimony in this case, formed no factor in the disposition of that case, and are mere dicta.

Defendant insists that this error cannot avail the plaintiff, for the reason that, if the court erred in admitting the by-laws as evidence this of itself would require the reversal of the case, and the cause should be remanded for another trial. We do not take this view. The plaintiff has established his right to recover unless the defendant has proved by competent evidence the existence of certain by-laws. The question now presented to this court is whether in the conduct of the trial errors occurred which were prejudicial to the substantial rights of defendant. If we find the judgment was warranted by the law and the facts, irrespective of the error committed which gave the defendant the privilege of introducing evidence to which it was not entitled, the judgment should be affirmed. A reviewing court does not sit for the mere purpose of determining whether every rule has been strictly followed, but its proper function is to protect the substantial rights of the parties to the suit. Moreover, a party cannot complain of errors made which are to his advantage.

Complaint is made of instructions given by the court. Those bearing upon the first defense are in conformity with the rule in *Royal Neighbors of America v. Wallace,* 66 Neb. 543, 73 Neb. 409, and *Modern Woodmen of America v.*

Wilson, supra. While the language used in some of the instructions relating to the second defense with respect to "fatal disease" seems to be too restrictive, since this defense was not established by the evidence it could not be prejudicial. We are also of opinion that the instructions tendered by the defendant were properly refused for the reason that on several points they are in conflict with the law as expressed in the Nebraska cases cited.

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

AFFIRMED.

ROSE, J., not sitting.

ALBERT A. BUSHEE, APPELLEE, V. WILLIAM L. KELLER, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,813.

1. **Vendor and Purchaser:** CONTRACT: ANNULMENT: MISREPRESENTATIONS. Where an executory contract for the purchase or exchange of real property at a distance is made, and one of the parties makes and the other party relies upon a detailed description of the property disposed of, which the seller guarantees, material misrepresentations of facts affecting the value are sufficient to warrant a court of equity in setting aside the contract at the suit of the party deceived.

2. **Injunction:** VENUE: NOTES IN ESCROW. Where part of the relief sought is to enjoin the delivery or disposal of certain notes of the plaintiff given in part payment of the property, such an action may properly be brought in the county where such notes are held in escrow, and a summons may be sent to another county for service.

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

Warren Pratt and *Tibbets, Morey & Fuller*, for appellant.

M. A. Hartigan and *J. A. Gardiner, contra.*

LETTON, J.

In December, 1910, plaintiff and defendant entered into an executory contract of exchange of real estate. Before the date of final execution arrived, plaintiff brought this action to restrain the delivery of certain notes executed by him and placed in escrow with the defendant bank, and to rescind and set aside the contract on the ground of misrepresentations and breach of certain warranties made by defendant. He prevailed in the action, and defendant has appealed.

The plaintiff owned a large tract of land in Lincoln county, Nebraska, for which he employed one Vermillion, a real estate agent, to procure him a purchaser. Vermillion communicated this fact to one Foley, who knew that defendant Keller owned certain property in Kearney, Nebraska, and in Kansas City, Missouri, which he desired to dispose of. Foley procured from Keller a letter giving a description of the Kansas City property, the contents of which were communicated to the plaintiff. After Keller was informed that perhaps an exchange might be effected, he went to look at the Lincoln county land. Afterwards Foley, Vermillion, Keller and plaintiff met at Hastings, Nebraska. An exchange of property was agreed to upon the following terms: Keller agreed to sell and convey his property at a valuation of $26,500, subject to a mortgage of $4,500, and Bushee agreed to pay for the same by conveying to Keller the Lincoln county land subject to a mortgage of $6,500, by paying $1,000 in cash, by giving a note for $600, due March 1, 1911, by paying $2,500 on March 1, 1911, and by giving a note signed by himself and wife for $2,400, due March 1, 1911. During the negotiations it was suggested by Vermillion that the letter from Keller to Foley describing the property should be made a part of the contract, since Bushee was trading for it upon the representations made by Keller in the letter. To this Keller objected, but, instead, inserted in the contract the following guaranty (omitting non-essentials): "Party of

the first part guarantees Kansas City property as set forth on back of this contract."

"Hastings, Neb., December 27, 1910.

"DESCRIPTION OF KANSAS CITY, MISSOURI, PROPERTY.

"House, 16 rooms, two-story, modern, brick, with slate roof, large brick barn with living rooms upstairs. * * * Three blocks from Convention Hall, five and one-half blocks from Baltimore Hotel, about eight blocks from the proposed new Union Depot, and about three blocks from the new viaduct on Twelfth street, which the city has voted to put in soon. * * * Twelfth street has business clear out to Washington street, which is only one block from Penn. ave. My property is surrounded by good substantial buildings, all fine properties, such as hotels, business, apartment houses, etc., of the better class.

"William L. Keller."

The contract was then executed, the $1000 in cash paid, the note for $600 executed and delivered to Keller, who delivered it to Foley, and the note for $2,400 deposited in escrow with W. A. Taylor, cashier of the First National Bank of Hastings, to be delivered to Keller upon the final execution of the contract. Bushee then went to Kansas City to see the property. On his return this action was begun. The action was brought in Adams county, where the defendant Bank is situated and where Taylor and Foley live. Service was had upon them there, and was obtained upon Keller in Buffalo county.

Defendant's first contention is that the district court for Adams county has no jurisdiction, for the reason that neither the bank, Taylor, nor Foley were necessary or proper parties to the action, and therefore no authority was conferred to send a summons out of the county. One of the objects of the suit being to prevent the delivery of the notes in the hands of the bank and Foley, they were necessary and proper parties in order to afford a complete and adequate remedy.

The claim that plaintiff is not entitled to relief because he does not come into court with clean hands for the reason that he fixed an excessive price upon the Lincoln county land is not well founded. There is no proof that any false statements were made as to the quality of the land, or any device used in order to deceive defendant.

The principal question in the case is whether the evidence justified the district court in allowing the contract to be rescinded. Several of the matters as to which the petition alleges misrepresentations were made were shown by the evidence to comply strictly with the guaranty. There are, however, several important particulars in which the property does not conform to the description given. It was understood by all that Bushee intended to rely upon the written statements, and did not design making a personal examination of the property before the contract was signed. This he had a right to do, and, if the representations upon which he relied were untrue with respect to any material matter, he is entitled to rescind the contract and have the aid of a court of equity to place him in the same situation as he was before he was misled. The Kansas City property was represented to be a house with 16 rooms. The proof is that the house contains five rooms and a reception hall on the first floor, five rooms, an alcove and a bathroom on the second floor, and two rooms and a dark storage room or closet on the attic floor. If the hall, alcove, bathroom and dark attic room are counted, there are 16 rooms in the house, but it is shown that such apartments (except perhaps the hall) are not usually considered as rooms in describing the capacity of a dwelling house. The barn was described as a "large brick barn." The evidence shows that it is a frame building veneered with brick, and that it was of ordinary size for such a dwelling. Furthermore, the property is 15 blocks from the entrance to the new Union Depot, instead of 8 blocks. This, according to the testimony, seriously affects its value. The statement that "my property is surrounded by good substantial buildings, all fine properties, such as hotels, business, apartment houses, etc., of the better class," also

is unsupported by the facts in evidence. The property does not correspond with the representations, and we think the evidence justifies the rescission of the contract.

The judgment of the district court is

AFFIRMED.

ELI M. LANG, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,701.

1. **Trial:** INSTRUCTIONS: SURPLUSAGE. In a charge to a jury controverted issues or essential facts should not be involved, confused or incumbered by the recital of unnecessary pleadings, by the unnecessary narration of admitted or immaterial facts, or by superfluous reference to questions already settled by pleadings or by uncontradicted evidence.
2. ———: ———: ———. Instructions should simplify the questions to be determined by the jury, and should not include extraneous matter.
3. **Carriers:** INJURY TO PASSENGERS: LIABILITY. If a street railway passenger attempts to alight when the car stops at an unusual place, knowledge of the conductor, or proof of facts charging him with knowledge, that the passenger is attempting to get off at such a place is essential to a recovery for personal injuries caused by the starting of the car while he is doing so.

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

John L. Webster and *W. J. Connell,* for appellant.

John W. Cooper, contra.

ROSE, J.

Plaintiff sued defendant for $10,000 on account of personal injuries, and on the verdict of a jury recovered judgment for $1,500. Defendant appeals.

A reversal is sought on account of errors in the instructions. In an attempt to state the issues, an instruction covering five pages of typewritten matter was given. It

contained the petition, the answer, and the reply. Before giving a more definite idea of controverted issues or essential facts than that found in the five-page instruction, the charge proceeded with statements that "those things that are agreed to by the parties in their pleadings or the evidence are to be taken as true," and that "the burden of proof is upon the plaintiff to prove every material allegation of the petition by a preponderance of the evidence, except such allegations as are not made of issue by defendant's answer." The trial court did not state directly what the parties had agreed to in their pleadings or in the evidence, nor what the material allegations of the petition were. In a charge to a jury the controverted issues or essential facts should not be involved, confused or incumbered by unnecessary pleadings, by the unnecessary narration of admitted or immaterial facts or by superfluous reference to questions already settled by pleadings or by uncontradicted evidence. The method adopted has often been condemned and should be abandoned without further multiplication of mistrials. The responsibility for this erroneous practice does not rest wholly on the parties. The form in which an issue of fact is submitted to a jury should neither depend upon the verbal infirmity nor the trenchant brevity of a pleader. The trial court in its instructions should, as far as possible, protect innocent parties, juries and the public from the burden of unnecessary allegations, undue prolixity and useless verbiage in pleadings. Instructions should simplify the questions to be determined by the jury, and should not include extraneous matter. The flagrant violation of these rules was error.

Plaintiff was a passenger on a west-bound street car on Farnam street in Omaha, intending to get off at the Twentieth street intersection, where defendant's tracks cross each other at right angles. His right to recover is based on allegations and proof that he was invited by defendant to get off at the east or near side of the intersection, that the car stopped there, and that when he was getting off it was suddenly started, throwing him violently to the pavement and seriously injuring him. These alle-

gations and all negligence on the part of defendant were denied. The regular stopping place was at the west or far side of the intersection. Defendant's pleading and proof tend to show that the car did not stop at the east side of the intersection, but slackened its speed there, and stopped at the west side of Twentieth street; that plaintiff got off the car when it was in motion, and was injured through his own negligence. With the record in the condition outlined the trial court gave erroneous and prejudicial instructions, permitting a recovery without knowledge of the conductor, or of proof of facts charging him with knowledge, that plaintiff was alighting at an unusual place.

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

REVERSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

NOAH MATTINGLY, APPELLEE, v. MANHATTAN OIL COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,712.

Master and Servant: ACTION FOR SALARY: BAD FAITH. In an action by a traveling salesman for a month's salary and expenses, plaintiff is not entitled to recover on uncontradicted evidence that he was properly discharged before the end of the month, and that during a part of the time he secretly acted in a dual capacity soliciting business for a rival of defendant; there being a failure on his part to prove performance of his duties in good faith for any definite part of the month.

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

Joseph A. Dyer and *Hugh A. Myers,* for appellant.

Edward L. Bradley, contra.

ROSE, J.

This is a suit to recover $175 for services of plaintiff as traveling salesman for defendant during the month of February, 1910, and $5 advanced for expenses. Defendant admitted the employment of plaintiff prior to February 15, 1910, pleaded an agreement requiring him to devote his entire time and his exclusive services to the duties of his employment, but denied liability for any part of his claim, alleging he failed to perform his duties, violated his contract, solicited orders for a rival of defendant without its knowledge, canceled orders in its favor, and turned them over to its rival and deprived defendant of the value of his services. Defendant also pleaded a counterclaim for damages in the sum of $500. From judgment on a verdict in favor of plaintiff for $180, defendant appeals.

Error is assigned in overruling defendant's motion for a new trial, in misdirecting the jury, and in rendering judgment on the verdict. Plaintiff testified he was employed at a salary of $175 a month and expenses, and that he was entitled to 30 days' notice from his employer, if his services became unsatisfactory, and that if plaintiff became dissatisfied with his employment he should give his employer 15 days' notice and resign. The testimony relating to notice was contradicted, but will be treated as true for the purposes of review. Plaintiff's own proofs show that he wrote defendant a letter February 12 or 13, 1910, stating that he would resign March 1, 1910, and that he received a reply February 19, 1910, informing him that his resignation would take effect at once. Though offering his services to defendant for the remainder of February, he did no real work after February 19. Before resigning he had secretly entered into a contract of employment with the Omaha Oil Company, a rival of defendant, and subsequently became a stockholder thereof. On evidence about which there can be no reasonable difference of opinion, it is shown that plaintiff secretly acted in a dual capacity during the month for which he demands full compensation. While in the employ of defendant he secretly solicited future orders for its rival, and his business on

behalf of defendant fell off to such an extent as to show conclusively that the value of plaintiff's services were impaired, if not destroyed, by conduct inconsistent with his duties to defendant. On these uncontradicted facts defendant, under the law, was justified in making plaintiff's resignation effective at once. Plaintiff was the trusted representative of defendant. In this controversy the burden was on him to prove facts showing that in performing his duties he acted in good faith during the entire month of February or for a definite part thereof. In these respects his proofs fail. He therefore failed to make a case for either full or partial compensation for the month of February. Both the verdict and the judgment are without support in the evidence. A recovery for plaintiff should not have been permitted.

The judgment is therefore reversed and the action dismissed at the costs of plaintiff.

REVERSED AND DISMISSED.

LETTON, FAWCETT and HAMER, JJ., not sitting.

NELLIE REDMOND, APPELLEE, V. UNITED STATES HEALTH & ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,772.

Insurance: "CHANGE OF OCCUPATION:" EVIDENCE. Under an accident insurance policy diminishing the indemnity if assured sustains injury "after having changed his occupation to one classed by the company as more hazardous" than that stated in the contract, "or while doing any act or thing pertaining to any occupation so classed," a change in occupation from "receiving clerk, office duties only," to "foreman," classed as more hazardous, or the doing of "any act or thing pertaining to any occupation so classed," is not shown by proof that assured, who remained in and performed the duties of his occupation as receiving clerk, was accidentally killed while temporarily directing other men in the performance of their duties to his employer.

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

E. C. Page, for appellant.

Murphy & Winters, contra.

ROSE, J.

This is a suit to recover accident insurance in the sum of $2,000 on a policy issued by defendant to Moses M. Redmond, who was killed in Omaha by the falling of a derrick-boom, while in the employ of the Witherspoon-Engler Company. Plaintiff is the wife of assured, and is the beneficiary named in the policy. The contract provides: "If the assured sustains injury, fatal or otherwise, or contracts illness, after having changed his occupation to one classed by the company as more hazardous than that herein stated, or while doing any act or thing pertaining to any occupation so classed, then this insurance shall not be forfeited, but the liability of the company shall be only for such proportion of the principal sum or other indemnity as the premium paid by the assured will purchase at the rates fixed by the company for such more hazardous occupation." The substance of the defense urged on appeal is that Redmond was insured as a "receiving clerk, office duties only;" that he was killed while discharging the duties of a foreman, an occupation classed by defendant as one more hazardous than that of receiving clerk, or while doing an "act or thing" pertaining to an occupation so classed; that in no event did he purchase insurance in excess of $1,000 applicable to the changed occupation, and that defendant is not liable under its policy for any greater sum. After evidence had been adduced on both sides the trial court discharged the jury and rendered judgment in favor of plaintiff for the full amount of her claim. Defendant appeals.

It is argued that the evidence on the issue as to assured's change of occupation is conflicting, and that therefore there was error in taking the case from the jury. Evidence

that assured at the time of his death was receiving clerk for his employer is uncontradicted. He received shipments of materials for his employer and kept a record thereof. A book in which he kept accounts as receiving clerk was found upon him after he had been killed. There is proof, however, tending to show that, immediately before the fatal accident, he had been directing some of his employer's men in excavating or in preparing for work of that kind. He was not the regular foreman, and did not, as such, have charge of them. His acts in directing them were at most of a temporary nature. None of his duties as receiving clerk had been abandoned. Within the law of accident insurance under the policy issued by defendant, this does not amount to a change of occupation to a class more hazardous than that of "receiving clerk, office duties only," or to "doing any act or thing pertaining to any occupation so classed." The use of the term "office duties only," in describing the occupation of assured, does not necessarily limit the risk to accidents occurring in the office where his duties are generally performed. There is no such limitation in the contract. According to the nonforfeitable clause quoted, the provision for diminishing liability does not reduce the indemnity of assured, unless injured "after having changed his occupation to one classed by the company as more hazardous than that herein stated, or while doing any act or thing pertaining to any occupation so classed." Mere temporary services of an employee for his employer outside of the regular employment do not constitute a change of occupation within the meaning of this language. In accepting his policy assured never intended to relinquish half of his insurance, if injured while performing for his employer some little act not strictly within the duties of his regular occupation. The amount of the indemnity should not be made so precarious by unnecessary construction of language. The diminished liability for which the contract provides applies to a change of occupation, or to the doing of an act or thing pertaining to a changed occupation classed as more hazardous than the one abandoned, and not to mere temporary acts gen-

erally performed by those in other occupations, where there has in fact been no change in assured's occupation. *Thorne v. Casualty Co. of America,* 106 Me. 274; *Miller v. Missouri State Life Ins. Co.,* 168 Mo. App. 330, 153 S. W. 1080.

It follows that in law there was no evidence of any change of occupation within the meaning of the policy issued by defendant, and that there was no question of fact to be submitted to the jury.

AFFIRMED.

FAWCETT, SEDGWICK and HAMER, JJ., not sitting.

CHARLES D. AUSTIN, APPELLEE, V. WILLIAM DIFFENDAFFER ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1914. No. 17,801.

1. **Trial:** REQUEST FOR SPECIAL FINDINGS AFTER JUDGMENT. The refusal of a request for specific findings, when made after the entry of a judgment, is not a ground of reversal.
2. **Appeal:** FINDINGS: EVIDENCE. A finding of fact on conflicting proofs is final on appeal, when supported by sufficient evidence.

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

F. A. Boehmer & Son, for appellants.

D. F. Osgood and *Tibbets & Anderson, contra.*

ROSE, J.

This is a suit to recover on eight separate causes of action the sum of $1,066. A jury was waived and the trial court entered judgment in favor of plaintiff for $270. Defendants appeal.

In their brief defendants express the conviction that the judgment was rendered on the eighth cause of action, which they describe in their abstract as follows: "In August and

September, 1910, at the special instance and request of appellant, appellee prepared 65 acres of ground and planted same in wheat, which services are worth $195, and he also furnished the seed for said ground of the value of $65, making a total of $260 in this cause of action." The answer amounted to a general denial.

It is argued on appeal that the trial court erred in overruling a request for special findings. This request was made after the entry of the judgment. It is clear that in denying the request there was no error.

It is further insisted that the judgment is not supported by the evidence, and that it is contrary to law. The evidence on the issues involving the eighth cause of action is conflicting, but is ample to sustain the finding of the trial court. It does not affirmatively appear that the judgment is contrary to law. On the other hand, it is obviously just. The appeal is not meritorious.

AFFIRMED.

LETTON, J., not sitting.

ADA H. KEPLEY ET AL., APPELLANTS, V. VICTOR B. CALDWELL, APPELLEE.

FILED SEPTEMBER 26, 1914. No. 17,807.

Wills: RESIDUARY CLAUSE: VALIDITY. The following residuary clause of a will *held* void as too indefinite and uncertain for enforcement: "All personal property, except money, not otherwise disposed of herein, is to be paid and distributed by my executor as follows: To such persons, respectively, as were my friends in my lifetime, and he may think suitable and appropriate, observing my wishes in regard thereto so far as he may know or have reason to believe what they were."

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

W. H. Thompson, McKenzie & Cox and *H. C. Vail,* for appellants.

Arthur C. Wakeley, contra.

ROSE, J.

Plaintiff assails the validity of the following provision of the will of Catherine F. Lacy, deceased: "All personal property, except money, not otherwise disposed of herein, is to be paid and distributed by my executor as follows: To such persons, respectively, as were my friends in my lifetime, and he may think suitable and appropriate, observing my wishes in regard thereto so far as he may know or have reason to believe what they were." In the district court this provision was held valid, and plaintiff has appealed.

The right of plaintiff to maintain the suit is challenged on the ground that she has not shown any interest in the property in controversy. On the whole record this point is not well taken. The petition attacks the validity of the residuary clause, and alleges that plaintiff is an heir at law of testatrix. The answer states that the executor has already distributed property under that portion of the will quoted, and the evidence fairly shows that some part of the undevised estate belongs to plaintiff, if the residuary clause is void.

To uphold the will in its entirety the executor relies on oral testimony and separate, unsigned memoranda enumerating a number of articles to show that the bequests and the legatees are sufficiently definite to meet the requirements of the law, but under well-recognized rules this cannot be done. Manifestly there was no intent on the part of testatrix to dispense charities. The principles of construction relating to that subject do not apply. The intention of testatrix, the legatees, and the bequests of property are too indefinite and uncertain for enforcement. The residuary clause should not be enforced. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

A. E. TUNBERG, APPELLEE, V. CHARLES R. COURTNEY, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,786.

Appeal: CONFLICTING EVIDENCE. A verdict on conflicting evidence, approved by the trial court, will not be set aside on appeal unless clearly wrong.

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

Carl E. Herring and *F. H. Woodland,* for appellant.

H. C. Brome and *D. L. Johnson, contra.*

FAWCETT, J.

From a judgment of the district court for Douglas county, upon a promissory note, defendant appeals.

The defense pleaded and relied upon in the court below was no consideration. The case was exhaustively tried by able counsel on both sides. The jury returned a verdict in favor of the plaintiff. The case must stand or fall now, and if it were reversed for another trial would again have to stand or fall, upon the question of the credibility of the witnesses. There is a substantial conflict in the evidence on the material issue in the case. In the argument at the bar we were impressed with the idea that the judgment might have to be reversed; but upon a careful examination of the record we find ourselves unable to enter such an order, although we concede that even now we entertain some doubt about the correctness of the verdict. Under our well-settled rules, we cannot permit mere doubt in our minds to weigh as against the fact that the trial court and jury saw the witnesses upon the stand and heard them testify. They were better able to determine the question of credibility. We must yield our doubts, based upon the cold record, to their judgment, based upon a hearing of

the testimony as it was given in court and an observance of the witnesses while giving it.

It is incidentally urged in the briefs that the court erred in the admission of certain testimony. It would serve no good purpose to set it out here. While the rulings were close to the border line, we do not think the court committed prejudicial error in receiving it.

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

AFFIRMED.

EGBERT H. WILHOIT, APPELLEE, v. JOHN D. STEVENSON, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,793.

1. **Contracts:** CONSTRUCTION. "A practical construction placed upon an ambiguous contract by the parties will generally be adopted by the courts." *Hale v. Sheehan*, 52 Neb. 184.
2. **Appeal:** HARMLESS ERROR. Error in assessing the amount of recovery cannot be urged as a ground for reversal by the party benefited thereby.
3. ———: CONFLICTING EVIDENCE. A judgment based on conflicting evidence in an action at law will not be disturbed on appeal unless manifestly wrong.

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

W. S. Morlan and *Ratcliffe & Ratcliffe*, for appellant.

C. E. Eldred, contra.

FAWCETT, J.

In December, 1906, plaintiff and defendant entered into a written agreement for the exchange of lands, in and by which plaintiff agreed to convey to defendant a tract of land in Dundy county, Nebraska, containing 963 acres, and defendant agreed to convey to plaintiff a tract of

land in Gentry county, Missouri, containing 231 acres. Subsequently it was found that plaintiff could not furnish title for 120 acres of the Dundy county land; whereupon, in January, 1907, the parties entered into a second contract, in which it was agreed that plaintiff should attempt to obtain title to the 120-acre tract; failing in that he was, if possible, to purchase in lieu thereof a certain 160-acre tract in another section; defendant agreeing to pay one-fourth of the purchase price of such tract, if it should be obtained, and also to pay the difference between the price of the remaining three-fourths of the tract and the appraised value of the 120-acre tract which plaintiff had been unable to convey. This second agreement also provided that, in case plaintiff was unable to obtain title to either the 120 or 160-acre tract, he should pay to defendant the appraised value of the 120-acre tract, this payment to be made upon a $1,200 mortgage then outstanding against the Missouri land, which plaintiff was to receive from defendant, and, in case the mortgage was not thereby fully canceled, defendant should pay the remainder of the mortgage. Pursuant to the first agreement, the parties exchanged deeds for their respective tracts, except the 120-acre tract referred to. Plaintiff subsequently paid off the mortgage on the Missouri land, in the sum of $1,260, but did not succeed in acquiring title to the 120-acre tract, nor did he succeed in purchasing the 160-acre tract. This action was brought by plaintiff to recover from defendant the difference between the appraised value of the 120-acre tract, which he failed to convey, and the amount which he was required to pay to release the Missouri land, which he received in the exchange, from the $1,200 mortgage referred to. The case was tried to the court without the intervention of a jury, and resulted in a judgment in favor of plaintiff in the sum of $540, from which judgment defendant appeals.

Three principal grounds for reversal are regularly assigned and urged in defendant's brief, while a fourth is incidentally included within his second assignment. We

will consider the assignments in the order presented in defendant's brief.

"1. The petition does not state facts sufficient to constitute a cause of action." The substance of this contention is that plaintiff's action is based upon the second agreement, and that the provision in that agreement, requiring defendant to pay anything on the mortgage covering the Missouri land which he was conveying to plaintiff, was not binding upon defendant, for the reason that it was wholly without consideration; that the first agreement in no manner required defendant to pay this mortgage or any part of it. We are unable to agree with counsel in this contention, for the reason that the agreement to convey set out in the first contract, as construed by the parties themselves in the second, contemplated conveyance by each party of the lands which he was conveying to the other, free of incumbrance. The district court properly construed the contract as did the parties themselves.

"2. Error in assessing the amount of recovery." It is a sufficient answer to this assignment to say that the error, if any, in assessing the amount of recovery was in favor of defendant and against plaintiff.

"3. One who refuses to perform his part of a contract cannot recover for a breach by the other party." While the evidence upon this point is conflicting, it is ample to sustain the finding that plaintiff did not refuse to perform his part of the contract, but, on the contrary, in every reasonable manner attempted to comply with the terms thereof.

The fourth contention, which, as we have stated, incidentally appears under the second assignment, is that plaintiff's action was prematurely brought, the contention being that by the terms of the second agreement plaintiff was only required to pay the remainder "due" on the mortgage debt; that he was not to pay it in advance of maturity or at a time to be fixed by himself; that he was to pay it when due, and should have waited until maturity

before doing so. This contention is so clearly without merit that we shall not spend time discussing it.

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

AFFIRMED.

JOSEPH W. SERHANT ET AL., APPELLANTS, V. GOOCH MILLING & ELEVATOR COMPANY, APPELLEE.

FILED SEPTEMBER 26, 1914. No. 17,816.

1. **Statute of Frauds:** MEMORANDUM OF SALE: SUFFICIENCY. The written memorandum of a contract for the sale of goods and chattels for the price of $50 or more, required by the code of civil procedure (section 2631, Rev. St. 1913), need not be signed by both parties. The requirement is sufficiently met if the memorandum is signed by the party to be charged thereby.

2. **Contracts:** SIGNING: WAIVER. The rule that when a condition is attached to the making of a proposed contract that both contracting parties shall sign the same, and one party neglects or refuses to sign, the party signing is not bound thereby, does not apply where the party who has signed, after discovering the neglect of the other party to sign, ratifies the contract as made and signed, and declares his intention to proceed under it. He thereby waives the failure of the other party to sign.

3. **Sales:** BREACH OF CONTRACT: SUFFICIENCY OF PETITION. The petition set out in the opinion examined, and *held* not vulnerable to a general demurrer.

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

Bartos & Bartos and *Hall & Bishop,* for appellants.

Charles S. Roe, contra.

FAWCETT, J.

This action was instituted in the district court for Lancaster county, for damages on account of the breach of a contract of the defendant to sell 400 barrels of flour to

plaintiffs. A general demurrer to the petition was sustained and plaintiffs' action dismissed. Plaintiffs appeal.

The petition alleges that the contract was not in writing, but that a memorandum thereof, in the nature of an order for purchase and sale, was made and signed by J. J. Langer, who was and was acting as the agent for the defendant. The form of the order is set out thus:

"Date Line ——— Jan. 16, 1909.
"GOOCH MILLING & ELEVATOR COMPANY, LINCOLN, NEBRASKA.
"Sold to Kryda & Company, Chicago, Ill.
"Shipment—February Via C. B. & Q.
"Terms—as before
"No. Lbs.—Brands Size Bbls. Price of cwt. No. of bags.
"400 brls.—Old Settlers 4.70
"All orders must be signed by purchaser.
"Ordered by ————.
"J. J. Langer, Salesman.
"All orders subject to confirmation by mail."

The petition further alleges that plaintiffs accepted the order verbally as offered by defendant at the time it was made, and bears date, in Chicago, Illinois, with the said Langer for and on account of the defendant; that in the memorandum the reference, "Shipment: February, Via C. B. & Q.," means and refers to the agreement that the flour should be shipped and delivered to plaintiffs in Chicago during the month of February; that the words "terms as before" mean and refer to a similar former memorandum of the purchase and sale of flour between the same parties, in which the terms of the purchase were written, and which indicate that the flour should be paid for at the price of $4.70 per barrel on 30 days' time, or, if payment were made within ten days from the time of delivery, a discount of two per cent. on the price was to be allowed; that the words and figures in the memorandum "400 brls." under the heading of "No. lbs.," and the words "Old Settlers" under the heading "Brands," and the figures "4.70"

under the heading "price of cwt." mean that it was agreed between the parties that 400 barrels of the brand of Old Settlers flour were bought by plaintiffs and agreed to be delivered at the price of $4.70 per barrel of 196 pounds weight; and that the signature of Langer at the bottom of the memorandum was the signature and execution of the memorandum of the contract by him as agent and salesman for the defendant. It is further alleged "that the memorandum referred to, which is blank under the heading 'size bbls.' and 'No. of packages,' indicates, as the agreement was between the parties, that the flour should be shipped in packages or sacks of 98 lbs. weight, and that, if any portion of the flour was desired to be shipped in smaller or larger packages, the designation of their size would, by the understanding of the parties, their course of dealing in the similar purchases just preceding this, and by the general custom of the trade, have been entered on said memorandum. The plaintiffs further designated and directed that said 400 barrels of flour be shipped in 98-pound sacks or packages when said memorandum was made, and so directed said Agent Langer." It is further alleged that on or about January 20, 1909, Langer delivered the memorandum and order for the flour to defendant, and defendant wrote plaintiffs a letter, which was received in due course by mail, which letter was as follows:

"Gooch Milling & Elevator Company.
"Manufacturers of Hard Winter Wheat Flour,
"Lincoln, Nebraska, Jan. 20, 1909.

"Kryda & Company, Chicago, Ill. Gentlemen: We have your order of the 16th inst. given to our Mr. Langer, for 400 barrels of Old Settlers flour at $4.70 per bbl. to be shipped to you in February. We thank you for this order and it shall have our careful attention. We await shipping instructions from you for our next car and hope you will be able to give them to us soon. Yours truly,

"Gooch Milling & Elevator Company,
"F. E. Roth, Secretary."

It is further alleged that defendant failed and refused to ship any or all of the flour so purchased during the month of February to the plaintiffs, "although they often requested said defendant so to do, orally on giving the order, at times in Feb., May 8 and 28, and by letter in the hand of defendant about May 14, 26, and June 3, 1909, and were ready and willing to pay the price agreed upon for said flour according to the terms of said agreement and memorandum;" that at all times mentioned plaintiffs were engaged in the wholesale and retail selling of flour in the city of Chicago; that the order was given defendant for the flour in controversy for the purpose of meeting and fulfilling contracts made by plaintiffs for the sale of flour during the month of February, 1909, and at the time the contract was made and the order for shipping flour was given plaintiffs were taking orders for the sale and delivery of the flour during the month of February, "all of which was well known to the defendant; that during the said month of February the market price of flour of the quality and grade of 'Old Settlers' flour, purchased from the defendant, increased to $6.05 per barrel on the market at Chicago, and the plaintiffs could and would have obtained that price for the flour so bought of the defendant, if the same had been delivered as was agreed to be done;" that, by reason of the failure of defendant to deliver the flour, plaintiffs were compelled to order other flour to fill their orders for that month at the advanced price named, and were prevented from making the profits stated on the flour purchased from the defendant, to their damage in the sum of $540, for which they pray judgment.

Plaintiffs state in their brief that the demurrer was based on two objections: First, that the contract for the sale of the flour was not mutual between the parties, no obligation having been assumed by plaintiffs to take and pay for the flour; and, second, that the memorandum of the contract, which was a sale order, did not satisfy the statute of frauds, not having been signed or confirmed in writing by the purchaser. Defendant's brief insists: (1) That the contract was not enforceable against either party

under the statute of frauds and was equally inoperative and unenforceable against either party regardless of the statute; (2) that the conditions to the contract prescribed by the defendant to be performed by plaintiffs were conditions precedent to the creation of a contract obligating the defendant; (3) that the defendant never contracted absolutely, but upon the condition that the contract was by the plaintiffs' acts to be rendered mutually enforceable between the parties; (4) that when a condition is attached to the making of a proposed contract that both the parties shall sign the contract, and one party neglects or refuses to sign, the party signing is not bound by the contract, whether or not the contract is within the statute of frauds; and (5) that a petition tested by demurrer must be construed most strongly against the pleader. We have concluded to follow the lines thus pointed out by defendant in its brief, in disposing of the case.

1. Taking the proper allegations of the petition, which are admitted by the demurrer to be true, we think it is clear that, if there were no statute of frauds, the contract would be enforceable. The petition very clearly and explicitly alleges that the contract was a contract of sale by defendant to plaintiffs of 400 barrels of flour at $4.70 per barrel; that plaintiffs purchased the flour for the purpose of filling their contracts with their customers, which fact was well known to the defendant; that, by reason of the great advance in the price of flour during the month of delivery, defendant refused to deliver, as agreed, and alleges the price which plaintiffs were compelled to pay in the open market in order to fill their contracts. This stated a valid and enforceable contract, if the requirements of the statute of frauds were met. The statute relied upon is section 2631, Rev. St. 1913, which provides: "Every contract for the sale of any goods, chattels, or things in action, for the price of $50 or more, shall be void, unless: First. A note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby." We think the memorandum constitutes a sufficient compliance with the statute. There are authorities holding that, in or-

der to constitute a compliance with such a statute, the memorandum must be signed by both parties; but the clear weight of authority is against that holding. In Wood, Frauds, sec. 405, it is said:

"Memorandum need only be Signed by the Party to be Charged. The fourth section of the statute of frauds requires that the note or memorandum shall be signed 'by the party to be charged,' and the seventeenth 'by the parties to be charged.' The object of the statute is to afford protection against fraud and perjury, and the means employed are requiring a written memorandum and preventing a recovery by mere oral proof. *The end and object of the statute are attained by written proof of the obligation of the defendant.* He is the party to be charged with a liability, and the one intended to be protected against the dangers of false oral testimony. To say that the plaintiff or the party seeking to enforce a contract is himself a party to be *charged* therewith is a perversion of language. The term 'parties' is used in connection with the words '*to be charged* thereby,' and does not include *all* the parties to the contract. It is, on the contrary, limited and restricted by the qualifying words to such only of those parties as are to be bound or held chargeable, and legally responsible on the contract, or on account of a liability created by or resulting from it. If to include all the parties had been intended, those words 'to be charged thereby' would have been unnecessary and superfluous. The appropriate language to express such intention would have been that the note or memorandum should be subscribed 'by all the parties thereto,' or 'by the parties thereto,' or some such general terms. *Mutuality of obligation is not essential to render a party liable upon a contract.* If there is a consideration for his undertaking, he is bound; and the fact that the contract may not be enforceable against one party, because not subscribed by him, is no defense to the other, by whom it is subscribed. Under both these sections it has long been well-settled that *an agreement signed by one party only is sufficient to charge him within the statute,* and therefore, upon a contract for the

sale of land or of goods, if the purchaser (seller) alone has signed the contract, he cannot refuse to execute the conveyance or to accept the goods upon the ground that the purchaser has not signed also. *And it is no objection that the party signing can enforce the contract while the other cannot*; for, if it is said that unless the plaintiff also signs there is a want of mutuality, the answer is that the defendant might have required the plaintiff's signature to the contract; or that, if he has not done so, it is his own fault; the object of the statute was to secure the defendant's. The party signing may, it appears, require the other to accept or refuse the contract in writing, and if this is not done may himself rescind it, at least before the other has done some act to bind himself." And so in this case, when Langer sent the written order to his principal, the defendant, without the signature thereto of the purchaser, and defendant wrote plaintiffs the letter of January 20, 1909, above set out, it waived the printed requirements in the memorandum that "all orders must be signed by purchaser." The text above quoted from Wood on Frauds is fully sustained in note 2, page 698, 28 L. R. A. n. s.; and in *Morrison v. Browne,* 191 Mass. 65; *Nebraska Bridge Supply & Lumber Co. v. Conway & Sons,* 127 Ia. 237; *Williams v. Robinson,* 73 Me. 186; *Greeley-Burnham Grocer Co. v. Capen,* 23 Mo. App. 301; and numerous other authorities cited in 28 L. R. A. n. s. *supra.*

2. We are unable to discover from the petition any conditions to the contract prescribed by defendant to be performed by the plaintiffs, as conditions precedent to the creation of a contract obligating defendant. The statement in the letter of January 20, 1909, from defendant to plaintiffs that "we await shipping instructions from you for our next car and hope you will be able to give them to us soon," did not constitute a condition precedent to a liability under the contract, especially so under the allegation in the petition that plaintiffs requested defendant to ship the flour, both orally at the time of giving the order and at times in February, which was the month in which the memorandum provided the shipment should be made.

3. We cannot agree with counsel that defendant "never contracted absolutely, but upon the condition that the contract was, by the plaintiffs' acts, to be rendered mutually enforceable between the parties." There is nothing in the petition, which is all we are considering, to justify this contention.

4. While it is true that when a condition is attached to the making of a proposed contract that both the parties shall sign the same, and one party neglects or refuses to sign, the party signing is not bound by the contract; yet, if the party not signing has merely neglected to do so, and after the other party has discovered the neglect he writes to the party not signing, ratifying the contract as made, and declaring his intention to proceed under it, he thereby waives the failure by the other party to sign.

5. Conceding defendant's contention, that a petition tested by demurrer must be construed most strongly against the pleader, does not aid it in this action, as we think the petition, so tested, states a cause of action, and that the district court erred in sustaining the general demurrer thereto.

REVERSED AND REMANDED.

REESE, C. J., and ROSE, J., not sitting.

LESLIE EDWARDS, APPELLEE, v. W. H. GILL ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1914. No. 17,753.

1. **Municipal Corporations:** OPENING STREET: DEDICATION: BURDEN OF PROOF. When the public authorities attempt to open a street, claiming that the owner of the land had dedicated it for that purpose, the burden is upon them to prove such dedication by a preponderance of the evidence.

2. **Dedication of Street:** SUFFICIENCY OF EVIDENCE. The evidence, indicated in the opinion, is insufficient to prove such dedication.

APPEAL from the district court for Boone county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

W. J. Donahue and *O. M. Needham,* for appellants.

A. E. Garten and *J. A. Price, contra.*

SEDGWICK, J.

Twenty-five or thirty years ago Thomas H. Smith was the owner of the W. ½ of the S. E. ¼ of section 21, and also the N. E. ¼ of that quarter section. This land adjoined the city of Albion on the west. He sold and conveyed the N. E. ¼ of the quarter section to one Tiffany, who platted the 40 acres as an addition to Albion. The acknowledged plat dedicated a strip two rods wide on the west side of the tract as a street. This was accepted by the city and the strip so dedicated was called Eleventh street. Afterwards Smith died and his widow, Mary E. Smith, became the owner of the land of her husband. She sold and conveyed to the plaintiff Edwards a small tract of land in the west half of the quarter section, the east line of the tract, as described in the deed, being the center line that divides the quarter section and forms the west line of Tiffany's addition, leaving for Eleventh street only the strip about two rods in width which is dedicated for that purpose upon the plat of the addition. She sold and conveyed a similar tract to each of several other persons. The defendants, as public officers, contend that the said Thomas H. Smith, at about the time the Tiffany addition was platted, dedicated for a public street a strip of land about two rods in width along the east side of his then remaining 80 acres of land, and they were proceeding to open it as a street accordingly. The plaintiff brought this action to enjoin them from so doing. He denies that Smith dedicated this strip of land as a street, and insists that his land extends east to the center line of the quarter section. The burden of proof was upon the defendants to show the dedication of the land to the public, as claimed by them, and the sole question involved in this appeal is as to the sufficiency of the evidence for that purpose. The trial court found the issues in favor of the plaintiff, and the defendants have appealed.

It should probably be found from the evidence that, at the time of the platting of Tiffany addition, there was a wire fence on the north and south line through the center of the quarter section, but whether this fence extended through the whole length of the addition is not so clear. The defendants attempted to prove that Thomas H. Smith, at about the time the addition was incorporated into the city, removed this fence about two rods to the west, thereby yielding that strip of land as a part of the street. If he had so moved his fence, and had thereby completed a street that was open to the public, it would have been a strong circumstance tending to prove an unconditional dedication. But this supposed street extended only half way across the quarter section and had no outlet to the south. Some eight or ten years afterwards a street was opened along the south half of the quarter section connecting with a public street on the south. This was after the death of Mr. Smith, and the removal of his fence, if he had so removed it along the entire length of the Tiffany addition, could not of itself and without a declaration of Mr. Smith or any other public act, amount to more than a proposition to give so much land toward a practical street, and could not be binding upon him as a dedication unless the authorities accepted the proposition and did their part toward the opening of the street. The death of Mr. Smith before anything was done by the public to accept the proposed donation would cancel the proposition, and, unless renewed by those who succeeded to the title, would not be binding upon them. The evidence that Mr. Smith removed his fence, or how much of it he removed, if any, is very indefinite and uncertain, and is contradicted by a preponderance of the evidence. There is some evidence that some travel on certain occasions passed over the land in dispute, but there is no evidence that the public at any time used the strip supposed to have been dedicated by Mr. Smith throughout the whole length. The preponderance of the evidence is that some parts of this strip of land were at all times impassable for travel.

The evidence entirely fails to establish a dedication of the land in dispute as a public highway, or that it was ever used as such, so as to raise a presumption of such dedication.

The judgment of the district court is

AFFIRMED.

JULIA WANDERHOLM, ADMINISTRATRIX, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,769.

1. **Railroads:** TRESPASSERS: IMPLIED INVITATION. If a railroad company fences its right of way through a small town, and posts a conspicuous notice that the grounds so fenced are private, and that it is dangerous to walk thereon and warning trespassers to keep out, the fact that employees of the company know that certain persons are in the habit of going through the fence and walking along such right of way in going to and from their business, and that such employees of the company have never personally forbidden such custom, will not constitute an invitation to so use the right of way and the railroad tracks thereon.

2. ———: ———: NEGLIGENCE. Under such circumstances the transaction of the business of the company in the ordinary way, or the running of a passenger train on substantially its schedule time along such right of way, or running such train from 9 to 12 minutes behind its regular time, or upon one of the two tracks upon such right of way generally used by trains running in the opposite direction, will not constitute negligence on the part of the company.

3. ———: ———: ASSUMPTION OF RISK. In such case a person going through such fence and walking along the right of way assumes the risk of accident and undertakes to avoid the danger he might incur from the ordinary transaction of the company's business.

4. ———: ———: NEGLIGENCE: LAST CLEAR CHANCE. If the defendant's engine struck the plaintiff's decedent and caused his death, and the engineer was so situated that he could not see the track before his train, so that it became the duty of the fireman, when not otherwise engaged, to keep a lookout for objects on the track, it being a stormy day with snow flurries in the air, and the engine emitting clouds of steam and smoke, and there being no evidence as to when

or where the deceased went upon the track, the fact that the fireman did not see the deceased before he was struck by the engine is not proof that he was neglecting his duty at the time, or that the defendant was guilty of negligence which was the proximate cause of the accident.

5. **Trial:** INSTRUCTIONS. The trial court correctly instructed the jury that there was no evidence that the defendant failed to sound the whistle or ring the bell, and that "the railroad company had the right to operate its westbound trains on its eastbound track, and also its eastbound trains on its westbound track, if it saw fit to do so."

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

Byron Clark and *Rawls & Robertson,* for appellant.

Matthew Gering, contra.

SEDGWICK, J.

The plaintiff is the widow of Oscar Wanderholm, and as administratrix of his estate brought this action in the district court for Cass county to recover damages for the death of her husband, caused, as she alleges, by the carelessness of the defendant railroad company and the defendant Sadle, who was the fireman upon the engine which, it is alleged, struck and killed Mr. Wanderholm. Upon trial in the district court the plaintiff recovered a verdict and judgment, and the defendant has appealed.

The defendant contends that under the evidence the plaintiff was not entitled to recover, and complains of some of the rulings of the court in the progress of the trial, and of some of the instructions given by the court and refusal to give certain instructions asked by defendant, and also that the verdict is contrary to the instructions given.

The principal question in the case is whether the evidence is sufficient to justify a recovery in favor of the plaintiff. The defendant contends that "deceased was a trespasser, or at most a bare licensee, to whom the company owed no duty except not to wantonly or wilfully injure him," and that the deceased was himself so negligent as to preclude a recovery.

The defendant's right of way extends north from the depot to the pumping station of the water company—nearly one mile. This right of way is fenced on both sides by the company, and a sign is posted in a conspicuous place notifying the public that the grounds are private and warning against trespassing thereon. Mr. Wanderholm had been in the employ of the water company as engineer at its pumping station for 8 or 9 months. He lived a few rods distant from the right of way, about half way from the depot to the pumping station. On the morning of January 1, 1911, the deceased left home "a good deal later" than he usually did. It was about 8 o'clock when he left home. He usually went between 6 and 7. Passenger train No. 15 arrived at the defendant's depot at 8:25. Its schedule time was 8:16. It was therefore 9 minutes late in arriving at the depot. It remained there 3 minutes and left the depot 12 minutes after the time it should have arrived. The body of the deceased was first discovered on the right of way a little before 9 o'clock. It is practically conceded that the deceased was struck and killed by train No. 15.

The plaintiff contends that the deceased was upon the tracks by invitation of the defendant. There is not much dispute in the evidence upon this point. The right of way of the railroad company was fenced the whole distance from the depot to the pumping station, and a large sign was placed in a prominent position notifying the public that the ground so fenced was private and that it was dangerous to trespass thereon. There had generally been for the past 15 years two or three employees of the water company, and they had been in the habit frequently of passing from their homes to the pumping station along these tracks. This was known by the yard-master and the section foreman of the railway company, and they had never notified the deceased that he must not so use these tracks. The statement in the brief that the manner in which the employees of the water company were to use the tracks was stated to them by the station agent is not sustained by the evidence. This certainly did not amount to

an invitation to the deceased and to the employees of the water company to travel on these tracks. It may have been more convenient for them to do so than to take some other route, but the evidence shows that they were not compelled to go upon this right of way for the distance of a mile or a half mile, as the deceased in this case did. There was a street along the right of way which they might have used. There is in this respect no parallel between this case and the case of *Armstrong v. Union Stock Yards Co.*, 93 Neb. 258. In that case the Cudahy Company maintained an inclosure in the yards of the defendant company which was used in connection with their shipping over the tracks of the defendant company, and was maintained and so used for the benefit of both companies with the knowledge and consent of the defendant company. In the case at bar there was no relation between the railroad company and the water company, and this inclosed right of way was for the exclusive use of the railroad company in its ordinary business. The water company and its employees had no more privilege or right on this right of way than the general public had.

It is also stated in the plaintiff's brief: "On the day of the accident the train which struck the deceased was 12 minutes late; it was run on the eastbound track, when it was usually run on the westbound track; its speed was scheduled at 28 miles an hour in ordinary weather; while in stormy weather under the rules of the company trainmen were enjoined, 'if delayed on any part of the road, not to attempt to make up time, but to take extraordinary precaution both at switches and at all places where the right to proceed depends upon signals.'" It was also argued that the fireman of the engine was negligent in not seeing the deceased and notifying the engineer, and so preventing the accident. The evidence is that train No. 15 was a few minutes late in leaving the Plattsmouth station, as before stated, and was running at a speed of from 25 to 35 miles an hour between that station and Oreapolis, and the engineer testified that at a curve in the track the

train was running at about 35 miles an hour. The distance from Plattsmouth to Oreapolis is 4 miles, and the schedule time of the train was 7 minutes, which would be something more than 34 miles an hour, which is not very much different from the fastest rate testified to—35 miles an hour. Cases are cited holding that 35 miles an hour "within railroad yards and city limits" is a dangerous and unreasonable rate of speed, but the argument derived from these cases in the case at bar is hardly fair. These cases have no application to the right of way between two small stations, when that right of way is fenced and a public warning given against trespassing thereon.

The argument which seeks to apply the so-called rule of the last clear chance is likewise unsatisfactory. The argument assumes that the deceased was upon the track in such a position and in such a distance from the approaching train, and that the conditions were such that the fireman, if he was keeping a proper lookout, must necessarily have seen him. It was a very cold and stormy day. It would be at least as probable that the deceased would walk between the tracks as that he would walk between the rails of either track, and there is no evidence that he was not walking between the tracks and suddenly stepped between the rails of the track upon which the train was approaching. Some of the witnesses testify that the train when going from the station was throwing large quantities of steam and smoke which would obstruct the view. There is no evidence to the contrary. The fact that the fireman did not see deceased under such circumstances is not proof that he was neglecting his duty at the time. The evidence was that one of these two tracks was ordinarily used by trains going north and the other by trains going south, and that on this occasion train No. 15 going north was upon the track ordinarily used by trains going the other direction. This is alleged as negligence on the part of the defendant company.

The trial court instructed the jury that there was no evidence that the defendant failed to "blow the whistle"

and ring the bell, and that "the plaintiff cannot recover on account of alleged failure" in that regard, and also that "the plaintiff cannot recover in this case solely because of the fact that the train in question was running on the eastbound track at the time of the accident in question, or because of any failure on the part of the defendant to notify the said Wanderholm that said train would run on said eastbound track on the day of said accident. The railroad company had the right to operate its westbound trains on its eastbound track, and also its eastbound trains on its westbound track, if it saw fit to do so." These instructions were justified by the evidence and properly eliminated those questions from the case.

When the deceased went through the company's fence and walked upon the right of way, he assumed the risk of accident, and undertook to avoid the danger he might incur from the ordinary transaction of the company's business. If the fact that the local employees of the company knew that deceased was in the habit of walking upon the right of way and made no objection to his so doing amounts to notice to the company and its consent to such use of its right of way, it could not amount to more than a license to so use it at his own risk, and could not be construed as an agreement on the part of the company to guarantee his safety, or to suspend or limit the ordinary use of its tracks so as to render them more safe for such use by deceased.

There is no evidence that the accident was caused by any negligence on the part of defendant. The judgment is therefore reversed and the cause remanded.

REVERSED.

REESE, C. J., and FAWCETT, J., not sitting.

ADELBERT F. GIBSON, APPELLANT, v. M. N. TROUPE ET AL., APPELLEES.

FILED SEPTEMBER 26, 1914. No. 17,808.

1. **Municipal Corporations:** ENACTMENT OF ORDINANCE: STREET IMPROVEMENTS. Section 5110, Rev. St. 1913, requiring a petition of three-fifths of the resident property owners for paving or for constructing sidewalks, or a vote of three-fourths of all the members of the council or board of trustees, does not apply to temporary walks on ungraded and unimproved streets. Section 5112 provides for such walks, and that section contains no such requirement.

2. ———: ———: ———. A village ordinance requiring the construction of a temporary sidewalk on an ungraded and unimproved street is not an ordinance of a general or permanent nature, and section 5154, Rev. St. 1913, does not apply in such case.

3. ———: STREET IMPROVEMENTS: ESTIMATE OF COST. Section 5011, Rev. St. 1913, requiring an estimate of cost by the city engineer before sidewalks are constructed, applies only to cities of the second class. A village is not required to have a "city engineer."

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

J. M. Easterling, for appellant.

H. M. Sinclair, contra.

SEDGWICK, J.

The board of trustees of the village of Gibbon by ordinance ordered a sidewalk constructed along the lots of plaintiff. The plaintiff failed to construct the sidewalk as ordered, and it was constructed by the village. The trustees of the village and the treasurer of the county were proceeding to enforce collection of the cost of the sidewalk against the lot of plaintiff, and this action was brought in the district court for Buffalo county to enjoin the collection of the tax. The district court found in favor of the defendants and dismissed the case, and the plaintiff has appealed.

The plaintiff insists that the tax is invalid, and states the following reason: "The ordinance was not read on three separate days, nor was such reading dispensed with by vote of the village board. No estimate of the cost of this sidewalk was ever made, nor bids for its construction advertised for." Section 5110, Rev. St. 1913, provides: "But unless three-fifths of the resident owners of the property subject to the assessment for such improvements petition the council or trustees to make the same, such improvements shall not be made until three-fourths of all the members of such council or board of trustees shall by vote assent to the making of same." There was no petition of the property owners affected, and three-fourths of all the members of the board of trustees did not by vote assent to the making of the same. Only three of the five members were present when the vote was taken. The language of this section is so explicit that the decision of *City of North Platte v. North Platte Water-Works Co.*, 56 Neb. 403, even if we felt bound to approve that decision upon this point, could not assist us in construing this statute.

Prior to the revision of 1913 there were some apparent inconsistencies in the statute governing cities of the second class and villages. An attempt was made in that revision to harmonize these statutes, and we do not feel compelled to resort to the history of the various legislative enactments in construing this legislation, except in case the provisions of the revision appear to be ambiguous or inconsistent. Immediately following section 5110, above quoted from, are two sections relating to sidewalks. Section 5111 provides for repairing them at the cost of the property owners, and section 5112 provides for temporary sidewalks on ungraded streets. If the proceeding to construct temporary walks on ungraded streets was intended to be the same and require the same formality as in case of permanent walks on improved streets, there would have been no occasion for section 5112. Section 5110 is broad enough to include both classes of sidewalks if no other provision had been added. If sidewalks are placed upon

ungraded and unimproved streets, and the streets are afterwards graded and paved or otherwise improved, the sidewalks would ordinarily be removed for that purpose. This seems to have been the thought of the legislature in enacting these two sections, and is the basis of the distinction between temporary and permanent walks. It seems probable that it was not intended that the formalities required in the construction of permanent walks on graded and improved streets, and in enforcing payment for the same by property owners, should necessarily be observed in laying temporary walks under section 5112. The provision for temporary walks was contained in the act of 1887 (laws 1887, ch. 12, sec. 1, subd. VI): "To provide for the laying of temporary plank sidewalks upon the natural surface of the ground, without regard to grade, on streets not permanently improved, at a cost not exceeding fifty cents a lineal foot, and to provide for the assessment of the cost thereof on the property in front of which the same shall be levied." In 1905 this subdivision was amended by inserting after the word "plank" the words "brick, stone or concrete." Laws 1905, ch. 29, sec. 1, subd. VI. No other change in the statute was made by this act. This statute, if properly enforced, cannot work a hardship upon the property owner, since the constitution does not permit the costs of such improvements to be charged against the property beyond the actual benefits to the property thereby. There is evidence that the street in question is one of the principal streets of the village, and the block along which this walk was laid is occupied with some of the most important buildings, but the street is not graded and is wholly unimproved, and the trustees did not abuse their discretion in ordering a temporary walk under section 5112.

Section 5154, Rev. St. 1913, requires that ordinances of a general or permanent nature shall be fully and distinctly read on three different days, "unless three-fourths of the council or trustees shall dispense with the rule." The ordinance in question was not of a general nature, and that section has no application. In case of a temporary walk

no petition of property owners is necessary, and a majority vote of the trustees is sufficient.

Section 5011, Rev. St. 1913, provides: "The city engineer shall make estimates of the cost of labor and materials which may be done or furnished by contract with the city. * * * Before the city council shall make any contract for building bridges or sidewalks, for any work on the streets or for any other work or improvement, an estimate of the cost thereof shall be made by the city engineer." This section is a part of article I, ch. 50, Rev. St. 1913, and is applicable only to cities of the second class. Villages have no city engineer. This section was in the act of 1879. Laws 1879, p. 197. It is the twentieth section of the act. The first 39 sections relate to cities of the second class. Sections 40 to 55, inclusive, relate to villages only, and the remaining 68 sections relate to both cities of the second class and villages. Section 20 has no application to villages.

The plaintiff cites *Nebraska City v. Nebraska City Hydraulic Gas Light & Coke Co.*, 9 Neb. 339, *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb. 876, *Moss v. City of Fairbury*, 66 Neb. 671, *Fairbanks, Morse & Co. v. City of North Bend*, 68 Neb. 560, and *Murphy v. City of Plattsmouth*, 78 Neb. 163, in support of the contention that section 5011 applies to villages. In the *Bellevue* case it was held: "Where a village board undertakes to levy and collect a local assessment for the construction of sidewalks, without in fact constructing the sidewalks, before obtaining any proposals for their construction, and before in any manner ascertaining or estimating the cost of their construction, held, that such local assessment is absolutely void." The section of the statute in question here was not mentioned in the opinion. The decision of this court in that case is not to the effect that a preliminary estimate is necessary. The point decided is that "there is required, as a basis for the assessment, at least some estimate made with reasonable certainty of that expense." The assessment cannot be made before the work is done without some effective measures taken to first ascertain the necessary

amount to be levied. This must not be taken as deciding that no assessment can be made before the work is done, but that when it is so made and no estimate of cost is made such assessment is void. The other cases cited by plaintiff relate to cities of the second class, and not to villages of less than 1,000 inhabitants, and are not applicable here.

The other points discussed in plaintiff's brief may be resolved as he contends and not affect the result. It may be that the statute gives too much latitude of discretion to village boards in the matters complained of; if so, further legislation may be expected. The courts cannot supply the remedy.

The judgment of the district court is

AFFIRMED.

REESE, C. J., and ROSE, J., not sitting.

MCCAFFREY BROTHERS COMPANY, APPELLEE, V. HART-WILLIAMS COAL COMPANY, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,822.

Statute of Frauds: SALES: MEMORANDUM. If the duly authorized sale agent of the defendant signs a memorandum addressed to his principal directing the shipment of specified goods to the plaintiff at a specified place, and for a specified price, and procures the plaintiff to sign an acceptance of the same as a memorandum of sale, and forwards the same to his principal as such memorandum, it will constitute a sufficient memorandum of sale under section 2631, Rev. St. 1913.

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

Smyth, Smith & Schall, for appellant.

Mahoney & Kennedy, contra.

SEDGWICK, J.

The plaintiff brought this action in the district court for Douglas county to recover on an alleged contract of

sale of a quantity of Portland cement by defendant to plaintiff. It is alleged that defendant failed and refused to fulfil its contract, though duly requested so to do. The defendant filed a general demurrer to the amended petition, which was overruled, and judgment entered for plaintiff. Defendant has appealed.

The contention is that the allegations of the petition are insufficient, and that it is not alleged that the defendant made any contract whereby it agreed to sell plaintiff the cement specified. The petition alleges: "On the 6th day of May, 1910, the defendant entered into a contract in writing with the plaintiff, a copy of which contract is hereto attached marked exhibit A. In said contract defendant agreed to deliver 2,500 barrels of Portland cement to the plaintiff as ordered, but not later than December 1, 1910, for the agreed price of 85 cents per barrel f. o. b. the mill on freight rate basis to Omaha, Nebraska, of 38 cents per barrel, and plaintiff agreed to purchase said cement on said terms." Exhibit A is as follows: "Order No. 1. Date 5-6-1910. Hart-Williams Coal Co. Ship to McCaffrey Bros. Co., at Omaha. When: As ordered, commencing at once. How ship: As ordered during the life of job, not later than Dec. 1st, 1910. Terms: Usual. Salesman: ————. Buyer: ————. Not less than 2,000, with option on 2,500, bbls. Portland cement from Lumberman's Portland Cement Co. Cement furnished guaranteed standard quality and to pass all standard tests as prescribed by the American Society of Civil Engineers. Ship one car at once. Price 85c. per bbl. f. o. b. Will present frt. rate 38c. per bbl. E. G. Hickey, W. S. A. Accepted: F. O. McCaffrey."

A contract for the sale of personal property for the price of $50 or more, when no payment is made on the purchase and no part of the goods accepted, cannot be enforced unless "a note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby." Rev. St. 1913, sec. 2631. The petition alleges that E. G. Hickey, who signed the memorandum of contract, was duly authorized by defendant to make such

contract, and that McCaffrey was duly authorized by plaintiff. It is not necessary that the memorandum should contain all the detail terms of the contract. *Ruzicka v. Hotovy,* 72 Neb. 589. In this memorandum the sale agent of defendant directs his principal to ship the cement to plaintiff at Omaha as ordered, commencing at once, and states the price to be paid therefor. The plaintiff by its agent accepted this, thereby binding itself to receive the cement and pay therefor the price specified. If the allegations of the amended petition are true, there was a contract of sale, and this writing was "accepted" from the defendant by the plaintiff as a memorandum thereof. If this writing was not delivered and accepted as a memorandum of sale of the property therein specified for the price stated therein, it devolved upon the defendant to controvert these allegations.

In *Fisher v. Buchanan,* 2 Neb. (Unof.) 158, there was an entire failure of evidence upon a vital matter in the case, which was sufficient ground for reversal. As the opinion is unofficial, it is not to be regarded as a precedent upon the question as to the sufficiency of the contract.

In *Darr v. Mummert,* 57 Neb. 378, the contract sued upon was considered to give an option only, and not to bind the party to whom the option was given. The court, by Ragan, commissioner, construed the contract to exclude any agreement on the part of Darr.

The general demurrer to the amended petition was rightly overruled.

AFFIRMED.

ROSE, J., not sitting.

GEORGE A. DAWSON V. STATE OF NEBRASKA.

FILED SEPTEMBER 26, 1914. No. 18,407.

1. **Rape:** EVIDENCE. Under our statute a defendant cannot be convicted of rape upon the wholly unsupported testimony of the person against whom it is alleged that the crime was committed. If she testifies positively and consistently to the facts constituting the crime, other evidence of opportunity and disposition on the part of defendant to commit the crime will furnish sufficient corroboration.

2. ———: ———. The defendant took a girl, under 15 years of age, from her father's house to defendant's home, and there stayed with her alone through the night. The opportunity to commit the crime was fully proved, and the evidence indicated in the opinion is *held* sufficient to support a finding of the jury that the defendant planned and brought about this opportunity for the purpose and with the intention of committing the crime charged.

3. ———: ASSAULT WITH INTENT: EVIDENCE. The crime of rape upon a girl under 15 years of age includes the crime of assault with intent to commit rape. It is not ground for reversal of a verdict and judgment of conviction of assault with intent to commit rape that there is no evidence of assault except the evidence of the complete crime of rape. If the evidence is sufficient to justify a conviction of the higher crime, it will support a conviction for the lesser one.

4. **Criminal Law:** INSTRUCTIONS. In a prosecution upon such charge of rape, it is not prejudicial error requiring reversal to instruct the jury that they may find the defendant guilty of the crime of assault to commit rape, though there is no evidence of assault except the evidence of the complete crime of rape. Such instruction should not be given, but the error is not prejudicial to defendant, requiring a reversal.

5. ———: ———. In such case an instruction which describes the girl upon whom the crime is alleged to have been committed as "the prosecutrix," although her father made the complaint and the county attorney signed the information, is not necessarily prejudicial to defendant so as to require a reversal, and, unless such prejudice appears from the record, none will be presumed.

6. ———: APPEAL: ADMISSION OF EVIDENCE. The rules of law governing the impeachment of witnesses by proof of statements out of court inconsistent with their testimony are important and necessary to the due administration of justice. When it appears that defendant has been prejudiced by a violation of those rules, the judgment against

him will be reversed. The defendant will not be heard in this court to complain of the improper introduction of evidence in which he has joined or which he has encouraged in the trial court.

ERROR to the district court for Gosper county: ERNEST B. PERRY, JUDGE. *Affirmed.*

E. T. Grunden and *Ritchie & Wolff,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

SEDGWICK, J.

The defendant (plaintiff in error here) was convicted in the district court for Gosper county of the crime of assault with intent to commit rape, and has brought the case here for review upon petition in error. The defendant on September 4, 1913, took his wife and children to her father's for a visit. His wife expected him to take her and the children home on the next or the following day. He had trouble with his automobile tire and had it repaired, and on the next day, September 5, he took the complaining witness, Mr. Zike, who was a rural mail carrier, around the mail route in defendant's automobile, arriving at Mr. Zike's home in Edison soon after 4 o'clock in the afternoon. He had supper with Mr. Zike's family, and afterwards, with Mr. Zike's consent, took Mabel, Mr. Zike's daughter, a girl not then quite 15 years of age, home with him, some 24 miles distant from Edison, where they stayed all night, no one else being in the house. The girl testified emphatically to the commission of the crime by defendant when they occupied the same bed that night. No discussion of the details of the crime as testified to by her is necessary to an understanding of the questions of law presented.

The defendant as emphatically denied all criminal conduct on his part. The principal question is whether the testimony of the girl is sufficiently corroborated to justify the verdict of the jury. The opportunity to commit the

crime is clearly established. If the evidence substantially shows an intention or disposition on the part of defendant, the corroboration is sufficient. The defendant testifies that he made statements in the presence of the girl's father from which he should have known that defendant's wife was not at home. This is denied both by the girl and her father, and the jury were clearly justified in believing that her father supposed that Mrs. Dawson was at home. When the defendant left Edison with the girl, he went first to Arapahoe, and then to his home. They stayed at Arapahoe some time, and did not arrive at his home until dark. He then did "chores," the girl helping him, as it was after half past 9 o'clock when they had finished. He concluded it was then too late to go after his family. He offers an excuse for going to Arapahoe, instead of going directly for his wife, and in this excuse he is supported by his wife's testimony. He admits, however, that it would have been only about six miles farther to have gone home from Arapahoe by way of his father-in-law's place, where his wife was and was expecting him. He says the roads were good "so far as rain is concerned" and does not testify that he would have found any bad roads in going by that way home, except in the statement that he was afraid he would have trouble driving his automobile "over the hills." There is no evidence as to the character of the hills he would have to pass. He testified that there was some difficulty with the timer of the automobile, so that only two cylinders were working, but he drove his automobile the following day and took his family to Edison, and said that he fixed the automobile himself, and, when asked how long it took him to fix it, he made no explanation. His evidence in regard to difficulty with his automobile is wholly uncorroborated. The state insists that the evidence shows that he planned taking his family away from home and putting the girl's father under obligations to him by carrying him around the mail route, and so gaining his consent and making the way clear for the very crime which he committed. It is not necessary to go so far for corroboration. If the defendant intended that Mr.

Zike should not know that Mrs. Dawson was away from home and planned to take the girl to his home and stay with her there, and purposely failed to take his family so that he might spend the night alone with the girl, the jury might from such conduct find corroboration of the girl's testimony. Without attempting to further recite the evidence bearing upon the question of the defendant's motive in taking the girl to his home, we are satisfied that it presents a question peculiarly for the jury, and the court is not required to interfere with their verdict.

The defendant presents 26 separate instructions which he requested the court to give the jury; all of them were refused, and the court on his own motion gave the jury 12 instructions, to each and every one of which the defendant took exception.

The information charged the defendant with the crime of rape, and in the first instruction, after defining that crime, the court defined the crime of assault with intent to commit rape, and submitted that question also to the jury. The objection made to this is: "The testimony, on the one hand, was a completed act; on the other, total innocence. There was no evidence of an assault with intent to commit rape other than the evidence of the completed act of rape. 'If the evidence in this case failed to justify returning a verdict of guilty of rape,' there was no evidence of assault with intent to commit rape, and the court erred in giving an instruction thereon 'without testimony to sustain it.'" The defendant cites *Fager v. State,* 49 Neb. 439, in which it was held: "When the evidence entirely fails to show an offense of a less degree than that charged in the information, it is not prejudicial error to omit to give an instruction defining an offense of such less degree."

It does not follow that, because the court was not required to submit the question of the lesser crime, it was prejudicial error to do so. The evidence is, as contended, that the defendant completed the act constituting the crime charged, and there is no other evidence of any assault. But the crime of rape cannot be committed without an assault with that intent. The latter is necessarily included

in the greater crime. It would have been better to have omitted from the instruction all reference to any lesser crime, but the defendant has no cause to complain of this error, especially after having insisted that such an instruction be given, as he did in this case.

In the seventh instruction given by the court the girl, Mabel Zike, is referred to as "the prosecutrix." The complaint before the examining magistrate was, in fact, made by her father, and the information on which the trial was had was signed by the county attorney, so that the girl was not, in fact, the prosecutrix, and ought not to have been so described; but from the nature of the instruction, which it is not necessary to quote, it seems impossible that the defendant could have been prejudiced by this oversight.

Instruction No. 10, given by the court, is objected to, and also 15 or 20 specified rulings of the court in receiving or rejecting evidence. For the purpose of laying a foundation for impeachment, Mr. Zike, while on the witness-stand for the state, was asked questions by defendant's counsel in cross-examination that had no relation to the evidence he had given in chief, and when witnesses were called by defendant to contradict his evidence so given they were allowed to testify at large as to a statement made by Mr. Zike out of court, without any regard to the ordinary rules for impeaching witnesses. This practice was participated in by both parties, and the trial court managed the investigation about as well as could be demanded under the circumstances. Neither party ought now to take advantage of errors of practice in which both participated. We cannot discuss all of these assignments of error, but we have not found any such prejudicial error as appears to require a reversal of the case.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

FRANK J. SIECK V. STATE OF NEBRASKA.

FILED SEPTEMBER 26, 1914. No. 18,431.

1. **Criminal Law:** FORMER JEOPARDY. In a prosecution for felony, if the information is quashed "at any time before the verdict" because "mistake has been made in charging the proper offense," the court should determine whether "there appear to be good cause to detain (the defendant) in custody." For that purpose he may hear further evidence, if necessary, and recognize the defendant "to answer to the offense on the first day of the next term of such court." In recognizing defendant to appear at the next term, the judge acts as examining magistrate, and, if he discharges the defendant without so recognizing him, such discharge will not be a bar to arrest and examination before another magistrate. Rev. St. 1913, sec. 9121.

2. **False Pretenses:** EVIDENCE. In a prosecution for obtaining money by false pretenses under section 8874, Rev. St. 1913, it is not necessary to prove that the person defrauded intended to pass the title and property in the money to defendant; it is sufficient in that regard if he intended to, and did, deliver the money to the defendant, and that the defendant obtained the same by false pretense or pretenses with intent to cheat or defraud such person.

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

R. H. Hagelin and *J. L. Caldwell,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

SEDGWICK, J.

The defendant, who is plaintiff in error here, was convicted in the district court for Lancaster county of the crime of obtaining money by false pretenses, and sentenced to confinement in the penitentiary for from one to five years. He has brought the case to this court upon petition in error.

1. The trial court sustained a general demurrer to the defendant's plea of former jeopardy, and it is now insisted that the ruling was erroneous. The plea alleged

that defendant had before been put upon trial for the same offense, and that after the jury had been impaneled, and the cause had been stated to the jury by counsel, and several witnesses had been sworn and testified in behalf of the state, the information was quashed because it failed to state the facts necessary to support a conviction, and that the defendant then asked that the jury be instructed to find a verdict of not guilty, which was refused, and the court discharged the defendant. Section 9121, Rev. St. 1913, provides: "When it shall appear at any time before the verdict that a mistake has been made in charging the proper offense, the accused shall not be discharged if there appear to be good cause to detain him in custody; but the court must recognize him to answer to the offense on the first day of the next term of such court; and shall, if necessary, likewise recognize the witnesses to appear and testify." The contention is that the words, "the accused shall not be discharged," are mandatory, and therefore such discharge was equivalent to an acquittal. If it appear before "verdict that a mistake has been made in charging the proper offense," the court should determine whether "there appear to be good cause to detain him in custody." If there is already sufficient evidence before the court, the judge should act accordingly; if not, he may as an examining magistrate take further evidence. *State v. Kendall,* 38 Neb. 817. In this inquiry the judge acts only as an examining magistrate, and, if he mistakenly discharges the accused without determining whether there is probable cause to hold him for trial, it will not bar an examination before another magistrate. *In re Garst,* 10 Neb. 78. The court therefore was right in sustaining the demurrer to the plea, and also in overruling defendant's motion to quash the information for the same reason.

2. The defendant objects to a supposed statement of the county attorney in his argument to the jury. He does not state the place in the bill of exceptions where any such statement as he discusses appears to have been made by the county attorney, and we have not observed any record of such statement to the jury.

3. It is alleged that the defendant and one Himber went to the home of Charles and Theodore Strelow and represented themselves to be a judge and sheriff. They presented a paper purporting to be a warrant for the arrest of the Strelows upon a charge of murder, committed many years before. They obtained $230 from the Strelows as bail or security for appearance in court in Lincoln for trial on the following Monday.

The information upon which the defendant was tried contained two counts, one charging larceny of the $230, and the other charging obtaining the same by false pretenses. The jury found defendant guilty of obtaining money under false pretenses, and not guilty of the crime of larceny. It is now contended that the evidence will not support the charge of obtaining money by false pretenses; that if any crime was committed it was larceny. Charles Strelow testified: "Q. What did the men do after they hitched their horses? A. They came in, and he says, 'I got here something for you.' Q. Who was he talking to? A. To me, and—what is it? 'Well,' he says, 'I am the sheriff and I take you for murdering a man 30 years ago.' * * * Then he said, 'If you can give us $500 cash bond, probably we will let you go.' Well, we agreed to that, but I said I did not know how much I have. 'Well, how much you will have?' 'Well, I don't know,' I say. And I spoke that over with my brother, and we agreed, me and my brother, to give him that, what we had. That gave us a chance until Monday, he said we can come in Monday and you get your money back."

This evidence is substantially without contradiction, and establishes, it is contended, that the owners of the money did not intend to part with the title, and consented only to part with the possession of the money until the following Monday, and as the defendant did not obtain the property in the money itself, but only possession thereof, by the representation made, he was not guilty of obtaining money —that is, the title and ownership thereof—by false pretenses, but if defendant intended to afterwards convert

the money to his own use, and did so convert it, it is argued that he was guilty of larceny only. There are many of the earlier cases which have drawn this distinction between the common law crime of larceny and the statutory crime of obtaining property by false pretenses. These decisions are not applicable to our statutory crimes. Section 8874, Rev. St. 1913, provides: "Whoever by false pretense or pretenses shall obtain from any other person, corporation, association, or partnership, any money, goods, merchandise, credit or effects whatsoever with intent to cheat or defraud such person, corporation, association, or partnership of the same, * * * shall be imprisoned in the penitentiary not more than five years nor less than one year; but, if the value of the property be less than thirty-five dollars, the person so offending shall be fined in any sum not exceeding one hundred dollars or be imprisoned in the jail of the county not exceeding thirty days and be liable to the party injured in the amount of damage sustained."

The same acts may constitute two or more different crimes, and there is no principle of law or public policy in our state that will forbid the legislature to make the act of obtaining the possession of the money or property of another by false pretenses, and with intent to cheat or defraud such person "of the same," constitute the crime of obtaining by false pretenses, although the person so defrauded did not at the time consent to the transfer of the title and property in the money, but supposed that the same money or a like amount would be returned to him. The fact that the defendant may have been guilty of larceny also is immaterial. If his intention and purpose are to obtain the property or money and convert it to his own use, and so cheat and defraud "such person * * * of the same," and he uses false pretenses to accomplish that result, and does obtain the money thereby, this is within the letter and spirit of the act, and there is nothing in the law or public policy of this state that prevents us from so construing it.

The crime was flagrant, boldly conceived, and recklessly executed. We find no error in the record requiring a reversal, and the judgment of the district court is

AFFIRMED.

REESE, C. J., and ROSE, J., not sitting.

EARLE A. HARVEY V. STATE OF NEBRASKA.

FILED SEPTEMBER 26, 1914. No. 18,434.

1. **Physicians and Surgeons:** PRACTICING WITHOUT LICENSE: INFORMATION. To "operate on, profess to heal or prescribe for, or otherwise treat any physical or mental ailment of another," is practicing medicine by the express provision of section 2724, Rev. St. 1913.
2. ———: ———. It is unlawful in this state to treat professionally and attempt to heal another by manipulation and adjustment of nerves, bones and tissues of the body, without first obtaining a certificate or license from the state board of health, as provided in articles II and VIII, ch. 27, Rev. St. 1913.
3. ———: ———. Every such treatment constitutes a separate offense, although of the same individual and for the same physical or mental ailment, if such treatments are on different days and entirely independent of each other.
4. **Evidence.** The evidence is found to be insufficient to support the conviction upon the second count in the information.

ERROR to the district court for Thayer county: LESLIE G. HURD, JUDGE. *Reversed in part and affirmed in part.*

C. L. Richards and *Sol L. Long,* for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton, contra.*

SEDGWICK, J.

The defendant was convicted of practicing medicine without a license on each of nine several counts in the information. He was sentenced by the court to pay a fine of $50 on each count, amounting to $450, and he has brought the case here for review upon petition in error.

1. The defendant's first complaint is that the information does not charge an offense. The reason for this objection stated in the brief is that it "does not inform the defendant whether he is charged with the violation of the medical practice act, article II of chapter 27, or article VIII, commencing with section 2788, being the article of the statute governing osteopathy." Each count of the information contains this allegation: "Did then and there for remuneration unlawfully practice medicine by unlawfully treating and attempting to heal one (name of patient) for a bodily ailment through the manipulation and adjustment with the hands by the said Earle A. Harvey, of certain nerves, bones and tissues of the body of the said (name of patient) without first having issued to him, the said Earle A. Harvey, by the state board of health of the state of Nebraska, a certificate or license to practice medicine."

Section 2717, Rev. St. 1913, begins with these words: "It shall be unlawful for any person to practice medicine, surgery or obstetrics or any of the branches thereof, in this state, without first having applied for and obtained from the state board of health a license so to do."

Section 2723 is as follows: "Any person not possessing the qualifications for the practice of medicine, surgery, or obstetrics, required by the provisions of this chapter, or any person who has not complied with the provisions of this chapter who shall engage in the practice of medicine, surgery, or obstetrics, or any of the branches thereof, in this state, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than fifty dollars, nor more than three hundred dollars, and costs of prosecution for each offense."

Section 2724 provides: "Any person shall be regarded as practicing medicine, within the meaning of this chapter, who shall operate on, profess to heal or prescribe f r, or otherwise treat any physical or mental ailment of another." The information without doubt charges offenses under these sections.

2. It is said that "the offense of practicing medicine under our statute without a license is a continuing offense," and it is therefore contended that the information charges but one offense, that of engaging in the practice of medicine, and that the court should have required the prosecution to elect upon which count of the information it would rely. In *Little v. State,* 60 Neb. 749, the information contained 16 counts, and it was held that the court did not err in refusing to require the prosecution to elect. Three counts in the information in the case at bar charged treatment of the same individual, but these treatments were on different days, and not dependent upon each other, and each was a violation of the law, within the decision in the *Little* case.

3. The second count of the information charged defendant with treating "Baby Mitchell, the unchristened infant." There is no evidence that defendant was paid or expected any remuneration for treating this child. He seems to have been spoken to about the condition of the child as a friend of the family, and it is very uncertain from the evidence what, if anything, he did that might be considered a treatment. This count is not sustained by the evidence.

4. Much is said in the brief about the "liberty of the citizens to follow a profession" and to "pursue a lawful calling in a lawful manner." It is said that the state cannot "prohibit any calling or profession, save and except it be detrimental to public welfare, public morals, public health, or a disturbance of the public peace. The state may not indirectly prohibit what it cannot prohibit directly, i. e., it may not prohibit the exercise and practice of chiropractic by refusing to provide an examination in the curriculum taught in the best schools and colleges of chiropractic—those branches deemed essential and put in operation by leading chiropractors—and compelling the chiropractor to procure a diploma from a medical college and take an examination in the curriculum of some one of the sects of drug-medication." This objection was

urged and passed upon in *Little v. State,* 60 Neb. 749. The court said: "It is insisted that the statute under consideration is void because it is prohibitive in its scope and effect. The construction of the act which counsel places upon it we are unwilling to adopt. The statute undertakes to regulate, and is not prohibitive in its nature. Any one who has complied with the provisions may practice medicine in this state. It is prohibitive only as to those who have not been duly licensed by the state board of health to practice the art of healing."

In that case the practice of osteopathy was involved, and the questions presented were entirely similar and may be said to be generally identical with those presented in the case at bar. The conviction was sustained, and the legislature afterwards enacted a law regulating the practice of osteopathy and providing for licensing such practice. Laws 1909, ch. 86. Some of the questions presented appeal strongly to one's sense of justice, and would be difficult of solution if they were not foreclosed by the statute and the early decisions of this court. The case of *State v. Buswell,* 40 Neb. 158, involved what is called Christian science healing, and was determined more than 20 years ago, upholding the statute. The *Little* case, above referred to as involving the practice of osteopathy, also upholds the statute and was decided about 14 years ago. This court cannot amend the statutes, nor disregard the early decisions upholding and construing those statutes. The legislature has had ample opportunity to modify the laws, if they are considered harsh, unjust or impolitic, and, not having done so, they must be enforced as the will of the public expressed through its lawmaking powers. All objections raised in the brief, except as to the second count of the information, are answered by the plain provisions of the statute, as construed by early decisions of this court.

The judgment of guilty on the second count of the information is reversed. In all other respects the judgment

of the district court is affirmed; each party to pay his own costs in this court.

JUDGMENT ACCORDINGLY.

REESE, C. J., dissents.

HAMER, J., dissenting.

I am unable to agree with the majority opinion. I take the view that the thing to be done is not properly "medicine." It does not approach nearer to medicine than a massage. The man who sits down in a barber's chair and has his face, neck and head rubbed will no doubt be benefited if he is in a nervous condition. The nerves will be quieted because the brain is the center. The principle contended for here by the prosecution would forbid the barber to exercise his art, and would also forbid a massage in the bathroom. I do not believe that obstacles should be placed in the way of making the individual comfortable. I insist that the art of the chiropractor is not medicine, neither is it surgery although it may be beneficial, and it is not forbidden by chapter 55 of the Compiled Statutes.

SARAH A. SMITH, APPELLEE, V. ROYAL HIGHLANDERS, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,726.

1. **Trial:** DIRECTED VERDICT. In an action by the holder of a beneficiary certificate, if there is evidence sufficient to sustain a verdict for the plaintiff, the case should be submitted to the jury, and in such case a motion upon the part of the defendant for a directed verdict is properly overruled.

2. **Insurance:** PROOF OF DEATH: ESTOPPEL. Before the beneficiary should be held estopped from the assertion of her claim by any statement in the proofs of death, there should be evidence of the fact that she was identified with such proofs at the time they were made, and a voluntary statement of one of the officers of the association would

not be binding upon the beneficiary, unless she had knowledge of it or directed it to be made.

3. **Appeal:** CONFLICTING EVIDENCE. Where there is a conflict of evidence concerning the manner in which the assured came to his death, the verdict of the jury will not be disturbed.

4. **Trial:** ARGUMENT OF COUNSEL: HARMLESS ERROR. Where counsel for the plaintiff makes statements to the jury which are improper because outside of the evidence in the case, or for other sufficient reasons, there is ordinarily no prejudicial error, if the court at once sustains the objection made by counsel for the defendant, and in effect warns the jury against the consideration of the matter sought to be introduced. *Atkins v. Gladwish*, 27 Neb. 841; *Catron v. State*, 52 Neb. 389.

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

Hainer & Craft, for appellant.

Bernard McNeny, contra.

HAMER, J.

The plaintiff, Sarah A. Smith, brought an action in the district court for Webster county against the defendant, the Royal Highlanders, upon a beneficiary certificate issued by the defendant to Rufus B. Smith. The plaintiff recovered a judgment against the defendant for $1,578.45. It is claimed by the appellant that the certificate provided: "In case of death occurring after becoming a member and remaining in good standing for three years or over, the sum of $3,000 will be paid to Sarah A. Smith, bearing the relation of wife, upon satisfactory proof of death, together with the surrender of this certificate. * * * Provided, further, that in the case of suicide of the member, either sane or insane, the amount of all contributions of the member to the fidelity fund of the fraternity, only, shall be paid to the beneficiary named in this certificate."

It is set up by way of defense that the certificate provided that there should be no recovery in case the holder should commit suicide. It is strenuously contended that Rufus B. Smith, the insured and the husband of the plaintiff, committed suicide, and therefore that the plaintiff is

entitled to recover nothing except the money paid in to the association, being $66. It is claimed that the proof shows that the said Rufus B. Smith died of carbolic acid poisoning at his home near Filley, "from drinking carbolic acid with suicidal intent."

It is the contention of Mrs. Smith, the plaintiff, that Mr. Smith did not commit suicide. There is a long correspondence between counsel touching the merits of the case, which we do not deem it necessary to consider, especially as it would prolong the opinion to an unusual length if we copied it or any considerable part of it. We will examine the evidence. The testimony for the plaintiff tends to show that the insured died on February 5, 1911, at his home near Filley, Nebraska. He had been at home all day, and about 7 o'clock in the evening took off his coat and shoes in the sitting room, where he had been conversing with the family. He said he was going to bed, and smiling he went out of the room. He had eaten that day. Apparently he was well.

An argument is made that a person could not take a quantity of carbolic acid without knowing the fact, and therefore it is claimed that it could not have been taken without the intent to commit suicide. At the close of the plaintiff's testimony the defendant moved the court as follows: "The defendant, upon the evidence, admissions and allegations of the pleadings in reference to the proofs of death, moves the court to instruct a verdict in favor of the defendant, for the reason that it appears thereby, and is not disputed, that the plaintiff has made and admitted certain proofs of death which are in evidence; that the plaintiff has never asked that the same be withdrawn, reformed, changed, or corrected, nor offered other or different proofs of death or the manner thereof; that the proofs in evidence are the only ones upon which the defendant society has had opportunity or been called upon to act; that no proofs of death have been submitted to the defendant making it *prima facie* liable, and no furnishing of proofs has been waived by the defendant; in this condi-

tion of the record the defendant cannot be liable for more than the $66 admitted in its answer." The motion was overruled, and the defendant excepted.

We think we should examine the evidence with a view to ascertaining whether there is evidence to sustain a verdict for the plaintiff. The defendant is a fraternal beneficiary order similar in character to the Workmen or Woodmen. It is said by the plaintiff that quite a competition has existed between the different fraternities; that the Workmen initiated the practice by which in case of the death of a member the *local lodge* is to take care of the *proofs of death*; that the other orders have followed this example and that quite a competition has existed between different fraternities; that the local lodges become the agents of the supreme lodge to procure new members; that it is of the greatest importance to demonstrate that losses are promptly paid and with the least possible delay or attention on the part of the beneficiaries who are assured by the officers of the local lodge that their interests will be looked after, and without *any action on their part.* In this case it seems that one J. F. Boggs was the local secretary and treasurer of the lodge at Filley, and he assured the son of the plaintiff that he would do the acts required to secure the insurance without any action on the part of the plaintiff.

We copy from the bill of exceptions: "Q. After your father's death, what, if anything, did you do about the sending in of proofs of death to the insurance company? A. Well, one day Mr. Boggs 'phoned over for me to come over. Q. Which Boggs? A. J. F. Boggs. And so I went over; and my mother said 'you had better go over,' and he said that he would fix up the death proof and send it in; he and the lodge would attend to that; that that *was his business,* and that *he would see to it,* and that we did not *have to worry or do anything about it,* and that was his business. Q. You say your mother told you to see Boggs? A. Yes, sir." Cross-examination by Mr. Hainer: "Q. You say that your mother told you to see about getting the

proofs in? A. I said that J. F. Boggs 'phoned over, and she said for me to go over and see what he wanted; and Mr. Boggs said he would see after the *death proofs,* and *he* and the *lodge would go and send it in.* Q. So that was the arrangement that was made with him? A. *He said he was the fellow to look after it.* * * * Q. You didn't take any further steps at all? A. No, sir; he said *she would get her money in a few days.* Q. I am asking about sending in the proofs, you know he was going to send in the proofs? A. He said he would. Q. You let it go at that? A. Yes, sir. * * * Q. And you informed your mother of what had passed between you and Mr. Boggs? A. What words were said I told her. Q. On both sides? A. Yes, sir."

The witness, the son of the plaintiff, testified that the carbolic acid had been on the shelf about two months; that he got it for a horse "to take the poisoning out of her foot." He was also asked if there was a medicine there on the shelf that was a dark medicine which he sometimes took for stomach trouble. He answered that there was; he also answered that there was only a little difference in the *color of that medicine* and the *carbolic acid.*

The letter of the chief secretary, F. J. Sharp, to the secretary-treasurer, J. F. Boggs, is dated March 23, 1911. It says: "Nowhere in the proofs is a detailed statement as to the cause of his death, and, as it is stated he died from *an overdose* of carbolic acid, we will have to know how he happened to take this poison."

March 25, 1911, J. F. Boggs, secretary-treasurer, wrote F. J. Sharp, secretary, at Aurora, that he had been unable to find any clippings from a newspaper. March 28, 1911, F. J. Sharp, chief secretary, wrote J. F. Boggs, secretary-treasurer at Filley, Neb. "Valiant Clansman: I am just in receipt of your favor of the 25th inst." April 17, 1911, J. F. Boggs, secretary-treasurer, wrote F. J. Sharp, chief secretary, saying: "Inclosed please find copy of Beatrice Express and Sun, each of which contains account of death of Clansman Rufus B. Smith. *There was no*

coroner's inquest held on body of Rufus B. Smith." The date of the Sun clipping is February 7, 1911. The date of the other is not given, except that a little letter concerning the matter is published in the other paper, dated February 6.

February 6, 1911, J. F. Boggs wrote a letter to "F. J. Sharp, Clansman, Aurora. Sir: This is to notify you of the death of Clansman R. B. Smith who passed away about 9 o'clock last night." February 15, 1911, J. F. Boggs, secretary, Dunkirk Castle, wrote F. J. Sharp, secretary, Aurora, asking for papers necessary for death proofs. February 25, 1911, F. J. Sharp wrote J. F. Boggs, saying that he inclosed "additional proof of death, which kindly get fully and properly executed." February 23, 1911, A. C. Tilton, illustrious protector, and J. F. Boggs, secretary-treasurer, sent in what is termed an official notice of the death of Rufus B. Smith. March 14, 1911, C. S. Boggs, appeared before the clerk of the district court and signed a certificate saying that the cause of the death was carbolic acid poisoning; that the deceased was sick about 45 minutes. There is also the statement of a friend, J. F. Boggs, made on the 21st of March. He says the cause of the death was carbolic acid poisoning. On the 21st of March, 1911, A. C. Tilton, illustrious protector, and J. F. Boggs, secretary-treasurer, make a statement which is designated proof of death. On the 27th of March, 1911, F. J. Sharp, chief secretary, makes a certificate to the effect that all payments were made, and that Rufus B. Smith was in good standing. On the 27th of June, 1911, the executive committee make a certificate that there is $66 due to Sarah A. Smith, upon surrender of the beneficiary certificate.

It will be noticed that the plaintiff does not sign any of these papers, that whatever is done is done by some officer of the lodge. She could not be bound without voluntary action upon her part. It does not affirmatively appear that it was necessary that she should see these papers. We think it may be safely assumed from all the

facts stated that Mr. Boggs, the secretary-treasurer of the subordinate lodge, got these newspaper clippings and sent them in without consulting the plaintiff, and with the view of assisting the defendant to defeat the plaintiff's claim. Both set up the death of the assured, and one purports to detail the particulars on the evening of the death of the decedent. These clippings are not evidence, and we know of no good reason why the plaintiff should be held responsible for them or any effect which they might produce. They cannot be "proofs" in any event, and the plaintiff is not shown to have been connected with them. To hold that the plaintiff is in any way responsible for them or bound by them would be unfair. Where the beneficiary is by the evidence connected with the "proofs," then they may be admissions. In this case the plaintiff is not identified with the newspaper clippings and such of the proofs as were prepared by Mr. Boggs and others.

There is quite a similarity between the instant case and the case of *Modern Woodmen of America v. Kozak*, 63 Neb. 146. In that case the plaintiff in error offered in evidence the proofs of loss made by the officer of the lodge and signed and presented by the defendant in error. The contention was that death resulted from a pistol shot inflicted by the deceased's own hand. It was claimed that the defendant in error was estopped by reason of the showing from claiming that Kozak did not die by his own hands. This court held that the contention could not be sustained. We copy from the opinion:

"Plaintiff in error, to support its theory, offered in evidence the proofs of loss made by the officer of the lodge and sundry witnesses, and signed and presented by defendant in error in support of the claim in the amount alleged to be due upon the certificate. From these various documents it appears that the cause of death was represented as resulting from a pistol shot in the left temple inflicted by deceased's own hand. It is claimed that defendant in error is estopped by this showing from claiming that Kozak did not die by his own hand. This con-

tention cannot be sustained. Proofs of loss of this character, in so far as they are admissions against the interest of the party making them, are manifestly admissible, and, if unexplained, no doubt are entitled to great weight. But they are not conclusive of the fact. *Leman v. Manhattan Life Ins. Co.,* 46 La. Ann. 1189, 15 So. 388. The testimony in this case shows that Mrs. Kozak, defendant in error was a Bohemian woman, unable to speak, read or write the English language. The officer of the lodge and the notary public, who prepared the proofs, say that her son was with her, and that they read the proofs to him, he in turn speaking to her in her native language, supposedly explaining the contents of the papers she afterwards signed. Whether he fully explained the contents of the papers to his mother or not does not appear from the record. He was called as a witness, but was not interrogated regarding the matter. In Mrs. Kozak's examination she testified positively that she had no knowledge of the matters contained in the proofs of loss, and that she was informed that if she signed the papers she would get the money in 30 days, and, relying upon these representations, she signed them. She denied that the papers were read or explained to her. It was incumbent upon plaintiff in error to show past doubt that Mrs. Kozak clearly understood the import and effect of the papers she was signing. *Selden v. Myers,* 61 U. S. 506. If she signed them in ignorance of their contents, they would not constitute admissions against interest; and whether she signed them in ignorance of what they contained was a question for the jury, and, in view of the evidence on this branch of the case, it seems they were justified in disregarding them. The weight to be given such admissions is a question for the jury. *Paxton v. State,* 59 Neb. 460. Under the pleadings in this case, the burden was upon plaintiff in error to prove its affirmative defense by a preponderance of the evidence. That the presumption is against suicide in cases of this character, and that the insurer has the burden of proving self-destruction, is recognized by all the authorities. *Travelers Ins. Co. v. McConkey,* 127 U. S. 661; *Whit-*

latch v. Fidelity & Casualty Co., 24 N. Y. Supp. 537; *Travelers Ins. Co. v. Nitterhouse*, 11 Ind. App. 155; *Mutual Life Ins. Co. v. Simpson*, 28 S. W. (Tex. Civ. App.) 837; *Inghram v. National Union*, 103 Ia. 395; *Burnham v. Interstate Casualty Co.*, 117 Mich. 142. * * * The presumption is not overcome by proof that death resulted from the shot of a pistol found near the person of deceased. In the case of *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, it is said: 'In such action, when the defense is self-destruction, the burden of proof is on the insurer to establish the suicide, and when circumstantial evidence only is relied on, the defense fails, unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another.' *Travelers Ins. Co. v. Nitterhouse*, 11 Ind. App. 155; *Jones v. United States Mutual Accident Ass'n*, 92 Ia. 652. In the last cited case it is said: 'Where in an action on an accident policy, it appears that the insured was killed by a pistol shot, the burden is on the insurer to show that the shot was not accidental.' "

It is further said in *Modern Woodmen of America v. Kozak, supra*: "Upon the question of the preponderance of the evidence this court is ordinarily powerless to disturb the jury's verdict. As said in the case of *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488: 'A judgment based upon a verdict which is supported by sufficient competent evidence will not be disturbed on the ground that the apparent preponderance of the evidence is on the side of the losing party.' Deceased may have been murdered, he may have committed suicide, or he may have accidentally killed himself. This was a question for the jury to determine from all the evidence in the case, and, their verdict being based upon conflicting evidence, it will not be disturbed. *Morton v. Harvey*, 57 Neb. 304."

No one may be quite certain whether the taking of the poison was with suicidal intent or due to an accident. There was a pantry door which opened from the kitchen into the pantry. In this pantry there was a shelf. It was over the cabinet and just handy to reach. This shelf was

behind the pantry door when the door was open, and it extended perhaps ten feet on the east side. On this shelf there were bottles scattered along, although the most of them were right behind the door on the east end of the shelf. These bottles contained "Dr. Pierce's Favorite Prescriptions," "Dr. Pierce's Golden Medical Discovery," "Watkin's Vegetable Anodyne Liniment," the bottle of carbolic acid, and two kinds of lemon extracts, and one of orange. There had been carbolic acid there before. They kept it for the hogs and chickens. There was a bottle of carbolic acid kept up there on that shelf. There would be a bottle put there every month. The plaintiff testified: "We kept it for the hogs. Sometimes I put it in the chickens' feed." There was nothing to prevent the deceased from first taking a drink of lemon extract or orange extract or Dr. Pierce's Golden Medical Discovery. The deceased may have accidentally taken a swallow of the carbolic acid supposing it to be one of the extracts, and then he may have attempted to relieve the burning sensation caused by the acid by drinking one of the extracts or one of Dr. Pierce's remedies. There is testimony of hearing some sort of violence. He may not have remained conscious longer than was necessary to reach the top of the stairs. He was probably suffering horribly, and perhaps was struggling to reach the bed when he fell upon it in convulsions. Because of the awful pain which he suffered he may have been unable to think.

It is urged by defendant that there is error in instruction No. 2, for the reason that it puts the burden of proof upon the defendant to affirmatively show that the insured committed suicide, and states that the legal presumption is that he did not commit suicide. That is the rule as we understand it.

The defendant quotes from the syllabus in *Hart v. Fraternal Alliance,* 108 Wis. 490, and *Insurance Co. v. Newton,* 22 Wall. (U. S.) 32. In the first of these cases the admissions were taken in connection with the testimony of the doctor as to the cause of death. It is said in the body of the opinion in *Insurance Co. v. Newton, supra*: "When

the plaintiff was permitted to show what the agent and officers of the company admitted the proofs established, it was competent for the company to produce the proofs thus referred to and use them as better evidence of what they did establish. * * * The question being in all the cases whether these proofs *estopped the insured from impeaching the correctness of their statements, or from qualifying them, or whether they were subject to be explained and varied or contradicted on the trial.*" The case quoted from is directly in point because in the instant case there is a failure to show that the proofs were prepared by the plaintiff or that she was directly connected with them in any way. She could not be *estopped* except by something which she did.

In *Insurance Co. v. Higginbotham,* 95 U. S. 380, there was an application for the reinstatement on a policy of one Dr. Day. The application was made on October 1. There was a statement accompanying it of the condition of the doctor's health. The reinstatement was not made until October 14. There was a question as to whether Dr. Day's health was the same October 14 that it had been when the application was made. The following month he was undoubtedly in a decline. He was obliged to give up his position as a teacher on the 18th of October. For some time prior to that he was somewhat debilitated. In the November following he had consumption, from which he died in January. Touching this matter, the United States supreme court said: "The jury might account for it on the theory that the whole contract was intended to be and was as of October 1, and that it spoke from that date. There is every indication that Day thus relied upon that contract, nor is there any reason to believe that he intended to deceive or to conceal. * * * He probably died in the honest belief that he had thus provided for his widow. It would be far from good faith to his representatives should it now be held otherwise."

In *Mallory v. Travelers Ins. Co.,* 47 N. Y. 52, it was held: "Where, from the facts of the case, it appears that a violent death was either the result of accidental injuries or

of a suicidal act of deceased, the presumption of law is against the latter." In that case it is said in the body of the opinion: "The policy was one embracing cases only where the death was caused by an injury received from an accident. From the facts above it appeared either that the death was caused by such an injury or the suicidal act of the deceased; but the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross moral turpitude in a sane person." The deceased was known to have used a bridge across a stream where the waters of the sound set into the land and extended up the stream at high tide. The manner of his death was uncertain. There was a wound upon his head, and there was a break in the corresponding part of his hat. The court said: "Although this wound might have been made after the deceased was in the water, or while falling in, yet it was for the jury to say how it was caused, and to determine its effect upon the question whether the death was the result of an accidental injury, or whether the deceased had destroyed his own life." There was an effort to avoid the policy upon the theory that the deceased 20 years before he made the application had a severe fever, during which he was more or less insane, but after recovering therefrom he was sane until 3 or 4 years before he made application for the policy. He was placed in a retreat for insane persons, and was kept there about 3 months before being discharged. It was claimed by the defense that the deceased should have made a full statement of the facts to the company. He was himself a solicitor for the company. He had had a general conversation with the president in which the president told him, in answer to his statement that he could procure a great number of applications in Newark, that he must be cautious as the company did not wish to insure insane persons or persons who had had habits of intoxication. The New York supreme court said: "This general conversation with the president some time before the application had no tendency to show a fraudulent concealment of material facts

upon making the application. There was no evidence tending to show that he was then insane, or that he had been for some time before, and this conversation did not convey to his mind the idea that the company regarded those that a long time before had been insane, as peculiarly liable to accidents." The proximate cause of death was for the jury. *Travelers Ins. Co. v. Melick,* 65 Fed. 178; *Cochran v. Mutual Life Ins. Co.,* 79 Fed. 46; *Moon v. Order of United Commercial Travelers, ante,* p. 65.

It is claimed by the defendant that there was misconduct of counsel for the plaintiff. It seems that Mr. McNeny characterized Mr. Sharp as "the most illustrious protector" of the defendant association. He said something about the color of his hair being visible to the jury. He also talked about one of the witnesses for the defendant, who seems to have admitted that he had been engaged in the patent right business. He referred to him as a patent right man or an ex-patent right man; that he had appeared at the trial without any subpœna, and that he testified that he was employed by the defendant at the rate of $10 a day to investigate the case. As one reads the record in this case he readily becomes aware of the fact that there was a strenuous fight when the record was made, and it is not at all clear that there was not as much art and as much aggressiveness on the side of the defense as on the other side. What Mr. McNeny said was of a humorous character. There was an opportunity to say it because of the high-sounding titles given to the officers of the company. If Mr. McNeny was humorous at the expense of the patent right man, he was only getting even, and there was provocation for it because Ringer had testified that the plaintiff told him that her dead husband had beaten her. The method followed by both sides is not to be commended. We are not ready to say that counsel for the plaintiff prejudiced the rights of the defendant by what he said and did. Counsel for defendant objected, and his objections were sustained.

In *Atkins v. Gladwish,* 27 Neb. 841, the counsel for the plaintiff used the following language: "No wonder that

those witnesses entertained feelings of hostility against defendant, the old bald-headed fiend, knowing, as they did, what he had done, and that one jury had found him guilty of the charge." To the use of this language defendant's attorney objected, and asked that the court restrain the attorney. Thereupon the court said to the attorney that such talk was improper, and told the jury not to consider it. The attorney desisted. Concerning the foregoing conduct of counsel this court said: "If upon the attention of the court being called to the above language of counsel in summing up to the jury it had refused to stop him and express its disapprobation of the language to the jury, such refusal would probably have been reversible error. But the court, having, on the contrary, stopped and reprimanded the counsel, did all that good practice required of it, and I do not think the misconduct of the attorney in the use of the language quoted was of that flagrant character which under the statute would vitiate a verdict *per se*."

In the instant case counsel for the plaintiff, Mr. McNeny, appears to have attempted to get before the jury his statement that the Royal Highlanders "hired a patent right man," a man who said he was engaged in the patent right business, to come to Red Cloud at $10 a day, and not only to help contest this claim and keep this woman from getting this money—here there was an objection which was promptly sustained. Then there was the statement "that they hired a patent right man to come here at $10 a day." There was an objection to that, which was promptly sustained. Then Mr. McNeny said: "But take this statement, then, that the patent right man; that the ex-patent right man admitted he got $10 a day to look this case up; he was not a detective; he was an investigator, according to his theory, and that the officer of his lodge, the most illustrious protector, my gray-haired friend there, and the counsel for the insurance company, allowed him, not only to try to beat this woman out of her money or give evidence against her, but allowed him to traduce the memory of the dead clansman; he said that she told him

Mr. Smith had struck her." Mr. Hainer objected: "I object to all these statements as entirely out of order; it is not based on the testimony, and should not be allowed to go to the jury. By the court: So far as the last statement is concerned the objection is sustained." There was no other objection or exception. The record shows that the court promptly sustained the objection of counsel for the defendant. This discussion seems to have grown out of the testimony of one of the witnesses for the defense.

In *Catron v. State,* 52 Neb. 389, one of the counsel for the state said: "My friend has referred to the fact that these foreign witnesses have remained here—has asked why they still remain. I'll tell him. It is because we thought some of the jury was, or might be, fixed by the defense, and that the jury would therefore fail to agree, and if so we proposed to try this case again at once, and have kept these witnesses here for that purpose." Mr. Sullivan at once objected to Mr. Harrington's statement, and the objection was sustained; the court saying that the statement was improper. The conviction was sustained.

The defendant complains of instruction No. 5, given to the jury on the court's own motion. The contention made is that the instruction given was equivalent to telling the jury that the plaintiff was under no obligation to truly state the facts, and that her statements have no binding effect in the absence of personal knowledge. We are unable to see any error in the instruction given. What we have said touching the merits of the case disposes of the contention made.

We see no sufficient reason for reversing the judgment of the court below. It is right, and it is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

JOHN L. NOFSINGER, APPELLANT, V. ALFRED D. PAUP, APPELLEE.

FILED SEPTEMBER 26, 1914. No. 17,745.

Assault and Battery: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* insufficient to sustain the verdict.

APPEAL from the district court for Boone county: GEORGE H. THOMAS, JUDGE. *Reversed.*

A. E. Garten and *William R. Patrick,* for appellant.

Albert & Wagner and *F. J. Mack, contra.*

HAMER, J.

The plaintiff brought suit in the district court for Boone county, seeking to procure a judgment for damages because of an alleged assault at the hands of defendant, Alfred D. Paup. The jury returned a verdict against the plaintiff, and the defendant had judgment on the verdict. From this judgment the plaintiff appeals. The plaintiff alleges that on or about the 24th day of May, 1911, in the county of Boone, and state of Nebraska, the defendant unlawfully, wilfully and violently committed an assault upon him, and struck, bruised, beat and ill treated him, and maliciously and deliberately struck him in a brutal manner a violent blow upon the head with a dangerous and deadly weapon, to wit, a spade; that said blow was a violent blow upon the head with the blade of the said spade, and inflicted a dangerous wound upon the plaintiff's head, being about three inches in length, and of sufficient depth to penetrate to the bone, and the wound permanently disfigured and injured the plaintiff's scalp and the bones of plaintiff's head; that, as a result of said blow, bruises and wounds so made by the defendant upon the plaintiff, the plaintiff was made sick and disabled, so that a blood clot formed on the brain of plaintiff, and he was partially paralyzed and was disabled as a result of said injuries;

that the plaintiff has suffered great pain and mental distress by reason of said injuries, and for a long time has been confined to his room and has been prevented from attending to his usual business; that the injury to plaintiff's head and brain is permanent, and that by reason thereof the plaintiff will continue to suffer great physical and mental distress for the rest of his life, and by reason thereof will be unable to attend to his usual business during the remainder of his life—all to the damage of the plaintiff in the sum of $10,000. The petition alleges that the plaintiff has been to $500 expense for the hire of physicians, surgeons and medical care and medicine. The prayer is for judgment for $11,500 and costs of this suit.

The defendant answered that the plaintiff, without any just cause or provocation, assaulted him, and would have greatly injured him if the defendant had not immediately defended himself; that in defending himself he unavoidably struck the plaintiff and somewhat injured him; that at the time of the striking by the defendant he had just cause to believe and did believe that he was in imminent danger of suffering great bodily harm from the plaintiff, and in defending himself used only such force as he deemed necessary to protect himself from the threatened injury, and if the plaintiff sustained any damage it was occasioned by his first assaulting the defendant. To this answer there was a reply, which is in substance a general denial.

The evidence tends to show that the defendant was the aggressor. He drove up behind the plaintiff and used the first objectionable language. He said: "What's biting you? What's biting you?" The plaintiff was driving a four-horse team along a very bad road, and was hauling a heavy load of wheat. The ground over which he was going was up-hill and very soft. He had a little 35-cent buggy whip in his hand. He had been using it for the purpose of keeping a slow horse abreast of the other horse. As the defendant came up he shortened the distance between them until they were only separated by about four feet. The defendant then had the spade in his hands. He had hold of the handle. According to plaintiff's testi-

mony defendant said: "I'll just kill you." Then defendant hit plaintiff on the head with the sharp edge of the spade. The plaintiff went, or was taken, to a doctor's office. The doctor sewed up the plaintiff's scalp. Plaintiff was cut on the head and had a lump over the left eye. He was also bruised on the jaw. His right hand was cut to the bone across the little finger. The evidence tends to show that ever since that time the plaintiff has been partially paralyzed, and that he has very little use of himself. He is also mentally affected. The blow with the spade seems to have inflicted a permanent injury. The doctor who testified found a cut three inches long and reaching down through the entire thickness of the scalp to the bone. He sewed up the wound on plaintiff's head, putting in five stitches. As a result of the injury the plaintiff's speech was broken and his articulation is bad. There was partial paralysis of the left leg and the left arm. He was in the first instance unable to pass his urine; later he was unable to retain it. The doctor testified that there was no probability of a recovery without trephining the skull with the object of removing any clot on the brain or any thickening of the membrane over the brain. The plaintiff's wife describes him as a strong and industrious man before he was struck with the spade; afterwards he was unable to do the easiest sort of work. He had become a physical wreck in mind and body.

Because the evidence is insufficient to sustain the verdict, the judgment of the court below is

REVERSED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

KARBACH REALTY COMPANY, APPELLANT, V. GEORGE & COMPANY, APPELLEE.

FILED SEPTEMBER 26, 1914. No. 17,746.

1. **Appeal in Equity.** While the supreme court is not bound by the findings and judgment of the trial court in an equity case, yet if the conclusion of the district court is derived in whole or in part from the consideration of the testimony of witnesses taken in the presence of the court, and such testimony is clearly in conflict, then the findings of the trial court may be considered in determining the issues in this court, the judges of this court keeping in mind that they are not bound to follow them. *Cooley v. Rafter*, 80 Neb. 181; *Nelson v. City of Florence*, 94 Neb. 847.

2. **Annulment of Lease:** SUFFICIENCY OF EVIDENCE. The pleadings and evidence examined, and *held* to sustain the finding and judgment of the district court.

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

C. W. De Lamatre and *Byron G. Burbank*, for appellant.

McGilton, Gaines & Smith, contra.

HAMER, J.

This is an appeal from a decree of the district court for Douglas county. The purpose of the suit is to set aside a lease of the Karbach Hotel property in the city of Omaha to one Mahlon B. Brown for the period of 99 years.

It is claimed by the plaintiff company that the defendant, George & Company, undertook to act as the agent of the Karbach Hotel Company in getting the lease in controversy; that the plaintiff company was induced to execute this lease by the fraudulent representations of the defendant, George & Company; and that George & Company procured the execution of the lease to Brown for its own benefit, and that it holds the property and collects the rents on its own account. The representations alleged to

be fraudulent are that the said defendant, Mahlon B. Brown, was represented by George & Company to be a retired capitalist and a good substantial business man, and it was further represented that the highest amount that could be obtained for said leasehold was the sum of $5,400 a year, and that the same was not worth more than $5,400 per year. It is claimed by the plaintiff that these representations by the defendant, George & Company were false; that George & Company knew that the representations were false; and that they were made with the intention of influencing the plaintiff to act upon them; and that the plaintiff believed the same to be true, and, relying upon them, on or about the 27th day of July executed in writing a paper in the form of a lease, which had been prepared by the defendant, George & Company, and whereby the plaintiff purported to lease to the defendant, Mahlon B. Brown, the premises in controversy for the period of 99 years, beginning on the 1st day of August, 1911, and for the sum of $5,400 each year, beginning on the 1st day of August.

In the action brought the defendant, Mahlon B. Brown, was defaulted, and a decree was taken against him, canceling his interest in the lease, and holding that he had no interest therein. The defendant, George & Company, against which the plaintiff had prayed an accounting of the rents collected, and for the commission which it had paid for leasing the said premises, answered, denying all allegations of fraud, and pleaded an option contract for the leasing of the premises to it, alleging that it later exercised its option to lease the premises, and that at the time of executing the lease it stated, by its president, to the plaintiff, through its vice president and general manager, that it desired the lease taken in the name of the said defendant, Mahlon B. Brown.

An examination of the testimony shows that Charles J. Karbach, who seems to have managed the affairs of the company, had lived in Omaha about 42 years; that he was vice president and a member of the board of directors of the plaintiff company and general manager of the plain-

tiff. He testified that the property in controversy was lot 8, in block 147, located at Fifteenth and Howard streets, in Omaha, the building described as a three-story brick building, 60 by 132 feet, and having six store rooms, five of which are occupied by merchants and one as the office of the Karbach Hotel, which hotel also occupies the upper floors of the building. He also testified that the property had been in the family about 50 years. His testimony shows that he had visited C. C. George of the defendant George & Company, and that there had been a discussion between Mr. George and himself touching the rate of interest that a lease of this kind would bring. They seem to have discussed the advantage of a lease because it saved the landlord the trouble of collections and the payment of taxes, and resulted in an income of about 5 per cent. on the value of the property. It seems that Mr. George made a proposition to him looking to the payment of 5½ per cent. on a valuation of $100,000. Karbach testified that he told George to go ahead, and that he asked George what his commission would be to make the arrangement, and that George told him it would be 2½ per cent.; that he said, "All right, go ahead." Then George said he would draw up the option and submit it to Karbach. Karbach testified that he said "All right," and that he agreed to pay a commission of $2,500 for getting the lease.

The trial court dismissed the plaintiff's petition as against George & Company, and confirmed the title of George & Company to the lease as a lessee.

The proof shows the option contract referred to to be in writing and signed by the Karbach Realty Company and George & Company, and it recites the terms and condition under which the Karbach Realty Company grants to George & Company, its successors and assigns, and that George & Company asks the privilege of leasing the premises in controversy. The lease when executed was signed by Mahlon B. Brown as lessee.

June 26, 1911, the Karbach Realty Company and the defendant, George & Company, made a contract in writing by which it was stipulated that George & Company,

"its successors and assigns," should have the privilege until the 26th day of December, 1911, of leasing the property in controversy. This contract provides that George & Company, as lessee, is to pay the Karbach Realty Company, its successors and assigns, $5,500 a year, payable quarterly in advance in sums of $1,375 each quarter. In addition thereto, George & Company, "its successors and assigns," shall pay all regular and special taxes of every kind that may be assessed or levied against said property from and after the date of final closing of this lease. Then comes a provision that George & Company, or its assigns, shall keep the building on said lot insured, or any building that may be hereafter erected thereon, and for the benefit of the Karbach Company, the amount of the insurance to be $40,000, payable to the party of the first part, as its leasehold interest may appear, with the understanding that, in the event of loss by fire, the money paid by the insurance company to the lessor or the lessee on account of said loss shall be used to repair or reconstruct the building. Then comes a provision that the 99-year lease to be used shall be in form substantially "the same as the lease made by Adelina M. Jahn covering lot 3, block 171, city of Omaha, and dated December 1, 1909." The condition of the particular contract is then set out. The transaction began with the execution of the contract of June 26, 1911. That contract *is based upon the promise of the parties* and the payment of one dollar by George & Company to the Karbach Company. The language used is, "For and in consideration of these presents." To this is added the payment of *one dollar,* the receipt of the same by the Karbach Company, followed by the promise of the Karbach Company to "grant and give" to George & Company, "its successors and assigns, the privilege" from a certain date to a certain date "of leasing the following described real estate," being lot 8, in block 147 of the city of Omaha, "together with the three-story and basement brick building thereon." The next sentence begins with the words "said lease," seeming to refer to the lease made by the Karbach Company to George & Company. Said

lease, referring to the privilege mentioned and fixing the time from June 26, 1911, to December 26, 1911, was an option upon the part of George & Company. The next provision in the contract is that the party of the first part, George & Company, "its successors and assigns," is to pay "a rental for said property of $5,500 a year, payable quarterly in advance in sums of $1,375 each quarter." The foregoing promise to pay $5,500 a year is a promise on the part of George & Company, in case George & Company avails itself of the option. The next provision in the contract is that George & Company shall "pay all regular and special taxes that may be assessed or levied against said property from and after the date of final closing of this lease." The contract further provides that, if the option is not taken up and the lease made on or before September 26, 1911, then on September 26, 1911, $100 is to be paid thereon. It is further provided that, if the option is not taken on or before October 26, 1911, then $100 more is to be paid on the option, and, if the option is not taken by George & Company on or before November 26, 1911, then $100 is to be paid on November 26, 1911, to carry the option through to December 26, 1911. All sums paid are to be applied on the first quarterly payment in the event that the option is exercised later. There is a further provision that, in case George & Company avails itself of the option at any date on or before December 26, 1911, then Karbach Company is to allow George & Company $2,500 "for placing this leasehold."

There is a concluding clause to the effect that, if the 99-year lease is made and the papers executed and delivered, then the possession of the property is to be given to the lessee, subject to the leases on the building above referred to.

The foregoing analysis of this contract would seem to show that George & Company bargained for this option upon its own account and for itself alone. It did not purport to act as the agent of the Karbach Company in getting this option. It was not getting the option for any one else, but just for itself alone. Therefore, as to the option,

there was no question of principal and agent. The Karbach Company acted for itself and George & Company acted for itself. There were two principals dealing with each other. George & Company was contemplated by this contract as lessee if it chose to exercise the option in that way. As the above contract ran directly to George & Company, there could be no objection to George & Company availing itself of this contract. It was entitled to exercise it for itself alone.

There cannot well be any doubt that George & Company was to be permitted, under this first contract, to become lessee of the premises. There could be no objection to putting Brown's name in the lease, unless Karbach made it. He made no such objection, but consented to it.

It will be noticed that this contract allows George & Company to lease the property itself. It also allows it to get a lessee for the property. Is it fair to say that it was within the contemplation of the manager of the Karbach Company that George & Company should become lessee at its option or that it could get any other lessee? It is contended by the appellee that, when this agreement was made, the agreement was that Karbach would lease the property to George & Company, that "Karbach accordingly knew that George & Company was exercising the option for itself." It is said with much plausibility that "Karbach may have had the right to insist that the lease should run to George & Company, but this he could waive and consent that the title be put in Brown." He seems to have consented that Brown's name should be put into the lease. The lease was prepared in blank. At that time George stated to Karbach that they had not determined in whose name they would place the title.

Mr. Karbach testified that he had a conversation with George about July 20, before the lease was made. He testified that the lease was signed in Mr. George's office; that Mr. George had asked him to come over to sign it; that Mr. George said that Mr. Brown would be over there ready. He then says that he went over to George's office, and that Mr. E. George said to him to step into the side

office where there was a window open to the outside, and that it would be pleasanter; that he went to the room, and was there about five minutes; the door to C. C. George's room opened, and he said, "We are ready for you now Charles, the lease is ready for you to sign. I will call in one of the clerks of the office to witness your signature." C. C. George went out for a clerk. Karbach looked at the lease. The lease was signed by Mahlon B. Brown. Karbach inquired where is Mr. Brown. C. C. George answered that Mr. Brown did not have very much time; that he had been called back again; and that he had signed the lease, and then had gone away. Karbach then signed the lease himself. He knew that Brown had signed it. He was willing to accept it with Brown's signature. He testified that no once was present at the conversation but C. C. George and himself. Karbach testified that he had no knowledge that Brown was acting for George & Company. He testified that afterwards in January, 1912, he had a conversation with Mr. Adams, and that his conversation with Mr. Adams suggested whether there was good faith in the lease to Brown. If that inquiry was material, it was late to make it six months after the contract had been closed up. Karbach testified that C. C. George came to his office with two papers which he wanted him to sign consenting to Brown assigning the lease to Kittelman, Scher & Wolf. When Karbach complained, C. C. George told him that Kittelman was worth $80,000 to $90,000, and that the other men were pretty well fixed. On cross-examination Karbach testified that he was in the office of George & Company three or four times before they finally came to an agreement about leasing the property. Karbach testified that the lease was drawn up and submitted to him by Mr. George, and that he took the lease to his attorney, Mr. De Lamatre, and then took it back to Mr. George and gave it to him.

It is said in the answer of George & Company: "That at the time (of signing the lease) this defendant, by its president, Charles C. George, stated to plaintiff, to its manager, Charles J. Karbach, that it desired said lease to

be taken in the name of Mahlon B. Brown, and that no objections were taken to said Brown by the plaintiff, and that no inquiries were asked defendant concerning him, except only as to the place of his residence, and accordingly on said date, the 27th of July, 1911, a lease was entered into between said parties, a copy of which is hereto attached marked exhibit B and made a part hereof." The evidence seems to support this conclusion.

There is a very severe arraignment of George & Company in the brief of counsel for the plaintiff. It is said that Mahlon B. Brown is a poor man working in the engineering department of the city of Council Bluffs, and that at the time he was brought into the case he was an inspector of pavements; that he had no property, and required his salary for his daily living. It does not follow that any fraud was contemplated because of the fact that an unknown man was selected to be the lessee of the property. There might have been valid business reasons containing no purpose to defraud which induced George & Company to seek out an unknown man for the purpose of becoming lessee of the property. If George & Company had for itself inserted its name in the contract, or the name or names of some successful business man in the neighborhood, it might have agitated the market for real estate in that vicinity.

It is contended that, because the name of George & Company did not appear in the lease, therefore it could not be held to be lessee, or the holder of the property as lessee. It is proper to remember that the inception of the contract was a carefully prepared agreement in writing, in which the purpose is set forth to be the privilege of leasing the property in controversy. Karbach testified that George told him at the inception of the transaction that Brown was leasing the property. George testified that he told Karbach that he did not know in whose name we would take title to that leasehold. There seems to be no controversy about the fact that George told Karbach that George & Company was ready to exercise the option. When the lease was prepared, Karbach submitted it to his attor-

ney. The attorney wrote a brief statement to the effect that the agreement made between Karbach and George & Company on the date of June 26, 1911, providing for the leasing of lot 8, in block 147, for the period of 99 years had been received by him, and also the lease had been prepared under the agreement. In that statement, which was to his client Karbach, he said that he presumed that it was with the intention *on their part to carry out the agreement.*

It is contended by counsel for the defendant that Karbach understood that George & Company was exercising its option to take the property in accordance with the contract of June 26. This does not necessarily follow, but under the evidence, including Karbach's testimony, it may have been considered by Karbach that it made no difference who signed the lease. At any rate, Karbach made no objection to the signing of the lease by Brown. George testified that he told Karbach, at the time that he submitted to him the form in which the lease was to be written, that he did not know in whose name they would take title to the property. The parties may have considered that was a sort of secondary matter and probably immaterial. Whether it was so or not, Brown's name was written into the lease, and Brown signed it, and Karbach knew when he received the lease that Brown had done so. The district court had an opportunity to consider the question whether Karbach knew that George & Company was taking the leasehold for itself, and whether Brown was a mere convenience to whom the property was to be temporarily conveyed. It is doing no violence to the intention of the parties to say that both contracts entered into the purpose of the parties, and that both contracts together constitute the whole.

On January 25, 1912, Jacob Kittelman and others made an offer to George & Company to purchase the lease in question. An assignment of the lease was submitted to Mr. Karbach about January 28. At that time Karbach asked George who these people were, and was told by George that they were all right, and that Kittelman

alone was worth a good many thousand dollars. At this time Karbach complained and seems to have been dissatisfied. Whether it was because there was an opportunity to sell the lease for a profit of $25,000, or thereabouts, it is not necessary to determine. Up to that time Karbach had not complained of Brown. Shortly after that he went to Council Bluffs, and soon thereafter brought the suit. The question unavoidably presents itself as to whether Karbach's dissatisfaction was due to the fact that George & Company had an opportunity to realize a profit. The circumstances, taken together, would seem to indicate that Karbach was the manager for the plaintiff company, and understood from the beginning that George & Company was to exercise its option concerning a lease to the property. The instrument itself specifically provides that the option was to run to George & Company; also, that George & Company had the right to exercise this option. When George told Karbach that they would take the option, Karbach must have understood that George & Company was taking the property by lease thereto, or at least that George & Company was in control of the property.

The provision of the contract that the lessee might take possession of the premises contemplated that George & Company might go into possession. If Brown made no objection and Karbach made no objection, then George & Company was rightfully in possession under the lease which might have been executed to it, but was not because the parties interested consented that Brown should be named as lessee. George & Company undertook to procure for the plaintiff a paying tenant or lessee, which might be itself at its option, or any one else it saw fit to name who would pay the annual rent and comply with the other terms of the lease. It is not now claimed that the rent has not been paid or that there has been any breach of the terms of the lease, unless it was a breach to put Brown's name in the lease as lessee, and Karbach testified that he permitted that to be done. Everybody seems to have agreed to what was done, and the plaintiff has been

receiving the rent from George & Company, who paid it, and who seems to be the responsible party in the case. There is no complaint that George & Company is not solvent or is not willing to carry on the contract.

Brown defaulted and made no defense. The decree of the district court finds that "Brown never did have and has not now any real or substantial interest in or to the certain leasehold in question herein, and that whatever apparent interest, if any, the said Brown may have had or may now have in or to said leasehold, the same should be canceled and held for naught." The district court further finds for the defendant George & Company and against the plaintiff herein, and finds that the amended petition of said plaintiff should be dismissed for want of equity, and further finds "that the defendant, George & Company at all times has been, and is now, the sole owner of and the only real party in interest in or to said leasehold as lessee thereof." The judgment is: "It is therefore ordered, adjudged and decreed by the court that whatever interest, or apparent interest, the said defendant Brown may have, or claim to have, in or to said leasehold, the same be and hereby is canceled and held for naught. It is further ordered, adjudged and decreed by the court that the amended petition of the plaintiff herein be, and the same hereby is, dismissed for want of equity, and that the said leasehold herein referred to be, and the same hereby is, settled and confirmed in the defendant, George & Company, as lessee thereof."

Under the finding and judgment of the district court, the effect is substantially the same as if George & Company had signed the lease itself as lessee, and should then be brought into court to answer to some sort of dereliction of duty without the same being alleged or proved. Karbach testified that George told him at the commencement of the transaction that Brown was to be the lessee, and that he was a man of property. George denied this. The lease, being a blank as to the lessee's name when the same was first prepared, furnishes some evidence tending to cor-

roborate George and to sustain the finding and judgment of the district court.

We admire the arguments made by counsel for the plaintiff, but we are not convinced by them. There is a sharp conflict of evidence, and the district court has determined that conflict in favor of the defendant. There is evidence to sustain its findings, and we do not feel justified in declaring that its judgment is wrong.

The judgment of the district court is

AFFIRMED.

BARNES, ROSE and SEDGWICK, JJ., not sitting.

HARRIET H. RAWLINS ET AL., APPELLEES, V. WILLIAM MYERS ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1914. No. 17,749.

1. **Pleading:** AMENDMENT. It is within the discretion of the trial court to permit an amendment of the petition or answer, and error cannot be predicated upon such permission unless an abuse of discretion is shown and prejudice results therefrom. *Brown v. Rogers & Bro.*, 20 Neb. 547; *McKeighan v. Hopkins*, 19 Neb. 33.

2. **Vendor and Purchaser:** RESCISSION: MISREPRESENTATIONS. Fraud or misrepresentation as to the quality or condition of the premises contracted for is ground for rescission, provided the statement is material, and is not the mere expression of an opinion, and is made under such circumstances as entitles the purchaser to rely on such statement. 39 Cyc. 1269, and cases cited.

3. ———: ———: ———. Where the vendor of land makes a false representation as to the character of the land, its location, and its value, under circumstances justifying the vendee in relying thereon, such misrepresentation is ground for a rescission of the contract. In such case the supreme court will not ordinarily disturb a verdict based upon a conflict of evidence. *Ross v. Sumner*, 57 Neb. 588.

4. **Instructions.** An examination of the instructions fails to disclose prejudicial error as against the defendants, and the judgment is supported by the evidence.

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

Herman G. Boesche, for appellants.

John M. Macfarland and *A. J. Kinnersley, contra.*

HAMER, J.

The plaintiffs, Harriet H. Rawlins and Rodney A. Rawlins, traded a drug store which they owned at Sioux City, Iowa, to defendants for an equity in a tract of land in Atchison county, Missouri. There was a mortgage on the drug store for $700. There were two mortgages on the Atchison county land. The first was for $4,500 and the second for $1,500, upon the latter of which $500 had been paid. The plaintiffs claim that the plaintiff Harriet H. Rawlins went to the Omaha office of defendants and proceeded with them to Missouri to examine a farm there known as the Dierks farm. The Dierks farm is claimed by defendants to adjoin the Austin farm, the Atchison county land for which the plaintiffs traded. The plaintiff Harriet H. Rawlins testified that she never examined the Austin farm, the particular farm in controversy, and that she did not think of examining the same and procuring title to it until after she returned from Missouri to Omaha; that she found she could not make a deal for the Dierks farm, and that the defendants drew a contract agreeing to trade her the Austin farm for the plaintiffs' stock of goods; that defendants were to examine the stock of goods; that the defendants went to Sioux City and examined the stock of goods before the trade was made; that the plaintiffs lived in Sioux City, Iowa, a long distance from the land in controversy, and that they knew nothing of it except what was represented to them by the defendants. The defendants represented to plaintiffs that, in addition to the land deeded to them, they would get 40 acres of land by reason of an accretion to the tract conveyed in Atchison county; that they further represented that the buildings on the land were in first-class condition; that there were 36 acres in winter wheat on the land, and that there was fine building timber on the land; that the defendants represented the valuation of

their land to be $10,000, and that it would be easy to obtain a loan to take care of the mortgage on the land, and that they (the defendants) would take care of the small mortgage on the land if the plaintiffs were unable to do so; that the plaintiffs relied on these representations, and believed them to be true, and were induced thereby to make the exchange of property; that the above representations were untrue, and the defendants knew they were untrue; that there were not 40 acres of accretion land; that there were not 36 acres of winter wheat on the land; that there was no building timber on the land, and that the whole of the second mortgage of $1,000 was due March 1, 1910; that when the defendants made the promise to take care of this mortgage they did not intend to do so; that, in fact, there was no equity in the land.

It appears that when the trade was made the plaintiffs made a bill of sale, which was delivered to defendants. They also delivered to defendants a note and mortgage for $3,700; that the plaintiffs also gave additional security upon their land in Louisiana; that the defendants immediately moved the stock of goods from Sioux City to Council Bluffs, and disposed of the same and paid the $700 loan and received for said stock $2,800; that the plaintiffs went to Missouri in March, 1910, and examined the land, and discovered the fraud, and offered to trade back. They were willing to pay back the $700, but the defendants refused to return them the stock of goods or its value, and refused to return the $3,700 note which the plaintiffs had given them.

The plaintiffs further claim that the land in Missouri was foreclosed; that under the laws of Missouri the land was sold and bought in by the defendants; that the defendants wholly refused and neglected to assist the plaintiffs in taking care of the securities which came due when the plaintiffs had no money and when they had relied upon the assistance of defendants; that the defendants by their fraud obtained the appellees drug store of the value of $2,800 and obtained a mortgage of $3,700 upon the land of

plaintiffs in Louisiana, and also got back the land in Missouri.

The plaintiffs appear to have filed their petition in the district court for Douglas county asking for $6,500 damages, being the amount of their drug stock and interest, and the amount of the note which they alleged was obtained of them by the fraud of defendants.

It appears that the plaintiffs asked leave to amend their petition by interlineation. The plaintiffs were allowed to amend their petition in paragraph 3½ by interlineation changing the words "allow credit for" to "pay back." Thereafter the court made an order vacating a previous order and permitting plaintiffs to amend their petition by attaching an amendment thereto, which was accordingly done. The amendment finally made to the petition reads: "The plaintiffs further say that on or about March 1, 1910, which was about the time they discovered the fraud herein set forth, they offered to deed back the defendants' land and allow credit for $700, if defendants would return their note and mortgage and drug store, and the defendants refused to do so." The plaintiffs further claim that on or about March 1, 1910, which was about the time they discovered the fraud herein set forth, they offered to trade back with the defendants, and the defendants would not trade back. Plaintiffs contend that at that time they offered to deed back to defendants their property, to wit, the Missouri farm, and pay back the $700, if defendants would return their note and mortgage and their drug store. The plaintiffs charge that the defendants admit the contract for the exchange of property; that defendants were fully informed as to the truth of the matters relating to the trade; that the defendants acted on their own judgment.

It is contended by the defendants that the proceeding should have been one in equity; that if the stock had been, in substance, in such condition that it could have been replevied, the plaintiffs had the right to replevy both the property and the note, and that, if the property could not have been reached, then the action would properly pro-

ceed as one in equity for the value of the property; that, in fact, this was done in this case.

Counsel for plaintiffs say in their brief that the amendments were made because it was the opinion of the trial judge that it was necessary that such amendments should be made, and that counsel for plaintiffs were acting in conformity to the express will of the presiding judge at the trial; that, in regard to the amendment, it was within the discretion of the court; the statute of the state upon amendments so stating and having been so construed. In *Scroggin v. Johnston,* 45 Neb. 714, the plaintiff brought an action in ejectment, and the plaintiff pleaded a contract entered into by plaintiff for the sale of the premises, and demanded affirmative equitable relief. The plaintiff was permitted to file an amended petition (pleading) changing the form of the action from ejectment to that of foreclosure of the contract. Held, not reversible error. In *Scherar v. Prudential Ins. Co.,* 63 Neb. 530, it was held it is within the discretion of the trial court to permit a defendant to amend his answer, and error cannot be predicated upon it unless an abuse of discretion is shown and prejudice resulting therefrom. Held, in *Brown v. Rogers & Bro.,* 20 Neb. 547: "The court, upon such terms as may be just, may permit the amendment of a pleading after the evidence is introduced, and before the cause is submitted to the jury, and, unless there is an abuse of discretion in the action of the court, error will not lie." In *McKeighan v. Hopkins,* 19 Neb. 33, it was held: "A court may permit a petition to be amended when the proposed amendment does not change substantially the claim, although the form of the action may be changed. So long as the identity of the cause of action is preserved, the form of the action is not material. A petition in ejectment, therefore, may be amended to be a petition to redeem; the object in both cases being to recover the land."

It is contended that the case was fairly submitted to the court and jury upon the evidence and pleadings, and that the jury found a verdict for the plaintiff for $2,800 and interest, and that this should not be disturbed. It is

admitted on all hands that the plaintiff failed to pay off the $1,000 mortgage upon the Atchison county land. After the foreclosure suit was instituted the plaintiff Rodney A. Rawlins saw the defendant Charles E. Erskine in Sioux City, Iowa, about March 1, 1910, and asked Erskine to take up the second mortgage, upon which the foreclosure suit was started, claiming that it was agreed at the time the trade was made that, if the plaintiffs were unable to take up that mortgage, defendants would take it up. Erskine denied this agreement. The plaintiffs claim that they rescinded the contract; that they demanded the drug stock to be returned, and offered to reconvey the farm in Atchison county to defendants, and to repay the $700 which they paid out to clear the drug store from incumbrances. The defendants claim that after the trade was made the plaintiff Rodney A. Rawlins went and examined the land for which he had traded, and solicited the defendants to assist him in selling or trading the land for other property. Erskine denied any agreement to take up the mortgage for Rawlins. The plaintiffs claim that because of such denial they rescinded the contract and demanded the drug store back, and offered to reconvey the farm in Atchison county. There is a conflict of evidence, and because of this conflict it is necessary to pay some attention to the testimony.

Rodney A. Rawlins testified: "Q. And thereupon you for the first time said to Mr. Erskine, in substance, that it looks as if I was being swindled or cheated here, and if you won't put this money up on this mortgage or take care of it I want to rescind this trade, or I want to trade back? A. Yes, sir. Q. You give me back my property and I will deed this farm back to you and give you credit for the $700 that you paid out on the stock? A. Yes, sir. Q. That is substantially what took place? A. Yes, sir. Q. And you said you would fix the matter of the money that they had paid out on account of the mortgage, and that belongs on the farm; you said that you would fix that? A. Yes, sir. Q. Have I stated fairly, Mr. Rawlins, the

substance of that conversation had on that subject in the Mitchell Hotel at that time? A. Yes, sir."

It is seriously contended by the defendants that there was no bargain to advance $1,000 to pay off the small mortgage. It is not seriously contended that the trade was a fair trade. Each side claims that there was misrepresentation on the other side. We are not inclined to think that the contention of plaintiffs that there was an accretion to the farm purchased is well founded. The mortgages against the land were large mortgages. It is apparent that the plaintiffs were getting little or nothing. They had a drug store free from debt except $700. They traded it for land that was of no practical value. Whether they were induced to do so by false representations can only be gathered from the testimony. It is alleged that there were representations made that there was fine building material on the land, while, as a matter of fact, there was no such material on it. The evidence seems to sustain that view.

After the amendment to the petition, counsel for defendant made a motion that the case should be transferred to the equity side of the court and should be tried as an equity case. Both parties were trying the case to a jury. They had introduced evidence; they were just ready to submit their controversy. It would seem that the motion was not made with serious intent. It is claimed that the plaintiffs affirmed the contract; that they did so by suing for fraud, and authorities are cited along that line. It is clear that plaintiffs wanted damages. It is also clear that they lost their drug store by reason of the representations of defendants. It is also in evidence that they tried to trade back. They seem to have begged and coaxed industriously but their efforts were futile. Fraud or misrepresentation as to the quality or condition of the premises contracted for is ground for rescission, provided the statement is material, and is not the mere expression of an opinion; and is made under such circumstances as entitles the purchaser to rely on such statement. 39 Cyc. 1269, and cases cited.

"Where * * * the purchaser resides near the property, and has knowledge of its value, and the owner is a resident of another state, and has no knowledge on that subject, statements of the purchaser representing the property to be greatly beneath its true value, and that the vendor's title has been conveyed by sale for taxes, will be sufficient to avoid the deed given by such purchaser." *Morgan* v. *Dinges,* 23 Neb. 271.

In *Ross v. Sumner,* 57 Neb. 588, this court held, where the vendor of land makes a false representation as to the character of the land, its location, and its value, under circumstances justifying the vendee in relying thereon, such misrepresentation is ground for a rescission of the contract. In such case the supreme court will not disturb a finding based upon a conflict of evidence.

At the close of the case, after the evidence was all in, the defendants moved for a directed verdict. This motion was overruled, and the case was submitted to the jury. There is a conflict in the evidence. The jury had an opportunity to determine whether they would believe the plaintiffs' evidence or the defendants.' They seem to have accepted the plaintiffs' evidence as true. We are unable to say that the finding of the jury is wrong. There is much to justify the conclusion reached by the jury. We are not inclined to disturb the verdict under the circumstances.

An examination of the instructions fails to disclose prejudicial error.

The judgment of the district court is

AFFIRMED.

LETTON, FAWCETT and SEDGWICK, JJ., not sitting.

MARY E. CUNNINGHAM, APPELLEE, V. MODERN BROTHERHOOD OF AMERICA, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,787.

1. **Insurance:** FORFEITURE. Where the secretary of a fraternal benefit association voluntarily advanced the dues or assessment of the assured for the month of June, and the next July, without the knowledge or consent of the assured, undertook to reimburse himself out of the funds sent to him by the assured to pay his July dues or assessment, and thereupon canceled the beneficiary's certificate and suspended the membership of the assured, the orders of cancelation and suspension were void, and a subsequent order attempting to reinstate the member was unnecessary, as the membership continued without interruption, and in such case there would be no requirement upon the part of the assured to make any statement concerning his condition of health with a view to securing his reinstatement as a member of the association.

2. ———: ———. And where the secretary of the association thereafter received the dues or assessments from the assured for each of the months of July, August, September, October, November, and December, and remitted the money received to the head office, as required by the rules of the association, it will be considered that the association has failed to establish a forfeiture of the certificate because of any failure to pay the dues or assessments; the fact being shown that the money paid for the several months mentioned was retained, and that the assured died in the latter month, concerning which there was no complaint of nonpayment of dues.

3. ———: ACTION ON POLICY: BURDEN OF PROOF: HEALTH OF APPLICANT. Where the assured, shortly prior to making his application for membership in the association, was treated for catarrh in the head, and still prior to that time had been treated for lumbago or rheumatism in the back, but there was no evidence to show that the particular disease which caused his death had been contracted before the beneficiary certificate issued, it will not be considered that an inquiry can be made as to whether the disease of which the assured died was latent in his body. The fact that he had other complaints than the particular one which caused his death places the beneficiary under no obligation in case of suit to show that the assured was sound as to the particular complaint causing his death at the time that the certificate issued and he was admitted to membership.

4. ———: ———: ———: ———. In an action upon a beneficiary certificate, it is not proper to place the burden of proof upon the

beneficiary to show that at the time the certificate issued the assured was free from the particular infirmity which ultimately caused his death.

5. ———: ———: INSTRUCTIONS: APPLICATION. The following instructions given at the request of the plaintiff are held to fairly submit to the jury the good faith of the assured in answering the questions contained in his application: No. 6. "You are instructed that, if you believe any of the answers in the application for insurance are incorrect or untrue in reference to a matter of opinion or judgment, and if you believe that said answers were made in good faith and without intention to deceive, then in that event the incorrectness or untruth of said answers shall not prevent the plaintiff from recovering, if upon all the other facts he be entitled to recover." No 7. "You are instructed that, if you believe that the answer, upon any fair interpretation of the meaning of the question in the benefit certificate application, as it might have been understood by the applicant, may be deemed a true answer, then, in that event, no forfeiture of the rights of the plaintiff shall be permitted, for that reason, if, upon all the other facts, plaintiff be entitled to recover."

6. ———: CONTRACT: ENFORCEMENT. Persons engaged in a life insurance business should be required to take the risk that properly belongs to the business, and the right of the beneficiary to recover should not be made to depend upon the skill, intelligence and accuracy of knowledge possessed by the assured touching his own physical condition. If the association has had an opportunity to examine the applicant by means of its physician, and voluntarily assumes the risk without deception upon the part of the assured, it should be held to the contract.

7. **Trial:** INSTRUCTIONS. In this case complaint is made by the defendant of instruction No. 2, given at the request of the plaintiff. Instructions should be read and construed together, and, if as a whole, they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism. *Brown v. Chicago, B. & Q. R. Co.*, 88 Neb. 604; *Boesen v. Omaha Street R. Co.*, 83 Neb. 378.

8. **Instructions** examined in the body of the opinion, and *held* not to be prejudicial.

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

A. H. Burnett and *C. T. Dickinson*, for appellant.

T. E. Brady, contra.

HAMER, J.

The defendant, a fraternal benefit association, organized under the laws of the state of Iowa, appeals from a judgment rendered in the district court for Douglas county. The defendant was authorized to do business in Nebraska at the time it issued the beneficiary certificate sued on. On or about March 17, 1910, Thomas Cunningham, who was then residing at Mitchell, South Dakota, through the local lodge at Mitchell, presented his application for membership to the defendant. It was approved by said defendant and the certificate sued on was issued. The assured died in December, 1910. The certificate contained the following conditions: "I further agree that any failure to pay any fines, dues or assessments required by said Modern Brotherhood of America, within the time therein provided, shall forfeit the rights of myself and my beneficiary or beneficiaries to any and all benefits to be derived from my membership in said society." Also: "It is further agreed by and between the parties to this contract that should said member fail to pay any assessments, dues, fines or charges upon him, as required by the by-laws, rules and regulations of the society, promptly when due, his membership shall thereupon cease, and this certificate shall be void, and all money paid thereunder shall be forfeited to the society."

It is claimed by the defendant that the assured did not pay the assessment for the month of July, 1910, during the month of July, 1910, and that because of such failure he was suspended, and that his beneficiary is not entitled to any benefits under said certificate. It is alleged in defendant's brief that the assured was residing in the city of Omaha, Nebraska, at the time he failed to make said payment, and that he continued to reside there until the time of his death, December, 1910; that in August, 1910, he remitted to the secretary of the local lodge at Mitchell, South Dakota, the assessment for July, 1910, and that he did not inform the secretary at that time that he was sick and under the doctor's care, and that the said secretary, in receiving said money and issuing a receipt for the

same, had no knowledge of the physical condition of said Cunningham.

The by-laws of the defendant association provided that the assured was required to make all payments for assessments during the calendar month following the levy, and, upon failure to make such payments, he forfeited all rights and interests which he might have in said certificate; also, that the assured, after his rights had been forfeited, might be reinstated by making said payments within 60 days from the date of suspension, provided he was in good health at the time of making such payment for reinstatement; also, that, in case he was not in good health, the receipt of such assessment would not reinstate him, and his beneficiary would not be entitled to receive any benefits under the certificate.

The appellant admitted the execution and delivery of the benefit certificate and the death of the assured, Thomas Cunningham, but sought to defend upon the grounds set out: (1) That the assured did not pay his assessment for the month of July, 1910, and was thereby suspended, by reason of which the certificate and all rights under it became forfeited; (2) that his reinstatement was not effective because the officers of the association did not know his physical condition and that he was in poor health at that time; (3) that he did not truthfully answer the questions in the application. There was a reply filed by the appellee to the defendant's answer. It denied each and every allegation.

On the issues as above set forth, there was a trial to a court and jury in Douglas county on or about March 15, 1912. The case was submitted to the jury, which rendered a verdict in favor of the plaintiff, the appellee herein, for $1,000, with interest, and the court on the 2d day of April, 1912, overruled the motion for a new trial and rendered judgment against the defendant for $1,078.84 and costs, together with interest at 7 per cent. from March 15, 1912.

The secretary of the Mitchell lodge No. 740, R. E. Cone, was called as a witness for the defendant, and testified that there was in the minutes of said lodge a resolution

which authorized him to pay the assessments and dues of any member who would otherwise become delinquent; for one time, and that, pursuant to that resolution, he had personally paid the assessment and dues of Thomas Cunningham for the month of June, on June 30, 1910. That on July 8, 1910, he received a letter from Thomas Cunningham, which reads as follows: "7-7th-10th. Mr. R. E. Cone, Mitchell, S. D. Dear Sir: Inclosed please find draft for $1.75 for this month's assessment in M. B. A. Yours truly, Thos. Cunningham." That said letter contained a draft for $1.75, which was the amount required for the payment of the July assessment of Thomas Cunningham and his wife. That he did *not* credit Thomas Cunningham or his wife on the books of the lodge with the payment of July assessment for $1.75 so received, but *took said money to reimburse himself for the money advanced for the June assessment.* That he did not remember that he ever notified Thomas Cunningham that he had paid his June assessment or that he had not credited him with his July payment until about September 1, 1910. That on August 31, 1910, he received from Thomas Cunningham a letter, which reads as follows: "Omaha, Nebr. 8-30th-10. Mr. R. E. Cone, Mitchell, S. D. Dear Sir: Inclosed please find draft to cover my dues for August and September. Yours truly, Thos. Cunningham, Suite 1013 City National Bank." That said letter contained a draft sufficient to pay two months' assessments and dues.

On September 1, 1910, the secretary of the Mitchell lodge, R. E. Cone, wrote a letter to Thomas Cunningham, which reads as follows: "September 1, 1910. Mr. Thos. Cunningham, Suite 1013, City National Bank, Omaha, Neb. Dear Sir: Yours of the 30th at hand, inclosing draft for $3.50, which you state is in payment for August and September. Beg to say that you did not pay the July assessment and I was consequently obliged to suspend you on this account, however I am now reinstating you and inclose receipt for July and August. Your September assessment must be received by me by the 30th if you wish to avoid suspension. Yours truly, R. E. Cone, Secretary."

There was inclosed therein a receipt, which reads as follows:

"MODERN BROTHERHOOD OF AMERICA.

"Reinstated.

"Mitchell Lodge No. 740.

"8-31-1910.

"Received of Thomas & Mary Cunningham, the sum of three and 50-100 dollars.

Charter of membership fee $——.

Supreme Lodge (payment of ass'ts Nos. 7 and 8, Series 1910) $2.90

Local Lodge Dues (Jul. and Aug. 1910) ..... .60

Total 3.50

No.——. R. E. Cone, Secretary."

This witness Cone testified that he did not remember that he ever demanded of Thomas Cunningham that he (Cunningham) should reimburse him for the June assessment which he had advanced, also that he was never authorized by Thomas Cunningham to use the money sent on July 7, 1910, to reimburse himself for the June assessment advanced. He also testified that the payments for the months of September, October, November, and December, 1910, were each and all of them paid before they became delinquent, and that Thomas Cunningham died in December, 1910. The assured in the instant case had been chief of police at Mitchell, South Dakota. Mr. Cone testified that during the last few months that Cunningham lived at Mitchell he was quite hoarse. "Brady: Can you tell approximately when it was that you talked with Thomas Cunningham you observed his hoarseness? Cone: My recollection is this: That Thomas Cunningham was hoarse, and I am certain that he had his throat bandaged at the time of his initiation into the Modern Brotherhood of America, which I think was in March, 1910. Brady: Did you observe at any other time after the time of the initiation of Thomas Cunningham this same hoarseness? Cone: Not to my recollection."

At this point it is proper to say that the secretary paid the June assessment for Cunningham. The association had passed a resolution which provided, in substance, that if a member failed to pay an assessment the secretary of the association was authorized to pay it for him. Under this arrangement Cone paid the assessment of Cunningham for the month of June, 1910.

"Brady: When you paid the June assessment for Thomas Cunningham, you paid same in your individual capacity, I understand you. Is that true? Cone: It is to this extent, that the resolution I spoke of provided for reimbursing him personally out of the general fund of the local lodge unless Mr. Cunningham did so. * * * Brady: About the 20th of June your custom would be to mail to every member who had not paid the June assessment a notice to be sure and pay it by the 30th, or something to that effect, and you think you probably mailed one to Mr. Cunningham? Cone: Probably so. Brady: You have no recollection whatever on that question? Cone: No. Brady: But on June 30 you paid his June assessment? Cone: I did. Brady: Now, did you afterwards write him and demand that he reimburse you for that June payment? Cone: I do not remember. Brady: Did he ever write to you authorizing you to use the money which he sent you on the 7th day of July to reimburse yourself for the June payment? Cone: No, sir. Brady: Did he ever authorize you verbally to do so? Cone: No, sir." Redirect examination. "C. T. Dickinson: Would you have made the payment for the June assessment, had it not been for the resolution passed by the local lodge? R. E. Cone: It is altogether likely that I would. It was my custom before the resolution was passed. Dickinson: To do that one time? Cone: Yes, sir."

It will be seen that the payment June 30, 1910, prevented Cunningham from being in default. The next question to ask is: Was he ever in default? The evidence shows that Cunningham sent to the secretary money to apply on the July assessment, also on the August assessment, and that

he also paid the assessments of September, October, November, and December before they were delinquent, although Cunningham died in the latter part of the month of December. Cone, the secretary of the local lodge, undertook to cancel the certificate. In order to do that, he took out of the money that was sent to him for July enough to reimburse himself for the money that he had advanced in June. The evidence shows that he was not authorized to do that, and that what he did was done without any agreement with Cunningham and without consulting anybody else. Therefore his attempt to cancel the certificate and then to reinstate Cunningham was futile. He had no right to cancel his membership, and, as he had no right to cancel his membership, there was no cancelation, and therefore no need of reinstatement.

"Brady: Were the payments of Thomas Cunningham on Policy 6772 for the months of September, October, November, and December paid before delinquent? Cone: Yes, sir. * * * Dickinson: Did you yourself advance the assessment for Mr. Cunningham for the month of December, 1910? Cone: It was not necessary to advance it for the reason that he died before the end of the month, but it was received prior to the time I made my remittance to the head office." Cone testified that he received the money for the December assessment from I. W. Aikin of Omaha, and that he took the money and "applied it in payment for his (Cunningham's) December assessment." "Brady: Is it a fact or not that, at the time of your examination of the applicant, Thomas Cunningham, appeared to be in good health? Bobb: He appeared to be. Brady: State whether or not at the time you examined him on March 9, 1910, you discovered the applicant to be suffering from any disease or ailment? Bobb: I found none at that time. Brady: At the time you examined him in January, 1910, did you examine his throat? Bobb: I did not. Brady: State whether or not it was a fact that Mr. Cunningham was a trifle hoarse at the time of the examination and for some considerable time prior thereto? Dickinson: What was that? Brady: A trifle hoarse. Bobb: As near

as I can remember, he might have been. Brady: State whether or not he had been hoarse at different times off and on for some time prior to that examination? Bobb: He had long had a husky voice. Brady: Had you ever talked to him or advised with him as to that condition? Bobb: I never did. I never thought anything of it. * * * Brady: State whether or not at the time of the examination of Thomas Cunningham on March 9, 1910, you considered the hoarseness or huskiness of voice to which he had been subject a matter of any seriousness or gravity? Bobb: I did not consider it at all." Bobb subsequently testified that he examined Cunningham's condition with respect to his heart and lungs, and that he found the lungs and heart to be healthy.

Dr. Reamer testified that he treated the assured for a diseased sore throat in March, April, and May, 1910. He testified that Cunningham had an ulcer of the epiglottis, which he diagnosed as tubercular. He thought that it was along in April, 1910. It was some eight months before he died. He testified that he treated the throat first May 5, 1909, and last, May 10, 1910; that in January, 1910, he removed a growth from the nose of the assured; that in February he did not treat him at all. "Brady: Nor again until the 12th of March? Is that a fact? Reamer: According to my books. I would not be able to answer these so definitely if I did not refer to my books. Brady: State whether or not up to the 12th day of March you considered Thomas Cunningham to be suffering with any severe disease? Reamer: Not suffering from the same disease that I later diagnosed as tuberculosis." Dr. Reamer testified that there was a tubercular ulcer in the epiglottis, which is a part of the windpipe, a part of the trachea; it is a cap that fits right over the windpipe or trachea, and that ulcer was located immediately under and a little to the left. "Brady: You may state whether or not you made any tests of this ulcer to determine whether or not it was tubercular, aside from your judgment by looking at it? Reamer: As I remember, I did not. Brady: State whether or not prior to March 9, 1910, you ever told Thomas

Cunningham that he was suffering with any severe sickness or disease from which he would not recover? Reamer: No. * * * Brady: If you can refresh your recollection, will you state whether or not during the months of October, November, and December, 1909, and January, 1910, you one or more times advised Thomas Cunningham that, if he would quit the police force so he could stay in out of the storms and take care of himself and rest up, he would probably get all right in a little while, or something to that effect? Reamer: As I remember, I did."

As the secretary, Cone, under the resolution of the local lodge, paid the June assessment, there was nothing to pay for June. July 8, 1910, Cunningham sent Cone $1.75 to pay for the month of July. He said in his letter: "For this month's assessment in M. B. A." Cone took *that* money to reimburse himself. He was without authority to do this. The money should have been applied as Cunningham desired it to be applied—on the July assessment. There was no power to place it anywhere else. August 30 Cunningham sent to Cone enough money to pay the August and September assessments, $3.50. On the receipt of that letter Cone wrote a letter to Cunningham informing him that he had not paid the July assessment, and therefore that he (Cone) was obliged to suspend him, but at the time of writing the letter he was "now reinstating you and inclose receipt for July and August." Cone had no authority to suspend Cunningham's membership because he failed to pay the July assessment. Cone was without authority to take the money and to pay a debt that was due from Cunningham to himself. If the plan adopted by the secretary of the association could be enforced, it would lead to a most unsatisfactory jugglery of receipts, assessments, and suspensions. It is clear from an examination of the testimony that Cunningham should not have been suspended for the month of July. As there was no suspension, there was no necessity to accompany the money sent to the secretary with any statement concerning the condition of the assured.

There is some contention on behalf of the defendant that there was deception upon the part of the assured at the time he made application for and received the certificate. The assured stated in his application that he had been last treated for bronchitis in November, 1909, by Dr. C. S. Bobb, and that there was a complete recovery. Dr. B. A. Bobb testified that he gave Thomas Cunningham some X-ray treatment for lumbago or rheumatism in the back in November, 1909. Dr. Reamer testified that he treated Cunningham for catarrh in the head in October, November, and December, 1909, and in January, 1910. Cunningham does not seem to have been treated for anything for about two months prior to the date of his application. The things for which he was treated prior to making his application are not shown to have contributed to his death. There was, therefore, no sufficient showing that the defendant was imposed upon by fraud, and that the association was induced thereby to issue the beneficiary certificate. Dr. B. A. Bobb, who examined Cunningham, thought he was a first-class risk. Cunningham himself does not appear to have had any knowledge that he was a dangerous risk. Besides, it is for the jury to say whether the answer given by the assured was given in good faith. *Modern Woodmen of America v. Wilson,* 76 Neb. 344. The insurance never lapsed at any time, so the defendant had no rights that could have been prejudiced under the consideration of that issue. The payment July 8 paid the July assessment.

One who receives and appropriates to his own use money sent him for a particluar purpose will be held to have received and retained it in accordance with *the purpose for which it was sent. Life Insurance Clearing Co. v. Altschuler,* 55 Neb. 341.

A debtor may, at or before the time of payment, prescribe the application of said payment, and it is the duty of the creditor to so apply it. If the creditor receives money with the direction from the debtor to appropriate it to a particular debt, it must go to that debt, no matter what the creditor may say at the time, and an appropria-

tion made by the debtor cannot be changed by the creditor without the debtor's consent. *City of Lincoln v. Lincoln Street R. Co.,* 67 Neb. 469.

Where the insured directed payment to be applied on the last assessment and the secretary of the lodge applied the same on a former assessment, such application was invalid. *Burchard v. Western Commercial Travelers Ass'n,* 139 Mo. App. 606.

It must be clear that, as Cunningham directed the money sent on the 7th of July to be applied on the July assessment, therefore there was no lapse in July. Cone could not take the money intended to pay the July assessment and pay himself what he had advanced in June. There was no agreement about it, and what Cone undertook to do was arbitrarily done, and without authority. If there was no lapse in July, there never was any lapse, because all the payments were made. If the assured never lapsed, he never needed to be reinstated. For that reason, there is no necessity of considering the question of suspension and reinstatement.

An incorrect answer in an application for life insurance in reference to matters of opinion or judgment will not avoid the policy if made in good faith and without the intention to deceive. *Royal Neighbors of America v. Wallace,* 73 Neb. 409; *Bryant v. Modern Woodmen of America,* 86 Neb. 372.

Instruction No. 6, given by the court upon its own motion, is claimed by the defendant to be prejudicial. We cannot quote this instruction because of its length without unduly extending this opinion. It submits to the jury the good faith of the assured in procuring the certificate, and tells them that they may consider the rules and regulations of the order, the questions and answers in the application, and the evidence. We are not told how this is prejudicial to the defendant, and to us it seems to be reasonably fair and appropriate.

There is a complaint by the defendant against instructions Nos. 6 and 7, requested by the plaintiff and given. They read:

No. 6. "You are instructed that, if you believe any of the answers in the application for insurance are incorrect or untrue in reference to a matter of opinion or judgment, and if you believe that said answers were made in good faith and without intention to deceive, then in that event the incorrectness or untruth of said answer shall not prevent the plaintiff from recovering, if upon all the other facts he be entitled to recover."

No. 7. "You are instructed that, if you believe that the answer, upon any fair interpretation of the meaning of the questions in the benefit certificate application, as it might have been understood by the applicant, may be deemed a true answer, then, in that event, no forfeiture of the rights of the plaintiff shall be permitted, for that reason, if, upon all other facts, plaintiff be entitled to recover."

These instructions seem to fairly submit to the jury the good faith of the assured in answering the questions contained in his application, and we are not told by the defense in what way these instructions are prejudicial.

Instruction No. 2, requested by the plaintiff and given by the court, is as follows:

No. 2. "You are instructed that in answering to a question of such application for the name of the ailment or ailments for which the assured has been treated, and the names of the physicians who treated him therefor, the assured is not required to give the name of every ailment, however trifling, or of every physician he has consulted, but may confine his answer to such ailments as are of a serious character."

The above instruction may be objectionable, but it does not seem that it could have been prejudicial as to the defendant, because the certificate was issued after the applicant had been examined by the physician furnished by the association, and when it is not claimed that there was concealment of any material fact affecting the health of the assured. The assured was not required to exercise better judgment or more intelligence concerning his condition than that which he actually possessed. Persons engaged

in carrying on a life insurance business should be required to take the risk that belongs to the business, and the right of the beneficiary to recover should not be made to depend upon the skill, intelligence and accuracy of knowledge possessed by the assured touching his own physical condition. It is easy to understand that his judgment might be of but little value concerning a latent infirmity or disease which he might have.

We have examined the other instructions given, of which complaint is made, and see nothing which seems to us to be seriously objectionable or prejudicial. We think that the instructions, considered as a whole, fairly state the law.

In *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578, this court held in the syllabus: "Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient." In the body of the opinion instructions Nos. 2, 3 and 4 are discussed together. It was held that the three instructions, considered together, properly state the law.

If an instruction, considered as a whole, states the law correctly, as applied to the evidence in the case, it is not erroneous, although a portion thereof, taken separately, may not have been accurate. *Smith v. Meyers,* 52 Neb. 70. In the above case there were four instructions given at the request of the plaintiff. Two other instructions were given at the request of the defendant. In the body of the opinion it is said: "It is a familiar rule that instructions must be construed as a whole. When thus considered, if they fairly state the law, it is sufficient." Several decisions of this court are cited in support of the statement.

"The true meaning of instructions is to be determined, not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case." *Lincoln Traction Co. v. Brookover,* 77 Neb. 221. *Vanderveer v. Moran,* 79 Neb. 431; *Neeley v. Trautwein,* 79 Neb. 751.

In *Lincoln Traction Co. v. Brookover, supra,* it is said in the syllabus: "(3) The true meaning of instructions

is to be determined, not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case. (4) An instruction which, if standing alone, might be erroneous, may not be so when considered with other instructions upon the same subject given in connection therewith."

In *Vanderveer v. Moran, supra,* the syllabus says: "Instructions must be taken together and their true meaning determined by considering all that is stated on each particular branch of the case." In the body of the opinion it is said: "The defendant objected to instruction No. 5 on the ground that it did not contain a statement of the duties imposed by law upon the injured person, and to instruction No. 15 on the same ground, and upon the further ground that it was a repetition and gave undue prominence to the matters contained in instruction No. 5. In at least five other paragraphs of the instructions of the court contributory negligence was properly defined, and the jury were plainly told that, if the plaintiff's son was guilty of want of ordinary care on his part, the plaintiff could not recover. Instructions must be considered together. *Philamalee v. State,* 58 Neb. 320. Their true meaning and effect must be determined by considering all that is said on each particular subject or branch of the case. *St. Louis v. State,* 8 Neb. 405. The same reasoning applies to the defendant's objections to instruction No. 7, of which it is complained that it fails to tell the jury that, if the act of the defendant was not the proximate cause of the injury, he would not be liable. If this instruction was deficient in that respect, it was amply cured by instruction No. 3 given at the request of the defendant."

In *Neeley v. Trautwein, supra,* it is said in the syllabus: "Instructions must be considered together, and their true meaning and effect must be determined by considering all that is stated on each particular subject or branch of the case."

Instructions should be considered together, separate clauses or parts of a sentence should not be separated from the context in order to arrive at the true meaning of the

language, and all that is said upon the particular subject is to be taken together. *Boesen v. Omaha Street R. Co.*, 83 Neb. 378. In the body of the opinion it is said: "Instructions should be considered together. Separate clauses or parts of a sentence should not be disconnected from the context, if it is desired to obtain the true meaning of the language. Taking the two instructions referred to together, while the language of the latter may not be entirely proper, we think it impossible that the jury could have been misled with regard to the extent of the duty imposed by law upon the defendant with regard to the care of its passengers, and, when considered in connection with the evidence in this case, we cannot see how this language, even if objectionable in nature, in anywise prejudices the defendant."

"Instructions should be read and construed together, and, if as a whole they state the law correctly, they will be held sufficient, although one or more of them, considered separately, may be subject to just criticism." *Brown v. Chicago, B. & Q. R. Co.*, 88 Neb. 604. In the body of the opinion it is said: "Instructions must be read and construed together, and, if as thus considered they state the law correctly, should not be held prejudicially erroneous because one or more of them, taken separately, may be subject to just criticism."

In reviewing instructions, the charge to the jury should be construed as a whole. *Hans v. American Transfer Co.*, 90 Neb. 834.

We fail to ascertain any error in the case. The judgment of the district court is right, and it is

AFFIRMED.

SEDGWICK, J., took no part.

STATE OF NEBRASKA, APPELLANT, V. WILLIAM NOXON, JR., ET AL., APPELLEES.

FILED SEPTEMBER 26, 1914. No. 17,802.

1. **Bastardy:** CONTINUANCE: JURISDICTION. A justice of the peace does not lose jurisdiction in a bastardy case by granting a continuance of the hearing on the defendant's own motion.
2. ———: ———. Neither can the defendant successfully urge a want of jurisdiction because of his own failure to appear at the hearing on the day to which the case is continued at his own request.
3. ———: RECOGNIZANCE: VALIDITY. A recognizance in such a case, conditioned that the defendant will appear at the time mentioned therein to answer the accusation against him and to abide the order of the court thereon, will be held valid as against the defendant and the surety who joins in the recognizance with him, and neither may successfully contend that such recognizance is void.

APPEAL from the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Reversed.*

Grant G. Martin, Attorney General, and *Rawls & Robertson,* for appellant.

D. O. Dwyer and *A. L. Tidd, contra.*

HAMER, J.

The plaintiff, the state of Nebraska, filed in the district court for Cass county its amended petition on the 19th day of April, 1912, alleging that it came into court by the authority of the attorney general. It appears from the said amended petition, the answer, and the evidence that Amelia Heidemann, an unmarried woman, on the 18th day of December, 1906, made a complaint before M. Archer, a justice of the peace in Cass county, Nebraska, charging the defendant, William Noxon, Jr., with being the father of her bastard child. The justice of the peace issued a warrant of arrest, and Noxon was arrested and appeared before the justice on the 19th day of December, 1906, and asked that the hearing be continued until December 22,

1906. This request was granted on condition that the defendant enter into a recognizance in the sum of $1,000. The recognizance was given by the said defendant, William Noxon, Jr., and George E. Dovey. It provided for the appearance of the defendant before the said M. Archer, justice of the peace, on the 22d day of December, 1906, to answer the accusation against him and to abide the order of the court. The conditions and obligations of the recognizance were orally stated to the said William Noxon, Jr., and to said George E. Dovey, who entered into the recognizance with said Noxon. The said Noxon and the said George E. Dovey agreed to the conditions of the recognizance, as shown by the record, and thereupon, in consideration of the giving of said recognizance, the said defendant, William Noxon, Jr., was released from the custody of the officer having him in charge, and by direction of the said justice of the peace. The said recognizance was made a part of the record of the court of the said justice of the peace, and reads as follows:

"The State of Nebraska, Cass County—ss: Be it remembered that we, William Noxon, Jr., and George E. Dovey of Cass county, do hereby acknowledge ourselves indebted to the state of Nebraska for the use and benefit of Cass county in the penal sum of $1,000 to be well and truly paid if default be made in the condition following: Whereas, the said William Noxon, Jr., has been arrested upon a warrant issued by M. Archer, a justice of the peace in and for said county, upon the complaint of Amelia Heidemann, an unmarried woman, resident of Cass county, for being the father of her bastard child, born on the 26th day of November, A. D. 1906. The condition of this recognizance is such that if the said William Noxon, Jr., shall appear before M. Archer, justice of the peace, at his office in the city of Plattsmouth, Cass county, Nebraska, at 10 o'clock A. M. on the 22d day of December, 1906, to answer such accusation, and to abide the order of the court thereon, then this recognizance shall be null and void, otherwise to remain in full force and effect.

"Taken and acknowledged before me this 19th day of December, 1906.

"M. Archer, Justice of the Peace."

The said Amelia Heidemann appeared before the said justice of the peace on the 22d day of December, 1906, but the said William Noxon, Jr., did not appear, and he was three times called in open court, as also the said George E. Dovey, the said George E. Dovey being called upon to produce the body of the said William Noxon, Jr., but he failed to do so. Thereupon the said William Noxon, Jr., and the said George E. Dovey were defaulted and declared to have failed to comply with the conditions of said recognizance, and the said justice of the peace, M. Archer, proceeded with the examination of the said Amelia Heidemann, and she was sworn as a witness in said case and her examination was reduced to writing. The said William Noxon, Jr., failing to appear or in any way to perform any of the conditions of the said recognizance, the said justice of the peace, M. Archer, proceeded to make an order upon the said William Noxon, Jr., to appear at the next succeeding term of the district court to be holden in Cass county, Nebraska, to answer said accusation and to abide the order of the court, and the said justice of the peace fixed the recognizance for the appearance of the said William Noxon, Jr., at the sum of $2,000; the said William Noxon, Jr., then and there wholly failed and neglected to give such recognizance. The justice of the peace, following the proceedings had before him touching the said matter of the said bastard child, filed a certified transcript of all the proceedings had in his said court upon said complaint with the clerk of the district court for Cass county, Nebraska. The defendant, William Noxon, Jr., failed to appear in person in the said district court for Cass county at any time subsequent to the hearing on said complaint, and the said George E. Dovey failed to produce the body of the said William Noxon, Jr., in the said district court for Cass county, Nebraska, at any time subsequent to the hearing on said complaint, and the said

William Noxon, Jr., and the said George E. Dovey failed in any way to abide the orders and commands of the said district court touching the appearance of the said William Noxon, Jr., thereupon a default was taken against each of them in the said district court concerning all the conditions of the said recognizance.

The plaintiff alleged in its said amended petition that, by reason of the default of the defendants, the said William Noxon, Jr., and his surety, George E. Dovey, the conditions of the said recognizance became forfeited, and that there was due on the recognizance the sum of $1,000, with interest and costs, for the use and benefit of the persons entitled thereto. Attached to the said amended petition of the state of Nebraska is the prayer for judgment against the said defendants, William Noxon, Jr., and the said George E. Dovey, and for a judgment against each of them for the sum of $1,000 and interest and costs of suit. To the said amended petition the said George E. Dovey filed a demurrer on the 24th day of April, 1912. It was in said demurrer objected that the court had no jurisdiction of the subject of the action, and that the said amended petition did not state facts sufficient to constitute a cause of action. The said demurrer appears to have been overruled, and on the 25th day of May, 1912, the said George E. Dovey filed his separate answer, claiming that he had no knowledge of the matters alleged in the amended petition, except that on the 19th day of December, 1906, there was pending before M. Archer, a justice of the peace in the said county of Cass, a bastardy suit, entitled Amelia Heidemann v. William Noxon, Jr., and that at said time there was orally stated by said justice of the peace to the defendant George E. Dovey a supposed verbal recognizance such as is set out in the amended petition, and said George E. Dovey alleged in his said answer that the said justice of the peace had no jurisdiction to receive or accept such supposed recognizance requiring the defendant, the said William Noxon, Jr., to appear before said justice of the peace, and that the said recognizance was and is void; that said supposed recognizance was not signed by the defend-

ants, or either of them, and that it was within the statute of frauds and void; that the amended petition failed to state a cause of action; that said Amelia Heidemann in the summer of 1907 intermarried with Herman Krimlofski, and that she and her husband became nonresidents of Cass county, Nebraska, and that no obligation has or can occur in favor of said Cass county and against said William Noxon, Jr.; that said Cass county did not request the bringing of the action. The defendant attached a prayer to his answer that he be dismissed and recover his costs.

On June 12, 1912, the plaintiff, the state of Nebraska, filed its reply to the separate answer of said George E. Dovey, admitting the marriage of Amelia Heidemann, and that she and her husband had become nonresidents of Cass county, but denying each and every other allegation in said amended answer, except certain matters admitted.

The trial was had June 12, 1912. At the trial the plaintiff introduced exhibits 1, 2 and 3, as follows:

"Exhibit 1.

"Hon. W. T. Thompson, Attorney General, Lincoln, Nebraska. Dear Sir: We wish to get your permission to prosecute a suit upon a bond given in a bastardy proceeding, said bond running to the state. This action must be brought in the name of the state under the holding in Myers v. Baughman, 61 Neb. 818. The plaintiff in the bastardy proceedings will be responsible for all costs which accrue. Copy of recognizance herewith inclosed. Yours truly,

WAR-WJW."

"Exhibit 2.

"State of Nebraska, Office of Attorney General.
"Lincoln, Neb., Jan. 25, 1910.

"Mr. Byron Clark, Plattsmouth, Nebraska. Dear Sir: Your letter of January 24 received. I am returning you herewith stipulation, with consent to institute suit on the undertaking thereon. Yours very truly,

"W. T. Thompson, Attorney General."

"Exhibit 3.

* * * * * * * * *

"Consent to institute and prosecute suit in name of state on the within undertaking is hereby granted with the understanding that the same is to be prosecuted without costs to this department. Jan'y 25, 1910.

"W. T. Thompson, Attorney General."

(The omission above indicated by stars is occupied in the original by a copy of the recognizance.)

On the trial the complaint of Amelia Heidemann before the justice of the peace, charging William Noxon, Jr., with being the father of her bastard child, was offered in evidence, and received over the defendants' objection. The warrant of the justice of the peace was also offered and received in evidence; also the questions and answers of Amelia Heidemann touching the fact that she had given birth to a bastard child, and that said William Noxon, Jr., was the father of the child. There was also offered and introduced in evidence the request of the defendant, William Noxon, Jr., that he be allowed to give the said recognizance. It also appeared from the record of the justice of the peace that the said William Noxon, Jr., had failed to enter his appearance on the 22d day of December, 1906, and that his surety had failed to produce the body of him the said William Noxon, Jr. On the trial evidence was taken on behalf of the state of Nebraska to the effect that the next term of the court following the 29th day of December, 1906, was the February term, 1907. The clerk of the district court testified that the defendant, William Noxon, Jr., was not present in court at that time, and that he never was present in court.

D. O. Dwyer testified that he was one of the attorneys for Noxon and Dovey; that he saw Dovey at his office in the store, and told him he was attorney in the case, and asked him if he would pay the amount mentioned in the petition; that Dovey replied he would not; that he was guaranteed by the other party's attorney. On cross-examination Dwyer testified that this conversation was had

after the commencement of the suit. A stipulation was made that the records of Cass county did not disclose any permission to institute the suit, and that the board of county commissioners never took any action in the matter; also, that the county attorney never authorized the action to be commenced. On the 12th day of June, 1912, there was a trial in the district court, and the journal entry shows that the jury was waived by both parties in open court, and that the court found in favor of the defendants and gave them judgment. On the same day a motion for a new trial was overruled. The plaintiff appeals.

It appears that a trial was had in the district court in the case of *Heidemann v. Noxon,* 83 Neb. 175. D. O. Dwyer was appointed guardian *ad litem* for the defendant Noxon, and on the trial the district court found on the merits of the case that the defendant was the father of plaintiff's illegitimate child, and that the reasonable value of the support of said child was $750, which should be paid to plaintiff at the rate of $15 a month, and ordered that the defendant Noxon give security for the payment thereof. From this judgment the said William Noxon, Jr., by his guardian *ad litem,* appealed to the supreme court, where the judgment of the district court was in all things affirmed. In that case it was held, as stated in the syllabus: "That a warrant issued for the arrest of the putative father of a bastard is not directed to the sheriff, coroner, or constable of the county is not a cause for abating the action in the district court where the question was not raised before the examining magistrate." Also, "The examining magistrate does not lose jurisdiction of the case by granting a continuance of the hearing on the request of the defendant." In the body of the opinion it was said: "Relating to the first alleged error, we conclude from the evidence in the record that the appearance of the defendant before the justice was entirely voluntary. * * * The defendant, who it appears was under arrest in Kansas City under some other charge, * * * told him (Fitzgerald) that he would accompany him back to Plattsmouth if he came

after him. * * * The defendant voluntarily accompanied Fitzgerald back to Plattsmouth."

The defendant Dovey contends that the recognizance is void, for the reason that the justice of the peace had no authority to take the same. It does not lie in the mouth of defendant Dovey to say that he succeeded in getting the defendant William Noxon, Jr., out of the custody of the court by getting it to do that which he asked it to do. Neither can Dovey say, successfully, that he is not legally bound to pay that which he promised to pay. As to William Noxon, Jr., he has not yet questioned the authority of the court to render a judgment against him. Nobody appeared for him, except that Dovey made a defense, which he contended should be applied to his friend. In *Heidemann v. Noxon,* 83 Neb. 175, it was held in paragraph 2 of the syllabus: "The examining magistrate does not lose jurisdiction of the case by granting a continuance of the hearing on the request of the defendant." In the opinion (p. 177) this court say: "It is further insisted that the justice had no authority to continue the case and take a recognizance from the defendant for his appearance on the day for which the hearing was set, and that the hearing had in the absence of the defendant was illegal." In discussing this the court say: "Relating to the second point, it will be borne in mind that a suit against the putative father of a bastard is a civil action, and, while the court can enter no orders not warranted and authorized by the statute, it cannot be good law that the justice lost jurisdiction of the case by granting a continuance of the hearing on the defendant's own motion. It would be a singular rule which allows a defendant to take advantage of the order of a court made on his own request and apparently for his own benefit."

In *Heidemann v. Noxon, supra,* it was held that the justice, by continuing the case, did not lose jurisdiction of it. For that reason, it must necessarily follow that the justice may exercise all the authority to continue the case which he has under the statute. It cannot be that, because the justice of the peace, at the special request of the

defendant, consents to take his obligation and release him, there is no binding force in the obligation.

In the *Town of New Haven v. Rogers,* 32 Conn. 221, which was a suit for a debt on a continuance, it was said: "Proceedings under the bastardy act (Rev. St., tit. 7, sec. 38), though civil in their nature, are in form like criminal proceedings, and a justice of the peace before whom they are pending may, on an adjournment, require the defendant to enter into a recognizance for his future appearance. And where the recognizance requires him not only to appear but to abide the judgment of the court, it is valid. The condition to abide the judgment of the court is not satisfied by a mere appearance of the defendant at the adjourned court, but he must appear at all the times fixed by future adjournments and whenever required by the court." In the same case it was held: "A recognizance is an obligation of record, and is strictly a bond, and where adapted to the nature of the case will answer the requirement of a bond in a statute." In the opinion it is said: "This is an action on a recognizance entered into by the defendant with one Orson A. Brooks before Justice Hollister, the object of which was to enforce the appearance of said Brooks before the justice on certain days when a case under the Bastardy act, in favor of the plaintiffs and against said Brooks, was pending."

In that case, as in this one, it was claimed that the justice had no power to take any recognizance whatever; that the statute provided only for a bond or recognizance where probable cause for the complaint should be found and the delinquent was bound over for his appearance before the superior court. It was held in that case, as it is held by our court, that a suit of this kind is a civil suit; that, if any bail was taken on the adjournment, it should have been to the officer having the delinquent in charge, as any other civil proceeding. The court said: "It is true, the object of the proceeding is to obtain security against an apprehended injury of a civil nature, in being subjected to the expenses of maintaining the child, but the forms of proceeding, which are substantially prescribed by the stat-

ute, are like those in criminal cases. The accused is brought before the magistrate by a forthwith process; he is held in custody by the magistrate's order, precisely as would be the case if he was charged with the commission of a crime; and, until the case is disposed of, he must either remain in custody, be committed to prison, or relieve himself therefrom by procuring security for his remaining in custody or appearing to abide the order of the court when the case shall be finally determined by the magistrate."

In that case it was further contended that the statute required a bond instead of a recognizance, and therefore that a bond, and not a recognizance, should be taken on an adjournment. Touching this matter the court said: "But a recognizance is nothing but an obligation of record; it is therefore a bond in the strict sense of the word, where the court or magistrate has authority to take it. * * * The words are apt enough for this purpose, and may have been introduced in order to save the necessity of renewing the recognizance at every adjournment or continuance of the cause. Whether they are necessary for this purpose is of no importance. If without them the mere appearance in court by counsel, or otherwise, without a surrender in discharge of the bail, would not be a performance of the condition of the bond, it surely can be no objection that the implied obligation or condition should be expressed in terms; and, if such would not be the effect without this clause, the object of inserting it is lawful, and as much for the benefit of the obligors as of the public, and is in furtherance of the convenient administration of justice, and, being voluntarily entered into, ought, we think, to be binding. * * * The meaning therefore undoubtedly is, that the court continued the case from day to day without the appearance of the parties or any further or other action of the court, that is, any further action than the bare continuance of the case, and, thus reading the *record, we are of opinion that the proceeding was regular.*"

In Illinois, in a bastardy case, it was held that an action of debt could be maintained for the recovery of a penalty on a bond given on a continuance before a justice of the peace. *People v. Green,* 58 Ill. 236. In that case it is said in a paragraph of the syllabus: "Where a party is arrested and brought before a justice of the peace, on a charge of bastardy, and obtains a continuance to another day for a trial, and enters into a recognizance for his appearance, but fails to appear, *held,* under the act of March 3, 1845, that the justice of the peace has power to take such a recognizance, and declare it forfeited on the failure of the principal to appear according to the condition of his recognizance."

In *State v. Moran,* 18 Neb. 536, a suit brought on a bastardy bond taken by a justice of the peace, the court stated in the syllabus: "In an action on a recognizance taken by a justice in a proceeding before him, under the provisions of chapter 37, Comp. St. 1885, *held,* that such recognizance was binding upon the security thereunto although the same was not recorded by the justice in his docket and was signed by the parties thereto."

The mere fact of removal does not defeat an action on a bond. This is laid down as the rule in 5 Cyc. 672, under the treatise touching bastardy. It reads: "Defendant cannot relieve himself from his liability by any agreement which he may make with other persons for the support of the child, nor will the mother's removal from the state * * * discharge him."

To the same effect is *Olson v. Johnson,* 23 Minn. 301. In that case the defendant offered a bond to save the county harmless from the child becoming a county charge. No such offer has been made in the instant case, and therefore the instant case is much stronger than the *Johnson* case.

Under the case of *Myers v. Baughman,* 61 Neb. 818, a suit upon a forfeited recognizance, the court held in paragraph 1 of the syllabus: "An action based upon a forfeited recognizance taken under the provisions of sections 3, ch. 37, Comp. St. 1899 (being the bastardy act) must

be brought in the name of the state, the obligee named in the recognizance." And the court held that "the amount of liability on such a recognizance is the penal sum named therein, with interest thereon from the date of the forfeiture."

Under the above holding it was only necessary to have the proceeding authorized by the state of Nebraska, the obligee named in the bond. This consent was given by Mr. W. T. Thompson, attorney general for the state of Nebraska, and was proved by exhibits 1, 2, and 3, exhibit 3 being a copy of the recognizance. This was the only consent necessary under the *Baughman* case.

The defendant urged that no demand of any kind was ever made upon the defendant prior to the commencement of the action. Section 9, art. I of the constitution of the state, provides: "All persons shall be bailable by sufficient sureties, except for treason and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

That all persons shall be "bailable by sufficient sureties" is a rule which should apply to one arrested in a bastardy proceeding, as well as to one charged with a felony or misdemeanor. Considering the foregoing provision of the constitution, Noxon had a right to give bail for his appearance. He gave bail when Dovey joined in the recognizance taken by the justice of the peace. Neither Noxon nor Dovey is in condition to say that he did not mean to be bound by the obligation when he gave it. The right to do what they did is guaranteed to them by the constitution, and if the obligation is binding upon one side it is certainly quite as binding on the other.

The evidence shows a demand to have been made upon the defendant Dovey, but cause of action upon a forfeiture results upon the breach, and not from a demand for payment. The judgment of the court ought to have been in favor of the plaintiff. No evidence was offered by the defendant to contradict any of the evidence of the plaintiff. The judgment of the court is not sustained by the

evidence, and it is contrary to it. The law of the state and public policy require that there should be a judgment for the plaintiff and that the same should be enforced.

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

REVERSED.

SEDGWICK, J., concurs in the conclusion.

FAWCETT, J., not sitting.

GEORGE A. MILES, APPELLEE, V. HOLT COUNTY, APPELLANT.

FILED SEPTEMBER 26, 1914. No. 17,842.

Newspapers: NOTICES: COMPENSATION. The evidence examined, and found to sustain the verdict and judgment.

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

Edward H. Whelan and *W. K. Hodgkin,* for appellant.

Arthur F. Mullen, J. A. Donohoe and *M. F. Harrington, contra.*

HAMER, J.

The plaintiff brought an action to recover for the publication of two certain notices under the "Scavenger Act," an act for the collection of taxes, which provides for the sale of lots and lands in aid of such collection. In his first cause of action the plaintiff seeks to recover for the publication of the first notice required, $2,669.50, with interest thereon at the rate of 7 per cent. per annum from the 2d day of August, 1905. In his second cause of action he seeks to recover for publishing the second notice required, $1,350, with interest at 7 per cent. per annum from the 21st day of April, 1906. The district court instructed the jury concerning the second cause of action that it would

be their duty to find for the plaintiff for the sum of $1,080, with interest thereon at the rate of 7 per cent. per annum from the 21st day of April, 1906, making a total amount due the plaintiff on that second cause of action at the time of the rendition of the verdict, December 30, 1911, of $1,461.91. On the plaintiff's first cause of action the court submitted the case to the jury. The jury returned a single verdict on both causes of action for $2,473.57, and on this verdict judgment was entered for the plaintiff. The defendant appeals.

This court has been called upon four times to decide some phase of the controversy pertaining to this case: *State v. Cronin,* 75 Neb. 738; *Miles v. Holt County,* 86 Neb. 238, 27 L. R. A. n. s. 1130; *Cronin v. Cronin,* 88 Neb. 141; *Cronin v. Cronin,* 94 Neb. 353. The purpose of referring to the above opinions is to give a history of the controversy for convenience.

In *Miles v. Holt County, supra,* being the first appearance in this court of this particular phase of the case, it was held as to the first cause of action that, having accepted the services of the plaintiff without protest, and having received enough money from taxpayers to pay for the publication, the defendant county must pay the reasonable value of the services. If we deduct the amount which the jury were directed to find upon the second cause of action, viz., $1,461.91, from the verdict returned, $2,473.57, we shall have left $1,011.66, which makes the amount which the jury found for plaintiff on his first cause of action including interest. In finding this amount due on the first cause of action it is apparent that the jury allowed the plaintiff between $700 and $800 as the reasonable value of his services, upon which interest was computed to make the amount of $1,011.66. Defendant's contention is that the plaintiff only should have been allowed on this first cause of action $269.11. We think that the defendant's contention would draw the line too closely, and that the amount allowed by the jury was not excessive. As to the second cause of action, we think the trial court

did not err in its instruction to the jury touching the amount to be allowed on that claim.

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

AFFIRMED.

ROSE, J., not sitting.

LAURITZ NELSON, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED SEPTEMBER 26, 1914. No. 18,421.

1. "**Negligence** is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done." *Omaha Street R. Co. v. Craig*, 39 Neb. 601.

2. **Master and Servant:** INJURY TO SERVANT: NEGLIGENCE: QUESTION FOR JURY. In an action for damages against a street railway company for an injury to a person because of the alleged negligence of the company, it is for the jury to say, under proper instructions from the court, whether the acts proved constitute negligence for which the company is liable.

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

John O. Yeiser, for appellant.

Rich, Nolan & Woodland, contra.

HAMER, J.

In *Nelson v. Omaha & C. B. Street R. Co.*, 93 Neb. 154, is a record of what appears to have been done when this case was first presented in this court. It shows an action to recover from a master for personal injuries. The opinion in that case fails to state the facts because it was deemed unnecessary. "After the evidence on both sides had been produced, a motion to direct a verdict for the defendant was filed on account of the insufficiency of the

petition and evidence. The journal recites: 'The defendant moves that the jury be instructed to return a verdict for the defendant, and said motion is argued and submitted. Whereupon the plaintiff asks leave to withdraw a juror; and, after due consideration, said leave is by the court granted.' " From this it appears that, after the motion by the defendant was made for a directed verdict, the plaintiff asked and obtained *leave to withdraw a juror,* and this was done, and the jury discharged and the cause "set for trial anew." The defendant excepted to these orders. "Afterwards, during the same term, the defendant moved the court 'to vacate and set aside its order allowing the plaintiff to withdraw a juror and setting the case for trial anew, for the reason that the motion of defendant to instruct the jury to render a verdict in favor of defendant had been duly argued by counsel and submitted to the court, as more fully appears from the record of the court, and the court was thereby without power to entertain any other motion until the said motion to instruct the jury had been either granted or denied, or to take any action whatsoever except to rule upon the said motion,' and defendant further moved that the court dismiss the action with prejudice, at plaintiff's cost. This motion was argued and submitted and taken under advisement." At the next term thereafter the motion was sustained, "for the reason that the court was about to sustain said motion to take the case from the jury when the application was made to withdraw a juror and continue the case, and the court now considers that the court was without discretion in the premises." The case was then dismissed according to defendant's motion made at the close of the testimony.

When this case was before this court at the former hearing, it was contended by the plaintiff that it was error to set aside the order granting a new trial and to dismiss the case, for the reason that the former order was within the discretion of the court, and that the evidence was sufficient to warrant its submission to the jury. The defendant, however, contended that, as there was no motion for a new trial, this court could not examine the evidence, and

that, the case having been submitted to the court by the motion to instruct, therefore the court had no power to allow the withdrawal of a juror and to grant a new trial. This court held that the district court had power, in the exercise of its discretion, to grant leave to withdraw a juror, and that, in the absence of a clear showing of an abuse of discretion, the action of the district court should be sustained; also that, since the district court at plaintiff's request exercised its discretionary power and permitted a new trial of the case, its later judgment setting aside this order and dismissing the case was erroneous. This court therefore reversed the judgment of the court below. The case now comes here for a new trial upon appeal from the judgment rendered at the second trial. We have referred to what was done at the former trial, both in the district court and in this court, because of two things for which the plaintiff contends. He maintains that "counsel for appellee convinced the lower court, regardless of his argument in briefs referred to above, that this court had closed its eyes to the question of sufficiency of the evidence, disregarding our arguments upon that question. He made the court believe that cases are sent back and forth for mere experience in practice, and that the original attempt at invasion of the province of the jury had been encouraged in the previous decision of this case." Counsel for the defendant also moved the court at the second trial, before the introduction of any new evidence, to return a verdict for the defendant upon the record and evidence *of the former trial.* The defendant also objected to the introduction of any evidence and to the statement of the case by counsel. The defendant's motion was overruled.

It is the contention of the plaintiff that the defendant furnished the plaintiff with two men to assist him in the work he was in charge of, and that these men were unable to understand the English language; that the defendant did not notify the plaintiff of that fact; that this was negligence upon the part of the defendant, the street railway company; that, by reason of such negligence, the plaintiff

received the injury complained of. It is claimed by the plaintiff that during the noon hour two of the men working under the plaintiff were taken away from him, and two other men, named Soke and Damonkos, were substituted in their places. It appears that there were four men assisting the plaintiff in the work during the forenoon; that they stopped work at noon for lunch; that at that time they had the base of the valve on which the valve was to rest in place on top of a large boiler, and a rope attached to the valve, which was being worked by a pulley and tackle over onto the base; that the thing necessary to be done was to raise the valve by the pulley and tackle to a level slightly higher than the base on which the valve was to rest, and then to push the valve, as it was suspended in the air, over onto the base. When it was in the proper position above the base, it was to be lowered onto it by the manipulation of the pulley and tackle, together with the assistance of the men who had hold of it, including the two new men, Soke and Damonkos. When the work was resumed after lunch, one of the men, named Morgensen, manipulated the pulley and tackle. It was his duty to raise the valve, and to so handle it and to assist in so handling it, as to put it down on the base. Three men, Soke, Damonkos and Ferguson, standing on one side of the valve, pushed it, while the plaintiff, who was standing on the other side, pulled it. They worked together there moving the valve and lowering it onto the base. It had to be moved a little over a foot. The evidence seems to show that the valve was very nearly to the point of its destination when Soke and Damonkos by mistake let go of it, and it came down on plaintiff's hand with great force, and crushed and permanently injured it. The valve weighed about 1,500 pounds. The accident happened about 30 minutes after Soke and Damonkos arrived.

It is claimed by the plaintiff that Soke and Damonkos let go because they did not understand the English language and misunderstood what was said to them. The evidence tends to show that the plaintiff had no knowledge of the fact that these new men who were brought to him

were unable to speak the English language. The plaintiff directly testified that these men did not understand the English language; that he afterwards talked to them, and that they were unable to understand him. He testified that he instructed them to pull the valve over, and that, instead of pulling it over, they let go of it, and it then fell and struck the plaintiff's hand. The valve was suspended by a tackle and pulley just above the place in which it was to be fitted on top of the boiler. The valve was to be placed in an opening in a large steam pipe going to all the boilers and running along on top of them. The surface of the top of the boiler where they were at work was about 20 by 24 feet. At the time of the accident Jim Morgensen, Art Ferguson, John Soke and Damonkos were all standing there on top of the boiler with the plaintiff. The valve was to be laid on top of the boiler and the steam pipe was thereafter to be fitted to it. The base on which the valve was to rest was about three feet high. It and the steam pipe had all been placed on top of the boiler. The plaintiff was the foreman of the job. It was for the men who assisted him to take orders from him. When work was resumed after lunch, the plaintiff told Morgensen to go up on top of the steam pipe and pull the valve up. The plaintiff told the others to take hold of the stem of the valve and guide it. They took hold of the valve as it was suspended by the tackle and pulley. "Q. Then what happened? A. They brought it up, and I told them to push it back, and got it pretty near in place without them letting go. * * * · Q. How far did they have to push the valve, after they once got a hold of it? A. About a foot. Q. And did they push it about a foot? A. Pretty close; yes, sir." The witness testified that he was pulling and that the helpers were pushing.

The plaintiff had been in the employ of the street railway 16 or 17 years. At the time of the accident the plaintiff was the foreman of the steam-fitting gang. He had held that position about nine months. Prior to that he had been foreman of the boiler room about 14 years, and before that he had been a fireman. About 35 men were

employed around the power house. They were oilers, firemen, helpers, and shovelers. The plaintiff testified that he did not know Soke or Damonkos, although he had seen Soke about the premises for four or five months; that there were men employed about the premises who did not speak or understand English, but he denied that he had worked with such men at the particular work in which he was engaged; that Mr. Gilbert hired the men, and that he himself did not hire any, but that he had to take such men as Gilbert hired.

The evidence fails to show an assumption of risk. The men who did not understand the English language shoveled coal or ashes. They were not in any sense skilled workmen; they were common laborers.

Gilbert testified that he got the men. He explained why they had to take the other men away from the work. He says it was to install a 3,000-horse power turbine for Aksarben. He explained that the new men, Soke and Damonkos, could not speak or understand the English language. When Gilbert was asked whether Soke could speak or understand the English language, he answered: "I didn't consider him a man that could talk the English language. Q. As to Damonkos? A. Even worse than Soke. Q. How about Morgensen? A. Could talk it fairly well. Q. Did you explain to Mr. Nelson that these men could not talk the English language? A. No, sir. * * * Q. Now, Mr. Gilbert, did you know of any one of your employees who could not understand the English language, that had ever, previous to that time, been put to work on important work like the fixing of this valve?" To this there was an objection, which the court sustained. "Q. What kind of work, Mr. Gilbert, before this particular transaction, did men who could not understand the English language engage in for the company?" To this there was another objection, which the court sustained. Counsel for the plaintiff then offered to prove that the men who could not speak and understand the English language were men who were engaged in shoveling coal and ashes, and that they were never employed at any other kind of

employment. To this there was another objection, which the court sustained.

If there was to be an issue tried as to whether there was an assumption of risk by reason of the fact that the plaintiff voluntarily worked with men in the line of his employment who were unable to speak and understand the English language, the court should have permitted it to be tried.

Mr. Gilbert testified: "We have what is known as coal unloaders and conveyers—men that unload the coal from the cars, and take care of the coal and ashes—common labor." Mr. Ferguson testified concerning Soke and Damonkos: "We were pushing it over and we got it pretty near over where it belonged and they let loose." There was then the inquiry as to whether they both let loose, and he said they did.

The motion at the close of the testimony made by the defendant reads: "Comes now the defendant and moves the court to instruct the jury to return a verdict in favor of the defendant on the ground that there is not evidence sufficient to justify a verdict in favor of the plaintiff." The motion was sustained, and judgment rendered in behalf of the defendant. We have carefully read the evidence contained in the bill of exceptions. We are of the opinion that there was evidence sufficient to require a submission of the case to the jury.

"Negligence is a failure to do what reasonable and prudent persons would ordinarily have done under the circumstances and situation, or doing what reasonable and prudent persons under the existing circumstances would not have done." *Omaha Street R. Co. v. Craig,* 39 Neb. 601.

"In an action for damages against a railroad company because of the injury to property occasioned by its alleged negligence, it is for the jury to say, under proper instructions from the court, whether the acts proved constitute negligence for which the company is liable." *Whitlow v. Missouri P. R. Co.,* 94 Neb. 649.

"'Ordinary care' in the selection and retention of servants and agents requires that degree of diligence and precaution which the exigencies of the particular service reasonably require, and is such care as, in view of the consequences that may result from negligence on the part of employees, is fairly commensurate with the perils or dangers likely to be encountered." *Emery v. City of Tacoma,* 127 Pac. 851 (71 Wash. 132).

"Where the negligence relied on in an action by an employee for injuries was that the master had employed a Mexican of a low order of intellect, and who could not understand the English language, as a co-laborer with plaintiff, and the evidence was conflicting, the question of whether such co-laborer understood the directions given him by defendant, and whether his failure to obey them, which resulted in plaintiff's injury, was owing to carelessness should have been submitted to the jury." *B. Lantry Sons v. Lowrie,* 58 S. W. (Tex. Civ. App.) 837.

"In this, a personal injury case, held, that whether or not the master negligently employed incompetent servants was, under the evidence, a question for the jury." *Francoeur v. Gribben Lumber Co.,* 115 Minn. 200.

"A servant is under no duty to examine into the character of servants employed to work with him, and he assumes the risk of their unfitness only where he is shown to have knowledge of it. Proof of notorious unfitness of fellow servant will not alone establish such knowledge on his part." *Texas & P. R. Co. v. Johnson,* 89 Tex. 519.

"It is the duty of the master to his servant to exercise a reasonable care in furnishing an adequate number of co-laborers to assist in the performance of work of a hazardous nature." *Supple v. Agnew,* 191 Ill. 439.

"A complaint alleging the incompetence of plaintiff's assistant, by reason of deafness, a fact known to the defendant and not known to the plaintiff, and that plaintiff was injured by reason of stopping to give a second warning to protect the assistant and property in his care, states a cause of action." *Harding v. Ostrander Railway & Timber Co.,* 64 Wash. 224.

The evidence was sufficient to require a submission of the case to the jury. For that reason, it was error to direct a verdict.

The judgment of the district court is

REVERSED.

ROSE, FAWCETT and SEDGWICK, JJ., not sitting.

CITY OF OMAHA, APPELLEE, V. DOUGLAS COUNTY ET AL., APPELLANTS.

FILED SEPTEMBER 26, 1914. No. 18,544.

Taxation: EXEMPTIONS: MUNICIPAL WATER-WORKS. The property of the municipality of Omaha, consisting of water-works used for a public purpose to supply the inhabitants of the city and its suburban towns and territory with water for domestic use and fire purposes, is not taxable under section 2, art. IX of the constitution.

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

Myron L. Learned, Joseph T. Votava, R. H. Olmsted and *George A. Magney,* for appellants.

Benjamin S. Baker, W. C. Lambert, John A. Rine and *L. J. Te Poel, contra.*

John L. Webster, amicus curiæ.

HAMER, J.

The appeals to this court are taken separately by the city of Omaha, the city of Florence, and School District No. 5. The city of Omaha appealed from the orders of the board of equalization to the district court for Douglas county, which held that the property over which the controversy existed was not subject to taxation under the constitution and laws of the state. From this last mentioned judgment the city of Omaha, the city of Florence,

and School District No. 5 have appealed to this court. Each filed a motion for a new trial, which was overruled.

An examination of the pleadings and evidence discloses that Omaha became the owner of property outside of the city, from which it is alleged to derive a profit, and which is sought to be taxed. The authorities for Douglas county attempted to assess for the years 1912 and 1913 the property of the city of Omaha claimed to have been known as its water-works. The transcript recites: "In the matter of the appeal of city of Omaha from the order of the board of equalization of Douglas county, Nebraska, in retaining upon the assessment rolls for purposes of taxation real and personal property in South Omaha, Florence, and Dundee recently purchased from the Omaha Water Company by City of Omaha. *Original assessment return made by the county assessor.*"

Here follows a list of certain personal and real property: "In name of Omaha Water Company. Assessment year, 1912.

Personal property in South Omaha	$609,500
Personal property in Florence	723,950
Personal property in Dundee	17,925
Personal property in East Omaha	18,925
Tax lot 1 & 2, sec. 21-16-13, Florence	19,850
Improvements	524,900
Tax lot 2, sec. 28-16-13, Florence	11,550
Lots 1 & 2 & part 3, block 126, Florence	200
Lots 4 & 5, block 126, Florence	125"

Then comes a protest filed June 28, 1912, addressed, "To the Honorable, the Board of County Commissioners of Douglas County, Neb., sitting as a Board of Equalization." It is signed, "City of Omaha, by W. C. Lambert, First Asst. City Attorney." The protest complains that on February 23, 1912, "said city became the owner of all property, property rights, franchises, and rights, and other interests, both real, personal and mixed, of the Omaha Water Company, in every way connected with or appurtenant to its water-plant in this city, and has ever since such time been the owner of all of said property." It is then al-

leged "that all and all parts of said property have been assessed by the county assessor of Douglas county and valued for assessment purposes for both said county and the city," and that the valuation "for said purposes has been placed at $5,334,500." It is then charged that at the time of said assessment, and ever since, "all of said property was exempt from assessment, valuation for assessment purposes, and taxation, under section 13, ch. 77, art. 1, Comp. St. Neb. 1911, and should not be valued and assessed for any purposes." It is then alleged that, if the petitioner is right as to its contention and view of the law, the effect "would be to require the carrying of said sum of $5,334,500 against which no assessment could validly be made, and would result in materially decreasing the amount of revenue which might be desired by both the county of Douglas and the city of Omaha;" also that the larger evils which might attend said course, in addition to the evils stated, "would be expensive litigation and troublesome delays in relieving against taxes assessed against said property." The prayer attached is: "That your honorable body determine and adjudge said property and all parts thereof heretofore belonging to said Omaha Water Company and passing from it by purchase to the city of Omaha, and now assessed as aforesaid, to be exempt from valuation, assessment, and taxation since February 23, 1912, because of the ownership thereof by the city of Omaha; and that you cause to be entered the proper order and to be made the proper records exempting said properties from taxation and cause the same to be stricken and removed from the assessment and taxing records and rolls of the county of Douglas."

The transcript shows that the board reconvened July 1, 1912, Chairman Best presiding; that there were present Dewey, Elsasser, Hart, Lynch, O'Connor, Shriver, and Mr. Chairman. On motion the assessment made by the county assessor "upon the personal property of the Omaha Water Company in the amount of $5,334,500" was reduced to *"no dollars"* by unanimous vote. On July 2, 1912, the board met again, all the members being present, and the

prior action of July 1, 1912, reducing the valuation of the personal property of the Omaha Water Company in Douglas county from $5,334,500 to "no dollars" was reconsidered by a vote of six yeas and one nay. Thereupon the original motion was withdrawn, and Peter E. Elsasser made a motion as follows: "I move that the real estate formerly owned by the Omaha Water Company and now owned by the city of Omaha, and situate within the city of Omaha, returned for taxation at a value of $259,300 be stricken from the tax rolls, and declared exempt from taxation. I move further that the real estate formerly owned by the Omaha Water Company and now owned by the city of Omaha, situate in the city of Florence, remain assessed and valued for taxation at $556,300, and that the real estate formerly owned by the Omaha Water Company now owned by the city of Omaha, situate in the precinct of Benson, remain assessed and valued at $25,000, all as returned by the county assessor for the year, 1912." Said motion was adopted by unanimous vote. It was therefore further moved by Peter E. Elsasser: "Whereas as the county assessor has made a return of $5,334,500 covering all the personal property of the Omaha Water Company in Douglas county, of which said amount $3,964,200 is within the limits of the city of Omaha; $723,950 within the limits of the city of Florence; $609,500 is within the limits of the city of South Omaha; $18,925 is within East Omaha, and $18,925 within the village of Dundee, all now owned by the city of Omaha, I, therefore, move that the personal property aforesaid within the city of Omaha be stricken from the assessment rolls, and declared exempt from taxation, valued at $3,964,200, and that the personal property aforesaid within the city of Florence valued at $723,950, within South Omaha valued at $609,500, within East Omaha $18,925, and within Dundee $18,925, be and the same is hereby valued and assessed for taxation at the figures above stated, respectively." This motion was adopted by a unanimous vote. Thereupon an appeal bond was executed and approved reciting the purpose of an appeal to the district court for Douglas county and notice

was given of the proposed appeal. The transcript of the proceedings for the year 1913 is very like the foregoing proceedings for the year 1912. There was an order made by the district court in each of the cases consolidating them, and they were heard and disposed of together upon the pleadings, a transcript of the record of the board of equalization of Douglas county, and the evidence, and also the arguments of counsel. The district court found that the property assessed and described in each of the cases was at the time of the assessment and levy the property of the city of Omaha; that the property described in the pleadings in each of said cases, being the property of the municipality of Omaha, was at the time of such assessment and levy exempt from taxation. The county of Douglas, School District No. 5 in Douglas county, and the city of Florence severally excepted to each and every of said findings. It was thereupon ordered and adjudged by said court: "That the assessment and levy by the assessor and board of equalization of the county of Douglas of and on the property described in the pleadings in each of the above entitled cases was null and void, and of no effect, and that the said levy and assessment is hereby set aside and canceled, and that the county treasurer of Douglas county is hereby ordered and directed to cancel upon his books the assessment and levy on all the property described in the transcript of the board of equalization, being the pleadings in each of the cases hereinbefore mentioned, and that the county of Douglas pay the costs of the appeal in each of said cases from the board of equalization." The county of Douglas, School District No. 5, and the city of Florence severally excepted, and each filed a motion for a new trial, and appealed from the judgment and order made.

It will be seen that the question presented is whether property which is municipally owned should be exempt from taxation. Section 2, art. IX of the constitution, in part reads: "The property of the state, counties, and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be

used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemption shall be only by general law." Section 4402, Rev. St. 1913, provides in part: "Lands, houses, moneys, debts due the city, and property and assets of every description belonging to any city governed by this chapter, shall be exempt from taxation." Section 6301, Rev. St. 1913, in part provides: "The following property shall be exempt from taxes: First. All property of the state, counties and municipal corporations." The foregoing provisions were in force in the state before the property in question was sought to be assessed.

It is contended by the appellants that the case must turn on the construction of the clause in the constitution concerning exemption; that at common law property of a state, county or city, used for public purposes, was exempt from taxation, and that the part of our constitution above quoted was merely declaratory of the common law. In the same connection it is said that the language of the constitution involved in this case should be construed according to the intention of its framers, and the people of the state of Nebraska, taking into consideration the conditions as they existed at the time of the adoption of such constitution; that to construe the constitution in any other way would do violence to the intention of its framers and to the people of the state, and produce results not contemplated or desired. To this, we think, it may be said that the policy of the law at the time the constitutional provision was adopted is the policy of the law at the present time. If at the common law property used for public purposes was exempt from taxation, and the constitution is declaratory of that principle, then the principle has existed in any event ever since the constitution was adopted.

The case of *Henry v. City of Lincoln,* 93 Neb. 331, is cited as authority for the statement that a municipality engaged in the furnishing of water is engaged in a purely business or commercial enterprise. In the *Henry* case the question is not a question of taxation. In that case the

question was whether it was necessary to file a claim for damages within the time specified by the statute. There was no question touching the levy of an assessment or the collection of taxes.

The brief of appellants contains a long argument calculated to show that under the present system the city of Omaha can keep up the interest, pay off the debt, and soon have a net profit amounting to a large sum of money. That is not the question. Whether Omaha can make money by selling water does not reach the constitutional provision, neither does it reach the statute. If it shall be found by the legislature, or by any competent authority created by the legislature, that the rates charged by the city of Omaha are too high, then such charges are to be regulated in a constitutional and legal way. The statute seems to be as broad as the constitution, and both constitution and the statute would seem to be plain enough, so that there should be no great doubt as to what was the purpose intended. The framers of the constitutional provision must have intended to exempt all classes of municipally owned property. That would seem to be the only fair interpretation which can be placed upon the language used in the constitution and the statute. We do not feel at liberty to disregard the provision of the constitution prepared by its framers, and adopted by the people when the instrument was voted upon and became the fundamental law of the state. Neither can we ignore the legislative expression of the will of the people through their representatives, and the expressions used in the statute concerning the same matter mentioned in the constitution emphasize the constitution. These provisions support each other. There should be no payment of taxes by the public upon that which the people own through their municipalities.

The city of Omaha was required to purchase the entire property from the Omaha Water Company, which had been serving the community of which Omaha is a part, and whether lying within the limits of Omaha or in any part outside of such limits. *City of Omaha v. Omaha Water*

Co., 218 U. S. 180. The city of Omaha was the undisputed owner of the property of said water plant; a part thereof being located in the city of Florence; a part in School District No. 5, Douglas county; a part in East Omaha; a part in the precinct of Benson; a part in the village of Dundee; a part in the city of South Omaha; a part in school district of South Omaha, and the remainder in the city of Omaha. The particular assessments in question here are a part of the assessments affected by this litigation. The board of equalization exempted that part of said property within the city limits of Omaha, but burdened the remainder of it with taxation. The water-works property was taken over by the city as a unit, and it is being operated as such in the service of the city. All the property involved in the assessments is property used in connection with the city's plant. The trial court found that the property so assessed was the property of the city of Omaha, and that the city of Omaha was a municipal corporation existing under the laws of this state. There is no controversy over the fact of ownership of this property by the city of Omaha, nor is there any question of its right to own such property, nor is there any challenge of its power to own and operate the plant in question. Under the constitution of this state rightful ownership of property by a municipal corporation such as the city of Omaha is all that is required or necessary to extend to such property complete exemption and immunity from assessment and taxation, whether located within the city or without. Section 2, art. IX of the constitution; Rev. St. 1913, secs. 4402, 6301; *Herman v. City of Omaha,* 75 Neb. 489; *People v. Assessors of City of Brooklyn,* 111 N. Y. 505, 2 L. R. A. 148; *Walden v. Town of Whigham,* 120 Ga. 646; *Smith v. Nashville,* 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469; *Ryan v. City of Louisville,* 133 Ky. 714, 118 S. W. 992.

In *People v. City of Brooklyn, supra,* the court held, as declared in the syllabus: "It seems that the principle that municipal property devoted to public uses is not taxable, unless expressly made so by statute, does not depend upon the origin of the title, whether acquired by purchase or

voluntary grant, or as the product of taxation, nor upon the locality of the property, whether situate within or without the territorial limits of the municipality." The landing place of Fulton Ferry in the city of Brooklyn was the place under consideration. It had been occupied and used as an incident to the ferry franchise for 250 years by the city of New York. It was held that it was not taxable in Brooklyn. The fourth syllabus in that case reads: "That the city of New York operates the ferry through lessees, and derives its revenue from the rental, and not from the operation of the ferry by its immediate agents and servants, does not make the franchise or the landing taxable." In the body of the opinion it is said: "We think the landing place was not taxable, upon the principle that property of a municipality acquired and held for governmental and public uses, and used for public purposes, is not a taxable subject, within the purview of tax laws, unless specially included. * * * There would be manifest incongruity in subjecting to taxation for public purposes property dedicated to, or acquired under legislative authority for public and governmental use."

In *Smith v. Nashville, supra,* it is said in the syllabus: "The fact that the city charged residents within its corporate limits for water furnished them, and thereby realized a considerable revenue, in excess of the expenses of operating the water-works, which surplus was applied to city purposes, does not defeat the implied exemption of the water-works from taxation." In the same case it was said that a city did not render itself liable for the payment of a privilege tax "by reason of the fact that it furnished water to persons outside its own corporate limits, for compensation, who are not shown to have been residents of any city, taxing district, or town falling within the provisions of said act."

In *Ryan v. City of Louisville, supra,* it is said in the syllabus: "The water-works system owned and operated by a city for the benefit of its inhabitants is used for public or governmental purposes, and is exempt from taxation, under constitution, sec. 170, exempting from taxation pub-

lic property used for public purposes." In the same case it was held that, where an assessment for taxation would create an apparent lien on the water-works of a city, the cloud of the title might be removed by an action in equity "because the property is exempted from taxation."

In *Herman v. City of Omaha, supra,* in the body of the opinion, quoting from *Trustees of Public Schools v. City of Trenton,* 30 N. J. Eq. 667: "The immunity of the property of the state, and of its political subdivisions from taxation does not result from a want of power in the legislature to subject such property to taxation. The state may, if it sees fit, subject its property, and the property owned by its municipal divisions, to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the state or its municipalities."

We conclude from an extended examination of authorities that the property is not taxable. The judgment of the district court is correct, and it is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

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13. The Insurance Code (laws 1913, ch. 154) *held* not invalid because of the invalidity of portions of two sections, where it does not appear that the defective portions constituted the inducement to the passage of the act, and where the objec-

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tionable parts may be be eliminated and leave an enforceable law which expresses the legislative will. *State v. Howard*..... 278

14. Secs. 147-149, ch. 154, laws 1913, authorizing the insurance board to establish maximum rates of premium for surety and fidelity companies, *held* not void as taking property without due process of law, or as being an unlawful delegation of legislative power. *State v. Howard*..... 278

15. Authority to make rules and regulations to carry out an express legislative purpose is not an exclusively legislative power, and may be delegated. *State v. Howard*..... 278

16. In an action by a public official and member of the insurance board, the court will not anticipate, for the purpose of declaring a law unconstitutional, that future acts of the board will infringe on the rights of others, or deprive persons of property without due process of law. *State v. Howard*..... 278

17. The duties of the insurance board under secs. 100, 138, ch. 154, laws 1913, relative to preparing a form of fire insurance policy, being ministerial or administrative, and not legislative, the sections are not an unconstitutional delegation of legislative power. *State v. Howard*..... 278

18. That portion of sec. 100, ch. 154, laws 1913, which provides that the New York form of fire insurance policy shall be used as it "may be hereafter constituted," is invalid. *State v. Howard*.. 278

Contracts.

1. Where the cashier of a bank made a loan to the managing agent of an insurance company with knowledge that the credit was for the purpose of imposing on the state insurance department, *held* that neither the insurance company nor the company which bonded the agent and sought to be subrogated to the rights of the bank had a cause of action against the bank. *Lion Bonding & Surety Co. v. Capital Fire Ins. Co*..... 51

2. Evidence *held* to show a contract of employment and profit sharing, and not a partnership. *Donahue v. Hanighen*..... 180

3. Where a physician, acting for the master, takes an injured employee to a hospital, the master cannot terminate his liability to the hospital by merely giving notice that he would not be responsible for care and treatment "from now on." *Omaha General Hospital v. Strehlow*..... 308

4. Evidence, in a suit to reform a written contract for the sale of real estate, *held* to sustain decree for plaintiff. *Potter v. Sorensen*..... 698

Contracts—*Concluded.*

5. A construction placed on an ambiguous contract by the parties will generally be adopted by the courts. *Wilhoit v. Stevenson*.. 751

6. A party to a contract, by ratifying it, waives the failure of the other party to sign it. *Serhant v. Gooch Milling & Elevator Co*..... 754

Corporations.

1. The state may impose such conditions as it sees fit on foreign corporations seeking to do business in the state. *State v. Howard*..... 278

2. Proceedings against stockholders of an insolvent corporation to recover the full amount for which each is liable must be by an action at law and trial by jury. *Dickinson v. Kline*..... 435

3. Where, in proceedings against stockholders of an insolvent corporation, the amount for which each is liable is unknown, the suit must be in equity. *Dickinson v. Kline*..... 435

4. A suit in equity to enforce the liability of stockholders of an insolvent corporation may be brought in the county of the principal place of business of the corporation, and summons may issue to other counties where other necessary defendants can be served. *Dickinson v. Kline*..... 435

5. In a suit for the appointment of a receiver and to wind up the affairs of an insolvent corporation, a decree against stockholders for contribution is not final, nor is a decree allowing a claim against the corporation final as to equities between such creditor and a stockholder who has paid in full his subscription for stock. *Dickinson v. Kline*..... 435

6. Where, in a suit to wind up the affairs of an insolvent corporation, the nature of claims of creditors appears, and it also appears that there are stockholders who ought not to contribute to such claims, all persons interested should be made parties and the equities determined. *Dickinson v. Kline*..... 435

7. A general subscription for corporate stock includes payment therefor at par. *Dickinson v. Kline*..... 435

8. Stockholders in a corporation are not liable beyond the amount of their subscription. *Dickinson v. Kline*..... 435

9. Creditors of an insolvent corporation have no claim against stockholders who have paid the agreed price of their stock until corporate property is exhausted. *Dickinson v. Kline*..... 435

10. Under sec. 4, art. XI*b* of the constitution, creditors of a corporation can insist that subscribers for stock shall make good their subscriptions. *Dickinson v. Kline*..... 435

Corporations—*Concluded.*

11. An agreement that payment in full for stock shall not be required is a fraud on subsequent creditors who deal with the corporation on the faith of the capital stock being fully paid, and such creditors can compel full payment for the stock, if required to satisfy their claims. *Dickinson v. Kline*..... 435

12. Stockholders who have misled *bona fide* creditors of a corporation become liable to such creditors for the par value of their stock. *Dickinson v. Kline*..... 435

13. Evidence, in a suit to enforce the liability of stockholders, *held* to show that none of the creditors whose claims were contested was a *bona fide* creditor without notice of the equities of the defendant stockholders. *Dickinson v. Kline*..... 435

14. Where the legislature has refused to include certain classes of public service corporations in a physical valuation statute, the courts will not include them therein by construction. *State v. Omaha & C. B. Street R. Co*..... 725

15. Ch. 107, laws 1909, provides for physical valuation of certain named classes of public service corporations, and no other class is subject to its provisions *State v. Omaha & C. B. Street R. Co*..... 725

Counties and County Officers. See FEES. PLEADING, 2. SHERIFFS. STATUTES, 5.

1. Under sec. 42, ch. 28, Comp. St. 1907, a county board in a county having over 18,000 and less than 25,000 inhabitants cannot allow the county clerk, as compensation for himself and assistants, any sum in excess of fees collected. *Mizen v. Adams County*..... 304

2. Under ch. 46, laws 1905, county commissioners of counties having a population of more than 150,000 hold office for four years and until their successors are elected and qualified. *Best v. Moorhead*..... 602

3. Ch. 46, laws 1905, *held* valid, and to fix the term of county commissioners at four years. *Best* v. *Moorhead*..... 602

4. A county board should allow reasonable compensation to the sheriff for feeding prisoners. *McShane v. Douglas County*.... 664

5. A contract between an attorney and county commissioners for a contingent fee for collection of a dormant judgment is enforceable. *Miles v. Cheyenne County*..... 703

Courts. See INTOXICATING LIQUORS, 2.

Ch. 94, laws 1911, *held* to confer on the supreme court jurisdiction "to reverse, vacate or modify" judgments of the state

Courts—*Concluded.*

railway commission, and not to retry the case. *Hooper Telephone Co. v. Nebraska Telephone Co.* 245

Criminal Law. See ASSAULT AND BATTERY, 2. HOMICIDE. PHYSICIANS AND SURGEONS, 2-4. RAPE.

1. Where accused is arraigned and waives examination, there is a sufficient compliance with law requiring a preliminary examination. *Clawson v. State* 499
2. Where the evidence is sufficient to sustain a verdict of guilty, the verdict is final. *Clawson v. State* 499
3. Expert evidence as to the manner in which a wound was inflicted *held* admissible, though the element of science involved was slight. *Clawson v. State* 499
4. It is not error to mark instructions as given at the request of accused. *Clawson v. State* 499
5. The giving of an instruction that defendant could be found guilty of the crime of assault with intent to commit rape *held* not prejudicial, though there was no evidence of assault except the evidence of the complete crime of rape. *Dawson v. State* 777
6. In a prosecution for rape, an instruction describing the girl as "the prosecutrix," though her father made the complaint, *held* not prejudicial. *Dawson v. State* 777
7. A violation of the rules governing the impeachment of witnesses by proof of prior inconsistent statements is ground for reversal. *Dawson v. State* 777
8. Accused cannot complain of the improper introduction of evidence in which he joined or which he encouraged. *Dawson v. State* 777
9. Discharge of accused by a magistrate without recognizing him to appear at the succeeding term in compliance with sec. 9121, Rev. St. 1913, will not justify a plea of former jeopardy. *Sieck v. State* 782
10. In a prosecution for obtaining money by false pretenses under sec. 8874, Rev. St. 1913, it is not necessary to prove that the person defrauded intended to pass title in the money to defendant. *Sieck v. State* 782

Damages. See ASSAULT AND BATTERY, 1. MALICIOUS PROSECUTION.

1. Verdict of $5,000 for wrongful death due to intoxication *held* not excessive. *Roach v. Wolff* 43

Damages—*Concluded.*

2. Verdict of $8,000 for injuries to a leg *held* not excessive. *O'Dell v. Stewart & Co* 147
3. The Carlisle table of mortality *held* properly admitted in evidence, where there was evidence that the injury was permanent. *O'Dell v. Stewart & Co* 147
4. Evidence *held* sufficient to require the submission of the question whether plaintiff's injuries were permanent. *O'Dell* v. *Stewart & Co* 147
5. Where the evidence establishes without contradiction that plaintiff's injuries are permanent, an instruction that plaintiff, if entitled to recover, should be compensated for such prospective suffering and loss of health as he will sustain by reason of his injuries, *held* not erroneous. *Bower v. Chicago & N. W. R. Co* 419
6. Verdict for $11,500 for loss of an eye *held* not excessive. *Bower v. Chicago & N. W. R. Co* 419
7. Damages in the sum of $9,000 for causing the death of a healthy man 27 years old, who was earning over $100 a month, with prospect of promotion, *held* not excessive. *Meck v. Nebraska Telephone Co* 539
8. In determining damages for loss of earning capacity, a mere fitful or temporary mental disorder will not be presumed to continue. *Broz v. Omaha Maternity & General Hospital Ass'n* 648

Death.

1. The death of an absent person may be presumed in less than seven years from the date of the last intelligence of him, from facts other than those showing his exposure to danger which probably resulted in his death. *Coe v. National Council of K. & L. of S* 130
2. Evidence of character, habits, and domestic relations, making abandonment of home improbable, may raise a presumption from which the death of one absent may be inferred without regard to the duration of such absence. *Coe v. National Council of K. & L. of S* 130

Deeds. See JUDGMENT, 3.

1. An instrument construed, and *held* to convey all the grantor's interest in certain land devised to him by his father's will, including a right of survivorship. *Trudeau v. Fischer* 275
2. Where the purchaser of a life estate received a quitclaim deed which failed to recite such interest, he did not acquire a greater interest than the grantor had. *King v. Boettcher* 319

Deeds—*Concluded.*

3. A covenant broken at the time of the conveyance is personal, and confers no right of action on subsequent purchasers. *Bryant v. Mosher* 555

4. A covenant that the grantors are lawfully seized of the premises free from incumbrances, if untrue, is broken when made, and a right of action thereon at once accrues. *Bryant v. Mosher* 555

Divorce.

1. Evidence *held* to sustain decree granting plaintiff a divorce. *Pierce v. Pierce* 511

2. Decree awarding the wife one-half of property accumulated by the joint efforts of husband and wife *held* proper. *Pierce v. Pierce* 511

Drains. See CONSTITUTIONAL LAW, 1-6.

1. Sec. 19, ch. 161, laws 1905, *held* to authorize supervisors of a drainage district to assess a railroad company for special benefits accruing from a drainage improvement. *Drainage District v. Chicago, B. & Q. R. Co.* 1

2. Ch. 161, laws 1905, *held* not to authorize the inclusion of a railroad company's right of way in a drainage district. *Drainage District v. Chicago, B. & Q. R. Co* 1

3. Railroad company *held* entitled to set off cost of ditches appropriated by a drainage district against special benefits. *Drainage District v. Chicago, B. & Q. R. Co* 1

4. Secs. 7640, 7646, Rev. St. 1913, providing for service by publication, *held* not to apply to proceedings before the supervisors of a drainage district to determine benefits to lands within the district. *Richardson County v. Drainage District* 169

5. Publication of notice of the meeting for apportionment of benefits in a drainage district *held* sufficient if published in a weekly paper one week before the meeting. *White v. Papillion Drainage District* 241

6. Where the affidavit to prove publication of notice of apportionment of drainage benefits was not filed within six months after publication, proof of publication may be supplied by oral evidence. *White v. Papillion Drainage District* 241

7. A drainage district is a local, administrative, political corporation. *White v. Papillion Drainage District* 241

8. Drainage district assessments are not void because lands which are found not to be benefited are omitted from the assessment. *White v. Papillion Drainage District* 241

Drains—*Concluded.*

9. Errors in making the apportionment of benefits in a drainage district may be corrected on appeal. *White v. Papillion Drainage District* 241

10. In a suit to enjoin collection of a drainage assessment, mere irregularities in the findings of the board in determining the benefits will not be considered. *White v. Papillion Drainage District* 241

11. In a suit to enjoin collection of a drainage district assessment the court, on cross-petition of the defendant district, may decree foreclosure of the tax lien without a prior administrative sale, if the land has been once offered for sale, and not sold for want of bidders. *White v. Papillion Drainage District* 241

12. In a suit to enjoin collection of an assessment, landowners who participated in the organization of a drainage district are estopped to urge that the district contains two separate watersheds. *White v. Papillion Drainage District* 241

13. The authority of directors of a drainage district to apportion benefits and make assessments cannot be questioned after levy of the assessments on the ground that the record does not state that the county board formally found that the improvement would benefit the public. *White v. Papillion Drainage District.* 241

14. Where the detailed plans and estimates of a drainage district are insufficient, they should be corrected on hearing of apportionment of benefits. *White v. Papillion Drainage District* .. 241

15. Apportionment of benefits in a drainage district may be made after commencement of the work and after the contract for the work has been let. *White v. Papillion Drainage District* 241

16. The drainage act (laws 1907, ch. 153) *held* not unconstitutional as not providing for a hearing upon the apportionment of benefits and assessments. *White v. Papillion Drainage District* 241

17. Ch. 153, laws 1907, *held* not unconstitutional because it gives directors of a drainage district jurisdiction to apportion benefits and levy assessments. *White v. Papillion Drainage District* 241

Elections. See STATUTES, 1-4.

1. Registration officers in cities covered by ch. 36, laws 1913, act ministerially in registering voters under sec. 12*a*. *State v. Moorhead* 559

2. Registration officers in cities referred to in ch. 36, laws 1913, are concluded by the answers of an applicant for registration,

Elections—*Concluded.*

and the record to be made under subd. 10, sec. 12*a*, is to be determined by two of the supervisors of registration from the answer of the applicant to subd. 7 and the evidence presented by him in answer to subds. 8 and 9. *State v. Moorhead*..... 559

3. The acts of the election commissioner under the last paragraph of sec. 10, and sec. 13, ch. 36, laws 1913, are quasi-judicial in character. *State v. Moorhead*..... 559

4. Where an election commissioner enters the word "challenge" opposite the name of a voter on the registration register, as provided by sec. 10, ch. 36, laws 1913, the proof requisite to have the challenge withdrawn is the verified affidavit specified by sec. 10; the voter not being required to produce his naturalization papers nor a certified copy of the record of the court in which he was naturalized. *State v. Moorhead*..... 559

Eminent Domain. See CONSTITUTIONAL LAW, 2.

Equity. See CORPORATIONS, 3, 4. SPECIFIC PERFORMANCE.

Courts of equity in cases of concurrent jurisdiction usually consider themselves bound by the statutes of limitations which govern courts of law in like cases. *Orcutt v. McGinley*..... 619

Estoppel. See DRAINS, 12. INSURANCE, 26. MECHANICS' LIENS, 3.

Evidence. See BILLS AND NOTES, 3, 4. CARRIERS, 3, 4, 6. CRIMINAL LAW. DAMAGES, 3-5, 8. DRAINS, 6. INSURANCE. MASTER AND SERVANT, 7. MUNICIPAL CORPORATIONS, 4. RAPE. TRIAL, 6, 7. VENDOR AND PURCHASER, 8. WITNESSES.

1. In an action for personal injuries, an admission of liability by defendant's general manager or duly authorized agent *held* admissible against defendant. *Egner v. Curtis, Towle & Paine Co*..... 18

2. Evidence that defendant's general manager or duly authorized agent placed defendant's refusal to compensate plaintiff for injuries solely on the ground that defendant was insured, *held* proper to be submitted to the jury under suitable instructions. *Egner v. Curtis, Towle & Paine Co*..... 18

3. In an action against indorsers of a note, parol evidence *held* admissible to show want of consideration and that the note was given solely for convenience. *Franklin State Bank v. Gettle*..... 60

4. It is not erroneous to exclude opinion evidence as to ultimate facts which are for the jury. *Gross v. Omaha & C. B. Street R. Co*..... 390

Evidence—*Concluded.*

5. Where the sum expressed as the consideration in a contract for the sale of real estate is not a promise to pay, the true facts may be proved by parol, and also as to acknowledgment of receipt of the consideration. *Wells v. Aufrecht* 402

6. Judicial notice will be taken of the fact that the "Black Hills" are in South Dakota, and that the western terminus of the main line of the Chicago & Northwestern Railway Company, running from Omaha northwest through Long Pine, Nebraska, is in the Black Hills. *Bower v. Chicago & N. W. R. Co* 419

7. Judicial notice will be taken of the fact that certain cities and villages are within this state. *Bartling v. Wait* 532

8. Proof of good health is not requisite to the admissibility of mortality tables as evidence. *Broz v. Omaha Maternity & General Hospital Ass'n* 648

9. Though proof of ill health or hazardous employment may impair the effect of mortality tables as evidence, it does not render them inadmissible. *Broz v. Omaha Maternity & General Hospital Ass'n* 648

10. In an action against a hospital for death of a patient, certain statements *held* admissible to prove negligence of the hospital. *Broz v. Omaha Maternity & General Hospital Ass'n* 648

11. Mortality tables are not conclusive as evidence tending to show expectancy of life. *Broz v. Omaha Maternity & General Hospital Ass'n* 648

12. Mortality tables are competent evidence to aid in determining the probable duration of life. *Broz v. Omaha Maternity & General Hospital Ass'n* 648

13. The records and by-laws of a fraternal beneficial association must be proved in the same manner as those of other private corporations. *Yonda v. Royal Neighbors of America* 730

Exceptions, Bill of.

1. Affidavits in support of motion for new trial will not be considered on appeal when not preserved in the bill of exceptions. *Roach v. Wolff* 43

2. Affidavits used in district court on the hearing of a motion will not be considered if not preserved in a bill of exceptions. *Wytoski v. Kiolbassa* 173

3. Affidavits to show misconduct of counsel must be included in the bill of exceptions to be available on appeal. *Bursow v. Doerr* 219

Execution.

Where property seized under execution is claimed as exempt and released, it is relieved from the lien of the execution. *France v. Larkin* 365

Exemptions. See EXECUTION. REPLEVIN, 2. TAXATION, 9.

Nonresidents are not entitled to the exemption of personal property provided for in sec. 521 of the code. *Woolfson v. Mead* 528

False Pretenses. See CRIMINAL LAW, 10.

Fees.

1. A compromise between a clerk of the district court and the county board respecting fees unlawfully retained is void. *Douglas County v. Broadwell* 682
2. A clerk of the district court must account for fees received as a member of the board of commissioners of insanity. *Douglas County v. Broadwell* 682

Fraud. See VENDOR AND PURCHASER, 10-12.

To sustain an action for fraud and deceit, plaintiff must plead and prove actual damage. *Kuper v. Snethen* 34

Fraudulent Conveyances.

Where a father knows that a gift of land to a son will inure to the benefit of his creditors, he may lawfully convey to his son's wife, and the wife takes the title free from the liens of judgments against her husband. *Wells v. Kindler* 233

Guaranty.

Where defendants orally directed plaintiff to furnish H. with merchandise and to present, monthly, written orders from H., *held* that the direction to present written orders was a condition precedent, and that defendants were not liable for goods furnished in excess of such orders. *Wells v. Garrison* 301

Highways. See INJUNCTION, 3.

Evidence *held* insufficient to prove a dedication of a strip of land for a public highway. *Nelson v. Reick* 486

Homestead.

1. A homestead may be claimed in lands held in joint tenancy or tenancy in common. *Doman v. Fenton* 94
2. The ownership of an occupying claimant need not be of an estate in fee simple, but the owner of an equitable title, occupying under a contract of purchase, may claim the homestead exemption. *Doman v. Fenton* 94

Homestead—*Concluded.*

3. Where the evidence showed that premises had been occupied as a homestead, the burden was on the execution creditor to show both removal therefrom and intentional abandonment. *Doman v. Fenton* 94

Homicide.

1. Evidence *held* to sustain a conviction of murder in the second degree. *Clawson v. State* 499
2. In a prosecution for murder in the first degree, the questions of premeditation and deliberation were for the jury, but, where they found accused guilty of murder in the second degree, refusal to instruct on those questions was harmless error. *Clawson v. State* 499
3. A sentence of 15 years' imprisonment for murder in the second degree *held* not excessive. *Clawson v. State* 499

Hospitals. See CONTRACTS, 3. EVIDENCE, 10. PHYSICIANS AND SURGEONS, 1.

1. A hospital conducted for private gain is liable to patients for the negligence of its employees. *Wetzel v. Omaha Maternity & General Hospital Ass'n* 636
2. A hospital conducted for private gain is liable for the tort of a servant while acting within the scope of his employment. *Wetzel v. Omaha Maternity & General Hospital Ass'n* 636
3. A hospital conducted for private gain is under an implied obligation that a patient shall receive such reasonable care as his condition, if known, may require. *Wetzel v. Omaha Maternity & General Hospital Ass'n* 636
   Broz v. Omaha Maternity & General Hospital Ass'n 648
4. A hospital conducted for private gain is liable to a patient for the negligence of nurses while acting within the scope of their employment. *Broz v. Omaha Maternity & General Hospital Ass'n* 648
5. In an action against a hospital, conducted for private gain, for death of a delirious patient from jumping from an unguarded window in absence of an attendant, *held* that the question of negligence was for the jury. *Wetzel v. Omaha Maternity & General Hospital Ass'n* 636
6. Whether a hospital was negligent in allowing a patient suffering from a mental disorder access, without an attendant, to a room where poison was kept, *held* a question for the jury. *Broz v. Omaha Maternity & General Hospital Ass'n* 648

Husband and Wife. See WITNESSES, 2.

1. Whether a note executed jointly by husband and wife was executed by the wife with reference to her separate property, or business, or upon the faith and credit thereof, and with intent to bind her separate estate, is a question of fact for the jury. *Whittier v. Wenner* 228

2. Where a creditor of the husband remits accumulated interest on condition that both husband and wife join in a note for the principal, the note is a new contract by the husband and wife jointly as principals on a sufficient consideration. *Whittier v. Wenner* 228

Injunction. See MANDAMUS. STREET RAILWAYS, 2. WATERS, 1, 2.

1. Notwithstanding sec. 7793, Rev. St. 1913, a judge of the district court may allow a temporary injunction in a proper case. *State v. Grimes* 719

2. A temporary injunction which transfers possession of realty from one litigant to another should not be allowed. *State v. Grimes* 719

3. Evidence, in a suit to enjoin a road district overseer from destroying plaintiff's fence, *held* insufficient to sustain decree for defendant. *Nelson v. Reick* 486

4. A suit to enjoin delivery of notes given in part payment of property may be brought in the county where the notes are held in escrow, and summons be issued to another county. *Bushee v. Keller* 736

Insurance. See CONSTITUTIONAL LAW, 13-18. CONTRACTS, 1. EVIDENCE, 13. TRUSTS, 4.

1. Where an insurance company's managing agent applied to a bank for a loan to his company, and placed the money to the company's credit with the bank, and the company had notice thereof, evidence that the note was signed by the agent individually *held* insufficient to overcome the uncontradicted evidence of the cashier that the loan was made to the company solely on its credit. *Lion Bonding & Surety Company v. Capital Fire Ins. Co* 51

2. Evidence that the managing agent of an insurance company bought school warrants with the company's funds *held* insufficient to prove conversion of the funds, in absence of evidence that the company's directors were ignorant of such purchase or objected thereto. *Lion Bonding & Surety Co. v. Capital Fire Ins. Co* 51

3. Evidence *held* to sustain finding that death was caused by external bodily injury, as contemplated by the indemnity clause

Insurance—*Continued.*

in the benefit certificate and constitution of defendant association. *Moon v. Order of United Commercial Travelers*..... 65

4. That assured's physical condition may have more readily permitted the rupture of an artery when he fell, *held* not to preclude recovery on his accident insurance certificate, where the fall was the proximate cause of death, and it was not shown that death would have ensued at the time it did but for the accident. *Moon v. Order of United Commercial Travelers*..... 65

5. Evidence that the age of assured may have caused hardening of the arteries, tending to a rupture of the heart in case of accident, *held* not to preclude recovery on an accident insurance certificate, on the ground that the accident was not the proximate cause of death. *Moon v. Order of United Commercial Travelers*..... 65

6. Where, in an action on an accident insurance certificate, the evidence was conflicting as to the cause of death, a finding that a fall was the proximate cause will not be disturbed. *Moon v. Order of United Commercial Travelers*..... 65

7. A provision in an automobile indemnity policy that the assured shall give immediate written notice of an accident is a reasonable requirement, but the word "immediate" is to be reasonably construed in connection with the circumstances. *Chapin v. Ocean Accident & Guarantee Corporation*..... 213

8. A provision for notice of accidental injury in an automobile indemnity policy only requires notice of such accidents as result in bodily injuries. *Chapin v. Ocean Accident & Guarantee Corporation*..... 213

9. Where no bodily injury is apparent at the time of an automobile accident, and there is no ground for belief that a claim for damages against the owner will arise, he is not required to give assurer notice until subsequent facts suggest that a liability to the injured person might arise. *Chapin v. Ocean Accident & Guarantee Corporation*..... 213

10. The word "accident," as used in an automobile indemnity policy, construed. *Chapin v. Ocean Accident & Guarantee Corporation*..... 213

11. By sec. 100, ch. 154, laws 1913, the insurance board is directed to adopt the New York form of fire insurance policy as the basis of the form which they are directed to prepare. *State v. Howard*..... 278

12. One insured by a mutual benefit society can change the beneficiary without his consent, provided the new beneficiary is

Insurance—*Continued.*

one who, by the laws of the order, may be made a beneficiary. *Baker v. Hardy* 377

13. Where a change of beneficiary in a benefit certificate is ratified by the society, and the money is paid without objection to a named trustee, the former beneficiary cannot complain. *Baker v. Hardy* 377

14. Under secs. 7616, 7619, Rev. St. 1913, a foreign insurance corporation may be sued in any county of the state in which it has property or debts, or may be summoned, or where the cause of action or some part thereof arose, or where any contract has been violated or is to be performed. *Clark v. Bankers Accident Ins. Co* 381

15. In an action on an insurance contract, where the policy was issued but not delivered, it was error to exclude the policy from evidence. *Clark v. Bankers Accident Ins. Co* 381

16. An insurance agent has power to make an oral contract of insurance and agree that the insurance shall be in force after the application is signed and the premium paid, in the absence of notice that the insurance will not be in force until the application is approved and the policy delivered. *Clark v. Bankers Accident Ins. Co* 381

17. An oral contract to issue an insurance policy will be presumed to intend a policy customarily used for such risk and in such amount as may be procured at the rates specified in the application or otherwise published by the insurer. *Clark v. Bankers Accident Ins. Co* 381

18. In an action on an accident policy, the burden is on the beneficiary to show that deceased was killed by an accident. *Clark v. Bankers Accident Ins. Co* 381

19. Evidence *held* to sustain verdict that deceased was killed by an accident. *Clark v. Bankers Accident Ins. Co* 381

20. Where a person within the class designated in sec. 94, ch. 43, Comp. St. 1911, was named as beneficiary in a benefit certificate, and died before the member, the certificate became payable to the member's surviving heirs, and not to his estate. *Schneider v. Modern Woodmen of America* 545

21. Where the beneficiary named in a benefit certificate died before the member, on the death of the member no action could be maintained by the administrator of his estate on the certificate. *Schneider v. Modern Woodmen of America* 545

22. An applicant for insurance who stated that she had not consulted a physician within seven years *held* not to have made a false

Insurance—*Concluded.*

statement, though on one or two occasions she had consulted one for minor ailments. *Yonda v. Royal Neighbors of America* 730

23. Evidence *held* not to establish fraud in applicant's answers concerning diseases. *Yonda v. Royal Neighbors of America* 730

24. Alleged errors as to a defense based on certain by-laws, where there is no competent proof of such by-laws, will not be considered. *Yonda v. Royal Neighbors of America* 730

25. A change in occupation from receiving clerk to foreman, classed as more hazardous, *held* not shown by proof that assured, who performed his duties as receiving clerk, was accidentally killed while temporarily directing others. *Redmond v. United States Health & Accident Ins. Co* 774

26. A beneficiary is not estopped by any statement in the proofs of death with which she was not identified. *Smith v. Royal Highlanders* 790

27. Where there is a conflict of evidence as to the manner in which assured came to his death, the verdict will not be disturbed. *Smith v. Royal Highlanders* 790

28. Where the secretary of a fraternal benefit association advanced a month's dues for a member, and, without the knowledge of the assured, reimbursed himself out of funds sent to pay later dues, the cancelation of the membership for nonpayment of dues was void. *Cunningham v. Modern Brotherhood of America* 827

29. That assured, at the time of his application, had ailments other than the one causing his death, did not place on the beneficiary the burden of showing that assured was sound at time of application as to the ailment causing his death. *Cunningham v. Modern Brotherhood of America* 827

30. An incorrect answer in an application, made without intent to deceive, will not avoid the policy. *Cunningham v. Modern Brotherhood of America* 827

31. Where a fraternal benefit association examined an applicant, and voluntarily assumed the risk without deception on the part of assured, it is liable, though the applicant did not name in his application every ailment had nor every physician consulted. *Cunningham v. Modern Brotherhood of America* ... 827

Intoxicating Liquors. See DAMAGES, 1.

1. Evidence in an action against saloon-keepers for death of plaintiff's husband while intoxicated *held* to sustain verdict for plaintiff. *Roach v. Wolff* 43

Intoxicating Liquors—*Concluded.*

2. The determination of the locality in which a saloon may be conducted rests with the licensing board, and ordinarily courts can determine only whether the law has been complied with as to the facts on which the right to grant a license depends. *Fraser v. Hunter* 134

3. Evidence *held* to justify the district court in refusing to set aside a saloon license. *Fraser v. Hunter* 134

4. Where plaintiff obtained a liquor license for a designated place, and by the city's permission removed to another location, and the court rescinded such permission, and another had procured a license for plaintiff's former location, *held* that plaintiff, having voluntarily abandoned the original location, could not recover the money paid for the license. *Simcho v. School District* 339

Judgment. See APPEAL AND ERROR, 7. CORPORATIONS, 5. MORTGAGES, 2. REPLEVIN, 1.

1. A right question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, though the second suit is for a different cause of action. *Turner v. Columbia Fire Ins. Co.* 98

2. A judgment in mandamus is conclusive on the parties thereto in another action as to all issues of fact litigated therein. *Richardson County v. Drainage District* 169

3. Grantor's title under a devise, together with his right of survivorship, *held* to have passed by deed to his grantee, to the exclusion of a judgment against the grantor. *Trudeau v. Fischer* 275

4. The district court has jurisdiction after decree and before it is complied with, on motion and satisfactory evidence, to correct an error in the journal entry thereof. *Occidental Building & Loan Ass'n v. Adams* 454

5. Evidence *held* to sustain order refusing to modify decree. *Occidental Building & Loan Ass'n v. Adams* 454

6. Where, in a foreclosure suit, neither the record nor the files show publication of notice for constructive service on minor heirs, the decree is subject to collateral attack. *Vandervort v. Finnell* 515

7. A recital in a judgment that "the court finds that due and legal notice of the filing and pendency of the action was given

Judgment—*Concluded.*

the defendants" will not supply the lack of facts necessary to jurisdiction. *Vandervort v. Finnell* 515

8. Where the record in a foreclosure suit against a nonresident fails to show that an affidavit for publication was filed and there is no affirmative proof thereof, the decree is void, notwithstanding a recital of service therein. *McKenna v. Pleasant* 581

9. A judgment against a municipal corporation is equally conclusive upon the corporation and its taxpayers. *Orcutt v. McGinley* 619

10. Judgment determining irrigation district bonds valid *held res judicata* in a subsequent suit concerning the same issue of bonds. *Orcutt v. McGinley* 619

11. A district judge may on his own motion vacate a judgment. *Douglas County v. Broadwell* 682

Jury.

Where defendant, in a personal injury case, was indemnified by a casualty insurance company, *held* proper for plaintiff's counsel to inquire of each juror on his *voir dire* whether he was a stockholder, or agent, or interested in such company. *Egner v. Curtis, Towle & Paine Co* 18

Justice of the Peace. See BASTARDY, 2, 3.

When, on appeal from a justice, both parties appear and without objection file pleadings, it is then too late to object to the sufficiency of the appeal bond. *Lydick v. Rolfs* 526

Landlord and Tenant.

Evidence, in a suit to set aside a lease, *held* to sustain decree for defendant. *Karbach Realty Co. v. George & Co* 808

Life Estates.

1. As between the life tenant and the owner of the fee, the life tenant should pay all taxes against the land during the continuance of his estate. *King v. Boettcher* 319

2. The purchaser of a life estate assumes the payment of taxes imposed on his grantor. *King v. Boettcher* 319

Limitation of Actions. See BASTARDY, 1. EQUITY. MORTGAGES, 3. TAXATION, 7.

1. An action for fraud must be commenced within four years after discovery of the facts constituting fraud, or facts sufficient to put a person of ordinary intelligence on inquiry. *Coad v. Dorsey* 612

Limitation of Actions—*Concluded.*

2. In a suit to subject certain property to the payment of a judgment, *held* that the suit was barred by limitations. *Coad v. Dorsey* 612

Lis Pendens. See VENDOR AND PURCHASER, 2.

Malicious Prosecution.

Verdict of $1,300 for malicious prosecution *held* not excessive. *Bursow v. Doerr* 219

Mandamus. See JUDGMENT, 2.

Mandamus will not lie to compel a district judge to set aside a temporary injunction which he has power to grant, unless he clearly abused his discretion or exceeded his jurisdiction. *State v. Grimes* 719

Marriage.

1. The contract requisite to the creation of the marriage relation need not be expressed in any special manner, nor by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct. *Reynoldson v. Reynoldson* 270

2. Evidence in a suit to annul a marriage *held* to sustain a finding that, when the marriage ceremony was performed, the defendant was the common-law wife of another. *Reynoldson v. Reynoldson* 270

Master and Servant. See CONTRACTS, 2, 3.

1. Where a brakeman, without the master's knowledge or consent and in violation of its known rules, operated an engine in switching cars, and injured a fellow brakeman, the master *held* not liable. *Fredericks v. Chicago & N. W. R. Co* 27

2. Where negligence depends on the reasonableness of a switchyard rule, the court should determine the question, if the facts are not in dispute; but, if the reasonableness of the rule depends on conflicting evidence, the court should charge under what conditions the rule would be reasonable and leave the question to the jury. *Wright v. Chicago, R. I. & P. R. Co* 87

3. An experienced carpenter, erecting a one-story building, must use such means in climbing upon and descending from the building as his own judgment may suggest. *La Londe v. Soderberg*. 118

4. A master is not an insurer, and is only required to use ordinary care to furnish reasonably safe and suitable tools and a reasonably safe place in which to work. *La Londe v. Soderberg* 118

Master and Servant—*Continued.*

5. A master must use reasonable care to furnish reasonably safe appliances for the use of his servants. *O'Dell v. Stewart & Co.* . . 147
6. In an action by an employee for injuries from the breaking of a defective plank, *held*, that the question whether the defect was so obvious that plaintiff was guilty of negligence in failing to discover it, or so latent that an inspection by defendant would not have revealed it, was for the jury. *O'Dell v. Stewart & Co* 147
7. In an action to recover for death of an employee, the burden is on plaintiff to show some act of negligence which was the proximate cause of decedent's death by a preponderance of the evidence. *Rhine v. Schall Co* 355
8. A servant assumes the ordinary risks incident to the business in which he is employed. *Rhine v. Schall Co* 355
9. Where, in an action for death of an employee, plaintiff fails to show negligence of the employer, the court should direct a verdict for defendant. *Rhine v. Schall Co* 355
10. Where one employed by the year as a traveling salesman offers conditionally to resign his position, but the employer continues him in his employment for more than 30 days, employer cannot thereafter avail himself of the offer to resign. *Nesbit v. Giblin* 369
11. Where an employer does not accept a conditional resignation of an employee employed by the year, he cannot thereafter discharge him without responding in damages, unless the employee is guilty of subsequent misconduct. *Nesbit v. Giblin* 369
12. In an action by an employee for a wrongful discharge, evidence *held* to sustain judgment for plaintiff. *Nesbit v. Giblin* 369
13. Evidence in an action for injuries to an engineer on a through train *held* to show that he was engaged in interstate business at the time he was injured, and hence entitled to sue under the Federal Employers' Liability Act. *Bower v. Chicago & N. W. R. Co* 419
14. Evidence *held* sufficient to justify submission of the question of defendant's negligence to the jury. *Bower v. Chicago & N. W. R. Co* 419
15. Evidence *held* not to require submission of the question of assumption of risk to the jury. *Bower v. Chicago & N. W. R. Co.* 419
16. A traveling salesman *held* not entitled to recover for a month's salary and expenses, where during the month he secretly solicited business for a rival of defendant. *Mattingly v. Manhattan Oil Co* 742

Master and Servant—*Concluded.*

17. In an action by an employee for injuries against a street railway company, it is for the jury to say, under proper instructions, whether the acts proved constitute actionable negligence. *Nelson v. Omaha & C. B. Street R. Co* 857

Mechanics' Liens.

1. A mechanic's lien takes precedence of a mortgage executed and recorded after the first delivery of material at the premises. *Cady Lumber Co. v. Miles* 107
2. Where the first load of material was used to construct a temporary structure occupied by the owner, but was afterward used in completing the dwelling, as was agreed on between the owner and the materialman, *held* that the materialman's lien was superior to that of a mortgage subsequently executed and recorded. *Cady Lumber Co. v. Miles* 107
3. A mortgagee who takes a mortgage with notice that a materialman has commenced to furnish lumber for the erection of a dwelling on the premises is estopped to claim that his lien is superior to that of the materialman. *Cady Lumber Co. v. Miles* 107
4. Statement of lien for stone used in a building *held* too indefinite to authorize a materialman's lien. *Consolidated Stone Co. v. Union P. R. Co* 521

Mortgages. See MECHANICS' LIENS, 1-3.

1. A foreclosure sale of land conveys only the interest of the mortgagor, though the purchaser supposes he is buying the whole title. *Vandervort v. Finnell* 515
2. A foreclosure decree is not a judgment within sec. 482 of the code, and does not become dormant by failure to issue an order of sale within five years. *St. Paul Harvester Works v. Huckfeldt* 552
3. Where a mortgagee purchases uninclosed land at foreclosure sale and takes such possession as its condition will permit, and his title under the foreclosure fails, he becomes a mortgagee in possession, and limitations will not run against the lien of his mortgage. *McKenna v. Pleasant* 581

Municipal Corporations.

1. Evidence in an action for injuries from stumbling over a pile of dirt on a sidewalk *held* to sustain verdict for defendants. *Music v. Adams* 298
2. In an action against a contractor for injuries received from a spike driven in a sidewalk, evidence *held* to support verdict for plaintiff. *Cole v. Gerstenberger* 451

Municipal Corporations—*Concluded.*

3. Three red lights in a street, two a block apart and one between, do not, as a matter of law, warn a pedestrian in the night, when the ground is covered with snow, that there is a continuous embankment along the block. *Meck v. Nebraska Telephone Co* 539

4. Where public authorities attempt to open a street, claiming dedication by the owner, the burden is on them to prove such dedication. *Edwards v. Gill* 761

5. Evidence *held* insufficient to prove dedication of land for a street. *Edwards v. Gill* 761

6. The construction of temporary walks on unimproved streets is governed by sec. 5112, Rev. St. 1913, and not by sec. 5110, requiring a petition of three-fifths of the resident property owners for construction of walks. *Gibson v. Troupe* 770

7. A village ordinance requiring the construction of a temporary sidewalk on an unimproved street, *held* not an ordinance of a general or permanent nature which must be read on three different days pursuant to sec. 5154, Rev. St. 1913. *Gibson v. Troupe* 770

8. Sec. 5011, Rev. St. 1913, requiring an estimate of cost by the city engineer before sidewalks are constructed, does not apply to a village. *Gibson v. Troupe* 770

Negligence. See EVIDENCE, 10. HOSPITALS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 3. RAILROADS. STREET RAILWAYS. TELEGRAPHS AND TELEPHONES, 2, 3.

Negligence is failure to do what reasonable and prudent persons would ordinarily have done under the circumstances, or doing what they would not have done. *Nelson v. Omaha & C. B. Street R. Co* 857

Newspapers. See DRAINS, 5, 6. TAXATION, 8.

Nuisance. See CONSTITUTIONAL LAW, 7.

1. The legislature may confer on private individuals the right to sue to abate a public nuisance. *State v. Fanning* 123

2. Under secs. 8779, 8781, Rev. St. 1913, a building declared to be a nuisance because used for immoral purposes should be closed for all purposes, unless a bond to release same be given as provided in sec. 8781. *State v. Fanning* 123

3. That part of a decree under secs. 8775-8782, Rev. St. 1913, declaring certain property a public nuisance, and enjoining the owner and occupant thereof from further illegal acts, from which no appeal is taken, is final, as to the existence of the

Nuisance—*Concluded.*

nuisance, on appeal from other provisions of the decree. *State v. Fanning* 123

4. Where, in a proceeding for an injunction and to abate a nuisance under secs. 8775-8782, Rev. St. 1913, it appears that persons not parties to the suit owned the furniture in the building, the court cannot order the furniture to be removed and sold. *State v. Fanning* 123

Officers.

1. Where an officer performs an act in the exercise of his office which it is his plain duty to perform, his motives cannot be questioned in an action for damages. *DeBolt v. McBrien* 237
2. Public officers may ordinarily ratify such acts as they could have authorized. *Mizen v. Adams County* 304

Parties. See CORPORATIONS, 6.

Where, in an action by the indorsee of a note against the maker, the maker answers that the note was transferred without consideration, the payee *held* properly impleaded. *Farmers & Merchants Bank v. Tate* 142

Partnership.

Evidence *held* insufficient to prove a partnership. *Donahue v. Hanighen* 180

Physicians and Surgeons.

1. A physician not connected with a hospital, who treats a patient therein, is not liable for negligence of nurses or internes, if he has no connection with any negligent act. *Broz v. Omaha Maternity & General Hospital Ass'n* 648
2. Information *held* to charge the crime of practicing medicine as defined by sec. 2724, Rev. St. 1913. *Harvey v. State* 786
3. It is unlawful to treat professionally and attempt to heal another by manipulation without a license from the state board of health. *Harvey v. State* 786
4. In a prosecution for practicing medicine without a license, every treatment constitutes a separate offense. *Harvey v. State* 786

Pleading. See APPEAL AND ERROR, 5.

1. Matter of defense not pleaded nor in issue in the county court will be stricken from the answer in the district court. *Fairbanks, Morse & Co. v. Austin* 139
2. Petition. in an action by a county supervisor for services rendered from the time his term would have expired until his

Pleading—*Concluded.*

successor qualified, *held* to state a cause of action. *Kerr v. Adams County* 178

3. A petition first attacked in the supreme court as not stating a cause of action will be liberally construed. *Burgeson v. Schultz* 553

4. In an action on contract, an amended petition *held* to plead the same cause of action, though it alleges a different breach of the same contract. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co* 458

5. Refusal to allow amendment of answer *held* error. *Zancanella v. Omaha & C. B. Street R. Co* 596

6. Error cannot be predicated on the allowance of an amendment to a petition, in absence of abuse of discretion. *Rawlins v. Myers* 819

Principal and Agent. See INSURANCE, 16.

1. Where a master directed his physician to care for an injured employee, and the physician took him to a hospital and told the authorities that the master would pay the bill, *held* that the master was bound by the acts of his agent. *Omaha General Hospital v. Strehlow* 308

2. The acts of a self-constituted agent may be ratified by the one for whom such agent has assumed to act, as of the date when the acts were performed. *Schneider v. Modern Woodmen of America* 545

Process.

1. Where the payee is impleaded in an action by the indorsee of a note against the maker, summons may issue to the county in which the payee resides. *Farmers & Merchants Bank v. Tate* 142

2. Service of summons on defendant by leaving a copy with defendant's wife, who was near the house, *held* service at his usual place of residence, as provided by sec. 69 of the code. *Bursow v. Doerr* 219

3. Publication of summons against a nonresident landowner is void, unless an affidavit for service has been filed. *McKenna v. Pleasant* 581

Quieting Title.

1. In a suit to quiet title, plaintiff must succeed only on the strength of his own title. *Stull v. Goold* 263

2. In a suit to declare a trust in land and to quiet title, the burden is on plaintiff to affirmatively establish an equitable title

Quieting Title—*Concluded.*

in himself, and, if he fail to do so, the nature or the existence of any title in defendant is immaterial. *Stull v. Goold*..... 263

3. Where plaintiff failed to establish his title as against a deed to defendant by the receiver of a trust company, and defendant was shown to have taken possession under the deed, plaintiff could not recover. *Stull v. Goold*..... 263

Railroads. See CARRIERS. DRAINS, 1-3. MASTER AND SERVANT, 1, 2. STATE RAILWAY COMMISSION.

1. Sec. 7, art. VIII, ch. 72, Comp. St. 1911, providing for a direct appeal from an order of the state railway commission to the supreme court, is special in its nature, is to be strictly construed, and governs as to procedure on appeal. *Hill v. Union P. R. Co*..... 205

2. An order of the state railway commission will be affirmed, unless there was prejudicial error in the hearing before the commission, or it exceeded its powers, or the order is unreasonable or unjust. *Hill v. Union P. R. Co*..... 205

3. Evidence *held* insufficient to require a reversal of an order of the state railway commission requiring the Union Pacific Railroad Company to construct a depot and install an agent at a county seat on its road. *Hill v. Union P. R. Co*..... 205

4. In an action for the killing of cattle, *held* that the evidence showed that the cattle entered defendant's right of way through a defective fence, thus rendering the company liable. *Kreycik v. Chicago & N. W. R. Co*..... 412

5. The term "through trains" means trains running through a division from one terminal point to the other. *Bower v. Chicago & N. W. R. Co*..... 419

6. That employees of a railroad company know that persons are in the habit of walking along the right of way, and do not forbid them, will not constitute an invitation to use the right of way. *Wanderholm v. Chicago, B. & Q. R. Co*..... 764

7. Running a train behind time, or on a track ordinarily used by trains running in the opposite direction, does not constitute negligence. *Wanderholm v. Chicago, B. & Q. R. Co*..... 764

8. A person walking along a right of way assumes the risk of accident from the ordinary transaction of the company's business. *Wanderholm v. Chicago, B. & Q. R. Co*..... 764

9. That the fireman did not see deceased before he was struck by the engine is not proof that he was neglecting his duty or that the defendant company was guilty of negligence which was the proximate cause of the accident. *Wanderholm v. Chicago, B. & Q. R. Co*..... 764

Railroads—*Concluded.*

10. An instruction that there was no evidence that defendant failed to give warning, and that it had the right to operate its westbound trains on either of two tracks, *held* proper. *Wanderholm v. Chicago, B. & Q. R. Co* 764

Rape. See CRIMINAL LAW, 5, 6.

1. The defendant cannot be convicted of rape on the wholly unsupported testimony of the person against whom the crime was committed. *Dawson v. State* 777

2. Where the person assaulted testifies positively to the facts constituting the crime of rape, other evidence of opportunity and disposition will constitute sufficient corroboration. *Dawson v. State* 777

3. Evidence *held* to sustain a finding that defendant planned the opportunity with the intention of committing the crime charged. *Dawson v. State* 777

4. The crime of rape on a girl under 15 years of age includes the crime of assault with intent to commit rape. *Dawson v. State* .. 777

5. Evidence justifying a conviction of rape will sustain a conviction of assault with intent to commit rape. *Dawson v. State* 777

Recognizances. See BASTARDY, 4.

Replevin.

1. Where a demurrer has been sustained to a petition in replevin, the parties may stipulate the value of the property and the damages sustained by defendant, so as to give the court jurisdiction to render judgment in accordance with the stipulation. *France v. Larkin* 365

2. An execution creditor cannot maintain replevin to recover possession of property released from execution as exempt. *France v. Larkin* 365

Sales.

Petition, in an action for breach of contract for sale of goods, *held* not demurrable. *Serhant v. Gooch Milling & Elevator Co* 754

Schools and School Districts. See ADVERSE POSSESSION, 2. CONSTITUTIONAL LAW, 8.

Sheriffs. See COUNTIES AND COUNTY OFFICERS, 4.

1. A sheriff who performs the duty of jailer is entitled to the compensation provided therefor. *Iler v. Merrick County* 114

Sheriffs—*Concluded.*

2. Where a sheriff is required by a resolution of the county board to occupy rooms in the county jail and to pay $50 a year for fuel and light, he is not liable to the county for rent. *Iler v. Merrick County* 114

Specific Performance.

1. A court of equity will exercise a sound discretion in disposing of a case involving the specific performance of a contract. *Thomas v. Shonsey* 318

2. Where plaintiff had performed a contract for exchange of properties and defendant had partly performed, *held* that defendant's refusal to aid in the mutual invoice of a stock of goods, lumber and coal would not deprive plaintiff of specific performance. *Waldo v. Lockard* 490

3. Where both parties have substantially complied with a contract for exchange of properties, equity may decree specific performance. *Waldo v. Lockard* 490

4. Where lands were to be exchanged subject to certain mortgages and proper deeds were placed in escrow, the fact that the mortgages were not referred to in the written contract is no defense to a suit for specific performance. *Waldo v. Lockard* 490

State Railway Commission. See CARRIERS, 1-3. CONSTITUTIONAL LAW, 11. CORPORATIONS, 14, 15. COURTS. RAILROADS, 1-3. STREET RAILWAYS, 1, 2, 12. TELEGRAPHS AND TELEPHONES, 1.

1. The constitutional amendment (Const., art. V, sec. 19*a*) creating the state railway commission, and ch. 90, laws 1907, enacted pursuant thereto, confer administrative and judicial powers on the commission in addition to its legislative powers. *Hooper Telephone Co. v. Nebraska Telephone Co* 245

2. The state railway commission has jurisdiction, under ch. 79, laws 1913, to order physical connection of telephone lines and exchanges, and, if the parties fail to agree, to prescribe the terms and conditions of such connection, and to apportion the expense. *Hooper Telephone Co. v. Nebraska Telephone Co* .. 245

3. Orders of the state railway commission are presumed to be within the power conferred on it, and will not be reversed on appeal, unless it appears affirmatively from the record that there is error prejudicial to the party complaining or that the commission has exceeded its powers. *Hooper Telephone Co. v. Nebraska Telephone Co* 245

4. When appeal is taken to the supreme court from an order of the state railway commission and the proper bond is given, such

State Railway Commission—*Concluded.*

order becomes final when approved by the court, but the remedies by injunction and mandamus authorized by subd. *e*, sec. 5, ch. 90, laws 1907, are not superseded by such orders. *Hooper Telephone Co. v. Nebraska Telephone Co* 245

5. Appeals from orders of the state railway commission directly to the supreme court, under sec. 7, ch. 90, laws 1907, as amended by ch. 94, laws 1911, are determined as appeals from the district court in a case tried by jury, and will not be reversed unless it affirmatively appears from the record that they are clearly wrong. *Byington v. Chicago, R. I. & P. R. Co* 584

Statute of Frauds. See TRUSTS, 1, 3.

1. The written memorandum required by the statute of frauds (Rev. St. 1913, sec. 2631) may consist of letters between the parties. *Herman Bros. Co. v. Wacker* 102
2. Where several writings are relied on as a memorandum required by the statute of frauds (Rev. St. 1913, sec. 2631), it is not essential that each writing be signed by the party sought to be charged, but the relation between the writings must appear on their face, and cannot be established by parol evidence. *Herman Bros. Co. v. Wacker* 102
3. Where a merchant by letter requested a cancelation of certain items in an unsigned order, and the request was acceded to, and after correspondence he insisted by letter on a cancelation of the whole order, *held* that there was a sufficient acknowledgment in writing of the making of the order to take it out of the statute of frauds. *Herman Bros. Co. v. Wacker* 102
4. The written memorandum of a contract for the sale of goods is sufficient if signed only by the party to be charged. *Serhant v. Gooch Milling & Elevator Co* 754
5. A signed acceptance of an order for goods *held* a sufficient memorandum of sale under sec. 2631, Rev. St. 1913. *McCaffrey Bros. Co. v. Hart-Williams Coal Co* 774

Statutes. See CONSTITUTIONAL LAW.

1. Under sec. 2335, Rev. St. 1913, the full text of an act need not be printed on the face of the referendum petition if the referendum is sought as to the entire act. *Bartling v. Wait* 532
2. Where a portion of an act is to be submitted for a referendum, such portion must be printed on the referendum petition. *Bartling v. Wait* 532
3. Under sec. 1*c*, art. III of the constitution, an appropriation for maintaining the national guard of Nebraska cannot be made the subject of a referendum. *Bartling v. Wait* 532

Statutes—*Concluded.*

4. An appropriation to erect a building for a memorial armory, not being an "expense" under sec. 1*c*, art. III of the constitution, may be made the subject of a referendum. *Bartling v. Wait* 532

5. That part of ch. 53, laws 1907, providing for letting contract to feed prisoners in counties having more than 100,000 population, *held* unconstitutional, and an inducement to the passage of the act rendering the whole act unconstitutional. *McShane v. Douglas County* 664

6. In construing a statute, effect should be given to the legislative intent. *State v. Omaha & C. B. Street R. Co* 725

7. Where the language of an act is abmiguous, resort may be had to the history of its passage to determine its meaning. *State v. Omaha & C. B. Street R. Co* 725

Street Railways. See CARRIERS, 7. MASTER AND SERVANT, 17.

1. The state railway commission has jurisdiction to regulate the services of the street railways of the city of Lincoln. *Herpolsheimer Co. v. Lincoln Traction Co* 154

2. Where a street railway company is operating its railway on certain streets under a city franchise, it will be enjoined from abandoning such service without first obtaining authority so to do from the state railway commission. *Herpolsheimer Co. v. Lincoln Traction Co* 154

3. In operating a motor car and heavy trailer on public streets, a street car company must use the same degree of care with respect to equipment with safety appliances as is usual in the operation of passenger cars. *Gross v. Omaha & C. B. Street R. Co* 390

4. An instruction that it was the motorman's duty "to employ all means at hand to avoid the collision" *held* not erroneous, in view of other instructions. *Gross v. Omaha & C. B. Street R. Co* 390

5. A street car company ordinarily is not liable for accidents resulting from horses becoming frightened by the usual operation of its cars. *Gross v. Omaha & C. B. Street R. Co* 390

6. Where a motorman fails to act in the manner that a person of ordinary prudence would have acted after discovering that a horse has become frightened by the street car, and damage results, the company is liable. *Gross v. Omaha & C. B. Street R. Co* 390

Street Railways—*Concluded.*

7. Where the evidence was conflicting, *held* that the question of negligence was for the jury. *Gross v. Omaha & C. B. Street R. Co* 390

8. Whether defendant was negligent in failing to provide a motor car with a fender *held* a question for the jury. *Gross v. Omaha C. B. Street R. Co* 390

9. Evidence, in an action for injuries from being struck by a street car, *held* insufficient to support judgment for plaintiff. *Sacca v. Omaha & C. B. Street R. Co* 447

10. Plaintiff's evidence that he did not see an approaching street car because of darkness and the absence of a headlight, and on stepping on the track he was struck, and that afterwards he saw the car about two blocks distant, *held* so inconsistent as to have no probative force. *Zancanella v. Omaha & C. B. Street R. Co* 596

11. Evidence *held* insufficient to prove that defendant's negligence was the proximate cause of plaintiff's injuries. *Zancanella v. Omaha & C. B. Street R. Co* 596

12. The words "railroad" and "railway" as used in the physical valuation act (laws 1909, ch. 107) *held* not to include street railways. *State v. Omaha & C. B. Street R. Co* 725

Subrogation.

Where an agent paid taxes under a mistake of fact which discharged a lien on real estate, equity will direct repayment or the preservation of the lien in favor of the person making the payment. *Lee v. Newell* 209

Taxation. See CONSTITUTIONAL LAW, 8. DRAINS, 11. LIFE ESTATES. SUBROGATION.

1. Where, in a suit to redeem from a tax sale, the petition fails to allege payment of taxes for the year preceding the suit, but subsequently an amended petition is filed which alleges such payment, the laches of plaintiff in paying the same will not defeat his action. *Myers v. Musser* 140

2. The "Scavenger Act" should receive a liberal construction in favor of an owner seeking to redeem from a tax sale, and he should be allowed to redeem where full compliance with the statute has not been observed. *King v. Boettcher* 319

3. Notice of expiration of the time of redemption from tax sale must be given before expiration of the time to redeem. *King v. Boettcher* 319

Taxation—*Concluded.*

4. The rights of a purchaser at tax sale and of the owner are determined by the law existing at the time of the sale, and not by a law enacted subsequent to the sale and prior to the application for a tax deed. *Wells v. Bloom* 430

5. The rights of parties to a suit to quiet title against a tax deed *held* determinable under the revenue law of 1901 (Comp. St. 1901, ch. 77, art. I), which was in force at the time of the tax sale. *Wells v. Bloom* 430

6. A tax deed issued in 1904, on a tax sale certificate issued on a tax sale made in 1902, without a previous compliance by the purchaser with sec. 124, art. I, ch. 77, Comp. St. 1901, *held* void. *Wells v. Bloom* 430

7. The owner of land sold at tax sale may proceed at any time within ten years to quiet his title against a void tax deed and to redeem. *Wells v. Bloom* 430

8. Evidence, in an action to recover for publication of notices under the scavenger act, *held* to sustain verdict for plaintiff. *Miles v. Holt County* 855

9. Water-works used to supply the inhabitants of a city and its suburban territory with water are exempt from taxation under sec. 2, art. IX of the constitution. *City of Omaha v. Douglas County* 865

Telegraphs and Telephones. See CONSTITUTIONAL LAW, 10. STATE RAILWAY COMMISSION, 2.

1. Evidence *held* insufficient to show that an order of the state railway commission requiring physical connection between certain telephone systems was impracticable or incapable of execution, or that the commission exceeded its powers. *Hooper Telephone Co. v. Nebraska Telephone Co* 245

2. A telephone company making excavations in public streets must conform to city ordinances requiring guards, signals and barricades for the protection of the public, and failure so to do is evidence of negligence. *Meck v. Nebraska Telephone Co* 539

3. Where a pedestrian fell from an embankment in a street and was run over by a street car, whether there was negligence of defendant telephone company in permitting the embankment to remain longer than necessary and in failing to furnish proper guards, *held* questions for the jury. *Meck v. Nebraska Telephone Co* 539

Trial. See APPEAL AND ERROR. CARRIERS, 4, 6. CRIMINAL LAW. DAMAGES, 4, 5. EVIDENCE, 2, 4. HOSPITALS, 5, 6. HUSBAND AND WIFE, 1. MASTER AND SERVANT, 2, 6, 9, 14,

Trial—*Continued.*

15, 17. RAILROADS, 10. STREET RAILWAYS, 4, 7, 8. TELEGRAPHS AND TELEPHONES, 3. WATERS, 4.

1. In a personal injury case, *held* proper to inquire of a witness who treated plaintiff whether he was employed by an insurance company which had indemnified the defendant employer. *Egner v. Curtis, Towle & Paine Co* 18
2. Statements by counsel in argument, to which exception was sustained and the jury admonished, *held* not ground for reversal. *Egner v. Curtis, Towle & Paine Co* 18
3. Certain conduct and statements of counsel in argument *held* not so clearly outside the scope of legitimate argument that it was error for the court to refuse to prevent it. *Roach v. Wolff.* 43
4. Where counsel makes statements outside the evidence, there is ordinarily no prejudicial error, if the court at once sustains an objection thereto. *Smith v. Royal Highlanders* 790
5. Refusal of request for specific findings, after entry of judgment, is not ground for reversal. *Austin v. Diffendaffer* 747
6. The probative effect of mortality tables is a question for the jury. *Broz v. Omaha Maternity & General Hospital Ass'n* 648
7. Where there is no conflict in the evidence, the court should direct a verdict. *Iler v. Merrick County* 114
8. Where both parties at the close of the evidence request a peremptory instruction, the court may pronounce judgment without submitting issues of fact to the jury. *Fairbanks, Morse & Co. v. Austin* 137
9. An instruction not in accord with the facts and not applicable to the evidence *held* properly refused. *Nesbit v. Giblin* 369
10. Refusal of requested instructions *held* proper, where the instructions given included the matters suggested by the requested instructions. *Cole v. Gerstenberger* 451
11. Where there is evidence to sustain a verdict for plaintiff, a motion for a directed verdict for defendant is properly overruled. *Smith v. Royal Highlanders* 790
12. Instructions should not be incumbered by recital of unnecessary pleadings, or admitted or immaterial facts, or by reference to uncontradicted evidence. *Lang v. Omaha & C. B. Street R. Co* 740
13. Instructions should simplify the questions to be determined by excluding extraneous matter. *Lang v. Omaha & C. B. Street R. Co* 740

Trial—*Concluded.*

14. If instructions, construed as a whole, state the law correctly they are sufficient, though one or more of them, considered separately, may be subject to criticism. *Cunningham v. Modern Brotherhood of America* 827

Trusts.

1. A parol agreement, made at the time of executing a deed, that the grantee shall hold the title to property in trust for the grantor, and when sold pay the proceeds to him, the grantor retaining possession and collecting the rents, is not within the statute of frauds. *Doll v. Doll* 185
2. Where one buys real estate and takes the title in the name of another, the grantee holds the property in trust for the purchaser. *Doll v. Doll* 185
3. Where one buys real estate in the name of another, the trust created is a resulting trust, not affected by the statute of frauds. *Doll v. Doll* 185
4. Where a named trustee has collected the money due on an insurance certificate, he must distribute it according to the terms of the trust. *Baker v. Hardy* 377

Vendor and Purchaser. See BILLS AND NOTES, 1, 2.

1. Evidence in an action to recover remainder of purchase price of land *held* to sustain verdict for plaintiff. *Davey v. Curry* 41
2. One purchasing land with knowledge that a suit is pending to establish a tax lien thereon takes subject to the suit. *Lee v. Newell* 209
3. All persons claiming an interest in or lien upon real estate must take notice of recitations in a duly recorded deed in the chain of title of their grantor. *King v. Boettcher* 319
4. The vendor must ordinarily tender a deed conveying merchantable title before the purchaser can be required to pay the purchase price. *Adler v. Kohn* 346
5. Where a part of the price of land has been deposited in escrow to be paid on delivery of a deed conveying a merchantable title, the vendor cannot claim a forfeiture until such deed has been tendered. *Adler v. Kohn* 346
6. Where a vendor fails to deliver a deed and rescinds the contract with the purchaser's consent, he cannot ordinarily recover purchase money in escrow. *Adler v. Kohn* 346
7. After rescission with the purchaser's consent, the vendor cannot tender a deed and sue for the purchase money in escrow. *Adler v. Kohn* 346

Vendor and Purchaser—*Concluded.*

8. In a suit to rescind and recover the purchase price for failure to furnish an abstract showing good title, *held* that the burden was on plaintiff to show that the abstract furnished did not show a marketable title. *Peterson v. Hultz*..... 406

9. Where a person is under no disability, and has an opportunity to investigate property offered in exchange, and makes a contract of exchange, he cannot rescind on the ground that the property he gave was of greater value than that he received, *Bowers v. Raitt*..... 460

10. Material misrepresentations in description of property by the vendor, relied on by the purchaser, will authorize setting aside a contract for the sale of land. *Bushee v. Keller*..... 736

11. Material misrepresentation of quality or condition of land is ground for rescission, where made under circumstances justifying the purchaser in relying thereon. *Rawlins v. Myers*.... 819

12. A false representation as to the character, location, and value of land, made under circumstances justifying the purchaser in relying thereon, is ground for rescission. *Rawlins v. Myers*..... 819

Venue. See CORPORATIONS, 4. INJUNCTION, 4. INSURANCE, 14.

Waters.

1. Injunction will not lie to restrain the construction of drainage ditches, where the evidence does not clearly show that the water drained will flow on plaintiff's land. *O'Kieffe v. Chicago, B. & Q. R. Co*..... 518

2. Injunction is a proper remedy to prevent the unlawful discharge of surface water on land. *O'Kieffe v. Chicago, B. & Q. R. Co.* 518

3. Irrigation district bonds authorized to be sold to the highest bidder, the proceeds to be used for construction work, *held* not rendered invalid because of delivery directly to a contractor in payment for work. *Orcutt v. McGinley*..... 619

4. In an action for damages from flood waters, evidence *held* to require a directed verdict for defendant. *Alt v. Chicago, B. & Q. R. Co*..... 714

Wills.

1. Where a will authorized the executor to sell land in Alabama and invest the proceeds elsewhere, and the land was sold and the proceeds invested in Nebraska, the conditions of the will touching the right of survivorship between remaindermen will be applied to the land purchased. *King v. Boettcher*..... 319

Wills—*Concluded.*

2. A residuary clause of a will *held* too indefinite for enforcement. *Kepley v. Caldwell* 748

Witnesses. See CRIMINAL LAW, 7. TRIAL, 1.

1. In an action against saloon-keepers for death by violence while intoxicated, certain evidence as to decedent's identity *held* admissible. *Roach v. Wolff* 43

2. Questions propounded on cross-examination to the wife as to a conversation with her husband and relative to her evidence on direct examination *held* not objectionable as calling for a confidential communication. *Whittier v. Wenner* 228