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UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. O. E. HEUER, TREASURER, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,893.

1. **Municipal Corporations:** POWER TO LEVY TAX. A village has no inherent power to levy taxes.
2. **Statutes:** CONSTRUCTION. In order to ascertain the intention of the legislature in the amendment of a statute, the course of legislation on the subject and existing conditions created under the former statutory provisions may be considered.

APPEAL from the district court for Platte county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

*Edson Rich, A. G. Ellick* and *William M. Cornelius,* for appellant.

*C. N. McElfresh* and *Otto F. Walter, contra.*

LETTON, J.

Plaintiff applied for an injunction to prevent the county treasurer of Platte county from collecting for the year 1911 taxes based on a ten-mill levy by the village of Platte Center for a "water-works fund." It is alleged in the petition that the village taxing authorities, made other tax levies for the same year as follows: "For general fund purposes, ten mills on the dollar valuation; for sinking fund on village bonds, six mills on the dollar valuation; for interest on water bonds, two mills on the dollar valuation." Plaintiff also alleged that it paid the taxes based on these statutory levies, and that the ten-mill levy for a water-works fund is void for want of municipal power to make it. Defendant admitted the making of the levies, but pleaded: "That said levy of ten mills for 'water-works fund' was for the maintenance, repair and upkeep of the water-works system and plant used, owned and kept by said village; that the maximum levy for general purposes under the statute was insufficient for this expense, and

that said levy is in all respects valid." To this part of the answer the trial court overruled a demurrer. Plaintiff electing to stand on its petition, the trial court refused to enjoin the collection of the ten-mill levy for a water-works fund. Plaintiff has appealed.

Under the admitted facts, the question of law in dispute is: Had the village the power to make a ten-mill levy for a water-works fund "for the maintenance, repair and upkeep of the water-works system and plant used, owned and kept by said village," the maximum levy for general purposes being insufficient for that purpose? The answer, of course, must be found in the village charter.

Plaintiff takes the position that the village had no inherent power to levy taxes; that express power to make the levy assailed cannot be found in any statute; that the only express power conferred upon the village with reference to water-works was to levy a tax to pay bonds issued to provide for the plant and for the payment of interest on the bonds; that the village charter does not imply the power to levy the tax in controversy. The first proposition is sound. Municipal power to levy taxes is statutory. "It is a rule, requiring the citation of no authorities to support it, that a municipal corporation can levy taxes only for the purposes authorized by statute." *Barkley v. City of Lincoln,* 82 Neb. 181. *State v. Royse,* 71 Neb. 1; *State v. City of Kearney,* 49 Neb. 325; *State v. City of Wahoo,* 62 Neb. 40. But, while this is the general rule, another principle applies in certain cases, and power to levy a tax may be implied from express power given to incur an obligation where the legislature must have intended a tax to furnish means of payment, and there is nothing to rebut the implication. 4 Dillon, Municipal Corporations (5th ed.) sec. 1377. What was the legislative intention?

In 1885 (laws 1885, ch. 20, p. 168) the legislature provided that cities or villages may "levy and collect a general tax in the same manner as other municipal taxes may be levied and collected for the purchase of steam engines and for the purchase, erection, or construction and mainte-

nance of such water-works, or to pay for water furnished to such city or village under contract, to an amount not exceeding five mills on the dollar in any one year." This was in addition to the ten-mill levy for general revenue purposes. The amount was in 1887 (laws 1887, ch. 12, p. 297) increased to seven mills. In 1893 (laws 1893, ch. 8, p. 134) subdivision 15 was again amended, retaining the provision that cities or villages may borrow money or issue bonds for the purchase of steam engines or fire-extinguishing apparatus, and for the purchase, erection, construction and maintenance of water-works, or to pay for water furnished such city or village under contract; but the express provision for the levy of taxes only gave authority to levy and collect a tax "to an amount sufficient to pay the interest and principal of said bonds."

It is a matter of common knowledge and judicial history in this state that many municipalities and towns previous to this time had erected water-works, and others had entered into contracts to pay for water supply for municipal purposes. It could never have been the intention of the legislature to take away the power to levy an annual tax to pay for water supply under such contracts, or to repeal the existing right to raise money by taxation for maintenance of existing works. Construing the section as it now stands, together with section 5108, Rev. St. 1913, that gives the city authorities power to levy any other tax authorized by law, the only reasonable construction that can be given is that the legislature intended that the power to levy for such purposes should still be continued, but that the limitation of the levy to seven mills should be removed. This statute has remained in substantially the same form until now. If we should hold as the appellant desires, the effect would be to say that the legislature meant in 1893 to take away all power on the part of the city authorities to carry out their existing contracts. This it seems to us would be an unreasonable construction, and the implied power to levy the tax remains. The limits of this implied power are imposed by the reasonable necessities of the situation and by the reasonable discretion of

the city authorities. The power is not unlimited, and is subject to review if such discretion is abused.

Judgment

AFFIRMED.

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CARLTON D. HUTCHINSON, ADMINISTRATOR, APPELLEE, V. WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLANT.

FILED DECEMBER 18, 1914. No. 17,902.

1. **Appeal:** EXCESSIVE VERDICT: REVERSAL. Where it is evident that, in fixing the amount of the verdict, the jury disregarded the instruction of the court as to the basis of recovery, and the verdict is so excessive that it must have been the result of passion or prejudice, the judgment will be reversed.
2. **Trial:** INSTRUCTIONS: STATEMENT OF ISSUES. Where a petition contains allegations of fact not supported by any evidence, it may be reversible error to include such statements in that part of the charge of the court defining the issues to be tried, and, if the reviewing court is satisfied that the jury has been misled by so doing, it will be its duty to grant a new trial.

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

*Mahoney & Kennedy, M. F. Harrington* and *H. G. Moorhead,* for appellant.

*Crane & Boucher* and *J. W. Woodrough, contra.*

LETTON, J.

Plaintiff is administrator of the estate of Charles B. Harris, deceased. The action is to recover damages to the next of kin by reason of the death of Harris while in the employment of defendant.

On the 25th of April, 1910, the deceased, with another workman, and a foreman were driving piles with an ordinary pile driver, operated by horse-power, on the premises of the Union Refining Company in Omaha. After a pile

had been driven it was necessary to move the pile driver to the place where the next pile was to be driven. When moving the machine it was customary to lower the hammer. At the time of the accident the hammer, together with another ponderous piece of iron, called the "follower," rested upon a piece of yellow pine scantling 2x4 inches in size, set on edge at a height of about 6 or 8 feet above the sills. This "toggle-bar," as it was called, rested upon the framework between the uprights or "leaders." The apparatus was large and top-heavy, and in moving it upon gas-pipe rollers under the sills it was necessary to use a crowbar as a lever at different points upon the sills to force or "pinch" it forward and in order to straighten its course. The span of the bar between the horizontal timbers on which it rested was about 17 or 18 inches. The hammer was about 16 inches wide, and the hammer and follower together weighed about 2,000 pounds. While moving the pile driver, Moore, the other workman, who was loosening one of the guy ropes and looking up at the rope, saw Harris pass close by him with a crowbar in his hand. In a moment afterwards he heard the breaking of the toggle-bar and the fall of the weight and saw Harris lying with his head under the hammer. He was instantly killed. The negligence alleged is the failure to supply a sufficient and adequate toggle-bar to hold up the weight; that the toggle-bar was of soft pine, weak and knotty, which, though it might hold up the weight while the machine was absolutely quiet, was, as the defendant knew, totally inadequate to sustain the weight during the process of moving the machine. The answer pleads contributory negligence and assumption of risk, and that Harris voluntarily placed himself in a position of obvious danger not within the scope of his employment. A verdict for $10,000 was returned by the jury, on which judgment was rendered.

The verdict is said to be so excessive that it must have been the result of passion or prejudice.

A few years before Harris had lived in North Dakota with his wife and three children, two sons and a daughter. The wife died. The family was kept together for a short

time with a housekeeper, but it separated in the autumn of 1909; the oldest son and the daughter going to live with an uncle in Wisconsin, and the father and younger son coming to Nebraska. In North Dakota Harris had been a tenant farmer, and between seasons had laid cement sidewalks. After coming to Nebraska he followed the same avocations for a time, but had worked for defendant with his team for over five months. The proof as to his earning capacity is not very clear. At the time of his death he owned a two-horse team, wagon and harness, and perhaps a little money; but it is shown that his work was irregular, that, though not a drunkard, he used liquor frequently, and it is not shown after he came to this state that he earned more than enough for his own maintenance, the keep of his team, and such sums as he was contributing to his children. At the time of his death Harris was 43 years old. Harry, the older son, was between 19 and 20; Homer, the younger son, over 18; and Dolly, his daughter, was 15 years of age. The older son testified that before leaving North Dakota he worked for his father; that he was strong and able-bodied, and that after he went to Wisconsin he was self-supporting, although he received money from his father a few times in small amounts. The second son testified that after he came to Nebraska his father did not furnish him any money; that he was and had been self-supporting, and that for the last two years he had been earning $60 a month. Harris paid $2.50 a week for the board of his daughter, and sent her in addition from $5 to $10 or $15 a month. It was the intention of both that, as soon as she was old enough to do so, she should keep house for her father. Considering the whole testimony, it may be doubted whether the sons suffered any pecuniary loss by the death of the father. Under these circumstances, considering the expectancy of the deceased, his earning capacity, the situation of his children, and the amount which he was able to contribute and did contribute to their support, it seems apparent that the jury disregarded the instruction of the court with respect to the measure of damages which limited recovery to pecuniary

loss, and that the verdict must have been the result of passion or prejudice.

Complaint is made of an instruction given with respect to expert evidence. We find no error in this instruction, which is widely different from that given in *Hayden v. Frederickson,* 59 Neb. 141.

Complaint is made of instruction No. 6. The jury were told that in order to recover the plaintiff must establish that the toggle-bar was of insufficient strength, and then proceeded: "Should the plaintiff so prove, and, *it not appearing that the deceased assumed the risk that caused his death or was guilty of contributory negligence,* plaintiff would be entitled to a verdict at your hands," etc. It is said that by this language "the court told the jury that neither contributory negligence nor assumption of risk appeared from the evidence." The phrase evidently means "and, if it does not appear," etc. We doubt whether this expression misled the jury, but it would avoid the possibility of misapprehension to change its form upon another trial. It is possible that jurors of foreign birth, unused to our idioms, might mistake the meaning.

The trial court was correct in holding that it was improper for the plaintiff, upon rebuttal, to attempt to prove that the toggle-bar was not sufficient and was not a usual and customary appliance. This should have been done upon the main case. As the case now stands, with the testimony upon this point, of a single witness who had comparatively little experience with pile drivers upon the one side, and that of a number of experienced bridge builders, some of them disinterested, upon the other, it is a close question whether the evidence supports the verdict. Upon a new trial the condition of the evidence in this respect may be different.

Complaint is made that the court did not properly state the issues. We are again moved to criticize the practice of copying the pleadings in full as a method of stating the issues to the jury. In this case the trial judge, in instruction No. 5 gave a clear, succinct and satisfactory statement of the issues as to negligence which the jury were

called upon to determine. The inclusion of the entire pleadings in the charge, which contained some allegations in the petition which were not supported by the evidence, may have operated to the substantial prejudice of defendant. Jurors are not lawyers, and are not always prepared to discriminate between that portion of a lengthy charge which contains statements made in pleadings, and the remainder of it. A clear, concise and terse statement of the issues is much to be preferred to the involved legal verbiage often found in formal pleadings, and is much more easily apprehended. Where a petition contains allegations of fact not supported by any evidence, it may be reversible error to include such statements in that part of the charge of the court defining the issues to be tried, and, if the reviewing court is satisfied that the jury has been misled by so doing, it will be its duty to grant a new trial.

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

REVERSED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

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GEORGE BRAUN, APPELLANT, V. M. D. PEET, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,880.

1. **Appeal:** DISMISSAL: HARMLESS ERROR. The dismissal of a civil case for insufficiency of the evidence to sustain a verdict in favor of plaintiff, instead of giving a peremptory instruction for defendant, is not reversible error.
2. **Landlord and Tenant:** EVICTION: NOTICE TO VACATE. Mere notice to vacate leased land does not amount to an eviction of a tenant who disregarded it, remained in undisturbed possession several months, and voluntarily vacated the premises.
3. ———: ———: REPAIRS. The failure of a landlord to furnish materials for repairs according to the terms of his lease does not amount to an eviction, where the tenant has not been damaged by that breach of covenant.

4. **Appeal:** DISALLOWANCE OF NOMINAL DAMAGES. The disallowance of nominal damages to which plaintiff is entitled in an action for breach of contract is reversible error, where it affects a substantial right or prevents him from recovering costs; but the rule is otherwise, if he is not thus injured.

5. **Landlord and Tenant:** EVICTION: ACTION FOR DAMAGES: EVIDENCE. Evidence of the landlord's purpose to eject the tenant is immaterial in an action by the latter to recover damages for an eviction of which there is no proof.

APPEAL from the district court for Keya Paha county R. R. DICKSON, JUDGE. *Affirmed.*

*Ross Amspoker* and *Lear & Lear,* for appellant.

*J. A. Douglas, contra.*

ROSE, J.

This is an action to recover from defendant damages in the sum of $5,000 for evicting plaintiff from leased land and for violating provisions of the lease. For the term of five years from March 1, 1911, defendant leased to plaintiff, for a share of the profits, a ranch in Keya Paha county, and agreed to stock it and to furnish necessary materials for repairs. Plaintiff pleaded that defendant took away three head of cattle; that he failed to provide corn for feed; that he refused to furnish materials for repairs; and that he notified plaintiff November 14, 1911, to vacate the premises. Defendant denied eviction and liability for damages. The case was tried to a jury. At the close of plaintiff's testimony the trial court dismissed the action for insufficiency of the evidence to establish the cause of action pleaded, and discharged the jury. Plaintiff appeals.

The dismissal is challenged as erroneous because the proper practice, if plaintiff failed to prove his case, was to direct a verdict for defendant. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, it is not reversible error to dismiss the action, instead of giving a peremptory instruction for defendant. *Zittle v. Schlesin-*

*ger,* 46 Neb. 844; *Thompson v. Missouri P. R. Co.,* 51 Neb. 527.

It is argued that the case should have been submitted to the jury. The solution of this question depends on the sufficiency of the evidence. It is conceded that plaintiff was notified by defendant to vacate the demised premises November 14, 1911. In addition, there is proof tending to show that defendant took away three head of cattle and afterwards said he would "make it right;" that he refused to furnish materials for repairs; and that plaintiff expressed a purpose to surrender possession unless defendant would furnish corn for feed. Plaintiff, however, remained on the ranch until January 16, 1912. There was no attempt to evict him by legal process. While defendant had agreed to pay a portion of the cost of grain, if necessarily purchased for feed, the lease, when properly construed, did not obligate him to furnish it. On the facts proved, plaintiff voluntarily surrendered the demised premises. Under the circumstances of this case, the notice to quit, when considered with all other acts of the parties, did not amount to an eviction.

While there is evidence that defendant took three head of cattle away from the ranch, and that he violated his agreement to furnish materials for repairs, there is nothing to show the extent to which plaintiff was damaged in those respects. From the proofs, the jury could not have estimated any substantial damage to plaintiff, and the trial court properly refused to submit that question to them. It is nevertheless insisted, on the undisputed facts, that plaintiff was entitled to nominal damages for breach of the covenant to furnish materials for repairs, and that therefore the dismissal was erroneous. The failure to allow nominal damages is reversible error, where it affects a substantial right of plaintiff or prevents him from recovering costs. *Mollyneaux v. Wittenberg,* 39 Neb. 547. The rule, however, is otherwise where plaintiff is not thus injured. *School District v. Burress,* 2 Neb. (Unof.) 554; *Heater v. Pearce,* 59 Neb. 583. For the trial court's failure to allow plaintiff nominal damages, he is

not entitled to a reversal for the following reasons: Not having adduced evidence of actual damages, no substantial right of plaintiff was affected by the dismissal. On the merits of the case, a judgment for nominal damages was the full measure of plaintiff's right to a recovery. That relief would not have entitled plaintiff to costs, because it was grantable by a justice of the peace. *Rev. St.* 1913, sec. 8168 (Code, sec. 621); *City of Hastings v. Mills*, 50 Neb. 842.

Complaint is made because the trial court excluded offered evidence that defendant had a fixed purpose to evict plaintiff. Eviction was not shown, and proof of the abandoned purpose mentioned was properly excluded.

Rejection of evidence that defendant said he had no corn for feed and could get none is also assailed as erroneous. This assignment of error is based on a misinterpretation of the lease, and is without merit. Other assignments of a similar nature are also overruled.

Finding no reversible error in the record, the judgment is

AFFIRMED.

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

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MARY BEBER, ADMINISTRATRIX, APPELLANT, V. BEEBE & RUNYAN FURNITURE COMPANY, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,881.

**Appeal:** DISMISSAL: EVIDENCE. Where the evidence is insufficient to sustain a verdict for plaintiff, the dismissal of the action is not erroneous.

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

*F. W. Fitch*, for appellant.

*Francis A. Brogan* and *Anan Raymond, contra.*

ROSE, J.

For alleged negligence resulting in the death of Wyman Beber, his widow, as administratrix of his estate, brought this action against his employer to recover damages in the sum of $15,000. At the close of the testimony on behalf of plaintiff, the trial court sustained a motion to dismiss the action on the ground that the evidence was insufficient to sustain a verdict in her favor. From the judgment of dismissal, she has appealed.

Beber and a fellow-servant were engaged in moving dressers in a room in defendant's warehouse in Omaha, December 28, 1910. They sat on the floor, braced their feet against a cleat, and with their backs pushed four dressers piled one upon another; each being wrapped in excelsior and burlap and resting upon its back. While they were thus at work, the top dresser struck another pile, fell on Beber, and fatally injured him. The negligence imputed to defendant consisted in ordering Beber from his regular employment as a glass crater to the unfamiliar and dangerous task of moving dressers and in requiring him to perform his new duties without sufficient help. It is argued by plaintiff that negligence in these respects was the proximate cause of the injury.

Is there any evidence that the order amounted to negligence under all of the circumstances proved? While Beber was a glass crater, he had, when not thus engaged, frequently worked at different times for two months at moving dressers. He was familiar with that work in the room where he was injured, though he was not used to the actual pushing—an exertion within his strength, but not the proximate cause of his injury. Evidence that it was his duty, when not engaged at his regular employment, to be busy at something else is uncontradicted. When the order was given, he obeyed without complaint or protest. There was no latent or hidden danger. Beber was an employee of mature years and of ordinary intelligence. The dangers incident to the motion resulting from physical exertion of employees and to the ordinary operation of familiar laws

of gravitation were open and obvious. The order, under the uncontradicted proofs, was not given under circumstances requiring the master to warn the servant of the dangers mentioned. *Lewis v. Koller & Smith,* 186 Fed. 403. It is clear that there was no evidence of negligence in the giving of the order. It follows that the trial court did not err in refusing to submit this issue to the jury.

Is there evidence that the employee was required to engage in an unfamiliar and dangerous work without sufficient help? A pile contained from three to nine dressers and was generally moved by three men, one to steady it and two to push it. The pile being moved when the accident occurred contained four dressers. Beber and his fellow-servant were strong enough to move it, but plaintiff insists that the foreman went away without leaving any one to steady the pile, while it was being moved in the manner already described. In this connection it is also argued that Beber was required to go ahead with his work in the absence of the foreman. There is proof that the foreman went away temporarily without leaving any one to steady the pile, but there is no proof of actionable negligence in these respects. The instruction to keep busy was a general order previously given to all employees. There is no evidence that the foreman directed the work in hand to proceed in his absence. Beber knew from observation and personal experience the purpose of steadying a pile, while it was being moved. There is evidence tending to show that a broken, projecting leg of the dresser which fell on Beber caught on a pile he had just assisted in moving. He did not ask for more help or wait for the foreman's return. Knowing obvious conditions and dangers as well as his master he voluntarily proceeded with his work. Under familiar principles of law, these are circumstances under which a master is not chargeable with actionable negligence for failure to furnish more help for the work in hand.

The proofs do not show that the accident itself, when considered with all of the attending circumstances, neces-

sarily involves actionable negligence on part of defendant. The dismissal, therefore, was without error.

AFFIRMED.

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

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JOHN STEINER ET AL., APPELLANTS, V. FRANK STEINER, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,888.

Waters: SURFACE WATERS: RIGHT TO INCREASE FLOW. In the interest of good husbandry, the flow of surface waters along natural depressions or drainways through farm lands may be accelerated and incidentally increased by artificial means.

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

*L. S. Hastings* and *E. A. Coufal,* for appellants.

*Matt Miller* and *Cain & Mapes, contra.*

ROSE, J.

The relief sought is an injunction to prevent defendant from collecting surface waters in a drainage ditch on his own farm and discharging them upon the lands of plaintiffs. The suit was dismissed. Plaintiffs appeal.

Should a court of equity grant relief to plaintiffs under the evidence? This is the controlling question. The parties are adjoining proprietors, with a public highway between their possessions. Plaintiffs are the owners of the south half of section 27, township 16, range 2 east, in Butler county. Of section 34, directly south, defendant owns the east half of the northwest quarter. The natural course of drainage for both tracts is northward through the lands of plaintiffs. In the drainage basin through defendant's farm there is a winding ravine, which increases in width

toward the north, while its banks gradually decrease in height. In 1911 defendant constructed on his own land from north to south a drainage ditch 2,000 feet long, with the upper end in the ravine and the lower end at the highway. The relief sought, if granted, would require defendant to fill his ditch and to allow the surface waters to take their natural course. Plaintiffs assert that the ditch is constructed with an excessive fall of 27 feet; that defendant's artificial channel will collect and concentrate surface waters and discharge them with increased velocity upon the farm of plaintiffs; that there is no ravine on their lands below the north end of the drain; that the flood waters, when allowed to take their natural course, spread out and run slowly over the highway in a thin sheet 50 rods wide; and that the lands and crops of plaintiffs will be injured by the washing of the surface waters and by the depositing of silt, unless equitable relief is granted. The more convincing proofs, however, lead to the following findings and conclusions:

The ravine or natural drain widens and grows more shallow, forming a swale, as it approaches the highway. After heavy rains the water crosses the highway in a body, perhaps 20 or 30 rods wide. The lower end of the artificial channel is not far from the center of the natural drainage. Negligence in the construction of the ditch is not shown. The fall of the new drain was not excessive under the existing conditions. In a straight ditch it could not have been less. It was not much greater than the fall of the ravine for the same distance. The ditch was constructed in the interest of good husbandry. Both channels would be dry, except after heavy rains or melting snows, and would carry the same water from the same drainage basin to the lands of plaintiffs. At the time of the trial there had been no running water in the new channel. Since the construction of the ditch, a culvert has been placed across the highway.

Of course, the movement of surface water would be accelerated by the change from natural to artificial drainage, because the old channel was long and tortuous, while the

new is shorter and straight. A landowner who is not guilty of negligence may, in the interest of good husbandry, accelerate surface water in the natural course of drainage without liability to the lower proprietor. *Todd v. York County,* 72 Neb. 207; *Perry v. Clark,* 89 Neb. 812; *Arthur v. Glover,* 82 Neb. 528; *Aldritt v. Fleischauer,* 74 Neb. 66. The quantity of water thus discharged upon the land of an adjoining proprietor may be increased. In the second case cited this court quoted with approval the following language of the supreme court of Iowa: "The owner of the dominant estate has the right, by ditches or drains, to drain his own land into the natural and usual channels which nature has provided, even though the quantity of water cast upon the servient estate may be somewhat increased." *Dorr v. Simmerson,* 127 Ia. 551. It is well established by precedent in other jurisdictions that the flow of surface waters along natural depressions or drainways may be accelerated and incidentally increased by artificial means. *Manteufel v. Wetzel,* 133 Wis. 619, 19 L. R. A. n. s. 167, and note; *Hughes v. Anderson,* 68 Ala. 280. The principles announced in the cases cited control the present controversy as disclosed by the facts already outlined. The findings and decree of the trial court are in harmony with these views.

It follows that the judgment is

AFFIRMED.

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

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GEORGE J. STEWART, APPELLANT, V. OLIVER A. RIDENOUR, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,895.

Tax Deeds: VALIDITY: NOTICE TO REDEEM. A tax deed to land is void, if issued by the county treasurer under a sale made by him November 7, 1904, where the purchaser in his notice to redeem stated that the time for redemption would expire November 8,

1906, the statutory period in fact expiring November 7, 1906. Comp. St. 1903, ch. 77, art. I, sec. 214.

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

*Wilcox & Halligan,* for appellant.

*William E. Shuman, contra.*

ROSE, J.

This is a suit to cancel a treasurer's deed to a tract of land in Lincoln county and to permit plaintiff as owner to redeem the land from the tax lien. November 7, 1904, was the date of the sale, and the treasurer's deed was dated November 8, 1906. The notice to redeem stated: The time for redemption will expire November 8, 1906, and if the premises are not redeemed from the tax sale on that day the purchaser will apply to the county treasurer for a tax deed. Plaintiff pleads, among other grounds for relief, that the tax deed is void for failure of the purchaser to comply with the statute in giving notice to redeem. The suit was dismissed, and plaintiff has appealed.

Was the notice fatally defective? The purchaser was bound by a statute requiring him, as a condition of being entitled to a tax deed, to give notice "when the time of redemption will expire." Comp. St. 1903, ch. 77, art. I, sec. 214. Under the constitution and the revenue law, that date was November 7, 1906. The date given in the purchaser's notice was November 8, 1906. Had the tax debtor, as directed by the notice, appeared on the latter date to redeem his land from the tax sale, he would have been one day too late, according to the limitation fixed by statute. The arbitrary terms of a revenue law, which prescribes in definite language the conditions under which a landowner may be divested of title, cannot be changed by construction to meet varying conditions or to conform to the promptings of equity. If a purchaser may extend for a day the period of redemption, why not for a year? A notice to redeem "must contain the precise information re-

quired by statute." *Thomsen v. Dickey,* 42 Neb. 314. Referring to the legislation under consideration, it was said in *State v. Gayhart,* 34 Neb. 192: "The provisions of section 123 of the revenue law relating to the time and manner of giving notice are mandatory, and must be substantially complied with, or the holder of the tax certificate will not be entitled to a treasurer's deed." In considering the same section, the following language was used in another case: "To entitle a party to a tax deed, all the essential requirements of the statute must be complied with, and if any are omitted the title will fail. 1 Cooley, Taxation (3d ed.) 323, 324. As the statute requires the notice to be given at least three months before the time for redemption expires to entitle the purchaser to a deed, there was no authority to give such notice and obtain a deed after the expiration of the time fixed by law to redeem." *Zahradnicek v. Selby,* 15 Neb. 579.

Courts in other jurisdictions hold that the purchaser at a tax sale, in giving the landowner notice to redeem, must comply literally with the statutory requirement to state "when the time of redemption will expire." In this respect the statutes of Nebraska and Illinois were the same. In both states the period of redemption expires in two years. In declaring a tax deed void under a sale June 1, 1885, because expiration of the period for redemption, as stated in the notice, was June 2, 1887, the supreme court of Illinois said: "The notice therefore did not correctly state the time of redemption, and hence was no compliance with the statute. This court has held in several cases that a misstatement in the notice of the expiration of the time of redemption will render invalid the tax deed." *Benefield v. Albert,* 132 Ill. 665. On this question the courts generally are in harmony. *Archer v. Tubbs Sheep Co.,* 25 S. Dak. 399; *Flickinger v. Cornwell,* 22 S. Dak. 382; *State Finance Co. v. Beck,* 15 N. Dak. 374; *Clary v. O'Shea,* 72 Minn. 105; *State v. Nord,* 73 Minn. 1; *Kipp v. Johnson,* 73 Minn. 34; *Kipp v. Robinson,* 75 Minn. 1.

The tax deed on which defendant relies being void, plaintiff should have been allowed to redeem. The judgment

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

REVERSED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

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FRANK SAILLING, APPELLANT, V. CHARLES MORRELL ET AL., APPELLEES.

FILED DECEMBER 18, 1914. No. 17,913.

1. **Contracts:** BUILDING CONTRACT: BOND: LIABILITY OF SURETIES. A stipulation in a contract for the erection of a building, that the contractor will provide all of the materials and perform all the work, constitutes a promise by the contractor to satisfy the lawful claims of mechanics and laborers, and the sureties on his bond for the faithful performance of the contract are liable for a breach of such condition, and such bond inures to the benefit of a mechanic or laborer.
2. ———: BONDS: REFORMATION. Where a surety bond furnished by a contractor contains two inconsistent stipulations, the first of which renders the surety liable for the faithful performance by the contractor of all the conditions in the bond, and the second relieves such surety from liability therefor, the bond may be reformed in equity, when it is made to appear by pleading and proof that the second stipulation was inserted by fraud, or by mutual mistake or inadvertence.
3. **School Trustees:** BUILDING CONTRACT: LIABILITY OF TRUSTEES. Where school trustees, acting as a school board in letting a contract for the erection of a school building, act in good faith and require the contractor to give a bond which they deem sufficient to protect all parties interested, such trustees will not be held individually liable to one who performs work and labor upon such building under employment by the contractor, even though the bond be not conditioned in the exact terms of section 7117, Ann. St. 1911. In order to establish such individual liability, the burden is upon the plaintiff to plead and prove that the action of the trustees was wilfully wrong.

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

*H. D. Rhea, P. E. Horan* and *Mahoney & Kennedy,* for appellant.

*E. A. Cook* and *J. V. Romigh, contra.*

FAWCETT, J.

This action was instituted in the district court for Dawson county, against the defendants individually, for work and labor performed by plaintiff in the erection of a school building in district No. 20, in that county, of which the defendants were trustees. The case was tried to the court without the intervention of a jury. From a judgment in favor of defendants, plaintiff appeals.

That plaintiff and his assignors performed the work and labor upon the school building, as charged, and that he has not been paid therefor, is admitted, and the only question for our decision is: Are the defendants, who were trustees of the school district, individually liable for the amount due plaintiff, by reason of the fact that a bond was not taken from the contractors, by whom the building was constructed, conditioned as required by section 7117, Ann. St. 1911, which provides:

"It shall be the duty of the board of public lands and buildings, boards of county commissioners, the contracting board of officers of all cities and villages, and all public boards now or hereafter empowered by law to enter into a contract for the erecting and finishing, or the repairing of any public building, bridge or other public structure to which the general provisions of the mechanic lien laws do not apply, and where mechanics and laborers have no lien to secure the payment of their wages, to take from the person or corporation to whom the contract is awarded a bond with at least two good and sufficient sureties conditioned for the payment of all laborers and mechanics for labor that shall be performed in the erecting, furnishing, or repairing of the building or in performing the contract; said bond shall be to the board awarding the contract; and no contract shall be entered into by such board until the bond herein provided for has been filed with and approved

by said board. The said bond shall be safely kept by the board making the contract and may be sued on by any person entitled to the benefit of this act. The action shall be in the name of the party claiming the benefit of this act."

It is conceded that the school board did not take from the contractors a bond conditioned as provided in the section quoted, but it is alleged in the petition that the board did in fact require the contractors to furnish a bond, and there is attached to and made a part of the petition the contract entered into between the school board and the contractors, and the bond of the Fidelity & Deposit Company of Maryland, as surety for the contractors. The bond expressly provides that the contract entered into by and between the school board and the contractors "is incorporated herein, and made to form a part hereof." The contract provides: "The contractors shall and will provide all of the materials and perform all the work included in the general plans and specifications for the erection of a school building (giving dimensions and location of the school building to be erected), * * * all to be done in strict accordance and as shown on the plans, details and specifications prepared by the Black Hills Co., Architects, Deadwood, S. Dak., and identified as plan No. 507F, which is plainly marked on each sheet of the plans and details and on the front page of the specifications, and the same hereby becomes a part of this contract." By article 15 the contract provides: "The said parties for themselves, their heirs, successors, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained." It appears, therefore, that the contractors agreed to "provide all of the materials and perform all the work" included in the general plans and specifications for the erection of the school building. This agreement is incorporated in and made a part of the bond. The contractors failed to "perform all the work." By this failure on their part the surety company became liable to the school board to the extent of such failure, and the board has a perfect cause of action against the surety upon its bond.

The fact that the bond is not conditioned as specified in the statute above quoted, is immaterial. If the bond is so conditioned that it protects all persons who performed work and labor under the contract, plaintiff has suffered no loss by reason of the action of the board in taking a bond thus conditioned, instead of one conditioned in the terms of the statute.

In *Lyman v. City of Lincoln,* 38 Neb. 794, which involved the furnishing of material and labor in the erection of two engine houses, the contractors gave a bond to the city "to faithfully perform all the terms of the contract." It also provided: "The contractors shall file with the board of public works receipts of claims from all parties furnishing them with material and labor in the construction of such engine houses." Lyman sued the contractors and their sureties for lumber used in the construction of the buildings: *"Held,* (1) That the clause quoted above from the contract was a promise on the part of L. & S. (the contractors) to pay for all labor and material furnished them in constructing said engine houses; (2) that the statement of L. in his petition, that L. & S. owed him for lumber furnished to and used by them in said buildings, was a sufficient averment of a breach of said bond; (3) that the awarding of the contract by the city to L. & S. was a sufficient consideration to support their promise to pay for the labor and material furnished them in the performance of said contract; (4) that the promise they made to the city of Lincoln was for the benefit of all persons who furnished labor and material used in said contract, and such persons could sue on said bond; (5) that the existence of an express statute or ordinance of the city of Lincoln was not necessary to the authority of the city to require of L. & S. a bond to pay their materialmen and laborers." The trial court sustained a general demurrer filed by the sureties on the bond. This ruling was held to be erroneous.

*Korsmeyer Plumbing & Heating Co. v. McClay,* 43 Neb. 649, was an action on a bond for the erection of a county courthouse. It was stipulated in the contract "that in each case of payment a certificate shall be obtained by the

contractor from the clerk of the county that he has carefully examined the records and finds no liens or claims against said work or on account of said contractor. Neither shall there be any lawful claims against the contractor in any manner, from any source whatever, for work or material furnished on said work." The provision that there should not be "any lawful claims against the contractor in any manner, from any source whatever, for work or material furnished on said work," is no stronger than the agreement in the contract at bar which required the contractors to "provide all of the materials and perform all the work." We held the condition in the contract to be "a promise by the contractor to satisfy the lawful claims of laborers and materialmen, and that the sureties on his bond for the faithful performance of the contract are liable for a breach of such condition."

In *Fitzgerald v. McClay,* 47 Neb. 816, we held: "P. and S. entered into a contract with the state to erect for it a building at a stipulated sum. The contract required, *inter alia,* that the contractor should pay for all labor performed or material furnished, and a bond for the faithful performance of the contract was given. *Held,* That the sureties on such bond are liable to a subcontractor for materials furnished by him and used in the construction of the building." In the opinion by Norval, J. (p. 818), it is said: "The demurrer was, doubtless, sustained upon the ground that the bond was given alone to protect the state, and that third parties could not avail themselves of the stipulations; but since that decision was rendered this court has frequently held, in suits brought on bonds given for the faithful performance of a building contract similar to the one before us, that a person furnishing labor or materials for the principal in such bond may maintain an action upon the bond to recover the price of such labor or materials." Judge Norval cites a number of cases in support of his opinion.

In *Morton v. Harvey,* 57 Neb. 304, the contract was for the erection of a courthouse, and provided that the contractors were "to furnish all material and perform all the

labor." A bond was given for the due and faithful compliance with the obligations of the contract. In the syllabus we held: "A stipulation in a building contract *held* to embody a promise to satisfy true claims of laborers and parties who furnished material in the performance of the contract; also, that this promise of the contract was included in the obligations of the bond given to secure the fulfilment of said contract."

In *Des Moines Bridge & Iron Works v. Marxen & Rokahr*, 87 Neb. 684, we held: "A board of supervisors in contracting for the construction of a courthouse may lawfully require the contractor to pay for the material used in the erection of said building, and a bond executed to secure the faithful performance of that contract inures to the benefit of a materialman."

In harmony with these holdings is *City of Alpena v. Title Guaranty & Surety Co.*, 158 Mich. 678. We think it is clear from the authorities above cited that plaintiff is fully protected by the bond which the school board required of and received from the contractors. This being so, his remedy was a suit upon the bond against the contractors and their surety, and not against the individual members of the school board.

But it is insisted by plaintiff that he could not recover in an action upon this bond, for the reason that it contains this clause: "The surety shall not be liable under this bond to any one except the owner, but it is agreed that the owner, in estimating his damage, may include the claims of mechanics and materialmen, arising out of the performance of the contract, and paid by him only when the same, by the statutes of the state where the contract is to be performed, are valid liens against his property." If the surety company, by reason of this stipulation in the bond, is relieved from liability to plaintiff, then it never incurred any liability whatever upon the bond. If it is not liable for the work performed by plaintiff, it could not be held liable for any default of the contractors, as nothing which any mechanics or laborers might do in the construction of the school building, from start to finish, would ever give them

a lien upon the school property, as the property is exempt by statute from any and all liens by mechanics, materialmen and laborers. If this clause in the contract is to be upheld in a case where the contract is for work upon public property, against which no lien can ever exist, then the entering into such a bond is a delusion and a snare. To so hold would be to permit a surety, with one hand to write into a bond a liability for all materials furnished and work performed in the construction of the building, and with the other hand to write in a clause exempting it from all such liability. It is too evident for serious thought to the contrary that the bond used in this case was the form of bond generally used for contractors under contracts for the construction or repair of buildings for individuals or private corporations, where, in case of a default on the part of the contractor to pay for the materials furnished and labor performed, a lien would attach. Such a clause has no place in a bond given for the faithful performance of a contract upon a public building. That it was not stricken out of the form of bond used in this instance may have been an oversight on the part of all parties concerned at the time the bond was executed. If so, it is subject to reformation.

Regardless of what we have above said, we do not think the defendants are liable individually, for the reason that it is neither pleaded nor proved that their action was wilfully wrong. On the contrary, the evidence clearly shows that defendants acted in good faith and required the giving of a bond which they evidently thought was sufficient to protect all parties interested. For an error of official judgment they are not individually liable. In *Reed v. Conway,* 20 Mo. 22, 43, it is said: "From a careful examination of authorities from the case of *Turner v. Sterling,* 23 Charles II, reported in 2 Ventris, 26, down to our own times, both in the English and American courts, the doctrine that a ministerial officer, acting in a matter before him with discretionary power, or acting in a matter before him judicially, or as a quasi judge, is not responsible to any one receiving an injury from such act, unless the offi-

cer act maliciously and wilfully wrong, is most clearly established and maintained." The nearest we have come to finding any such holding of liability against school trustees in a case like the one at bar is *Owen v. Hill,* 67 Mich. 43, in which two judges of the court were disposed to hold them liable while the chief justice and one other judge declined to so hold. The second paragraph of the syllabus in that case reads: "Whether such trustees are liable *in any event* for such neglect, query—SHERWOOD and CHAMPLIN, JJ., holding them so liable, and CAMPBELL, C. J., and MORSE, J., reserving their opinion on the subject."

Taking the case as a whole, we think it is clear that plaintiff has mistaken his remedy. The judgment of the district court is therefore affirmed, without prejudice to plaintiff's right to institute such other proceedings as he may elect.

AFFIRMED.

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## PARIS G. COOPER V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1914. No. 18,708.

1. **Criminal Law:** ERROR: REVIEW. Where the evidence in a criminal case tried in the county court is certified to the district court in the form of a bill of exceptions, which is used therein to maintain a petition in error filed in that court, this court, in a proceeding in error to review the judgment of the district court, will examine the entire proceeding, and affirm or reverse the judgment of the district court as the law demands.
2. **Municipal Corporations:** DISORDERLY HOUSES: LEGALITY. The maintenance of houses of prostitution may not lawfully be permitted in a city, although the purpose is to segregate immoral persons from the better class of citizens, for the protection of the latter from the force of evil example and dangerous associations.
3. ———: ———: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* sufficient to sustain the judgment of the district court.

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

*Justin E. Porter, William P. Rooney, Earl McDowell* and *Allen G. Fisher,* for plaintiff in error.

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

HAMER, J.

The plaintiff in error, hereafter called the defendant, seeks to review the judgment of the district court for Dawes county. He was tried before the county court under a complaint containing two counts. The first charged him with being the owner of a certain building within the county of Dawes, and with leasing said building to one W. H. Allen for the purpose of keeping therein a house of ill fame and a place for the practice of prostitution and lewdness. The second count charged him with owning and controlling a certain building in said county of Dawes, and unlawfully and knowingly permitting the same to be used by one W. H. Allen and divers other persons for the practice of prostitution and lewdness. There was a trial before the county judge on an amended complaint, which charged that the building specified in the original complaint was situate on lot C, in the town (now city) of Crawford, in said county, and that it was wrongfully and wilfully leased to John Doe and Jane Roe, whose true Christian names were unknown, and for the same purpose as that charged in the original complaint. The second count charged that the building was on lot C, in the town (now city) of Crawford, in said county, and that the defendant wrongfully, unlawfully, knowingly and wilfully permitted said building to be used by Pearl Darrah and Jane Roe for the purpose charged in the original complaint. Another defendant was charged with the defendant herein, but was not arrested. The trial was had on the 11th day of March, 1910, before the county judge, and the defendant was convicted on the first and second counts of the amended complaint, and sentenced to pay a fine of $50 on each count, together with the costs; and there was an objection to the bill of exceptions, but the bill was

finally settled and allowed and filed in the district court. The case was heard in that court, the judgment of the county court was affirmed, and the defendant has brought the case to this court on petition in error. The record contains the bill of exceptions allowed by the county judge and the bill of exceptions allowed by the district court, and the question presented is: Was the evidence sufficient to sustain the judgment.

While the evidence for the prosecution may not be quite as clear and as strong as could be desired in order to sustain the judgment of the county and district courts, it nevertheless sufficiently establishes a very peculiar and unusual condition of affairs. It shows that the defendant and others, of the city of Crawford, in Dawes county, associated themselves together with a view to segregating the immoral persons in said city who were engaged in the practice of prostitution and lewdness from the other residents of the city, and to that end there was built by certain persons, whose names do not very clearly appear in the proof, two houses in which there were to be maintained establishments for the practice of prostitution and lewdness. One Leona Bowdish testified to a residence in Crawford of six years, to knowing the defendant Cooper, and Mr. Hand, Mr. Bruer, the firm of Stanton & Son, and others connected with the unlawful enterprise. She was a stenographer employed in the office of Stanton & Son, and drew up a contract between the Stantons and Mr. Cooper for the construction of two houses on outlot C, at Crawford. The contracts were drawn in September or October, 1909, and were signed by John Bruer, P. G. Cooper, who is the defendant, Joe Hand and C. R. Ivins, also by Stanton & Son. The parties engaged gave her a blank contract and dictated what she should put into the blanks. She wrote in what was dictated to her, and put in the names as she was directed, and Mr. W. H. Allen testified that he rented the two houses; that he made a contract with Joe Hand. Joe Hand is shown by the evidence to have been the "manager." Hand was to collect the rent. Allen was to pay $100 a month for each house. Allen testified that

he paid for the furniture that went into the houses, and that he delivered possession of the houses to Pearl Darrah; that he sold the furniture to her, and assigned his lease to her. He claimed that the lease had been drawn in a lawyer's office in Crawford. He named the lawyer and a man named Winters. He said Winters was a partner with him at the start. He was unwilling to testify whether the name of the defendant, Cooper, was on the lease, but he thought it might have been; but he said Cooper was not in the capacity of running the houses. He testified that Joe Hand, whom he believed to be a policeman in Crawford, was supposed to be the owner.

The lawyer, who received the lease between Allen and Joe Hand, testified that the lease was at once destroyed, and that another lease was drawn up between Joe Hand and Pearl Darrah. A lease between Joe Hand, president of the Crawford Realty Company, and Pearl Darrah was introduced in evidence. The acknowledgment bore date December 23, 1909. It purported to be made between the Crawford Realty Company, by Joe Hand, its manager and president, and the said Pearl Darrah. This lease provided that the rent should be $200 for every month, payable in advance. Joe Hand appears to have paid by checks, $1,597.32, presumably toward the construction of the buildings. He also got a receipt from William Stanton & Son for $1,500. He also got a receipt for $25 from A. O. Antrim. Receipts are in the bill of exceptions for painting and plumbing and heating. There is also in the bill of exceptions a contract concerning the said premises as outlot C, in block No.—. The Pioneer Townsite Company signs this contract, by one B. M. Hewitt, its president. The contract purports to be given by the Pioneer Townsite Company to C. R. Ivins and P. G. Cooper, of Dawes county, and state of Nebraska. It is entitled "Surrendered Contract No. 12,274."

Joe Hand testified that he had some bills in his possession which related to the business "of the Crawford Realty Company, or this real estate." He testified that he had paid the bills; that he also paid the checks. At the sug-

gestion of counsel, he submitted the papers as evidence. He testified that the money was expended upon "the houses on outlot C, the property in controversy." Hand testified that he was street commissioner and police officer of the city of Crawford; that he collected from the tenants of the houses on outlot C any moneys by way of donations, so called, by order of any of the city officers; that he turned the money over to the city treasurer, and took the treasurer's receipt for it. Hand also testified that he had been connected with the enterprise all the time. He testified that he was "manager;" that he had ordered the stuff as manager, and paid the bills as manager; that the company included "whoever they would take on when they incorporated. Q. They have not incorporated yet? A. No, sir. Q. Who appointed you as night watch, or police commissioner? A. Why, the mayor and city council." He then testified that he commenced to collect from the inmates of these houses in December; that he collected $100 in December and $200 in January. He also testified that the contract price for building the houses was $2,500; that that was Mr. Stanton's bill. "Q. Now, you knew all the time you were making these collections that they (the houses) were occupied and used for purposes of prostitution? A. Certainly."

Where the judgment of a court of general jurisdiction is claimed not to be regular, the error alleged must be shown by an exhibition of the record. *Wright v. State,* 45 Neb. 44. This has not been done in this case. We are unable to say that the judgment is not sustained by the evidence.

The judgment of the district court is

AFFIRMED.

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

OSCAR EISENTRAUT, APPELLEE, V. CHARLES MADDEN, APPELLANT.

FILED JANUARY 2, 1915. No. 17,738.

1. **Instructions** to a jury in a lawsuit should be confined to and be in accord with the evidence submitted upon the trial.
2. **Assault and Battery:** ACTION FOR DAMAGES: DEFENSE. The rule that when parties enter into a mutual combat, and the victim in good faith withdraws therefrom and is afterwards assaulted, he may recover damages for such assault, does not apply when one who is assaulted and severely beaten strikes his assailant immediately, in the heat of passion, upon escaping from his attack.

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

*Neal & Armstrong, F. L. Dinsmore, E. F. Warren* and *E. B. Quackenbush,* for appellant.

*S. P. Davidson* and *Hugh LaMaster, contra.*

REESE, C. J.

This is an appeal from a judgment of the district court for Johnson county, wherein plaintiff, Eisentraut, recovered a judgment against defendant, Madden, for the sum of $1,500 on account of personal injuries alleged to have been inflicted upon plaintiff by defendant by unlawfully, and without cause, striking plaintiff upon the back part of the head with a large, heavy, metal scoop shovel, whereby a lasting and permanent injury was suffered by plaintiff, the character and extent of the alleged injuries being fully set out in the petition, together with plaintiff's pain and suffering, physically and mentally. The amount sued for was $10,000. The petition also contains a second cause of action, by which the expenses of the sickness and ailments, consisting of physicians' treatment and medicine, are alleged to the amount of $300, making a total of $10,300 damages alleged to have been suffered. Defendant an-

swered (1) by a general denial; (2) alleging that plaintiff first made an unlawful assault upon him, that he resisted the same only in self-defense, and that he used only such necessary force as was required from the assault and beatings inflicted upon him by plaintiff; (3) that, at the time mentioned in the petition, plaintiff, without lawful excuse or provocation, assaulted defendant, striking him, knocking him down, beating him when down, and inflicting a permanent injury to his right eye, by which the sight of his said eye was greatly and permanently impaired, and, in addition to his pain, suffering and mental anguish, he has been compelled to undergo treatment for his eye at heavy expense, and that he has thereby been damaged in the sum of $10,500, for which he asks judgment. Reply, a general denial. A jury trial was had, with the result above stated. Defendant appeals.

The evidence is conflicting in many respects, but, so far as the facts concerning the alleged assaults are concerned, there is practically an agreement. There was some difficulty between the parties, which seems to have been of a trivial nature. Plaintiff was a school district officer, but, upon the expiration of his term of office, was succeeded by defendant, who claimed there had been some slight irregularity in keeping the books of the office. Owing to some assertion by plaintiff as to his knowledge and ability to properly keep his accounts, defendant styled plaintiff as "Professor," which seemed to nettle him. At times harsher epithets were used by both parties, but this consisted of words only. On the 3d day of December, 1910, a neighbor was engaged in shelling corn, and these parties were called in to assist. Upon defendant's arrival at the place of the shelling, he passed near plaintiff, when he gave his apparently usual salute, "Hello, Professor." This angered plaintiff, who immediately ordered defendant to cease "calling him names." He approached defendant in a menacing manner, shaking his fists, and cursing violently, but to which defendant made little, if any, response, standing still, but holding his scoop shovel in such a position as to ward off any blows which plaintiff might attempt

to inflict. Plaintiff succeeded in breaking defendant's guard, striking him in the face, knocking him down, and immediately sprang upon him, beating him about the face, in the course of which assault defendant received an injury to his eye, which is claimed to be permanent. Defendant, being unable to protect himself, called to his son, who was near-by, to take plaintiff off, which he did. Up to this time plaintiff seems to have been the sole aggressor. Upon being taken off defendant, he started to walk away, probably with his side to defendant. Upon being released, defendant picked up his scoop shovel and struck plaintiff upon the head with the bowl or under side of the shovel, inflicting a small flesh wound, and which felled plaintiff to the ground. The alleged injury to plaintiff appears not so much to be the superficial wound itself as the effect of the blow upon the nervous system. The injury to defendant is alleged to be a rupture to the muscles and membranes of the eye, involving the retina and other parts of the inner eye, caused by the blow on the eye when defendant was knocked down, or thereafter while he was on his back receiving the blows inflicted by plaintiff. From the testimony of physicians and surgeons, as well as other witnesses, it would seem that both parties received more or less serious injuries, from which complete recovery is, to say the least, in doubt.

There is practically no conflict in the evidence as to the beginning of this unfortunate affair. While it was not in good taste for defendant to be derisively calling plaintiff "Professor," yet it did not charge him with the commission of any offense against the laws of the state, nor of the United States, nor did it accuse plaintiff of the violation of public morals, nor in any way slander him, nor hold him up to public contempt, ridicule or scorn. It was not intended as a pleasantry, perhaps, and yet could scarcely be considered so exasperating and defamatory as to excuse the assault which followed. The evidence shows that defendant committed no act which could be construed as a physical attack upon plaintiff, nor a desire to enter into a contest of that kind. Plaintiff was angry,

and approached defendant in a menacing manner, using language which could not be approved in polite society in any ordinary parlor conversation. Prior to the striking of the blow by plaintiff which felled defendant to the ground, defendant's actions were not aggressive, but rather indicated a desire to protect himself against the actual attack of plaintiff. Plaintiff could have withdrawn at any time before striking defendant, and the subsequent events would not have followed. He succeeded in striking defendant, knocking him down, when he sprang upon defendant and followed up the attack by striking and pounding him, until defendant, apparently becoming satisfied that, under the circumstances, he was no match for plaintiff, called for help, and plaintiff was, by force, removed. It may be assumed that defendant was not in the most pleasant frame of mind by that time, and not calculated to act with cool judgment and deliberation. Upon being released, he seized the shovel and dealt the blow of which plaintiff complains, felling plaintiff to the ground. Plaintiff arose, declaring in emphatic and forceful language, but not elegant, that he could whip defendant, but this seems to have closed the incident for the time being.

It is contended by plaintiff that he had abandoned his attack and was moving away when he received the blow complained of; but, if so, the distance to which he had gone is not clearly stated. However, it seems quite clear that he was not far enough away to have given defendant sufficient time to do much in the way of reflection. Otherwise stated, the blow with the shovel was not so long after the castigation received by defendant as to justify holding it to be a separate transaction and not a part of plaintiff's attack. Plaintiff was the aggressor. He committed an unlawful assault upon defendant, the final result of which was evidently not satisfactory to him. To use a common expression, he "got the worst of it." The question then arises: "Can plaintiff, after assaulting defendant, knocking him down, and inflicting an injury upon him, recover damages for what he has suffered and is suffering, which are the natural result of his own act?" We use the words

"natural result," not in the sense of a resulting or necessary effect of previous conditions, but those which might be looked for or expected, when considering the natural effect the treatment, or punishment, suffered by defendant would have upon an ordinary human being. Defendant was smarting under the injuries which he had received. Plaintiff, apparently satisfied with what he had done, claims that he turned to move away, when defendant continued the affray by striking plaintiff.

A kindred question arose in *Fosbinder v. Svitak,* 16 Neb. 499, where we held that a plaintiff could not recover where he had been the original assailant, the first wrongdoer, and, upon receiving injuries resulting from the affray brought on by himself, transfer his cause from the battlefield to the courts. A somewhat similar question was presented in *Taylor v. Clendening,* 4 Kan. 524, although not based upon exactly similar facts. In that case the plaintiff was held to be the aggressor, but his withdrawal from the affray was not as claimed in this case. The court say: "He cannot undertake to wreak an (un) lawful vengeance upon his antagonist—pistol in hand—and, defeated, sue him for damages to the person, upon the basis of the instructions. He must run his own risk. Nor would it be an easy matter for the party, attacked in the manner narrated in the testimony of the defendant, to act with all the deliberation the instruction would seem to require. In the heat of blood he could hardly be expected to weigh his words or to measure or count his blows or shots very carefully."

At the request of plaintiff, the court gave to the jury the following instruction: "The court instructs the jury that the defendant alleges that he acted in self-defense. You are instructed that the law does not permit a person to voluntarily seek or invite a combat, or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any wilful act of his,

or where he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him. Nor is any one justified in using more force than is reasonably necessary to get rid of his assailant. Now, if you believe from the evidence in this case that the defendant, Madden, voluntarily sought or invited the difficulty in which the plaintiff, Eisentraut, was injured, if you believe from the evidence that he was injured, or that the defendant provoked or commenced or brought it on by any wilful act of his own, or that he voluntarily or of his own free will engaged in it, then and in that case you are not authorized to find for the defendant upon the ground of self-defense. In determining who provoked or commenced the difficulty or made the first assault, you should take into consideration all the facts and circumstances in evidence before you."

As we view it, much of this instruction cannot be applied to the evidence in this case. Assuming that the words, "Hello, Professor," can be construed as offering a direct insult, one that would, ordinarily, cause anger on the part of plaintiff, we are yet met with the well-established rule that mere words cannot justify an assault upon the person using them. There was therefore no legal excuse which could justify the attack of plaintiff upon defendant, which the evidence clearly shows he made. Without any just cause or excuse, he made such an attack, knocking defendant down. Plaintiff seems not to have been satisfied with the injury thus inflicted, but followed up the advantage thus gained by springing upon defendant and administering further beatings until defendant called for help, and plaintiff was forcibly pulled off the prostrate body of his victim. We find nothing in the evidence showing that defendant did "voluntarily seek or invite a combat, or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant." Nor can we apply the direction that "the right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any wilful act of his, or where

he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him."

The instruction also submits to the jury the proposition that, if defendant voluntarily sought or invited the difficulty, or if defendant provoked or commenced or brought it on by any wilful act of his own, or if he voluntarily or of his own free will engaged in it, the jury would not be authorized to find for defendant upon the ground of self-defense. There may be no question but that the instruction is sound law when applied to a state of facts coming within the rule, but, as we read the evidence, there was nothing therein to which the rule could be applied, and we are persuaded that the instruction, as written, should not have been given. From an examination of the instructions given on the court's own motion, it is clear that the law was fairly and fully presented to the jury, and all well within the issues in the case, and should have been sufficient.

Substantially, the same instruction was given and approved in *Morris v. Miller,* 83 Neb. 218, annotated in 20 L. R. A. n. s. 907; but there is a clear distinction between the two cases. In the *Morris* case the parties to the affray voluntarily and mutually agreed to enter into the contest, and both were wrongdoers. Therefore the instruction was properly given in that case. As we have shown, the facts in this case were quite different. The rule stated in *Glassey v. Dye,* 83 Neb. 615, is more clearly applicable to the facts of the case at bar than that of *Morris v. Miller, supra.*

While we recognize the established rule that, if a plaintiff wrongfully assaults a defendant, and, upon reflection, or for some other reason, voluntarily withdraws from the conflict, the person assaulted is not justified in following up the withdrawing party, and, after time for reflection, inflict a new and counter assault, and he may, in a proper case, be held liable for any damage arising from his wrongful assault; but that rule must be applied in reason and with a proper consideration for the passions and infirmities

of humanity. In this case the assault was committed by plaintiff with no legal justification or excuse. Had he voluntarily withdrawn from the contest after knocking defendant down, defendant might have been placed in the wrong, had he deliberately followed plaintiff, as he retreated, and renewed the contest by a counter assault; but that is not this case. After striking defendant and knocking him down, he sprang upon him, following it up by beating and pounding defendant, while down, until forcibly pulled off by others who came to defendant's relief. He was certainly willing to continue the punishment of defendant until forcibly compelled to desist. Defendant, while suffering and smarting from the injuries which he had received, arose from the ground, picked up his shovel, which was not necessarily a deadly or dangerous weapon, and gave the blow of which plaintiff complains. Plaintiff is entirely willing to forgive and forget the injuries inflicted upon defendant, but seeks to recover a money compensation for the injury he received in the affray which he inaugurated and followed up until compelled by force to desist, and which was immediately followed by what he received.

We are constrained to believe that the instruction above quoted should not have been allowed.

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

REVERSED.

LETTON and ROSE, JJ., not sitting.

SEDGWICK, J., concurring.

The majority opinion seems to hold that the evidence establishes that the blow of which this plaintiff complains was so connected with the affray which the plaintiff himself brought on that it must be regarded as a part of that affray. If this is the necessary conclusion from the evidence of course the judgment is wrong. I think that the instruction set out in the opinion was not applicable to the evidence, and was therefore erroneous. It was highly prejudicial to the defendant. For this reason I concur in the reversal of the judgment.

WALTER M. FINEGAN, APPELLEE, V. ST. JOSEPH & GRAND ISLAND RAILWAY COMPANY ET AL., APPELLANTS.

FILED JANUARY 2, 1915. No. 17,911.

1. **Railroads:** CONSTRUCTION: CONTRACTOR'S BOND: LIABILITY TO SUBCONTRACTOR. Where a railroad company takes a bond from a contractor for the faithful performance of his contract for the construction of a part of its line of road in the state of Kansas, conditioned substantially as provided by section 7006 of the General Statutes of that state, it will not be liable to a subcontractor for the work of his teams and for profits claimed by him from such contractor.

2. ———: ———: ———: FAILURE TO FILE BOND: SUBCONTRACTOR: RIGHT OF ACTION. The fact that such bond was not filed with the register of deeds of the county where the work was to be performed will not entitle the subcontractor to maintain an action therefor against such railroad company.

3. ———: ———: ACTION: SERVICE ON CONTRACTOR: JURISDICTION. In such a case by the bringing of an action against the railroad company in a county in this state where the subcontractor resides, and serving a summons on the contractor in another county, no jurisdiction is acquired to proceed against the contractor.

4. ———: ———: ACTION BY CONTRACTOR: SUFFICIENCY OF EVIDENCE. Evidence examined, and found to be insufficient to sustain an action in favor of the subcontractor and against the railroad company.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

*Brown & Eastin, Lathrop, Morrow, Fox & Moore, O. W. Pratt, E. A. Wunder* and *John C. Hartigan,* for appellants.

*F. N. Prout* and *Heasty & Barnes, contra.*

BARNES, J.

Walter M. Finegan commenced this action in the district court for Jefferson county against Wood, Bancroft & Doty, to recover a balance alleged to be due him as a subcontractor under them in the construction of certain im-

provements on the line of the St. Joseph & Grand Island Railway Company in Marshall county, Kansas. He joined the railroad company as a defendant, for the alleged reason that the company, in letting the contract to Wood, Bancroft & Doty, failed to take the bond provided for by section 7006 of the General Statutes of Kansas for 1909. Service was had upon the railway company in Jefferson county, and thereupon a summons was sent to other counties, and was served upon Wood, Bancroft & Doty, at their office in Douglas county, and on George F. Bancroft at his residence in Butler county, in this state. The contractors challenged the jurisdiction of the court by demurrer, by their answer, and by objections to the evidence, and in every way reserved the jurisdictional question. The defendant railway company demurred to the plaintiff's petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the company answered over, alleging that Wood, Bancroft & Doty actually gave the company the bond provided for by the section above named. The company also pleaded the Kansas statute and the interpretation thereof by the supreme court of that state. The trial court, on motion of the plaintiff, struck out of the answer of the defendant railway company all of the allegations beginning with the plea of the law of Kansas, and the interpretations thereof by the supreme court of that state, for the reason that all that portion of the answer contained no allegations of fact, but were the conclusions of law of the pleader, and were immaterial, irrelevant and redundant.

The case then went to trial. The plaintiff offered, and the court received, in evidence the bond given by Wood, Bancroft & Doty to the defendant railway company; but the testimony showed that the bond was not filed with the register of deeds of Marshall county, Kansas. The plaintiff also offered, and the court received, the General Statutes of Kansas for 1909, and particularly section 7006, which is the section pleaded by both the plaintiff and the defendant company. The defendant further proved and offered in evidence exhibit 3, which was the subcontract

between Finegan, the plaintiff, and Wood, Bancroft & Doty, and then proceeded to introduce testimony tending to show the work he did under that contract.

The testimony of Finegan, commencing at page 11 and extending to page 42 of the bill of exceptions, relates with much detail the various efforts Finegan made to comply with his contract with Wood, Bancroft & Doty. All of this testimony was objected to by the defendant railway company, on the ground that it was not competent, and did not bind it for any work that the plaintiff did himself; that he had no lien, and no right to charge the defendant company for any work performed by himself; that the defendant company was not bound by anything contained in the contract between Wood, Bancroft & Doty and the plaintiff; that plaintiff could not fix a liability upon the defendant for any money due to him as a subcontractor from Wood, Bancroft & Doty. These objections were made to the court, and appear continually throughout the examination of the plaintiff's witnesses, but were overruled. The plaintiff's entire testimony simply tended to show that there was a balance due to him from Wood, Bancroft & Doty on his subcontract; while the testimony of the defendants Wood, Bancroft & Doty tended to show that there was nothing due plaintiff.

The defendant railway company, at the close of the testimony, requested the following instruction: "Under the pleadings and the evidence in this case, the jury will return a verdict for the defendant, the St. Joseph & Grand Island Railway Company." This instruction was refused, the cause was submitted to the jury, and a verdict was returned for the plaintiff and against both of the defendants for $1,240. Timely motions for new trials were filed by each of the defendants. The motions were overruled, judgment was rendered on the verdict, and defendants have prosecuted separate appeals.

It is the contention of the defendant railway company that the court erred in overruling its demurrer to plaintiff's petition, and that as against it the evidence failed to establish a cause of action in plaintiff's favor. It must

be observed that the plaintiff sought to recover against the railway company for the sole reason, as alleged in his petition, that it failed to take a bond from the contractors, Wood, Bancroft & Doty, as provided by section 7006 of the General Statutes of Kansas for 1909. That section reads as follows: "That whenever any railroad company shall contract with any person for the construction of its road or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics and materialmen, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the register of deeds in each county where the work of such contractor shall be. And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor."

It appears from the testimony that the railway company did take a bond, conditioned for the faithful performance of the contract, from the contractors, which bond, together with a copy of the contract which was attached thereto, appears in the bill of exceptions. It was shown, however, that the bond was not filed with the register of deeds of Marshall county, Kansas, and it is contended by the plaintiff that this fixed the railroad company's liability in his favor. The question of the filing of the bond, however, was before the supreme court of Kansas in *Mann v. Burt,* 35 Kan. 10, and the court said: "On the part of the plaintiff, it is urged that before the railroad company will be exempt from liability for the debts of the contractor it must not only have taken a bond, but it must also have filed the same in the office of the register of deeds; while the claim of the company is that, to escape such liability, it was only required to take a good and sufficient bond; and this it alleges it had done. We agree with the de-

fendant. The statute is so written. Its terms are plain and unmistakable. The language fixing the liability of the railroad company is: 'And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor.' * * * Thus it will be seen that the filing of the bond is not a condition precedent to be performed by the railroad company before it can claim immunity from the payment of the debts mentioned in the statute. It is true that in a preceding part of the statute it is made the duty of the company to file the bond in a public office, and we might agree with the plaintiff that it would add much to the convenience of persons who desire to avail themselves of the benefit of the bond, to have required it to be filed before the company would be freed from liability; but when the legislature came to fix the condition upon which the liability of the company should arise, it provided that it should be liable if it failed to *take* a bond, and not if it failed to take and *file* the same; and the inconvenience occasioned, or the impolicy of the statute, are not considerations for the court."

It thus appears that the failure to file the bond created no liability to the plaintiff on the part of the railway company. It is contended by the railway company that the bond which was actually taken is sufficient in form and substance to comply with the statute, and we are inclined to the view that this contention is well founded.

It is further contended that the plaintiff, as a subcontractor under Wood, Bancroft & Doty, was not entitled to maintain an action on the bond against the defendant railway company. The statute of the state of Kansas, requiring a contractor to furnish a bond, has been construed many times by the supreme court of that state.

In *Wells & Co. v. Mehl,* 25 Kan. 205, the court said: "This may be a remedial statute, as counsel urges; but it is a statute imposing an additional liability, and under which it is sought to hold a party liable for a debt he never contracted. Such a statute should never be ex-

tended beyond the fair import of its terms." The statute in that case was held to be a *quasi* mechanics' lien law.

In *Missouri, K. & T. R. Co. v. Baker,* 14 Kan. 563, Judge Brewer, speaking for the court, said: "Baker sues for services rendered the contractor as 'time-keeper,' and 'superintendent.' Is such a debt one within the scope of the act? We think not. The act provides that the railroad company shall take from the contractor a 'bond, conditioned that such person shall pay all laborers, mechanics, and materialmen, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons,' etc., and, in case of failure to take such bond, that the company 'shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor.' * * * This act does not provide that the company shall be responsible for *all debts* contracted by the contractor, but only those to certain classes of persons. Now, the only class in which Baker can by any sort of construction be placed is described by the term 'laborers.'" The court then proceeded to hold that a time-keeper is not a laborer within the meaning of that term, and concluded as follows: "Counsel contends that this is a remedial statute, and should be liberally construed. But it is also a statute imposing an additional liability, and under which it is sought to make the company responsible for a debt it never contracted. Such a statute should never be extended beyond the fair import of its terms."

*St. Louis, K. & A. R. Co. v. Cobb,* 25 Kan. 388, was an action brought by persons who furnished a subcontractor with provisions and other goods for the subsistence of persons who worked in the construction of the railroad. In that case no bond was taken, and the court held that the question there presented had already been virtually answered in the negative, in the case of *Wells & Co. v. Mehl,* 25 Kan. 205. The court said: "The plaintiff in this case did not furnish anything to be *incorporated into the construction of the railroad itself,* which alone would place him in the first class; and he did not furnish anything *to the*

*contractor,* which we think is requisite to place him in the second class." It was held that the plaintiff in that case could not recover.

In *Atchison, T. & S. F. R. Co. v. Cuthbert,* 14 Kan. 212, where this statute was before the court, it was said: "Now, in this case a purely statutory liability is sought to be enforced. Independent of the statute, there is no law or reason for making the railroad company responsible for the debts of Oxelson & Riney. Hence, a party claiming under this statute must show all facts necessary to bring his case within its terms."

In *Parkinson & Co. v. Alexander,* 37 Kan. 110, it was held: "Laborers, mechanics and materialmen furnishing work or materials in the construction of a railroad are so protected that they may recover against * * * the railroad company where no bond is given, for everything furnished by them which goes into the construction of the railroad, whether such laborers, mechanics or materialmen are employed by the contractor, or by a subcontractor or by a sub-subcontractor; but persons furnishing only provisions, or goods which do not go into the construction of the railroad, are not so protected, unless such provisions or goods are furnished to the contractor himself."

In *Mann v. Burt,* 35 Kan. 10, it was held that the labor of teams is not protected, and where a man and his team were employed "for a certain price per day for the joint labor of both, and no agreement is made respecting the price or value of the personal services of the teamster, the debt will constitute a single and indivisible demand for which the railroad company is not chargeable."

The supreme court of Kansas having thus interpreted the section of the statute in question, this court should follow such interpretation. The whole purport of the section is to protect laborers, mechanics and materialmen, and the words, "or to any person to whom any part of such work is given," should be read in connection with the words which immediately follow, "incurred in carrying on such work." These are the debts covered, and not the debt of an original contractor to a subcontractor. The plaintiff

himself testified on the trial as follows: "Q. Your bills that you contracted down at Carden are all paid, aren't they? A. I don't know that they are all paid. Q. Don't you know, as a matter of fact, they are all paid? A. I don't know that they are all paid, I know part of them is paid; yes, sir. Q. Well, aren't they all paid? You don't owe any teamsters anything down there, do you? A. No, sir; the laborers have all been paid. Q. The laborers have all been paid? A. Yes, sir. Q. The teamsters have all been paid? A. Yes, sir. Q. Your material bills have all been paid? A. Yes. Q. And the bills for your supplies have all been paid? A. Well, I don't know. Q. Don't you know that the very last vestige was settled in a lawsuit down in Marysville, when Wood, Bancroft & Doty paid it? A. I don't know that they have all been paid in full. Q. What did you say? A. I can't say that they are all paid, because I don't know. Q. Now, so far as you have heard, or learned, all these materialmen, or laborers, or supply men, none of them are calling on you now for any money? A. No. Q. Don't you know that they have all been paid? A. I don't know that they have all been paid, I never had no notice that they have all been paid. Q. Now, you did know that a few months ago a judgment was rendered down there? A. Yes, sir. Q. And paid by Wood, Bancroft & Doty? Do you know that Wood, Bancroft & Doty paid that judgment? A. They paid one judgment. Q. Now, you are not suing in this case in order to get money to pay any bills down there, or on behalf of any of these materialmen, supply men, or laborers and mechanics? (Objected to as immaterial, irrelevant, incompetent, and not the proper cross-examination. Sustained. Exceptions.)"

It appears from the evidence, without dispute, that Wood, Bancroft & Doty had taken up the work where the plaintiff left it, and finished it according to the contract with the railroad company; that they had paid all the claims of laborers, mechanics and materialmen, and all other claims of every kind and nature which had been made

against Finegan. Finegan only sought to recover against Wood, Bancroft & Doty for the labor performed by his teams and the profits which he claimed would have accrued to him had he completed his contract. It thus appears that no cause of action existed in favor of the plaintiff and against the railroad company, and the court erred in refusing to instruct the jury to return a verdict in its favor. It also follows that no cause of action existed in favor of the plaintiff and against the railroad company when the suit was brought, and that the defendant railroad company was joined as a defendant with Wood, Bancroft & Doty in order to obtain service upon that firm in Jefferson county, and the court had no jurisdiction to proceed against Wood, Bancroft & Doty. The judgment as to them must also be reversed.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

LETTON, J., dissenting.

The conditions in the bond taken by the railroad company vary widely from those required by the Kansas statute, and it therefore failed to comply with that statute. By the provisions of the statute, if the company fails to take the statutory bond, it becomes liable to pay "all just debts due to such persons or to any person to whom any part of such work is given." While this language is not entirely clear, it is difficult to see what meaning can be given to it unless it means debts due from the contractor to a subcontractor. It is a common expression to say that work "is given" to a contractor or to a subcontractor.

We have been cited to no Kansas case which has construed this language, or which holds that liability to a subcontractor is not included by this statute. The most reasonable view is, it seems to me, that the intention was to include subcontractors.

ROSE and SEDGWICK, JJ., concur in this dissent.

ISAAC F. DOUGLASS, APPELLANT, V. CHARLES BURTON ET AL., APPELLEES.

FILED JANUARY 2, 1915. No. 17,947.

1. **Bills and Notes:** DEFENSES. When a negotiable note is purchased after maturity from an innocent holder who purchased it before maturity for value, the purchaser takes it free from all equities and defenses that existed between the original parties to the paper.
2. ———: ———: DIRECTING VERDICT. In a suit on such a note, it is proper for the trial court to direct a verdict in favor of the plaintiff, where the uncontradicted evidence of witnesses whose credibility is not questioned shows that plaintiff purchased it for value from an innocent holder, who obtained it by purchase for full value before its maturity.

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

*Lambe & Butler* and *J. W. Cole,* for appellant.

*W. S. Morlan* and *C. H. Boyle, contra.*

BARNES, J.

This was an action in the district court for Hitchcock county on a negotiable promissory note, executed and delivered to Robert Burgess & Son by the defendants, on February 7, 1905, due 18 months after date, for $875, bearing interest at the rate of 8 per cent. per annum.

The amended petition was in the usual form, and alleged, among other things, that before the maturity of the note Robert Burgess & Son sold it to Frank N. Ireland & Son (bankers), in due course of business, for the amount due thereon with interest, at a discount of 2 per cent., and that payees indorsed the note as follows: "For value received, I hereby guarantee payment of the within note and waive demand and notice of protest on same when due. Robert Burgess & Son." That afterwards, on April 20, 1911, at Washburn, Woodford county, Illinois, for and

in consideration of $700 paid by plaintiff to said Ireland & Son, said Ireland & Son sold and assigned the note to the plaintiff and indorsed it as follows: "Pay to I. F. Douglass or order. Frank N. Ireland & Son." That plaintiff is the owner and holder of the note, that the same is long past due and wholly unpaid, and there is now due from defendants jointly and severally to plaintiff the sum of $875, with interest at the rate of 8 per cent. per annum, for which the plaintiff prayed judgment.

The defendants, by their answer, admitted that they signed the note as set forth in plaintiff's petition. Denied all of the allegations of the petition not specifically admitted, and alleged a complete defense as against the original payee.

Plaintiff, by his reply, denied the matters of affirmative defense set forth in the answer, and alleged that Frank N. Ireland & Son purchased said note of Robert Burgess & Son a long time before maturity, for full face value, less 2 per cent., and that, at the time of the purchase and sale of said note and delivery of the same and the payment therefor, said Frank N. Ireland & Son had no notice or knowledge of any defense thereto, and that Ireland & Son afterwards sold, assigned and delivered the note to the plaintiff.

The cause was tried to a jury, and a verdict was returned for the defendants. Judgment was rendered on the verdict, and the plaintiff has appealed.

Appellant contends that the verdict is not supported by and is contrary to the evidence. The note was introduced in evidence, and bore the alleged indorsements. Plaintiff introduced the deposition of Frank N. Ireland, who testified, in substance, that on March 7, 1906, at his office in Washburn, Illinois, he bought the note in suit for its face value, and interest, less 2 per cent.; that the money was paid to Robert Burgess & Son, the business being transacted with Charles H. Burgess; that he paid the consideration for the note by a check on the Washburn bank on March 31, 1906, and the note was then delivered to him; that the check was afterwards paid by the bank to

Robert Burgess & Son; that the indorsement was placed on the back of the note and signed by the bookkeeper of Robert Burgess & Son in his presence. Ireland further testified that he kept the note until April 20, 1911, when he sold it to the plaintiff, who paid him at that time the principal and interest to that date, and the indorsement, "Pay to I. F. Douglass or order. Frank N. Ireland & Son," was put on the back of the note by him at the time of the sale to Mr. Douglass; that the note was delivered to plaintiff at that time, since which time the witness Ireland had not had possession of it or any control over it, and that he claimed no interest in it whatsoever. He further testified that when he bought the note from Robert Burgess & Son he had no knowledge of any defense, or that it was claimed that there was a failure of consideration, and that he did not know what the note had been given for. His testimony was corroborated by the evidence of Charles H. Burgess, a member of the firm of Robert Burgess & Son, who also testified that Mr. Ireland was not told what the note was given for, and that Robert Burgess & Son, since the transaction of March 31, 1906, had no interest in said note. The plaintiff testified that he purchased the note in suit of Frank N. Ireland & Son on April 20, 1911, paying therefor the principal and interest due to that time; that the indorsement of Frank N. Ireland & Son was placed thereon at that time in his presence. On cross-examination plaintiff testified, in substance, as follows: The reason I bought the note, I was dickering with Mr. Ireland for several other papers at the same time, and I wanted this piece, and he told me if I bought it at his price he would sell me some other paper at the same time at my price. I had been in Nebraska previous to that time to look at some real estate, and had ascertained the financial responsibility of the parties who signed the note. In the fall of 1910 I investigated the value of some land on which Mr. Ireland was offering to sell me some mortgages, and Mr. Ireland told me to make inquiry as to the ability of the maker of the note to pay it. I inquired generally about McCook, Culbertson and Imperial. The information I

obtained at each place was substantially the same; the makers of the note were good for their contract, and well able to pay the amount due thereon, and their father had considerable property independent of what they had. I never heard of any defense to the note until after I brought this action. None of this testimony was disputed, and there was no evidence introduced impeaching or tending to impeach the testimony of plaintiff or any of his witnesses.

The testimony given by Charles Burton was permitted to go to the jury over plaintiff's objections, and tended to show a defense in the hands of the original payee, and that in June, 1907, Mr. Ireland came out to see the defendant about the note, and the witness told him: "I would not pay the note, and he wanted to know why, and I said I did not have value received, and he wanted to know why it was, and I said the horse had never got a colt, and I showed him my books, and he said, 'If that is the case and I had knowed it, I never would have come here to collect this note or tried to collect it.' * * * He said, * * * 'I will take this note back and turn it back to Burgess & Son,'" The witness further testified that he got notice from Mr. Ireland about the time the note was due which he did not answer; that Mr. Ireland came to see him after the note was due.

At the conclusion of the evidence, the plaintiff moved to strike out defendants' testimony as incompetent, immaterial and irrelevant, and because the testimony did not tend to prove or disprove any of the issues in the case. Plaintiff also moved the court to direct a verdict in his favor. The motions were overruled, to which the plaintiff excepted.

It clearly appears from the evidence that, when the note in suit was sold by Robert Burgess & Son to Ireland & Son, they purchased it for full consideration before maturity in good faith, and in the usual course of business, without notice of any defense thereto, and without any information as to the original consideration for which it was given; that it was sold to the plaintiff after its ma-

turity for its face value. The plaintiff therefore took the note free from all equities and defenses existing between the original parties to the paper. *Koehler v. Dodge,* 31 Neb. 328; *Barker v. Lichtenberger,* 41 Neb. 751; *Jones v. Wiesen,* 50 Neb. 243; *Knight v. Finney,* 59 Neb. 274; *Commissioners of Marion County v. Clark,* 94 U. S. 278.

We find nothing in the negotiable instruments law which in any manner conflicts with the rule stated in the cases above cited. Defendants contended, however, that, while the testimony of plaintiff's witnesses was undisputed and unimpeached, the jury were justified in returning a verdict on inferences to be derived from the evidence; that the jury were not required to accept the evidence introduced by plaintiff as true, though it was not directly contradicted. In support of this contention, defendants seem to rely upon *Ostenberg v. Kavka,* 95 Neb. 314. In that case the plaintiff did not allege that he purchased the note sued on in good faith, and the facts brought out by the testimony are different from those shown in the case at bar. In *Piper v. Neylon,* 93 Neb. 51, it was said: "In a suit on an unpaid, past-due negotiable promissory note, it is the duty of the trial court to direct a verdict in favor of the plaintiff, where the uncontradicted evidence of witnesses whose credibility is not questioned shows that the plaintiff is a *bona fide* holder of the note; that he purchased it for value before maturity, without knowledge of any infirmity therein, or of any facts indicating bad faith in taking it." The facts of that case were very much like those in the case at bar. We are therefore of opinion that the evidence does not support the verdict.

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

REVERSED.

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

ANNA M. LARR, APPELLEE, V. PAUL STEIN ET AL., APPELLANTS.

FILED JANUARY 2, 1915. No. 17,965.

**Judgment:** SUMMONS: SETTING ASIDE RETURN. The return of an officer that he has served a summons cannot be impeached, except by clear and satisfactory evidence; but, if the evidence is sufficient, a judgment based upon a false return may be set aside in equity.

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

*John Macfarland* and *A. J. Kinnersley,* for appellants.

*W. C. Fraser, contra.*

LETTON, J.

Action in equity to set aside a judgment and to recover money paid thereunder. Plaintiff prevailed, and defendant appeals.

The plaintiff, whose name was formerly Petersen, married one Larr in June, 1911. On July 14, 1911, she was sued in justice court under the name of Anna M. Petersen by the defendant Macfarland, who is an attorney at law, to recover the sum of $200, which he alleged was due him for legal services. A summons was issued and a return made by defendant Stein, who was then constable, certifying that he had made personal service upon Anna M. Petersen on the 18th of July, 1911. No appearance was made, and judgment by default was rendered for $200 and costs. This judgment was transcripted to the district court, where certain proceedings in garnishment were had and money seized. In that court plaintiff herein appeared, and moved to dismiss the proceedings on two grounds: First, that the garnishee received the money in his hands as clerk of the district court, and the fund was for that reason not subject to garnishment; second, that the judgment in the justice court upon which the proceedings were based was

null and void. The district court found that Macfarland was entitled to have the money in the hands of the garnishee paid to him upon the judgment, and $185 was so paid.

Plaintiff alleged that she had no knowledge of the proceedings in the justice court until after the garnishment proceedings were begun, that she had never been served with a summons, and that she was not indebted to Mr. Macfarland. The answer pleads the validity of the judgment in the justice court, that the issues in this case were adjudicated in the garnishment proceedings in the district court, and alleges that Mr. Macfarland performed legal services for the plaintiff of the value of $200.

Plaintiff called the constable as her first witness. He testified that he served the summons upon her personally in a two-story boarding or rooming house on Twenty-third street, north of Clark street, in Omaha; that the house was numbered about 1810 or 1812; that plaintiff lived upon the lower floor, and was upon the porch when he served her. He testified that Mrs. Larr, who was in the court room, "is the lady * * * to the best of my recollection." Mrs. Larr testified that, with her husband, she lived until the fall of 1911 at Twenty-fourth and Charles street in a two-story house; that the lower part was rented to another family; that they lived upstairs, and that the entrance to their rooms was by an outdoor stairway; that in September of that year the building was moved a distance of about four blocks to the neighborhood of Twenty-third and Clark street, where they afterwards lived. She testified positively that she never was served with a summons in the justice court case; that she knew Stein by sight, and knew he was a constable, but she never knew that Macfarland made any claim for services, and never heard of the suit until after garnishment proceedings were begun. She testified she had a written contract with Mr. Macfarland, whereby he was to have an interest in a lot for certain service to be rendered, but says that the service was never performed, and that by mutual agreement the contract was canceled and revoked, and he has performed

no service for her of any kind. Mr. Larr testified that during the whole month of July, 1911, he was sick at home, and corroborates her testimony as to living then upstairs at Twenty-fourth and Charles street, and as to the moving of the house. The evidence of these two witnesses as to their residence was not disputed. We are satisfied from the evidence that the summons had never been served.

The questions as to whether plaintiff was indebted to Macfarland for services and whether the surrender of the written contract terminated their relations are more difficult to solve. Both Mr. Macfarland and his stenographer testify to several conversations in Mr. Macfarland's office between him and plaintiff. The stenographer says she heard Mr. Macfarland say he would surrender the contract if plaintiff would pay him. Were it not for the fact of the destruction of the written contract by mutual consent, we would be inclined to take the view that some service at least had been performed, for which compensation should be paid; but, considering all the testimony on this point, and giving the findings of the district court due consideration, we have come to the same conclusion as did that court, and are of the opinion that plaintiff was entitled to the relief prayed.

Defendant contends that the question as to the validity of the judgment was tried and determined in the garnishment proceedings in the district court. The proof shows that no testimony was taken upon this issue, and no finding was made by the court. The court evidently was of opinion that such a collateral attack could not be made upon the judgment.

The judgment of the district court is

AFFIRMED.

BARNES and SEDGWICK, JJ., not sitting.

PHILIP KRUM, APPELLEE, V. SULLIVAN & SCHABERG TRANSFER & FUEL COMPANY, APPELLANT.

FILED JANUARY 2, 1915. No. 17,989.

1. **Jury:** CHALLENGE: PARTY TO PENDING ACTION. The trial of this case took place in December, during the October term of the district court. Upon the *voir dire* it was disclosed that one of the jurors was a member of the board of trustees of the village of Bethany. In the month of October an action in equity brought by certain individuals to disconnect territory from that village had been tried and determined. In that action the summons was served upon this juror. He was challenged for cause under section 8158, Rev. St. 1913, on the ground that he was a party to a suit pending for trial in the court at the term. Under a later statute governing the selection of juries in Lancaster county, the juror could not have been selected or summoned, nor could he have sat in the month of October. He had no personal interest in the action to disconnect territory. *Held*, That under these circumstances it was not erroneous to overrule the challenge.
2. ———: ———: CONSULTATION WITH COUNSEL. It is not reversible error to overrule a challenge for cause, on the ground that the juror has consulted one of the opposite counsel in a legal proceeding.
3. **Master and Servant:** ACTION FOR INJURIES: SUFFICIENCY OF EVIDENCE. Conflicting evidence set forth in the opinion examined, and *held* to be sufficient to sustain the verdict.
4. **Appeal:** ARGUMENT OF COUNSEL. It is erroneous and may be prejudicial for counsel in the closing argument to make improper statements not within the issues. Courts should interfere, even upon their own motion, to prevent an unwarranted appeal to the passions or prejudice of jurors; but, when an objection to an improper remark is sustained, a judgment will not be reversed on account of it, unless this court is of the opinion that the statements have influenced the jury so as to prejudice the substantial rights of the complaining party.
5. **Damages.** Where a teamster 24 years old suffered a compound fracture of both bones of the left forearm, the flesh and tissues were torn and lacerated, he was incapacitated for labor for more than a year, suffered four surgical operations at intervals during this period, lost the control of one finger, the injury resulted in the permanent shortening of the arm, and the bill for surgical

and hospital expenses amounted to over $750, a recovery of $5,026 *held* not to be excessive.

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

*Jesse L. Root, E. C. Strode* and *Max V. Beghtol,* for appellant.

*J. B. Strode* and *G. E. Hager, contra.*

LETTON, J.

Action for personal injuries. Plaintiff recovered, and defendant appeals. The plaintiff was a teamster in the employment of defendant, which is a draying company. At the time of the accident he was about 24 years old. He had worked for defendant for about four months and was earning $47.50 a month. On the day of the accident the defendant was engaged in unloading and delivering two large steam boilers, each six feet in diameter, eight feet long, and weighing about eight tons. Each boiler was upon a separate flat-car. These boilers were unloaded by placing skids so as to form an inclined plane upon one side. An unloading apparatus was then made by making a chain loop around the rail of a side-track, on the other side of the flat-car and parallel thereto, fastening a rope to the chain, thence passing the rope twice around each end of the boiler, bringing the rope back to the chain, where a rope loop was made through which the rope was passed and then wrapped a number of times around the ropes leading to the boiler, at right angles; the free end was then held by a man at right angles to the line, so that when the boiler started to roll down the skids the friction of the wrapped ropes upon the ropes leading to the boiler acted as a brake, and the man holding the end could gradually pay out the rope, and thus control the movement of the boiler down the skids. The first boiler had been unloaded safely in this manner. The testimony shows that this is the usual and customary method of unloading articles of this nature among those engaged in the busi-

ness. Plaintiff's evidence is to the effect that a separate rope was used at each end of the boiler when the first boiler was unloaded, but that at the unloading of the second boiler a rope about 600 feet long was used, each end being made fast to each end of the boiler and the coil of slack placed in the middle between the two end ropes. It was upon January 25, and about 5 o'clock in the evening or later, when the ropes had been placed around the second boiler. The management of the operations was in the hands of Mr. Sullivan, who gave directions to the men employed, of whom there were five. The plaintiff was stationed at one rope and two men were stationed at the other for the purpose of paying out the rope as it descended. When the word was given to start the boiler, it was pried off the flat-car and onto the skids, and instantly the plaintiff was jerked forward, and his arm caught in the loop formed by the slack rope. Both bones of his arm were broken and protruded, and the flesh was severely lacerated, cut and torn.

The particular acts of negligence charged in the petition are that, instead of following the plan used in lowering the first boiler, the defendant changed the manner of placing the ropes about the boiler, and, instead of using two ropes, carelessly and negligently used only one rope for that purpose; that, instead of taking the loose end of the rope in a half hitch around a stable and solid object and wrapping or entwining it about the other portion of the rope in order to give the one holding it greater purchase and holding power defendant carelessly and negligently failed so to do, and carelessly directed the plaintiff to take hold of the rope and permit it to loosen gradually so as to lower the boiler, and that, because of the careless and dangerous way in which the rope had been placed by defendant, when the weight of the boiler came upon it, it failed to hold, and the plaintiff's arm became entangled. The defendant pleads assumption of risk and contributory negligence.

The evidence is clear that, in order to secure sufficient friction to lower such a boiler safely, it is essential that

the rope, after being placed through the loop, be wrapped at right angles a number of times around the ropes leading to the boiler, and that, unless this is done, it would be impossible for two men, one at each end of the boiler, to hold eight tons when rolling down the inclined plane. The principal conflict in the evidence is with respect to whether the rope which the plaintiff was holding was wrapped a sufficient number of times around the boiler rope, and also as to whether there was greater danger in using two ends of a long rope with a loose coil in the middle between the ropes than in using a separate rope for each end. It was shown that, where the ends of a single rope were used, when the end was brought back from the boiler passed through the loop, and wrapped the other ropes, the slack would form a loop, while if two separate ropes were used no loop would be formed. If a man stationed to pay out the rope was suddenly jerked forward, the loop formed by using one rope only would be more apt to catch his arm. We think there is sufficient evidence to sustain the finding of the jury that proper care had not been used with respect to wrapping the rope a sufficient number of times, and that the use of a single rope was more dangerous than the other method.

The first assignment is that the court erred in overruling defendant's challenge to the juror Armstrong. Section 8158, Rev. St. 1913, provides that it shall be sufficient cause for the challenge of a juror, "that he is a party to a suit pending for trial in that court, at that term." The evidence shows that Mr. Armstrong was a member of the board of trustees of the village of Bethany, and that a summons was served upon him as such officer in an action in equity brought by certain individuals to disconnect territory from the village. The case was tried to the court and determined in October, 1912. The present action was tried in December, 1912, at the same term. Under the statute, Mr. Armstrong had not been selected as a juror and did not sit in October. Mr. Armstrong's name did not appear as a party to the suit and he had no personal interest in it. There are two reasons why this assignment

should not be sustained: First. Mr. Armstrong was not, strictly speaking, a party to the suit. If the evidence had indicated a personal interest in the controversy, even though his name did not appear, we might perhaps conclude that the word "party" would be sufficiently broad to include him. Second. The evident object of the statute was to prevent a person from acting as a member of the regular panel, who in all probability would be in close association with his fellow jurors during the term, and whose personal relations with them might be calculated to sway their judgment or gain their favor. This would give him an unfair advantage over his adversary. We have no doubt that it would be reversible error for a court to permit a member of the jury, who had a jury case pending at the time for which he was summoned, to sit as a member of the panel. This would permit the very evil which the statute was designed to correct. Defendant has quoted cases from Tennessee and Illinois holding that the statute is to be construed literally. These cases were decided at a time when courts were much more inclined to enforce technical rules, regardless of the reason of the rule, than they are at present. Considering the circumstances of this case, we can see no prejudice to defendant in retaining this juror.

It is urged that the juror had consulted with Mr. Strode, counsel for the village, who is one of the attorneys for the plaintiff. This, however, while it might justify defendant in using a peremptory challenge in order to remove the juror, is not a ground to excuse a juror for cause under the statute.

It is next contended that the evidence is insufficient to sustain the verdict. We have already stated the substance of the proof. It is said, however, that all the witnesses said the rope was wrapped around twice and that this must be true, otherwise the boiler could not have been stopped when it started to roll. The evidence shows that the plaintiff's arm held the rope from going through the loop. This stopped that end of the boiler. Two men were holding the rope at the other end and apparently stopped

that end. Furthermore, the boiler was blocked as soon as it was learned the plaintiff was caught in the rope. There is a conflict as to whether one or two ropes were used in unloading the first boiler, also in regard to the amount of wrapping of the rope the second time. It is not very clear from the plaintiff's witnesses whether the rope was wrapped around once, or twice, or at all the second time. These witnesses were German, and they had some difficulty in expressing themselves clearly in English. Defendant's witnesses said that Sullivan ran the end of the rope through the loop and gave it three or four twists on the line on both sides. The testimony for the plaintiff, if believed, justified the conclusion that the rope was not wrapped more than twice at the most, while there is testimony that it should have been wrapped at least six times. It is also shown by defendant that if the rope was not wrapped it would be impossible to hold the boiler. It seems clear that the rope was not wrapped sufficiently or the accident would not have happened, and it is also clear that the plaintiff was inexperienced, trusted to Mr. Sullivan, and obeyed his orders.

It is next assigned that the court erred in allowing the attorney for plaintiff to appeal to the prejudice of the jury by referring to plaintiff's family and his property. The remark of counsel to which the first objection was taken is only in the record by inference from the objection, but the court sustained the objection. The jury should also have been told to ignore the statement.

The record also shows that counsel said: "Which will you do, let the Sullivan-Schaberg company go without paying anything, or make a pauper out of him, with these debts on his hands, without giving him anything?" This was objected to and the objection overruled. The question at issue was not whether the plaintiff was or would become a pauper, but it was whether the defendant had been guilty of actionable negligence. But we cannot say that the remark itself excited the passions or prejudices of the jury. The record showed that the plaintiff was a laboring man receiving $47.50 a month; that the accident had prevented

him from working for more than a year; and that he had incurred debts amounting to over $750 for surgical care and hospital expenses. These were evidently the debts referred to. Under all the circumstances, we do not think the statement was prejudicially erroneous. The language of counsel was flamboyant and oratorical. It would have been better to have left it unsaid. Counsel should be scrupulous to avoid improper statements not within the issues, and courts should interfere, even upon their own motion, to prevent an unwarranted appeal to the passions or prejudices of jurors.

It is next assigned that the court erred in allowing a temporary model to be used in the district court. The same model was used in the argument before this court and no serious complaint was made. It assisted us to obtain an idea of the manner in which the ropes were used, and we find no error in allowing its use.

It is next insisted that the verdict was excessive. The evidence shows that both bones of the plaintiff's arm were broken near the wrist; that the flesh and tissues were so torn and cut that only a strip of flesh and skin was left by which the hand remained attached to the arm; that he was six weeks at the hospital the first time, but after going home the wound was dressed every other day for a month. He then returned to the hospital for a second operation. He remained there for three or four weeks. After this the wound was again dressed at his home for about a month. He was compelled to go to the hospital a third time for another operation, where he stayed three or four weeks. After that still another operation had to be performed to withdraw some wires which had been used to hold the bones of his arm together. It is also shown that he suffered pain for more than a year; that he has no control over his first finger and that the left arm is about two inches shorter than the right. The evidence shows that the surgical and hospital charges are over $750. The jury rendered a verdict for $7,526. The district court required a remittitur of $2,500, which was made, so that the ques-

tion before us is whether a recovery of $5,026 is excessive under the facts proved.

The plaintiff endured great pain and suffered permanent injury. Considering the loss of wages during the time that he was entirely incapacitated and the surgical and hospital expenses, there is left as compensation for his suffering, for the shortening of his arm, and for the loss of the use of the first finger about $3,500. We do not consider this excessive.

The judgment of the district court is

AFFIRMED.

BARNES and HAMER, JJ., not sitting.

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## FULLER SHELLENBERGER V. STATE OF NEBRASKA.

FILED JANUARY 2, 1915. No. 18,636.

1. **Criminal Law: EVIDENCE: CONFESSIONS.** The accused, while in a precarious condition from being overheated, was cared for by the sheriff at Burlington, Kansas. Upon his making inquiry as to the relatives of the accused so that they might be notified in order to care for him Shellenberger requested that the officers at Nebraska City be informed, giving as a reason that he had been implicated in a murder near that place. The sheriff wrote to Nebraska City, but the officers referred to took no action. Upon being so informed, accused requested that the sheriff of Nemaha county, Nebraska, be notified, and told that he had been implicated in a murder committed in that county some 13 or 14 years before. He gave the details of the murder at length, which he repeated to the sheriff of Nemaha county when he arrived. *Held*, That the confession being voluntarily made before arrest, and before any accusation had been made, was properly received in evidence.

2. ———: ———: ———. The father of the accused was for years afflicted with Saint Vitus dance. His mother was a woman of violent temper and an epileptic. In his boyhood the accused was also afflicted with Saint Vitus dance. He is below the average in intelligence. The evidence, unaided by the confession, is not sufficient to sustain a conviction. Under these circumstances, every fact tending to throw any light upon the truth or falsity of the confession should be submitted to the jury, and since mental

tendencies, peculiarities and predispositions may extend over a lifetime, the fact that he had made a false confession in 1890 that he was guilty of another murder was not too remote to be admissible in evidence.

3. ———: REVERSAL: EXCLUSION OF EVIDENCE. A double murder was committed near the city of Omaha in 1890. The guilty person was apprehended, tried, convicted, and executed. Soon after the murder, defendant was arrested, charged with complicity in that crime, to which he made a confession. It was afterward shown that the confession was untrue, and the prosecution was dismissed. At this trial, in order to aid the jury to determine the weight to be given to the confession made by accused as to the murder of Bahuaud and to show the abnormal condition of the defendant's mind, it was sought to prove that he had made such previous false confession. This evidence was excluded upon objection by the state. *Held*, That this ruling was prejudicially erroneous.

4. ———: CAUTIONARY INSTRUCTION: POLICE OFFICERS. A cautionary instruction as to the evidence of police officers is only proper to be given when the officer is a witness for the state in the endeavor to convict the accused.

5. ———: EVIDENCE: OPINIONS. A nonexpert witness may, after detailing the facts and circumstances upon which he bases his opinion, give his opinion upon the question of sanity, but he is not permitted to express his opinion without disclosing the facts upon which it is based.

6. ———: IRRELEVANT EVIDENCE. Error cannot be predicated upon the admission of testimony which at the time seems relevant. If by reason of further facts it appears to be irrelevant and prejudicial, defendant should move to strike it from the consideration of the jury, otherwise he cannot complain.

7. ———: INSTRUCTIONS: CONFESSION. An instruction, which stated in direct terms that "the confession of defendant, if he made such confession, is competent evidence to prove his connection with such crime," without further instruction sufficiently qualifying the direct statement under the facts in this case, should not have been given.

8. ———: ———: REASONABLE DOUBT. Instructions given upon the subject of reasonable doubt criticized.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

*John C. Watson* and *Max M. Cohn*, for plaintiff in error.

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

LETTON, J.

Plaintiff in error, hereinafter termed the defendant, was indicted on November 14, 1913, upon the charge that upon the 16th day of June, 1899, he murdered one Julian Bahuaud, in the attempt to perpetrate a robbery, by striking him on the head with a blunt instrument. He pleaded not guilty, was tried, and was convicted of murder in the first degree. The jury fixed the penalty at imprisonment for life, to which term he was sentenced. He brings the case here by proceedings in error.

The proof that a murder was committed is positive and undisputed. Bahuaud was an old man, something of a recluse, who lived alone on a farm a short distance from the village of Julian. On the afternoon of Sunday, June 18, 1899, some neighbors found his body lying on the bed in his house. Decomposition had set in, and it was apparent that he had been dead from 24 to 48 hours, according to the medical testimony. His skull was crushed, apparently by a blow from some blunt instrument. His house had been ransacked, drawers were opened, and a tin box, which apparently had contained papers, was found upstairs with the lid cut open. A print of bloody fingers was on the stairway wall. A chair was displaced and a bench overturned in the kitchen. Some empty dishes and a candle were standing on the table. An inquest was held at once. No clue to the perpetrators of the crime was found.

On June 28, 1913, Sheriff Grubb of Coffey county, Kansas, was called into the country near-by by a telephone message that there was a sick man on the public highway. He went out, and found the defendant lying by the roadside overcome by heat. He took him to Burlington, put him in the jail, and called the county physician. The doctor examined him, and told the sheriff that he was suffering from heat, had a fever, and that he could not tell what might happen. The sheriff told the defendant that the doctor said he was in a bad condition, and, if he had

any people, probably he had better communicate with them so that they could come and get him, or take care of him. Defendant told the sheriff to notify the officers at Nebraska City to come and get him; that he was implicated in a murder which took place there in a big cut near the wagon bridge down by the river. The officers at Nebraska City were notified, but none came. The sheriff testified that, when the officers did not come from Nebraska City, defendant told him about the murder of Julian Bahuaud. He said that he and two other men met in the back part of a barber shop in Julian; that they afterwards met at a street corner and walked upon the railroad to Bahuaud's home; that as they went up they looked in at the window and saw the old man eating his supper, his back towards the door; it was about dusk; that one of them hit him on the head with a stone tied in a handkerchief; that it was not their intention to kill him, but to commit a robbery; that after they found he was dead they carried him and laid him on the bed. He said that he went outside to watch, and the others went upstairs and found a tin box in which they found some money; that they went back up the railroad to town, and he went back to where he was working in the country. The witness asked him about the blood on the wall of the stairway, and he said one of them cut his hand in opening the tin box, and coming down stairs left blood on the wall or the banister.

W. H. Jones, sheriff of Nemaha county, Nebraska, testified that he went to Burlington, saw the defendant in jail at that place, and had three conversations with him. The statements made by defendant, in substance, were the same as those made to Sheriff Grubb, but, in addition, defendant said that it was about eight or half past in the evening, and that the lamp was lighted; that Gibbs slipped in and hit Bahuaud; that the others got about $800 or $1,000 from the tin box, and that he got $200 in money. In the third talk he added that he was working at the time for Henry Levigne, and that he stopped work about the middle of the afternoon that day and went to Julian. After repeated questioning, he finally told him that one

of the men was Frank Gibbs, and that the other was a little fellow called Joe, but he could not remember his last name. On the witness asking if it was Joe Kopf, he said, "Yes, it was." He also told that he remained in the neighborhood of Julian for about a year, when one Sunday he heard a Mr. Cook say, "Let's hang Shellenberger for killing old man Julian;" that he then thought they knew about it, and went away. He afterwards said to the witness he did not see Gibbs strike the deceased. The witness said that he suggested the name of Joe Kopf to defendant because a number of people were suspicious that he was one of the parties who committed the murder.

Mr. Levigne testified that defendant worked for him in June, 1899, and, by referring to his account book, that on the 16th of June he worked three-quarters of the day, being off duty the latter part of the day, and that he did not see him again until next morning. On cross-examination he testified that he did not remember whether defendant was at home for supper that evening, he could not be positive. He also said it was not unusual for defendant to take a half or three-quarters of a day off, and go to town, and that defendant continued to work for him until the 4th of August.

The witness Cook testified to making a joking remark about a year after the event, proposing to hang Shellenberger for Bahuaud's murder. He described the surroundings of the house, and said that the window in Bahuaud's kitchen was a half window, and so high that a man could not look into it from the ground outside, the top of it going close to the ceiling. The house stood about two feet above the ground, and, while one could see out from the inside, he could not see in from the outside. The state also showed by this witness that defendant, a year or two before the murder, worked on an adjoining farm to that of deceased, and lived one winter in a cabin about 30 rods from Bahuaud's house. The foregoing is a much condensed statement of the essential facts proved by the state.

For the defense, one group of witnesses was called to prove that defendant was weak-minded, or defective men-

tally, and that he had a mania or predisposition to make false confessions that he was implicated in serious crimes. Another group, among whom was Kopf himself, was called to prove an alibi for Kopf. Defendant also took the stand. He admitted that he made nearly all the statements testified to by Jones and Grubb, but declared them to be false, and said he could not tell why he made them. He also testified that he remained in the neighborhood of Julian and Nebraska City for four or five years after the remark made by Cook, to which allusion had been made, which he said was made in a joking manner, and to which he paid no attention. A doctor testified that with other physicians he made a physical examination of defendant, and found scars caused by syphilitic lesions, and that syphilis is apt to affect the mental soundness of those afflicted with it, and cause degeneracy, loss of mind or mental capacity.

In rebuttal, two other physicians were called who had participated in the examination of defendant. These testified they found no evidence of syphilis, and that defendant was not weak-minded, but was mentally dull. Several witnesses testified that soon after the murder Kopf's hand was wrapped up.

Over 100 assignments of error are made in the petition in error. We cannot consider them all with due regard to the rights of other litigants.

It is strenuously insisted that the confessions made to Sheriff Grubb and Sheriff Jones were not voluntarily made, and are for that reason inadmissible. At the time these were made defendant was suffering from a heat stroke, and had been taken to the county jail, not because he was accused of any crime, but in order to give him proper care. The statements made by him to Sheriff Grubb, both as to a murder at Nebraska City and the Bahuaud murder, seem to have been entirely voluntary on his part. He was apparently unrestrained except by his own physical condition. No compulsion is shown as to the statement to Sheriff Jones. We have no doubt that the statements made were proper to be received in evidence in connection with all the testimony as to the circumstances under which they

were made, and it was for the jury, and not for the court, to say what, if any, weight should be given to them.

Error is assigned upon the exclusion of the testimony of several witnesses as to a confession made by defendant, years before, that he was guilty of another murder.

The testimony of T. J. Mahoney, of Omaha, was taken out of the hearing of the jury in order to accommodate the witness, and it was afterwards offered on the part of defendant as a deposition by consent of counsel. The gist of Mr. Mahoney's testimony was that in 1890 a Mr. and Mrs. Jones were murdered in Douglas county; that at that time Mr. Mahoney was prosecuting attorney for that county; that one Neal was arrested and charged with the crime; that Neal made a statement which implicated the defendant; that defendant was arrested and taken to Douglas county, and, while in custody, confessed that he went with Neal to the farm where Mr. and Mrs. Jones lived to steal horses and cattle; that he saw Neal shoot them, and that Neal gave him the revolver, which he threw into a stream near-by. Mr. Mahoney then questioned him as to the locality of the crime and the situation of the buildings upon the farm. He did not reply, and seemed unable to do so, but when leading questions which suggested answers were put he brightened up and answered, "Yes;" that most of these questions suggested things contrary to the fact, but that defendant readily answered "Yes" to any of them. A complaint and information was filed against him by the witness, but upon further investigation the prosecution was dropped and Shellenberger discharged. Questions as to the defendant's mental condition at that time were excluded upon objections by the state. Nearly all of this testimony was excluded as too remote and immaterial, and was not read to the jury.

The testimony of H. P. Hayes was taken in the same manner, and much of it excluded as too remote. He testified that he was chief detective of the Omaha police force at the time of the Jones murder; that after Shellenberger was arrested for that crime he talked with him several times with regard to it; that Shellenberger stated, in sub-

stance that he was associated with Neal in the murder, giving details; that upon inquiry it was found that he could not describe anything about the farm, which led to an investigation at Nebraska City, and that following this investigation the defendant was discharged.

George W. Leidigh testified that he had lived in the state of Nebraska for 43 years, had been warden of the state penitentiary, and had been a member of the legislature for several terms; that in February, 1890, defendant worked for him at Nebraska City for a week or ten days putting up ice, and including the 4th of February, which was the date of the Jones murder. He produced a check dated the 4th of February, and stated that he delivered that check to Shellenberger between the hours of 8 and 10 o'clock at night on that day; that he always paid his men in the evening after they were through work; that in the course of business this check was returned to him, and that he afterwards took it to Omaha and delivered it to Mr. Mahoney, who afterwards returned it to him. Both Hayes and this witness positively identified the defendant as being the Joseph Shellenberger who was charged with the Jones murder and who made the confession. The witness was then asked with respect to conversations which he had with defendant at that time, with reference to the confession and other talks and acts of defendant with the object of laying a foundation for his opinion as to sanity. This was objected to and excluded, and an offer to prove denied.

Mr. Chapman, who served as mayor of Nebraska City, and who had lived in Nebraska City for 30 years, testified that the defendant was commonly known by the name of Joe Shellenberger; that his parents lived upon a small farm which the witness owned, and that he was on quite intimate terms with the defendant and his family; that defendant's mother was a woman of high temper, would have tantrums, would go about the house talking to herself, and at times would fight with any member of the family; that she suffered from epileptic fits, would fall down and froth at the mouth; that defendant's father was

afflicted with Saint Vitus dance for many years and finally died from that affliction; that the defendant, when he was a boy on the farm, was afflicted with Saint Vitus dance and was a very nervous boy.

It was also shown that the defendant is without education, unable to read or write, and below the average in intelligence; he had been a wanderer from place to place both before and after 1899, changing his name from time to time, sometimes working as a farm hand or laborer, sometimes apparently engaged in petty crimes. With such testimony in relation to defendant's character and life, and under the peculiar conditions of this case, where the truth of the confession is the most material matter in the controversy, it seems to us essential to a fair trial that every fact which would throw any light upon its truth or falsity should be submitted to the jury. The state insists that the testimony with reference to defendant's confession or implication in the murder of Mr. and Mrs. Jones is too remote in point of time to be of any weight; but it must be remembered that the subject of investigation is the mental condition and peculiarities of defendant, that the motive for the confession is material, and that a peculiar mental bias, weakness or tendency may extend for a lifetime. There is often a persistency in both mental and physical habits that is remarkable, and a defective mind may continue as it was in childhood.

The defendant stood charged with a crime punishable by the extreme penalty of the law. If he is a degenerate or defective, there is the more reason for care and caution that every provision which the law offers for the protection of those accused of crime should be allowed. There are numerous cases upon record where men have voluntarily confessed themselves to be guilty of atrocious crimes, where investigation has proved their innocence, and the confession could only be attributed to a defective or abnormal mentality. This is said, not as indicating or expressing any opinion as to the guilt or innocence of the defendant, but merely to emphasize the necessity of extreme care to allow the accused a full opportunity to make his defense.

After a careful consideration of all the testimony in the record, we are satisfied that without the confession there is not sufficient evidence to sustain the conviction. The most important inquiry therefore—the vital question in the case—is what weight and value should be given to the confession as evidence. To determine this, all the testimony bearing upon defendant's physical and mental condition, both at the time of the confession and before, the tendencies which he may have inherited, his manner of life, and the fact that he confessed to other homicides of which he could not have been guilty, should all be taken into consideration. We are of opinion that evidence as to any fact occurring during the life of this defendant which is in any way calculated to throw light upon the credibilty of his confession is material to the issues, should have been submitted to the jury, and that it was prejudicial to his rights to exclude it.

The court gave the following instruction: "A certain police officer has testified in this case, and you are instructed that under the laws of this state, in weighing his testimony, a greater care should be used, because of the natural and unavoidable tendency of such persons in procuring and stating evidence against the accused." The witness Hayes is the only police officer who was sworn. His testimony was for defendant. Instructions of this nature are countenanced by the courts in behalf of a defendant, in order to call attention of the jury to the fact that the hunting instinct still exists, and that men whose duty it is to prosecute criminals sometimes allow their zeal, perhaps unconsciously, to color or bias their testimony in the endeavor to procure conviction. This is the only reason why such instructions are permitted. If this instruction had any effect, it could only be to disparage the testimony of Hayes.

It is said that the court erred in refusing to permit the defendant to show, by several witnesses called by him, that, in the opinion of each of them, the defendant was insane on the subject of confessions implicating himself in crimes. We think that in the main the court was justi-

fied in excluding this evidence. The settled rule is that a nonexpert may, after detailing to the jury at length the facts and circumstances upon which he bases his opinion, give his opinion upon the question of sanity. Not being an expert, after he has given the facts upon which he bases his opinion, the jury are as well fitted to decide the question as the witness, and he is, therefore, not permitted to express his opinion without disclosing the facts upon which he bases it. This rule of the law of evidence is so elementary as to require no authorities to support it.

Complaint is made with respect to the admission of the testimony of Cook as to the remark that was made by him to Shellenberger which has been alluded to. Since the defendant told this to the sheriff at Burlington, it was proper to allow the witness Cook to testify to it also, as corroboration of the confession and as showing a motive for flight. Its effect as evidence, however, practically disappeared when it was shown that, though Cook had not seen the defendant afterwards until the trial, Shellenberger remained in the vicinity for at least four or five years afterwards. If it was desired to exclude the testimony, defendant should have moved the court to remove its consideration from the jury, since it was only proper to receive it to show a motive for flight on account of fear that his guilt was suspected, and in connection with evidence that he actually fled or went in hiding.

Error is assigned on account of instruction No. 20, which is as follows: "The court instructs the jury that if the prosecution in this case has proved, independent of the confession of the defendant, beyond a reasonable doubt that Julian Bahuaud was killed on the 16th day of June, 1899, as alleged in the indictment in this case, then the confession of the defendant if he made such confession, is competent evidence to prove his connection with said crime, and may, with slight corroboration, be sufficient to convict." The complaint is that there was no proof outside of the confession to show defendant's connection with the crime, and that it was erroneous to say "that the confession of the defendant, if he made such confession, is

competent evidence to prove his connection with said crime." We think there was no error in the preliminary statement as to the fact of the murder, but we agree with the defendant that the latter part of the instruction, which tells the jury that "the confession, of the defendant, if he made such confession, is competent evidence to prove his conection with said crime," is too broad a statement. It is true the confession *may* be competent evidence, but this can only be so if the jury are satisfied that the defendant made it voluntarily and understandingly, and not by reason of mental weakness or obliquity. In other words, the instruction seems to determine as a matter of law that the confession "is competent evidence," while it was for the jury to determine its competency and weight as evidence.

Complaint is made as to the giving of instructions Nos. 12 and 13, defining reasonable doubt. In *Blue v. State,* 86 Neb. 189, in the opinion by Sedgwick, J., some of the language of this instruction is considered at some length and condemned. It is then suggested that the instruction upon reasonable doubt given by Chief Justice Shaw in the trial of Professor Webster for the murder of Parkman (*Commonwealth v. Webster,* 5 Cush. (Mass.) 295, 320), which was expressly approved in this state in *Carr v. State,* 23 Neb. 749, is a model which may well be followed by our trial courts. It was said in *Flege v. State,* 90 Neb. 390, 401, by a minority of the court, and in *Bartels v. State,* 91 Neb. 575, by a divided court, that an instruction similar to No. 12 was erroneous, and was prejudicially erroneous in those cases.

The case is a difficult one. On the one hand, the story told by Shellenberger seems to be corroborated by the physical facts surrounding the tragedy; on the other hand, an abnormal and defective individual, with a vivid imagination uncontrolled by sound reason, living at the time in the neighborhood of the crime, at the house of a man who had attended the inquest, where all the circumstances and details were matters of common discussion and general knowledge, might, years afterwards, relate

these incidents and by an exaggerated egoism, if his mental peculiarities ran in that direction, accuse himself of the crime. Such instances have not been uncommon in the history of criminal law in England and in this country. Even in this state in recent years, unfounded confessions of murder have been made, and the confessing party acquitted when all the facts were disclosed. The defendant may be guilty, but the orderly and impartial administration of justice and the dignity and welfare of the commonwealth demand he be afforded the opportunity to produce before the jury all of the material and competent evidence upon which he relies.

The judgment of the district court is

REVERSED.

ROSE, J., not sitting.

FAWCETT, J. I concur in the views of the majority as general legal propositions, but under the evidence in the record, taken as a whole, I do not think they justify a reversal.

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

FILED JANUARY 2, 1915. No. 18,795.

**Taxation:** BOARD OF EQUALIZATION: INCREASE OF ASSESSMENT: INJUNCTION. Under the provisions of section 6456, Rev. St. 1913, a county board of equalization must adjourn from time to time until the action of the state board of equalization shall have been had and certified to the county clerk. Since the state board is not authorized to meet until the third Monday in July of each year, a petition to enjoin the collection of a tax upon the sole ground that an increase in a personal assessment was made by the county board of equalization upon July 1 does not state a cause of action.

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

*George A. Magney, Charles Haffke, Benjamin S. Baker* and *John A. Rine,* for appellants.

*R. M. Switzler, contra.*

LETTON, J.

Action to set aside an increased assessment made by the county board of equalization of Douglas county and to enjoin the collection of a tax based thereon. A demurrer to the petition was overruled. The defendant stood upon the demurrer. Judgment was rendered as prayed. Defendants appeal.

In substance, the petition alleges that in 1913 the county assessor valued and assessed the personal property of plaintiff for that year at $22,550. That the board of equalization met on June 10, 1913, for the purpose of equalizing valuations, and that on July 1, 1913, the board raised the valuation of the property of plaintiff to the sum of $80,000, and caused this increased valuation to be placed upon the assessment rolls for taxation purposes.

Plaintiff insists that the tax is void for the reason that the board of equalization is a tribunal of limited jurisdiction, and had no authority to act to increase the valuation after the expiration of 20 days from the first Tuesday after the second Monday in June. This is the sole complaint made.

Section 6437, Rev. St. 1913, is, so far as applicable, as follows: "The county board (of equalization) shall hold a session of not less than three and not more than twenty days, for the purpose contemplated in this section, commencing on the first Tuesday after the second Monday of June each year." This portion of section 6437 must be construed in connection with sections 6456 and 6447. Section 6456 provides: "The county board of equalization shall adjourn from time to time until the action of the state board of equalization and assessment shall have been had and certified to the county clerk, and, on the last day of sitting as a board of equalization, the county board shall levy the necessary taxes for the current year." Sec-

tion 6447 provides: "The state board of equalization and assessment shall, on the third Monday of July of each year, meet at the state capitol for the purpose of equalizing assessments."

The increase in the assessment was made on the 1st of July. Under the statute the board had authority to act until after the third Monday in July. The petition does not state a cause of action.

The judgment of the district court is

REVERSED.

SEDGWICK and HAMER, JJ., not sitting.

The following opinion on motion for rehearing was filed March 13, 1915. *Former opinion modified and rehearing denied.*

**Taxation: ASSESSMENT: EQUALIZATION: TIME WITHIN WHICH TO BE MADE.** A county board of equalization is required to equalize and correct assessments in time for the county clerk to prepare and forward an abstract of the assessment rolls to the state board of equalization and assessment on or before July 10 of each year.

PER CURIAM.

On motion for rehearing our attention for the first time was called to section 6442, Rev. St. 1913, which provides in substance that the county assessor, immediately after the board of equalization shall have completed its labors, shall prepare an abstract of the assessment rolls, the values to be given as equalized and corrected by the county board, and forward it to the state board of equalization and assessment on or before the 10th day of July. This, of course, limits the time within which the county board of equalization may act. The statement in the former opinion, "Under the statute the board had authority to act until after the third Monday in July," is therefore incorrect, and the opinion is modified accordingly.

This, however, does not affect the former judgment, since the action of which complaint is made was had upon July 1. The motion for rehearing is therefore

OVERRULED.

DAVID COLE CREAMERY CO., APPELLEE, V. HENRY S. MCDONALD ET AL., APPELLANTS. No. 18,796.
KIRSCHBRAUN & SONS V. MCDONALD. No. 18,797.
BUSHMAN WAREHOUSE CO. V. MCDONALD. No. 18,798.
WOLLSTEIN & CO. V. MCDONALD. No. 18,801.
ROSSO FRUIT CO. V. MCDONALD. No. 18,802.
MID-WEST ELECTRIC CO. V. MCDONALD. No. 18,803.
EMERSON-BRANTINGHAM IMPLEMENT CO. V. MCDONALD. No. 18,804.
BERTSCHY GARAGE V. MCDONALD. No. 18,805.
CHICAGO LIQUOR HOUSE V. MCDONALD. No. 18,806.
BLOTCKY V. MCDONALD. No. 18,807.
CASE PLOW WORKS V. MCDONALD. No. 18,808.

FILED JANUARY 2, 1915.

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

*George A. Magney, Charles Haffke, Benjamin S. Baker* and *John A. Rine,* for appellants.

*R. M. Switzler, contra.*

LETTON, J.

The point involved in each of the above entitled cases is identical with that decided in the case of *Farmers Cooperative Creamery & Supply Co. v. McDonald, ante, p.* 510. For the reasons given in that case, the judgment of the district court is

REVERSED.

IN THE MATTER OF THE APPLICATION OF JOHN I. TAMINOSIAN TO RECLAIM THE NAME OF MOHAMMED NADIR.

FILED JANUARY 2, 1915. No. 18,918.

**Name, Change of.** Under the statute requiring sufficient and reasonable cause for a change of name, a decree is not a matter of right, but of judicial discretion. Rev. St. 1913, ch. 53.

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

*John I. Taminosian, pro se.*

ROSE, J.

Under a statute of this state petitioner demanded a judicial decree changing his name. Rev. St. 1913, secs. 5315-5318. From a dismissal of the proceeding, he has appealed to this court.

Such a petitioner is required, among other things, to state "the cause for which the change of petitioner's name is sought." There is no statutory duty resting on the district court to make the order demanded, except "upon being duly satisfied, by proof in open court, of the truth of the allegations set forth in the petition, and that there exists proper and reasonable cause for changing the name of the petitioner." Proof of proper and reasonable cause sufficient to satisfy the district court is a condition of the statutory relief. At common law a man may change his name any time, but in this state, if he desires a judicial record thereof, he must adduce evidence to satisfy the court that there is sufficient and reasonable cause for the change. In exercising the power to change names, the district court is not subject to the whims of every petitioner. According to his own statements, petitioner was baptized in a Congregational church at Antioch, Syria, by the name of Isaiah Taminosian; was admitted into the religion of Islam under the name of Mohammed Nadir, which he now desires to resume, his name having by the decree of an

Egyptian court been changed thereto from Yusuf; was banished from Constantinople, escaped from banishment, and traveled under assumed names; was a "Howling Dervish" in the Barnum & Bailey circus; was baptized in the Catholic church at Carlstadt, New Jersey, by the name of John Isaiah Taminosian; was a Volunteer of America in Chicago, as "Captain Tommy, the Turk;" and was rebaptized in the Christian church at Sterling, Illinois, under the name of John I. Taminosian. Petitioner has a wife, two daughters and one son. The wife protests against the change of her husband's name. She and her children are citizens of this state. As such they are entitled to the protection of the laws and the customs governing society. By their present names they have acquired a standing in the family, in the schools and in the community. Proper domestic relations are concerns of the state, and the district court is an arm of sovereignty. In that tribunal the rights of the mother and the children should be protected when known, though they are not parties to the proceeding. Injuries to the feelings and sensibilities of innocent women and children may result in greater suffering and damage than the fraudulent invasion of property rights. Under the statute requiring sufficient and reasonable cause for a change of name, a decree is not a matter of right, but of judicial discretion. Sufficient and reasonable cause for changing the name of petitioner has not been shown. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissenting.

Our statute (Rev. St. 1913, secs. 5315-5318) provides: "The district court shall have authority to change the names of persons, towns, villages and cities within this state. Any person desiring to change his or her name may file a petition in the district court for the county in which such person may be a resident, setting forth: First, that the petitioner has been a *bona fide* citizen of such county for at least one year prior to the filing of the petition; second, the cause for which the change of petitioner's name is sought; third, the name asked for. And

it shall be the duty of the district court at any term thereof after the filing of said petition upon being duly satisfied, by proof in open court, of the truth of the allegations set forth in the petition, and that there exists proper and reasonable cause for changing the name of the petitioner, and that thirty days' previous notice of the intended application had been duly given in some newspaper printed in such county, or in case no newspaper be printed in the county, then in some newspaper in general circulation therein, to order and direct a change of name of such petitioner, and that an order for the purpose be made in the journals of the court." The following sections provide for the change of names of towns and for the payment of costs of the proceedings, with a proviso that "any change of names under the provisions of this chapter shall not in any manner affect or alter any right of action, legal process, or property." It will be noticed that the proceedings contemplated by the statute are simple. The only traversable allegation required in the petition is that the petitioner has been a *bona fide* citizen of the county for at least one year. The petition must also allege the name asked for and "the cause for which the change of petitioner's name is sought." Of course, no issue can be tendered on these two allegations.

Formerly the given name, the name in which one is christened, sometimes in Christian countries called the Christian name, was regarded as the real name of the individual. Now custom gives one the family name of his father, and such prænomina as his parents choose to put before it. *Laflin & Rand Co. v. Steytler,* 146 Pa. St. 434. Custom also gives the wife the surname of her husband, but not his given or Christian name. "This person's real and legal name, therefore, was Mrs. Lucy Rogers and not Mrs. Wm. Rogers." *Uihlein v. Gladieux,* 74 Ohio St. 232, 247. This court seems to have stated this rule. *Carrall v. State,* 53 Neb. 431. At the common law a man might adopt any name he chose. In the states that have statutes like ours, providing for change of name, it has generally been held that statutes providing for the change of names

by judicial proceedings do not destroy the right to effect such change by the common law method. *Smith v. United States Casualty Co.,* 197 N. Y. 420. This was the only question considered in that case, and it is quite fully discussed. The opinion quotes with approval from *Laflin & Rand Co. v. Steytler, supra,* as follows: "A man's name is the designation by which he is distinctively known in the community. Custom gives him the family name of his father and such prænomina as his parents choose to put before it, and appropriate circumstances may require Sr. or Jr. as a further constituent part, but all this is only a general rule, from which the individual may depart, if he chooses. The legislature, in 1852, provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect. But without the aid of that act a man may change his name or names, first or last, and when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name." This court has decided that "the name which a man 'always went by' which he declares is his name in his dying declaration, and by which his own mother knew him, may be deemed his right name, although one witness has testified that it was not 'his right name.'" *Binfield v. State,* 15 Neb. 484.

What, then, is the "proper and reasonable cause for changing the name of the petitioner" which must appear by "proof in open court" to the satisfaction of the judge? It is generally held (see authorities cited above) that such statutes are "in affirmance and aid of the common law," and the purpose of the statute is "to make a definite point of time at which a change shall take effect. But without the aid of that statute a man may change his name or names, first or last." If, at the time of the application, the applicant's situation and circumstances are such as to make it appear that he seeks to change his name for some unlawful purpose, to assist him in the perpetration of some fraud or injustice, the application might be refused.

The change of the husband's name does not necessarily change the name of his wife. See an article on this question in 18 Law Notes, p. 164, in which a case in the California court of appeals is cited, and other cases. The article concludes facetiously as follows: "In view of all the foregoing, it would seem that our legal neophyte in California should have an unimpeachable right to take the name of Smith, although her husband's name is White. Abstractly considered, there does not appear to be much choice between the two names. White and Smith: What should be in that Smith? Why should that name be sounded more than White? Write them together, White is as fair a name; sound them, it doth become the mouth as well; weigh them, it is as heavy; conjure with them, White will get a verdict as quick as Smith. All irrelevant and immaterial. Mrs. White has chosen to be Mrs. Smith, and that the name of Smith shall bear the honors of her future forensic triumphs. And Smith let it be, say we." In the case at bar there is and can be no party named except the petitioner himself. No one is supposed to join issue with him. The majority opinion assumes that the wife and children are specially interested. If so, there should be a provision for making them parties, or at least for allowing them to appear and defend.

The petitioner, for reasons of his own, which are not forbidden by our law, desires to have a record of his change of name fixing a definite time when that change shall take place. This is all he asks of the court, and I think that the statute is intended for that purpose.

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

# CUSHMAN MOTOR WORKS, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED JANUARY 2, 1915. No. 17,855.

1. **Municipal Corporations:** DUTIES: OBSTRUCTIONS IN STREETS. Every municipal corporation is bound to use reasonable diligence to keep its streets free from obstruction. This duty cannot be evaded, suspended or cast upon another by any act of the municipal corporation.
2. ———: OBSTRUCTIONS IN STREETS: CONSTRUCTION OF RAILROAD: LIABILITY. Where a city grants to a railroad company the right to construct its road through the city and over and along its public streets, and such railroad company negligently constructs its roadbed and embankment in such manner as to obstruct the streets, or negligently fails to construct suitable and sufficient ditches, drains and culverts, made necessary by the construction of its road, to protect adjacent property from flood waters which should reasonably be anticipated, the city is liable to the same extent as if the negligent acts of the railroad company had been performed or omitted by its own servants; and the fact that the city in its grant to the railroad company provides that the railroad company shall hold the city harmless from all damages arising from the grant, and shall make all drainage that might be necessary by reason of the construction of its road and tracks, does not relieve the city from its liability; and one who, without fault or negligence on his part, suffers injury therefrom may recover from the city or the railroad company separately, or from both jointly.

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

*Burr, Greene & Greene,* for appellant.

*Fred C. Foster* and *D. H. McClenahan, contra.*

FAWCETT, J.

This action was instituted in the district court for Lancaster county, to recover damages alleged to have been caused to plaintiff's property by the flood waters of Antelope creek, on May 17, 1909, and August 29, 1910. From a verdict and judgment for defendant, plaintiff appeals.

It is alleged in the petition that the waters from these floods were dammed up and caused to flow over and upon plaintiff's shop near Twenty-first and N streets, in the city of Lincoln, by the negligent construction of the conduits on O and N streets, and the construction of the bridge, roadbed and embankment of the Chicago, Rock Island & Pacific Railway Company across Antelope creek in defendant city, all of which, it was alleged, caused the flood waters to overflow the banks of the creek and flood plaintiff's shop. The answer of defendant admits that it is a city of the second class, denies that it was negligent in the construction of its conduits, and alleges: That, if plaintiff was damaged, such damage was sustained by reason of its own negligence; that Antelope creek "has an extremely winding course, through a broad valley, flowing from the south and east; that the Chicago, Rock Island & Pacific Railway Company's right of way and railroad tracks cross said Antelope creek at different places, at which places said railroad company constructed and maintained railroad bridges, and at various places said right of way and railroad tracks run parallel with said Antelope channel; that said company has on each side of its right of way a ditch for drainage purposes, which extends to the Antelope creek and connects therewith at said bridges and other places along said right of way; that the grade or elevation of said railroad right of way, tracks and bed slopes to the northwest and decreases in elevation as it reaches and passes plaintiff's property, and that, on account of said bridges, ditches and cuts so made by said railroad company's connection with the Antelope creek, water was allowed to escape from the channel of the Antelope creek down said railroad company's tracks, thereby preventing said water from escaping by way of said Antelope channel, over which acts of said railroad company this defendant city had no control or authority whatever, nor did it contribute in any manner to the diverting or backing up of water by said railroad company or in flooding plaintiff's premises, and the said acts were the sole carelessness and negligence of said railroad company, and

not of this defendant city; that by reason of said fact, and the facts as hereinbefore alleged, plaintiff's premises are so located that they were flooded long before the said arches and conduits on N street were running full of water, and long before the banks of the Antelope channel were filled."

These allegations in defendant's answer amount to an admission that plaintiff's damage was caused by the negligent construction by the railroad company of its bridges, ditches and cuts, which prevented "said water from escaping by way of said Antelope channel." Defendant seeks to shield itself from liability by reason of the negligent construction of these bridges, ditches and cuts by alleging that the defendant city had no control or authority whatever over the railroad company or over its negligent acts. The trial court took this view of the law and instructed the jury as follows: "And you are instructed that, if you believe from the evidence that any flooding or injury done to the plaintiff was caused by the negligent construction of the said Rock Island Railway bridge, that would be negligence for which the city of Lincoln would be in nowise to blame, and could not be held responsible for in this lawsuit. You should consider the evidence as it may bear upon the question whether or not the plaintiff would have been flooded, but for such Rock Island Railway bridge, and, if so, to what extent." The giving of this instruction is prejudicial error for which the judgment must be reversed. Section 129, subd. LXI, art. I, ch. 13, Comp. St. 1909, in force at the time plaintiff received its damage, gave the city the power to regulate railroad crossings and do a number of other things, among which are: "To compel railways to conform tracks to grades at any time established, and if lengthwise in a public way to keep them level with street surface; to compel railways to keep streets open, construct and keep in repair ditches, drains, sewers and culverts along or under their right of way or tracks, and lay and maintain paving of their whole right of way on paved streets." In the light of this statute it was the duty of the city, when it per-

mitted the railroad company to pass over its streets and through the city, to see that it did "construct and keep in repair ditches, drains, sewers and culverts along or under their right of way or tracks." This language of the statute, of course, means to construct and keep in repair suitable and sufficient ditches, drains, culverts, etc. If the railroad company failed to construct sufficient drains, ditches and culverts, it was the duty of the city to compel it to do so, and a failure to perform that duty was negligence on the part of the city. It alone had the power to compel the company to do these things. Plaintiff could not do it. The city could not enact an ordinance which permitted the railroad company to pass through the city and over its public streets, and thereby shift from its shoulders to the shoulders of the railroad company the duty which the city owed property owners in the vicinity of its grant. That the city recognized this fact is shown by the provisions in its several ordinances under which this railroad company was given the right to run its road through the city. See its ordinances passed March 29, 1892, April 12, 1892, June 7, 1892, July 12, 1892, August 16, 1892, and other ordinances passed in relation to this matter, appearing at pages 443 to 448, both inclusive, in its "General Revised and Consolidated Ordinances and Special Ordinances of Lincoln, Nebraska. Published by Authority of the Mayor and City Council 1908." In those ordinances it is provided: "That said company shall hold the city of Lincoln harmless from all damages arising from this grant." And: "That said railway company will make all drainage that may be necessary by reason of the construction of its road and tracks and by closing of said streets and alleys: And provided further, that by the acceptance of the rights and privileges hereby granted, the said railway company agrees to save and keep the said city of Lincoln harmless from the payment of any costs, damages, or expenses, growing out of the exercise of the rights hereby conferred and granted, in favor of any person whomsoever." It will be seen from an examination of these ordinances that the city then recognized the fact

that in granting these privileges to the railroad company it was not relieving itself of the duties and obligations resting upon it to protect property owners from damage by reason of defective drainage, sewerage, etc., in the railroad company's work, and so it contracted with the railroad company that, in the event the city should be required to answer for damages to property owners by reason of the failure of the railroad company to properly construct its railroad, the city could compel the railroad company to reimburse it for such damage. It being alleged in defendant's answer, as well as shown by the evidence, that the negligent construction of the railroad company's railroad was responsible for, or at least contributed to, plaintiff's damage, the instruction above set out should not have been given. By that instruction one of plaintiff's material grounds of complaint was withdrawn from the jury. If the city, upon a full submission of all the material charges of negligence in the petition, is finally held liable on account of negligence on the part of the railroad company, as alleged, it can recoup its loss by requiring the company to make reimbursement in accordance with the terms of its grant. *Omaha Gas Co. v. City of South Omaha,* 71 Neb. 115. On the point that the city could not shift its responsibility to the railroad company, see *Russell v. Inhabitants of the Town of Columbia,* 74 Mo. 480, in which it is held: "A gas company, empowered by law to lay its gas pipes through the streets of a city with the consent of the city authorities, obtained such consent, agreeing on its part to leave the streets in good condition and not to allow the ditches it might dig to be left open longer than should be necessary to lay or repair the pipes. In the prosecution of its work the company opened a ditch in one of the streets, which, for want of pipe, was left open for several days. Whilst so exposed, plaintiff, passing at night, fell in and was hurt. Held, that the city, having given the company permission to occupy the street, was liable to the same extent as if the ditch had been opened by its own servants, i. e., without proof of notice; that the fact that the city had obtained from the

company an agreement for securing the safety of the streets did not do away with the city's liability, and that the plaintiff, if free from fault or negligence on her part, might recover for the injuries sustained, though she knew of the existence of the ditch when she went into the street."

In the light of the clear error above pointed out, we deem it unnecessary to consider any of the other points presented and discussed by counsel for plaintiff. The judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

LETTON, J., not sitting.

BARNES, J., dissenting.

I am unable to concur in the majority opinion. The testimony in this case clearly shows that the Chicago, Rock Island & Pacific Railway Company had constructed a bridge across Antelope creek several blocks to the south and east of the plaintiff's premises; that the bridge was so constructed that the current of the creek flowed against the west abutment thereof; that it was so constructed as to properly carry off all ordinary flood water. It appears, however, that, when the floods came down the valley of Antelope creek, the height of the water was so great that it broke over the dike on the west and south side of the bridge, and a large part of the floods flowed down on the southwest side of the track along the ditches and borrow pits until it reached a point near plaintiff's premises, where that part of the flood was augmented by the waters which flowed north and east from Sixteenth street in said city, and that the flood waters then broke over the Rock Island tracks in an immense volume, and flowed into the plaintiff's shops to the depth of about three feet; that such condition existed for a considerable time before the conduits under O and N streets were filled up, and before the waters overflowed the channel of Antelope creek.

The defendant also introduced testimony which showed that, when the flood of May 17, 1909, occurred, there was

an unusual and excessive rainfall, which amounted to about 4.7 of an inch within a very short time, and, when the flood waters came down the Antelope creek valley from the south, there was a wall of water, which the witnesses described as something over 3 feet in height, which covered the whole valley. Defendant's testimony also showed that, when the flood of August 29, 1910, occurred, there was a rainfall of something over 8 inches over the area drained by the Antelope creek, and that the floods in question were the greatest and highest ever known to occur in the Antelope valley within the memory and experience of the oldest inhabitants of the city. The evidence shows that the railroad bridge above mentioned was not erected on any street, highway or public ground of the city, but was constructed on private property purchased or condemned by the Rock Island Railway Company, and was erected under the supervision of the sanitary drainage district. The city, therefore, had no jurisdiction over the matter, and should not be held liable for the negligent construction of the bridge, if such construction was negligent.

In constructing and operating the railroad, the company was acting for itself, and not for the city. It was no more the city's agent than is an individual licensed by ordinance or resolution to engage in some legitimate private business requiring such license or authority. If the railroad company disobeyed the law, or was negligent in building or operating its road, the city was no more responsible therefor than it would be for the tort of a private individual in the pursuit of his business. *City of Denver v. Bayer,* 7 Colo. 113; *Bancroft v. City of San Diego,* 120 Cal. 432; *Murphy v. City of Chicago,* 29 Ill. 279; *Purinton v. Somerset,* 174 Mass. 556. The evidence on this question alone was sufficient to authorize the jury to return a verdict for the defendant.

Again, the jury were correctly instructed that, if the floods of which the plaintiff complained, were caused by such unusual and extraordinary rainfalls as amounted in law to an act of God, then they should find for the defend-

ant. As I view the evidence in this case, it was not only amply sufficient, but as a matter of fact required the jury to return a verdict in favor of the city.

For the foregoing reasons, I am of opinion that the judgment of the district court should be affirmed.

HAMER, J., concurs in this dissent.

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JAMES USHER, APPELLEE, V. AMERICAN SMELTING & REFINING COMPANY, APPELLANT.

FILED JANUARY 2, 1915. No. 17,896.

1. **Master and Servant:** INJURY TO SERVANT: DEFECTIVE MACHINERY: ASSUMPTION OF RISK. It is the settled rule in this state that where a servant, in obedience to the requirements of his master, uses and operates machinery which, though defective, is not of such dangerous character that it may not with reasonable probability be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury resulting from the master's negligence.

2. **Appeal:** INSTRUCTIONS. An instruction containing an inaccurate explanation of terms correctly used therein will not require a reversal of the judgment, unless it appears that such inaccuracy probably caused the instruction to mislead the jury.

3. **Instructions** requested by defendant, and referred to in the opinion, *held* properly refused.

4. **Master and Servant:** INJURY TO SERVANT: SUFFICIENCY OF EVIDENCE. The evidence examined, and set out in the opinion, *held* sufficient to require the submission of the case to the jury and to sustain the verdict rendered thereon.

5. ———: ———: TRIAL: VERDICT: INCONSISTENCY. In an action for personal injuries by a servant against his master and its foreman jointly, where the principal negligence alleged is that of the master alone, a verdict in favor of the foreman and against the master will not be set aside on the ground that it is inconsistent, unless it is made to appear that plaintiff would not have received the injury for which he seeks to recover but for the negligence of the foreman.

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

*Montgomery, Hall & Young,* for appellant.

*James O'Hara, James C. Kinsler* and *Crofoot & Scott, contra.*

FAWCETT, J.

Action in the district court for Douglas county for personal injuries. Verdict and judgment in favor of defendant Wolfe and against defendant American Smelting & Refining Company, from which it appeals. Defendant Wolfe not being a party in this court, the singular number will be used in referring to the appealing defendant.

The second amended petition, upon which the case was tried, alleges substantially: That the defendant corporation was at the time complained of operating its smelting and refining plant in the city of Omaha, and, that defendant Wolfe was its foreman or superintendent; that plaintiff "was employed by the defendant corporation as a motorman, and was required by the defendants to operate a certain electrical motor car furnished and used by the defendant corporation for the purpose of moving ores and metals from one part to another of its said smelting plant;" that the car was defectively, dangerously and negligently constructed, and that it was an unsafe and dangerous place in which to perform the work required of plaintiff. It then describes the construction of the car, its defective condition from use, and the manner in which the electric current used to operate it passed from an overhead trolley wire through an uninsulated iron trolley down to and through the motor of the car, the manner in which the trolley was attached to the floor of the car, and the close proximity of the point where it was attached to the place where plaintiff was required to sit while operating the car; and alleges that the accident was caused by the defective condition of the car, and that his injuries resulted from its dangerous construction.

The defendant answered, admitting its corporate capacity, the business in which it was engaged, that defendant Wolfe was a foreman, and that plaintiff was employed in operating the motor car, all at the time of the accident; denies every other allegation in the petition; pleads, in detail, contributory negligence and assumption of risk, and alleges that the car and its appliances and equipment were reasonably safe and fit for the purpose for which they were designed and used, and were those generally and commonly used in the business in and about which plaintiff was employed. It then pleads an alleged settlement; but, as nothing on that account is claimed in its brief here, that portion of the answer need not be referred to. The reply denies and explains specifically the several acts of contributory negligence alleged in defendant's answer; alleges that prior to the date when he was injured he called the attention of defendant Wolfe and of the defendant corporation to the fact that the brake shoes were worn too thin to hold the car in going down grade, but defendants assured him that the car was safe, and that he could go on and use it with safety; that he relied upon the assurances that the car could be safely used, and continued to use it until he received the injuries complained of; that, when he was struck by the iron arm projecting from the trolley pole, he received an electrical shock of 250 volts pressure, which came through the uninsulated trolley pole and iron arm projecting therefrom.

As we view the case, the material assignments of error are: Insufficiency of the evidence; whether or not defendant assumed the risk; whether, under the pleadings and evidence, the defendants are so joined that the verdict against the appealing defendant is so inconsistent with the verdict in favor of its codefendant that it cannot be sustained; and the rulings upon the instructions.

We shall not attempt to set out the evidence *in extenso*, nor attempt to discuss the weight of the evidence offered by defendant in opposition to that offered by plaintiff, but will go into it only far enough to discover whether or not there was sufficient evidence to take the case to the jury.

If so, then that question must be considered settled. The evidence shows that in its smelting plant defendant was using two cars for moving ores and metals to and from different places in its large plant; that one car, which plaintiff says he used most of the time, had a cupola over it from which the trolley pole extended upward to the trolley wire. It will be seen at a glance that with this kind of a car the accident which happened to plaintiff could never have occurred. The car which plaintiff was using at the time of his injury was a metal car without, so far as the evidence shows, any wood in its construction. The floor of the car was metal, the seat, provided for the operator to use while operating the car, was metal. The trolley pole and the arm extending therefrom and the coil spring were all metal. There was no insulation anywhere about the car—not even a wooden seat for the operator to sit upon, or a wooden platform on which to rest his feet. The trolley pole, made of a piece of iron gas pipe, was fastened to the metal floor of the car upon a metal base about two feet high, which base was within the distance of about two feet from where the operator was required to sit. It seems to us that defendant was chargeable with notice of the fact that in putting such a car in use in its plant it was exposing its employee, who should be called upon to operate it, to serious danger whenever an accident might occur which would cause the disarrangement of the connection of the car with the overhead wire carrying the electric current. It also knew that the brake appliances required for the control of the car when running down the grade, which was so steep that there was a drop of 9 in 150 feet, were so defective that they would not control the car. When the attention of defendant's foreman was called to this condition of the car, he made no promise of repair, but told plaintiff that he could control the car by reversing the electric current. The foreman, while upon the witness-stand at the trial, still insisted that such was the fact. He testified that the car could be controlled by reversing the electric current, even if there had been no brakes at

all upon it. He also insisted, while upon the witness-stand, that the car was a perfectly safe appliance for the purpose for which it was being used, and the only fact claimed as negligence on the part of the plaintiff was that, after he had made his trip up the grade referred to, and deposited his load, he started back down the grade without reversing his trolley pole. The foreman testified that, in running, the trolley pole should always slope upward to the rear so that it would "trail," but that, when plaintiff came down the grade at the time of the accident, his trolley pole was extending upward toward the front; that it was plaintiff's duty, when he had deposited his load, before returning to reverse the trolley and have it trail, going down, just as it had done going up. He admits, however, on cross-examination that he had frequently seen the men going down the grade without reversing the trolley. Plaintiff testified that at one time during his employment the trolley could have been reversed at the top of the grade before returning, as there was plenty of room to get around the car and swing the trolley around, but that by reason of building some walls around the furnaces, and on account of a switch engine knocking out a bridge that at one time stood there, there was thereafter not room enough to get around and turn the trolley. In this he is somewhat corroborated by one witness for the defendant, who testified that he had seen the trolley pole turned at the top of the incline, but that it might have been when the bridge was there. That the car was not a safe appliance is shown by the fact that, notwithstanding plaintiff applied both the brakes and the current, as he testified, yet the car did run away and the accident did occur.

It is contended that there is no evidence that plaintiff received any electric current in his body, and hence he suffered no damage beyond the mere blow upon his cheek by the arm extending from the pole. We think the evidence is ample to take the case to the jury on that point. Plaintiff, who since the injury has taken a course in electricity, fitting himself for an electrical engineer, testifies unqualifiedly that he did receive the electric current in and

through his body by coming in contact with the trolley or the metal arm extending from it. At least one physician who examined him testified that, no other cause being apparent for the condition in which he found plaintiff, he must assume that his weakened condition was the result of having received the electric shock complained of. It is said that, if he had received this shock at the time his cheek came in contact with the metal arm, a burn would have been discernible; but the evidence shows that that is not always true. So that from any view-point it seems to us there was sufficient evidence to go to the jury on the question of defendant's negligence as to the character of the appliance, as to the place where plaintiff was required to work, and as to his having received the injury complained of, without fault on his part.

This brings us to the question of assumption of risk. It is contended that plaintiff knew the condition of the car both as to its imperfect brake shoes and the uninsulated character of all of its parts, and that by continuing in his employment without any promise of alteration or repairs he assumed the risk and cannot recover. The question of continuing without promise of repairs is not within the issues, nor claimed by plaintiff in his testimony. We think this point is controlled by *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578, and the cases decided subsequently thereto, based upon and approving that case. The *Finlayson* case was expressly followed in *Lee v. Smart,* 45 Neb. 318, *Dehning v. Detroit Bridge & Iron Works,* 46 Neb. 556, and *Sapp v. Christie Bros.,* 79 Neb. 701. In *Dehning v. Detroit Bridge & Iron Works, supra,* the second and third paragraphs of the syllabus are as follows: "(2) An employee assumes the risks arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards.

"(3) The above rule has been modified in this state as follows: 'Where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence.' *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578; *Lee v. Smart,* 45 Neb. 318."

While the three cases last above cited are based upon the rule announced in paragraph 5 of the syllabus in the *Finlayson* case, there is an inaccuracy in their statement of the rule there announced. In the *Finlayson* case the language used in the latter part of the syllabus is: "And the employee, in obedience to the requirements of the employer, uses and operates such dangerous machinery carefully and skilfully, believing there is no immediate danger, and when it is reasonably probable it can be safely operated with such care, the employee does not assume the risk." This statement is accurate and consistent. The inaccuracy in quoting the syllabus in the later cases consists in omitting the language that where the employee uses such dangerous machinery when it "is reasonably probable" it can be safely operated with such care. The inaccuracy pointed out does not, however, show any inclination on the part of the court to depart from the rule as announced in the *Finlayson* case. So that, from the decision in that case, in 1884, to *Sapp v. Christie Bros.,* in 1907, the modification to which attention is called in the *Dehning* case may be said to have been the unbroken rule in this state. We are not willing to recede from it now. As said in *Thomsen v. Jobst,* 93 Neb. 375: "It is difficult to perceive how these former cases can be distinguished from the case at bar. If the defendant is not allowed to assert assumption of risk or contributory negligence because he has promised to remedy the defect in the dangerous implement, and so induces the plaintiff to continue its use, why should he be allowed to rely upon such defenses when he has insisted that the plaintiff shall continue

to use the dangerous implement, and has induced him to do so by a threat of this nature, and not only that, but has stood by and directed him in the dangerous use of the implement." While in some of the former cases there was a promise of repair, in the case at bar there was an assurance of safety, viz., that the car could be controlled by reversing the electric current. Plaintiff relied upon this assurance and continued to use the car, as "directed" by the foreman. That he neither assumed the risk nor was guilty of contributory negligence in so doing is amply sustained by the case above cited, and by *Anderson v. Pitt Iron Mining Co.*, 103 Minn. 252; *Hunley v. Patterson & Co.*, 116 La. 736, 41 So. 54; *Galveston, H. & S. A. R. Co. v. Puente*, 30 Tex. Civ. App. 246, 70 S. W. 362; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467; *Alabama Consolidated C. & I. Co. v. Heald*, 171 Ala. 263. We think the rule announced aptly fits the case at bar. According to plaintiff's testimony the car he was called upon to use was defective and in a sense dangerous, but he was assured by his employer that, notwithstanding its defective condition, it could be used with safety. He continued to use it safely for about another month, and then, while using it with reasonable skill and caution, he received the injury complained of. We therefore hold that in so doing he did not, as a matter of law, assume the risk of injury from the accident which resulted from the master's negligence.

Instruction No. 6, given by the court, which was complained of, is as follows: "The plaintiff, while in the employ of defendant company, assumed all the risks of injury that were ordinarily incident to the employment in which he was engaged; and he also assumed the risk incident to the use of defective appliances, provided such defects were open and obvious, and plaintiff knew, or by the exercise of reasonable care should have known and appreciated, the danger incident to the use of such defective appliances; and, if you believe from the evidence that his injuries, if any he received, grew out of a risk that was ordinarily incident to his employment, or were the result of defects which were open and obvious, and that plaintiff knew and

appreciated, or by the exercise of reasonable care should have known and appreciated, the danger of using and operating the car, then your verdict should be for defendants. By the use of the expression 'risk ordinarily incident to the employment' and 'defects open and obvious' is meant a risk of injury that does not arise or grow out of any act of negligence on the part of defendants. The employee does not assume a risk created by any act of negligence of an employer."

While this explanation of the two terms quoted is not strictly accurate nor exactly within the rule announced in the *Finlayson* and other cases cited, it is not so inaccurate or erroneous, when taken in connection with the main part of the instruction, as to warrant us in holding that it was prejudicially erroneous.

Instruction No. 1, requested by defendant, was properly refused. It did not respond to either the pleadings or the evidence, but is based upon a case where there has been a promise to repair a defective appliance, which promise was not kept. Instruction No. 2 would have told the jury that the defendants were not required to furnish plaintiff the newest or safest motor car and machinery and appliances for the performance of the work in which he was engaged; that if the car and its appliances were reasonably safe and fit for the performance of the work, and if the plaintiff in the execution of his work "could have used such car and appliances and equipment with reasonable safety to himself by the exercise of ordinary care on his part, then the defendants are not liable." This instruction would completely nullify the rule laid down in the *Finlayson* case. It was properly refused. Instruction No. 3 contains the same vice as instruction No. 1, already referred to, and was properly refused. By instruction No. 4 the court was asked to tell the jury that, if they found the car and its appliances and equipment were reasonably safe for the work in which plaintiff was engaged, and were those commonly and generally used for such work and were not defective, then the plaintiff cannot recover. In announcing the rule which defendant was seeking to

invoke by this instruction, the courts never intended to hold that appliances in common and general use for certain work applied where such appliances were defective. The use of the very best known appliances will not protect a master if they are permitted to become so defective that they will no longer safely do the work for which they are being used. The evidence shows that there was no general system of inspection of the cars or other appliances used in this plant, but that they were only repaired when something went wrong with them. Even then it was not done in this case.

This brings us to the only remaining question: Whether, under the pleadings and evidence, the defendants are so joined that the verdict against the appealing defendant is so inconsistent with the verdict in favor of its codefendant that it cannot be permitted to stand, but that defendant is entitled to a like judgment as was entered in favor of its codefendant. This is not a case where the appealing defendant could not be guilty of the negligence charged unless its foreman was also guilty. If the pleadings and evidence showed that the negligence of the foreman alone was the proximate cause of the injury, and that plaintiff could not have been so injured but for the negligence of the foreman, there might be some grounds for the contention; as where a locomotive engine runs over a person and kills him, and the railroad company and engineer are proceeded against jointly for the damage, and the charge of negligence is that the engineer recklessly and negligently ran his engine over the deceased. There are authorities which hold that in such a case a verdict releasing the engineer would release the company, for the reason that the only act of negligence alleged against either was the negligent act of the engineer himself. But here the principal negligence alleged was that of the defendant company in furnishing a defective and unsafe appliance for use by its employee and an unsafe place for the employee to do the work. This was purely the negligence of the master and not the negligence of its foreman. Even if the foreman had told plaintiff to run the car, this would not have amounted

to more than a concurrent act of negligence on the part of the foreman, and the rule, we think, is well settled that an injury to one by the joint agency or cooperation of several persons, or done contemporaneously by them, even though without concert, renders them liable jointly and severally; and the mere fact that, in an action where several persons are proceeded against jointly for a wrong, one of the joint tort-feasors is released will not release the others, and the verdict against them will be sustained. 1 Cooley, Torts (3d ed.) sec. *166, p. 247; *Walton, Witten & Graham v. Miller's Adm'x*, 109 Va. 210; *Cleveland, C. C. & St. L. R. Co. v. Hilligoss*, 171 Ind. 417; *Cuddy v. Horn*, 46 Mich. 596; *Flaherty v. Minneapolis & St. L. R. Co.*, 39 Minn. 328; *Corey v. Havener*, 182 Mass. 250.

Upon consideration of the whole record, we are unable to discover prejudicial error. The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

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CORN EXCHANGE NATIONAL BANK, APPELLEE, V. OCHLARE ORCHARDS COMPANY; HENRY G. HARTE ET AL., APPELLANTS.

FILED JANUARY 2, 1915. No. 17,835.

1. **Trial:** INSTRUCTIONS: ISSUES. When the trial court instructs the jury as to what issues are submitted for their determination, it is not required that the court should tell the jury the reason for so limiting the issue.
2. **Evidence:** CONTENTS OF WRITTEN INSTRUMENT. It is not competent to prove by a witness on the stand the contents of a paper which he holds in his hands while testifying.
3. **Witnesses:** IMPEACHMENT. It is not competent to question a witness as to immaterial matters for the purpose of laying a foundation for impeachment.
4. **Trial:** MISCONDUCT OF JURY. A juror must not state to his fellow jurors material facts not in evidence but within his personal

knowledge. If a juror states in the jury room that he is expert in matters of handwriting and can determine a disputed fact from an inspection of papers in evidence or declares that a party to the suit is liable because of some fact proved that would not, as matter of law, justify such finding, this does not constitute such misconduct of the jury as requires a reversal. Assertions of opinion and boasting of ability or expert knowledge are said to "inhere in verdicts," and the law will not regard such matters as misconduct.

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

*T. W. Blackburn,* for appellants.

*Smyth, Smith & Schall, contra.*

SEDGWICK, J.

The Ochlare Orchards Company executed and delivered its four promissory notes to four several parties, one of them being to one Cummings. The note to Cummings was indorsed by the defendants Henry G. Harte and John H. Harte, and also by Mr. Cummings. Mr. Cummings sold the note to the plaintiff bank, and afterwards the bank brought this action thereon against the company and the three indorsers in the district court for Douglas county. Cummings was not served with process. The action proceeded against the other defendants, and resulted in a verdict and judgment for the plaintiff. The defendants Henry G. Harte and John H. Harte have appealed.

When the note was offered in evidence, there appeared on the back thereof, over the signatures of the appellants, the following indorsement: "Notice of nonpayment and protest and demand for payment is hereby waived by the indorsers hereof." The defense was that the defendants were not notified of the dishonor of the paper as the law merchant requires, and that the above quoted waiver of such notice was not on the paper when these defendants indorsed the same, but was placed thereon afterwards without the knowledge or consent of these defendants. The sole issue of fact to be submitted to the jury was whether

the waiver of notice was placed upon the paper before or after the indorsement by these defendants. These defendants testified positively that the waiver of notice was not on the paper when they indorsed the same. Several witnesses testified as positively that it was. If the issue was properly tried and submitted to the jury their verdict must be conclusive.

The court did not say to the jury that the defendants claimed that they were guarantors only, but it was not necessary to tell them why the time of indorsing this waiver was material. It was sufficient to tell them that their verdict must depend upon that question.

As these four notes were given at the same time, and for the same purpose of providing money for the company, and the respective parties who took them sustained the same relation to the company, the fact, if it was a fact, that the other three notes had no indorsement of waiver of notice, although not directly controlling, might tend to support the contention of these defendants that the companion note in question was not so indorsed when signed by them. A witness on the stand held one of these other notes in his hand while testifying, and was not allowed by the court to state to the jury what indorsements were or were not upon the back of the note which he so held. The court was, of course, right in this. There was no reason for withholding the note itself, which was the best, and, under the circumstances, the only competent, evidence of its contents. The other notes not being in evidence, there was no competent evidence that they were not indorsed with the same waiver of notice. It was therefore not material that the stenographer, who testified that she wrote the waiver on the note in suit before these defendants indorsed the same, had stated out of court that she also wrote the same on the other notes. There was no offer of competent proof that the other notes were not also indorsed with the same waiver of notice.

That some of the jurors argued in the jury room that these defendants would be liable as indorsers, even if the waiver was not upon the note when indorsed by them, and

that some also stated that they had experience in handwriting and could tell from an inspection of the indorsements on the note that the signatures of these defendants were placed thereon after the waiver of notice, would not be such misconduct as to require a reversal. These jurors were not assuming to state evidence of facts within their personal knowledge. They were stating their opinions derived from the facts in evidence, and fortifying those opinions by showing their ability to judge such matters. Such opinions and discussions of jurors are matters that inhere in the verdict, and no prejudicial error can be predicated thereon. It is not necessary to examine the record to ascertain whether these affidavits of the jurors are properly preserved in the record.

This note was negotiated upon the strength of the indorsement of these defendants. It has not been paid. The defense that they were not notified of its dishonor is technical under the law merchant. The question whether they waived such notice was fairly submitted to the jury.

The judgment of the district court is right, and is

AFFIRMED.

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

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PAUL NICKEL, APPELLEE, V. ROBERT BUTKE, APPELLANT.

FILED JANUARY 2, 1915. No. 17,869.

**Master and Servant:** INJURY TO SERVANT: EVIDENCE. The judgment is reversed because, under the facts in evidence, the plaintiff has no cause of action against this defendant.

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

*Greene, Breckenridge, Gurley & Woodrough,* for appellant.

*Smyth, Smith & Schall, contra.*

SEDGWICK, J.

This is an action to recover personal injuries claimed to have been received through the negligence of defendant in furnishing a defective gasoline engine, which the plaintiff was employed to operate. Judgment for plaintiff, defendant appeals.

The petition charged the defects in the engine to be that the cylinder was not properly packed, and that the timer to the engine was not properly placed or secured. It is alleged that the plaintiff was informed by the defendant before he began work that the engine was in good running order; that he relied upon this statement, and, in attempting to start the engine in the usual and ordinary way, the engine started suddenly, causing his foot to slip in such a position that it became crushed and necessitated the amputation of a toe. The answer admits that plaintiff was employed to run a gasoline hoisting engine, and that he was injured while in the defendant's employment. It also pleads assumption of risk, contributory negligence, and makes a general denial of all other allegations not admitted.

It appears from the evidence that a gasoline engine, especially one with one cylinder, is dangerous and uncertain. It is very important that one who assumes to run one of them is familiar with the job and has had experience in regard to how they act. The plaintiff was employed as one having had such experience. He represented that he had been engaged in running gasoline engines for four years. The defendant was not familiar with gasoline engines. He did not examine it himself, but employed a man, who had also had experience, as the plaintiff had, to put it in order, and honestly supposed that it had been put in order. He so informed the plaintiff, and the plaintiff knew, or ought to have known, just what it means to put a gasoline engine in order. When the plaintiff attempted to start the engine, it did not act regularly, but "puffed." This was because the gas was not exploded at the right time, and that would cause it to run irregularly, with a jerk and jam, and that would be ample notice to a man who had run

a gasoline engine that, unless the gasoline was low, the timer was out of place. The plaintiff knew from the way this engine acted when he first attempted to run it that there was something wrong with the timer. He says that he examined the engine. He looked at the timer and saw that it was in place; but, as he had run a gasoline engine, he must have known that he might find the timer in place, and the moment gas was exploded in the cylinder, if the timer was loose, as he now says it was, it would be thrown out of place, and he ought to have known at once that this was the condition here. Nothing else could possibly cause it to act as the engine did when he attempted to start it.

Again, when the engine "puffed and jerked" when he attempted to start it, he should have known, and undoubtedly did know, that the jerks were not regular. Some of them might be very much more severe than others, and so he should have prepared himself. If he persisted in attempting to start it without further examination, he should have prepared himself for a more severe jerk than any he had yet noticed. It is suggested that the timer might have been put out of place by some meddlers while the engine stood in an exposed place. If this was the case, the plaintiff never looked at the timer to see whether it was in place or not, which, when he found that the engine was not starting regularly, was gross negligence on his part.

It is not necessary to discuss the other errors assigned. It is an unfortunate thing that the plaintiff had his toe mashed. Of course, he did not intend to hurt himself, and perhaps there should be some fund prepared from which such damages could be realized, but under the law this employer is not liable.

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

REVERSED.

LETTON, J., dissenting.

At the time the plaintiff was employed, defendant stated to him specifically that the engine was in good running order, all he had to do was to put oil cups on and get some

gasoline, and told him to start the engine that afternoon. He relied upon this statement, and attempted to start the engine without going over it and examining all its parts. Nickel only assumed the risk which would arise from the operation of a gasoline engine which was in good running order. If he had been told to overhaul the engine and examine it before starting it, or had been told that the timer was out of place, and had then proceeded to operate it without adjustment, he would have assumed the risk.

The testimony as to the assurance to plaintiff by the defendant that the engine was in good running order is undisputed. By making this unqualified statement, we think the employer, and not the workman, who had no knowledge of the fact, took the risk that the engine had not been tampered with during the length of time it had been standing in the public street. The servant relied upon this assurance, and therefore refrained from making an examination. Having thus rested upon his employer's statement, which under these circumstances he had a right to do, he was entitled to recover if he was injured through a hidden defect. *Hedin v. Northwestern Knitting Co.*, 149 N. W. (Minn.) 541, and cases cited.

REESE, C. J., and ROSE, J., concur in this dissent.

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JOHN F. REAMS, APPELLEE, V. ALBERT W. SINCLAIR, APPELLANT.

FILED JANUARY 2, 1915. No. 17,873.

1. **Judgment:** RES JUDICATA: DIRECTION OF VERDICT. In a law action, if the parties submit their case for the determination of the court upon defendant's motion to direct a verdict in his favor, a verdict so directed and judgment thereon will be *res judicata* of the issues in the case.
2. **Trial:** DIRECTION OF VERDICT: RECEPTION OF FURTHER EVIDENCE. Upon ruling in defendant's favor upon such motion, the court may in its discretion allow the plaintiff, upon his request, to introduce

further evidence, and will do so when it appears that justice requires such action.

3. **Judgment:** RES JUDICATA: DIRECTION OF VERDICT. If, upon such motion, the plaintiff makes no request to be allowed to proceed further in the case, but appeals to this court from the judgment, entered upon such verdict, he will not afterwards be allowed to litigate the issue involved in such action.

4. **Ejectment:** PLEADING AND PROOF. In an action of ejectment, the plaintiff must allege and prove a legal title and right of possession.

5. **Judgment:** RES JUDICATA: EJECTMENT. If an action in ejectment is decided for defendant because a writing relied upon by plaintiff as a conveyance in his chain of title is construed to be insufficient for that purpose, such judgment will not be a bar to a subsequent action in equity in which it is alleged and proved that the said writing transferred to the grantee named therein an equitable right to the land in question, and that such grantee duly conveyed his interest in the land to the plaintiff.

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

*W. C. Dorsey,* for appellant.

*Bernard McNeny* and *George J. Marshall, contra.*

SEDGWICK, J.

This plaintiff began an action in ejectment against the defendant in the district court for Franklin county. When the evidence was completed, the trial court directed a verdict for the defendant. Upon appeal to this court, the judgment of the trial court was affirmed. *Reams v. Sinclair,* 88 Neb. 738. Afterwards the plaintiff began this action in equity in the district court for Franklin county to establish and quiet his title in the same land. The trial court found the issues in favor of plaintiff, and entered a decree quieting his title, and the defendant has appealed.

The defense relied upon is the former adjudication in the ejectment action. In that action, as above indicated, the parties proceeded to trial, and, when the evidence was in and the parties had rested, the court, upon the defendant's motion, directed the jury to find a verdict in the defend-

ant's favor. There is considerable discussion in the briefs and many authorities are cited upon the question whether a judgment upon an involuntary nonsuit is a bar to another action for the same cause and between the same parties. The seeming conflict in the authorities upon this point is apparently largely due to changes from the common law practice introduced by the code procedure, and also to the different provisions in the codes of the various states. Our code provisions are plain and simple, and we have not generally found difficulty in applying them. Section 7654, Rev. St. 1913, provides: "An action may be dismissed without prejudice to a future action: First, by the plaintiff, before the final submission of the case to the jury * * *; second, by the court where the plaintiff fails to appear at the trial; third, by the court for want of necessary parties; fourth, by the court on the application of some of the defendants where there are others whom the plaintiff fails to diligently prosecute; fifth, by the court for disobedience by the plaintiff of an order concerning the proceedings in the action. In all other cases on the trial of the action the decision must be upon the merits."

If the plaintiff desires that the disposition of his case shall be without prejudice to another action, he can dismiss it "before the final submission of the case." If he persists and takes the judgment of the court on his case, it will be *res judicata* of the issues involved therein. It is said in the brief that, when the defendant moves for nonsuit and his motion is overruled, the defendant may still proceed with his case, and that the same privilege should be allowed the plaintiff. If the plaintiff asks to be allowed to introduce further evidence, the court has the discretion to allow it. *Nelson v. Omaha & C. B. Street R. Co.*, 93 Neb. 154. The trial court will generally allow this if it appears that justice requires it. But if the plaintiff does not ask to submit further proofs, and persists in standing upon the record as made, and appeals to this court from the decision against him, he cannot afterwards avoid the effect of the judgment.

The question, then, in the case at bar is whether the issues presented and tried in this case are the same as those determined in the former action. In an action of ejectment, the plaintiff must show a legal title and right of possession. In the ejectment suit, the plaintiff "traced the title from the United States to Fred Smith." He then introduced a deed of a master in chancery of an Illinois court purporting to convey title to plaintiff's grantor. This deed did not convey a legal title, because it appeared that "the proceedings in Illinois were in partition," and it was held that "partition proceedings are *in rem*." And in such proceedings the Illinois courts could not convey title to real estate in Nebraska. In the case at bar, it appears that the then owners of the land treated the Illinois proceedings as sufficient, and received full compensation for the land thereunder. This gave plaintiff's grantor an equitable title to the land, which could not be enforced in that action. This action in equity is the proper action in which to try that issue. It plainly was not tried and determined in the former action.

This being the sole question presented in this case, it follows that the judgment of the district court is

AFFIRMED.

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

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WILLIAM MCCORMICK, APPELLEE, V. ALICE A. BROWN ET AL., APPELLEES; WILLIAM WILSON, INTERVENER, APPELLANT.

FILED JANUARY 2, 1915. No. 17,925.

1. **Fraudulent Conveyances: HOMESTEAD.** The homestead of a debtor and his family is not subject to the claims of his creditors, and fraud cannot be predicated upon the transfer of the homestead interest by the debtor to his wife.

2. **Husband and Wife: WIFE'S INTEREST IN HUSBAND'S REALTY: LIABILITY FOR HUSBAND'S DEBTS.** Under the act of 1907 (laws 1907,

ch. 49, Rev. St. 1913, secs. 1265-1272), a wife has an interest in the real estate of her husband which he cannot alienate without her consent, and is not subject to his debts.

3. **Fradulent Conveyances:** HUSBAND AND WIFE: HOMESTEAD. If the title to the homestead property is in the husband, and it is sold and conveyed by husband and wife for more than the $2,000 homestead exemption, upon the husband's agreement with his creditors to pay them out of the proceeds thereof, the fact that he transfers to his wife the amount of the homestead exemption, and of her interest under the statute in the remainder, is not a fraud against his creditors of which they can complain.

4. ———: ———: RIGHTS OF HUSBAND'S CREDITORS. In such case, if the husband fails to pay his creditors out of the proceeds of the sale, without the knowledge of the wife that he intends to or does so fail, it will not amount to fraud on the part of the wife, so as to subject her interests in the proceeds of the sale to the claims of the husband's creditors.

5. **Husband and Wife:** RIGHTS OF WIFE: LIABILITY FOR HUSBAND'S DEBTS. If, in such case, the wife in good faith repurchases the property with her shares of the proceeds of the sale, and the proceeds of a loan which she procures on the property, her title will not be subject to the claims of her husband's creditors.

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

*Stewart, Williams & Brown,* for appellant.

*Burkett, Wilson & Brown* and *Tibbets & Anderson, contra.*

SEDGWICK, J.

In November, 1910, the defendant John J. Brown held the title to about 20 acres of land near the corporate limits of the city of Lincoln, and he and his wife, the defendant Alice A. Brown, had lived upon the land as their homestead. At that time he sold the land to William J. Bryan for the consideration of $8,750. This consideration was paid $5,000 in cash, and two promissory notes of Mr. Bryan, one for $2,258.62 and the other for $1,491.38. Afterwards Mr. Bryan reconveyed the land to Mr. Brown, who immediately conveyed to the defendant, Alice A. Brown. The plaintiff, William McCormick, began this ac-

tion in the district court for Lancaster county against these defendants, Alice A. Brown and John J. Brown, in which action Mr. William Wilson intervened. The intervener alleged that in March, 1910, he loaned to the defendant John J. Brown $800, and took his promissory note therefor, due in six months, and that the title to the land was taken in the defendant Alice A. Brown to defraud the creditors of her husband, John J. Brown, and particularly this intervener. The issue between the plaintiff and the defendant Alice A. Brown was adjusted, and trial was had upon the petition of the intervener. The trial court found the issues in favor of the defendant Alice A. Brown, and entered a decree quieting her title. The intervener has appealed.

The defendant John J. Brown made no appearance in the action. It appears from the evidence that, at about the time of the sale and conveyance of the land to Mr. Bryan, the defendant John J. Brown, who was in some kind of business in the city of Lincoln, had failed, and his wife was aware that he was having difficulty with his creditors, so that she must have known that if he transferred to her property which was liable for his indebtedness it would operate to hinder and delay his creditors. We think, therefore, the question in this case is whether Mr. Brown did transfer to his wife property which in his hands would have been subject to the claims of his creditors. Mrs. Brown was a witness in her own behalf, and appears to have answered all questions on the direct and cross-examination without hesitation or evasion. Her knowledge in regard to the terms of some of the transactions was not as complete and accurate as we would expect in the case of an ordinary business man, but the trial court appears to have relied upon her testimony in regard to those matters that were within her knowledge, and we have observed nothing in the record that requires us to find that the court was not justified in so doing. She testified that she was married to the defendant John J. Brown something more than a year before the sale of the land to Mr. Bryan, and that at the time of her marriage her father gave her $1,000,

which was mostly expended in furniture and household articles for their home. Afterwards her father procured insurance for them on the house and furniture, amounting altogether to $3,000. The property was destroyed by fire and the insurance was paid. She says that she received $1,900 of the insurance money. There is considerable discussion in the brief as to her right to the $1,900. Mrs. Brown testified that there were two policies of insurance. She thought one of them was upon her house and the other upon the furniture and household goods, but she was not certain about this. It appears that the house and a considerable part of the furniture were included in one policy, as the property of Mr. Brown. We do not regard this as of controlling importance in the case. The real question is how much of the property really belonged to Mrs. Brown. The fact that, in making out the policy, a transaction in which she took no part, some of the household furniture that belonged to Mrs. Brown was included in the policy upon the house does not appear, under the circumstances in this case, to be inconsistent with the testimony of Mrs. Brown as to the ownership of the property. She testifies that when the property was sold to Mr. Bryan she understood from Mr. Brown that he was selling it for something over $14,000, and that Mr. Brown promised her $6,000 of the money as her "dower interest" in the property. As a matter of fact, he never gave her any of the money at all, but he transferred to her immediately after the sale of the property Mr. Bryan's promissory note, $2,258.62. She repurchased the property from Mr. Bryan. Mr. Bryan, knowing that there was some question raised as to the good faith of Mr. Brown in these transactions, declined to convey the property directly to Mrs. Brown, and insisted on returning it, at her request, to Mr. Brown from whom he received the title. This was done, and Mr. Brown immediately transferred it to Mrs. Brown. She did all of the negotiating with Mr. Bryan for a return of the property. Mr. Bryan, at her solicitation, consented to return the property for the amount that he had paid for it, with interest thereon at 6 per cent. per annum, amounting at the time to

$9,071.32. Mrs. Brown procured a loan upon the property in the sum of $4,897.80. She testified that she paid Mr. Bryan for the property by returning to him the note, $2,258.62, and giving him the check, the proceeds of the loan, $4,897.80, and a payment in cash, $1,914.90. This cash item was the amount that she had received in the settlement with the insurance companies. The intervener testified that Mr. Brown promised to pay his claim out of the proceeds of the sale to Mr. Bryan, but failed to do so. It appears that Mrs. Brown was not aware that he had failed to make such payment when she repurchased the property from Mr. Bryan. No fraud can be predicated on the conveyance to Mrs. Brown of the homestead interest of $2,000 in this property. Under the act of 1907 (laws 1907, ch. 49), which is now secs. 1265-1272, Rev. St. 1913, Mrs. Brown was entitled to a one-half interest in the real estate of her husband, which he could not will or convey away from her. *Gaster v. Estate of Gaster,* 92 Neb. 6.

The evidence indicates that the land was worth more than the amount that it was sold for to Mr. Bryan; but if we consider its value to have been $8,750, and deduct the $2,000 homestead estate, Mrs. Brown's one-half interest would be more than the amount of the note that was given her in lieu of that interest. If her personal property, for which she received insurance money, was worth $1,000, and Mr. Brown transferred to her the homestead interest, $2,000, and one-half of the value of the land after deducting that interest this would be more than Mrs. Brown received as her interest in the proceeds, and the creditors of Mr. Brown could not complain. The creditors of Mr. Brown therefore are not in a position to complain of her purchase of this property as she did.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

LETTON, J., dissenting.

I did not hear the argument in this case; but, since the doctrine announced in the second paragraph of the syl-

labus is directly opposed to the language of the statute and is of great importance, I feel it my duty to call particular attention to it by this dissent. Section 1269, Rev. St. 1913, provides: "The right of a married man or woman to inherit a part or all of the real estate of which his or her spouse was seized of an estate of inheritance at any time during the marriage *may be barred* * * * *by the sale of such real estate under execution* or other judicial sale, during the lifetime of the owner." In *Gaster v. Estate of Gaster,* 92 Neb. 6, 14, Sedgwick, J., says, speaking of the language of this section: "It recites the right of a married man or woman in the property of his or her spouse, provides in express terms how that right may be barred, and excludes the power to bar that right by will." The holding in the present case is inconsistent with this statement. It holds, in effect, that the right of one spouse to inherit the real estate of the other can *not* "be barred * * * by the sale of such real estate under execution * * * during the lifetime of the owner." This holding affects the property interests of every creditor of a man or woman in the state who owns real estate in excess of the homestead exemption. The language of the statute is plain. It requires no construction. Formerly a sale of the wife's real estate to pay her debts barred the curtesy of the husband. *Miller v. Hanna,* 89 Neb. 224. But a sale for the husband's debts did not bar the dower right of the wife in his real estate. *Butler v. Fitzgerald,* 43 Neb. 192. The legislature by this statute changed the law, placed husband and wife on a parity in this, as in other respects, and made the real estate of either spouse, in excess of the homestead exemption, subject to sale for his or her debts.

In *Gaster v. Estate of Gaster,* 92 Neb. 6, the writer of that opinion also said: "No duty of this court is more manifest and exacting than the duty to avoid trespassing upon the province of the legislature. * * * It is not for this court to determine the legislative policy, nor to criticize that policy when adopted by the lawmakers. If apparently matters have been omitted in legislation which would have been supplied if brought to the attention of the

lawmakers, it is not within the province of the court to supply such omissions. Hasty and ill-considered legislation can be revised only by the legislature itself." This is sound doctrine. It is equally true that, when the legislature has spoken in plain and unambiguous language, it is not for the court to interpret language that needs no interpretation, or to disregard and virtually repeal the law. A law may seem to the members of this court to be unwise, but, nevertheless, it is the duty of the court to declare what has been plainly written, and not strain the language in order to inject a new meaning, and thus attain a result that appears to it to be more desirable. It is for the legislature, and not for the court, to repeal or amend a statute.

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WILLIAM L. NAIMAN ET AL., APPELLEES, V. MARY BOHLMEYER ET AL., APPELLANTS.

FILED JANUARY 2, 1915. No. 17,939.

1. **Homestead:** DESCENT. When the holder of the legal title of a homestead dies, leaving a widow and children, the law creates two new estates, a life estate in the widow and an estate in remainder in the children. These estates, are absolute and do not depend upon occupancy.
2. ———: SALE BY ADMINISTRATOR: VALIDITY. In such case the homestead is not liable for debts incurred by the deceased in his lifetime, and an attempted sale by the administrator to pay the debts of the deceased is void.
3. ———: ———: ———. If the widow buys the land at such administrator's sale, and afterwards conveys it by warranty deed, the grantee in such deed takes the life estate. It is void as to the estate of the children.
4. **Quieting Title:** SUIT BY REMAINDERMEN. The children of the deceased can maintain this action to have their title to the particular estate determined and quieted. The rights of the holders of the life estate and the holders of the particular estate as between themselves are not determined in this action.

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

*J. P. Baldwin* and *C. L. Richards,* for appellants.

*M. H. Weiss* and *J. T. McCuistion, contra.*

SEDGWICK, J.

In January, 1894, Theodore Naiman died, being the owner in fee of a quarter section of land in Thayer county, which he occupied as a homestead, with his wife and four minor children. His widow, Mathilde, was appointed administratrix of his estate, and afterwards intermarried with one Henry Koch, who was substituted as administrator of the estate of Theodore Naiman. As such administrator, Mr. Koch applied to the district court for Thayer county for license to sell the real estate in question. License was granted, and the land was sold by the administrator to his wife, then Mathilde Koch. Afterwards Mathilde Koch, together with Henry Koch, her husband, sold and conveyed the land to Henry Bohlmeyer. Afterwards Henry Bohlmeyer died, and this action was brought by the four children of Mr. Naiman against the widow and children of Henry Bohlmeyer, who were then occupying the premises. The object of this action, as stated in the petition, was to cancel the deed from Henry Koch as administrator to his wife, Mathilde Koch, and also the deed from Mathilde Koch and her husband to Henry Bohlmeyer. The trial court found the issues in favor of the plaintiffs and canceled the deeds accordingly, and the defendants have appealed.

The appellants contend that Mathilde Koch, the widow of Theodore Naiman, having abandoned the land as her home and having taken her children with her, the homestead character of the land ceased. In this, of course, the appellants are mistaken. Under our statute, when the holder of the legal title of the homestead dies, the law creates new estates, a life estate in his widow and an estate in remainder in his children and heirs. It is immaterial whether the widow and children continue to occupy the premises. Their estates do not depend upon the occupancy thereof after the death of the holder of the legal title, but vest in them absolutely on his death. The deed of the ad-

ministrator of the estate of Theodore Naiman to Mrs. Koch was, of course, absolutely void. The land having been the homestead of Mr. Naiman was not subject to his debts. The deed from Mrs. Koch and her husband to Mr. Bohlmeyer would be effectual to transfer the life estate of Mrs. Koch to Mr. Bohlmeyer, and ineffectual for any other purpose. Mr. Bohlmeyer, therefore, and after him his heirs, were the owners of a life estate for the life of Mathilde Koch, and the decree in this case should have disposed of the issues on that basis. This is substantially what the decree does, except that it declares the deed from Mathilde Koch and her husband to Bohlmeyer to be absolutely void. These plaintiffs were entitled to bring this action under sections 6267, 6268, Rev. St. 1913, to have their title to the particular estate determined, and were entitled to have any conveyances interfering therewith canceled.

It is alleged that the land at the time it was deeded to Mr. Bohlmeyer was incumbered by a mortgage, and that Mr. Bohlmeyer has paid the mortgage in part and renewed it in part, and has also made valuable improvements upon the land. Mr. Bohlmeyer and his heirs are entitled to the use and benefit of this land during the life of Mathilde Koch, and were not required to pay the principal of the mortgage, but it was their duty to pay the taxes and interest on the incumbrance. The rights and liabilities of these respective parties, the one as the owner of the life estate, and the others as the owners of the remainder, are of course, not determined in this action.

The judgment of the district court is therefore modified so as to decree the deed from Mathilde Koch and her husband to Henry Bohlmeyer sufficient to convey the life estate of Mathilde Koch, and to cancel the same so far as it attempts to convey the particular estate of these plaintiffs. In all other respects the decree is affirmed. The costs of this appeal should be paid by the parties incurring the same.

MODIFIED AND AFFIRMED.

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

# EDGAR WENQUIST, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JANUARY 2, 1915. No. 17,944.

1. **Evidence:** RES GESTÆ. The statement by a party to an accident, of a fact directly connected with the accident as a cause thereof, and made contemporaneously with the occurrence, is competent as a part of the *res gestæ*, if such fact is within the knowledge of the party making such statement, but is not competent as evidence of a disconnected fact not within his personal knowledge.
2. **Master and Servant:** INJURY TO SERVANT: LIABILITY. If an employee, who is himself without negligence, is injured by the negligence of his employer, under such circumstances that the injury would not have occurred but for such negligence, the contributory negligence of a fellow servant will not prevent a recovery.
3. ———: ———: ———: SUFFICIENCY OF EVIDENCE. The principal question submitted to the jury was whether the defendant's inspectors misplaced the "controller" which was the primary cause of the accident, and the evidence was of such a nature as to justify submitting this question to the jury.
4. ———: ———: INSTRUCTIONS. The answer alleged that the party complained of as guilty of negligence was a fellow servant, but denied that he was guilty of negligence. The instructions plainly submitted both questions to the jury. Taking the whole case together, the jury could not have been misled by a recital in one of the instructions that "the defendant having plead that the injuries complained of were caused by the act of a fellow servant."
5. ———: ———: ———: FELLOW SERVANT. An error in defining "what constitutes a fellow servant" is immaterial, if, under the undisputed evidence in the case, that relation did not exist and the jury have so found.
6. **Appeal:** VERDICT: EVIDENCE. Unless the evidence is so deficient that it appears from an examination of the whole record that the verdict must have been produced by passion or prejudice or some influence outside of the evidence, in other words, that the verdict is clearly wrong upon the questions of fact presented, this court cannot control the action of the jury.

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

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

*Sullivan & Rait, contra.*

SEDGWICK, J.

The plaintiff, a motorman in the employ of the defendant company, was injured while in that employment, and brought this action in the district court for Douglas county, alleging that the injury was caused by the negligence of this defendant. There was a verdict and judgment in his favor, and the defendant has appealed.

It appears from the evidence that the defendant maintains a car barn in the city of Omaha, in which from 70 to 80 cars are placed for the night. In the early morning, as his duty was, the plaintiff went to the car barn, ascertained the car that he was to take out that morning, and was preparing to do so. At the same time, another motorman, named Mace, was about to take out his car, which stood behind plaintiff's car about eight feet distant. Mace "turned on the overhead electric connection," and his car immediately started rapidly forward, catching plaintiff between the two cars, which caused his injury. There are several car inspectors or repairers, employed by the defendant, whose duty is to inspect and repair, when necessary, the cars in the barn during the night. These inspectors or repairers are under the control of a barn foreman. The plaintiff alleged that, during the nighttime, one of the inspectors inspected the car which was operated by Mace that morning, and "carelessly and negligently left the car standing with the safety lever thrown so that the car might be started when connected with electricity, and carelessly and negligently left the controller thereof set for a forward movement;" that Mace believed that the safety lever and controller were in a position of safety, and so connected the electricity which caused the accident. When the accident happened, plaintiff asked the motorman, Mace, "What were you trying to do?" and he answered, "The damned inspectors left the controller turned on." Defendant's counsel objected to this answer, and the court

at first struck it out, but afterwards, upon a repetition of the question, the same answer was made, and the court overruled the defendant's objection thereto.

It is now insisted that this evidence was incompetent, and that the court erred in allowing it. The controversy at that point was whether the inspectors had misplaced the controller, as plaintiff alleged, or whether the motorman, Mace, had misplaced it. The statement objected to asserted three things: That the controller was turned on; that Mace did not turn it on himself; and that the inspector did. As to the first two, the evidence was competent as a part of the *res gestæ*. The witness Mace at the time was in possession of full knowledge as to whether the controller was turned on at the time that he applied the electricity, also as to whether he himself turned it on; and this statement immediately at the time of the accident should be considered by the jury upon those two important features of the case. It was not error, therefore, to refuse to strike it out. But the motorman had no knowledge as to whether the inspectors, or the foreman of the car barn, or possibly some trespasser, misplaced the controller. None of these could have had any part in the *res gestæ*, and the statement was, of course, incompetent as evidence of such matters. The court should have instructed the jury that this statement was not to be regarded as evidence that the inspectors of the company had turned the controller on, and no doubt would have so instructed the jury if there had been a request for that purpose. No such instruction was requested. The defendant cannot, therefore, rely upon this ruling as prejudicial error.

There is much discussion in the briefs as to whether the inspectors were fellow servants with the motormen. It appears, however, to be conceded that the two motormen were fellow servants. The plaintiff testified that he had been in the service of the company as motorman for several months; that he had a copy of the rules of the company, and that, under rule 10 of the company, it was the duty of the motorman to inspect the car before starting it and see whether it was in first-class condition; and that

they were also "expressly required to look the car over to see that brakes, fenders, and controllers were all in good order." Rule 10 of the company was also in evidence, and it provides: "After signing for their runs and having procured the necessary supplies, conductors and motormen will proceed to inspect the car and see that it is in first-class condition. * * * The motormen will look the car over to see that brakes, fenders, and controllers are all in good order." The plaintiff also testified that Mace, before turning on the electricity, went into the vestibule of the car, and was standing in the vestibule in front of all the mechanism when he turned on the electricity. He was then asked this question: "And was all there where he could put his hand on it, even if it were as dark as Egypt, and tell whether the power was turned off or whether the reverse was on or off, couldn't he? He could tell that from the feeling of it, if he wanted to? A. Yes, sir." If we consider that, under the rule of the company and the circumstances disclosed by this evidence, the motorman, Mace, was guilty of negligence in turning on the overhead electricity without knowing that the controller was in place, will such contributory negligence on the part of a fellow servant prevent a recovery? The question has been answered in the negative by this court. In *Van Horn v. Cooper & Cole Bros.*, 88 Neb. 687, 696, it is said: "The law appears to be well settled that, if the injured servant was free from contributory negligence, the master would be liable where such injury was caused by the concurrent negligence of the master, or his vice-principal, and of a fellow servant. 26 Cyc. 1302, and cases cited in notes." The note referred to cites a large number of cases in the various states which seem to establish this rule beyond further controversy.

The defendant contends that the car inspectors and the motormen were fellow servants, and that the plaintiff cannot recover for an injury caused by the negligence of the car inspectors. The question is presented at great extent in both briefs. It is frequently difficult to apply the fellow-servant doctrine. In this case, however, it seems there

can be little doubt. The car inspectors were under the direct control of the car barn foremen. These foremen had no control whatever over the motormen. The motormen reported to the superintendent and were under his direction. In *Nocita v. Omaha & C. B. Street R. Co.*, 89 Neb. 209, it was said: "To make the rule applicable there must be some consociation in the same department of duty or line of employment." The motormen and inspectors were not engaged in the same duties. Indeed, there was no consociation of duties between them. The plaintiff cites *Denver Tramway Co. v. Crumbaugh*, 23 Colo. 363, *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, and *McDonald v. Michigan C. R. Co.*, 132 Mich. 372, which are similar cases and seem to be in point.

The trial court instructed the jury that, unless they found that "one of the inspectors of defendant, during the night and prior to the accident, carelessly and negligently left the car, which moved up to and against the plaintiff, to stand with the safety lever thrown so that the car might be started when connected with electricity, and carelessly and negligently left the controller thereof set for a forward movement, so that, when the overhead connection was made, the car started forward and crushed and injured the plaintiff," they must find for the defendant. This instruction followed the allegation of the petition, which was that the acts of negligence of the inspector "were the sole and exclusive cause of the injuries received by the plaintiff." It is contended that the evidence will not justify the finding of the jury that the inspectors left the controller out of place. It appears that there were two inspectors employed in this car barn on the night in question. One of them testified that there were 75 or 80 cars in the barn; that these cars stood upon 10 different tracks; and that their duties did not require them to inspect all of these cars, but only such as had been reported for inspection. The evidence is that these cars are left at night close together. The two cars were about eight feet apart, as the motorman found them on the morning of the accident. The evidence tends to show, and the jury might have found

from the evidence, that the motorman, Mace, did not misplace the controller. The barn is not a public place; it is under the exclusive control of the defendant during the night, and every one is excluded except the inspectors and the foremen of the barn. Misplacing this controller was the negligent act which was the primary cause of the injury. If this was not done by the motorman, Mace, it must have been done either by the motorman who brought the car to the barn the night before or by the car inspectors. The motorman who brought the car into the barn was not called as a witness. He was in the employ of the defendant, and presumably, if he left this controller misplaced, the defendant would have proved that fact by him. These circumstances pointed directly to the inspectors as the parties who misplaced this controller. The defendant attempted to rebut this presumption. One of the inspectors testified that he did not think that he had anything to do with the car that night, but he testified that he thought the car in question stood on track No. 3, and was the third car north from the door. There was evidence that the car in question was on track No. 2, and that it was the second car from the door. The inspector also testified that he could not remember what cars he examined; that he probably examined 35 or 40 cars. He could not remember whether he moved some of them or not, but that it was sometimes necessary to move them. The other inspector was also a car repairer, and was in reality an assistant to the principal inspector. His testimony is a little more definite in regard to whether he had anything to do with the car in question, but is not so direct and positive as to remove all doubt upon that matter. Upon the whole case, the evidence that these inspectors misplaced this controller is not clear and satisfactory, but we cannot say that the verdict of the jury is so wholly unsupported on this point as to require us to reverse their finding.

The fourth instruction given by the court recites that "the defendant having plead that the injuries complained of were caused by the act of a fellow servant." This is not strictly accurate. The defendant did not plead that

the injuries were caused by the act of a fellow servant; but, while denying that the inspectors were guilty of negligence which caused the injury, the answer contained the allegation that the inspectors and motormen were fellow-servants. It is complained that this recital in the instruction is inconsistent with a subsequent clause in the same instruction which submitted to the jury the question of negligence of the inspectors. It does not appear that the jury could have been misled by this inaccurate recital in the instruction. Taken altogether, the instruction was plainly that it was contended by the defendant that the action was not due to any carelessness of the inspectors, and that question was fairly submitted to the jury.

It is also complained that the same instruction "incorrectly defined what constitutes a fellow servant." It is not necessary to discuss this instruction in that respect, since under the circumstances in this case the court might have instructed the jury that the motorman and inspectors were not fellow servants.

The questions of fact involved in this case are peculiarly within the province of the jury. This court is not authorized to retry those questions. Unless the evidence is so deficient that it appears from an examination of the whole record that the verdict must have been produced by passion or prejudice or some influence outside of the evidence, in other words, that the verdict is clearly wrong upon the questions of fact presented, this court cannot control the action of the jury.

The judgment of the district court is

AFFIRMED.

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

ANTON PITELA, APPELLEE, V. DOMINEK ROUBLICEK, APPELLANT.

FILED JANUARY 2, 1915. No. 17,955.

1. **Appeal:** REVIEW: PLEADING. When part of an answer is stricken out by the court, and no exception is taken to such ruling, and an amended answer is filed upon which the case is tried, error cannot be predicated upon such ruling of the court.
2. ———: AFFIRMANCE. The evidence is found sufficient to support the verdict, and, no error being pointed out requiring a reversal, the judgment is affirmed.

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

*Burr, Greene & Greene,* for appellant.

*E. E. Placek* and *P. P. White, contra.*

SEDGWICK, J.

The plaintiff brought this action against the defendant in the district court for Saunders county to recover damages for an alleged assault and battery. The defendant answered, setting up what he called a counterclaim, somewhat in the nature of an offset for prior damages. On motion of the plaintiff, this was stricken out. The defendant then filed an amended answer. No exception was taken to the ruling of the court in striking out a part of the former answer, and, of course, by filing the amended answer the ruling of the district court was acquiesced in.

In addition to a considerable argument in regard to the right of defendant to counterclaim damages, which, of course, has no application to this case in the condition of the record, the defendant briefly alleges in the brief that the evidence is not sufficient to support the verdict, and that there were errors of the court. No parts of the record are referred to containing the supposed errors, and there is no ground for the contention that the verdict was

not supported. The plaintiff and several witnesses testified to the assault and battery, and the defendant himself substantially admitted the same.

No error is pointed out in the record, and the judgment of the district court is

AFFIRMED.

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

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JOHN EYRE ET AL., APPELLANTS, V. JOHN A. DOERR, APPELLEE.

FILED JANUARY 2, 1915. No. 18,701.

1. **Intoxicating Liquors:** LICENSE: MUNICIPAL ORDINANCE. Under the laws of this state, no license can be issued for the sale of intoxicating liquors unless an ordinance is first passed authorizing such license and regulating the same. Whether an ordinance prohibiting such sale has any force or effect, *quære.*

2. ———: ———: ———: VALIDITY. An ordinance purporting to authorize the sale of intoxicating liquors, which contains no regulation as to "what officer or officers shall receive, file, and give notice of the application" for license, nor "who shall take and approve the bond of the applicant, and sign and issue the license," and omits other necessary regulations, is invalid and will not authorize the granting of license.

3. ———: ———: PETITION: SUFFICIENCY. No proceeding can be taken by the mayor and council upon the application for license until a petition is filed containing the allegations provided by statute and signed by the required number of resident freeholders.

4. **Municipal Corporations:** ORDINANCE: INITIATIVE AND REFERENDUM. When a petition for an ordinance under the initiative and referendum statute is filed with the city clerk, and "the mayor and city council convened before such proposed ordinance can be legally submitted to a direct vote of the voters," the clerk must "forthwith present to such body a certified copy of the proposed ordinance." If the proposed ordinance "is not made law by the mayor and city council" within the specified time, the "clerk shall submit the same to the voters." If the mayor and council are so convened, the clerk cannot submit the ordinance to the voters without first presenting it to the mayor and council.

5. ———: ———: ———. An ordinance adopted by the voters under the initiative statute does not "go into effect" until 30 days after it is adopted.

6. **Intoxicating Liquors:** LICENSE: PETITION: AMENDMENT. A petition for license, which does not allege that the applicant is a man of respectable character and standing and a resident of this state, is insufficient, and any proceedings attempted thereunder will be void. An amendment of the petition in this respect, with or without the consent of the petitioners, will not validate proceedings of the mayor and council thereon which were taken when no sufficient petition was on file.

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

*A. G. Wolfenbarger, R. M. Proudfit, J. H. Agee, S. R. Buck* and *H. S. Lower,* for appellants.

*Bernard McNeny, contra.*

SEDGWICK, J.

On the 7th day of April, 1914, at an election held for that purpose under the initiative and referendum statute, the voters of the city of Superior, in Nuckolls county, a city of the second class having more than 1,000 and less than 5,000 inhabitants, adopted an ordinance forbidding the licensing of saloons. Afterwards, on the 22d day of May, 1914, at a special election held for that purpose, an ordinance was adopted relating to and regulating the sale of malt, spirituous and vinous liquors in the city of Superior. Under this last ordinance, John A. Doerr applied for a license and filed with the clerk of the city his petition signed by more than 30 of the freeholders of the city. A remonstrance was filed, and upon the hearing the city council granted the license. The remonstrants appealed to the district court for that county, and by the judgment of the court the action of the city council was affirmed. Remonstrants have appealed to this court.

A number of curious, and some of them technical, questions are presented and discussed in the briefs. We find it necessary to notice only a portion of them. The first ordinance, of April 7, orders that no saloon license shall

be granted, and that "no person, firm or corporation shall be licensed to sell malt, spirituous or vinous or intoxicating liquors within the corporate limits of the city of Superior." It makes an exception in the case of sales for "medical, mechanical or sacramental purposes." This ordinance accomplishes nothing that was not already the law of this state. No license for the sale of intoxicating liquors could be issued by the authorities of the city without first adopting an ordinance providing therefor and regulating the manner of issuing the license. This first ordinance is treated in the briefs as having some force or effect, and it does not appear to be necessary to determine that question. It is also a serious question whether the second ordinance, of May 22, is valid. No license can be granted unless there is first an ordinance providing therefor, and until such ordinance is enacted no application for license can be made and no other step taken towards procuring such license. This was first decided in *State v. Andrews,* 11 Neb. 523, and was afterwards approved and affirmed in *Hornberger v. State,* 47 Neb. 40. From the *Andrews* case it appears that the statute requires the ordinance for the purpose of determining the policy of the village as to whether it will, or will not, license saloons, and also for the purpose of regulating the issuance of licenses. Unless the ordinance supplies those regulations which are not supplied in the statute, no license can be issued. The opinion recites some of the regulations that the ordinance must contain. It must provide that a license can be granted, "what officer or officers shall receive, file, and give notice of the application, * * * who shall take and approve the bond of the applicant, and sign and issue the license." And the opinion says that there are other important matters that can be regulated only by ordinance passed in due form, "and, until so regulated no application can be made and no other step taken." This ordinance does not appear to contain those things which are said, in the opinion referred to, to be absolutely necessary to the validity of the ordinance.

It appears that the city council was in session within the 30 days after the filing of the petition for the election at which the second ordinance was adopted. The statute provides: "If the mayor and city council be convened before such proposed ordinance can be legally submitted to a direct vote of the voters, the clerk aforesaid shall forthwith present to such body a certified copy of the proposed ordinance and the demand for the submission of the same on file in his office." It also provides that, if the proposed ordinance is not made a law by the mayor and council "within 30 days from the filing of the same with such clerk, the said clerk shall submit the same to the voters according to the provisions of this article." Rev. St. 1913, sec. 5232. If the section of the statute is complied with and the city council enacts the ordinance as proposed, the expense and delay of the election is avoided. It is a serious question whether the clerk can disregard this provision of the law and proceed with the election without submitting the ordinance to the mayor and council.

Section 5237, Rev. St. 1913, provides: "No ordinance for the government of any city aforesaid in this state, except as hereinafter provided, shall go into effect until 30 days after the passage of the same." It is contended by counsel for the applicant that this section applies only to the passage of an ordinance by the mayor and council. But this section was a part of the original act providing for the initiative and referendum. Laws 1897, ch. 32, sec. 12. Prior to that act there was no such provision in regard to ordinances enacted by the mayor and council, and in the act of 1897 there is no other provision than this in regard to the time when the ordinance adopted by the people shall take effect. If this ordinance did not take effect until 30 days after its adoption by the voters, it was not in force when the application and petition for the license were filed, nor was it in force 10 days before the last publication of the published notice. And it would follow that for this reason the board was without jurisdiction to act upon the petition, even if we should consider that the ordinance in question is valid.

The petition for the license did not contain the allegation that the applicant is a man of respectable character and standing and a resident of this state. The statute expressly requires this allegation in the petition. Rev. St. 1913, sec. 3844. It has been many times held by this court that the petition is jurisdictional, and that it must contain all of the allegations provided by the statute. *State v. County Commissioners,* 12 Neb. 54; *Steinkraus v. Hurlbert,* 20 Neb. 519; *Maxwell v. Reisdorf,* 90 Neb. 374. See, also, 23 Cyc. 125. The rule is perhaps technical, but it has been so long recognized as the rule in this state that to depart from it now would be legislation.

For these reasons, the judgment of the district court is reversed and the cause remanded, with directions to cause the license to be canceled.

REVERSED.

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

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JOHN EYRE ET AL., APPELLANTS, V. ANDREW FREY, APPELLEE.

FILED JANUARY 2, 1915. No. 18,700.

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

*A. G. Wolfenbarger, R. M. Proudfit, J. H. Agee, S. R. Buck* and *H. S. Lower,* for appellants.

*Bernard McNeny, contra.*

SEDGWICK, J.

The proceedings in this case involve the same ordinances considered in *Eyre v. Doerr, ante,* p. 562. There is the same objection to the published notice, and other similar questions raised. For the reasons stated in that case, the

judgment of the district court is reversed and the cause remanded, with directions to cause the license to be canceled.

REVERSED.

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

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JOHN EYRE ET AL., APPELLANTS, V. CHARLES F. ABBOTT, APPELLEE.

FILED JANUARY 2, 1915. No. 18,702.

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

*A. G. Wolfenbarger, R. M. Proudfit, J. H. Agee, S. R. Buck* and *H. S. Lower,* for appellants.

*Bernard McNeny, contra.*

SEDGWICK, J.

The proceedings in this case involve the same ordinances considered in *Eyre v. Doerr, ante,* p. 562. There is the same objection to the published notice, and other similar questions raised. For the reasons stated in that case, the judgment of the district court is reversed and the cause remanded, with directions to cause the license to be canceled.

REVERSED.

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

MARY A. ROSENCRANS, APPELLEE, V. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED JANUARY 2, 1915. No. 17,846.

1. **Death: PRESUMPTION.** Where absence of the person insured is shown to have continued for seven years or more, unaccompanied by circumstances which reasonably account therefor on a theory not involving death, it is sufficiently strong to cast the burden of rebutting it on the party who asserts the continuance of life.

2. ———: ———: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* sufficient to warrant the presumption of death from the absence shown.

APPEAL from the district court for Sarpy county: HARVEY D. TRAVIS, JUDGE. *Affirmed.*

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

*W. W. Slabaugh* and *James T. Begley, contra.*

HAMER, J.

The defendant and appellant, Modern Woodmen of America, is a corporation and a fraternal beneficiary association. On the 8th day of October, 1892, it issued a benefit certificate to Charles H. M. Rosencrans, the husband of the plaintiff. The certificate provided that on the death of said Charles H. M. Rosencrans the defendant would pay to Mary A. Rosencrans, the plaintiff herein, the sum of $2,000. The plaintiff and her husband resided at Papillion, Nebraska. For a considerable time prior to the 9th day of September, 1903, the husband was working as a carpenter for Swift & Company, in South Omaha, and the plaintiff lived with the children at Papillion, Nebraska. Rosencrans boarded with a Mr. and Mrs. Ashburn at South Omaha, and generally went home to Papillion on Saturday nights, returning to South Omaha Monday mornings. It appears that on or about September 9, 1903, Mr. Rosencrans told Mrs. Ashburn that he was going up to the Odd Fellows Hall in Omaha to see a man buried, and that he

expected to be back that evening. The body of the man who was to be buried was shipped away, and so there was no burial. Rosencrans did not return that night, and up to date he has failed to come back. The plaintiff commenced an action in the district court for Sarpy county on the 26th day of December, 1911, against the defendant, Modern Woodmen of America, for the sum of $2,000, with interest, and the costs of the suit. She recovered a judgment on the 22d of June, 1912, against the said defendant for $2,052.10, together with interest from the 10th day of May, 1912, at 7 per cent. per annum, and the costs. From this judgment the defendant appeals.

The evidence shows that Rosencrans had lived 34 years in Nebraska. He and his wife had lived together 23 years. Most of the time they had resided at Papillion. They had a family of four children. Rosencrans was a most industrious man, much devoted to his family, and was a member of at least three fraternities, the Masons, Odd Fellows, and Modern Woodmen. He owned a home in Papillion and also a residence property in Omaha. He was a Dane, and came from Copenhagen, Denmark. He seems to have been affectionate to his wife, and wrote to her every week when he was absent from home. He also wrote to the children, and they wrote to him. The daughter was a school teacher. He and his wife seem to have lived together happily. The fraternal orders assisted in making a search for the lost husband. They got the assistance of the police. They engaged in a wide correspondence. The defendant produced the evidence of a Mr. Beadle, who testified that he had seen Rosencrans in the latter part of October, 1904, at Winnemucca, Nevada. He testified that he went into a restaurant to get supper between 6 and 7 in the evening and saw Rosencrans sitting at the table eating supper; that he spoke to him and said to him "I thought you was dead;" that he talked with him about 15 minutes, and was told by him that he was working for the Southern Pacific Railroad Company.

Mrs. Rosencrans procured her counsel, Mr. Holmes, to investigate concerning whether her husband had been at

Winnemucca. It appears that the lawyer wrote to the foreman of the shops at Winnemucca, and received a letter from him. The foreman examined a photograph of Mr. Rosencrans, and said that "he knew of no such man ever having worked there." On objection being made by the defendant, this evidence was stricken out.

It is contended by the defendant that, as there is evidence to show that the husband of the plaintiff was seen after he left Nebraska, therefore the presumption that he is dead by reason of the expiration of seven years is removed. It is contended that there must be a lack of information concerning the absentee on the part of those likely to hear from him after diligent inquiry; that the inquiry should extend to all those places where information is likely to be obtained and to all those persons who, in the ordinary course of events, would be likely to receive tidings if the party were alive, whether members of his family or not, and that in general the inquiry should exhaust all sources of information which the circumstances of the case suggest.

The insured seems to have been attached to his family, and it was strange that he should leave his wife and children as he appears to have done. We should not lose sight of the fact, however, that his wife forbade him to visit Mrs. Graham, the woman who had slandered her and her daughter. This fact may not throw much light on the subject, but Mr. Rosencrans may have been very impatient of his wife's interference touching the question of whether he was at liberty to visit Mrs. Graham. It is not shown that they quarreled about this matter, but it is shown that the relations between the plaintiff and Mrs. Graham were, to say the least, unfriendly, and that the plaintiff denied to her husband permission to call upon Mrs. Graham. That fact appears to show the only jar in their lives. That alone may have been reason enough why the assured would leave his wife and his family, and, once having left them, he would be subject to other influences which might prevent him from returning. The facts do not appear to stand in the way of the plaintiff's right of recovery. No one may

know whether the assured is really dead or alive. He has been gone since that particular day when he dropped out of sight. It was for the jury to say whether they believed the testimony of the witness Beadle. If they did not believe his evidence (and they may have felt bound to question it) there was nothing to prevent the application of the usual rule which would enable the jury to consider the presumption of the assured's death a fact after the expiration of seven years. It is more than eleven years since the assured went away. There is nothing strange that he should die at his time of life.

The case of *Modern Woodmen of America v. Gerdom*, 72 Kan. 391, is criticized in *Miller v. Sovereign Camp, W. O. W.*, 140 Wis. 505, where the court refused to follow it. The court say: "Proof of diligent search and inquiry is not required to establish the presumption of death of a person who has been absent from his home or place of residence for seven years." On the question of residence the court further say: "The general rule is that a man must have a habitation somewhere and that he can have but one, and that in order to lose one he must acquire another." The court refers to the *Gerdom* case, which is cited by the defendant, and refuses to follow it, and quotes from 1 Greenleaf, Evidence (16th ed.) sec. 41, as follows: "After the lapse of seven years without intelligence concerning the person, the presumption of life ceases, and the burden of proof is devolved on the other party. * * * It is sufficient, if it appears that he has been absent for seven years from the particular state of his residence, without having been heard from."

In the *Gerdom* case the assured was last seen at other places than his home, the residence of his mother, and there were also rumors as to his whereabouts. In that case there was no proof that the son had acquired a new residence, and the court was held to have rightly presumed that his residence was with his mother. In the *Gerdom* case the father and mother were beneficiaries on a certificate issued to the son. The son left his parent's home in Topeka, Kansas, on August 15, 1895, for California. In

December of that year he wrote to them. In August, 1896, they learned from his employer that he was last seen in May of that year. The court say: "In this case Joseph Gerdom (the father) was the only witness produced to prove want of intelligence from the absentee at his former place of residence, and he spoke for himself alone. * * * The young man's mother and his brothers and sister were not called." The son may have continued to correspond with his sister for years after leaving Oakland, and may even be in correspondence with her now. His last word to his family was that he intended to stay in California for some time at least, and it was the duty of the plaintiffs to secure information there. *Whiteley v. Equitable Life Assurance Society,* 72 Wis. 170. In *in re Estate of Harrington,* 140 Cal. 244, the court hold that a wife is not bound to make inquiry as to the whereabouts of her husband, who has been absent for ten years without advising her concerning his movements. It is the duty of the husband to inform his wife of his whereabouts.

In *Magness v. Modern Woodmen of America,* 123 N. W. 169 (146 Ia. 1), the court said: "The presumption of death from absence is not conclusive; but, when absence is shown to have continued for seven years or more unaccompanied by circumstances reasonably accounting therefor on a theory not involving death, it becomes sufficiently strong to cast the burden of rebutting it on the party asserting continuance of life." In that case Magness disappeared from Iowa City June 13, 1899. In September his wife received a letter, purporting to be written by him in South Dakota, saying that he would return in October. Afterwards he wrote her, saying that he was going to Minneapolis, and requesting her to write him at that city. She did so, but the letters were undelivered. Nothing in his previous history indicated a purpose to repudiate his duty to his family. The court said: "No greater wrong could be done to the character of the man than to account for his absence even after the lapse of a few short months upon the ground of a wanton abandonment of his family and friends." In that case the lower court found

for the plaintiff, and the appellate court affirmed the judgment. It was said in the opinion: "There was no direct evidence of Magness' death; but the fact was sought to be established by circumstances, the chief of which was the disappearance of said insured person from his home and from the knowledge of his family and friends for a period of more than seven years."

In *Holdrege v. Livingston,* 79 Neb. 238, this court said: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." In that case it was further said: "Where a party leaves his domicile with the avowed intention of establishing some specific new abode, the inquiry must follow him to such new domicile, but * * * there is a total lack of any evidence that Elijah Noyes * * * did in fact establish any new residence or place of abode."

It is contended by the defendant that the court erred in giving instruction No. 3. In that instruction the jury were told, in substance, that the presumption of life continues for seven years, under ordinary circumstances, after the unexplained disappearance of a man from whom no tidings return to his friends or acquaintances, and that then the presumption of death arises; that this presumption may be overthrown by evidence of facts and circumstances surrounding such disappearance which tend to affect the inference of continued life or early death, and in arriving at their conclusion the jury should consider the facts and circumstances and possible motives of the missing man to absent and conceal himself, as also his attachment to the members of his family and his friends, and his prospects in business, his character and habits, and the extent of the search made for him. It was then said: "Accordingly, if you find by a preponderance of the evidence that the insured, Charles H. M. Rosencrans, left his home and has been continuously absent therefrom for a

period of seven years prior to the 26th day of December, 1911, without any intelligence of his whereabouts being received from or concerning him during that time by his family or friends who, were he living, would naturally hear from him, then such continued absence, together with such lack of intelligence concerning him, would, if unexplained, raise the presumption of his death, and in that event, if the presumption has not been overthrown by evidence in the case, your verdict should be for the plaintiff."

We are unable to see any prejudicial error in the foregoing instruction. Mrs. Rosencrans and the various organizations of which her husband was a member seem to have more or less diligently searched for him. The testimony of the witness Beadle, who claims to have seen Rosencrans at Winnemucca, was not very satisfactory. The jury may well have questioned it. The interview with the husband at Winnemucca seems to have been exceedingly brief. In any event, the attorney who represented the plaintiff made inquiry about the matter, and the plaintiff saw the letter which he received from Winnemucca. But whether this interview did or did not occur, and whether the insured was ever at Winnemucca or was never there, is perhaps immaterial under the law as we conceive it to be.

In *Holdrege v. Livingston,* 79 Neb. 238 this court said: "The rule is settled that the presumption of life with respect to persons of whom no account can be given ends at the expiration of seven years from the time they were last known to be living, after which the burden of proof is devolved on the party asserting the life of the individual in question. 2 Greenleaf, Evidence (16th ed.) sec. 278*f*."

The insured seems to have been a man of excellent habits and of a domestic turn of mind. There are many reasons to suppose that he would return to his family if he were living and able to do so. Under the rule established in this state and in some other jurisdictions, the insured is presumed to be dead after the expiration of seven years from the time he was last known to be living. In this case more than ten years have elapsed since that time. We

find abundant evidence in the record to sustain the judgment of the lower court.

The judgment of the district court is

AFFIRMED.

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

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WILLIAM H. HORTON, APPELLANT, V. WILLIAM B. HOWARD, AUDITOR, APPELLEE.

FILED JANUARY 2, 1915. No. 18,615.

1. **Counties:** COMMISSIONERS: ORDERS: VALIDITY. Where one of the county commissioners has moved out of the commissioner district in which he resides into the district of another commissioner, and who continues to act as a member of the county board, the fact of such removal does not render an order of such county board a void order.
2. ———: BONDS: VALIDITY. Where a special election is held to issue bonds for the purpose of building and furnishing a court-house and jail, and the same has been ordered to be held by the county board and the proper steps have been taken in the regular way to cause such election to be held, and the bonds are carried, there is no reason to attack their validity because one of the members of the board had moved into another commissioner district.
3. **Evidence** examined, and *held* to sustain the judgment of the district court.

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

*Sterling F. Mutz* and *Harold M. Noble,* for appellant.

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

HAMER, J.

William H. Horton, the plaintiff, commenced an action in the district court for Lancaster county, Nebraska,

against William B. Howard, the auditor of public accounts of the state of Nebraska. The purpose of this action was to enjoin the registration of certain bonds issued by the county of Keya Paha. An answer was filed to the petition, and there was a reply to the new matter in the answer. On the trial the court found for the defendant and against the plaintiff, and denied the prayer for an injunction and dismissed the plaintiff's cause of action. The plaintiff appeals from the judgment of the district court. No supersedeas bond was allowed.

The bonds sought to be enjoined were registered and sold. The plaintiff alleges in his petition that he is a resident, a taxpayer, and a legally qualified elector of Keya Paha county. The bonds issued were courthouse bonds and jail bonds. There were 17 of them, each for $1,000. The complaint is that the bonds were illegally issued and void. It is claimed that the history of the bonds is false, and that it does not contain a correct copy of the records of Keya Paha county; that the records of that county do not show that the resolution and notice set forth in an exhibit attached thereto were signed by the chairman of the board of county commissioners and by Willard Sprague, a commissioner; that there is no showing that a vote was had upon the resolution and notice and proposition to issue the bonds; that the records of the county clerk do not show action by the county board of county commissioners as shown in the statement and history; that the resolution calling the election to vote on the proposition to issue the bonds was not adopted by a majority vote of the county commissioners; that Herbert Cottrill voted for said resolution; that Albert Stoltenberg voted against said resolution; and William Sprague was disqualified because before the meeting at which the resolution was offered he vacated his office by removing from the district; that only three commissioners were elected, and that the vacancy caused by the disqualification of the said William Sprague was not filled by appointment or otherwise; that the proposition submitted in paragraph two of the notice proposes to issue bonds "for the purpose of purchasing material for

the building, erecting, constructing, finishing, furnishing, and completing a courthouse and jail building," whereas the official ballot provided for in the resolution and notice proposes to issue bonds "for building and finishing a courthouse building and jail building" and for building and furnishing a courthouse and jail building; that the propositions to build the courthouse building and a jail were submitted together and were not separate, and that the voters were compelled to vote for both or against both, and were thereby prevented from expressing their true will; that the notice without the resolution or other commissioners' proceedings attached was published only in the issues of May 1, May 8, and May 15, 1913, of the Springview Herald; that it was not published in the issues of said paper on the 22d of May, 1913; that the resolution and notice required the publication of both the resolution and notice, whereas the notice only was published in the issues of May 1, May 8, and May 15, 1913; that the bonds presented for registration indicate the purpose of the issue to be for "furnishing" a courthouse and jail in addition to the erection of said buildings; that the taxpayers of Keya Paha county are without remedy unless in a court of equity; that no remedy whatever can be had in a court of law; that no remedy can be filed in a court of law; that, if the defendant proceeds to register the bonds and in making a certificate of the legality of their bonds, the said bonds will be given official validation; that a purchaser of said bonds would be required to look only for the certificate of the said defendant; that, if the bonds were sold, the purchaser would be an innocent purchaser for value without notice of the defects and the illegality of the issue of said bonds; that, unless the defendant be restrained from registering said bonds and from issuing the certificate of legality of issue the said county commissioners of Keya Paha county will proceed to sell said bonds and will use the proceeds to erect a courthouse and jail and to levy taxes upon the petitioner and the other taxpayers of the county to pay the principal and interest of said bonds.

There was a prayer for a temporary injunction restraining the defendant from registering said bonds and from making the certificate showing that the bonds had been voted and issued in accordance with law, also from signing the approval of the said defendant upon said bonds; that on the final hearing the injunction should be made perpetual and said bonds declared illegal and void.

The history recited that at an adjourned session of the regular January meeting of the board of county commissioners of Keya Paha county, Nebraska, held in the office of the county clerk in said county on the 14th day of April, 1913, all of the members of said board of county commissioners were present, and that there came up for consideration the matter of the advisability of submitting to the legal voters of said county at a special election to be held on the 24th day of May, 1913, a proposition to issue the bonds of said county for the purpose of erecting a courthouse and jail; that it was moved by Herbert Cottrill and seconded by William Sprague that an order and resolution should be adopted making it the duty of the county commissioners to provide a safe and suitable courthouse and jail and every necessary of the buildings, and to provide suitable offices for the county officers and for the courtrooms and offices for the accommodation of the several courts of record, also fire-proof safes and vaults for the safe-keeping of county records. This resolution also recited that the county courthouse was in an unsafe condition, inadequate for the accommodation of the several county offices and courts of record, and that there was no safe in which to keep the county records; also, that the vaults wherein the records of said county were stored were unsafe, and that said records were likely to be destroyed. And it was resolved by the board of commissioners of Keya Paha county at an adjourned meeting of the regular January session, 1913, that a special election be called to be held in said county on Saturday, the 24th day of May, 1913, to submit to the legal voters of said county a certain proposition, to wit: "Shall the board of county commissioners of Keya Paha county, Nebraska, for and on be-

half of said county issue the bonds of said county in the sum of seventeen thousand ($17,000) dollars of the denomination of one thousand ($1,000) dollars each for the purpose of purchasing material for the building, erecting, constructing, finishing, furnishing, and completing a courthouse and jail building for said county, in the town of Springview, the county seat of said county, on the courthouse block in the said town of Springview, known and described as block one (1) of the village of Springview, Keya Paha county, Nebraska, and all the costs thereof not to exceed the sum of seventeen thousand ($17,000) dollars, the entire amount of said bonds to be payable to bearer at the Nebraska fiscal agency in New York City at the expiration of twenty years from the date thereon, interest to be made payable on the first day of December, 1913, and on the first day of June and December in each year thereafter, said bonds to draw interest at the rate of five and one-half per cent. per annum from date of issue of same, payable semiannually?"

The form of the ballot was also set out and the places where the election should be held, naming ten certain precincts. There was also in the said history the affidavit of the publisher issuing the weekly newspaper in which the said notice had been published. There was also the certificate of the county clerk of the said county of Keya Paha showing that a proper canvass of the returns upon said proposition had been made as provided by law, and that the said canvassing board found that 421 votes were cast authorizing the county board of county commissioners of Keya Paha county to issue said bonds. On the 29th day of May, 1913, it was found that there was a proposition to issue the bonds of said county in the sum of $17,000 to build and finish the said courthouse and jail building, and that due and legal notice of the submission of said proposition was given by publication of the said notice in the Springview Herald for four consecutive weeks beginning in the issue of April 24, 1913, and running through the issues of May 1, 1913, May 8, 1913, May 15, 1913, of said paper. The said proceedings are set out at great

length, and we cannot set them out in full without greatly and unnecessarily extending this opinion.

The defendant, William B. Howard, answered admitting that 17 bonds of the county of Keya Paha, Nebraska, of the denomination of $1,000 each, accompanied by a history thereof, had been received from the county clerk of Keya Paha county with the request that said bonds be registered according to law and the certificate of the defendant be attached to said bonds showing that they had been voted in accordance with the law and that they were legally issued. There was also the statement of the said defendant that he was about to register said bonds and make a certificate that the same had been issued and voted according to law, and that he was ready to do so unless restrained by the order of the court. It was also alleged that Herbert Cottrill and William Sprague voted for the resolution submitting the question of the issue of said bonds, and that Albert Stoltenberg voted against said resolution; that said William Sprague, prior to the time he voted for said resolution, had removed from the commissioner district in which he resided at the time of his election into another commissioner district; but it was further alleged that the term for which the said William Sprague was elected had not expired, and that he had not resigned therefrom, but continued to perform the duties of the office of county commissioner in said county, and was recognized as a member of said board of county commissioners by the other members thereof and by the people of said county generally. Also, that the resolution submitted the proposition to be voted upon, "for the purpose of purchasing material for the building, erecting, constructing, finishing, furnishing, and completing a courthouse and jail building," etc. Also, the defendant answered admitting that the first publication of the notice was on the 24th day of April, 1913, and that the same was thereafter published May 1, May 8, and May 15, 1913, and that the publication was in a legal newspaper; that the bonds presented indicated the purpose of the issue to be to raise money for furnishing a court-

house and jail as well as to raise money for the erection of such buildings.

There was a reply to the answer denying the allegations of new matter. Upon the trial the district court found for the defendant and against the plaintiff, and dismissed the plaintiff's petition. Plaintiff's motion for a new trial was overruled.

The record fails to show that any supersedeas bond was filed. The bonds have been registered and sold and delivered. We have read the bill of exceptions. It shows that there was no proceeding to oust Commissioner Sprague, and that there was no appointment made to fill the alleged vacancy caused by the removal of Sprague from one commissioner district to another. It was also stipulated that the exhibit attached to the plaintiff's petition contained a true and correct copy of the history of the bonds as submitted to the auditor when application was made for their registration; also, that the bonds recited that they were issued for the erection and furnishing of a courthouse and jail; also, that for the last 15 years it has been the custom of the newspapers of Springview to publish the proceedings of the county commissioners from time to time, giving their action upon the various subject-matters coming before them and disposed of by them.

F. J. Rhodes testified on behalf of the relator that he had made an investigation of the records of Keya Paha county in relation to the passage of the resolution and notice calling an election—the one in controversy; that he did it previous to the commencement of the suit; that he investigated the records of the county clerk and of the board of county commissioners of Keya Paha county, and that he did not find the words following the resolution, "On motion the above resolution was adopted as read this 14th day of April, A. D. 1913, at Springview, Nebraska. John Scheie, County Clerk of Keya Paha county." On cross-examination he testified that he did not know whether the resolution passed or not.

There is also a stipulation in the record showing that the county attorney of Keya Paha county wrote to the

attorney general of the state of Nebraska, and received from him a letter to the effect that, "if the boundaries of the district were changed arbitrarily by the board, so that a commissioner was changed from the district from which he was elected, our court has held that this would not deprive him of holding the office for the full term. But, where he does an act himself that places him outside the boundaries of the district, evidently it would be different. The safer course to pursue is for the commissioner to be a resident of the district he represents." It does not appear that Sprague was advised that he should give up the office of county commissioner, and he appears to have retained the office and to have continued to serve as such county commissioner. There was a unanimous vote of the county board that the bonds should be issued. There was also a vote to the effect that the office of William Sprague as county commissioner had not expired.

The notice published states the amount of the bonds to be voted, the interest they are to draw, the time for which the bonds are to run, the date of the election, and the polling places. This is sufficient. Rev. St. 1913, sec. 956.

In *Linn v. City of Omaha,* 76 Neb. 552, there was to be a bond issue of $60,000 to pay for the construction of fire-engine houses for the use of the fire department of the city of Omaha. There were other particulars stated in the notice. The ballot label upon the voting machine was: "Shall the city issue $60,000 fire-engine house bonds to run 20 years at 4%?" It was said that the ballot label was not intended to furnish information to the voter in detail as to the object of the election; that the proclamation was notice of the election and fully informed the electors of the object of the election; that the object of the inscription was to instruct the voter as to how he might vote intelligently on the question of which the proclamation gave him notice.

In *Calahan v. Handsaker,* 133 Ia. 622, there was a resolution by the directors of the school township to submit the question at an annual meeting where bonds in an

amount not exceeding $4,000 should be issued to erect the schoolhouse. The notice of the meeting recited that the question was whether the township should issue bonds not to exceed $4,000 for the erection of a schoolhouse, and stated the manner of voting on the proposition. The ballot to be used followed the notice, except that it omitted the limit of the amount of bonds that might be issued. It was held that the ballot was a sufficient compliance with the law which provided for submitting the question to be voted on.

In *Wightman v. Village of Tecumseh,* 157 Mich. 326, the words, "For sewer purposes," were omitted from the ballot as it was printed. In the form of the ballot it was provided that the same should contain the purpose for which the bonds were authorized; but the court held that an omission from the statement upon the ballot of the purpose for which the bonds were to be issued did not invalidate the election, as the resolution and the published notice contained a full statement of the purpose.

We are unable to discover any error which seems to us to be prejudicial. The evidence appears to fully sustain the judgment of the district court, and it is

AFFIRMED.

ROSE, J., not sitting.

FAWCETT, J.

For the reasons stated in the foregoing opinion, supplemented by the reasons assigned in the concurring opinion of SEDGWICK, J., I concur.

LETTON, J., concurs as stated by Fawcett, J.

SEDGWICK, J., concurring.

I think that the conclusion reached in the opinion of Judge Hamer is right. The relator in his brief urges six different reasons for reversing the judgment of the district court.

1. The resolution calling the election for the issuance of bonds was adopted by the votes of two of the members of

the county board, one member voting against it. Mr. Sprague, one of the members voting for it, had removed from the precinct from which he was elected to another precinct in the county, and the relator contends that he was disqualified to vote, and that therefore the resolution was not adopted. The relator cites *State v. Skirving,* 19 Neb. 497, and *State v. Field,* 26 Neb. 393. In the former case it was directly held that a county commissioner must reside in the precinct from which he was elected. The commissioner had removed to another precinct, and at the next general election it was insisted by all parties that a successor should be elected. The candidates were regularly nominated, and the relator in that case was elected. He brought an action in *quo warranto* to test his right to the office. The court held that he was entitled to the office. This holding was approved without comment in the latter case. In the case at bar no one contested Mr. Sprague's right to the office, and he continued to act in that capacity without objection. His actions therefore were entitled to the force and effect of the act of an officer *de facto.*

2. The second point urged is that the notice of the election was defective. In this contention the relator disregards the first publication, in which the whole proceedings of the county board were published, including the matters which he insists were not properly published. When we remember that the respondent, as auditor of state, was not restrained from proceeding with the registering of the bonds, and that the bonds have accordingly been duly registered and sold and the proceeds received by the county, and that this relator has no special interest in the matter, it must be held that the first publication was not invalid because it included the whole minutes of the county board.

3. It is objected that there were two propositions submitted, and that under the law they should have been submitted separately. The purpose of the bonds was stated, "for the purpose of erecting a courthouse and jail building in said county," and in another place, "for building and furnishing a courthouse building and jail building." It

seems to be contended that this contemplated two buildings; but there is no allegation that it was so considered by the board, or that any one was misled in that respect. The building contemplated was for a courthouse and jail, and I think that this objection was without merit.

4. It is also contended that the county commissioners were without authority to issue bonds for furnishing the building. The notice recited that it was "for the purpose of purchasing material for the building, erecting, constructing, finishing, furnishing, and completing a courthouse and jail building for said county." In *Linn v. City of Omaha*, 76 Neb. 552, it was held that the authority to issue bonds for the construction or purchase of needful buildings for the use of the city included the power to purchase the site for such buildings; and in *Champion Iron Co. v. City of South Omaha*, 93 Neb. 56, it was held that the installation of cells in the city hall to be used in connection with the police court was authorized by a vote to purchase a site and erect a city hall thereon. A courthouse and jail would be useless without proper furnishing, and such furnishing must be considered as a part of the building itself, within the contemplation of the statute.

5. Various discrepancies in the language used for stating the purpose of the issue of the bonds are discussed in the brief; but in view of the facts before stated, that the relator has no special interest in the matter, and that the proceeds of the bonds have already been appropriated, I would not consider it necessary to discuss these verbal discrepancies.

6. Lastly, it is contended that the trial court should have required the auditor to examine the authenticity of the history of the bonds. The law makes it his duty to examine the history of the bonds, and the court properly presumed that the auditor had done so.

For the foregoing reasons, I think that the conclusion affirming the judgment of the district court is correct.

# CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

## JANUARY TERM, 1915.

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ALVARADO W. CRAIG, ADMINISTRATOR, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY ET AL., APPELLANTS.

FILED JANUARY 6, 1915. No. 17,876.

1. **Negligence.** Upon the questions of negligence and contributory negligence, *Craig v. Chicago, St. P., M. & O. R. Co.*, *ante*, p. 426, followed.
2. ———: IMPUTED NEGLIGENCE. The mere fact that the relationship between the driver of a wagon and the person riding therein is that of mother and son does not, of itself, as a matter of law, make the negligence of the driver imputable to the mother.
3. ———: ———: QUESTION FOR JURY. Where it is contended that a son whose negligence contributed to the injury was his mother's agent or servant, so that his negligence is imputable to her, and the evidence is conflicting, the question is for the jury.
4. **Action for Death:** COUNTERCLAIM. A counterclaim for damages for injury to the rolling stock and roadbed of the defendant railway company, caused by the negligent act of the driver of a vehicle, cannot be asserted against the beneficiaries of an action under Lord Campbell's Act.
5. **Damages.** Evidence examined, and a verdict of $10,000 for the death of the plaintiff's decedent *held* not to be so excessive as to justify setting it aside as the result of passion or prejudice.

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

*George W. Peterson, Brome & Brome* and *James B. Sheean,* for appellants.

*Sullivan & Rait* and *W. T. Thompson,* contra.

LETTON, J.

This action is brought by the administrator of the estate of Catherine E. Craig, for the benefit of himself and the next of kin, to recover damages for the death of his wife. Judgment was rendered in his favor for $10,000. Defendant appeals.

The principal facts with relation to the accident whereby Mrs. Craig lost her life are set out at length in the opinion in the case of *Craig v. Chicago, St. P., M. & O. R. Co., ante,* p. 426. It will be unnecessary, therefore, to consider the claim of defendant that the evidence does not support a finding that it was guilty of negligence, that point having been decided adversely to its contention in the former case. We adhere, also, to the view expressed as to the defense of contributory negligence with respect to Zell Craig. Defendant contends that the negligence of Zell Craig must, as a matter of law, be imputed to Catherine Craig, and that, if this claim is decided adversely, then the damages awarded are so excessive as to have been the result of passion and prejudice on the part of the jury. In both cases defendant asserts that the court erred in not receiving evidence in support of its counterclaim for damages to its engine, train and track resulting from the derailment caused by the collision. The latter point was not considered in the other case, but will be considered briefly here.

Even if a tort could be offset against a tort, such a counterclaim as this cannot be asserted.

The plaintiff is suing in his representative capacity as a trustee. The action is not brought for the benefit of the estate of the deceased, nor can the amount, if any, recovered be made subject to any claims of creditors. The cause of action is one created by statute. Its purpose is to prevent those persons who had the right to look forward

to the services of, or support from, the deceased, and who will suffer a pecuniary loss by the death, from being deprived thereof by the wrongful act of the defendant. If Zell Craig, as the agent or servant of Alvarado W. Craig in the driving of his team, recklessly and carelessly caused injury and damage to another, under the doctrine of *respondeat superior,* Alvarado W. Craig might be liable personally, but he could not be liable in a representative capacity. In such a case, if Zell Craig were the agent or servant of the mother, whether her estate could be reached or not, the fund created for the benefit of her heirs and next of kin could not be touched. The court, therefore, properly rejected this evidence.

Upon the question of imputed negligence, the court gave the following instructions:

"(6) If you find from the evidence that Zell Craig was on the day of the accident sent to Lyons by his father, on his father's business, driving his father's team, and that Catherine E. Craig went on business of her own, without any authority or duty with respect to the driving of the team, and without any reason to suspect the want of care or skill on the part of her son, then and in that case, his negligence, if any there was, could not be charged or imputed to her, and the relation of mother and son would not alone and of itself afford a necessary inference that she possessed the right, or was charged with the duty, to control or direct the driving of the team.

"(7) When a passenger, while riding in a private vehicle with the consent of the driver or owner thereof, is injured by the concurring negligence of the driver and another, the negligence of the driver is not imputed to the passenger, so as to prevent a recovery of damages for the injury sustained, unless he had authority to control, or was charged with a duty to control, such driver, or had reason to suspect a want of care or skill on his part. Applying this principle to the case in hand, you are instructed that the negligence of Zell Craig, if any there was, contributing to the accident in question, cannot be charged or imputed to Catherine E. Craig, so as to prevent a re-

covery in this case, unless she possessed the right, or was charged with the duty, to control such driver, or had reason to believe or suspect that there was a want of care or skill on his part."

The complaint is made that "the rule of law thus announced is not applicable to the undisputed facts, and is erroneous." It is also stated that the mother gave the directions as to the grist and the manner in which the corn should be ground, and it is argued that the business at the mill was a joint enterprise for the benefit of the family, but, even if it was not so, that, in the absence of the father, Mrs. Craig was the master or principal and the son was her servant or agent.

The doctrine of imputed negligence has been considered in this state in the cases of *Omaha & R. V. R. Co. v. Talbot,* 48 Neb. 627, *Loso v. Lancaster County,* 77 Neb. 466, and *Hajsek v. Chicago, B. & Q. R. Co.,* 68 Neb. 539. The holding in the *Talbot* case is modified by the *Loso* case. It was held in the *Hajsek* case: "Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state." This is the rule adopted by nearly every state in the Union. *Loso v. Lancaster County, supra.* If there is any doubt or question as to the nature of the relation existing between Mrs. Craig and her son with respect to the management of the team at the time the accident happened, the question is one of fact for the jury. So far as the evidence shows in this case, Mr. Craig was the owner of the farm and carried on the farming operations. It was at his direction that the son went to the mill, it was his team and wagon that was used, and the grist that was to be ground belonged to him. It is true that the miller asked Mrs. Craig how she would like the meal ground, and, housewife like, she indicated her preference; but this does not indicate that the corn was not the property of her husband. Mrs. Craig had not driven a team for ten years. There is nothing to show that she was invested with any authority over her son with respect to the management of the journey. The son went to town up-

on the father's business, and it is shown that the mother desired to go in order to exchange a pair of shoes for a better fitting pair. We cannot say, as a matter of law, that the relation of principal and agent, or master and servant, existed between the mother and son, even though the young man had not arrived at his majority. The son only lacked a month of being 18 years old. He weighed 183 pounds, and was a man in all but years. It has been held that, where a person is a passenger or a guest in a vehicle and it becomes apparent that the driver is taking unusual risks, if the passenger or guest makes no attempt to leave the vehicle or save himself from the threatened injury, he is equally guilty of negligence and cannot recover. *Rebillard v. Minneapolis, St. P. & S. S. M. R. Co.*, 216 Fed. 503, and many cases cited in the opinion; *Trumbower v. Lehigh Valley Transit Co.*, 235 Pa. St. 397. But, in this case there is evidence that, as soon as the young man apparently saw the train and commenced to whip the horses, the mother attempted to seize his arm or the reins, seemingly in the endeavor to prevent the team from crossing the track in front of the locomotive. May not the converse of the proposition apply, and, if the guest or passenger attempts to thwart the negligent act, is this not strong or conclusive evidence that no negligence existed on his part or should be imputed to him?

The relation of parent and child is not the determining factor. *Johnson v. City of St. Joseph*, 96 Mo. App. 663, was a case in which the driver of a wagon in which the plaintiff was riding, which was precipitated into an excavation in a defective street, was her son. It was held that, as it did not appear that the son was in her employment, his negligence could not be imputed to plaintiff, citing *Dickson v. Missouri P. R. Co.*, 104 Mo. 491. In *Buckler v. City of Newman*, 116 Ill. App. 546, the facts were that the plaintiff was riding in a wagon drawn by a team of horses driven by her son, aged 17 years. The wagon wheel dropped into a defect in the highway. As a result the plaintiff was thrown to the ground and injured. The jury were instructed that, if the accident "resulted from a want

of reasonable care and caution for her own safety on the part of the plaintiff, *or the person driving the team,* then the jury should find in favor of the defendant." The court said: "It cannot be said, as a matter of law, that the mere fact that he was her son and a minor gave her such control over him as to make her responsible for his careless driving. The record fails to disclose the ownership of the team and wagon, whether the driver was in her or her husband's employ, or whether she was a passenger by right of ownership of the team and wagon or by invitation or permission of the owner. As we take it, the mere relation of parent and child is not sufficient, but before the negligence of the driver could be imputed to appellant, the relation of either master and servant, or of principal and agent, must have been established." The judgment was reversed. *Peabody v. Haverhill, G. & D. Street R. Co.,* 200 Mass. 277, and cases cited in the opinion.

It is strongly urged that the court erred in permitting the plaintiff to testify as to the value of his wife's services. Mr. Craig testified that his oldest daughter was 20 years of age when the accident happened; that she has since married and moved to Colorado; that the surviving son is not quite 16, and that his daughter Ilene is not quite 14 at the present time. Mrs. Craig was 52 years old and in good health at the time of the accident. They had been married 22 years. She did all the housework, with the help of the girls when they were not at school, made the children's clothes, did the washing, and took care of the milk and butter and poultry. She also instructed the children and helped them with their lessons in school and Sunday school. After giving these facts, the witness was asked what, aside from the care of the children, the value of her services was for taking care of the house, caring for the poultry, making butter, etc. This was objected to because no foundation was laid. The objection was overruled. Mr. Craig then testified that her services were worth about two or three times as much as those of a servant girl to whom you would have to pay $5 to $10 a week, and worth at least $15 a week. We find nothing

prejudicially erroneous in the admission of this evidence. The evidence is not strictly that of an expert. The wages of domestic servants is a matter of common knowledge, and the facts in evidence with reference to the services of Mrs. Craig as housekeeper and in the care and instruction of the children justify the conclusion testified to by her husband.

It is next urged that the verdict is so excessive that it appears to have been the result of passion or prejudice on the part of the jury. No tables of expectancy are in the record, but, according to the brief of both parties, the expectancy of Mrs. Craig was between 19 and 20 years. Assuming as a basis of calculation that her services were worth at the minimum $15 a week or $780 a year, and taking the present value of that sum for the period of expectancy, with interest for the time intervening between the commencement of the suit and the rendition of the verdict, this amounts to about $8,900. Plaintiff urges that this is the minimum value of the services, which the jury was not bound to adopt, and that, if the value of her services is estimated with reference to the testimony as to the wages paid a servant girl and the proof, they were worth two or three times as much, and the present worth of her services would be about $20,000. On the other hand, the defendant, upon the assumption that her services were worth $1 a day or $365 per annum, argues that the present worth would aggregate $3,733, or, if $5 a week be taken as a basis, to $5,167.50. It is impossible to ascertain with accuracy or certainty the pecuniary loss which will be suffered by the husband and children on account of the death of Mrs. Craig. Tables of expectancy show mere averages, but seem to afford as reasonable an index to longevity as has so far been discovered. The beneficiaries may all cease to exist within a year, or they may live far beyond the average duration of life. It is also impossible to place a definite money value upon the services of a wife and mother. The wages of a servant girl or a housekeeper are not always a true index of the pecuniary loss to the husband and children. If the amount fixed by the jury does not con-

vince the mind that it is unjust and entirely disproportionate to the loss suffered, courts should not, and they are loth to, interfere with verdicts. The question must be determined under the attending circumstances of each individual case. While we are satisfied that the amount assessed is fully as much as the recovery should have been, we are not convinced that it is so excessive that we are justified in setting the verdict aside as a result of passion or prejudice, or that a remittitur should be required.

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

AFFIRMED.

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

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BESSIE B. BORCHERT, APPELLANT, V. JAMES BASH, APPELLEE.

FILED JANUARY 6, 1915. No. 17,879.

**Limitation of Actions:** ASSAULT AND BATTERY. A civil action for damages for an assault and battery with circumstances of aggravation must, under section 13 of the code, be begun within one year after the cause of action accrued.

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

*C. E. Eldred* and *A. T. Cowings,* for appellant.

*Bernard McNeny, contra.*

LETTON, J.

This is a civil action for assault and battery. It is charged that the defendant assaulted the plaintiff and attempted to have carnal intercourse with her against her will and without her consent by forcibly overcoming her resistance, but that the plaintiff by exercising her strength

succeeded in releasing herself. The assault is alleged to have occurred on the 6th day of March, 1911. The action was begun on the 23d of September, 1912. The defendant filed a general demurrer, on the ground that the plaintiff's cause of action was barred by the statute of limitations. The demurrer was sustained, and, the plaintiff having elected to stand upon her petition, a judgment of dismissal was entered. Plaintiff appeals.

The question to determine is whether the action is one for assault and battery, which by section 13 of the code, must be brought within one year, or whether it is "an action for an injury to the rights of plaintiff, not arising on contract, and *not hereinafter enumerated,*" which, under section 12, is not barred until four years after the wrong. The appellant's position is that the petition charges a felonious assault, and that felonious assaults are not within the definition of assault and battery, and, hence, must be covered by the provision of section 12. It is a settled doctrine of statutory construction that words shall be taken to have their ordinary and customary meaning. The question, then, is, for what classes of wrongs has it been generally understood, both in England and in this country, can damages be recovered in civil actions for assault and battery?

At the common law the action for every wrong of this nature was trespass, *vi et armis,* for assault and battery. *Dickey v. McDonnell,* 41 Ill. 62; *Agnew v. Jobson,* 13 Cox C. C. (Eng.) 625.

In *Elliott v. Van Buren,* 33 Mich. 49, 20 Am. Rep. 668, it is said: "This action is nothing more than trespass for an assault and battery. There is no such thing as a private action for a crime as such. The civil grievance here charged was an assault, described, as was proper, with its attendant circumstances of enormity, including an attempt to ravish. This, however, does not make it differ from an action for a lighter grievance, except as showing a heavier ground of complaint, for which, if made out, the damages allowed would be likely to be larger."

It is unnecessary, in order to make out a cause of action, to plead matters of aggravation, since their effect is merely to increase the damages (3 Cyc. 1082*h*); and the contention that, because the assault is alleged to have been accompanied by aggravated circumstances, the nature of the action is changed from a civil action of assault and battery, we think, is untenable. It is the same action, but the damages may be enhanced by the nature of the assault.

The books are full of reports of civil actions for indecent assaults of this nature, extending over a period of many years. They are uniformly classed at common law as actions in trespass, *vi et armis,* for assault and battery, and in code states as actions for assault and battery. The following illustrative cases are concerned with like assaults. Each is denominated an action for assault and battery. *Luttermann v. Romey,* 143 Ia. 233; *Haulish v. Boller,* 75 N. Y. Supp. 992; *Derwin v. Parsons,* 52 Mich. 425; *Parker v. Coture,* 63 Vt. 155. See, also, 1 Kinkead, Commentaries on Torts, sec. 206.

In Ohio, from which state our code was taken, there seems to have been no doubt as to the nature of an action for such an assault; and, in the absence of a disability on the part of the plaintiff (such as infancy), it must be brought within one year. *Bormuth v. Beyer,* 10 Ohio C. C. 291.

It is significant that libel, slander, assault and battery, malicious prosecution, and false imprisonment—all personal wrongs—are included in the one year statute. The legislature evidently thought that the public interest requires a prompt prosecution of such actions. Charges of this nature are easily made and difficult to defend against, and the lapse of more than one year after the alleged occurrence of the wrong allows time for the dispersion of witnesses, and makes the difficulty of defending such cases much greater. In *Kramer v. Weigand,* 91 Neb. 47, which plaintiff cites, it is said, speaking of the common law: "Damages for assault and battery were recoverable in a civil action, but damages for rape were not, and where rape was part of the violence proved there could be no

recovery for assault and battery. * * * This difference between the nature of the offenses was evidently observed by the legislature when the statute of limitations was enacted." That case, therefore, furnishes no basis for plaintiff's contention.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissenting.

The opinion of the majority approves of *Kramer v. Weigand,* 91 Neb. 47, and professes to distinguish it from this case. In each case the action is for damages caused by a felony committed against the plaintiff. In each case the felony complained of included an assault and battery, and neither felony could be committed without committing an assault and battery. In the case at bar the struggle was more strenuous, and the plaintiff succeeded in preventing the consummation of the rape. In the *Weigand* case the resistance was not so determined and successful. In the case at bar, if the plaintiff had been more yielding and had not resisted so strenuously, she would have had four years in which to begin her action. By her stubbornness she forfeited that right, and must suffer her injuries without redress because she did not begin her action within one year after the felony was committed against her. Could anything be more inconsistent? The explanation given in the majority opinion for such distinction is, to my mind, still more curious. It is said: "Damages for assault and battery were (at common law) recoverable in a civil action, but damages for rape were not, and where rape was part of the violence proved there could be no recovery for assault and battery. * * * This difference between the nature of the offenses was evidently observed by the legislature when the statute of limitations was enacted." If this statement has any application in the *Weigand* case, it has the same application in the case at bar, but it has no application in either case. Several hundred years ago in England all damages caused by any felony belonged to the King. There could be no private action for damages

caused by a felony. They said the damages were included in the crime. If that were the law with us, it would of course apply to one felony as well as another, and would not distinguish the case at bar from the *Weigand* case. But there never was any such common law in this state. At the earliest opportunity a right of action was given for all felonies, and no distinction was made. "The right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of and in addition to the punishment of the latter." 1 Complete Session Laws, p. 351. The first territorial legislature of 1855 enacted a criminal and civil code. It defined the crime of assault, assault and battery, rape, and assault with attempt to commit rape. 1 Complete Session Laws, p. 96. It adopted a part of the Iowa civil code, which contained the statute of limitations. It contained no provision specially limiting the time for bringing actions for assault or assault and battery, but actions for injuries to the person were limited to two years. 1 Complete Session Laws, p. 25. Later the limitation for actions for injuries to the person was extended to four years, and this limitation was made to apply to all actions for injuries to the person "not hereinafter enumerated," and a subsequent section provided the limitation for action for assault and battery should be one year. It would seem very clear that under these statutes we ought to hold, either that all actions for damages caused by a felony committed against the person are actions for simple assault and battery and must be brought within one year, or else that all such actions have a four-year limitation. The majority opinion says: "At the common law the action for every wrong of this nature was trespass, *vi et armis,* for assault and battery. * * * And the contention that, because the assault is alleged to have been accompanied by aggravated circumstances, the nature of the action is changed from a civil action of assault and battery, we think, is untenable. It is the same action, but the damages may be enhanced by the nature of the assault." That is, if an assault and battery is included in the act complained of, all consequences of the assault and

battery are matters in aggravation of damages and cannot change the nature of the action. This would, of course, include an accomplished rape and all possible consequences thereof, and as plainly includes the *Weigand* case as it does the case at bar. The opinion in the *Weigand* case begins with the statement: "Plaintiff is an unmarried woman, and this is an action for trespass upon her person." Of course that correctly states the nature of the case. There can be no rape without an assault and violence against the person. The petition in that case alleged that "the defendant with force and violence made indecent assault upon the plaintiff," and the evidence tended to prove the allegation. The petition alleged, and the evidence tended to prove, serious consequences of the assault. It was an aggravated assault. The plaintiff did not resist so successfully as in the case at bar, and the consequences were different, but both were felonies and both were followed by consequences that might be anticipated from the nature of the assault.

The majority opinion cites *Luttermann v. Romey,* 143 Ia. 233, and other similar cases. These cases have no relation to the question we are deciding. The action was for an aggravated assault. The plaintiff failed to prove those elements of the offense which under our statute would constitute a felony. It does not appear from the opinion whether the offense charged was a felony under the Iowa statute. The decision was that, if plaintiff failed to prove the more serious crime, she might still recover for the assault. The assault was necessarily included in the charge, as in the case at bar and in the *Weigand* case, and, of course, a recovery for an assault could not be denied because the plaintiff failed to prove the felony. In construing a statute words should be taken to have their ordinary meaning, and it is unfortunate to give a strained and unnatural meaning to the language of a statute upon an erroneous idea of the common law of England of hundreds of years ago. This is especially so when the result is to construe a statute in one case, and give it an exactly

contrary construction in the next case which involves the same question.

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JOHN L. NOFSINGER, APPELLANT, V. ALFRED D. PAUP, APPELLEE.

FILED JANUARY 29, 1915. No. 17,745.

1. **Assault and Battery:** RIGHT TO RECOVER. The plaintiff, in an action for damages for an assault and battery, cannot recover when he is shown to have been the aggressor, unless the defendant, in repelling the plaintiff's assault, has used more force than would appear necessary to an ordinarily prudent man under like circumstances.
2. **Appeal:** AFFIRMANCE. This court will not set aside the verdict of a jury as unsupported by the evidence, unless it is clearly wrong.

REHEARING of case reported in 96 Neb. 805. *Former judgment of reversal set aside, and judgment of district court affirmed.*

BARNES, J.

This was an action to recover for personal injuries sustained by the plaintiff for an assault and battery alleged to have been committed by the defendant. The defendant's answer was a denial and a plea of self-defense. By a former opinion (*Nofsinger v. Paup,* 96 Neb. 805), we held that the evidence was insufficient to sustain the verdict in favor of the defendant. A rehearing was allowed, the cause has been reargued and submitted, and the question now is: Shall we adhere to our former opinion?

It appears that on the 24th day of May, 1911, the plaintiff started from his home with a load of wheat to be delivered at Albion, which place lies about seven miles northeast of the plaintiff's premises. At the corner of the defendant's farm a boy named Adam Gardner got upon the wagon and rode with plaintiff to a point where the difficulty occurred. The plaintiff testified, in substance, as follows: I had

stopped about five times from the Paup corner to the hill, about 25 or 30 rods south of the Gardner place. I stopped at the bottom of the hill. I then made a pull and stopped perhaps 50 feet up the hill. I raised up to get off my wagon to start my team. While doing that I said: "They are playing thunder with these confounded drags." When I looked back I saw Mr. Paup with his spade up ready to strike. He was close to the east of his horses' heads, about eight feet from me. When I dropped my lines I turned, facing him. I came within about four feet diagonally northeast from the hub of my wheel. Paup said: "If you come an inch I will hit you with this spade." I was holding up my right hand to keep him from hitting me. I begged him not to hit me with the spade. He said: "I will hit you with the spade; I will hit you with the spade." And he said some foul words as he struck me. He said: "I will just kill you." There was scarcely a check from the first words spoken until I was hit.

The testimony of the defendant, relating to the commencement of the affray, was, in substance, as follows: On the morning of May 24, I went out and King-dragged the road. I noticed plaintiff's team over the hill. I knew he was prejudiced against us working the road. I did not want to meet him. I waited until he went north of the corner, about 40 rods from where I was. When I got on top of the hill he was about 60 rods ahead of me. When I saw him next he was about 30 rods ahead of me. When I got down there the horses began to slow up, and I looked up and said, "Whoa," and they stopped, and there was Mr. Nofsinger's team standing in the road. He turned round in the seat and said: "What in the devil do you want to be dragging these roads for all the time?" I finally says: "What's biting you?" He said: "There is a whole lot biting me." He climbed off the wagon with the whip in his hand and started toward me. I waited until he got back of the back end of his wagon, and he kept coming, and I waited until he got pretty near to the head of my horses, and I saw that he was going to come, and I had this shovel on there, and I picked it up and

warned him to stand back. I told him not to come any farther. He was then about 10 feet from me. I said: "Stand back or I will hit you." He was in front of me watching me, and I was looking at him. I warned him the second time. He kept crowding in on me. I warned him the third time to stand back, and he kept crowding up on me, and when I warned him the third time he made a rush at me like that, and I struck him with the spade. I do not know whether I hit him with the spade, or whether the spade came off and hit him, but anyway he rushed into me and commenced pounding me with the butt end of the whip, and he struck me across the face and over the head and kind of dazed me, and when I came to he had his thumb in my eye trying to gouge my eye out, and I jerked away from him and got my thumb in his mouth, and he bit me on the thumb, and I jerked away from him, and in some way or other I was trying to push him from me, and I got him by the shirt, and in the tussle I threw him down and was holding him down. He said: "You ought to be ashamed of yourself to hit an old man 52 years old." And I said: "You ought to keep a 52-year old man's place."

Adam Gardner, who was the only other witness who saw the encounter, testified, in substance, as follows: I was riding with Mr. Nofsinger. He had stopped his team there, and Paup came up behind him. Nofsinger used a vulgar and profane expression, and then said: "What are you always dragging up my tracks for?" Paup said: "What's biting you?" And Nofsinger went off his wagon with his whip in his hand and went back to him. Paup said: "Stand back or I will hit you." And he said: "I will dare you to hit me with the spade." Mr. Paup said three times, "Stand back." Nofsinger went right toward him, and he hit him over the head with the spade. Nofsinger fell and clinched Mr. Paup. That is all I saw, and I went into the house. Nofsinger was holding his hand up to his face. He had a broken-off piece of buggy whip three or four feet long in his hand. Paup moved

backward. They were 10 or 15 feet back of the hind wheel when the blow was struck with the spade.

The foregoing is the substance of the testimony describing how the encounter between the plaintiff and defendant took place. There was considerable other testimony, and the statements of the witnesses named were to some extent modified by cross-examination, but the above is a fair statement of what the testimony shows.

It must be conceded that Nofsinger was quite severely injured by the blow struck with the spade. His other injuries were comparatively slight. The defendant was also injured in the fight, but his injuries were not permanent. The case was submitted to the jury under proper instructions. In fact, the trial court submitted nearly all of the instructions requested by the plaintiff. Some of them were slightly modified, but, as we view the record, the modifications were properly made. The jury returned a verdict for the defendant, on which the trial court rendered judgment. By a reference to the testimony, it is apparent that the jury were of the opinion that the plaintiff was the aggressor, and that the defendant struck him in self-defense. If this was so, plaintiff could not recover, unless the defendant used more force than, under the circumstances, an ordinarily prudent man would be justified in believing was necessary to repel the assault, and the jury were apparently convinced that the force used by defendant was justifiable. We are unable to say that the jury were not justified in arriving at that conclusion.

Where a question is submitted to the jury upon conflicting evidence and upon proper instructions, the verdict will not be set aside by a reviewing court, unless it is clearly wrong. The evidence was substantially conflicting, and in such case the verdict of a jury should not be set aside on the ground of its being against the weight of evidence, unless it is clearly so, and more especially ought this rule to be observed by reviewing courts. Considering the charge to the jury as a whole, we find no prejudicial error in the instructions.

It follows that our former judgment should be, and is, set aside, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., not sitting.

HAMER, J., dissenting.

Paup was driving a team behind Nofsinger and overtook him. Both Nofsinger and Paup agree that Paup said to Nofsinger, "What's biting you?" Nofsinger testified that he said to Paup, "There is nothing biting me," that at the time he said this he thought his team was stuck. The ground was soft. Nofsinger further testified that when he first stepped off the wagon he was about even with the hind edge of the front wheel; that when he looked back "he saw Mr. Paup with his spade up ready to strike." He puts Paup about eight feet distant from him, and says that he (Nofsinger) dropped his lines and turned to face Paup; that Paup said to him, "If you come an inch I will hit you with this spade;" that he (Nofsinger) begged Paup not to hit him with the spade; that Paup said, "I will hit you with the spade; I will hit you with the spade;" that he said some foul words and wound up by saying, "I will just kill you."

Paup was 10 years younger than Nofsinger. Nofsinger complained because Paup struck a man who was older than he was. Paup himself testified: "I got him by the shirt, and in the tussle I threw him down and was holding him down." As long as Paup was 10 years younger and was able to throw him down, there does not seem to have been any necessity for striking him with the spade. Nofsinger had a 35-cent buggy whip. It could not have been of much force as a weapon.

Paup opened his defense with the statement that he had "grippe" and heart trouble and a bad cough. He testified he was uncertain whether he hit Nofsinger "with the spade, or whether the spade came off and hit him." The boy testified that Paup said to Nofsinger, "Stand back;" that Paup then went right toward him, and he hit him over

the head with it. Paup appears to have told Nofsinger, "You ought to keep a 52-year old man's place." The fact is uncontroverted that Paup hit Nofsinger with the spade. With its sharp edge he cut Nofsinger's head.

The defense in this case is, to the mind of the writer, very much of a sham. While it is for a jury to determine the merits of conflicting evidence, the jury has no right to render a verdict that is not sustained by the evidence. The defendant very seriously injured the plaintiff. I have been wholly unable to find any justification for his conduct. I thing he ought to pay for it.

Dr. Thompson testified that Nofsinger was "in a condition of shock and collapse; he was quite pale and very nervous; there was some blood on his face and head, and on the scalp here on the right side, a little to the right of the middle line, there was a cut which by measurement was three inches in length, reaching through the entire thickness of the scalp, to the bone, and some bruises or abrasions on his face and neck." The doctor also testified that he put "five stitches in the scalp wound." Later there was a partial paralysis of the left leg. Nofsinger's speech became incoherent and broken. His bladder was affected, and he was unable to retain his urine. His injuries seem to have been permanent.

The court gave the following instructions upon its own motion:

"(4) The fact that defendant struck plaintiff a blow on the head with a spade is not controverted by the proofs, hence there are but two questions left for your determination, viz.: First. Was said blow struck in self-defense as hereinafter explained? And, second, if you determine such fact in the negative, then you are to determine whether the plaintiff has sustained damages by reason thereof, and, if so, the amount of such damage.

"(5) Upon the question as to whether said blow was struck in self-defense, the burden of proof is upon the defendant, and, to justify you in so finding, the jury should be satisfied, from a preponderance of the evidence, that the blow was struck in self-defense. If upon this question the

evidence is evenly balanced, or if it preponderates in favor of the plaintiff, your finding should be for the plaintiff."

The foregoing instructions seem to relate to each other. These instructions may be criticized because they lay down no rule of any kind by which the jury are instructed as to what is "self-defense." They are left to roam at will. If they conclude that the blow was struck in self-defense, there is nothing more to be done, although they are not told what will justify the striking. The jury are left to determine the law upon this subject for themselves.

The 6th instruction reads: "Upon the question as to whether the plaintiff has sustained damages by reason of the blow struck by defendant, and as to the amount of such damages, if any you shall find, the burden of proof is upon the plaintiff; and before you would be justified in assessing damages in his favor you must be satisfied from the evidence, and by a preponderance thereof, that he has sustained damages in some amount, as a result of said blow, and you must be further satisfied, as explained in the next preceding paragraph of these instructions, that said blow was not struck in self-defense."

This instruction permits the jury to tide over any amount of injury by coming to the conclusion that the blow might have been struck in self-defense. It tethers them nowhere. The judge in effect tells the jury that Paup had a right to cut his head with the spade, provided he thought that he was acting in self-defense.

Instruction No. 9½ would seem to be a license to the defendant upon the theory that his physical condition was not good. This instruction substantially told the jury that they could "take into account his physical condition" (meaning the defendant's physical condition) and compare it with that of the plaintiff, although there was no testimony whatever upon which to base such a comparison. This instruction must have been highly prejudicial. It is indefensible. It reads: "In the determination of the question whether the defendant used unreasonable force or means to defend himself, it is proper for you to take into account his physical condition,

as disclosed by the evidence at the time, and as compared with that of the plaintiff."

The following instruction requested by plaintiff was refused: "(1) You are instructed that this action has no relation whatever to any other action or litigation, and you are instructed that you must disregard any reference to any former action." It is difficult to understand upon what ground this action was taken.

The court also refused to give the following instruction requested by the plaintiff: "(3) The jury are instructed that, if they find for the plaintiff, then, in assessing his damages, they are at liberty to take into account the character and extent of plaintiff's injuries, so far as they have been proved by the evidence, the pain and suffering endured by him, if any, in consequence of such injury, his loss of time and cost of medical attendance, and award such damages as will fully and fairly compensate the plaintiff for his suffering and loss, if any, in view of all the facts and circumstances proved, not exceeding the sum of $11,500." It would seem that an instruction of this nature should have been given.

Instruction No. 6, requested by the plaintiff and refused, reads as follows: "The court instructs the jury that, if you find from a preponderance of the evidence that at the time of the encounter the plaintiff and defendant were men of about equal size, that they occupied common ground, that the plaintiff had no apparent advantage over the defendant, that the plaintiff was not armed with any dangerous or deadly weapon with which he might have killed or seriously injured the defendant, and that the plaintiff, prior to the time of being struck on the head with a spade by defendant, had made or uttered no threat against the defendant, nor made any effort to strike or injure the defendant, under such circumstances the action of the defendant in striking plaintiff with the spade is wholly without justification in law, and his plea of self-defense is of no avail."

Instruction No. 15, requested by the plaintiff and refused, reads: "You are instructed that, if a party enters

into a fight dangerously armed and fights with undue advantage over his antagonist, even though mutual blows pass, if he strikes his adversary with a dangerous weapon pursuant to a previously formed design to use such weapon in case of emergency in which his life would not be endangered, or he would not be in danger of suffering great bodily injury, it is not self-defense, and he is liable in damages."

Instruction No. 16, requested by the plaintiff and refused, reads: "You are instructed, to make a plea of self-defense available, the defendant must be without fault. If he was himself the aggressor, he cannot invoke the doctrine of self-defense, even if the plaintiff was approaching him in a hostile manner; and whether the necessity to strike the plaintiff was real or only apparent, if brought about by the design, contrivance or fault of the defendant, he cannot be excused on the plea of self-defense."

It should be remembered that an impartial consideration of the evidence in this case might lead to the conclusion that these men fought by consent. While the plaintiff may have been willing to fight, he was not armed with a dangerous weapon. He had a little broken buggy whip. He could not have seriously injured the defendant. The defendant was armed with a spade. In law a spade is a deadly weapon. It is as dangerous as a dagger, a revolver, or a cleaver. The language used by the trial court in instructing the jury was such as to confuse their ideas concerning the matter.

The first point to determine is which of the parties was the aggressor, or whether the plaintiff attempted any thing more than mere talk. In this connection it should not be lost sight of that the defendant was in no great danger if the plaintiff did not attempt to strike him. He could not jump to the conclusion that he was going to be struck until there was an actual demonstration of some kind. Second, he was in no danger as long as the plaintiff had in his hand an insignificant little whip. No mere threat justified the use of the spade, if the plaintiff stood away and talked. Even though he had the whip, there was no justification

in the defendant using the spade. Before using the spade the defendant was bound to retreat to the wall; that is, he was bound to avail himself of any apparent and reasonable avenue of escape. He was not permitted to make a chopping block of the plaintiff because the plaintiff seemed to be out of humor.

At the request of the defendant the court gave four instructions, calculated apparently to excuse the defendant for using the spade. Much time and care were no doubt expended by defendant's counsel in the construction of these instructions. Their effect was to tell the jury to excuse the defendant for what he did. In three of these instructions they excuse him for using a great degree of force. Three of these instructions came right along one after another as a man might pound with a maul or sledge-hammer. They all hit the same place, the wedge, intended to divide the plaintiff from any chance to recover. The three of them which we intend to discuss together read:

"(1) You are instructed that when a person is attacked by another in such manner as to excite in him a reasonable belief that he is in danger of receiving serious bodily injury, or that he will sustain thereby serious loss or damage to his property, he may lawfully resist the attack by employing such reasonable means within his power as are apparently necessary to defend himself and protect his property. He is not required to weigh or measure the degree of force necessary to that end to a nicety or with exactitude; all that is required of him in that respect is that he act as a man of ordinary care and prudence, situated as he was at the time, would have acted.

"(2) You are instructed that, while the law will not justify the use of more force than is reasonably necessary to repel an attack, still it does make a reasonable allowance for the infirmity of human judgment under the influence of sudden passion, provocation, or fear, and does not require a man to reason with mathematical exactness the degree of force necessary to repel an attack upon himself.

"(3) You are instructed that, when a person is threatened with an assault upon himself, he has a right to defend against the same, and to use such force as, in view of all the circumstances, is reasonably necessary to that end. He is not required to weigh and calculate to a nicety the exact amount of force to use, but merely to use such care and caution as a reasonably careful and prudent man in like circumstances would use."

The first idea in the first of the above instructions is that the defendant is permitted to exercise a "reasonable belief" of danger. If he had such belief, which an angry man could easily have, then he is at liberty to use the spade on the plaintiff's head. The second idea in that instruction is that he is made the judge of what is "reasonable means" and "apparently necessary" to defend himself. Then comes the part which cannot help releasing the defendant from liability in the minds of the jury. The jury are told that the defendant may make a mistake about it and may use more force than is necessary, but it will still be all right. The actual language used is: "He is not required to weigh or measure the degree of force necessary to that end (protection) *to a nicety or with exactitude.*" In the next instruction the judge still whacks away on the question of "exactness" not being required to measure the force necessary. He first says that, "while the law will not justify the use of more force than is reasonably necessary," yet it will make "a reasonable allowance for the infirmity of human judgment under the influence of sudden passion, provocation, or fear." Was ever a thing better devised than that to excuse the violence of the defendant? But the learned judge does not stop here. He goes on to say in addition that a man, under such circumstances, is not required "to reason with mathematical exactness the degree of force necessary to repel an attack upon himself." That is the cap sheaf. I have never seen a more labored effort to justify an assaulting party than the foregoing. But he was just getting a good start, for in the third instruction the jury are told that he has

a right to defend himself when *"threatened* with an assault;" that in such case "he is not required to weigh and calculate to a nicety the exact amount of force to use." Three times in succession this matter of nicety or exactitude is gone over. Each time the jury are told "it don't make any difference."

But, fearing that he had not made it quite strong enough, the judge goes after the jury in the fourth instruction requested by the defendant. In that instruction the defendant is justified in defending himself merely if the plaintiff "approached" him. It is not required that he actually do anything in order to justify the defendant's attack with a spade. It is quite enough if the manner of the plaintiff is "menacing and threatening."

These instructions were not reviewed in the former opinion because the evidence seemed insufficient to justify the verdict.

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BANK OF SALEM, APPELLEE, V. LYMAN B. CORNELL, APPELLANT.

FILED JANUARY 29, 1915. No. 17,837.

**Mortgages:** FORECLOSURE: APPRAISEMENT. "It is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud." *Security Investment Co. v. Sizer*, 58 Neb. 669.

APPEAL from the district court for Richardson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

*Burkett, Wilson & Brown* and *E. Falloon*, for appellant.

*C. F. Reavis, T. L. Hall* and *Rinaker & Kidd, contra.*

BARNES, J.

Appeal from an order of the district court for Richardson county confirming a sale of real estate to satisfy a

decree of foreclosure. It appears that on the 24th day of February, 1911, a decree was rendered against Lyman B. Cornell in favor of the Bank of Salem for the foreclosure of its mortgage on two quarters of land situated in said county, and in favor of certain other mortgagees and lienholders, who were all made parties to the action. The decree found the several different sums due from the defendant Cornell, which were liens upon the land, amounting in all to $24,671.55. An order of sale, which contained a copy of the decree, was issued on the 2d day of February, 1912. The sale took place on the 23d day of March of that year at 10 o'clock A. M. One quarter of the land was purchased by C. M. Heinzleman and the other by one W. P. Gobel. It further appears that the two quarter sections of land were appraised separately. The quarter section about which there is no controversy was valued at the gross sum of $12,800, and the other was appraised at the gross sum of $12,000, the total gross appraised value of the land being $24,800. The appraisers deducted from the gross value of the quarter section in question the sum of $253.43, which was the amount of the unpaid taxes thereon, thus leaving the appraised value at the sum of $11,746.57, and the sheriff stated as his conclusion at the end of his appraisement that the interest of the defendant in that quarter section was nothing. After the sale was made, the defendant filed an objection to the appraisement, alleging that the land was erroneously appraised because the several mortgages and liens merged in the decree were all included in the certificate of liens and were deducted by the appraisers from the value of the interest of Cornell in the mortgaged property. When the case came on for confirmation, the defendant filed a motion, based upon his objection above mentioned, to set aside the sale. The motion was overruled and the sale was confirmed. The defendant now contends that the court erred in overruling his objections and confirming the sale.

It is quite apparent that the sheriff in making the appraisement thought that, when the several liens established by the decree were satisfied, the defendant would have no

interest in the premises, and so stated at the conclusion of the appraisement. In such case an objection to the appraisement, in order to be available, should have been filed before the sale took place. *Bernheimer v. Hamer,* 59 Neb. 733; *Northwestern Mutual Life Ins. Co. v. Marshall,* 1 Neb. (Unof.) 36; *Mills v. Hamer,* 55 Neb. 445; *Security Investment Co. v. Sizer,* 58 Neb. 669. In the case last cited it was said: "It is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud." In the case at bar there is no allegation, and no showing, of fraud. There is nothing in the record showing, or tending to show, that the land in question brought any less at the sale by reason of the irregularity in the appraisement complained of than it would have brought under other circumstances. It is conceded that the defendant's land was sold for much more than two-thirds of the gross amount of the appraisements.

As we view the record, the defendant's objections to the confirmation were without substantial merit, and the judgment of the district court is

AFFIRMED.

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

HAMER, J., concurring.

One of the quarters of land sold was not properly appraised. The interest of the mortgage debtor was appraised at nothing. The opinion takes the view that it is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud, citing *Security Investment Co. v. Sizer,* 58 Neb. 669, and in the body of the opinion citing, also, three other cases. Whether the interest of the mortgage debtor is appraised too low ought to be the only question which can be properly raised. An appraisement which tends to drive prospective bidders away, by reason of the fact that no value is alleged, must be prejudicial to the debtor. A review of the cases in which the doctrine is announced, that objection to the appraisement must be

taken before the sale is made, shows that the doctrine in this state started with the case of *Vought v. Foxworthy*, 38 Neb. 790. The opinion in that case starts out with the statement: "It remains to be said that the value of the property, as shown by the affidavits filed in support of the motion to set the sale aside, does not so greatly exceed its appraised value as to raise a presumption of fraud." The view of the writer is that the "presumption of fraud" is an unnecessary thing to find before the sale can be set aside. If the appraisement is accidentally too low, or is for any other reason too low, then it ought to be set aside, so that prospective bidders will not be driven away. There should be no "chilled bids." In that case it is further said: "Parties desiring to make objections to the value fixed on property appraised for sale under execution, whether on the ground that such valuation is too high or too low, should make and file such objections in the court where the case is pending, together with a motion to set aside such appraisement before the sale occurs." It is then further said that the party seeking the sale of the appraised property would have notice, and that he could proceed to the sale of the property or take his chances of the appraisement being finally set aside, "or could stay the sale until such time as the court should decide the question as to the correctness of the appraisal made." Of course, if the mortgage debtor made an application for a "stay," he would at once waive his right of review, and that would be the end of the proceeding. The trouble with the doctrine is that the interest of the mortgage debtor gets but little consideration in this opinion. No case in this court is cited in the opinion in *Vought v. Foxworthy*. It rests upon the mere dictum of the learned commissioner, who gives no reason for his conclusion. The other cases find their support in the case of *Vought v. Foxworthy*.

The next case after *Vought v. Foxworthy*, *supra* (it is not cited in the majority opinion), is *Scottish-American Mortgage Co. v. Bigsby*, 52 Neb. 104. It gives no reason that "the objection that the appraisement was too low

came too late after the sale," except *Vought v. Foxworthy, supra.* The opinion in that case was prepared by Commissioner Ryan. Ragan goes ahead and Ryan follows him.

In *Bernheimer v. Hamer,* 59 Neb. 733 (cited in the opinion), the case of *Ecklund v. Willis,* 44 Neb. 129, is referred to as authority for that decision. On going to that case it is found that it cites *Vought v. Foxworthy, supra.* It will therefore be seen that it rests upon the original dictum of Commissioner Ragan.

In *Mills v. Hamer,* 55 Neb. 445, the same point is made, and *Vought v. Foxworthy, supra,* and *Ecklund v. Willis, supra,* are cited therein, together with *Burkett v. Clark,* 46 Neb. 466, *Kearney Land & Investment Co. v. Aspinwall,* 45 Neb. 601, and *Overall v. McShane,* 49 Neb. 64.

In *Burkett v. Clark, supra,* the original case of *Vought v. Foxworthy, supra,* is cited, and the same case is cited in *Overall v. McShane, supra.* The two former of the three cases last cited were prepared by Commissioner Ragan.

In *Northwestern Mutual Life Ins. Co. v. Marshall,* 1 Neb. (Unof.) 36, the case of *Mills v. Hamer, supra,* is cited as the basis of the opinion, and as that case rests on the case of *Vought v. Foxworthy, supra,* we go back to the original source, *Vought v. Foxworthy, supra.*

In *Security Investment Co. v. Sizer,* 58 Neb. 669, the case of *Vought v. Foxworthy, supra,* is again relied upon, together with the cases which follow it, *Burkett v. Clark, supra,* and *Kearney Land & Investment Co. v. Aspinwall, supra.*

It will thus be seen that the whole doctrine that it is too late, after a sale of real estate under a decree of foreclosure, to question the correctness of the appraisement except for fraud, rests upon the dictum of one supreme court commissioner followed by the dictum of another supreme court commissioner, and after that "the sheep all went over the fence." I think that *Vought v. Foxworthy, supra,* should be overruled, but I can understand that this court may well hesitate, whatever the origin of the case, about changing a rule that has been in force 21 years. I reluctantly concur in the majority opinion in the instant

case, although, as I understand it, the rule applied started without a reason being given for its existence, and it cannot help being prejudicial to the mortgage debtor. So long as the rule stands, I am unable to see my way clearly to do otherwise than concur.

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CATHERINE TIEHEN, ADMINISTRATRIX, ET AL., APPELLEES, V. SENORA C. CORNELL, APPELLANT.

FILED JANUARY 29, 1915. No. 17,906.

1. **Mortgages: FORECLOSURE: APPRAISEMENT: CONFIRMATION: REVIEW.** Where objections to an appraisement and the confirmation of sale are without merit, it is not reversible error for the trial court to strike them from the files.
2. ———: ———: **DEFICIENCY JUDGMENT.** A finding in a decree of foreclosure of the amount due from the mortgagor to the plaintiffs, who are the mortgagees, will authorize the court, on confirmation of sale, to render a deficiency judgment. *Crary v. Buck*, 1 Neb. (Unof.) 596.

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

*Burkett, Wilson & Brown* and *R. C. James*, for appellant.

*John C. Mullen* and *Reavis & Reavis, contra.*

BARNES, J.

Appeal from an order of the district court for Richardson county confirming a sale of real estate under a decree of foreclosure, and from the deficiency judgment rendered by the court upon the order of confirmation. No question is presented by the record challenging the validity or regularity of the decree of foreclosure, which contained a finding of the amount due from the defendant, Senora C. Cornell, to the plaintiff, Catherine Tiehen, and the cross-petitioner, the Farmers & Merchants Bank of Verdon,

Nebraska. It appears that the order of sale was issued on the 23d day of April, 1912. The sheriff, together with two other freeholders, appraised the mortgaged premises at the sum of $4,000. The sale was advertised for the 8th day of June, 1912, in the Verdon Vedette, a legal newspaper published in Richardson county, for six consecutive weeks next before the day of sale. On the day of sale the sheriff made return of the order, together with all of the proceedings thereunder, and defendant filed the following objections to the appraisement and confirmation: (1) Because no certificates of liens were filed and deposited with the appraisement before advertising the sale. (2) Because no appraisement of the interest of the defendant was made and filed with the clerk as provided by law. (3) Because the land was not advertised 30 days last before the sale took place, and was not appraised immediately before it was advertised. (4) The land was not described with clearness. The name of the plaintiff did not appear, and the purpose of the sale was not stated. The objections were not signed by the defendant; they were not signed by her attorney, but purported to be signed by L. B. Cornell as her agent. On motion of the plaintiff's attorney, the objections were stricken from the files, and the court made the usual order that cause be shown by the following morning at 9 o'clock why the sale should not be confirmed. The defendant did not further appear, and on the 12th day of June, 1912, the sale was confirmed.

As we view the record, the objections were not well taken. The certificates of liens were waived in writing by the plaintiff, and therefore were not made. The record shows that the land was duly and regularly advertised six consecutive weeks before the day of the sale. The land was clearly described and the plaintiff was named in the advertisement. In fact, the objections were without merit, and the court did not err in striking them from the files. This case should be ruled by *Hamer v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 705. There was no error in confirming the sale.

On the hearing it was argued that the court erred in rendering a deficiency judgment against the defendant. From an examination of the decree it appears that the findings contained therein were sufficient to authorize the court to render the deficiency judgment for $97.60.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

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## IN RE ESTATE OF ANTON VASEK.
## EMANUEL VASEK ET AL., APPELLANTS, V. JOSEPH VASEK, ADMINISTRATOR, APPELLEE.

FILED JANUARY 29, 1915. No. 17,919.

**Executors and Administrators: FINAL ACCOUNT: CREDITS: SALE OF LAND: PAYMENT OF LIENS.** An administrator, who, in selling mortgaged land for the payment of debts, pays prior liens in good faith out of the proceeds of the sale, and complies with an order of court to take a first mortgage for a portion of the unpaid purchase price, is entitled in his final account to credit for the amount thus paid, where the land sold for its full value, and the sale was approved and confirmed by the court, though the statute requires such sales to be made subject to existing liens.

APPEAL from the district court for Colfax county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

*George W. Wertz,* for appellants.

*Cain & Mapes, contra.*

BARNES, J.

This is a controversy between the heirs of Anton Vasek, deceased, and the administrator of his estate over an item of $2,797.49 in the latter's final account. To pay debts the administrator, under a license from the district court for Colfax county, sold for $18,240 a quarter section of land encumbered by a mortgage for $2,500. His license directed him to make the sale "subject to all liens and

encumbrances" upon the following terms: Five thousand dollars in cash, half the balance upon confirmation, and the remainder in three years, "to be secured by first mortgage." In offering the land for sale, the administrator announced that from the cash payment he would pay off the mortgage and convey to the purchaser a clear title. The sale for $18,240 was reported to and confirmed by the district court. From the proceeds the administrator paid off the existing mortgage, and he afterward conveyed the land to the purchaser, taking a mortgage thereon to secure the unpaid balance of the purchase price. His final account showed the receipt of $18,240, the purchase price of the land sold, and the disbursement of $2,797.49, the amount of debt and interest paid on the released mortgage. To the allowance of the latter item the heirs of decedent excepted. The county court overruled the exceptions, and the heirs appealed to the district court, where the judgment of the county court was affirmed. From the affirmance, they have appealed to this court.

The heirs contend that the administrator, in paying mortgagor's debt and in selling the land free from encumbrance, departed from mandatory provision of statute, and that he is chargeable in his final account with the entire purchase price without any credit for the amount thus illegally paid. The statute provides: "All sales and conveyances of land made by executors or administrators, pursuant to the provisions of this article, shall be subject to all charges thereon, by mortgage or otherwise, existing at the time of the death of the testator or intestate." Rev. St. 1913, sec. 1477.

The record shows that the sale was irregular, but it was approved and confirmed by the court, and it was therefore binding upon all parties. If the heirs had appealed from the order of confirmation, it would no doubt have been corrected, but they failed to object to the order or perfect an appeal, and it became a binding adjudication and was final. While it is true that the statute was not strictly followed, we are of opinion that the order was not void. The heirs waited until after the sale and confirmation

and received the full benefit thereof. After having, by their silence, lulled the administrator into security, they now attempt to make him give them $2,797.49, to which they have no claim either in equity or good conscience. We are therefore of opinion that they cannot enforce such a claim. The record shows that the land sold for its full value, free from encumbrances, and that the heirs were not injured by the action of the administrator. The order of sale directed him to secure a share of the unpaid purchase price by a first mortgage. He could only comply with this requirement by discharging the lien of the existing mortgage. This he did by paying the same out of the proceeds of the sale. After allowing him credit for the amount paid by him for that purpose, the heirs will receive the full amount to which they are justly entitled. In settling the estate, therefore, he should be allowed credit for the item in dispute. *Millard v. Harris,* 119 Ill. 185; *Abby v. Fuller,* 8 Met. (Mass.) 36; *Russell v. Wheeler,* 129 Mich. 41.

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

AFFIRMED.

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

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JOSEPH H. JAMES, APPELLEE, V. HAYDEN BROTHERS, APPELLANT.

FILED JANUARY 29, 1915. No. 17,998.

1. **Municipal Corporations:** USE OF STREETS: ACTIONABLE NEGLIGENCE. It is actionable negligence to drive a horse, attached to a wagon, in such a manner as to collide with, knock down and injure a pedestrian lawfully walking along the sidewalk of a public street of a city.
2. **Master and Servant:** NEGLIGENCE OF SERVANT: LIABILITY OF MASTER. The person thus injured, without fault on his part, may recover of the master of the driver for his injuries, if, at the time of the

collision, the driver was engaged in carrying on the master's business.

3. **Damages: REMITTITUR.** The evidence failing to show any permanent injury, a verdict for $4,000 is excessive, and the plaintiff should be required to file a remittitur of $2,000 or the judgment will be reversed; but, if the remittitur is filed, the judgment thus reduced will be affirmed.

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

*Greene, Breckenridge, Gurley & Woodrough,* for appellant.

*Jefferis & Tunison, contra.*

BARNES, J.

This was an action for damages for personal injuries. The plaintiff alleged in his petition that the servant and employee of the defendant, while in the course of defendant's business, carelessly and negligently omitted to control a horse and vehicle which he was then driving, and negligently and carelessly drove and managed said horse and vehicle at a rapid and dangerous rate of speed, and without regard to the rights of the plaintiff, who was upon the sidewalk on one of the streets of the city of Omaha, and, by reason of said negligence, the horse and vehicle violently ran upon and across said sidewalk, and against and upon the plaintiff with great force and violence, while the plaintiff, in the exercise of ordinary care, and while in plain view of said driver, was walking eastward on the south sidewalk of Izard street and in front of a gateway leading into the feed stables of the defendant, and thereby struck and knocked the plaintiff with great force and violence upon the ground, and dragged him and ran over and injured him severely and permanently. Defendant, by its answer, admitted that it was a corporation, organized and existing under and by virtue of the laws of the state of Nebraska; admitted that on or about November 3, 1911, a collision occurred between plaintiff and a horse and vehicle belonging to defendant; denied each and every allegation of the

plaintiff's petition and, further answering, alleged that plaintiff's injuries, if any, resulting from the aforesaid collision, were received through plaintiff's own carelessness and negligence, and not through that of the defendant. The cause was tried in the district court for Douglas county. The jury returned a verdict for the plaintiff for $4,000, on which the court rendered judgment, and the defendant has appealed.

It appears that on the 3d day of November, 1911, the plaintiff, while walking east on the sidewalk on the south side of Izard street, in the city of Omaha, and while passing the defendant's barn, where it kept its teams and delivery wagons, was run down by the horse and wagon of defendant, which a servant of the defendant was driving from the street into defendant's yard. The accident, as described by the witnesses, occurred as follows: The plaintiff, while lawfully passing along the sidewalk in the prosecution of his own business, had occasion to pass defendant's premises where there was a driveway from the street across the sidewalk into defendant's yard and barn. It was a cold day, and plaintiff had on an overcoat, with his hands in his pockets. He was walking along the sidewalk looking neither to the right nor to the left. Just at that instant, the defendant's servant, with a horse and wagon, on his way to the barn, came up behind the plaintiff from the west and turned in onto the driveway. As the horse was about to collide with plaintiff, the driver called, "Look out!" and at the same instant the horse's head struck the plaintiff and knocked him down. The horse veered slightly to the east, the wagon ran against the plaintiff and dragged him into the yard. The person who was driving the horse uttered a profane exclamation and went on his way, while another of defendant's servants came out from the barn, helped the plaintiff up, took him into the barn, washed his cuts and bruises, brushed his hat and clothing, and started him on his way. The plaintiff went to his home, and sent for Dr. Bliss, who attended to his injuries, which will hereafter be more particularly described.

It is defendant's first contention that the evidence was insufficient to justify a verdict for the plaintiff and against the defendant. We think this contention should not be sustained. The plaintiff, when struck by the defendant's horse, was lawfully passing along the sidewalk on the public street of the city, attending to his own affairs. He had no notice that any one was approaching him or intended to enter upon the driveway across the sidewalk. The driver of defendant' horse was approaching the driveway from the west and behind the plaintiff. One of defendant's witnesses testified that the horse was trotting as it came down the street and turned into the driveway. The view of the driver was unobstructed, and he must have been aware of the fact that plaintiff was crossing the driveway and did not see him. The driver was in a hurry to get his horse put up, for it was about noon, and it is apparent that he negligently and carelessly drove the horse against the plaintiff without giving him timely warning of his approach. The evidence was therefore sufficient on this point to sustain the verdict.

Defendant's second contention is that the verdict and judgment were grossly excessive, and that the verdict was given as a result of passion and prejudice. This requires us to consider the evidence relating to the plaintiff's injuries. The record shows that the plaintiff's head was cut open in two places. The wound on the back of his head was the more extensive, and was bleeding profusely. There were other bruises and abrasions on his person, and especially on his wrists, which abrasions were filled with dust and cinders. He complained of an injury to his back, and could hardly walk. After his wounds were washed, he went home, and called Dr. Bliss. The doctor dressed his wounds and prescribed rest and the use of some kind of liniment. This was the only treatment which the doctor gave him, and, after a couple of visits, he was not again called. The plaintiff remained in bed some time, and did not attempt to do any work for about two months. At the time of the accident he was a collector for the Singer Sewing Machine Company and was earning about $85 a month. About the

1st of February, 1912, he obtained a position as collector for the Independent Telephone Company at $15 a week. This position he held until that company went out of business. He then obtained employment as a solicitor and collector for a furniture company, and at the time of the trial was earning $12 a week. It thus appears that plaintiff suffered some diminution of his earning capacity by reason of his injuries. He testified that his wounds healed up all right, but he complained of his back and lameness in one of his hips. He testified that he was continually troubled with it, and that he easily became tired and did not rest well nights; that he obtained relief from the use of hot baths and liniment. Shortly before the trial, plaintiff was examined by Drs. Bliss and Bacon, and their evidence appears in the record. Neither of these witnesses testified that plaintiff's injuries were necessarily permanent. Dr. Bliss advised plaintiff to have an X-ray examination of his hip; but this was not done, and there is no competent evidence that plaintiff was permanently injured. Dr. Bliss stated that his recovery might require considerable time; but he did not state that his injuries were permanent. Two other competent medical experts, who heard the evidence of Drs. Bliss and Bacon, testified that they could not determine from the examination made by those doctors that the plaintiff had sustained any permanent injury.

As we view the evidence, the verdict for $4,000 was grossly excessive and should have been materially reduced. If the plaintiff files a remittitur with the clerk of this court in the sum of $2,000, within 30 days, the judgment as thus reduced will be affirmed; otherwise the judgment will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

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

MAUDE NEWMAN, APPELLEE, V. JOHN DOVEY, JR., APPELLANT.

FILED JANUARY 29, 1915. No. 18,007.

1. **Bastardy**: PRELIMINARY EXAMINATION: TRANSCRIPT OF EVIDENCE. Where, in a prosecution instituted under the provisions of chapter 7, Rev. St. 1913, it was stipulated by the parties that the testimony of the complainant should be taken in shorthand and transcribed and certified by the magistrate, which was done, and the testimony was filed in the district court before the trial, an objection of the defendant to being placed on trial because complainant's evidence was not reduced to writing by the magistrate was properly overruled.

2. ———: COMPLAINT: SUFFICIENCY. An objection to the complaint, which was filed before the birth of the child, that it did not state that the child was born alive, should be overruled.

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

*Bernard McNeny,* for appellant.

*E. U. Overman, F. J. Munday* and *Fred Maurer, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Webster county, in which John Dovey, Jr., was adjudged to be the father of a bastard child, of which Maude Newman, an unmarried woman, was the mother.

It appears that a complaint, in the usual form, was filed before the county judge of Webster county, acting as magistrate. A preliminary hearing was had, and the defendant was bound over to the district court to answer to the charge. When the complaint was filed, the child was not born. The complaint alleged that the complainant was pregnant with a bastard child. This was all the allegation that could have been made upon that subject. The complaint was therefore sufficient. If the child had died after the filing of the complaint, that would be a matter of defense or of

mitigation of the amount of the recovery. The objection was therefore properly overruled. The cause was tried on the original complaint filed before the magistrate. The defendant pleaded not guilty, and objected to being placed on trial on the ground that the magistrate, before whom the testimony on the preliminary examination was taken, did not reduce the complainant's testimony to writing, as the law required, and that no transcript of the testimony taken and reduced to writing by the magistrate had been filed in the district court, as required by law. His objection was overruled, the testimony on both sides was taken, and the jury returned a verdict finding the defendant guilty. A motion for a new trial was overruled, and the court rendered judgment on the verdict that the defendant was the reputed father of the child, and charged him with its maintenance in the sum of $1,200, payable in six instalments.

Defendant's first assignment of error is that the complaint was not sufficient to require him to be put upon his trial, in that it failed to allege the birth of the child, or that the child was then alive. The second error complained of is that the defendant was wrongfully put upon his trial in the absence of the written examination of the complainant upon the examination before the magistrate. The statutes provide that the testimony of the prosecutrix shall be reduced to writing and filed in the district court by the magistrate before whom the preliminary examination is held. It appears from the record that, at the time of the preliminary examination, it was agreed, by both parties, that the testimony of the prosecutrix should be taken in shorthand and then reduced to writing, and should be certified by the magistrate and filed in the district court. This was done, and at the time of the trial the shorthand notes had been transcribed, the magistrate had duly certified to the correctness of the same, and the prosecutrix's evidence, thus preserved, was on file in the district court. We know of no reason why this method of procedure should not have been resorted to. Defendant cites the case of

*Morgan v. Stone*, 4 Neb. (Unof.) 115. The opinion in that case does not support the defendant's contention. The record discloses that the testimony of the complaining witness was on file at the time of the trial, and, if the defendant had desired to introduce it in evidence to refute her testimony on the trial, it was available to him, but he did not see fit to make any use of it.

It appears from the record that the testimony of the prosecutrix was reasonable; that it was delivered in a straightforward, convincing manner; and, if the jury saw fit to believe her evidence, it was sufficient to sustain the verdict. By his testimony the defendant denied that he was the father of her child, but that was a fact for the determination of the jury.

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

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

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FAY WHITFIELD ET AL., APPELLEES, V. MAMIE E. CLARK; T. LEWIS YOUNG ET AL., APPELLANTS.

FILED JANUARY 29, 1915. No. 18,010.

**Judgment:** LIEN ON REALTY. A judgment creditor, by transcripting his judgment to the district court, does not obtain a lien upon real estate which has been conveyed to a third party by the judgment debtor by a duly recorded deed.

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

*William G. Rutledge*, for appellants.

*Lambert & Armstrong, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Nemaha county confirming the proceedings and sale in

a partition suit. The appeal is prosecuted by a creditor of William E. Watkins, the one-time owner of a share in the estate which was disposed of by the judgment from which this appeal was taken.

The record discloses that on the 2d day of August, 1910, one William G. Watkins died intestate, seized in fee of the southeast quarter of section 18, township 6, range 14 east of the sixth P. M., situated in Nemaha county. The decedent left nine children, of whom William E. Watkins was one, and who inherited a one-ninth of the land above described. On February 24, 1911, William E. Watkins conveyed by warranty deed his interest in the above described premises to his sister, Fay Whitfield. Her deed was filed for record in the office of the county clerk of Nemaha county on the following day. On April 5, 1911, the appellants herein, Young and Young, recovered a judgment in the county court of said county against said William E. Watkins for the sum of $232.85, and $4.40 costs. An execution was issued on the judgment and returned unsatisfied. On the 8th day of April, 1911, a transcript of said judgment was filed in the office of the clerk of the district court. No execution was issued on the judgment after it was filed in the office of the clerk of the district court, and no proceedings were taken to obtain satisfaction of the judgment or make it a lien on any real estate, other than the filing, docketing and indexing of the same, and except the proceedings hereinafter set forth.

It further appears that Fay Whitfield commenced an action to partition the estate. Appellants filed an answer and cross-petition, claiming their judgment to be a prior lien on the former interest of William E. Watkins, and also praying for a partition of said premises. On the trial of the partition suit, the court found and decreed that the appellants had no lien by virtue of their judgment upon the interest in the real estate formerly owned by William E. Watkins, and which was conveyed by his deed to Fay Whitfield. To this finding and decree the appellants excepted. On September 21, 1912, the real estate was sold by a referee to the appellee Margaret Katherine Watkins.

The appellants filed objections to the confirmation, which were overruled, and an exception was taken. The sale was confirmed and a deed was made to the purchaser. The court fixed the sum of $500 as the amount of the supersedeas bond, and ordered the referee to retain in his hands, pending the final determination of the appeal, the sum of $310 of the proceeds of the sale.

Appellants contend that the finding and judgment of the trial court, that as a creditor they had no interest in, or lien on, the share of their debtor, William E. Watkins, in the estate disposed of by the decree, is not sustained by the evidence and is contrary to law. The only question presented by the appeal is: Was the appellants' judgment, which was transcripted to the district court, a statutory lien on William E. Watkins' share of his father's estate, which he conveyed by warranty deed to his sister, Fay Whitfield? When the transcript of appellants' judgment was filed in the district court, the judgment debtor had conveyed his share of his father's estate to his sister, and her deed had been recorded. The conveyance was fraudulent as to creditors, but was not void; it was voidable only. It was good between the parties to it, and conveyed the legal title to the grantee, which might be defeated by proceedings in the nature of a creditor's bill. Appellants took no action whatever to create a specific lien on the debtor's interest in the estate. There was no attempt to levy an execution thereon, and no creditor's suit was commenced by them. It follows that this case should be ruled by *Flint v. Chaloupka,* 72 Neb. 34, where it was held that such a judgment is not a specific lien on real estate which has been conveyed to a third person.

The order of the district court, requiring the referee to retain in his possession the amount of the appellants' judgment, should be set aside, and the judgment of the district court is in all other things affirmed.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., not sitting.

DAVID A. MINICK, APPELLANT, V. SAMUEL A. REICHENBACH ET AL., APPELLEES.

FILED JANUARY 29, 1915. No. 17,916.

1. **Limitation of Actions:** SUIT TO DECLARE DEED A MORTGAGE. "The statute of limitations runs against a bill to declare a deed absolute in form a mortgage, in favor of a grantee in possession, from the time such possession becomes adverse to the grantor's title." *Stall v. Jones*, 47 Neb. 706.
2. **Adverse Possession:** INFERENCE FROM ACTS OF OWNERSHIP. "That grantee's possession is adverse may be inferred from the exercise by him of acts of ownership after payment of the debt." *Stall v. Jones*, 47 Neb. 706.
3. **Deed as Mortgage:** TITLE. "In this state a deed absolute in form passes the legal title, although intended as security for a debt, and for most purposes treated as a mortgage." *Stall v. Jones*, 47 Neb. 706.
4. ———: EQUITY OF REDEMPTION: FORFEITURE. "Therefore, where the grantee under such a deed is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right to an accounting." *Stall v. Jones*, 47 Neb. 706.
5. **Appeal:** AFFIRMANCE. Upon a trial *de novo* this court finds, as did the district court, that the plaintiff is not entitled to the relief prayed.

APPEAL from the district court for Butler county: EDWARD E. GOOD, JUDGE. *Affirmed.*

*C. M. Skiles* and *R. C. Roper*, for appellant.

*L. S. Hastings* and *E. A. Coufal, contra.*

LETTON, J.

This is an action in equity to declare a conveyance in the form of a warranty deed to be a mortgage and to be allowed to redeem. The district court found generally for defendant. Plaintiff appeals. The case seems to have been tried on the petition and the separate answer of Samuel A. Reichenbach, since we find no reference to the other defendants in the pleadings or decree.

The allegations of the petition may be summarized as follows: That the plaintiff was in 1888 the owner of 320 acres of land in Butler county, which he occupied with his family as his homestead; that in 1893 he borrowed $4,000 from the Aetna Life Insurance Company, which was secured by a mortgage on this land; that the defendants Reichenbach are the officers and owners of the Rising City Bank, a corporation, and that in 1893 the plaintiff, in order to pay prior debts to the bank, executed notes to the sum of $4,500, and, to secure the same, gave a mortgage to Samuel A. Reichenbach, subject to the mortgage of the Aetna Life Insurance Company; that in 1895 the plaintiff was financially embarrasssed, and that at that time the bank had a number of notes due other parties against the plaintiff for collection, which the owners had ordered to be sued; that defendant urged plaintiff to convey the premises to him in order to prevent judgments being rendered and levied upon the land, and promised him that he could redeem at any time by paying the debt due the bank, and that they would reconvey the premises; that, relying upon this promise, on September 30, 1895, he conveyed the premises to Samuel A. Reichenbach by a deed absolute in form, but it was intended by both parties only as a mortgage; that the farm at that time was worth $14,000; that afterwards the plaintiff was worried because he could not redeem the farm, and on account thereof suffered a paralytic stroke on the 1st day of June, 1900, which rendered him weak-minded, unable to understand his rights, and not of sufficient mental capacity to realize the necessity of taking action to protect his title to the farm; that he continued in this condition, except at intervals, until April 2, 1906, when he suffered a second shock, and from that time to 1911 he was mentally incompetent; that not until shortly before the commencement of this suit was he in full possession of his faculties; that on February 5, 1902, defendants acknowledged that the deed was merely given as security, and offered to reconvey on the payment of the amount due them, including the first mortgage, which they had paid; that on December 11, 1911, he of-

fered to pay all money due the defendants, asked for an accounting, and demanded a reconveyance, which was refused. He offers to pay the full amount due and demands a reconveyance.

The answer alleges that on September 30, 1895, the Aetna mortgage and interest, the $4,500 debt to the bank, and taxes paid by the defendants amounted to over $10,000; that, the land not being worth more than the indebtedness and liens, the plaintiff with his wife conveyed it to defendant; that defendant leased the land for a crop rental to plaintiff year after year until the 1st day of March, 1901, when plaintiff moved to another farm which he had purchased near-by; that between January 9 and March 29, 1899, the plaintiff claimed for the first time the right to redeem the land; that defendant then stated that he would convey the same to him if he would pay all of this indebtedness; that they agreed upon the sum of $10,369 as the amount then due, which amount was then the fair value of the land; that prior to the 29th of March, 1899, the plaintiff stated he was unable to obtain the money, whereupon defendant informed plaintiff that there must be a settlement; that plaintiff then agreed that if defendant would lend him the money to buy a smaller farm, pay for the improvements he had placed upon the farm, and deliver to him the notes, he would move off the premises on the 1st day of March, 1901; that, in pursuance to this agreement, the defendant delivered the notes, paid for a windmill wheel and chicken house left on the farm, amounting in all to $65, released the Aetna mortgage and the mortgage that had been given to him, and it was agreed that this was a full and complete settlement of any interest in the premises or right to redeem plaintiff had; that, in accordance with this agreement, the defendant loaned the plaintiff and his wife $2,235 with which to pay for the other farm; that plaintiff moved there as agreed; that defendant has been in exclusive possession ever since the settlement, claiming title, with the full knowledge of plaintiff; that he has made valuable improvements, amounting in all to about $2,000; has paid all taxes for the last 18 years; that

the land has increased in value to $35,000—all of this with the plaintiff's knowledge; and plaintiff has not asserted a right to redeem until this suit was begun. He also pleads laches, adverse possession, and the statute of limitations.

In the reply plaintiff admits that he delivered to defendant each year one-third of the crop, but alleges that this was for the purpose of keeping up the taxes and repairs, and that it was agreed that, if the share of the crop should more than pay these items, the surplus should be applied on the principal. He also alleges that he moved onto the smaller farm on account of being unable to work the large farm, and that it was agreed that thereafter defendant should continue to receive one-third of the crop and apply it upon the debts.

The pleadings have been set forth because they show, perhaps, in the most abridged and convenient form the contentions of the respective parties; and it may be said that with one or two exceptions, which will be hereafter noticed, the evidence on the part of the plaintiff and defendant support in the main the respective allegations in the pleadings. The direct conflict in these statements is reflected in the evidence as to almost every material fact in the case.

There is such a mass of testimony that the proper limits of this opinion will not allow a comparison and discussion of it. Since we have not the great aid to the ascertainment of truth afforded by seeing the witnesses and hearing them testify, we are inclined to attach great weight to the undisputed testimony as to the conduct of the respective parties with reference to the land. In the answer it is said that after defendant had paid the Aetna mortgage, and prior to the 28th day of March, 1899, plaintiff claimed for the first time the right to redeem the land; "that thereupon this defendant stated to plaintiff that he would convey said premises to him if he would *then pay to him the amount of his indebtedness* to defendant, including interest thereon, together with insurance premiums that he had paid to keep the buildings on said premises insured, and the taxes, that he (defendant) had paid on said lands, together with what he had paid to the Aetna Life Insurance

Company; that thereupon he and said plaintiff computed the amount which would be due the defendant from the plaintiff as aforesaid, and that from said computation they found and agreed upon the sum of $10,369 as the amount *that would then be due from the plaintiff to the defendant,* under the said arrangement, which amount was then the fair market value of said land." These allegations amount to an admission by defendant that, at the time of the conversation with Mr. Aldrich hereafter mentioned, there was an existing indebtedness; that the evidence of this indebtedness was still in the hands of defendant; and that plaintiff then had the right to redeem. The rights of the respective parties, therefore, must be determined by a consideration of whether there was a subsequent arrangement or contract between them whereby the Minicks surrendered this right. This must be determined from the evidence and the conduct of the parties with reference to the land. Several years after the deed was executed, and at a time the date of which is in dispute, Mr. Minick asked Mr. Aldrich, a lawyer of David City, to make a loan upon this land and to see if it could be redeemed. Aldrich consulted defendants, and defendants offered to reconvey the land if the indebtedness was paid. This is evidently the basis of the admission in the answer. Mr. Aldrich was unable to make or procure the loan. Defendant testifies that shortly afterwards he requested Mr. and Mrs. Minick to come to the bank; that they came, and a conversation was had in which defendant stated that he wanted the matter settled as to whether Minick claimed any rights in the premises, and that a settlement was had whereby Minick orally renounced all claim to the land and right to redeem, and Reichenbach (as he claims) delivered the notes, and agreed to furnish him the money with which to buy another and smaller farm.

On March 6, 1900, plaintiff made a contract to purchase the Carter farm of 160 acres. He paid $100 down, agreed to pay $500 on May 1, 1900, and $3,100 on or before March 1, 1901; and possession was to be given at that time. Defendant furnished the money for the last payment and took

a second mortgage on the place (which had a prior mortgage upon it of $1,800) as security. The payment was made, and Minick moved to the Carter place on the 1st of March, 1901. Before he moved he demanded and received payment for a chicken house and a windmill wheel which he had placed upon the farm after the deed to Reichenbach was made, saying that, unless he was paid for them, he would remove them to his new farm. Plaintiff insists that the conversation and agreement with Mr. Aldrich to allow redemption did not occur until 1902. To show this, he testifies that he went to see Mr. Aldrich about a claim made against him by a hired man which was not asserted until 1902, and he produced a letter of that year in which the claim of an employee for an amount said to be due him for services was made. Mr. Aldrich testified that he visited the land in 1899 or 1900, while he was undertaking to procure the loan, and that Mr. Minick was living upon it at the time, and also says that it was at a time when he had gone to look at some black cattle near Rising City. If he went while Minick was on the farm, his testimony corroborates that of defendant as to the year in which the alleged settlement occurred; but, if it was when he went to look at the cattle, it was probably some time in 1901. The evidence for the defendant as to the agreement that plaintiff should give up the right to redeem, in consideration of the cancelation of his indebtedness and the new loan with which to buy the Carter farm, is most consistent with all the circumstances; and we believe that this and the Aldrich interview occurred some time in the fall of 1900, and while plaintiff was still on the farm. From that time until December, 1911, plaintiff never set foot upon this land. Although there is both oral and documentary evidence to show that he had hundreds of transactions with the bank during this interval of time, borrowing money in order to carry on his stock feeding and shipping operations, paying and renewing notes, keeping a bank account there and drawing numerous checks, he says himself he never requested a statement as to the receipts or disbursements of money from the farm. He never inquired

whether the taxes were being paid, or whether anything was being applied upon the debt, as he asserts it was agreed should be done. He knew that the defendant was making lasting improvements, such as building corn cribs and granary, repairing, repainting and reshingling the house, barn, etc.; but he seemed to have lost all interest in the farm.

With respect to the plea of weakness of mind on the part of the plaintiff as constituting a disability which would toll the running of the statute of limitations, it appears that he suffered a stroke of paralysis on June 1, 1900; but its effect, so far as beclouding his intellect, passed away to a great extent in a comparatively short time. Until the time this suit was begun, except for a short time in 1906 when he suffered another and a less severe attack of the same disease, he was able to conduct and direct, not only ordinary farming operations, but the purchasing and feeding of cattle, their shipment to South Omaha to market (himself often accompanying and selling them upon the market )and the disposition of the proceeds. It is also shown that in the same interval he successfully conducted the Carter farm and practically paid off the whole purchase price, with no one to help him except his wife and a hired man. The large number of checks upon and notes given to the defendants' bank show that the business he conducted was in excess of that of the ordinary farmer. The oral waiving of the right to redeem was in the fall of 1900, as we view the evidence, after plaintiff had recovered in great measure from the effects of the stroke of June 1, and at a time when he was competent to transact and was transacting his own business. Ten full years intervened during which he was fully competent to act and during which he remained silent. During the later years of the period an unprecedented rise in the value of land took place, and after this had occurred he took action. It seems to us that his conduct during and after this long period of time is most persuasive in determining the character of his relation to the land. Actions often speak louder than words.

More than ten years' possession, accompanied by acts of exclusive ownership, such as the erection of buildings and making other valuable improvements upon the land, of which plaintiff was aware, without consulting him or requesting his consent, the retention of the entire proceeds of the farm, without offering to account, and other acts inconsistent with any admission of title in the plaintiff, should have been enough to apprise him that the defendant claimed and was asserting the exclusive title. His own acts also in diverting the earnings and profits of the Carter farm to other purposes than the attempt to redeem seems inconsistent with his testimony. Moreover, aside from the plea of the statute of limitations, we are convinced that Minick parted with all right to redeem soon after the Aldrich incident. His conduct shows it; and hence, even if ten full years have not intervened, he still must be denied the relief he seeks upon the facts.

Reichenbach was in possession of the land at the time of the settlement, by Minick as tenant, and he has continued in possession until this day. Under the authority of *Stall v. Jones,* 47 Neb. 706, the right to an accounting was parted with when the oral setlement was made, and Minick had no further interest in the land. We have come to these conclusions as to the weight of evidence more by a consideration of the actions of both parties than upon their spoken words.

We believe the judgment of the district court warranted by the proofs, and it is therefore

AFFIRMED.

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

MABEL C. KING, APPELLEE, V. PHYSICIANS CASUALTY ASSOCIATION OF AMERICA, APPELLANT.

FILED JANUARY 29, 1915. No. 18,000.

1. **Insurance**: MUTUAL BENEFIT ASSOCIATION: DIRECTORS. The by-laws of a mutual benefit association specified in detail the duties of the president of the association. These did not include duties as a member of the board of directors, of which the president was *ex officio* a member. Another by-law provided that, in the absence of the president, it should be the duty of the vice-president to perform the duties belonging to the office of president. *Held*, That the president alone became *ex officio* a member of the board of directors, and that the vice-president did not, in the absence of the president, become a member of such board.
2. ———: ———: SUSPENSION OF MEMBER: NONPAYMENT OF ASSESSMENT. When the failure to pay an assessment is claimed as a reason for the suspension of a member of a mutual accident association, which suspension forfeits the interest of the member in the association, the assessment must be made by a legally constituted body under the charter and by-laws of the association. If the assessment is not made by such a body, no suspension for its nonpayment can be made.

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

*Nolan & Woodland*, for appellant.

*James H. Adams* and *Byron G. Burbank, contra.*

LETTON, J.

Action upon a certificate of membership in a mutual accident insurance company to recover for the accidental death of a member. The court directed a verdict in favor of plaintiff for the amount of the certificate and costs. Defendant appeals.

The defendant is a mutual accident insurance association incorporated in 1902. In 1907, Walter S. King, the husband of the beneficiary (plaintiff), became a member of the association. On May 3, 1911, an assessment was

made upon the members payable on or before June 10. Dr. King did not pay the assessment. He was accidentally injured on the 15th and died on the 16th of June. Payment was refused on the ground that Dr. King became suspended after June 10 on default of payment and so remained at the time the accident occurred.

Plaintiff insists that, under the original by-laws of the association, there was no provision for suspension of the members for nonpayment of assessment at any time that the subsequent attempted amendment was void; that the laws of the state as to filing amendments to by-laws were not complied with; and that the assessment for the nonpayment of which Dr. King was suspended was not legally made. We find it only necessary to consider the latter point.

Section 6, art. IV, of the by-laws, provides, among other things: "The president and secretary shall be *ex officio* members of the board of directors." Section 4 provides: "In the absence of the president, it shall be the duty of the vice-president to perform the duties belonging to the office of president." Section 5, art. XVI, provides: "Six members shall constitute a quorum for the transaction of business at meetings of the board of directors." The assessment was made at a meeting at which four elected directors, the secretary and the vice-president were present. Defendant asserts that the vice-president, by virtue of the provision that, in the absence of the president, it shall be his duty to perform the duties belonging to the office of president, is thereby constituted *ex officio* a member of the board of directors, and that therefore there was a quorum present. We will consider this without deciding that, as plaintiff claims, the provision making these officers *ex officio* members of the board is in conflict with the articles of incorporation and therefore void, and assuming its validity. It is no part of the duties of the president of an association of this nature to act as a member of the board of directors. Sections 1-3, art. IV, of the by-laws, specify in detail the duties and powers of the president of the association. These are the "duties" which it is

intended that the vice-president shall perform in the absence of the former officer, and they do not include *ex officio* powers. Section 4, immediately following, contains the provisions referring to vice-president. If it had been the intention, at the time the by-laws were enacted, that the vice-president should act as a member of the board of directors in the absence of the president, no doubt they would have so provided. The term "*ex officio*" denotes by virtue of the office. It cannot reasonably be said that, when the vice-president is performing the duties of president, he thereby holds the office of president. No one but the actual occupant of the office of president can be, by virtue of that office, a member of the board of directors, since it is only the president, the particular officer, who is so constituted by the by-laws. The by-laws require six directors to be present in order to constitute a quorum. Only five directors were present at the meeting of May 3. The assessment was made without power or jurisdiction on the part of the body attempting to make it. When the failure to pay an assessment is claimed as a reason for a suspension which forfeits the interest of a member in the association, the assessment must be made by a legally constituted body under the charter and by-laws of the association. Dr. King was still a member of the association at the time of the accident, and the judgment of the district court in directing a verdict for plaintiff was right.

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

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C. B. HAVENS & COMPANY, APPELLEE, V. COLONIAL APARTMENT HOUSE COMPANY ET AL., APPELLANTS.

FILED JANUARY 29, 1915. No. 17,903.

1. **Corporations:** RIGHT TO SUE: FORFEITURE OF CHARTER. After the charter of a corporation has been forfeited, under the act of 1909, for nonpayment of the occupation fee, an action cannot be prosecuted in the corporate name. Laws 1909, ch. 25.

2. ———: ———. The provisions of the general corporation law, authorizing dissolved corporations to sue in the corporate name, do not apply to a corporation whose charter has been forfeited, under the act of 1909, for nonpayment of the occupation fee. Comp. St. 1909, ch. 16, secs. 62, 67, 68; laws 1909, ch. 25.

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

*J. W. Woodrough* and *Crane & Boucher,* for appellants.

*D. L. Johnson* and *H. S. Daniel, contra.*

ROSE, J.

This is a suit on a promissory note for $5,483.85, dated November 9, 1910, and due May 9, 1911. Plaintiff, C. B. Havens & Company, a domestic corporation, is payee. Colonial Apartment House Company, defendant, is maker. Defendants Edwin S. Rood and Thomas D. Crane are sued as indorsers. The principal defense pleaded is the incapacity of plaintiff to maintain the action, on account of the forfeiture of its charter for failure to pay an occupation fee. From a judgment in its favor for $4,868.28, defendants appeal.

Is incapacity of plaintiff to maintain the action established as a defense? Its occupation fee for the year ending June 30, 1910, was not paid, and for that reason the governor by proclamation declared its charter forfeited November 30, 1910. The original petition in the case was filed May 19, 1911, and the judgment was rendered June 29, 1912. The act under which the forfeiture was declared was passed in 1909. Laws 1909, ch. 25. It forbids a corporation "to do business by virtue of its charter" without an occupation permit; requires payment of an annual fee as a condition of exercising corporate powers; provides for notice and for forfeiture of the charter by proclamation of the governor for nonpayment of the fee; orders a public record of forfeitures and declares:

"It shall be unlawful for any corporation, delinquent under this act, either domestic or foreign, which has not paid the occupation fee, together with the penalty for such

delinquency, as in this act prescribed, to exercise the powers of such corporation, or to transact any business in this state, after the thirtieth day of November next following the delinquency. Each and every person who exercises any of the powers of a corporation so delinquent, either domestic or foreign, which has not paid the occupation fee, together with the penalty for such delinquency, or who transacts any business for or in behalf of any such corporation, after the thirtieth day of November next following the delinquency, shall be guilty of a misdemeanor." Section 8.

"In all cases of forfeiture under the provisions of this act, the directors or managers in office of the affairs of any domestic corporation, whose charter may be so forfeited, or of any foreign corporation whose right to do business in this state may be so forfeited, are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited, and have full power to settle the affairs of the corporation and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, or to take such legal proceedings as may be necessary to fully settle the affairs of said corporation, and such directors or managers, as such trustees, may be sued in any of the courts of this state by any person having a claim against any of said corporations." Section 9.

The statutory forfeiture not only extends to the right to do business, but makes the exercise of corporate power a misdemeanor. The bringing of a suit in the name of the corporation is an attempt to exercise such power. After the delinquency, "each and every person who exercises any of the powers of a corporation," says the statute, "or who transacts any business for or in behalf of any such corporation," shall be guilty of a misdemeanor. The act, according to its own terms, not only forbids the bringing of a suit in the corporate name after delinquency and forfeiture, but its provisions are self-executing. Defendant argues, however, that a former, unrepealed statute authorizes dissolved corporations to prosecute suits in the

corporate name. Comp. St. 1909, ch. 16, sec. 144*m*. It cannot be denied that, under the statute as it existed when the act under consideration was passed, the law was as follows: "A dissolved domestic corporation may, after such dissolution, prosecute any suit in its corporate name in the same manner and with like effect as if the corporation had not ceased to exist." *Schmitt & Bro. Co. v. Mahoney,* 60 Neb. 20.

As already indicated, the statute, providing for the payment of an occupation fee and for the forfeiture of the charter, contains new and different provisions. It is an independent act covering the entire subject of legislation and modifies former statutory provisions at variance with its terms. The purpose to take away a dissolved corporation's existing right to sue in the corporate name, after the charter has been forfeited for nonpayment of the occupation fee, is manifest. The lawmakers have declared that the directors or managers are trustees with power to maintain actions, and that the exercise of corporate powers is a misdemeanor. These provisions would not have been inserted in the new law had the legislature intended the general statute to apply to the new conditions. Plaintiff was without capacity to sue or to maintain the action. Identical provisions of a California statute were discussed at length in recent opinions of the supreme court of that state. *Kaiser Land & Fruit Co. v. Curry,* 155 Cal. 638; *Newhall v. Western Zinc Mining Co.,* 164 Cal. 380. In the latter case the following language was used: "For that act clearly and unmistakably declares and provides for a forfeiture not dependent upon judicial determination and decree, but a forfeiture which is self-acting and operating. The language of the act does not even permit a doubt upon this question. It not only declares the day and the hour when the forfeiture shall arise, but it makes it a penal offense for any officer or agent thereafter to exercise any corporate powers on behalf of the corporation, and, finally, it provides that the winding up of the corporate affairs is imposed upon the directors or managers of the corporation who 'are deemed to be trustees of the corporation

and stockholders or members of the corporation whose power or right to do business is forfeited.' These trustees, and not the corporation, may sue or 'may be sued in any of the courts of this state by any person having a claim against said corporation.' * * * It empowers them as trustees to sue and be sued, but not to answer suits in the name of the defunct corporation." The reasoning in similar cases is in harmony with the language quoted. *MacRae v. Kansas City Piano Co.*, 69 Kan. 457; *Venable Bros. v. Southern Granite Co.*, 135 Ga. 508; *Hawley v. Bonanza Queen Mining Co.*, 61 Wash. 90.

Plaintiff cites a federal decision under a New Jersey statute, but it is distinguishable on account of differences in statutory provisions. *Harris-Woodbury Lumber Co. v. Coffin*, 179 Fed. 257.

Since plaintiff had no authority to maintain the action, the trial court erred in rendering judgment in its favor. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

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

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JENNIE E. HALLETT, APPELLEE, v. JAMES W. RANSOM, APPELLANT.

FILED JANUARY 29, 1915. No. 17,934.

**Trial:** VERDICT: SURPLUSAGE. Where the verdict contains proper findings on the issuable facts submitted to the jury, clearly indicating the judgment which the law should pronounce, severable matter outside of the pleadings, the proof, the issues, the instructions and the law may be rejected as surplusage.

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

*Mapes & McFarland* and *Charles H. Kelsey*, for appellant.

*M. D. Tyler* and *M. B. Foster, contra.*

ROSE, J.

This is an action to recover $1,200 as profits clandestinely made by defendant while acting as agent for plaintiff in the sale of a farm owned by her in Madison county, near Norfolk. Defendant wrote to plaintiff, who resided at Seward, that the best price obtainable was $800. She promptly went to Norfolk, and in consideration of that sum executed a deed containing the name of M. B. Irwin as grantee. Subsequently his name was erased and that of M. O. Wolcott inserted. Within three months Wolcott sold the land to August F. W. Braasch for $2,000. It was pleaded by plaintiff, and the jury found, that defendant was the actual purchaser from her, and that he was the real grantor in the subsequent sale for $2,000. From a judgment in favor of plaintiff for $1,301.10, defendant appeals.

The principal assignment is that there was error in entering judgment on the verdict. It was rendered by the jury in this form:

"We, the jury duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of her recovery at the sum of $1,301.10, less the amt. of four hundred one and 10/100 $401.10. Said amt. being allowed the defendant for his expenses, commission and the advance in price of said land during the time said defendant came in possession of the land and the time same was sold to the said August F. W. Braasch. We therefore find for plantiff the sum of $900."

The trial court accepted the following as the verdict and rejected the rest as surplusage:

"We, the jury duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of her recovery at the sum of $1301.10."

The question for the determination of the jury was whether defendant, as shown by the pleadings and the proofs, acted for himself in transactions resulting in his making clandestine profits out of the business of his princi-

pal. Their finding in favor of plaintiff settled the issuable fact. In that respect the verdict is not only supported by the evidence, but it responds to the demands of justice and equity. With defendant's betrayal of trust settled in favor of plaintiff, the jury had nothing to do with the amount of the recovery. The law settled that question by awarding plaintiff clandestine profits amounting, with interest, to $1,301.10. The jury were so instructed. When they attempted to allow defendant a set-off or credit of $401.10, they went outside of the pleadings, the proofs, the issues, the instructions and the law. The trial court must be allowed to determine questions of law and to limit the work of the jury to the proper function of that arm of the judiciary. Under similar circumstances, the courts often reject extraneous matter in a verdict and enter a judgment conforming to the facts established by the findings of the jury. *Frank v. Symons,* 35 Mont. 56; *Schweitzer v. Connor,* 57 Wis. 177; *Pierce v. Schaden,* 62 Cal. 283. On principle the rule in this state is the same. *State v. Beall,* 48 Neb. 817. It would perhaps be better practice, before accepting such a verdict, to direct the jury to eliminate the surplusage but the action of the trial court in the present case did not amount to a reversible error.

One of the instructions is criticised, but, if erroneous, it is not prejudicial to defendant.

AFFIRMED.

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

HAMER, J., dissenting.

The verdict ought not to have been received. As it is now divided, it is not the verdict that the jury agreed upon. The verdict which they returned was clearly a compromise. If a verdict is to be regarded as the expression of the jury in the case, it should be what they have said. If they attempt to say something that is outside of the proper issues in the case, then all that they say on the subject should be rejected. No court should be allowed to substitute any sort of conception of the trial judge in

place of what the jury have solemnly agreed upon, whether it is correct or not. If the verdict is so far erroneous that it should not be considered, then it ought not to be received. That the verdict may be cut in two is an arbitrary assumption of the judge who attempts to substitute his view of what is legal in place of the jury's view of what is right. This cannot be accepted as the verdict, unless the court might properly have directed it. That it could not do if there was a fact properly before it to try.

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GUS A. TYLEE, APPELLEE, V. ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT.

FILED JANUARY 29, 1915. No. 17,959.

1. **Master and Servant:** RELEASE: CONSIDERATION: PAROL EVIDENCE. An oral promise by an employer to pay an employee his regular salary during a temporary disability may be shown by parol to be a part of the consideration for a release of the employer's liability for personal injuries, though the employee signed a release for the expressed consideration of a specific sum of money.
2. **Principal and Agent:** CONTRACT BY AGENT: ACCEPTANCE OF BENEFITS. A principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it.

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

*Helsell & Helsell, William Baird & Sons, Blewett Lee* and *W. S. Horton*, for appellant.

*W. C. Fraser* and *J. C. Kinsler, contra.*

ROSE, J.

The suit was brought to recover $900 alleged to be due plaintiff for his salary as traveling watchman for defendant from April 8, 1911, to April 8, 1912, at $75 a month. Plaintiff was injured March 6, 1911, in alighting from a

moving passenger train operated by defendant. He pleaded that he settled his claim for resulting damages and signed a release in consideration of $10 paid to him by defendant and of an oral promise by the latter to pay his regular salary, while unable, on account of his injuries, to return to work; that in making the settlement defendant acted through its claim agent; that plaintiff was unable on account of his injuries to resume the duties of his employment before April 8, 1912; that defendant paid him his salary in full for March, 1911, but refused to pay it for any subsequent month. Defendant denied the execution of a release on the terms described in the petition, and alleged that its claim agent had no authority to make the oral promise pleaded by plaintiff. It is admitted that plaintiff was in the employ of defendant, and that his salary for the month of March, 1911, was paid; but it is alleged that he was not thereafter an employee of defendant, and that he is not entitled to any salary as such. From the judgment on a verdict for the full amount of plaintiff's claim, defendant has appealed.

One of the assignments of error challenges testimony of plaintiff on the ground that it varies and modifies the terms of a written instrument. The release signed by plaintiff makes no mention of a promise to pay his salary as a part of the consideration. After reciting the fact of the injury and the denial of liability on the part of the employer, the release reads:

"Now, therefore, in consideration of the sum of ten and 00-100 dollars ($10) to me this day paid by the Illinois Central Railroad Company in behalf of itself and any other companies whose lines are owned or operated by it, I do hereby compromise said claim and do release and forever discharge the said Illinois Central Railroad Company and all companies whose lines are leased or operated by it, their agents and employees from any and all liability for all claims for all injuries, including those that may hereafter develop as well as those now apparent, and also do release and discharge them of all suits, actions, causes of action and claims for injuries and damages, which I have or might

have arising out of the injury above referred to, either to my person or property, and do hereby acknowledge full satisfaction of all such liability and causes of action."

The oral testimony of plaintiff tends to show that the promise to pay his salary during the temporary disability resulting from his injuries was part of the consideration for the release. It is argued that proof of this nature varies and modifies the terms of the written instrument quoted and is consequently inadmissible. What plaintiff signed was an agreement releasing defendant from liability for personal injuries. There is no attempt to vary the terms of the release itself. Plaintiff is not seeking damages for the tort. In effect, the action is one on an oral promise to recover part of the consideration for the release. The rule of law applicable to the present inquiry is that an oral promise by an employer to pay an employee his regular salary during a temporary disability may be shown by parol to be a part of the consideration for a release of the employer's liability for personal injuries, though the employee signed a release for the expressed consideration of a specific sum of money. *Galvin v. Boston Elevated R. Co.*, 180 Mass. 587; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289; *American Car & Foundry Co. v. Smock*, 48 Ind. App. 359; *Illinois C. R. Co. v. Fairchild*, 48 Ind. App. 300; *Texas C. R. Co. v. Eldredge*, 155 S. W. (Tex. Civ. App.) 1010; *Harrington v. Kansas City C. R. Co.*, 60 Mo. App. 223; *Hobbs v. Brush Electric Light Co.*, 75 Mich. 550. It follows that the oral evidence was properly admitted.

It is further argued that the judgment in favor of plaintiff is erroneous because defendant's claim agent had no authority to make the oral agreement on which it is based. There is positive testimony that the oral promise to pay plaintiff his salary as pleaded was made by the claim agent as a part of the consideration for the release. On this issue the finding of the jury was in favor of plaintiff. To defeat a recovery on the cause of action pleaded in the petition, defendant introduced in evidence the release signed by plaintiff. It therefore invoked the protection of that in-

strument, and thus adopted the instrumentalities employed by its claim agent in procuring it, including the oral promise. On the record presented defendant is bound by the rule that a principal who accepts the benefits of a contract executed in his behalf by an agent is chargeable with the instrumentalities employed by the latter in procuring it. *American Car & Foundry Co. v. Smock*, 48 Ind. App. 359, 371; *Bertha v. Regal Motor Car Co.*, 180 Mich. 51; *Joslin v. Miller*, 14 Neb. 91; *McKeighan v. Hopkins*, 19 Neb. 33; *Rogers v. Empkie Hardware Co.*, 24 Neb. 653; *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb. 110; *Leavitt v. Sizer*, 35 Neb. 80; *Dresher v. Becker*, 88 Neb. 619; *Doll v. Getzschmann*, 90 Neb. 370.

There being no error in the record, the judgment is

AFFIRMED.

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

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WILLIAM HENRY ESSEX, APPELLANT, V. GILBERT SMITH ET AL., APPELLEES.

FILED JANUARY 29, 1915. No. 17,963.

1. **Limitation of Actions**: MORTGAGE FORECLOSURE: REDEMPTION. The statute of limitations does not begin to run against mortgagor's right to redeem the mortgaged land from a void foreclosure sale, until possession is taken under the mortgage or the foreclosure.
2. **Adverse Possession**: PRESUMPTION: UNIMPROVED LAND. The law presumes that the holder of the legal title is in possession of unimproved and unoccupied land.
3. **Limitation of Actions**: ACTION QUIA TIMET: POSSESSION. The statute of limitations does not begin to run against an action to remove a cloud from the title of a landowner while he is in exclusive possession.

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

*M. E. Crosby,* for appellant.

*J. G. Beeler* and *Wilcox & Halligan, contra.*

ROSE, J.

The subject of litigation is a 300-acre tract of land in Lincoln county. In a proceeding to foreclose a mortgage thereon, the sheriff sold the land to Herman P. Chelins February 1, 1898, and on March 28, 1899, issued a sheriff's deed to the purchaser, who conveyed the land to Gilbert Smith. This is an action against Chelins, his grantee, and the latter's wife to quiet title in plaintiff, who alleges he acquired it through mesne conveyances from mortgagors. The trial court sustained a demurrer to the petition on the ground that the action was barred by the statute of limitations. From a judgment of dismissal, plaintiff has appealed.

Does the petition show on its face that the action is barred? It was filed May 21, 1912, and in substance alleges, in addition to the facts already narrated: The foreclosure was commenced June 6, 1898, after maturity of the unpaid debt. The judicial proceedings, including the sheriff's sale, were void for want of notice to defendants in the foreclosure suit. The only claim of title on part of defendants herein is based on the void judicial sale. The sheriff's deed was recorded March 28, 1899. Plaintiff offers to pay the mortgage debt and taxes. In the petition it is also alleged: "Prior to January 8, 1908, the said above-described premises were unoccupied, unimproved lands, and the said Herman P. Chelins, or any one claiming under him, had never gone into possession of said premises, had never placed any improvements on said premises, or caused any part thereof to be placed under cultivation, or exercised any right of possession over the same."

Other facts not material to the present inquiry are also pleaded in the petition. The invalidity of the foreclosure proceedings is not controverted on appeal. To justify the sustaining of the demurrer, defendants insist that the statute of limitations began to run from the maturity of the mortgage, as early as June 6, 1898, or at the latest from the recording of the sheriff's deed March 28, 1899 and that,

reckoning from either date, the ten-year period expired before the petition herein was filed May 21, 1912. In support of these propositions defendants cite: *McKesson v. Hawley*, 22 Neb. 692; *Morrow v. Jones*, 41 Neb. 867; *Pleasants v. Blodgett*, 39 Neb. 741; *Eayrs v. Nason*, 54 Neb. 143. On the contrary, plaintiff argues that the statute of limitations did not begin to run until defendants entered into possession of the premises January 8, 1908, and that therefore the action is not barred.

The cases cited do not control the decision in the present case. The contention that the cause of action accrued on the maturity of the debt is at variance with a recent decision of this court. In *Clark v. Hannafeldt*, 79 Neb. 566, the syllabus reads: "An action to redeem from the lien of a mortgage does not accrue to the mortgagor until the mortgagee takes possession of the premises after default in payment, and the action is not barred until ten years from the date of such possession." That case was correctly decided, and the principle of law applicable to the facts should be stated thus: The statute of limitations does not begin to run against mortgagor's right to redeem the mortgaged land until possession thereof is taken under the mortgage.

The position that the statute of limitations begins to run from the recording of the sheriff's deed is likewise untenable. Defendants herein were not in possession prior to January 8, 1908. The title was in plaintiff. The law presumes that the holder of the legal title is in possession of unimproved and unoccupied land. *Butler v. Smith*, 84 Neb. 78; *Herbage v. McKee*, 82 Neb. 354; *Troxell v. Johnson*, 52 Neb. 46; *Yorgensen v. Yorgensen*, 6 Neb. 383. In contemplation of law plaintiff was in exclusive possession prior to the adverse entry of defendants January 8, 1908. The void sheriff's deed was a continuing cloud upon his title. The statute of limitations does not begin to run against an action to remove a cloud from the title of a landowner while he is in exclusive possession. *Batty v. City of Hastings*, 63 Neb. 26; *Dringman v. Keith*, 86 Neb. 476; *Clark v. Hannafeldt*, 79 Neb. 566; *Jackson v. Rohrberg*,

94 Neb. 85. On the face of the petition the action is not barred.

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

REVERSED.

MORRISSEY, C. J., not sitting.

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CHARLES WAKEFIELD, APPELLANT, V. GEORGE W. WAKEFIELD, APPELLEE.

FILED JANUARY 29, 1915. No. 17,970.

**Appeal:** AFFIRMANCE. A judgment will not be reversed on appeal, where it is the only one sustainable under the pleadings and the evidence.

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

*John M. Macfarland* and *A. J. Kinnersley,* for appellant.

*E. H. Westerfield* and *R. M. Crossman, contra.*

ROSE, J.

The petition contains two counts one for a balance of $2,300 deposited with Jacquith & Company for the use of defendant at his request under an oral promise by him to pay back the money, and the other for $800 likewise deposited with Lampsen Brothers. At the close of plaintiff's testimony, the trial court directed a verdict for defendant.

Plaintiff asserts that there was error in taking the case from the jury. The parties to the suit are brothers. A portion of the testimony of plaintiff tends to show that he made deposits as pleaded by him, and that defendant promised to return the money with interest. All testimony of this nature, however, was positively contradicted by defendant, while he was testifying as a witness for plaintiff. It is conclusively established that Jacquith & Company and

Lampsen Brothers were bucket-shop keepers, and that the funds in question were, for plaintiff's own use, knowingly deposited with them for gambling purposes in buying and selling grain on margins. The evidence will admit of no other inference. Defendant had no connection with the bucket-shops except as a customer. Courts do not grant relief under the circumstances shown. No other verdict than that rendered could be upheld. The judgment thereon is

AFFIRMED.

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

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CHARLOTTE M. MARTIN, APPELLANT, V. SAMUEL B. STARRETT ET AL., APPELLEES.

FILED JANUARY 29, 1915. No. 17,972.

1. **Bankruptcy**: DISCHARGE: DEBTS EXCEPTED. An act of fraud, embezzlement, misappropriation or defalcation does not except a debt from a discharge in bankruptcy, unless the debtor created it "while acting as an officer" or in a "fiduciary capacity." 30 U. S. St. at Large, p. 550, sec. 17.
2. ———: "OFFICER:" MANAGING PARTNER. The managing partner of a firm composed of two members is not an "officer" within the meaning of that word as used in the bankruptcy act of 1898. 30 U. S. St. at Large, p. 550, sec. 17.
3. ———: TRUSTS: "FIDUCIARY CAPACITY." The term "fiduciary capacity," as used in the bankruptcy act of 1898, applies to technical trusts, and not to those arising by implication of law from the contract of parties. 30 U. S. St. at Large, p. 550, sec. 17.
4. ———: ———: ———: MANAGING PARTNER. During the existence of a partnership formed by two persons for the purpose of conducting a banking business, the managing partner does not act "in any fiduciary capacity," within the meaning of that term as used in the bankruptcy act of 1898. 30 U. S. St. at Large, p. 550, sec. 17.

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

*James H. Wooley*, for appellant.

*Garlow & Long, contra.*

ROSE, J.

This is a proceeding to revive a judgment, rendered November 3, 1893, in the district court for Merrick county, in favor of the plaintiff for $38,772.03, in a suit brought by David Martin against Samuel B. Starrett and George Wells. The plaintiff died January 29, 1896. His wife, Charlotte M. Martin, succeeded to his rights. The trial court revived the judgment as to Wells, but refused to grant such relief as to Starrett, on the ground that he had been released by a decree in bankruptcy from liability for the debt. The deceased plaintiff's widow is appellant.

Is Starrett's discharge in bankruptcy a defense to revivor? The solution depends on the nature of the debt and on the provisions of the bankruptcy act of 1898. David Martin and Starrett had entered into a partnership for the purpose of operating a bank at Central City; the former furnishing the money and the latter managing the business and controlling the funds for a share of the profits. In the suit wherein the judgment in controversy was rendered, plaintiff sought a dissolution of the partnership and an accounting between the partners. This relief was granted. The principal debts were created by the use of partnership funds lost in gambling on the board of trade in Chicago, both Starrett, as manager of the partnership business, and Wells, as a participant in the gambling transactions, having been held accountable to the plaintiff for the losses thus incurred. Starrett was declared a bankrupt December 12, 1898, plaintiff being his only creditor. In the bankruptcy court the fraudulent nature of the bankrupt's debt was pleaded, but the final discharge was nevertheless granted April 4, 1900. Is the dormant judgment excepted from the operation of the decree in bankruptcy? Under the act of 1898 a discharge releases a bankrupt from all of his provable debts except such as "were created by his fraud, embezzlement, misappropriation or defalcation while

acting as an officer or in any fiduciary capacity." 30 U. S. St. at Large, p. 550, sec. 17. An act of fraud, embezzlement, misappropriation or defalcation does not except a debt from a discharge in bankruptcy, unless the debtor created it "while acting as an officer" or in a "fiduciary capacity." *Crawford v. Burke,* 195 U. S. 176.

Did the managing partner act as "an officer" or "in any fiduciary capacity," within the meaning of the bankruptcy act? Starrett was called "cashier," but that did not make him an "officer" as that word is used in the act of congress. He was neither a public officer nor an officer of a private corporation. The bank was not incorporated. Under a partnership contract he was manager, having control of the partnership funds and business. In this contractual relation he was not an "officer," within the meaning of the statute. That he did not act in a "fiduciary capacity" in the sense that defeats a discharge in bankruptcy is well settled by rulings of the federal courts. The term as it appears in the act applies to technical trusts, and not to trusts implied by law from contracts. *Chapman v. Forsyth,* 2 How. (U. S.) 202; *Inge v. Stillwell,* 88 Kan. 33, 42 L. R. A. n. s. 1093, and cases cited in note. While a partnership contract implies trust and confidence, as held in *Knapp v. Reed,* 88 Neb. 754, a partner during the existence of the partnership does not by reason of that relation, when managing the funds and the business of the firm, act in a "fiduciary capacity" as understood in the bankruptcy law. *Chapman v. Forsyth,* 2 How. (U. S.) 202; *Barrett v. Prince,* 74 C. C. A. 440; *In re Camelo,* 195 Fed. 632; *Goodman v. Herman,* 172 Mo. 344. The rule applicable to the undisputed facts of the present case has been settled as follows: "Misappropriation by a partner of partnership funds is not a misappropriation by him while acting in a 'fiduciary capacity,' within the meaning of the provision excepting certain debts from the effect of a discharge in bankruptcy." *Karger v. Orth,* 116 Minn. 124. To the same effect: *Gee v. Gee,* 84 Minn. 384; *Pierce v. Shippee,* 90 Ill. 371; *Inge v. Stillwell,* 88 Kan. 33, 42 L. R. A. n. s. 1093.

In holding that the judgment against Starrett was not excepted from the operation of his discharge in bankruptcy and in denying a revivor as to him, the trial court followed the law.

AFFIRMED.

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

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EMIL C. AEGERTER, APPELLEE, V. ANTON RONSPIES, APPELLANT.

FILED JANUARY 29, 1915. No. 17,983.

1. **Continuance:** ABSENCE OF WITNESS. The absence of a witness is not ground for a continuance, where his testimony would be inadmissible under the issues.
2. **Sales:** OFFER TO RETURN PROPERTY: WITHDRAWAL OF OFFER. A rejected offer to return a purchased chattel to the seller may be withdrawn by subsequent acts of the purchaser in using and in treating the property as his own.
3. **Appeal:** NOTES: CONSIDERATION: EVIDENCE. "Where a defendant pleads a total failure of consideration as a defense to an action on a promissory note, and his evidence at most tends to prove only a partial failure of consideration, it is not error to refuse to submit that defense to the jury." *Sibley & Davis v. Rodgers*, 90 Neb. 497.
4. **Appeal:** EXCLUSION OF EVIDENCE. Error cannot be predicated on the exclusion of testimony not within the issues.

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

*C. H. Stewart* and *M. H. Leamy*, for appellant.

*C. B. Willey, contra.*

ROSE, J.

This is a suit on a promissory note for $1,600, dated May 21, 1910, and due January 1, 1911. Plaintiff is the payee and defendant is the maker. The note shows on

its face that it was given for the purchase price of an automobile. Defendant admitted the execution of the note, and pleaded that the consideration to the extent of $100 was for instructions and for storage of the car; that the car was not new, but contained many old parts; that it failed to work properly; that plaintiff agreed to return the note any time during the year in case the car did not work perfectly; that he offered to return the car June 12, 1910; that he had driven it less than 1,000 miles; that plaintiff failed to give proper instructions; that employees of plaintiff replaced new parts with old, while the car was in his garage; that defendant had deposited in a bank, subject to the order of plaintiff, the amount due on the note, upon his putting the car in good running order. At the close of the testimony, the trial court directed a verdict for plaintiff, and defendant appeals.

The overruling of a motion for a continuance on account of the absence of a witness is assigned as error. The assignment must be overruled for insufficiency of the showing. It does not appear that his testimony would have been admissible under any issue raised by the pleadings.

Defendant contends that the verdict should have been in his favor, and that there was error in the peremptory instruction for plaintiff. On the record presented the position is untenable. Execution of the note is admitted. It was given for an automobile. After the alleged offer to return the car, defendant used it for his own benefit, making a number of trips. The evidence does not prove a total failure of consideration, but disproves an effective tender of the car to plaintiff. A rejected offer to return a purchased chattel to the seller may be withdrawn by subsequent acts of the purchaser in using and in treating the property as his own. *Hefner v. Robert,* 76 Neb. 192; *Fannin v. Thomason,* 50 Ga. 614. A partial failure of consideration was not properly pleaded. Under the evidence adduced, there was no error in directing a verdict for plaintiff, the rule being: "Where a defendant pleads a total failure of consideration as a defense to an action

on a promissory note, and his evidence at most tends to prove only a partial failure of consideration, it is not error to refuse to submit that defense to the jury." *Sibley & Davis v. Rodgers,* 90 Neb. 497; *Daniels v. Englehart,* 18 Idaho, 548, 39 L. R. A. n. s. 938.

The exclusion of testimony in a number of instances is assigned as error, but the offered proofs were not within the issues.

AFFIRMED.

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

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O-98 Neb. 707, (S.C.)

MARY J. DAVIS, APPELLEE, V. PATRICK MANNING, APPELLANT.

FILED JANUARY 29, 1915. No. 17,926.

1. **Limitation of Actions:** AMENDMENT OF PETITION. If a plaintiff amends his petition, and introduces a new cause of action therein, the statute of limitations will continue to run against such new cause of action until it is brought into the issues. But if the substance of the cause of action stated in the original petition is retained, the filing of the original petition and service of summons therein will stop the running of the statute as to such cause of action.

2. **Appeal:** VERDICT: EVIDENCE. Although the evidence of facts necessary to support the verdict of a jury is not conclusive, so that it seems probable that the court might have arrived at a different conclusion, still, if there is substantial evidence of all facts necessary to support the verdict, the judgment thereon cannot be set aside by this court, unless upon the whole record it appears that the verdict is clearly wrong.

3. **Landlord and Tenant:** DEFECTIVE PREMISES: LIABILITY OF LANDLORD. If a landlord rents a house in a dangerous condition, and knows at the time, or ought to know from facts within his knowledge, that it is dangerous, and such dangerous condition is not known to the tenant, and the conditions are such that an ordinarily prudent person, situated as the tenant was, would not know the danger, the landlord is liable for damages caused to the tenant, without fault on her part, by reason of such dangerous condition.

4. ———: ———: INJURY TO TENANT: SUFFICIENCY OF EVIDENCE. The evidence, indicated in the opinion, is found sufficient to support the verdict.

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

*Gurley & Woodrough* and *Dunham & Aye,* for appellant.

*W. W. Slabaugh* and *John W. Battin, contra.*

SEDGWICK, J.

In December, 1906, the plaintiff, who was then living in a house in Omaha, which she rented from the defendant Patrick Manning, fell on the kitchen floor. A little less than four years thereafter she began this action in the district court for Douglas county against Manning and the agents who had assisted him in renting the property and collecting the rents. A demurrer was filed to her first petition and sustained, and afterwards she filed an amended petition. In this amended petition she alleged that she rented the house from the defendant Manning through his agents, the other defendants, and that a part of the floor of the kitchen, near the stove, was in a dangerous and defective condition; that the "under portion of the boards of the floor were rotted, leaving but a thin upper part solid and apparently strong; that the floor at said place was near to the ground; that the defendants, and each of them, knew, and should have known by the exercise of reasonable diligence, of the dangerous and defective condition of said floor at said place; and that the defendants, and each of them, fraudulently failed to notify the plaintiff of the defective and dangerous condition of said floor at said place; that defendant Manning constructed said building about the year 1875, lived in it for many years, and knew of the nearness of the floor to the ground, and that the under parts of said floor would rot;" that she did not know the condition of the floor; and that "while she was preparing her breakfast, and was standing near the front of her stove and the door into

said pantry, and was about to step from the stove to the said pantry, and while plaintiff was standing on said floor whereof the boards were, as aforesaid, rotten, defective and dangerous, a part of one of the floor boards broke through, causing a hole about 7 by 2½ inches in size, into which the heel and a portion of plaintiff's left foot passed, thereby throwing plaintiff, while the heel of her foot remained in said hole, onto the floor on her left side, thereby crushing and bruising her left side, and fracturing and breaking her left thigh bone, and fracturing two of the lower ribs on her left side," and other injuries. The defendant Manning denied these allegations, and alleged that the house was well built and of good materials, and that "said plaintiff had occupied and lived in said house since about the 1st day of May, 1905, and for a long time prior thereto, and that the condition of said premises was fully known to plaintiff and was open and obvious to her during all of said times; * * * that the injuries, if any, which plaintiff received arose from and were due to dangers and risks which were open and obvious and known to plaintiff and assumed by her; * * * that the injuries, if any, received by plaintiff were occasioned by and due to her own negligence and want of care." The other defendants were dismissed from the case by the court. There was a verdict in favor of plaintiff and against the defendant Manning, and judgment was entered thereon, and the defendant has appealed.

1. The first objection urged is that the plaintiff's action was barred by the statute of limitations, the amended petition having been filed more than four years after the alleged cause of action accrued. There is no merit in this contention. The amendment of the petition consisted in omitting an allegation of defects in other parts of the kitchen floor than the part where the plaintiff was injured, and omitting an allegation of the plaintiff's knowledge of those defects. There was no change in the cause of action, and it must be deemed to have been begun upon the filing of the first petition.

2. The principal contention is that the verdict and judgment are not supported by the evidence. The evidence was, and it appears to be conceded, that the defendant built this house about 25 years before the accident happened, and that it was well built and of good materials, and that it was supposed by the defendant that the kitchen floor was in a safe condition. There was, however, evidence from which the jury might find that at the time alleged in the petition the plaintiff was engaged in her ordinary household occupation in the kitchen, and, in attempting to go from the stove to a pantry close by, her foot broke through the floor, causing her to fall; that she was unable to remove her foot from the break in the floor and was released by her daughter and another woman; that she suffered injuries substantially as alleged in her petition; that the kitchen was a one-story addition to the main part of the house; that the kitchen floor was near the ground, and the space under the floor was inclosed with a wall and was without any ventilation, and that the drainage of a part of the yard was toward the house, so that it might be anticipated that the space below the floor would be in a damp condition; that the defendant built his house himself and knew of these conditions. The defendant contended that the plaintiff must have slipped or stumbled on the floor, which was the cause of her fall; that the floor was made of first-class hard white pine lumber and was in sound condition, and could not have broken through with the plaintiff. He produced some of the boards of the floor in evidence. They were identified by the reporter, and upon examination appeared to be sound and in good condition. There is, however, substantial evidence, as we have said, by at least three witnesses that there had been openings in other parts of the kitchen floor which had been covered with tin, and that the floor at the place where the accident occurred was smooth and appeared to be sound upon the surface, but gave way under the weight of the plaintiff as alleged, and upon examination was found to be damp and soft on the under side and so decayed as to in fact have but little

strength. There was evidence that the plaintiff did not know, and had no means of knowing, the unsafe condition of the floor at the place where the accident occurred. The defendant contended that he had no knowledge that the floor was in an unsafe condition.

The court instructed the jury that, in order to recover, the plaintiff must prove by a preponderance of the evidence, among other things: "That the defendant knew of said defect in said kitchen floor at the time of the last leasing of said premises, or should have known of the defect in said floor by the exercise of reasonable care in observing the natural law of decay of said kitchen floor." The plaintiff's contention was that the defendant, having built the foundation under the kitchen as he did, without ventilation and with the floor so near the ground and with the conditions making it possible that there would be dampness under the floor, if he had taken notice of "the natural law of decay" he would have known, or ought to have known, that the floor was in an unsafe condition. The defendant contends that this issue was not plainly and fairly submitted to the jury. The language of the instruction above quoted was substantially taken from instructions requested by the defendant, and there is nothing in the record, so far as we have observed, that indicates that the jury failed to comprehend the precise questions of fact that were controverted by the parties and upon which their verdict must depend.

The plaintiff's original petition was in evidence, and it contained the allegation that in other parts of the floor there were cracks and openings, and that she had requested the defendant's agents to repair the same. The defendant contends that this proves that the plaintiff had notice of the condition of the floor, and was therefore guilty of contributory negligence. The plaintiff in her evidence at the trial testified that she knew that these cracks existed in other parts of the floor and that they had been repaired, but she insisted that she did not know that it was because of any decayed condition of the floor that these cracks existed, and this question of the plaintiff's knowledge of the

condition of the floor appears to have been fairly submitted to the jury.

The defendant has furnished us with an extensive and interesting brief. It discusses several questions of law which seem to be sound. These questions are not controlling here. If the landlord rented the house in a dangerous condition, and knew at the time, or ought to have known from facts within his knowledge, that it was dangerous, and such dangerous condition was not known to the tenant, and the conditions were such that an ordinarily prudent person, situated as the tenant was, would not have known the danger, the landlord is liable for damages caused to the tenant, without fault on her part, by reason of such dangerous condition. These things appear to have been found by the jury in the plaintiff's favor. It must be conceded that upon some of these questions of fact the plaintiff's evidence was not conclusive; but, as has often been decided, we cannot set aside a verdict of the jury because it seems probable that the court might have arrived at a different conclusion upon the facts presented. If there is substantial evidence supporting the findings of the jury, their verdict must be conclusive, unless upon the whole record it appears that it is clearly wrong.

We cannot say that the verdict of the jury is not supported by the evidence, and, no reversible error appearing in the record of the trial of the case, the judgment of the district court is

AFFIRMED.

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

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CORDELIA PEYTON, APPELLEE, V. LACEY E. PEYTON, APPELLANT.

FILED JANUARY 29, 1915. No. 17,937.

1. **Divorce:** CULPABILITY OF PLAINTIFF. A court of equity will not grant a divorce to one whose conduct has been such as to furnish sufficient grounds for divorce, even if the conduct of the other

party has been grossly more culpable. In such case the court will deny relief to either.

2. ———: APPEAL: CONFLICTING EVIDENCE. In such action, if the evidence is principally oral and is conflicting, and the determination of the issues depends upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by this court upon review of the evidence.

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

*Brome & Brome,* for appellant.

*John M. Macfarland* and *Lambert, Shotwell & Shotwell, contra.*

SEDGWICK, J.

The plaintiff began an action in the district court for Douglas county against the defendant, and afterwards filed an "amended petition" therein. The original pleadings are not contained in the transcript. In this supplementary petition she asked for a divorce from the defendant, and alimony, principally upon the ground of cruelty. The defendant filed an answer and cross-petition asking for a divorce from the plaintiff. Upon the trial the court found that neither party was entitled to any equitable relief, and that the plaintiff was without means of support, and dismissed the action, judging the costs against the defendant. The defendant has appealed.

In his cross-petition the defendant alleged that the plaintiff and defendant were married on the 25th day of July, 1905, and that they have no children; that the plaintiff was addicted to the excessive use of intoxicating liquors and was frequently intoxicated and in drunken condition; and "that, by reason of plaintiff's conduct in this behalf and her frequent unexplained absences from her home, controversy arose between plaintiff and defendant, and defendant remonstrated with plaintiff, and sought to persuade her to abandon and cease her conduct and habits in this respect, but without success; * * * that thereafter, and on about the 1st day of June, 1911, and at various

times thereafter, plaintiff proposed to defendant that she would cease the use of intoxicating liquors and conduct herself properly in the future if defendant would resume marital relations with her, and thereupon defendant, relying upon the promises and protestations of plaintiff, was induced to and did resume marital relations with plaintiff, returned to his home at number 315 Park avenue in the city of Omaha, and plaintiff and defendant there resided together as husband and wife until the 15th day of January, 1912; that plaintiff did not cease the excessive use of intoxicating liquors, and was frequently absent from her home without any cause or reason therefor, and frequently returned in an intoxicated and drunken condition." He then alleged that the plaintiff had been guilty of adultery with different men, specifying several instances of the commission of that crime by her. He asked for an absolute divorce. There seems to be no doubt that the allegations against the plaintiff are sufficiently proved to justify the findings of the trial court that she was not entitled to any relief in a court of equity.

The defendant insists that the charges which she has made against him are not sustained by the evidence. A large amount of evidence was taken. It is contained in something over 800 sheets of type-written matter. It is very conflicting and we cannot attempt to give anything like an analysis of it. It appears without substantial conflict that, while the plaintiff was living with a former husband, she and this defendant were frequently together. Their relations were very intimate, and at about the time that she obtained her divorce from her former husband the plaintiff and this defendant began secretly living together as husband and wife, and so continued for several years before their marriage.

Counsel for defendant insists that this conduct of the parties before their marriage ought not to be counted against the defendant in this case. If his general conduct and his treatment of his wife since their marriage have been in all respects exemplary, this suggestion would be entitled to consideration. Their former sinful conduct

illustrates their character, and might furnish a basis for their mutual jealousies and brutal quarrels which continued during the most, if not all, of their married life. There is no doubt under this evidence that they habitually used personal violence against each other and the grossest kind of vituperative language. The plaintiff testified that he frequently beat her with great violence. On many occasions, she says, he knocked her down, choked and otherwise abused her. He admits using violence, but says that it was upon occasions when she was intoxicated, and was for the purpose of restraining her from doing violence against him. He admits that on one occasion he struck her a severe blow in the mouth, but says they were quarreling, that he was trying to restrain her, and the blow was with the back of his hand and was accidental. She frequently accused him of infidelity with the young woman who was working for her. She testifies to many admissions of his in that regard, and also admissions of the girl, which they deny. She does not testify to any circumstances indicating such a crime or indicating any disposition to commit it. In one of these quarrels in the presence of their family physician she accused him vigorously, and the plaintiff and the physician both testify that the defendant admitted his infidelity with the girl. He denies having made such an admission, but says that his wife so often accused him that on this occasion he may have said: "Well, let it go at that." If we consider the admitted circumstances as the evidence of the plaintiff and her daughter would characterize them, the defendant's conduct was grossly and unreasonably violent and abusive, and in many respects wholly improper. In the light of the defendant's testimony, when we consider the wholly abandoned character and conduct of the plaintiff, the defendant's exhibition of temper and violence might possibly be excusable. The trial court appears to have given the evidence the most conscientious and careful consideration. The evidence is mostly the oral testimony of witnesses in open court. These witnesses radically disagree as to the character of the various actions described. It is impossible to tell how to understand these

witnesses and determine the disposition of the defendant and the character and motives of his conduct toward the plaintiff during the latter part of their living together as husband and wife. The trial court saw these witnesses and heard their testimony. He frequently questioned the parties themselves, with the evident purpose of ascertaining their disposition toward each other, and the nature of the conduct of defendant toward his wife, making full use of the advantages he had for determining the truth of their testimony and the proper construction to be given it—advantages which this court does not possess. He has found that under all the circumstances the defendant is not entitled to the relief he asks. We cannot with any satisfactory degree of certainty come to a different conclusion.

The judgment of the district court is

AFFIRMED.

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

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J. McC. PRESTON, APPELLEE, V. HARLAN COUNTY ET AL., APPELLANTS.

FILED JANUARY 29, 1915. No. 17,948.

1. **Taxation:** PERSONALTY OF NONRESIDENT. Personal property in the possession of the owner at his place of residence in another state is not subject to taxation by the authorities of any county in this state.
2. **Evidence** examined, and *held* to sustain the judgment of the district court.

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

*O. E. Shelburn* and *W. W. Wenstrand,* for appellants.

*R. L. Keester, contra.*

HAMER, J.

This case is one where the plaintiff filed a petition to enjoin the treasurer of Harlan county from collecting certain personal taxes levied against him for the years 1910 and 1911. Plaintiff alleged that he was, and had been, a nonresident of Harlan county since the year 1908; that he was a *bona fide* resident of the state of Colorado, and has had no property in Harlan county since his removal therefrom; that the county assessor returned for taxation against him "all notes secured by mortgages," amounting in round numbers to $42,000, without any notice to plaintiff; that plaintiff never listed said property for taxation in Harlan county, and yet the county authorities levied taxes on said so-called assessments, and the county treasurer was about to institute proceedings to collect said taxes. The answer admitted the allegations of the petition, except as to the matter of the plaintiff's residence, and alleged that plaintiff was a resident of Harlan county, Nebraska, and owned the notes secured by mortgages. On this issue the case was tried. The district court found for the plaintiff and enjoined the proceedings to collect the alleged taxes.

The plaintiff, by his own evidence in the form of a deposition, clearly showed that he had sold his home in Harlan county in the spring of 1908, and had removed to the city of Lincoln, where he registered at the fall election of that year; that he then removed to Colorado Springs, Colorado, where he has ever since resided, except some time spent on visits to California; that he has never been in Harlan county, except to pass through there on the cars, since he sold his residence situated therein; that all notes secured by mortgages which he owns have at all times been in his possession at his home in Colorado. His testimony was corroborated by many other witnesses who reside in Harlan county. The defendants sought to prove, on cross-examination of the plaintiff, that he had not listed his property for taxation elsewhere. This the plaintiff denied. The testimony also shows that the assessor made up the so-called assessments from an examination of the county records and entered the lump sum of $42,000 on the assess-

ment rolls without identification or description other than as above quoted; that he never gave any notice to the plaintiff of the so-called assessments. Under the pleadings, the only question presented for trial was that of plaintiff's residence. The assessment having been made before the present statute relating to the taxation of mortgages took effect, the decree of the district court is right, and it is

AFFIRMED.

MORRISSEY, C. J., not sitting.

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S. A. FOSTER LUMBER COMPANY, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,981.

**Railroads: INTERSTATE SHIPMENTS: EXCESSIVE CHARGES: REMEDY.** A shipper cannot maintain an action in the courts of this state to secure reparation for excessive freights collected on an interstate shipment, where the rate charged was in accordance with the published tariff of the carrier as authorized by the interstate commerce commission and no order for a refund or reparation has been made by said commission.

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

*W. B. Price* and *Ray J. Abbott,* for appellant.

*Edson Rich, B. W. Scandrett* and *C. B. Matthai, contra.*

MORRISSEY, C. J.

The appellant, S. A. Foster Lumber Company, engaged in business at Callaway, Nebraska, on the 23d day of June, 1907, applied to the connecting line of the appellee at Wrencoe, Idaho, for a car of 30,000 pounds net minimum carrying capacity in which to ship 25,780 pounds of lumber from Wrencoe, Idaho, to Callaway, Nebraska, and at that time paid to the proper officer of the carrying company the full tariff rate for transporting such car in the sum of $140. For its own convenience the carrier furnished a car with a minimum carrying capacity of 60,000 pounds. The

tariff fixed and established by the interstate commerce commission for the car so furnished was $270. After the shipment was delivered the appellee demanded the further sum of $130 to cover the difference between the amount paid and the tariff so fixed. This sum was paid under protest by the shipper, on October 31, 1911, making a total paid for the transportation of said car of the sum of $270. The connecting line of the appellee did not have available a car with a net minimum carrying capacity of 30,000 pounds at the time this shipment was made, and the larger car was furnished solely for the convenience of the carrying company, and the smaller car would have answered the requirements of the shipper equally as well. Without making complaint to the interstate commerce commission or demanding reparation of that tribunal, appellant brought suit in the courts of this state to recover back the sum of $130 which it had theretofore paid to appellee under protest. A jury was waived in the district court and the cause was tried to the court. The findings and judgment of the trial court being for the appellee, the appellant has brought the case here on appeal.

It is agreed that the rate charged is the proper one for a car of the capacity furnished; but it is contended by the appellant that the car ordered would have answered equally as well for the shipment as made, and that the shipper cannot furnish a larger car than the one ordered and then collect a higher tariff than what it would be entitled to collect for the car ordered. The appellee admits that the car furnished rendered no greater or better service than the car ordered would have rendered, but says that, under the act of congress known as the "Interstate Commerce Act," it is not permitted to make reparation in the absence of an order so to do from the interstate commerce commission.

It is contended by the appellant that the question of rates and tariffs is not involved in the controversy. It says that the appellee's published rates for the car of 30,000 pounds net minimum carrying capacity and for a 60,000 pounds net minimum carrying capacity are satisfactory to it, but that appellant had the right to order

and get a car of 30,000 pounds net minimum carrying capacity, and if the carrier used a larger car it is a matter in which the appellant is not concerned. But the trial court very properly treated the question as one involving the reasonableness of a tariff rate, and a like rule is laid down by the interstate commerce commission in *American Lumber & Mfg. Co. v. Southern Pacific Co.*, 14 I. C. C. Rep. 561.

The railroad company in making the collection for a car of larger capacity did what it was bound to do under the interstate commerce act and its tariff rates as published, and the published tariff rates, which both the shipper and the company are bound to know, are the rates which must be collected in the first instance, the charges being no longer the subject of contract but of law. It follows that the appellant's request for reparation is one that must be made in the first instance to the interstate commerce commission. Conference Ruling 220, June 7, 1907; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, 9 Am. & Eng. Ann. Cas. 1075.

In the case of *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, Mr. Justice Van Devanter, speaking for the court, says: "The acts, ch. 104, 24 St. at L. 379; ch. 382, 25 St. at L. 855; ch. 61, 28 St. at L. 643; ch. 708, 32 St. at L. 847, whilst prohibiting unreasonable charges, unjust discriminations, and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect, invested the interstate commerce commission with authority to receive complaints against rates so established, and to inquire and find whether they were, in any wise violative of the prohibitions of the act, and, if so, what, if any, injury had been done thereby to the

person complaining or to others, and further authorized the commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation, by an action in the circuit court of the United States, if the carrier failed to comply with it.

"Thus, for the purpose of preventing unreasonable charges, unjust discriminations and undue preferences, a system of establishing, maintaining and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any nonconformity to those standards by an appropriate change in schedules and by due reparation to injured persons.

"When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the interstate commerce commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the commission, and would be destructive of the uniformity and equality which the act was designed to secure."

The judgment of the district court is correct and is

AFFIRMED.

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

JOHN F. KOLTERMANN, APPELLEE, V. WILLIAM B. CHILVERS ET AL., APPELLANTS.

FILED FEBRUARY 12, 1915. No. 18,001.

Ejectment: APPEAL: CONFLICTING EVIDENCE. In an ejectment suit, where the evidence is conflicting as to adverse possession, the general rule applies that the verdict of the jury will not be set aside unless it appears to be clearly wrong.

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

*H. C. Brome* and *M. H. Leamy,* for appellants.

*Fred H. Free* and *H. F. Barnhart, contra.*

BARNES, J.

This was an action in ejectment tried in the district court for Pierce county. The plaintiff alleged in his petition that he was the owner of the southwest quarter of the northwest quarter of section 10, and the south one-half of the northeast quarter of section 9, all in township 26 north, of range 2 west of the sixth P. M., situated in Pierce county. This description, according to the government survey, embraced the land in question, which contains 13.246 acres, and plaintiff alleged that ever since the 25th day of October, 1901, the defendants had kept him out of possession thereof. The answer was a general denial. On the issue thus joined, there was a jury trial and a verdict was returned for the plaintiff. Judgment was rendered on the verdict, and the defendants have appealed.

The questions presented in this case are: (1) The true location of the boundary line between the plaintiff's land described in his petition and the land owned by defendants, which lies immediately south of and adjoining plaintiff's premises. (2) The statute of limitations.

Defendants contend that the verdict of the jury is not sustained by the evidence. The bill of exceptions discloses

that the parties are all old residents of Pierce county. The plaintiff's evidence showed that the person from whom he obtained his title homesteaded the land and obtained title thereto from the United States; that the land was conveyed by plaintiff by a warranty deed. Therefore, there was no question as to plaintiff's title. On the other hand, defendants showed a perfect title to their land adjoining plaintiff's premises on the south. It appears that the land was farmed on both sides of the boundary line, and in 1901 the defendants built a fence between their premise and the plaintiff's land, which they testified was placed on the turn-row between the fields as they had been theretofore cultivated. The plaintiff insisted that the fence was not on the true boundary line, but was placed so far north of the true line as to include 13.246 acres of his land. The evidence was conflicting, but to our minds the testimony of W. H. Lowe, a competent surveyor who resurveyed the land belonging to the litigants, was sufficient to sustain the verdict. Mr. Lowe described the manner in which he ascertained the ancient government corners and how he reestablished and marked them. He subdivided the sections in question, and testified positively that the defendants' fence was about seven rods north of the true boundary line. Other witnesses who had seen the ancient corners, and claimed to know the boundary line, corroborated the evidence of the surveyor. The witnesses did not all agree upon this question, but we must decline to set aside a verdict rendered on conflicting evidence.

As to the statute of limitations, it appears that defendants' fence, inclosing the land in controversy, was built in 1901. This action was commenced in 1904. At that time the statute authorized two trials in an ejectment suit. This accounts for the length of time the action was pending before final judgment was rendered. The defendants contended that they had exclusive adverse possession of the land, from the time of purchasing it in 1893, as far north as the fence was placed. In this they were supported by several witnesses. The plaintiff contended that the fence was placed farther north so as to include the strip of land

of which defendants had not had exclusive adverse possession before the fence was built, and that each party had in fact had control of the land up to the true line. Upon this fact there was a substantial conflict, and we cannot say that the verdict is so clearly wrong as to require a reversal.

It follows that the judgment of the district court was right, and is

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

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ROBERT C. JOERGER ET AL., APPELLEES, V. BETHANY HEIGHTS, APPELLANT.

FILED FEBRUARY 12, 1915. No. 18,015.

1. **Municipal Corporations:** UNPLATTED LAND: RIGHT TO DETACH: ESTOPPEL. The fact that unplatted land used exclusively for agricultural purposes was included in the incorporated limits of a village with the tacit permission of a former owner does not estop his grantee from proceeding under section 5090, Rev. St. 1913, to have it disconnected therefrom.
2. **Appeal:** AFFIRMANCE. A judgment of the district court in such proceeding will not be reversed, in the absence of a showing that the trial judge committed an important mistake of fact, or made an erroneous inference of law. *Gregory v. Village of Franklin*, 77 Neb. 62.

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

*J. B. Strode* and *G. E. Hager,* for appellant.

*George A. Adams* and *Morning & Ledwith, contra.*

BARNES, J.

Robert C. Joerger and five other persons commenced separate actions in the district court for Lancaster county against the village of Bethany Heights, under the provi-

sions of section 5090, Rev. St. 1913, to disconnect their lands from said village. Issues were joined and by agreement all of the actions were consolidated and were tried as one case. The district court found for all of the plaintiffs, except B. L. Paine, and rendered judgments in their favor. The defendant has appealed from the judgments rendered in favor of Therza Henderson and Samuel B. Tanner, and contends that the judgments from which its appeals have been prosecuted are not sustained by the evidence and are contrary to law.

The bill of exceptions discloses that Bethany Heights, the seat of Cotner University, is a village situated in Lancaster county about five miles north and east of the city of Lincoln, and has a population of 1,200, including about 300 students attending the university. The village was incorporated in 1890, and there was included in the corporate limits much unplatted farm land, of which the premises of the appellees are a part. The principal street or highway, passes through the village from north to south, and is called Saunders avenue. Holdrege street, which is practically the south boundary of the settled part of the village, runs east and west. Vine street also runs east and west, and is a half mile south of Holdrege street. The village is connected with the city of Lincoln by two lines of street railway, one owned by the Interurban Railway Company, and the other by the Lincoln Traction Company. The land belonging to the appellee Tanner is situated wholly south of Vine street, and the premises of the appellee Henderson are situated directly west of the land owned by Tanner. None of this land has ever been subdivided into lots and blocks, either by the present owners or their grantors, but is all farm land used for the purpose of raising wheat, oats, corn, alfalfa and other farm products. The appellee Tanner has a house and other improvements on his 80-acre tract, while there are no improvements in the way of buildings on the Henderson tract. None of the sidewalks are extended from the settled part of the village to either the Henderson or the Tanner tract. No village improvements, such as water-works, electric

lights, or other village conveniences, are situated on or near either of these tracts of land. The line of the Missouri Pacific Railway Company runs east from the city of Lincoln through the lands in question, but there is no permanent depot or other improvements situated thereon, except a sort of flag station, or what is called a box car station, where freight which is consigned to the village is sometimes unloaded. The lands are not urban in character, but are farm lands, and are not in any way connected with the village.

The appellant cites, in support of its contention, *State v. Village of College View*, 88 Neb. 232, and argues that this case is decisive of the right of the appellant to retain the land in question within its corporate limits. The facts in that case, however, are different from those in the case at bar. In that case it was said: "A line of the Chicago, Burlington & Quincy Railway Company's railway runs through the southern part of the village about a mile distant from the post office, and the relator's tract of land, which contains about 43 acres, lies immediately north of the railway company's right of way. A sidewalk extends along the east side of the highway immediately east of the relator's land, northward through the business part of the village, and street lights are maintained to within 40 rods of his premises. The land abutting the east side of this highway is subdivided into tracts of from one to five acres each."

An examination of the plat contained in the bill of exceptions in this case shows, when taken in connection with the oral evidence, that all the land lying south of Ash Grove street, or avenue, although shown to be platted in blocks or lots by the exhibit, with the exception of one square of four blocks, is used as farm lands and always has been. The appellees show beyond question that none of their land has ever been platted and no plat thereof has ever been recorded; that their farms are in no way connected with the village, but are, and always have been, used as agricultural lands; that the village is attempting to prevent them from disconnecting their farms therefrom,

as was said in *Village of Osmond v. Smathers,* 62 Neb. 509, for the sole purpose of retaining them for taxation.

It is contended by the appellant that the appellees are estopped to disconnect their land from the village because they have paid village taxes for many years, since the village was incorporated without protest. Where the owner of unplatted land has used it exclusively for agricultural purposes for some years, but has tacitly submitted to its inclusion in the incorporated limits of a town, he is not estopped from proceeding under the statute to have it disconnected therefrom. *Barber v. Village of Franklin,* 77 Neb. 91; *Gregory v. Village of Franklin,* 77 Neb. 62; *Village of Osmond v. Smathers, supra.*

As we view the evidence, it cannot be said that the district court committed an important mistake of fact; neither was that court guilty of an erroneous inference of law. The judgment of the district court is

AFFIRMED.

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

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ABRAHAM KADNER, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 12, 1915. No. 18,016.

1. **Carriers:** INJURY TO PASSENGER: RIGHT TO RECOVER: CONTRIBUTORY NEGLIGENCE. It is not such negligence for a passenger to stand on the front step of a crowded street car while in motion as will *per se* prevent a recovery for injuries received in consequence of the negligence of the servants of the street car company or of other persons who are crowded upon the platform of the car.

2. ———: ———: NEGLIGENCE. It is evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platforms and steps of the cars. *Pray v. Omaha Street R. Co.,* 44 Neb. 167.

3. ———: ———: ———: PRESUMPTION. A person standing on the steps of a moving street car, being unable to secure a seat or stand-

ing room within, is presumed to be there with the consent of the servants in charge of the train.

4. ———: ———: ———: QUESTION FOR JURY. The plaintiff, a lad 12 years of age, went to the corner of Twenty-fourth and Lake streets, in the city of Omaha, in order to take a car which would transport him to the place where he was attending school. When the car reached the place where he, with others, was waiting, it came to a stop, thus inviting him to become a passenger thereon. Being unable to get inside of the car, he secured standing room on the front steps of the car, holding onto the dashboard and the handle attached to the body of the car. When the car reached Twentieth street, it swung around the corner onto that street, and the movement of the car caused the passengers who were crowded on the front platform to sway outward against the plaintiff, and he was thus forced off the car, fell to the pavement, and received the injuries complained of. *Held*, That the questions c the negligence of the street car company and of the contributory negligence of the plaintiff were for the jury.

5. Jury: VOIR DIRE: CHALLENGE. The rulings of the court on the impaneling of the jury were without error.

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

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

*J. C. Kinsler* and *Martin L. Sugarman, contra.*

BARNES, J.

This was an action brought by one Abraham Kadner, a boy about 12 years old, by his next friend, to recover damages against the street car company for negligence, which, it was alleged, caused his injuries.

The petition alleged, in substance, that the defendant was negligent in allowing its car to become overcrowded with passengers and in operating the car in such a manner as to cause the plaintiff to be pushed, or thrown, to the ground and under the wheels of the moving car, thus causing his injuries. The answer was a denial of the acts of negligence alleged in the petition, and it was further alleged that plaintiff was not a passenger, but was attempting to steal a ride, and was pushed off the car by one not a

passenger at the time of the injury. It was also alleged that plaintiff's injuries were caused by his own contributory negligence. The reply was, in substance a general denial. The cause was tried in the district court for Douglas county and a verdict was returned for the plaintiff in the sum of $4,125. Judgment was rendered on the verdict, and the defendant has appealed.

The record discloses the following facts: In September, 1910, the defendant was operating a double-track street car line running east and west on Lake street, which turns south on Twentieth street, in the city of Omaha. This line was known as the Dodge street line, and was much used by pupils who attended the various public schools. Plaintiff was living with his parents on Twenty-fourth street about half a block south of Lake street, where they kept a grocery store. At that time he was attending the Lake school. He assisted his stepfather at the store during the holidays and periods of recreation. A few days before the accident, which happened on the 26th day of September, 1910, plaintiff sprained his ankle and was obliged to remain at home from school until the following Monday morning. It was already quite late when the plaintiff decided that it would be best for him to go to school that day on the street car. His stepfather gave him the money with which to pay his fare, and he went across to the southeast corner of Twenty-fourth and Lake streets, where a large number of other school children were waiting for the east-bound car. When the car arrived, it came to a stop at the regular stopping place on the east side of Twenty-fourth street. The car was already crowded to its full capacity and the platforms were filled with passengers. The plaintiff went first to the rear platform, but by the time he got there it was so crowded that it was impossible for him to get a place even on the rear step of the car. He then went to the front platform, which was also crowded with passengers, but, with the assistance of another boy, who was attending the high school, he managed to get what seemed to be a good, safe place to stand on the front end of the car. He had both feet on the step and took hold of

the handles with both hands, one hand on the handle attached to the body of the car and the other on the handle on the front end of the car. The conductor took on as many passengers at this point as the car platforms and steps would hold. The motorman was so pressed, crowded and hemmed in by the passengers on the front platform that it was impossible for him to see a person on the front step of the car. Very shortly after the plaintiff got in what seemed to him a safe position on the front step of the car, the conductor rang the bell and the motorman started the car east toward Twentieth street. The plaintiff had his money in his pocket ready to pay his fare. The conductor was somewhere inside of the car collecting fares from other passengers. The car proceeded east until it came to a switch located on Lake street just west of Twentieth street. It was necessary to stop the car at that place in order to throw the switch so as to permit the car to swing around the corner and go south on Twentieth street. When the car was stopped at the switch, the front platform was so crowded that the motorman could not throw the switch himself, so he arranged with a boy on the street to do it for him. The boy who threw the switch wanted to go down town, and the motorman waited for him to board the car and in some manner he crowded on the front platform. The car was started and swung around the curve at increasing speed. It did not make the usual stop, and as it swung around the curve the passengers who were crowded on the front platform surged out to the west and were pushed and thrown against the plaintiff so that he was forced to let go his hold on the handles of the car. He fell beneath the wheels in such a way that his left foot was mangled and crushed so that it became necessary to amputate the leg between the foot and knee. The toes of his right foot were also bruised and crushed. The motorman testified that he had no intention of bringing his car to a stop at the usual stopping place on the south side of Lake street; that the car was loaded; that he had all that could be taken on at Twenty-fourth and Lake streets, and that he intended to go right on down town. The car was proceed-

ing at such a rate of speed that the motorman was unable to stop it until it got about a block south of Lake street, although he was promptly advised by one Kenneth Craig that the car had run over the plaintiff.

At the close of the evidence the defendant requested the court to direct a verdict in its favor because the facts proved failed to establish any actionable negligence on its part. The request was overruled and the ruling is assigned as error. In support of the assignment the defendant cites *McCumber v. Boston Elevated R. Co.*, 207 Mass. 559, *Seale v. Boston Elevated R. Co.*, 214 Mass. 59, *Huber v. Cedar Rapids & M. C. R. Co.*, 124 Ia. 556, and *Lehberger v. Public Service R. Co.*, 79 N. J. Law, 134. The *McCumber* case seems to be most relied on. In that case it was said: "The plaintiff voluntarily and intelligently became a passenger upon a car so crowded that she could not get a seat, and knew that perhaps she might be obliged to stand in the vestibule. This was not negligence on her part, but by doing so she assumed whatever obligation or risk was incident to that condition. * * * It is not negligence on the part of a carrier in the present state of transportation to permit passengers to come upon cars which are already crowded. * * * That there was some pushing in the effort to pass the plaintiff is not significant. It is only when done in a disorderly way that it becomes of consequence. Hence there was no evidence of negligence on the part of the defendant." The other cases cited seem to, in a way, support the rule announced in the *McCumber* case.

So far as this court is concerned it has evidently repudiated that doctrine. In *Pray v. Omaha Street R. Co.*, 44 Neb. 167, it was held: "It is not such negligence for a passenger to stand on the front steps of a crowded street car while in motion as will *per se* prevent a recovery for injuries received in consequence of the negligence of persons in charge thereof." It was further held: "It is evidence of negligence on the part of a street railway company to carry passengers greatly in excess of the seating capacity of its trains, and permitting them to stand on the platforms and steps of the cars. A person standing on the

steps of a moving street car, being unable to secure a seat or standing room within, is presumed to be there with the consent of the servants in charge of the train." It was also held in that case: "Street railway companies in this state are common carriers, and are presumptively liable for the concurrent negligence of their servants and third persons resulting in personal injuries to passengers."

In the above case the plaintiff, a lad 14 years of age, boarded the defendant's train at South Omaha, bound for the city of Omaha. When he reached the train, which was waiting at the terminus of the line, it was so crowded that he was unable to get inside, but secured standing room on the rear platform of the trailer. When the first stop was made, four blocks distant, he stepped off the train to assist a fellow passenger to alight, and was unable to get upon the platform again, his place being occupied by other passengers. He went forward immediately and secured standing room on the front step of the trailer, holding onto the dashboard and to the iron rail attached to the car for the distance of a block, when he was forced, by the pressure of the other passengers on the platform, to relinquish his hold, and fell, receiving the injuries complained of. It was there held that the question of negligence was for the jury and it was error to direct a verdict for the defendant. This rule is supported to some extent by *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, and *East Omaha Street R. Co. v. Godola*, 50 Neb. 906. We are constrained to follow the rule in those cases, and we therefore hold that the motion for a directed verdict was properly overruled.

Defendant contends that it was not guilty of negligence by reason of any movement of the car which was consistent with its proper management under the circumstances. This question seems to have been settled by the opinion in the *Pray* case, *supra*. If the movement of the car was such as to cause the passengers, who crowded onto the platform, to force the plaintiff from the steps of the car where he had obtained a foothold, then the question of negligence was one for the determination of the jury and this assignment must fail. Therefore it was not error for the court to

refuse to instruct the jury as requested by the defendant on that point.

It is also contended that the court should have directed a verdict in defendant's favor because the plaintiff was not crowded from the car by any act of its trainmen, but was in fact crowded from the step by a stranger who attempted to board the car. There was some testimony which tended to support that theory, but the evidence as a whole on that point was conflicting, and therefore that question was properly submitted to the jury.

It is further contended that the court erred by not instructing the jury that the plaintiff was guilty of contributory negligence in getting upon the front step of the crowded street car, he having been admonished not to get onto a crowded car. We find nothing in the record tending to show that the defendant's servants gave plaintiff any warning of that kind. On the contrary, they paid no attention to his movements.

The opinion in the *Pray* case, *supra,* holds, in substance, that a boy 14 years of age was not guilty of contributory negligence. In the case at bar the plaintiff was only a little more than 12 years old, and while we might be constrained to hold that a person of mature years and judgment would be guilty of contributory negligence, under the circumstances of this case, we think, where the plaintiff was immature in years and without discretion, the question of contributory negligence was properly submitted to the jury.

Finally, it is contended that the court erred in not sustaining defendant's challenge to the juror Haynes. The record shows that the juror, when examined by counsel for plaintiff, stated that he had a kind of general prejudice against corporations, but he had no prejudice of any kind against the defendant street railway company; that he knew nothing about the case on trial; that he could try the case fairly and impartially and without regard to the feeling referred to; that he could try the case as fairly and impartially as he could one between two individuals; that he could try the case on the evidence and the law alone

without regard to any other thing, and, if sworn as a juror, he would do so. The court then asked the juror: "Suppose you had a trial, a case of your own here, and you would call 12 men into the jury box who felt toward you just exactly like you feel toward these men, would you be perfectly willing to try your case before those men?" The juror answered, "I would. Q. Perfectly willing? A. Yes, sir." The court saw the juror, heard his statements, and observed his manner of answering questions, and then in the exercise of his discretion overruled defendant's challenge for cause. In this ruling there was no abuse of discretion. The record further shows that the juror was excused by the exercise of one of defendant's peremptory challenges.

As we view the record, it contains no reversible error. The defendant had a fair trial, and the judgment of the district court is

AFFIRMED.

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

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HENRY J. BACKES, APPELLANT, V. L. C. COOK, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,996.

**Sales: WARRANTY: WAIVER.** Seed potatoes were sold and delivered under a warranty that they would grow. When the sacks were opened they appeared soft, and the purchaser, though in much doubt as to their fitness for seed, relied upon the warranty, planted, and cultivated them. *Held*, That he did not thereby waive the warranty, and is not precluded from defending an action brought upon the note given for the purchase price, on the ground that there had been a total failure of consideration.

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

*Allen & Dowling* and *Needham & Doten,* for appellant.

*H. C. Vail, contra.*

LETTON, J.

This is an action by the payee against the maker of a promissory note for $235. The defense is that the note was given for the purchase price of 100 bushels of seed potatoes, which were warranted to be true to name, of good quality, and valuable for seed; that they were not true to name, but were of mixed varieties and unfit for seed; that they were properly planted and yielded only about 20 bushels to the acre; that good seed potatoes under like circumstances would have yielded about 100 bushels to the acre, all to defendant's damage in the sum of $595: Verdict that plaintiff had no cause of action, and judgment of dismissal. Plaintiff appeals.

The first error assigned is that the court erred in permitting defendant and his witnesses to testify to the condition of potatoes sold to other purchasers and delivered at the same time. In one or two instances objections were made to certain questions along this line, but witness after witness was allowed to testify without objection as to the condition of the potatoes he had bought and received from plaintiff at the time those of defendant were delivered. In view of the fact that no objection was made to the great mass of like testimony, the ruling of the court could not be prejudicial.

It is also assigned that the court erred in admitting evidence of an express warranty because there was no consideration therefor. It is clear that there was an implied warranty, but it is also clear that the potatoes were sold upon an express warranty; Backes himself testifying that he guaranteed the potatoes to be sound and to grow. The purchase price was the consideration for the warranty.

According to defendant's testimony, when he received the potatoes he was in some doubt as to their being fit to plant. Plaintiff insisted that he take them and said that he would guarantee them to grow. When the sacks were opened in order to cut them for planting, defendant discovered that some of the potatoes were rotten and that a large quantity of the others were soft and seemed to be unsuit-

able for seed. He planted about 12 or 14 acres of potatoes altogether, about 7 or 8 acres with the 100 bushels he purchased from plaintiff, and the remainder with seed of another variety which he had grown himself. From the seed purchased the stand of potatoes was very poor, and he raised about 140 bushels, or about 20 bushels to the acre, while the remainder of the field planted with his own seed yielded about 90 bushels to the acre. It is clear that defendant believed that some of the potatoes would not grow, but he was not fully convinced that the remainder of them were unfit for seed, and the positive warranty given him by the plaintiff in all probability turned the scale in his mind and led him to spend the time and labor necessary to plant and cultivate the crop.

Plaintiff requested an instruction to the effect that, if the jury found from the evidence that the potatoes furnished were of poor quality and unfit for planting, and this fact was known to defendant when he planted them, and that he did so without notifying plaintiff of such defects, he thereby waived any breach of warranty. This was refused. The following instruction was given without objection or exception by plaintiff: "The defendant claims that this note was given for 100 bushels of seed potatoes, and that said potatoes were worthless, and for that reason he ought not to pay the note sued on. And, if you believe from a preponderance of the evidence that such is the case, you will find for the defendant. If, on the other hand, you believe from the evidence that the potatoes were good seed potatoes, containing germinating vigor, vitality, and strength, and that the defendant's failure to raise a crop therefrom was due to some other cause or causes than lack of vigor, vitality, and strength in the seed, your verdict should be for the plaintiff." Instruction No. 6, to which plaintiff excepted, is substantially the same. Plaintiff insists that the proper rule is that, if a purchaser accepts goods with knowledge of their defective condition and consumes them by use, he thereby waives any warranty of quality, citing *Hazen v. Wilhelmie*, 68 Neb. 79, and cases following it; and it is said that *Dunn v. Bushnell*, 63 Neb.

568, was overruled by the former case. This does not follow. In the *Hazen* case the question of recovery upon a breach of warranty was not involved, and it is apparent that the purchaser accepted the trees and planted them knowing definitely at the time that they were not in accordance with his contract of purchase. The principle was the same as if it had been an ordinary contract of sale of merchandise and not a sale and delivery of seeds, plants or trees warranted to grow. The cases are distinguishable. In *Dunn v. Bushnell, supra,* one question only was really involved, and the decision in that case is not overruled. In *Grisinger v. Hubbard,* 21 Idaho, 469, it is said: "Where fruit trees are received under an implied warranty as to their condition and likelihood to grow, and the purchaser cannot definitely determine whether they are in such condition at the time of delivery, the purchaser has the right to receive them and ascertain whether they are in a good or bad condition or will grow if given proper care, and by so receiving such trees the purchaser is not precluded from recovering upon such warranty." See, also, note to that case in Ann. Cas. 1913E, p. 87. There is an interesting note to the case of *Leonard Seed Co. v. Crary Canning Co.,* 147 Wis. 166, in 37 L. R. A. n. s. 79, upon the liability of a vender of seeds. *Frith & Co. v. Hollan,* 133 Ala. 583, 91 Am. St. Rep. 54. A reference to these cases and notes shows that the doctrine of *Dunn v. Bushnell, supra,* is supported by authority. Defendant might have refused to receive the potatoes, but he also had the right to retain and plant them, and, if they proved to be worthless, to assert that fact as a defense against an action for the purchase price.

Plaintiff claims that whatever may be held to be the rule of damages there was not an entire failure of consideration and there should have been a verdict in his favor pro tanto; but it seems to us that the fact that, after preparing the ground, planting, cultivating and harvesting the crop from 7 or 8 acres, the plaintiff only received 40 bushels of potatoes more than the seed planted evidences an entire failure of consideration. No man with any common

sense or judgment would prepare, plant and cultivate that amount of ground for such a meager return.

We find no prejudicial error in the record.

AFFIRMED.

MORRISSEY, C. J., not sitting.

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HERMAN ZIGMAN, ADMINISTRATOR, APPELLEE, V. BEEBE & RUNYAN FURNITURE COMPANY, APPELLANT.

FILED FEBRUARY 12, 1915. No. 17,999.

1. **Negligence:** ACTION FOR DEATH. The act of coupling two wagons together and thus driving them on the street does not of itself constitute negligence on the part of the owner of the wagons, so as to render him liable in damages for the death of a child who climbed on the connecting pole.
2. ———. The doctrine of the "Turntable cases" is not applicable to the facts in this case.

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

*McGilton, Gaines & Smith,* for appellant.

*Baldrige, Keller & Keller* and *Charles E. Foster, contra.*

LETTON, J.

Action for the wrongful killing of plaintiff's intestate; verdict and judgment for $3,000, defendant appeals.

The facts that seem to be established by the evidence are substantially as follows: The defendant is a wholesale dealer in furniture. On the afternoon of October 19, 1909, a driver in its employ was driving at a walk along Twentieth street in Omaha with two covered furniture wagons, connected together, on his way to the railroad station. The first wagon, to which three horses were attached, was heavily loaded with outgoing furniture, the other was

empty and was to be loaded with incoming furniture. Both wagons were of the same size and character. The pole or tongue of the rear wagon was tied to the axle of the front one. An eyewitness testifies that as the wagons came past his drug store, near which he was standing, Philip Zigman, the deceased, a little boy between four and five years old, with another little boy of about the same age, were lying across the pole of the second wagon, with their backs toward him and their faces down. The driver was seated in front of the first wagon, with his view to the rear obstructed by the load of furniture. The witness stood about five feet from the wagons as they passed. Within a minute afterwards he was told by two school boys that the deceased, who was then sitting upon the curbing about 60 or 65 feet away, had been run over. The boy had been run over across the body and he died in a very few minutes. The street is usually busy at that point with heavy traffic, street cars pass every 10 minutes, but few automobiles use it. The Zigman home is a block west from where the accident happened.

The driver testified that the tongue was about 2½ feet from the ground; that there were about 8 feet between the box part of the front wagon and that of the rear one; that there was no one on the rear wagon; that this was the customary way of hauling the empty wagons; that he did not see any boys as he passed the drug store; and that he knew nothing about the accident until he was called back to the spot where it happened. The mother testified that the boy went to the drug store to buy some candy, and that it was only five minutes from the time he left the house until he was brought back dead.

At the conclusion of the evidence for plaintiff, defendant moved the court to direct a verdict in its favor, for the reasons that it is not shown that defendant was guilty of any negligence in using the streets or in the manner of using the wagons, and that the injury to the child was due to the carelessness of the parent and plaintiff. The motion was overruled, and the questions as to the negligence of the defendant in connecting the wagons, and in using them on

the street as connected, were submitted to the jury under instructions based upon the doctrine of the "Turntable cases."

Defendant makes the same contention here as in the district court. The crucial question is whether the coupling of the wagons together in the manner described and driving the team on the street without a guard or outlook on or about the rear wagon in order to warn children who might attempt to climb thereon can be said, as a matter of law, not to constitute negligence. The jury has found that the act was negligence. Unless, when legal principles are applied to the facts presented, the defendant must be held to have been acting within its legal rights and was without fault, the verdict must stand, because otherwise the question was for the jury. The plaintiff relies upon the doctrine of *Lynch v. Nurdin,* 1 Adolph. & E. (Eng.) 29, that one who negligently leaves dangerous machinery or appliances of such a nature as to be attractive to children, within their reach, unguarded, or in such a situation that it may be easily put in motion by children, may, if injury to a child results, be guilty of actionable negligence. This is the rule of the "Turntable cases," and is the law in this state. *Sioux City & P. R. Co. v. Stout,* 17 Wall. (U. S.) 657; *Chicago, B. & Q. R. Co. v. Krayenbuhl,* 65 Neb. 889. Can this principle be applied to the passage of vehicles along the streets of a city? In the diversity of vehicles which traverse the streets there may be many forms attractive to children, and in many instances the attractive part of the vehicle is not within the view of the driver. Omnibuses are often used which are entered by steps at the rear, with no conductor or guard, and the door to which is held closed by a cord or strap, reaching to the driver's seat. Would a child who climbed upon the rear steps while the omnibus was passing along the streets of a city be entitled to recover for injuries sustained by falling off the steps? *Hebard v. Mabie,* 98 Ill. App. 543, holds to the contrary, even in a case where the driver knew the child was there. It is not uncommon to see automobiles with trunk platforms or tire holders projecting from the

rear, upon which a child might easily climb and be beyond the view of the driver. Could negligence be imputed to the owner of the machine if an accident occurred by reason of a child having seated himself upon the rear projection without the driver's knowledge? Wagons of certain types are constructed so that children can easily climb upon them. Those used for hauling stone, or to remove growing trees, or to carry iron girders, are of this class. Is it incumbent upon the owner of such a vehicle to send a guard as well as a driver every time he uses the streets for the transportation of his goods? These inquiries are suggested by the facts in this case. If the nature of a vehicle used on the streets is such as to be attractive to children, and they may easily climb thereon, then, if the principle contended for by the plaintiff is sound, no owner of such a vehicle can relieve himself from liability for negligence unless it is accompanied by a special guard, for the attention of the driver in a busy street must necessarily be directed to the front in order to control his team or his automobile. The question would be different if the driver was aware that children were congregating on and about it, and were liable to be injured if not warned away, and this is the principle upon which some cases have been decided. The following cases establish the principle that, under the circumstances of this case, no negligence has been shown. *Bishop v. Union R. Co.*, 14 R. I. 314; *Hestonville Passenger R. Co. v. Connell*, 88 Pa. St. 520; *Rice v. Buffalo Steel-House Co.*, 45 N. Y. Supp. 277; *Foster-Herbert Cut Stone Co. v. Pugh*, 115 Tenn. 688; *Emerson v. Peteler*, 35 Minn. 481. In the California case of *Skinner v. Knickrehm*, 10 Cal. App. 596, upon which the plaintiff places much stress, the facts were that a house with a wagon attached at the rear was being slowly moved along the streets of Los Angeles. The driver was unable to see the wagon from his position in front of the house, and none of the other employees were in a position that they could see the wagon. "These children were permitted to, or at least were not by any one forbidden to, play upon the wagon, and did so for a long space of time while the house was being moved for a

large portion of a block." Under these circumstances the court held it was for the jury to determine whether the defendant was guilty of negligence. This case is not applicable here, because in the present case the driver was unaware of the presence of the child. If the proof had shown his knowledge, a different question would be presented. The other cases relied upon by plaintiff, where dangerous machines, such as iron rollers, wheel scrapers, or the like, were left unguarded upon, or where lumber or building material was piled in a dangerous condition close by, a public street, come within the doctrine of *Lynch v. Nurdin, supra,* and the "Turntable cases," and are likewise inapplicable.

The judgment of the district court is

REVERSED.

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

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JAMES R. WEDDLE, APPELLEE, V. GEORGE C. SPECHT, APPELLANT.

FILED FEBRUARY 12, 1915. No. 18,003.

1. **Homestead:** DESCENT. Upon the death of either a husband or a wife holding the fee to the family homestead, the homestead vests in the surviving spouse for life. Their minor children, merely by virtue of such relation, have no homestead interest therein.
2. **Judgment:** CONCLUSIVENESS: PARTITION: INFANTS. Where, in a partition suit in a court of competent jurisdiction, service is properly had upon minor heirs, and a guardian *ad litem* is appointed and answers for them, the final judgment in the case binds the minor heirs as fully as other owners of the real estate, and the judgment may not be collaterally attacked. *Kazebeer v. Nunemaker*, 82 Neb. 732.
3. *Shearon v. Goff*, 95 Neb. 417, examined, and statement set forth in this opinion explained.

APPEAL from the district court for Jefferson county: LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

*Heasty & Barnes,* for appellant.

*C. H. Denney, contra.*

LETTON, J.

Action by the vendor to enforce specific performance of a contract to purchase real estate. The defense is that the title is not perfect in the vendor, as it was agreed it should be. Decree for plaintiff.

Hattie Weddle died intestate, owning 160 acres of land which was occupied by her and her husband, James Weddle, and their two minor children as the family homestead. She had two other children who were of full age. Afterwards her husband, James Weddle, brought an action in partition, making each of the heirs a party defendant. The petition set forth that he was the owner in fee of an undivided one-fourth interest in the land, and that each of the four heirs owned a three-sixteenth interest in it, subject to his right of homestead, which he alleged was of the value of $1,200; that there were no debts; that he had given the statutory bond to cover debts and expenses; and that the land was encumbered by a mortgage lien in the sum of $2,000. The adult heirs entered a voluntary appearance. Proper service was had upon the infant defendants, and a guardian *ad litem* appointed, who filed an answer. The court found the allegations of the petition to be true, confirmed the shares of the respective parties, and appointed a referee to make partition. The referee reported that the premises could not be divided without great prejudice to the owners, and he was thereupon ordered to sell the land. It was sold to James Weddle, who was the highest and best bidder. The sale was confirmed and the proceeds distributed in accordance with the decree. The share of the minor heirs was paid to and receipted for by their duly appointed and qualified guardian.

The defendant takes the position that the land was the homestead of deceased, and continued to be the homestead of James Weddle and his minor children after his wife's death, and that therefore the proceedings in partition were ineffective so far as concerns the estate of the minors, and that plaintiff is not possessed of a title in fee simple. He

states the question for determination, as follows: "If the district court has jurisdiction to decree a partition of the homestead while it is occupied by the surviving spouse and the minor children of the deceased as their home, then the judgment of the lower court should be affirmed. If, on the other hand, a homestead while thus occupied may not be partitioned, then the judgment of the lower court should be reversed."

The theory of defendant is that the court has no jurisdiction to partition a homestead while the parent and minor children are residing thereon as one family, for the reason that the infant defendants could not legally consent to a waiver of their homestead rights, nor could their guardian *ad litem* consent to such waiver for them. This assumes that in this state minor children have a homestead interest separate and apart from that of a surviving father or mother. Reliance is placed upon the following quotation from a note to *Battey v. Barker,* 62 Kan. 517, in 56 L. R. A. 33, 77: "The policy of the law with reference to homesteads is as a general rule to keep the family together after the death of its head, and to preserve the home to it for the joint use of all. Partition of the homestead estate, either between the children or between the widow and the children, is not, therefore, usually allowed, and in some instances it is expressly prohibited." But it is pointed out elsewhere in the note that the estate or interest which either the surviving parent or the minor children acquire in a homestead depends entirely upon the language of the statute, and that in many states minor children of the family are given by statute an interest in the hometsead. In this state the survivor upon the death of his or her spouse takes a life estate in the homestead. There is no statute separating the rights of minor children from those of the surviving parent, and if he or she should select another homestead, or move the family residence to another point, there is nothing to prevent it from being done. The life estate does not depend upon residence. *Durland v. Seiler,* 27 Neb. 33; *Cooley v. Jansen,* 54 Neb. 33; *McFarland v. Flack,* 87 Neb. 452. In the opinion in *Shearon v. Goff,* 95

Neb. 417, all preceding cases upon this point are collected and reviewed. But defendant also relies upon the following statement in the latter case, speaking of the rights of a surviving husband where the deceased wife had been the owner of the fee: "On the other hand, he could not have compelled the owner of the remainder estate to submit to a sale by partition or otherwise. A remainderman may say to the owner of the life estate: 'You have a right to sell your life estate. Over that I have no control. But you cannot sell the entire estate. That is to say, you cannot sell my interest as a remainderman, even though you turn over to me a portion of the proceeds arising from such sale. I prefer to wait until your death and then take the entire estate.'" This point was not involved in the determination of the case. The language is obiter dictum as applied to the owner of an interest in fee and seems to be in contravention of the statute.

The determination of this case might be placed upon another ground. The proceedings in partition were apparently entirely regular, and under the provisions of sections 1497, 1499, 8212, 8213, 8322, 8323, Rev. St. 1913, the minor heirs are bound by the finding and judgment of the court as fully as the other owners of the property. 30 Cyc. 223; *Sites v. Eldredge,* 45 N. J. Eq. 632, 14 Am. St. Rep. 769.

This action is of the nature of a collateral attack upon a judgment rendered by a court of competent jurisdiction over the person and the subject matter, and hence it cannot be maintained. The cases of *Staats v. Wilson,* 76 Neb. 204, and *Kazebeer v. Nunemaker,* 82 Neb. 732, are decisive of the question. *Morrill v. Morrill,* 20 Or. 96, 23 Am. St. Rep. 95, and note.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

FOURTH NATIONAL BANK, APPELLANT, V. ADAM RUTHERFORD ET AL., APPELLEES.

FILED FEBRUARY 12, 1915. No. 18,006.

**Appeal:** CONFLICTING EVIDENCE. A judgment based upon the verdict of a jury, rendered upon conflicting evidence, will not be set aside unless it is manifestly wrong.

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

*John M. Ragan, James E. Eddie* and *E. E. Danly,* for appellant.

*J. W. James* and *Karl D. Beghtol, contra.*

LETTON, J.

Action by the indorsee of a promissory note. The defense is that the note was delivered to the plaintiff bank to hold in escrow, together with two deeds, a note and mortgage, and other papers, during negotiations between defendant Adam Rutherford and the payee, James B. Blazer, for the purchase of certain lands; that the negotiations fell through, and the sale was never consummated; that the bank fraudulently and without authority from Rutherford delivered the note to Blazer; and that afterwards Blazer indorsed the note to the bank, which took it with full knowledge of these facts and was not a *bona fide* holder for value. Verdict and judgment for defendants. Plaintiff appeals.

The vital question presented is whether the note was ever delivered to Blazer by Rutherford, or whether it was placed in escrow and delivered to him without authority by the plaintiff, for, of course, if this course was pursued, the bank could not be a purchaser and holder in due course of business.

The evidence shows that Blazer and Rutherford on May 27, 1910, went to the office of an attorney at Wichita, named

Hatfield, to procure the contract drawn. Hatfield drew the contract, two deeds and a mortgage. By the terms of the contract Blazer agreed to sell to Rutherford certain lands in Kansas, and Rutherford, in payment agreed to convey to Blazer certain lands in New Mexico, assume a mortgage of $5,600 on the Kansas land, give Blazer a note for $4,400 secured by a second mortgage on the same land, and pay him $500 in money and $500 in a negotiable promissory note, due and payable January 1, 1911. (The latter is the note in controversy.) The contract further provided that the deeds, mortgage, contract and notes should be deposited in the Fourth National Bank of Wichita, with instructions that, when Blazer was satisfied with the equipment and working of a well and pump to be placed on the New Mexico farm by Rutherford, the deeds, notes and mortgage should be delivered to the respective parties, but that, if Blazer was not satisfied, the bank was to deliver back the deeds, mortgage and notes to the parties making the same, and the agreement was to be discharged. When Blazer and Rutherford left the office of Mr. Hatfield, Blazer had an envelope containing the deeds, mortgage and contract in his pocket. When they arrived at the bank they drew up the $4,400 note, the $500 note, a draft for $500, and a check for $12.50. So far there seems to be no dispute in the evidence.

Rutherford testifies that when they went to the bank they met its president, L. D. Naftzger, and explained that they were making an exchange of land and wanted to leave some papers in the bank; but they also had a conversation with the younger Naftzger, who was assistant cashier; that after signing the notes Rutherford gave them to Blazer; that Blazer put the notes in the envelope with the other papers, gave them to Mr. Naftzger, and told him they were to be placed in escrow. "Q. Where did you go after you had signed that? What did you do then, and what did he do? A. We turned around to Mr. Naftzger's desk. Q. What did he do with the notes? A. He took them out of the envelope and looked at them. Q. Who did? A. Mr. Naftzger." He also said that by agreement Blazer directed

Naftzger to send the $500 note to Hastings to have Mr. Rutherford's brother sign, and this was done. The contract recited: "The deeds and mortgage and *notes specified herein* shall be deposited," etc.; that, if Blazer is satisfied with the well, "the said deeds and *notes* shall be delivered," and that, if he is not satisfied, then "the bank is hereby instructed to deliver back the said deeds and mortgage and *notes* to the respective parties." Rutherford denies an absolute delivery to Blazer, but one for the purpose only of procuring his brother's signature and replacing the note in escrow.

For plaintiff Blazer testified that the note was delivered at the time it was executed; that it was never placed in the envelope and left in escrow, but that, after the deeds and mortgage were placed in the envelope and delivered, Rutherford signed the note, and they together asked Mr. Branch, the cashier of the bank, to send this note to Hastings; that afterwards he went to the bank and Branch handed him the note properly signed; that he indorsed and sold the note to the bank in August, 1910; that in the agreement the note was considered as cash and was not to be placed with the other papers in escrow.

Mr. Branch testified that he did not look at the papers in the envelope when they were handed to him; that there were no instructions on the envelope; and that he sent the papers to Hastings, as directed by Blazer; and that he never knew the $500 note had anything to do with the land transaction, but bought it at the suggestion of the president of the bank. Mr. Naftzger testified that, at the time of his conversation with Blazer relative to the purchase of the note, he did not know Rutherford, and purchased the note purely upon the faith of Blazer and what Blazer said about Rutherford.

Hatfield testified that he was acting as attorney for Blazer when he drew the papers; that the word "notes" appearing in the contract was an error of the stenographer and should have been the word "note." The envelope in which the papers were placed was produced. It bore the words "Blazer-Rutherford papers" in blue pencil in the

handwriting of Hatfield, also the words "2 warranty deeds, one mortgage and note $4,400, one contract," written in ink, also in Hatfield's handwriting. There is a conflict in the evidence as to whether the latter words were upon the envelope at the time it was delivered to the bank.

There is a direct conflict in the evidence. The fact that the contract mentions "notes" as being among the papers to be held in escrow corroborates Rutherford, but Hatfield testified that this was a clerical error. The language of the contract is somewhat ambiguous. Rutherford agrees "to pay said Blazer $500 cash in hand, earnest money, the receipt of which is hereby acknowledged by said Blazer, to execute his said promissory note to said Blazer for the sum of five hundred ($500) dollars as earnest money, due on or before January 1, 1911," but the receipt of the note is not acknowledged, as it well might be if the other note only was to be placed in escrow.

The plaintiff contends that the evidence does not sustain the verdict, and that the court erred in refusing to direct a verdict for plaintiff. We are unable to view the evidence in this light. If, as Rutherford testified, the note was not delivered to Blazer, and was placed in the bank to be held in escrow, and was afterwards delivered to Blazer by the bank in violation of the escrow agreement, Blazer acquired no title, and the bank was not an innocent purchaser and a holder in due course. We are inclined to the view that the greater weight of testimony is with the plaintiff; but it must be said that, if the jury believed Rutherford's testimony, and disbelieved that of Hatfield and Blazer, it is sufficient to support the verdict.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., ROSE and HAMER, JJ., not sitting.

## AMERICAN EXPRESS COMPANY, APPELLEE, V. POSTAL TELEGRAPH-CABLE COMPANY, APPELLANT.

FILED FEBRUARY 12, 1915. No. 18,012.

1. **Telegraphs and Telephones:** NEGLIGENCE: LIABILITY. A telegraph company is liable for all damages sustained by reason of its failure to correctly transmit and deliver a message received by it, notwithstanding an agreement printed on its blanks to the contrary. Rev. St. 1913, sec. 7406.
2. ———: TORTS: DAMAGES. The sender of a message, who has been damaged by the failure of a telegraph company to deliver it as written, may waive the contract and sue as in tort, and in such case he is entitled to compensation for all damages which are directly caused by or flow from the negligent omission, regardless of whether they might have been contemplated as a probable result of a breach of the duty. *Chicago, B. & Q. R. Co. v. Spirk*, 51 Neb. 167.
3. ———: NEGLIGENCE: LIABILITY. A telegraph company, which accepts a message to be delivered, beyond its own lines and delivers the same incorrectly, is liable for the mistake, although made by an employee of another corporation over whose lines the sending company transmitted the message.
4. ———: ———: DEFENSES. As against one who employs an express company to transmit money by wire, the fact that by a rule of the express company its agents are required to send messages directing the payment of money in code words, does not constitute the express company a joint tort-feasor with a telegraph company which failed to correctly deliver the message (which designated the amount of money to be paid in plain words) and constitutes no defense in an action for damages, for such failure, by the express company against the telegraph company.
5. ———: ———: DAMAGES: DIRECTION OF VERDICT. Where the amount of damages sustained by reason of the failure to deliver a message correctly is proved by undisputed evidence and is liquidated, it is not error for the district court to apply principles of law to the undisputed facts and direct a verdict for plaintiff.

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

*Greene, Breckenridge, Gurley & Woodrough,* for appellant.

*F. H. Gaines, B. H. Dunham* and *Herman Aye, contra.*

LETTON, J.

In 1905, Watson, Woods Brothers & Kelly Company, who were engaged in importing and selling horses for breeding purposes at Lincoln, Nebraska, employed the American Express Company to transmit by telegraph to Joseph Watson, Queen's Hotel, Antwerp, Belgium, 80,000 francs. In order to accomplish this, the agent of the express company delivered to the agent of the defendant at Lincoln the following message, addressed to the American Express Company at 65 Broadway, New York: "Button Pike. Eighty thousand francs. Joseph Watson, Queen's Hotel, Antwerp, Belgium." The words "Button Pike" were code words used to identify the sender of the message as the agent of the express company, and also constituted an order to transmit the sum named. The telegram reached Chicago, and was there received in proper form by an automatic receiving and recording instrument known as a "Morsograph." In transmitting the message from Chicago, the letter "y" in the word "eighty" was omitted, and, as received by the express company in New York, it was a direction to pay eight thousand francs. The express company promptly cabled its agent at Antwerp to pay 8,000 francs to Mr. Watson. This message was delivered to him about 9 o'clock in the evening of November 2. Watson had been purchasing horses in Belgium and France, which were to be delivered to him at Antwerp on November 3, to be loaded upon the steamer "British Princess," which was scheduled to leave Antwerp on November 4. As soon as Watson received the message he notified the express company's agent that there was an error, and immediately cabled to his company at Lincoln to the same effect. A correction was made, and the remainder of the 80,000 francs was ordered paid to him. The message was received on November 5, after the steamer had sailed. As soon as Watson found that he could not get the money in time to pay for the 35 horses he had purchased, he, through his interpreters, notified the persons from whom he bought to

delay delivery. Previous to this, Watson, Woods Brothers & Kelly Company had incurred large expenses in advertising a public auction of these 35 horses and 19 other horses to be made at Lincoln, Nebraska, on December 5, and had incurred large expenses in preparing for the sale. Neither Watson nor his associates in this country were able to procure other transportation so that the horses might be delivered before the day of sale, although they used due diligence in that behalf. The horses were finally shipped by a later steamer. Watson, Woods Brothers & Kelly Company, afterwards began an action against the American Express Company to recover damages for the failure to transmit the money to Watson. Issues were made up, and as the case was about to come to trial the express company was informed by its counsel that, from his knowledge of the facts constituting the plaintiff's case, if the case went to a jury, a verdict for a large sum would probably be rendered against them, and that a proposition to compromise for the sum of $3,000 had been made. He advised its acceptance. This was done, and a judgment for $3,025 was rendered against the express company in the United States circuit court for Nebraska. The Postal Telegraph-Cable Company was fully notified by the express company of the nature of that action, warned to defend, and was advised of the offer to compromise, but at all times denied any liability. This action is brought to recover the amount of the judgment paid by the express company, together with the costs and expenses of defending that suit.

The defense is: (1) That the message was sent as an unrepeated message, under a condition in the contract which provided that the telegraph company should not be liable for mistakes in any such messages beyond the amount received for transmission; (2) that the error was made by an operator in the employment of the Postal Telegraph-Cable Company of Illinois, a different corporation from this defendant, and that there was a condition on the telegraph form which provided that the company should not be liable for mistakes made beyond its own lines; (3) that a rule of the express company required its agents to send

messages of this nature in code words; (4) that the message did not indicate, and the company was ignorant of, its purpose, and such liability and loss as is claimed here was not within the contemplation of the parties; (5) that it accepted the message with the belief that the express company had, in accordance with one of its rules, procured an agreement from the sender of the money that it should not be liable for errors made by telegraph companies in sending messages of this nature.

At the conclusion of the testimony the district court directed the jury to return a verdict for plaintiff for the amount claimed. Defendant appeals.

The brief of appellant presents three points which are relied upon as requiring a reversal of the judgment. It is claimed that there was no legal proof of damages of which the mistake was the proximate cause; that, if it be so held, the amount was a question for the jury; and that the damages claimed are so remote and speculative that they could not be forseen or anticipated. It is argued that it is not shown that Watson had any legal contract with the sellers to deliver the horses in Antwerp on November 3. In the absence of evidence to the contrary, Mr. Watson's testimony sufficed to show that he had bought the horses, and that they would have been delivered in Antwerp if he had not stopped delivery as soon as he ascertained that the money would not be received in time to pay for them on that date. The testimony as to other damages incurred was undisputed and would have sustained a much larger judgment. It is immaterial that the telegraph company was not aware of the purpose of the message other than that it directed the payment of money. By section 7406, Rev. St. 1913, a telegraph company is declared to be liable for the nondelivery of, and for all mistakes in transmitting, messages made by any person in its employ, and "any such telegraph company shall not be exempted from any such liability by reason of any clause, condition or agreement contained in its printed blanks." This statute is considered and applied in *Kemp v. Western Union Telegraph Co.*, 28 Neb. 661, *Western Union Telegraph Co. v. Low-*

*rey,* 32 Neb. 732, *Pacific Telegraph Co. v. Underwood,* 37 Neb. 315, *Western Union Telegraph Co. v. Kemp,* 44 Neb. 194, and *Western Union Telegraph Co. v. Beals,* 56 Neb. 415, and it is held that a telegraph company, by virtue of the statute, is liable for all damages sustained by its failure to correctly transmit and deliver a message received by it, notwithstanding anything contained on its printed blanks. In a like action, under a somewhat similar statute in Wisconsin, in *Fisher v. Western Union Telegraph Co.,* 119 Wis. 146, it was held that the familiar doctrine of *Hadley v. Baxendale,* 9 Exch. (Eng.) 341, which ordinarily controls the measure of damages in actions for breach of contract, does not apply. See, also, *Barker v. Western Union Telegraph Co.,* 134 Wis. 147. *Smith v. Western Union Telegraph Co.,* 80 Neb. 395, and *Marriott v. Western Union Telegraph Co.,* 84 Neb. 443, were apparently actions for breach of contract, and the rule in *Hadley v. Baxendale, supra,* seems to have been applied. Here, however, the petition bases the right to recover, not upon the contract, but upon negligence and want of care on the part of the telegraph company, and the rule as to the measure of damages in actions for breach of contract does not apply. The case falls within the rule applied to other common carriers, with respect to the right of a plaintiff who waives the contract and sues in tort and the plaintiff is entitled to compensation for all injuries which are directly caused by or flow from the wrongful act or acts, regardless of whether they might have been contemplated as a probable result of a breach of the duty. *Chicago, B. & Q. R. Co. v. Spirk,* 51 Neb. 167.

It is asserted that the telegraph company is not liable for the mistake of an employee of the Postal Telegraph-Cable Company of Illinois, which company had assumed the obligation to deliver the telegram at New York city. At the time of the trial, defendant stipulated that the telegram in question "was delivered by the defendant to the plaintiff at its office in New York city on November 1, 1905." Since the company accepted and actually delivered

it, all subordinate agencies and persons employed in the transmission were directly or indirectly in its service and acting in its behalf. It assumed the burden of delivery, and delivered the message in a mutilated form. Moreover, under the statute referred to, the condition printed upon the back of the message whereby it attempted to limit its liability to its own line is inoperative.

It is next argued that the negligence of the express company concurred with that of the Postal Telegraph-Cable Company of Illinois, and there can be no contribution between joint tort-feasors. It is said that the express company is a tort-feasor because it was negligent in failing to use code words in sending the message. There was no duty to send code words, and no neglect in failing to do so. The express company could waive its own regulation, and it is shown that it often did so. The telegraph company received the message with the amount of money to be paid stated in plain words. It is too late after damages result to say that it should not have been written or accepted unless in code. Besides, among the printed conditions upon which the telegraph company bases its defense is one that it shall not be liable "for errors in ciphers or obscure messages." This of itself justifies the use of plain words, if any justification is needed. That the words of a telegram are too plain and easily understood is a novel complaint. It is usually codes and ciphers that do not find favor with telegraph companies.

The damages sustained by the importing company were abundantly proved and seem to have exceeded the sum agreed upon. The amount of the judgment, attorneys fees, and expenses incurred by the express company in defending the suit were not disputed. The amounts being liquidated, the district court had the right to apply the principles of law and to direct the jury accordingly. Its judgment is therefore

AFFIRMED.

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

JOHN FRISH, APPELLEE, V. SWIFT & COMPANY, APPELLANT.

FILED FEBRUARY 12, 1915. No. 17,991.

1. **Negligence:** ACTS DONE IN EMERGENCY. On the issue of contributory negligence in an action to recover damages for personal injuries, where plaintiff was placed in a position of sudden peril without any fault on his part, the test of his conduct is that of a person of ordinary prudence confronted with the same circumstances, and this rule applies to cases in which the emergencies arise from accidents or from acts of third persons or from negligence of the defendant.
2. ———: QUESTIONS FOR JURY: CONFLICTING EVIDENCE. In actions to recover damages for personal injuries, issues of negligence and contributory negligence are questions for the jury, where the evidence is conflicting.
3. **Master and Servant:** ASSUMPTION OF RISK. An employee does not assume the risk of actionable negligence on the part of his employer.

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

*Greene, Breckenridge, Gurley & Woodrough,* for appellant.

*Smyth, Smith & Schall, contra.*

ROSE, J.

Plaintiff brought this suit to recover from his employer damages in the sum of $3,000 for personal injuries. From judgment on a verdict in favor of plaintiff for $2,000, defendant has appealed.

At the time of the injury plaintiff and about 50 other employees were working in the sheep department of defendant's packing house in South Omaha. Sheep were handled at the rate of 200 an hour. When killed they were suspended from an overhead, moving, endless chain, running on small pulleys supported by a stationary iron rail swung from the ceiling. The slaughtered animals moved with the chain past plaintiff, who, in common with other butchers,

had a distinct service to perform in the dressing of each animal. The cattle department was in operation at the same time in a different part of the same room. A steer, infuriated by a blow intended to be, but not proving, fatal, ran into the sheep department. An alarm was given. The chain was stopped. The employees, without exception, hastened to places of safety. One jumped behind a post. Another crawled into a pit. Plaintiff climbed onto a three-inch railing, threw his left arm on the overhead rail already described, and clung to the chain with his left hand. Before the steer had been killed and before the employees had returned to their places, the chain was started, drawing plaintiff's hand into the pulleys. This action was brought to recover resulting damages. The starting of the chain without notice or warning under the existing conditions is the negligence imputed to defendant. The latter denied negligence, and pleaded contributory negligence and assumption of risk.

Error in refusing to direct a verdict for defendant is one of the assignments. Under this head it is argued that plaintiff was guilty of contributory negligence as a matter of law, and that there is no evidence of actionable negligence on part of defendant. It is asserted that when plaintiff climbed onto the railing he knew the chain was dangerous; that it was unnecessary to put his hand on it; that he knew it was almost constantly in motion during working hours; that his act amounted to negligence; that he should have put his arm around the track in which the chain ran or grasped some other safe and convenient part of the structure. The truth of these assertions would not necessarily defeat the action on the ground of contributory negligence. It is undisputed that plaintiff was required to act instantly in the face of imminent peril. An infuriated steer, a few feet away, was charging toward him. No place had been provided for his safety. He had no time for deliberation. The machinery was motionless. The chain had been stopped. It was dangerous only when in motion. The butchers were not in their places to perform their work on moving carcasses suspended from the chain. Following

the instinct of self-preservation, plaintiff's attention was directed to the movements of the dangerous animal. The situation was not created by plaintiff's negligence. In the analysis of his conduct under such conditions, the law did not require mature deliberation in front of the approaching, infuriated steer or the wisest selection of the place to put his hand, while balancing on a three-inch railing. The test of contributory negligence in a situation like this is not to ascertain where a person of ordinary prudence would have deliberately put his hand in the absence of danger, but what he would be likely to do under the same circumstances in the presence of the existing peril. It is clear that plaintiff was not guilty of contributory negligence as a matter of law. The issue was one of fact for the jury.

The law has been correctly stated as follows: "When a person without his fault is placed in a situation of danger, he is not to be held to the exercise of the same care and circumspection that prudent persons would exercise where no danger is present; nor can it be said that, as matter of law, he is guilty of contributory negligence because he fails to make the most judicious choice between hazards presented, or would have escaped injury if he had chosen differently. The question in such case is not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do, in the presence of such existing peril, and is one of fact for the jury." *Pennsylvania R. Co. v. Snyder,* 55 Ohio St. 342.

The rule is not confined to cases where the peril was created by defendant's negligence, but is applicable to situations arising from accidents or from acts of third persons. *Chattanooga E. R. Co. v. Cooper,* 109 Tenn. 308; *Cassida v. Oregon R. & N. Co.,* 14 Or. 551; *Alabama & V. R. Co. v. Lowe,* 73 Miss. 203; *Palmer v. Larchmont Horse R. Co.,* 98 N. Y. Supp. 567; *Wheeler v. Oregon R. & N. Co.,* 16 Idaho, 375; *Hoff v. Los Angeles Pacific Co.,* 158 Cal. 596; *Cannon v. Pittsburg & Birmingham Traction Co.,* 194

Pa. St. 159; *Lemay v. Springfield Street R. Co.*, 210 Mass. 63, 37 L. R. A. n. s. 43, note, p. 57.

Was actionable negligence proved? Defendant's foreman controlled the power used in operating the chain. He stopped the chain when the warning of danger was given. The jury settled the fact that the foreman started the chain without warning. There is evidence tending to show that plaintiff at the time was in plain view of the foreman, who was perhaps not over 20 feet away. Plaintiff's unusual position, with his arm on the overhead railing, and his left hand necessarily near the chain or on it, would naturally attract attention. Though the foreman denied that he saw plaintiff in the situation described, the denial is not conclusive. *Zitnik v. Union P. R. Co.*, 91 Neb. 679. It may be inferred from circumstances of which there is proof that the foreman knew, or by the exercise of ordinary care should have known, of plaintiff's peril. Plaintiff was not a trespasser. Defendant owed him the duty of exercising ordinary care to prevent injury. Under the circumstances the issue of negligence was one of fact for the jury.

Plaintiff did not assume the risk of actionable negligence.

The instructions are in harmony with the views expressed.

The record does not affirmatively show that the verdict is excessive.

AFFIRMED.

MORRISSEY, C. J., not sitting.

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HAROLD BLACKMAN, APPELLEE, V. WESTERN ELECTRIC COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 12, 1915. No. 17,992.

**Master and Servant:** INJURY TO SERVANT: ACTIONABLE NEGLIGENCE. Where an employee voluntarily goes outside of the scope of his employment without the permission or the knowledge of his employer, and operates a rip-saw by which he is injured, the employer

is not chargeable with actionable negligence for failing to give warnings of danger or instructions to prevent injury.

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

*John W. Parish,* for appellants.

*Sullivan & Rait, James O'Hara* and *Edward Simon, contra.*

ROSE, J.

This is an action by plaintiff against his employer, the Western Electric Company, and its foreman, to recover damages in the sum of $10,000 for personal injuries. From a judgment in favor of plaintiff for $3,000, defendants have appealed.

When plaintiff was injured, he was 16 years and five months old. His regular work was taking apart and cleaning telephones and polishing nickel. Being anxious to make a partition in a drawer in which he and fellow employees kept their tools, he went to a rip-saw in his employer's workshop, January 2, 1911, with a four-foot board four inches wide, and ripped it through the center. In doing so, the saw severed from his left hand the index finger and the thumb. The negligence imputed to defendants consists in their failure to warn plaintiff of the dangerous character of the saw and to instruct him in its operation and use. They denied negligence, and pleaded that plaintiff voluntarily went outside of the scope of his employment without his employer's permission or knowledge and injured himself through his own negligence.

The sufficiency of the evidence to sustain the verdict is the determining question presented. There is nothing to indicate that plaintiff was handicapped by any mental or physical infirmity. When injured, he was not acting within the scope of his employment. He was neither directed by defendants to make a partition in the tool drawer nor to use the rip-saw for that purpose. To sustain the verdict, he relies on special permission and the resulting duty to

give warnings of danger and proper instructions to prevent injury.

Plaintiff testified that he asked the foreman in charge, a few days before the injury, for permission to use the saw for the purpose of ripping the board, and that the foreman said, "Yes," then added, "Wait until we invoice." Plaintiff testified further that he had no personal knowledge that the invoice had been taken when he used the saw, but took it for granted. There is no competent evidence to establish that fact. It is not shown that, after having assumed the invoice had been taken, he renewed his request or subsequently obtained permission. He stated he did not know that, while using the saw, he had been observed by the foreman. The latter testified the injury was inflicted before he knew what plaintiff was doing. Knowledge of defendants, before the injury, that plaintiff was using the saw is not shown. Plaintiff voluntarily went outside of the scope of his employment, without the permission or the knowledge of defendants, and operated the rip-saw by which he was injured. Under such circumstances an employer is not chargeable with actionable negligence for failing to give warnings of danger or instructions to prevent injury. *McMahon v. O'Donnell,* 32 Neb. 27; *Stodden v. Anderson & Winter Mfg. Co.,* 138 Ia. 398, 16 L. R. A. n. s. 614; *Sinclair v. Berndt,* 87 Ill. 174.

It is suggested that plaintiff had implied permission to use the saw, and that, in doing so, he acted within the scope of his employment. These suggestions are based on evidence that plaintiff, about two weeks before the injury, had used the saw four hours in cross-cutting boards. From this experience permission to use it generally, or at the time of the injury, cannot fairly be inferred. He then acted under special directions from the foreman and used a gauge. He was not required to put his hands near the saw. There was increased danger in the attempt to cut a narrow board lengthwise. He had never been allowed to do that kind of work. He did not prove his case. For that reason, the

judgment in his favor is reversed and the cause remanded for further proceedings.

REVERSED.

MORRISSEY, C. J., not sitting.

HAMER, J., dissenting.

When the foreman told the plaintiff, on his request, that he could use the rip-saw to rip the board, that was consent to do the dangerous act, and the further statement of the foreman, to "wait until we invoice," did not take away the consent, and at most was only a request by the foreman to defer the act of sawing the board. The permission to rip the board should have been followed at once by special instructions or a positive command to wait until after they were given. The boy was carelessly turned loose, and the injury is the result. The judgment should be affirmed.

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## LEOPOLD KURPGEWEIT V. STATE OF NEBRASKA.

FILED FEBRUARY 12, 1915. No. 18,829.

1. **Larceny**: INFERENCE OF GUILT: UNEXPLAINED POSSESSION. In a prosecution for cattle-stealing, the jury may infer guilt from defendant's unexplained possession of the recently stolen animals.

2. **Criminal Law**: WITHDRAWAL OF REST: DISCRETION. In a prosecution for larceny, it is within the discretion of the trial court to permit the state to withdraw its rest and prove the ownership of the property as charged in the information.

3. ———: INSTRUCTIONS: CONSTRUCTION. In a criminal prosecution, an instruction that defendant is entitled to the presumption of innocence as a matter of evidence, and another instruction that the evidence is what is said by the witnesses on the stand, should be construed together, and, when thus considered, they are not inconsistent or erroneous.

4. ———: APPEAL: AFFIRMANCE. In the appellate court, a judgment will not be reversed unless error in the proceedings below is affirmatively shown by the record.

5. ———: ———: REFUSAL OF INSTRUCTION. The refusal to give a requested instruction is not erroneous, where its substance is properly given in a different form.

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

*Willis E. Reed,* for plaintiff in error.

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

ROSE, J.

In a prosecution by the state in the district court for Madison county, Leopold Kurpgeweit was convicted of cattle-stealing, and for that felony was sentenced to the penitentiary for a term of not more than ten years nor less than one year. As plaintiff in error, he now presents for review the record of his conviction.

The first objection to the judgment is that the verdict is not sustained by the evidence. Defendant was accused of stealing seven cows and five heifers, the property of Herman Kurpgeweit, of the value of $500. There is proof tending to show: Defendant and the owner of the cattle are brothers. Both are farmers, defendant living west of his brother. There is a quarter section of land between their possessions. Their houses and barns are north of a public highway running east and west. The stolen animals are described as red. They were horned cattle and were unbranded. During the evening of October 1, 1913, the cattle mentioned and a black cow were inclosed for the night in the corral of the owner on his premises. The next morning they were missing. The fence wires at the northeast corner of the owner's pasture had been cut. On the west side the conditions indicated that the posts had been pulled out, that the fence had been thrown on the ground, and that it had been put back in its place. Defendant made no inquiry or search, though he was promptly notified of the loss. He offered to loan a saddle to be used by the owner of the stock in making a search which might

take him away from defendant's premises. The owner, public officers and others made searches extending into several counties. The black cow returned alone, unharmed, October 5, 1913. The other missing animals were found in defendant's pasture October 10, 1913, and were there identified in presence of the sheriff. They had been recently dehorned and bore the fresh marks of the mutilation. Some of the tails had been cut. On one cow there had been an attempt to destroy an identifying mark. In the left ears of the animals the letter "L" had been rudely cut. They were grazing with some of defendant's red cattle, and the latter bore similar marks of fresh branding and of dehorning. Defendant claimed to be the owner of the stolen cattle after they were found in his pasture. He afterward gave as a reason for taking them that they were mortgaged, and that the mortgagee would be the loser instead of his brother. In this summary there is no attempt to make findings or to recite facts or to mention any evidence on behalf of defendant. The purpose is to outline some of the proofs in support of the charge against accused, for the purpose of testing the sufficiency of the evidence to sustain the conviction. There is no direct testimony showing when or how the cattle got into defendant's pasture. Defendant adduced proof tending to show that, owing to the conditions of the weather and the pasture, live stock had a propensity to break out of inclosures, and that teamsters drove through gates across defendant's farm, but the jury did not draw from testimony of this character the inference that the missing cattle strayed or broke into defendant's pasture. Defendant and his wife and their son testified as witnesses, but there was no attempt on the part of any one to explain why cattle belonging to defendant and similarly colored cattle owned by his brother bore alike the fresh marks of branding and dehorning when found. The return of the black cow, which could not be disguised, is a suspicious circumstance. There is nothing in the record to make the testimony on behalf of the state unbelievable. The evidence will sustain a finding that a proper explanation of defendant's possession of the recently stolen

cattle in the mutilated condition described was not given. In a recent case the law was stated thus: "The unexplained possession of stolen property, shortly after the theft of it is a fact which may justify the jury in inferring that the person so in possession is the thief." *Palmer v. State,* 70 Neb. 136. To the same effect: *Williams v. State,* 60 Neb. 526; *Dobson v. State,* 46 Neb. 250; *Robb v. State,* 35 Neb. 285; *Thompson v. State,* 6 Neb. 102. The conclusion is that the verdict is sustained by the evidence.

An order permitting the state to withdraw its rest and to prove the ownership of the cattle is challenged as erroneous. The information was notice that evidence of this nature was essential to a conviction. Defendant could not have been surprised by its introduction. The ruling was within the discretion of the district court. *Blair v. State,* 72 Neb. 501; *Hans v. State,* 50 Neb. 150; *Clough v. State,* 7 Neb. 320.

Many rulings in the exclusion of testimony on behalf of defendant are pointed out as erroneous, but they are not properly presented for review. There is a failure to comply with the rules relating to assignments of error in briefs. Principles of law asserted to be violated in rejecting testimony are not stated. The materiality of the rejected evidence to the plea of not guilty or to the disproval of any part of the state's case is not in many instances shown. In answer to questions in proper form, witnesses were permitted to testify to matters excluded without error earlier in the trial. There are few offers of proof indicating the purpose of the rejected testimony. In determining whether plaintiff had a fair trial, however, all of the rulings challenged have been examined without finding an error prejudicial to defendant.

The following instruction is criticised as erroneous: "The evidence is not what counsel on either side said to you in their opening statements, nor what they have said to you in the course of argument, nor what they may have said to the court in your presence. The evidence in this case is what the witnesses have been permitted to say to you while upon the witness-stand. And any statement made by any

witness upon the stand which was ordered stricken by the court is not evidence in this case, and is not to be considered by you in determining your verdict."

The criticisms are: The jury were prevented from considering the presumption of innocence. Neither party requested the instruction. It prevented defendant from having the benefit of counsel. The language used is argumentative. The criticisms are all without merit. The law was correctly stated. The first criticism is answered by the following instruction:

"The law presumes this defendant to be innocent, and this presumption carries with it all that a presumption of innocence implies, and is matter of evidence to the benefit of which the defendant is entitled until his guilt is proved by the evidence to your satisfaction beyond a reasonable doubt, and follows and remains with him throughout until removed by the evidence beyond a reasonable doubt, and must be recognized by you in your deliberation."

The two instructions, when considered with the entire charge, as they should be, are not inconsistent, but give defendant the benefit of the presumption of innocence as evidence. The trial court may give a proper instruction applicable to the evidence, though neither party requested it. The jury were not directed to disregard the arguments of counsel, unless they misstated the evidence. What was said in argument by counsel does not appear in the record. It follows that in this respect error in the instruction is not affirmatively shown. It is equally clear that the direction of the trial court is not objectionable as being argumentative.

Another instruction is also assailed by defendant, but it is applicable to the evidence and has often been approved.

The refusal to give a requested instruction is the subject of another assignment, but its substance was properly given in a different form. There is no error in the record, and the judgment is

AFFIRMED.

MORRISSEY, C. J., not sitting.

HAYDEN W. MITCHELL, APPELLANT, V. MAHLON C. BRESSLER, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,984.

**Trial:** DIRECTION OF VERDICT: EVIDENCE. Where at the close of plaintiff's case in the trial of a law action the evidence is clearly insufficient to sustain a judgment for the plaintiff, it is the duty of the trial court to direct a verdict for the defendant.

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

*Charles H. Kelsey* and *J. W. Rice,* for appellant.

*O. A. Williams, contra.*

FAWCETT, J.

Appeal by plaintiff from a judgment of the district court for Antelope county, entered upon a verdict directed for defendant.

The controversy in this case is over an oral agreement, which plaintiff claims was entered into in 1907, under which, it is alleged, defendant was to furnish the money to purchase a tract of land in Antelope county, for $3,300; that both parties should endeavor to dispose of the land for money or exchange for other property; that when such a deal should be closed there should be added to the amount received for the land the rents and profits thereof, and from this gross sum defendant should be reimbursed for all moneys expended by him in purchasing the property, paying taxes thereon, and caring for the same, and the remainder divided equally between the parties. Plaintiff claims to have fully performed his part of the contract; alleges that defendant refused to convey the land, but has elected to retain the same for his own use and benefit. Defendant denies the making of the contract, as alleged, and claims that at the time he purchased the land plaintiff represented that he had a man, who was the owner of a stock of goods worth $10,000, who would trade the stock

for the land, and that defendant stated that if he made the deal for the stock he would give plaintiff one-half of all he made on the deal over and above the money he had put in, with interest; that upon examining the stock he found that it was worth not to exceed $1,500, and he therefore refused to make the deal; that he then orally suggested to plaintiff that if plaintiff could find a good deal for the land, promptly and without delay, he would still hold the matter open and give plaintiff one-half of the profits. The answer further pleads the four years' statute of limitations, and alleges that the oral agreement, under which plaintiff claims, is in conflict with section 6022, Ann. St. 1911, and that since purchasing the land he has placed valuable improvements thereon of the approximate value of $2,000; denies all other allegations in the petition. The reply is a general denial.

The errors relied upon for reversal are: That the court erred in sustaining defendant's motion for a directed verdict, for the reason that the verdict is not sustained by the evidence but is contrary thereto; that the court erred in sustaining objections to the offer of plaintiff to prove the market value of the land on February 2, 1910. It is said in the brief of counsel for plaintiff that the construction of the court seemed to be based upon two propositions, the second of which they state is: "That the appellant did not show that the appellee had ever refused to perform any of the terms, that the appellee therefore had never breached the contract." As this proposition is decisive of the case, it is the only one we deem it necessary to consider. Let the testimony of the plaintiff answer the proposition. He testified as follows: "Q. When did he first intimate to you that he was no longer willing to live up to the terms of this deal? A. I don't know as he ever intimated to me that he would not live up to the terms of this deal. Q. When did you first make demands of settlement? A. 1910. Q. What time in 1910? A. February 2, 1910. Q. How do you fix that time? A. Because Mr. Bressler and I were settling up another deal of the same nature, and after we had settled that up and he had paid me my profits I says,

'Now, Mal, what is the matter of fixing up this old deal that has been hanging fire for so long?' 'Now, Hade,' he says, 'I will tell you whenever we sell this land I will fix that satisfactory with you, and don't have any hard feelings about it.' Q. Did he intimate at that time that he intended to keep the land? A. Well, he said, 'When we sell the land I will fix it satisfactory with you.' Q. Well, did he ever tell you he would not sell the land under the terms of this deal? A. No, sir." In addition to this, the testimony of plaintiff himself shows that, while he showed the land to a number of parties, he never produced but one person, Mr. L. B. Harris, who had property of sufficient value to justify the defendant in making an exchange with him. Harris had a stock of merchandise which, according to the evidence, seems to have been of sufficient value to have warranted an exchange, but this trade fell through, for the reason that Mr. Harris was unable, for some cause not disclosed, to close the deal. He testified: "The proposition was left open for a few days, I was to make some other arrangements, which I don't remember now, if I could do, then I could make the deal, otherwise I could not, I couldn't close it." There is no testimony in the record to show that plaintiff ever produced any one else who was ready, willing and able to purchase the land, as alleged in the petition. There was, therefore, no competent evidence in the record to show that defendant had ever refused to carry out the contract alleged by plaintiff, even had such contract been made as alleged. There being no evidence that plaintiff had, on or prior to February 2, 1910, refused to carry out the contract which plaintiff alleges, the court did not err in refusing to admit testimony as to the value of the property on that date.

An attempt was made to prove by a letter which counsel for plaintiff received from defendant, of date February 15, 1912, that defendant then refused to carry out the contract. The offer of this letter was refused. No error is assigned on account of such refusal, for the reason, doubtless, that the letter itself does not contain such refusal. The most that can be said for the letter is that defendant

at that time claimed that he had not made the agreement alleged by plaintiff, and that he did not think plaintiff had any just demand against him. If the letter had been received in evidence, we think it would, in other respects, have been more damaging to plaintiff than to defendant.

The conclusion we have reached on the evidence renders a consideration of the authorities cited unnecessary. It is sufficient to say that they are not applicable to the state of facts shown in this case.

AFFIRMED.

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

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STATE, EX REL. CHARLES OLSON, APPELLANT, V. HERMAN M. CLANEY ET AL., APPELLEES.

FILED FEBRUARY 12, 1915. No. 18,717.

**Abatement:** PENDENCY OF ANOTHER ACTION: MANDAMUS. The plea in abatement of another action pending in the same court between the same parties, regarding the same subject matter, and in which the relief sought is practically the same, is a good defense to a second action; and this rule is applicable to proceedings in mandamus.

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

*William V. Allen* and *William L. Dowling*, for appellant.

*H. Halderson, contra.*

FAWCETT, J.

At the general election, April 7, 1914, there was submitted to the voters of the village of Newman Grove the question of license or no license for the sale of intoxicating liquors. The election board received and counted 233 votes, of which 117 were for and 116 against license. At the

same election there were to be elected three village trustees. There were five candidates for these three offices, whose names all appeared on the ballot "by petition." Below the names of these candidates there was printed on the ballot on two separate lines, "For Saloon License," and "Against Saloon License." Opposite each was the usual square in which the voter was required to make his mark. Similar squares were opposite the names of the five candidates for trustee. Above the voting squares for the election of trustees there was printed, "Vote for three." On one ballot the squares opposite the names of four of the candidates for trustee were marked and the square opposite the words, "Against Saloon License," was also marked. The election board, after considering this ballot, decided that it was a spoiled ballot and did not count it for any of the candidates for trustee or for or against license. The village board canvassed the returns filed by the election board and declared the result of the election to be for saloon license. On June 8, 1914, the relator applied to the district court for Madison county, for a writ of mandamus to compel the election board to reconvene and complete the performance of its duty by counting the ballot above referred to, which, if counted, would, as alleged, make the vote on the license question a tie. He also prayed that the writ require the village board to convene and recanvass the vote. A demurrer by the village board to the petition for the writ was sustained, and a demurrer by the election board overruled; whereupon the members of the election board answered. In the fourth paragraph of their answer they allege: "Further answering, these respondents aver that on or about the 27th day of April, 1914, the relator herein commenced a proceeding in the county court of Madison county, Nebraska, against the parties who are respondents herein, the purpose and object of which was, and is, to contest the election upon the said liquor license proposition, which proceeding is now pending and undetermined in the district court for Madison county, Nebraska, and that A. T. Rodman, who is the clerk of said village of Newman Grove, Nebraska, has been cited to appear in said proceeding, and

bring with him and produce in said court the tally sheet, certificates, poll books, list of voters, and ballots, and all papers relating to the said election, and upon his obeying said citation there will be nothing to do for this election board except the idle ceremony of reconvening."

Relator filed a motion to strike certain parts of the answer. The third paragraph of his motion is as follows: "The relator further moves the court to strike out all of paragraph 4 of said answer because the same is the statement of a conclusion and not the averment of an issuable fact; said paragraph has reference to a contest proceeding instituted in the county court of Madison county, Nebraska, but in no manner connected with the subject and purpose of this action, and it is not averred that the question involved therein has become *res adjudicata,* nor do the matters therein stated constitute a defense or an excuse for the failure of the respondents to perform their duty as averred in the petition."

While this pleading is denominated a motion, we think the third paragraph is clearly a general demurrer to the fourth paragraph of the answer, on the ground that it does not state a defense to plaintiff's action, and it will be treated as such. The reply to the answer and return of the members of the election board is a general denial of every affirmative allegation therein contained. The trial court found that the election board duly canvassed all the votes cast at the election on the license question; that, in canvassing the same, they canvassed and considered the one ballot in controversy as a mistaken ballot, rejected the same, and did not count it for or against the license proposition; further, that the relator has a plain, adequate remedy at law to contest all errors, etc.; and entered judgment in favor of the respondents against the relator and dismissed his action with costs. From this judgment the relator appeals, and, from the ruling of the court striking out paragraph 4 of their answer, the respondents, the members of the election board, present a cross-appeal.

We do not deem it necessary to consider relator's assignments of error seriatim, for the reason that in our judg-

ment the case must be decided adversely to his contentions upon a proposition settled by our former adjudications that, even if the remedy by mandamus existed in favor of relator, a point which we do not concede, another remedy, equally as available and equally as adequate, also existed in his favor, viz., the right to contest the election; and that, where two remedies exist, and the one in whose favor they exist elects to proceed for the enforcement of one and institutes a proceeding therefor, he cannot avail himself of the other while such proceeding is pending. *State v. Matley,* 17 Neb. 564, *State v. North Lincoln Street R. Co.,* 34 Neb. 634, and *Monroe v. Reid, Murdock & Co.,* 46 Neb. 316, 331, where the same rule is announced, and *State v. North Lincoln Street R. Co., supra,* is cited and followed. See, also, *Bartley v. State,* 53 Neb. 310, 322, where the two last above cases are cited with approval, as is also done in *Spencer v. Johnston,* 58 Neb. 44, 48. In *State v. Matley, supra,* at page 568, Maxwell, J., speaking for the court *in re* the two remedies, said: "He may contest the election, however, instead of proceeding by mandamus, and may have sufficient cause for doing so, as where illegal votes were cast for his competitor. But whatever the cause, having chosen his remedy, he must exhaust that before instituting other proceedings. The whole theory of our civil procedure is to avoid a multiplicity of suits, hence the plea of another action pending between the same parties and for the same cause of action is a good plea in abatement. A proceeding to contest an election is substantially an action, and, as it was pending when this proceeding was instituted, that remedy must be exhausted before relief will be granted in this." In *State v. North Lincoln Street R. Co., supra,* in the second paragraph of the syllabus we held: "The plea of the pendency of another suit in bar is applicable to proceedings in mandamus." In the seventh paragraph of the syllabus in *Monroe v. Reid, Murdock & Co., supra,* we held: "The plea in abatement of another action pending in the same court between the same parties, regarding the same subject matter, and in which the relief sought is practically the same, is a good defense to a second ac-

tion, and the fact that one is an action at law and the other in equity is immaterial." In the light of these authorities, we think we may well say that the rule above stated should be considered as settled in this state.

Treating that part of the motion of relator, which assails the fourth paragraph of the answer of the respondents, as a demurrer, the fact stands admitted that at the time this action was commenced, on June 8, 1914, there was still pending and undetermined, in the same court, a proceeding that had been instituted on or about April 27, 1914, by the relator in this action as contestant in that, and against the same parties who are respondents in this action, to contest the same election upon the liquor license proposition that is involved in this action. This being true, relator can obtain in that contest proceeding a full and complete investigation and decision of all of the questions which he raises in this action. Having elected to travel that road, he should be required to travel it to the end. This conclusion disposes of the two points: (a) That the court erred in sustaining the demurrer of the members of the village board; and (b) in refusing to permit the ballots of McElhoes and Ward to be taken from the ballot box and used in evidence.

Upon a consideration of the whole case, we think the district court was right in disposing of the case on the ground stated in its judgment; but, if that point were in doubt, there can be no doubt but that upon the record before us no other judgment could have been properly entered than the one complained of.

AFFIRMED.

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

IN RE GUARDIANSHIP OF GEORGE G. WILLIAMS.

FRANCIS A. AMSBERRY, GUARDIAN, APPELLANT, V. GEORGE G. WILLIAMS, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,966.

**Appeal:** DISMISSAL. Upon appeal to this court, when the record shows affirmatively upon its face that there is no question presented thereby as ground for reversal that has not heretofore been plainly and unequivocally decided by this court, the appeal will upon motion be dismissed.

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

*Charles W. Beal* and *A. L. Chase,* for appellant.

*Silas A. Holcomb* and *A. P. Johnson, contra.*

SEDGWICK, J.

A motion is made to dismiss the appeal upon several grounds, one of which is, in substance, that no error is shown upon the record, and that it appears upon the face of the record that no substantial question is presented for determination by this court.

The transcript shows that a petition was filed in the county court of Custer county by Francis A. Amsberry, a guardian of George G. Williams, a minor, showing that as guardian he received $975 and has paid out $907 belonging to the estate; that there are unpaid costs, attorney's fees, guardian's fees, and he asks that the court approve the final settlement and discharge him as guardian. From a decision against him in that court he attempted to appeal to the district court. In the district court a motion was filed by the ward to dismiss the appeal for the reason that no appeal bond had been given. The motion was overruled, but afterwards the former order was vacated, the motion sustained, and the appeal was dismissed. A supersedeas bond was then filed for an appeal to this court in

the sum of $1,800. A transcript of the record was afterwards filed in this court, showing the petition, motion to dismiss, and final order dismissing the appeal.

This court has expressly decided that, when a guardian or administrator is personally interested adversely to the estate of the ward or of the decedent, he must give bond upon appeal. In *Thompson v. Pope,* 77 Neb. 338, the syllabus does not exactly state the proposition, but the court in the opinion quotes from *Rhea v. Brown,* 4 Neb. (Unof.) 461, "It may well be said that section 44, ch. 20, and section 234, ch. 23, Comp. St., rightly construed, mean only that executors, administrators and guardians are not required to give bond when they appeal in their representative capacities, and that when they appeal in their personal capacities, from judgments rendered against them personally, they should give bond the same as other litigants," and approves of this construction of the statute. Afterwards in the case *In re Estate of O'Brien,* 80 Neb. 125, this is assumed to be the law, although it is not directly so determined in that case.

It therefore follows that in this case, as it was solely a contest as to the interest of the guardian as against the estate of his ward, the guardian could not appeal from the probate court to the district court without giving bond. The record shows this fact. The district court therefore plainly did right in dismissing the appeal, and in such case, under our more recent holdings, this court will not put the parties to the delay of a couple of years when the appeal to this court is clearly frivolous. In other words, there is no question presented in this record, as plainly appears from the record itself, which could be urged as ground for reversal, except the one question which has been plainly decided by this court.

The appeal, for that reason, is

DISMISSED.

NICHOLAS WECKER, APPELLANT, V. RUDOLPH DOMMER, APPELLEE.

FILED FEBRUARY 12, 1915. No. 17,985.

1. **Highways:** ESTABLISHMENT: PRESCRIPTION. The rule that "to establish a highway by prescription there must be a continuous user by the public under a claim of right * * * for a period equal to that required to bar an action for the recovery of title to land" applies in establishing a highway by prescription alone. When the proper authorities have attempted to establish a highway, proceeding under the statute, and the owners of the land affected have acquiesced therein, if the authorities have exercised some jurisdiction over the road by building necessary bridges or culverts to facilitate its use by the public, and it has been so used as a road for more than ten years, the rule is not applied with strictness.
2. ———: ———: EVIDENCE. The fact that a creek crossing the alleged public road is not bridged, and travel must go upon adjoining lands in order to cross the creek, is a circumstance tending to show that the road is not a public highway, but the fact that the authorities have neglected to make the creek passable on the line of the alleged road is not of controlling importance, especially when the owners of adjoining lands make no objection to the use thereof for such purpose.
3. ———: ———: ———. The evidence indicated in the opinion is found sufficient to support the decree.

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

*O. S. Spillman* and *M. H. Leamy,* for appellant.

*C. H. Stewart, contra.*

SEDGWICK, J.

The plaintiff is the owner of the west half of the southwest quarter of a section of land in Pierce county. The defendant is road overseer, and was proceeding to remove a fence which the plaintiff had placed on the section line between his 80 and section 20 on the south, on the theory that it obstructed the public road. The dispute is as to whether there is a public road running east and west be-

tween sections 17 and 20. The plaintiff brought this action in the district court for Pierce county to restrain the defendant from removing the fence. The defendant by answer and cross-petition asked that plaintiff be enjoined from obstructing the road. The trial court found the issues in favor of the defendant, and dismissed the plaintiff's case, and enjoined plaintiff as prayed in defendant's cross-petition, and plaintiff has appealed.

There is evidence in the record as to the use of this road by the public for more than 20 years. The plaintiff cites *Lewis v. City of Lincoln,* 55 Neb. 1, in which it was said: "To establish a highway by prescription there must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land." He also cites other similar decisions. This rule applies when it is attempted to establish a highway by prescription only. When there has been an attempt by the public authorities to open a road, and pursuant thereto the public, supposing that the road has been established by regular proceedings, have used it as a public road for so long a period, that rule is not applied with such strictness. In such case any attempt of the authorities to improve the road with the knowledge of the adjacent landowners, and without objection on their part, is important in determining whether the public has used the road under claim of right.

It appears that a petition was filed with the county board asking for the opening of a road on the section line, commencing at the southwest corner of section 17, and running thence along the section line five miles east. The county commissioners' record and evidence show that in December, 1882, this petition "was granted as prayed for." This plaintiff was then one of the three county commissioners, and it appears that a short time afterwards he built a fence along the south side of his land about two rods north of the section line. This fence appears to have remained in that position until about five or six years be-

fore the trial in the lower court, at which time the plaintiff appears to have removed the fence to the section line. This new road which the county commissioners attempted to authorize was used more or less as a public road, although not very extensively, until the plaintiff's fence was removed to the section line. There was a creek crossing the section line at or near the southeast corner of the plaintiff's land, which appears to have been impassable at that point. It was necessary to drive north for about a quarter of a mile and cross this creek at a ford and then return to the section line road. For more than 20 years after the attempt to establish this road there appears to have been no objection made by the landowners to this deviation from the section line. At the time of the trial there had been fences built so that it was necessary to open several gates in crossing the fields to this ford and returning to the road. Not long after the order of the commissioners referred to, there was a bridge or culvert built to connect this road with the main thoroughfare running north and south at the west end of the road. There was evidence that this was done by the public authorities for the purpose of connecting this new road with the main thoroughfare. The plaintiff testified that a neighbor who was interested in this new road was, with several others, building this bridge, and that this neighbor told the plaintiff that he was "working the county commissioners" to get the lumber for the bridge or culvert, and that he must not say anything about it. This neighbor died before the trial of this action, and if such evidence was competent it fails to overcome the positive testimony of witnesses that this work was done by public authorities.

We cannot attempt a complete analysis of the evidence in this case in regard to the use of this road, but it seems clear that at the time the action was taken by the county authorities it was considered by the authorities, and by the public generally, that the road had been opened and had become a public highway. It must have been so considered by the plaintiff himself, as he was not only a member of the board of county commissioners at the time, but also

built his fence in accordance with the accepted theory that the road had been opened, and the fence remained in that position for about 20 years. The fact that the creek was not passable at the place where the road crossed the section line, and that no crossing was constructed by the authorities, is perhaps a circumstance which might tend to show that it was not regarded as a public road if the evidence was otherwise doubtful; but the fact that the public authorities neglected to bridge this creek, and so made it necessary to trespass upon private lands, is not of controlling importance, especially since the owners of the land made no objection.

The evidence appears to be sufficient to support the decree, and the judgment of the district court is

AFFIRMED.

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

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## MICHAEL EGAN, SR., V. STATE OF NEBRASKA.

FILED FEBRUARY 12, 1915. No. 18,699.

1. **Indictment:** RECEIVING STOLEN GOODS: DUPLICITY. The statute provides that an indictment for larceny of personal property may also contain a count for receiving or for concealing the same. Rev. St. 1913, sec. 9057.
2. ———: ———: ———. In a prosecution for receiving stolen property, it is necessary to allege and prove that the defendant knew that the property was stolen. Evidence that he participated in the larceny is competent for that purpose. The conviction will not be reversed because the defendant is also charged with the larceny.
3. **Criminal Law:** VENUE. Receiving property in this state, knowing it to be stolen and with intent to defraud the owner, may be prosecuted in this state, although it was stolen in a foreign state.
4. ———: MISCONDUCT OF JURY: SHOWING. The district court did not err in refusing to order a juror to appear and make affidavits of matters occurring in the jury room which would not amount to

such misconduct of the jury as to require the court to set aside the verdict.

5. **Receiving Stolen Goods:** PROOF. In a prosecution for receiving stolen property, it must be alleged and proved that the defendant received the property, knowing it to have been stolen and with intent to defraud the owner thereof.

6. **Criminal Law:** EVIDENCE: BOOK ACCOUNT. A memorandum of items of money paid by the witness is not competent in evidence as a book account.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

*J. J. Harrington, M. F. Harrington* and *Lee Card,* for plaintiff in error.

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

SEDGWICK, J.

This defendant was convicted in the district court for Dawes county of the crime of receiving stolen property, and has brought the case here for review by petition in error.

1. The information contains three counts. The first count charged that the defendant and his son John Egan, in the county of Dawes, state of Nebraska, did unlawfully and feloniously steal, take and carry away one mare, the personal property of one William Hanna. The second count charged the same defendants with receiving the stolen property, knowing that it was stolen, with intent to defraud the owner. And the third count charged the same defendants with concealing the same property. The jury found the defendant John Egan not guilty. The evidence shows that the property was in South Dakota, and, if it was stolen, was stolen in that state.

The defendant insists that the prosecution knew before the complaint was made that the animal was kept in South Dakota, and that, if stolen, it must have been stolen in South Dakota, and that therefore the defendants could not be convicted upon the first count of the information; that

the whole object in charging these defendants with stealing the property was to prejudice the jury against them in the other counts of the information; that the defendant was prejudiced thereby, and therefore has not had a fair trial. This contention is very earnestly presented and elaborately argued in the brief. It is said in the brief: "A man may be charged with larceny, and some of the jurors may believe him guilty of larceny and others not guilty, and, if the prosecution be confined to the one count, it would result in a disagreement or an acquittal. But you join with it a count for receiving the same property, knowing it to be stolen, and some of those who would acquit him of larceny may believe him guilty of receiving stolen property. You charge him in another count with concealing stolen property, and some of those who would acquit him both of larceny and of receiving stolen property with intent to defraud the owner will believe that he concealed the stolen property, knowing it to be stolen. In other words, he has to meet and defend three charges and not one, and he has to take his chances of an acquittal as against men some of whom believe him guilty of one count and innocent on another. The result is that the state has a tremendous advantage, because those who may believe him guilty on one count would not be able to convict him. But you get enough men believing him guilty on one count, and some more guilty on another count, and some more on still another count, and the end is a conviction by compromise of some kind." This is putting it pretty strong, and there may be some ground for such reasoning, but the same reasoning would apply to any and all cases in which there are more than two counts in an information, and we are not prepared to hold that the prosecutor cannot join different counts in an information.

It is said that there is no evidence in the case tending to show that the property was stolen in this state, and that a charge that it was so stolen was made for the purpose of allowing the prosecution to bring matters into the case for the purpose of prejudicing the defendant, and that such practice ought not to be allowed. In a prosecution for re-

ceiving stolen property, it is necessary to allege and prove the name of the owner of the property, if known, and that the defendant knew that the property was stolen and received it with the intention of defrauding the owner. It would seem that, without the count charging the defendant with having stolen the property, evidence that he did in fact steal the property might be competent as tending to show that he knew that it was stolen, and so, if the property had been stolen in a foreign country, evidence tending to show that the defendant participated in the larceny would of course show that he knew the property to be stolen, a necessary element to be proved.

It appears that the defendant and his sons owned and were using several tracts of land, all near the state line, some of them in the state of South Dakota and some in this state, and that Mr. Hanna received this animal from one of the defendant's sons some time in March, 1913. The animal was kept on Mr. Hanna's ranch, which adjoined the ranch of the defendant's son, and was situated in the state of South Dakota, near the state line. The animal was allowed to run upon the range and might have been in either state when stolen. We cannot see that the bitter charges of fraud against the prosecution are very substantially sustained. Our statute makes larceny and receiving stolen property and concealing stolen property three distinct offenses. It has been held that stealing property in another state is not a crime that can be prosecuted in this state. *Van Buren v. State,* 65 Neb. 223. It has also been held that receiving property in this state which has been stolen in another state may be prosecuted in this state. *In re Loomis,* 84 Neb. 493. Our statute also expressly provides that these several counts may be united in one information. Rev. St. 1913, sec. 9057. We think that this contention of the defendant is without merit.

2. Before filing his motion for a new trial, the defendant applied to the court for an order requiring the foreman of the jury to appear and give testimony as to matters that took place in the jury room. The court refused to make such order, and this ruling is now alleged as prejudi-

cial error. With this application the defendant filed an affidavit of his attorney in regard to statements made by the juror immediately after the verdict was rendered. It is insisted that these statements show that the witness would testify to matters that occurred in the jury room that would make the jurors themselves competent witnesses, and that the juror had refused to make an affidavit in regard to the matter. The affidavit stated a number of considerations that it is claimed influenced the jury that were not entirely proper, but it does not show that the witness could testify to any statements of facts made by any juror. The nearest approach to this is the allegation that the juror stated that all of the jurors knew that the Egan boys had been receiving stolen property. It does not appear that any juror stated that he knew that it was a fact and so influenced the jurors. Matters of opinion and arguments of jurors in the jury room are considered as inhering in the verdict, and as not such matters of misconduct as can be proved by the jurors themselves.

3. The state produced evidence tending to prove that Michael Egan, Jr., contracted to sell this animal to Mr. Hanna for $70; that Mr. Hanna took the animal on trial and afterwards made payments thereon, and after he had it for several months it was taken from the possession of Mr. Hanna and was found upon the ranch and among the horses of this defendant; that a short time afterwards one Philpot, who was a dealer in horses, went to defendant's place and contracted with him to purchase the animal with another of defendant's horses, and that on the next day the defendant sent the two animals to town to complete the sale. The state contended that the title to the mare was transferred to Mr. Hanna by the transaction between him and Michael Egan, Jr., and that Mr. Hanna had made substantial payments thereon; that one of the defendant's sons took the mare from Mr. Hanna's possession without his knowledge or consent under circumstances which amounted to larceny, and secretly conveyed her to the defendant's ranch, and that the defendant received her, knowing all of the above facts.

The defendant kept a large number of horses on his range. He appears to have been engaged principally in farming and horse raising. He sometimes bought and frequently sold horses. His older sons also transacted business independently of their father. They owned a large tract of land and were also engaged in raising horses. They bought large numbers of them and prepared them for market. Some of these horses were occasionally and perhaps frequently transferred from one ranch to the other across the state line, and this mare in question, while she was nominally in the possession of Mr. Hanna, was at times among the horses upon the range of the defendant's sons. There was evidence that Michael Egan, Jr., had purchased this animal with 50 or more others some eight years before the transactions in question, and that he made the arrangements with Mr. Hanna, placing the animal in Mr. Hanna's possession. The defendant testified that he knew nothing about that arrangement and never knew that such arrangements had been made. There was no direct evidence that he did. If it is to be found that the defendant knew that Mr. Hanna had an interest in this animal, it must be found from the relation between the parties and their manner of doing business, and perhaps from other circumstances. It was contended by the state that John Egan, who was 17 or 18 years of age and was residing with his father, took this mare from the range on the other side of the state line to his father's place secretly and without the consent of Mr. Hanna. The defendant testified that this mare, with three or four others, was observed by him upon his range a few days before the sale to Mr. Philpot, and that he supposed that they had returned voluntarily, and had no knowledge that they had been brought there intentionally. There was no direct evidence contradicting this testimony, and if it is to be found that John Egan did wilfully and secretly bring this mare to his father's ranch, and that the defendant knew that, it must be found from the circumstances in the case. We refrain from expressing any opinion upon the sufficiency of this testimony, since there may be other and different testimony if this case is to be tried again.

4. The defendant established his character and reputation for honesty in the community where he lives about as well as such a matter can be established by human testimony. Charles A. Weston, who is well known in the state, and has been formerly auditor and regent of the university, testified that he had known this defendant for 27 years; that he was well acquainted with all of the defendant's neighbors and with those who resided in the same community with the defendant and who have known him for a long time; that he knew the defendant's general reputation for honesty in the community where the defendant lives, and that his reputation was good. The defendant's neighbors were also called, and, when 6 or 7 such witnesses had testified emphatically to his good reputation for honesty, the state inquired how many witnesses they proposed to offer on that question, and it was announced that the defendant had 12 or 14 witnesses there for that purpose. The court then announced that 7 were sufficient and the number was limited accordingly. The state made no attempt to contradict or explain this testimony. The defendant's reputation for honesty must be considered as established by this evidence.

5. The court directed the jury to find the defendants not guilty under the first count, and instructed them that a material allegation of the second count is: "That defendants, Michael Egan, Sr., and John Egan, then and there being, did then and there unlawfully and feloniously receive and take into their possession the mare described in the information;" that the mare was stolen with intent to defraud the owner; and "that defendants then and there knew that said mare had been stolen." Also, "If you are satisfied from the evidence, beyond a reasonable doubt, of the truth of each one and all of the foregoing material allegations of the second count of the information, then you should find the defendants guilty as charged therein." It is contended that this instruction is erroneous in that it does not tell the jury that the defendant must have received the property with intent to defraud the owner. The inten-

tion to defraud the owner of his property is of course the gist of the offense. In *Goldsberry v. State,* 66 Neb. 312, 329, the court in one of its instructions told the jury: "The buying and receiving, knowing them to have been stolen, is the material part; and if you believe from the evidence, beyond a reasonable doubt, that the defendants bought or received the mule, or horses, or any of them, from any person whatsoever, knowing them to have been stolen, then you should find the defendants guilty as charged." This was held to be reversible error because it did not include the element of intent to defraud the owner. This instruction in the case at bar has the same defect and was peculiarly dangerous in the condition of this evidence.

6. It was contended in behalf of the defendant that this mare was taken by Mr. Hanna upon trial, and that the ownership of the property had never been transferred to Mr. Hanna. Mr. Hanna testified that he took the mare upon trial, and that afterwards, having become satisfied, concluded to keep her, and that the price agreed upon, in case he concluded to keep her was $70, and that he had made payments in small amounts from $1 to $3 each from time to time; and Mrs. Hanna also testified to payments made by her husband on account of the purchase of the mare. After the plaintiff had rested, Michael Egan, Jr., testified that the price was agreed upon between them, and that Mr. Hanna took the mare upon trial, and had never closed the agreement, and had never made any payments except certain small items of charges that Mr. Hanna had against him for shaving him from time to time. Of course the question as to payments made by Mr. Hanna was a very material question, and, after the defendant had rested, the state offered further evidence in regard to such payments. This was objected to as not proper rebuttal testimony. But the objection was overruled, and Mr. Hanna was called as a witness and produced a memorandum book in which he testified that he made entries of the payments on account of the purchase. After he testified, a leaf of the memorandum book containing the entries was offered in evidence, and was objected to on the ground that it was

incompetent. The objection was overruled and the statement was received in evidence containing entries of payments to Mr. Egan in small amounts. There was no evidence that this book was a book of original entries of general accounts, or otherwise competent as evidence under the statute. Evidence of the sale of the mare to Mr. Hanna and of payments made by him thereon was of course material upon the question of ownership of the property and should have been offered in chief by the state. In any view of the case, this memorandum was not competent evidence, and was, under the condition of the evidence, highly prejudicial to the defendant.

The nature of this charge and the character of the evidence required that the defendant's rights should be carefully protected. The prosecution was vigorous; the prosecuting attorney was not always as careful of the rights of defendant as the interests of the state demand. We cannot find from this record that the defendant has not been prejudiced by the rulings of the court and the instruction complained of. The judgment of the district court is reversed and the cause remanded.

REVERSED.

MORRISSEY, C. J., not sitting.

HAMER, J., concurs in conclusion.

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W. E. WINTERRINGER, APPELLANT, V. C. O. SELLEN ET AL., APPELLEES.

FILED FEBRUARY 12, 1915. No. 18,827.

1. **Appeal:** BRIEFS. It is the duty of counsel in briefing a case for this court to comply with the rules, and so assist the court in the ready transaction of its business. If they fail to do so, the court will still correct any manifest error observed in the record, which is of such a nature as to have probably caused a miscarriage of justice.
2. **Intoxicating Liquors:** LICENSE: APPLICATION: REQUISITES: PROOF. In an application for a liquor license, the petition must state the

matters prescribed by the statute, and must be signed by the requisite number of resident freeholders. If a remonstrance is filed denying the allegations of the petition, the burden of proof is upon the applicant to establish those allegations. It is not required to establish the ownership of real estate for each of the petitioners, as in cases of trial of titles.

3. ———: ———: FREEHOLDERS: PROOF. In such case, when the remonstrants deny that any of the petitioners are freeholders, and refuse to admit the qualifications of those in regard to whom there is in fact no question, the signers may be called as witnesses, and if a signer of the petition testifies orally that he is the owner in good faith of certain specified real estate in the village, and in possession thereof, such testimony is *prima facie* evidence that he is a freeholder.

4. ———: ———: ———: ———. Resident freeholders, counted on the petition or for the purpose of making a larger number of signers necessary in a village of less than 60 freeholders, must own real estate in the village in good faith. If a small tract of land is conveyed to several persons for the purpose of qualifying them as freeholders in petitioning for license, or for the purpose of preventing the granting of license, such persons are not thereby qualified as freeholders, within the meaning of the statute.

5. ———: ———: BURDEN OF PROOF: ORDINANCE. When a remonstance duly filed with the village board specifically alleges that there is no ordinance of the village authorizing the issuing of a license, the burden is upon the applicant to prove the existence of such ordinance, and without such evidence no license can be granted.

APPEAL from the district court for Wayne county: ANSON A. WELSH, JUDGE. *Affirmed.*

*Kingsbury & Hendrickson,* for appellant.

*A. R. Davis* and *Fred S. Berry, contra.*

SEDGWICK, J.

This appellant applied to the village board of the village of Sholes, in Wayne county, for a liquor license. A remonstrance was filed, a hearing had, a large amount of evidence taken, and the board granted the license. The remonstrants appealed to the district court for that county, and upon trial in that court the decision of the village

board was reversed and the license canceled. The applicant has appealed to this court.

The appellant has not complied with the rules of this court in the preparation of his brief. He has not given us the assistance which he might and should have given us. He has practically disregarded rule 12. He relies upon the insufficiency of the evidence to sustain the verdict, and has presented us with a record of more than 400 sheets of evidence. There is no attempt to refer "with particularity by question and page to the evidence in the record supporting the contention made," nor to state separately "the propositions of law relied upon as necessarily involved in the decision of the case * * * numbered and separately stated, concisely and without argument or elaboration, and authorities relied upon as supporting them * * * cited with each proposition, respectively." His argument does not follow his brief "distinct therefrom."

He presents one proposition of law with some degree of compliance with the rule, and we have therefore examined that proposition with usual care. He says that the trial court decided "that, because the petitioners had not introduced the deeds in evidence, we failed to prove that the petitioners were freeholders." He does not refer us to the part of the record that contains such a decision; but, as that question appears to be involved in the case and is presented in both briefs, it appears to call for determination.

The petition for license is jurisdictional. It must state the matters prescribed by the statute, and must be signed by the requisite number of resident freeholders. If a remonstrance is filed denying the allegations of the petition, the burden of proof is upon the applicant to establish those allegations. The petition in this case contains the necessary allegations. The remonstrance denies generally all of the allegations in the petition. It then specifically denies each of those allegations, and denies that the purported signatures appearing on the petition and application are genuine, and that any of the persons whose names appear on the petition are resident freeholders of the village. It also de-

nies other jurisdictional matters. The applicant contends that the evidence in this record shows that there were only 18 resident freeholders in the village, and, as the statute provides that when there are less than 60 resident freeholders in the village a majority thereof shall be sufficient as signers of the petition, in this case 10 signers of the petition would be sufficient. Without determining whether the proper construction of the statute is that so small a number of petitioners is sufficient to justify the granting of a saloon license in a village, we will examine the question of law which the applicant presents. When there are 60 resident freeholders in a village, which is generally the case, there must be at least 30 signers of the petition. If it is necessary to establish the ownership of real estate for each one of these petitioners in the manner usually followed when titles are in dispute, the record would become very large, as is the record in this case, and the expense of the litigation would be proportionately increased. The difficulties of the trial would also be increased and the labor of the courts upon appeal. Fair dealing upon the part of the remonstrants would dictate that they should admit of the qualifications of those signers who are clearly qualified, and should specify with particularity in their remonstrance the names of those signers whose qualifications they intend to contest and the ground of such contest. If it is said that the proceedings before a village board, being before an administrative body, are not expected to be formal and accurate, it must also be conceded that the rules of evidence are not applied with the same strictness as in courts of justice. Even in the courts, when questions of title are not directly involved, the rule requiring the best possible evidence is relaxed, and in many cases it is permitted to introduce oral evidence of ownership and possession.

We think that when, as in this case, the remonstrance contains only a general denial of the qualifications of any and all of the signers of the petition, those signers may be called as witnesses, and when a signer of the petition testifies that he is the owner in good faith of certain specified

real estate in the village, and in possession thereof, such testimony is sufficient *prima facie* evidence that he is a freeholder. The brief of the applicant furnishes us but very little assistance in analyzing this evidence to determine which of these signers are and which are not qualified. The brief of the remonstrants assumes that the law is that no evidence is competent to show that these signers are freeholders except the best possible evidence of title to real estate. The evidence which he refers to in the record shows that very few of these signers produced their title deeds; but, as we have already said, oral evidence of ownership and possession was competent under the issues in this case.

The applicant, in support of his contention that there are but 18 resident freeholders in the village, contends that the remonstrants fraudulently conveyed real estate to a number of citizens for the purpose of increasing the number of resident freeholders. It appears that one of the remonstrants, who was greatly interested in preventing the issuing of a license, while the application was pending before the board, conveyed to 11 or 12 individuals an unimproved village lot. He testified that he sold the lot to these individuals for a tennis ground at an agreed price of $200; that some of them paid their proportion in cash upon delivery of the deed, others gave their promissory notes, and to several of them, among whom was a near relative of his residing in his family, he donated an undivided interest.

We have frequently held that the conveyance of real estate to a number of individuals to enable them to become signers upon the applicant's petition would not constitute such persons as freeholders, within the meaning of the statute. Of course, the same rule should be applied to the remonstrants. The object of the statute is to exclude transient persons who are without substantial interest in the matter, and to leave the final authority for authorizing saloons in the village to permanent residents who have substantial interest in the public welfare. When a small and not very valuable tract of land is conveyed to a large number of persons, instead of conveying to a trustee for such purpose, and this conveyance is made while the contest is

pending, and it is immediately insisted by those who are opposing the license that the grantees in such deed must be counted as freeholders for the purpose of preventing the granting of a license, the transaction would seem to come within the principle that has so frequently been applied to prevent the granting of a license upon the petition of such signers. Some of the grantees in this deed, it is claimed, were already freeholders of the village, and others were nonresidents; but they appear to have all been opposed to the granting of the license and to have assisted in contesting the same. It is difficult to ascertain from this record how many resident freeholders there are in the village. Counsel have limited their efforts upon this question to the inquiry whether the grantees in this deed were thereby qualified as freeholders, and have not in other respects given us much assistance in the examination of this record.

The remonstrants urged several grounds in support of the decision of the trial court, and, among them, it is contended that there was no ordinance of the village authorizing the granting of a license. The remonstrance filed with the board specifically alleged that there was no such ordinance, and now it is contended that there is no evidence in this record tending to show that such ordinance was ever enacted. It has frequently been held that such ordinance is necessary, and that the village board are without jurisdiction to grant a license in its absence. When it is specifically alleged in the remonstrance that no such ordinance existed, it devolves upon the applicant to furnish *prima facie* evidence, at least, of the existence of such an ordinance. The applicant has not referred us to any such evidence in this record, and we have not observed any.

The evidence is not sufficient to justify the issuing of a license, and the judgment of the trial court is therefore

AFFIRMED.

MORRISSEY, C. J., not sitting.

ROSE, J., dissenting.

I dissent from all of the opinion except what relates to the affirmance. The judgment of the district court is affirmed on the sole ground that there is no proof of an ordinance authorizing the issuance of a license. If this ruling is correct, nothing else is essential to a decision on the merits of the appeal. All other expressions in the opinion of the majority are dicta. They are not binding as precedents. They obscure or confuse former decisions. Litigants with undetermined controversies are entitled to the time devoted to the preparation and the consideration of dicta. The public expense incident to the preparation, consideration and publication of opinions not necessary to a decision should be avoided. The official reports of decisions should not be incumbered by extraneous matter. In the future the supreme court should not be embarrassed by expressions of opinion not necessary to a decision in a former case. Owing to a statute requiring reiteration of settled principles of law, opinions have already been multiplied beyond reason.

The opinion of the majority, as I understand it, contains dicta at variance with rules of law deliberately announced by a unanimous court. A practice essential to the dispatch of judicial business requires an appellant to specifically point out the errors of which he complains. In my judgment there has been an attempt in the opinion of the majority to modify this rule by a dictum, and the method of proving that petitioners for a license are freeholders has been questioned, if not unsettled. *Swihart v. Hansen,* 76 Neb. 727; *Starkey v. Palm,* 80 Neb. 393; *Rosenberg v. Rohrer,* 83 Neb. 469. The dictum relating to the duty of remonstrants to admit the qualification of known resident freeholders is contrary to the following doctrine announced in *Swihart v. Hansen,* 76 Neb. 727: "Where the qualifications of the signers to a petition for the sale of liquor are put in issue by a remonstrance, the burden is upon the applicant to show by competent evidence that the petitioners do possess the qualifications required." To the same effect: *Rosenberg v. Rohrer,* 83 Neb. 469. If the

dictum in the fourth paragraph of the syllabus implies that remonstrants must be freeholders, it is at variance with the former opinion holding: "Under section 3, chapter 50, Compiled Statutes, the right to protest or remonstrate against the issuance of a license is not confined to residents of the ward or village where the intoxicating liquors are sought to be sold." *Somers v. Vlazney*, 64 Neb. 383. I cannot concur in dicta thus changing or modifying or indirectly overruling former decisions.

LETTON, J., concurs in the dissent.

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STATE, EX REL. JOSEPH B. BRITT, APPELLANT, V. SIGEL MATSON ET AL., APPELLEES.

FILED FEBRUARY 26, 1915. NO. 18,586.

1. **Schools and School Districts:** BONDS: SUBMISSION OF PROPOSITION FOR ISSUANCE. "A proposition of a school district to issue bonds must be submitted separate and distinct from any other that is not germane thereto." *State v. Barton*, 91 Neb. 389.
2. ———: SCHOOLHOUSE: SELECTION OF SITE. *Held*, that under section 6737, Rev. St. 1913, the selection of a building site for a schoolhouse can be made only by the electors of the district at a district meeting, by a vote of two-thirds of the qualified electors present.
3. **Mandamus:** INCONSISTENT RELIEF. A peremptory writ of mandamus will not issue to compel the doing of an act inconsistent with the petition and inconsistent with the alternative writ.

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

*A. G. Wolfenbarger* and *H. S. Lower*, for appellant.

*Morning & Ledwith, contra.*

MORRISSEY, C. J.

This was an application for a writ of mandamus addressed to the district court for Lancaster county. The

writ was issued, but not in the form prayed, and both parties appealed. The respondents are the officers of school district No. 139 of Lancaster county, a district not in a city of the metropolitan class, and the relator was an elector of said district. February 26, 1914, there was filed with the respondents a petition signed by more than one-third of the legal voters of the district "suggesting that a vote be taken for or against the issuing of bonds of said school district, * * * to purchase lots Nos. 27, 28, 29, 30, 31, 32, 33, 34, Hillcrest addition to the village of Bethany Heights, Nebraska, and to build thereon a school building and to fully equip the same with heat, light, water, sewerage and furniture." The respondents declined to issue a call to submit that question to the voters of the district, and an alternative writ was issued directing the performance of the acts as prayed in the petition, or, on failure to obey the order, to appear and show cause.

Three of the respondents answered and showed that they had at all times been ready and willing to grant the prayer of the petition, but, being less than a majority of the board and the other members refusing to call the election, as prayed, they were powerless to act. The other respondents answered, admitting their official positions, the filing of the petition, that it contained the names of more than one-third of the legal voters of the district, etc.; but denied that the act sought to be enforced by this proceeding was a duty required of them by law. They alleged that school district No. 139 adjoins another school district, and that a number of families residing in this adjoining school district had been set over into district No. 139 under section 6942, Rev. St. 1913, and that the parents of these children are qualified voters in said district on all school questions, except the issuance of bonds; that the district now has a school site with a schoolhouse thereon, and that the present site is nearer the geographical center of the district, and of the population thereof, than the site proposed in the petition for the bond election; that the proposition to purchase a new school site should be separately stated, and that the proposition should not designate any par-

ticular property, but the district should be left free to negotiate for a new school site upon the most advantageous terms, and left free to select the location which two-thirds of the legal voters of the district, including those outside the district, but legally entitled to vote, should select; that two propositions are combined in one, and that it is impossible for voters to vote for or against either proposition without voting for or against the other; that the petition as presented was not in such form as would authorize the calling of an election as prayed. A peremptory writ was issued, but not in the form or substance of the alternative writ. The court found that the selection of a specific building site for a schoolhouse can be made only by the electors at a school district meeting, and cannot be legally submitted to the electors at a bond election, and in this conclusion we agree. It further found "that at the time of the commencement of this action it was the duty of the school board of district 139 to call an election and to submit to the qualified electors the question of voting for or against the issuing of bonds of said district in the amount of $25,000 for the purpose of purchasing a building site and for the construction, equipment, including heat, light, water, sewerage and furniture, and furnishing of a school building or schoolhouse," and allowed a peremptory writ directing that the school district officers issue a call for an election according to said finding, and taxed the costs to the respondents, as members of the school board. The relator and respondents have separately and severally excepted and appealed.

The school district had a site. The effect of this bond election, if the proposition carried, would be the purchase of a new site and the transfer of the school thereto without giving the voters of the district an opportunity to vote on the question as provided by the statute. It is stipulated that not less than two families had been transferred from the adjoining district to district No. 139 for school purposes. The parents and guardians of these children were, under section 6942, Rev. St. 1913, entitled to vote upon all school matters except that of issuing bonds. Section 6737,

Rev. St. 1913, provides a method of changing the school site, and it is evident that the legislature did not intend that the school site might be changed in any other way. The method undertaken under these proceedings is a clear evasion of this section of the statute and is in violation of the rights of the voters who were entitled to vote upon this question alone, and it would effectually disfranchise those electors transferred from the other district who are not entitled to a vote upon the issuance of bonds.

The court could not split up the relators' cause of action, nor could it issue a peremptory writ differing in terms from the alternative writ. "The peremptory writ of mandamus, which has been likened to an execution, should conform strictly to the command of the alternative writ." *Laflin v. State,* 49 Neb. 614.

There are a number of other issues raised, but as those discussed dispose of the case it is unnecessary to comment upon them.

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

REVERSED AND DISMISSED.

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

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STEPHEN H. RICHARDSON, APPELLEE, V. HOWARD W. JOHNSON ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 18,024.

1. **Wills: ESTATE OF WIFE: RIGHTS OF HUSBAND.** In this state the wife cannot lawfully dispose of her real estate by will so as to deprive her husband of the interest given him by chapter 17, Rev. St. 1913.
2. **———: ———: RIGHT OF ELECTION.** Where a married woman by her will makes a provision for her husband of a less estate than is provided for him by the chapter above mentioned, he may renounce the provisions of the will and elect to take the estate given him by law.

3. ———: ———: SUFFICIENCY OF ELECTION. In making his election, no particular form of words is required, and if it clearly appears from the writing filed by him in the county court that he refuses to take the provisions made for him by the will and elects to take, have and receive the part of the estate which is given him by the laws of the state of Nebraska, this will constitute a sufficient election.

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

*A. C. Epperson,* for appellants.

*P. E. Boslaugh, contra.*

*L. E. Cottle, guardian ad litem.*

BARNES, J.

This appeal requires a construction of some of the provisions of chapter 17, Rev. St. 1913. It appears that Emily D. Johnson, a resident of Clay county, Nebraska, in the year 1903, made a will by which she devised the net proceeds of certain real estate situated in Clay and Lancaster counties to Stephen H. Richardson, during his life, he being her husband at the time of her death, with the remainder over to Howard W., Alida May, Charles, Everett R., and Agnes Johnson, her grandchildren by a deceased daughter, who was her only child. On the 31st day of December, 1910, the testatrix departed this life, and her will was duly admitted to probate by the county court of Clay county on February 27, 1911. On April 1, 1911, plaintiff Richardson filed a writing in the county court, refusing to take under the provisions of the will, and electing to take the share of the estate of the testatrix given him by the laws of this state. Thereafter he commenced an action in the district court for Clay county to partition the said real estate. Issues were joined, and by an agreement of the parties a jury was waived and the cause was tried to the court. It was stipulated that the debts, liabilities of the estate, and the expenses of the administration had been paid and the estate had been duly adminis-

tered. The trial resulted in a judgment for the plaintiff, and the defendants have appealed.

It is contended by appellants that the plaintiff has no power or right, as the widower of Emily D. Richardson, to renounce the provisions of the will in his favor and take and have the part of the estate of his deceased wife which he would have taken and received if she had died intestate. It is also contended that, if this right existed in favor of the plaintiff, then the writing filed by him is insufficient to constitute a refusal and an election.

Section 1265, Rev. St. 1913, provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed, * * * which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead in the manner following: * * * Third. One-half to the husband or wife, if the survivor is the parent of all the children of the deceased and there be only one child or the issue of a deceased child, surviving."

This section was construed in *Gaster v. Estate of Gaster*, 92 Neb. 6, where it was said: "A husband cannot lawfully devise his real estate or lawfully dispose of his personal property by will so as to deprive his wife of all interest therein given by the said act. Laws 1907, ch. 49. If a married man by his will disposes of all his property, real and personal, to others, and gives nothing to his wife, she will be entitled to take the distributive share given her by the statute as though he had died intestate." In the body of the opinion it was said: "The first, and perhaps one of the most prominent, difficulties in the construction of this act is that, in defining the rights of the husband or wife in the property of the deceased spouse, the statute contains the expression, 'not lawfully devised,' in the case of real estate, and 'not lawfully disposed of by will,' in the

case of personal property. * * * In this case the deceased devised all of his property, but made no provision for his widow. She insists that she ought to share in the property as though there was no will. The statute says that, when the real estate is not lawfully devised, she may do so. We are asked to hold that the property was lawfully devised, and that therefore the provision of the statute giving her a distributive share in the property has no application. * * * If the property which by this statute is given to the surviving spouse cannot be lawfully devised to others, the principal difficulty in construing the statute disappears." It was further said in the opinion: "It is wholly inconsistent with the idea that the right can be defeated by will. It recites the right of a married man or woman in the property of his or her spouse, provides in express terms how that right may be barred, and excludes the power to bar that right by will."

Section 1270, Rev. St. 1913, provides that a surviving husband or wife can be excluded from participating in the estate of a deceased spouse by an antenuptial contract made in lieu of the right of inheritance.

Section 1271, Rev. St. 1913, provides: "If any real estate be devised by a deceased husband or wife to the surviving husband or wife of such deceased person, or other provision be made for him or her in the last will and testament of such deceased person, he or she shall be entitled to his or her election to take the lands so devised, or the provision made for him or her in the last will and testament of such deceased husband or wife, or to take by inheritance, descent and distribution the interest in the estate of the deceased, provided by law."

The chapter of the Revised Statutes from which the foregoing quotations are taken is complete and comprehensive. By its provisions the husband and wife are placed upon exact equality as to the rights of each in the property of the other. The nature, extent and limitation of the rights of the surviving spouse, whether widow or widower, are exactly the same, and the law applicable to one is equally controlling as to the other.

In *In re Estate of Strahan,* 93 Neb. 828, it was said by Sedgwick, J., in his concurring opinion: "The title of the present act is 'An act to provide for succession to the estates of decedents and to repeal (sections named).' Under this act the husband and wife are placed upon exact equality as to the rights of each in the property of the other. * * * But now the husband succeeds to property of his deceased wife as the wife does to property of her deceased husband. The policy of our law, as developed by legislation from time to time, has been more and more to place husband and wife upon an equality as to their property, and to regard each as interested in the property held in the name of either. It may have been considered that the marital relation is of great importance to the state, and generally covers the active life of both parties. Their fortunes are made together, and by their mutual help and contribution."

It therefore seems clear that by the provisions of the act in question Richardson, the surviving husband of the testatrix, was entitled to one-half of the real estate devised by will to the defendants. It is contended, however, that the testatrix had lawfully devised this property right to the defendants; that the act of 1907 (laws 1907, ch. 49) did not repeal the section of the statute which gave Mrs. Richardson the right to will her property to her grandchildren, and therefore her estate was lawfully devised, and the plaintiff could take nothing except the interest which the will of the testatrix gave him. This contention cannot be sustained. The statute has always provided that either the husband or the wife may lawfully devise his or her real estate by will. In case the survivor accepts the provisions of the will, it may then be said that the estate has lawfully been devised, but we have always held that the widow of a testator may elect to abide by the provisions of the will or take under the statute, and under the present law the same privilege is accorded to the surviving husband.

This brings us to the consideration of the effect of the writing filed in the probate court by which the plaintiff rejected the provisions of the will and elected to take under the statute. The refusal and election of the plaintiff complies with every requirement of the statute. By his written statement he declared that he would not receive or accept the provision made in or benefit conferred on him by the will, and that he intended to take, have and receive the part of his deceased wife's estate given and awarded to him by the law of the state of Nebraska as the husband and widower of the deceased. The law makes no provision defining the terms in which the election shall be made. The intention of the plaintiff is clear and unambiguous, and by the use of the language employed he gave notice that he elected to take the identical interest expressed by the legislature by the use of the words "to take by inheritance and descent and distribution as by law provided." Indeed, it may be said that the language of the writing is more clearly correct as expressing the right and interest of the plaintiff as the surviving husband of the deceased than the words above quoted.

The record shows conclusively that the court could not well have rendered any other judgment than the one complained of, and the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

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JAMES M. LANIGAN, APPELLEE, V. EDWARD GILROY ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 18,040.

Tax Sale: REDEMPTION: LIMITATIONS. Where the evidence on which a tax deed is executed is recorded with it and clearly shows that the deed is void, the owner may maintain an action to quiet his title and redeem his land from tax sale at any time within ten years after the recording of the deed.

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

*E. P. Clements,* for appellants.

*T. P. Lanigan & Son* and *J. R. Swain, contra.*

BARNES, J.

Action to quiet plaintiff's title to the south half of section 13, township 20 north, range 11 west of the sixth P. M., situated in Greeley county, Nebraska, to set aside certain tax deeds and redeem the land from the lien for delinquent taxes.

It appears that defendant Edward Gilroy purchased the land in question at tax sale on the 13th day of November, 1903, for the taxes assessed against it for the years 1894 to and including 1902; that he had paid the taxes subsequently assessed against the land for the years 1903 to and including the year 1908. It further appears that the time provided by statute for redemption of the premises expired November 13, 1905; that the purchaser failed to publish the notice for redemption required by statute until January 11, 1906, which was the date of the last publication of the notice; that the notice was directed to C. E. Fowler, while the deed records show that the land was then owned by Charles E. Fowler. The purchaser failed to file the affidavit required by statute authorizing the publication of the notice. On this record the county treasurer, on the 22d day of June, 1906, executed to the defendant Edward Gilroy a tax deed for each of the quarter sections of land described in his two certificates of purchase. It also appears that, after receiving his certificates of tax sale, Gilroy fenced the land in question with other large bodies of vacant, unimproved, prairie lands, and used the same as a pasture for his cattle. After receiving his tax deeds, he continued to so make use of the half section in question, with other lands which he had inclosed, as aforesaid. The plaintiff proved his title to the premises, and on the facts thus shown by the record the district court found generally for him, and rendered a judgment in his favor

canceling the tax deeds and quieting his title upon the payment of the taxes, interest and penalties, amounting to the sum of $357.85, with interest at the rate of 10 per cent. per annum from the date of the decree, which was declared to be a first lien on the premises, and that defendant Mary Gilroy had acquired no interest in the land in question. It was further decreed that, unless the sum so found due to the defendant was paid within 20 days, the land should be sold as upon execution to satisfy said lien. From that judgment the defendant Edward Gilroy has appealed.

Edward Gilroy contends that the judgment is not sustained by the evidence, and argues that the tax deeds were valid on their face; that, having taken possession of the land conveyed to him thereby, the plaintiff was barred by section 6558, Rev. St. 1913, which provides: "No action for the recovery of real estate sold for the nonpayment of taxes shall be brought after five years from the execution and recording of the treasurer's deed, unless the owner is at the time of the sale a minor, insane person or convict in the penitentiary, in which case such action must be brought within five years after such disability is removed." This contention might be sustained if it were not for the provisions of section 214, art. I, ch. 77, Comp. St. 1903, which were in force at the time Gilroy purchased the land for taxes. That section provides, in substance, that the evidence upon which a tax deed is issued shall be recorded therewith. This evidence consists of the notice of redemption and proof of service of publication, if service be so made, together with the affidavit authorizing such service. In the case at bar, service of notice of redemption was attempted to be made by publication, and the notices, together with the proofs, were filed with the deeds and duly recorded as a part thereof. The notices show that they were published long after the time for redemption had expired and without the affidavit authorizing the publication. The tax deeds were therefore void. The statute makes the evidence, on which deeds were executed, a part of the public records in the office of the register of deeds,

so that any person may have the opportunity of investigating and finding out for himself the true condition of the title. In *King v. Boettcher,* 96 Neb. 319, it was said: "Notice of the time when the redemption of land from tax sale will expire must be given by the tax purchaser or his assignees before the expiration of the time to redeem." In *Wells v. Bloom,* 96 Neb. 430, it was said: "A tax deed issued in 1904, upon a tax sale certificate issued on a treasurer's tax sale made in 1902, without a previous compliance by the purchaser with the requirements of section 124, art. I, ch. 77, Comp. St. 1901, is void and confers upon the grantee in such tax deed nothing more than color of title. And in such case the owner of the land may proceed at any time within ten years to quiet his title as against such tax deed and to redeem his land from such tax sale." If it be said that the tax deeds in question, when considered apart from the evidence on which they were executed, are valid on their face, they are nevertheless void, and the grantee acquired no rights by reason of their execution. *Stewart v. Ridenour, ante,* p. 451; *Peck v. Garfield County,* 88 Neb. 635; *Thomsen v. Dickey,* 42 Neb. 314; *State v. Gayhart,* 34 Neb. 192.

The judgment of the district court was right and is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

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## IN RE ESTATE OF FERDINAND VODVARKA. MARY KRAJICEK, APPELLANT, V. ESTATE OF FERDINAND VODVARKA, APPELLEE.

FILED FEBRUARY 26, 1915. No. 18,031.

1. **Wills: PROBATE: JURISDICTION.** When a county court had acquired jurisdiction of a proceeding to probate a will, and the hearing had been begun and some testimony heard, it did not lose jurisdiction merely by reason of the facts that by agreement between the proponent and contestant, with the consent of the county

judge, the further hearing was continued from time to time, and both parties appeared when the final hearing was had, although no entry was made of one of the continuances upon the docket.

2. ———: ———: DECREE: MOTION TO VACATE: SHOWING. A motion to open up a decree probating a will on the ground that the contestant was not informed of the time of the final hearing should set forth facts sufficient to show a *prima facie* defense against the probate of the will.

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

*A. R. Oleson,* for appellant.

*F. Dolezal, contra.*

LETTON, J.

On October 11, 1909, Ferdinand Vodvarka filed his petition in the county court of Dodge county setting forth that his father Ferdinand Vodvarka died in that county leaving surviving him four children and six grandchildren, and praying that the instrument produced by him be admitted to probate as the last will and testament of the deceased. The 3d day of November, 1909, at 9 o'clock A. M., was fixed for the hearing of the petition, and it was ordered that notice be given by publication and also by personal service on the resident heirs. Notice was duly given, and on October 3, 1909, Mary Krajicek, one of the children and heirs at law, appeared, and filed objections to the probate of the will on the ground that the testator was of unsound mind, and was induced to execute the instrument by undue influence. At the time set for the hearing, the three other surviving children and the plaintiff appeared personally and by attorney. Witnesses were sworn, and by consent the further hearing of the case was continued until November 29. On November 29 the attorney for the petitioner appeared and asked that the cause be continued to December 6, 1909, which was done. On that day the attorney for petitioner requested the hearing be continued until December 11, 1909. On that day, no one appearing, the hearing was continued to January 10, 1910, by order

of the court. On April 25 the petitioner appeared and asked to have the hearing continued until the 3d of May, 1910. On that day the petitioner appeared by his attorney, Frank Dolezal, and the contestant also appeared by her attorney, J. C. Cook, and the record recites: "No further evidence or proof being offered by the parties to this proceeding, by consent of counsel this cause was submitted to the court upon the petition of Ferdinand Vodvarka, and the objections of Mary Krajicek, and the testimony taken in open court on the 3d day of November, 1909, of Nick Diechmann and Fred Renter, the subscribing witnesses to said instrument, purporting to be the will of said deceased, also the testimony of Herman Holsten, witness for petitioner." The court then found that the will was valid in all respects and admitted it to probate.

On July 8, 1910, a motion was filed in the county court by Mary Krajicek to vacate the decree for the reasons that the continuances were irregular; that she had no notice of the hearing set for the 3d day of May, 1910; and that the court was without jurisdiction to act upon that day. This motion was supported by the affidavit of Mary Krajicek that she was not informed by her attorney or any one else of the hearing on May 3, 1910; that he had promised to notify her of the time the matter would be heard; that she knew nothing of the order until a short time before July 2, 1910; and also stated that "she has a good defense against said will being admitted to probate as the last will and testament of said deceased." Objections to the vacation of the decree were filed, supported by the affidavits of Frank Dolezal and of J. C. Cook. Mr. Dolezal's affidavit, in substance, is to the effect that several continuances were made by agreement between himself and Mr. Cook with the knowledge and consent of the county judge. Mr. Cook's affidavit corroborates that of Mr. Dolezal, and sets forth further that he explained to the contestant several times that she must produce witnesses to sustain the charges made in her objections, but that she failed to give him the name of any witness or disclose any proof; that he had made independent inquiries of the physician treat-

ing the deceased and of others, and that none of such persons showed any knowledge of facts tending to sustain the contest; that prior to the 3d day of May, 1910, he informed contestant of the date of the hearing, and that, unless she indicated to him or pointed out some witnesses with proof of the objections, he would have nothing further to do with the cases; but that the contestant did not appear on that day, although he had given her timely notice and ample opportunity to be present. The case was taken to the district court by proceedings in error. The district court found no error and affirmed the order of the county court.

The question presented is whether the court lost jurisdiction by the failure to continue the hearing from January 10, 1910, to a specified time. We are not of that opinion. The proponent had produced his evidence and rested. A county court in the exercise of its probate jurisdiction is not bound by the statute which fixes terms within which its jurisdiction in civil cases must be exercised. There is nothing in the statute to prevent a county judge from taking a case under advisement and rendering his decision at any time at which the parties are present either in person or by their attorneys. This is also the case where the proceedings are by agreement of the parties left open for a short time for the purpose of obtaining further testimony. None of the cases cited by the appellant are applicable to the facts presented here.

Furthermore, the allegations in the motion to open up the judgment and set aside the decree are inadequate. While pleading the conclusion that the contestant has a good defense against the admission of the will to probate, it entirely fails to set forth sufficient facts to constitute a *prima facie* defense.

The judgment of the district court is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

FRANK HAAR, APPELLEE, V. FRANK HOWARD, APPELLANT.

FILED FEBRUARY 26, 1915. No. 18,037.

1. **Appeal:** CONFLICTING EVIDENCE. A verdict rendered upon conflicting evidence will not be set aside unless it is clearly wrong.
2. **Trial:** INSTRUCTIONS. The instructions complained of, when considered with those given by the court at defendant's request, *held* to submit all the issues in the case to the jury.

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

*Story & Story,* for appellant.

*J. C. Dort, contra.*

LETTON, J.

This action was brought to recover upon a protested check given to plaintiff in payment for a mare purchased from him by defendant, who was a dealer in horses. Defendant admitted his liability on the check, but pleaded as a set-off that he had purchased another mare from the plaintiff, who fraudulently concealed her true character from him, and warranted her to be sound, but that she was a cribber and windsucker, was unsound, was worth only the sum of $92.50, instead of $185, which he paid for her, and that he was thereby damaged in the sum of $92.50, for which he asked to be credited on the amount due. Plaintiff recovered, and defendant appeals.

The first assignment of error is that the verdict is not sustained by the evidence. There was a direct conflict in the evidence with respect to warranty and false representations, but the clear preponderance was with the plaintiff. It is sufficient to sustain the verdict.

Complaint is made of the instructions given, and more specifically of instructions Nos. 8, 10 and 13, requested by plaintiff, for the reason that they eliminated as a set-off defendant's cause of action for deceit. These instructions treated of the law with respect to breach of warranty. Con-

sidered in connection with the instructions given at defendant's request, which covered the subject of defendant's right to recover on account of deceit and false representations, both defenses were submitted, and the defendant has no ground for complaint.

We find no prejudicial error in the two rulings of the court complained of with respect to the admission of evidence. The case turned upon an issue of veracity between a horse dealer, upon one side, and a young farmer living in Kansas, upon the other. The jury evidently believed the farmer and his witnesses and disbelieved the testimony of the horse dealer. Long experience has shown the writer that this is not an unusual result in suits of this nature.

We find no reason for reversing the judgment.

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

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

FILED FEBRUARY 26, 1915. No. 18,011.

1. **Taxation:** VOID ASSESSMENTS: EQUITABLE RELIEF: TENDER. Where assessments are wholly void and the owner of taxable property has no means of ascertaining what amount may be lawfully levied, he is not required to make a tender as a condition of obtaining equitable relief.
2. ———: ———: INJUNCTION. An injunction against the collection of void taxes levied against the owners of land in an irrigation district will not be denied because some have paid the void assessments.

Rehearing of case reported in 96 Neb. 619. *Former opinion modified.*

ROSE, J.

The suit was brought to cancel bonds issued by the Alfalfa Irrigation District and to enjoin the collection of

irrigation taxes levied on property therein. The district court sustained the bonds, but denied plaintiff relief as to the taxes. The judgment below was affirmed. *Orcutt v. McGinley,* 96 Neb. 619. This is a motion by plaintiff to modify the affirmance to the extent of enjoining the collection of the irrigation taxes levied during the years 1896 to 1908, inclusive. It is stipulated that the taxes for the year 1896 are invalid. On the face of the record the assessments for the other years mentioned are void because the taxing officers in making them disregarded mandatory provisions of the statute.

It is argued that plaintiff is not entitled to relief from the assessments because he did not offer to pay what is equitably due from him as a tax debtor. Where assessments are wholly void and the owner of taxable property has no means of ascertaining what amount may be lawfully levied, he is not required to make a tender as a condition of obtaining equitable relief. *Hutchinson v. City of Omaha,* 52 Neb. 345; *Harmon v. City of Omaha,* 53 Neb. 164; *Sioux City Bridge Co. v. Dakota County,* 61 Neb. 75; *Schneider v. Plum,* 86 Neb. 129.

In oral argument it was suggested that an injunction should not be granted for the reason that some of the owners of land in the irrigation district had paid the void assessments. This, however, will not prevent the granting of equitable relief to those who resist unpaid void assessments. The motion is sustained. The decree of the district court is reversed to the extent of canceling the void taxes and granting an injunction to prevent the collection thereof. In other respects the judgment is affirmed.

MODIFIED AND AFFIRMED.

GEARHART & BENSON, APPELLEES, V. FRENCHMAN VALLEY IRRIGATION DISTRICT ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 18,697.

**Waters: IRRIGATION: APPROPRIATION: VESTED RIGHTS.** A completed appropriation of water for power under the law of 1877 is a vested right, of which subsequent appropriators for irrigating purposes are bound to take notice, and the priority, if unchallenged, is not lost by failure to demand an adjudication under the law of 1895. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District*, *ante*, p. 139, followed.

APPEAL from the State Board of Irrigation, Highways and Drainage. *Affirmed.*

*W. S. Morlan, C. E. Eldred* and *J. F. Cordeal,* for appellants.

*Flansburg & Flansburg* and *G. C. Proud, contra.*

ROSE, J.

This is an application to the state board of irrigation for the adjudication of a water right. Gearhart and Benson, plaintiffs, claimed the right to divert from the Republican river 200 cubic feet of water a second for the purpose of operating a flour-mill near Arapahoe. Their claim was resisted by defendants, who are upper appropriators of water for irrigation. The work of constructing the plant owned by plaintiffs was begun July 24, 1879. It was completed December 31, 1879. Since that time the right thus acquired has been continuously exercised. Separate, adjudicated appropriations of defendants date from 1890 to 1912. The state board of irrigation decreed that plaintiffs acquired the right to divert for power at the headgate of their millrace 195 cubic feet of water a second, and that the appropriation dates from July 24, 1879. Defendants have appealed.

It is argued by defendants that plaintiffs have no valid appropriation, because they did not give notice of their

claim or present it to the state board of irrigation for adjudication until June 10, 1912; that the doctrine known as "balance of convenience" should be applied, because the use of water for irrigation is more important than its use for power; that the claim of plaintiffs should have been rejected, because they allowed defendants, without notice or objection, to expend $300,000 in improvements for the purpose of using for irrigation waters of the Republican river and its tributaries. On the record in the present case, there being no dispute about the controlling facts, these propositions are questions of law which were recently decided adversely to defendants in the case of *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District, ante,* p. 139. It is unnecessary to restate the rules of law announced in the case cited or the reasons for the conclusions reached. The findings of the state board of irrigation are proper deductions from the evidence, and the decree correctly applies the law.

It was asserted in argument below that defendants had acquired prescriptive rights superior to the claim of plaintiffs, but this question is not adjudicated.

AFFIRMED.

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

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JAMES C. JOHNSON, APPELLEE, V. SCHMOLLER & MUELLER PIANO COMPANY, APPELLANT.

FILED FEBRUARY 26, 1915. No. 17,964.

**Trial:** INSTRUCTIONS. Record examined and found not to contain any prejudicial error.

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

*John M. Macfarland,* for appellant.

*Weaver & Giller, contra.*

FAWCETT, J.

Plaintiff brought this action in the district court for Douglas county to recover $3,457.47, alleged to be due him as commissions earned in the sale of pianos for defendant under two contracts covering the years 1911 and 1912. Defendant denies that there is anything due plaintiff under the contract, for the reason, as stated in its brief, that "the repossessions of pianos and the amount charged back thereunder against the appellee would offset, at the time of the trial, a large portion of the commissions, and that the contracts really contemplated that the appellant should retain sufficient of the commissions in its hands to offset future charges for repossessions under the contracts until the business between appellant and appellee was finally closed." There was a verdict and judgment for plaintiff for $2,512.62, and defendant appeals.

The court instructed the jury that the questions to be considered had narrowed down to a single issue; that one of the defenses pleaded by defendant was a set-off amounting to $305.40, which plaintiff claimed on account of repossessions of certain pianos which plaintiff had sold during the year 1910. By instruction No. 2 the court told the jury: "The burden of proof is upon the defendant to establish by a preponderance of the testimony that the terms of the contract were as it claims, and as above set forth. And, if the defendant has so established this fact, then under the testimony in this case the plaintiff is entitled to a verdict at your hands for $2,512.62. If the defendant has not established that the contract for 1910 was as it claims with respect to charging back the commissions as above set forth, then the plaintiff is entitled to a verdict for $2,818.02." After being out for about 24 hours without reaching an agreement, the jury were brought into court and interrogated as to the probability of their arriving at a verdict. The foreman and several members of the jury stated that they did not think it would be possible for them to agree. The court then called the attorneys before it, and, after some conference with them, counsel for plaintiff stated that, rather than have a disagreement, he would be

willing that the jury should return a verdict in favor of the plaintiff for the lesser sum, and that the court might so inform the jury; whereupon the court said: "Gentlemen of the jury, I am authorized to say to you by Mr. Weaver, attorney for the plaintiff, that, rather than have a disagreement in the case which would result in a retrial of this case at considerable expense to the county and the parties, the plaintiff would much prefer that you would find in favor of the plaintiff for the lesser sum, thus allowing the set-off for the amount claimed under the 1910 contract. With this statement on the court's part I will ask you to retire and further consider the case." Thereupon, the jury retired, and, after further deliberation, returned a verdict for the plaintiff for the sum stated. No error is assigned in defendant's brief as to what took place when the jury were called in, or as to the giving of the supplemental instruction which was given by the court at that time; but it is contended that the court erred in giving instructions 1 and 2 in the first instance. We are unable to discover any error in the giving of these two instructions. They were fully warranted by the pleadings and the evidence in the case. The evidence was conflicting, but was sufficient to sustain the verdict. This being true, we find no error in the record.

AFFIRMED.

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

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NIKOLA P. JERICH, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED FEBRUARY 26, 1915. No. 17,971.

1. **Evidence:** PREPONDERANCE. "The preponderance of evidence is not determined alone by the greater number of witnesses who testify in favor of a party." *New Hampshire Savings Bank v. Dillrance*, 63 Neb. 412.

2. **Master and Servant:** INJURY TO SERVANT: SUFFICIENCY OF EVIDENCE. The evidence examined and set out in the opinion *held* sufficient to sustain the verdict.

3. **Trial:** MISCONDUCT OF COUNSEL. The record examined and discussed in the opinion *held* insufficient to show misconduct on the part of counsel for plaintiff.

4. **Evidence:** PREPONDERANCE: INSTRUCTIONS. Instruction No. 12, set out in the opinion, examined and *held* properly given.

5. ———: EVIDENCE AT FORMER TRIAL: ADMISSIBILITY. Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause between the same parties is admissible if otherwise unobjectionable.

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

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

*Smyth, Smith & Schall, contra.*

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for personal injuries, defendant appeals.

On the day plaintiff received his injury he and a fellow workman were engaged in removing rivets from the boiler of a locomotive engine belonging to defendant, which was in defendant's shop for repair. At the same time two other employees of defendant were engaged in the same kind of work on the other side of the boiler. The two latter employees were using what is termed an "air gun" in their work. In order to remove the rivets one employee would hold a hammer over the head of a rivet and his associate would strike it with a sledge hammer, thus breaking or cutting off the head. It could then be driven out with a backing-out punch and sledge. When the air gun was used in connection with this work it was used in lieu of the backing-out punch and sledge. This air gun weighs about 25 pounds and consists of a plunger, a die and backing-out punch and the hammer itself. It is operated by com-

pressed air, which is conveyed to it through a long rubber hose, which can be attached to iron pipes that are located throughout the building, and which serve generally to convey the air through the shops from the machinery where it is generated. When the machinery is in operation there is a continuous supply of air running through the pipes, and it can be made to flow through the rubber hose or shut off again by the turning of an angle cock at the point of connection with the iron pipe. On the upper side of the heel of the hammer is a trigger which controls the immediate application of the air when connection between the iron pipes and the rubber hose is open. When the air is thus applied the plunger, which is a smooth, polished piece of steel several inches long, moves back and forth inside the hammer, like a piston, at a great rate of speed, striking the die when the air is on in full force at the rate of 700 or 800 strokes a minute and with a pressure of about 120 pounds to the square inch. The force thus applied to a rusty rivet soon loosens it and drives it out. The substance of plaintiff's testimony as to the manner in which he received his injury is that, after he and his partner, Hutchinson, had broken off the heads of a number of the rivets with the sledge and hammer, Hutchinson left him, for some purpose not disclosed, when he continued alone the work of driving them out; that one of the rivets stuck; that he stooped down so as to get a look at the other end of it, for the purpose of ascertaining the nature of the trouble. The boiler was resting upon wooden blocks from 18 to 24 inches in thickness, so that a person stooping down could look under the boiler across to the other side of it. Plaintiff testified that when he stooped down he saw the air gun on the other side of the boiler; that the hose to which it was attached was coiled and the gun was lying on top of the coil, pointing towards him; that as he looked the gun "went off" and the plunger left the gun and struck him in the eye, the result of which was the complete loss of the eye. The negligence charged is the act of leaving the gun lying idle, without removing the

plunger or shutting off the air. Just how the discharge of the gun was brought about is not shown.

The first assignment of error, and the principal one urged, is that the verdict is not sustained by the evidence. Plaintiff testified unqualifiedly that he had not had the gun in his hands nor used it on that day, but that the accident occurred as above outlined; while four witnesses testified for the defendant that plaintiff, prior to receiving the injury, had been using the gun on his side of the boiler. That there is a preponderance of witnesses in favor of the defendant on this material point is clear, and by reason chiefly of that fact it is urged that the great preponderance of the evidence is with the defendant and against the plaintiff. On this point the court, by instruction No. 9, told the jury: "If you believe from the testimony that the air gun had been taken by the plaintiff and was being used by him at the time he received his injury, then under the pleadings as set forth by plaintiff he cannot recover herein and you should find for the defendant." It is urged that the clear weight of the testimony shows that the verdict was contrary to this instruction. No witness claims to have seen plaintiff at the immediate time of the accident. They heard his outcry, and some of the employees, including Hutchinson, rushed to his assistance. Every witness who testified for defendant in relation to matters material to the case was, at the time of testifying, an employee of the defendant, unless we except Hutchinson. Hutchinson's testimony shows that he came from Virginia to Omaha shortly prior to the accident, which was in August, 1910, and worked for defendant until December 18 of that year, when he returned to Virginia; that he came to Omaha again when sent for by the claim agent of defendant, for the purpose of testifying in the case; that he returned to Omaha April 28, and from then until the time of the trial (in December) he had remained in Omaha at his own expense; that the railroad company furnished him a ticket to come to Omaha, but had not paid him anything else for coming and had made "no agreement at all" to give him anything. In *New Hampshire Savings Bank v. Dillrance,*

63 Neb. 412, Norval, C. J., tersely stated the rule thus: "The preponderance of evidence is not determined alone by the greater number of witnesses who testify in favor of a party." That has been the rule of this court from our earliest decisions to the present time, and has been many times announced and followed. We have followed that rule and refused to reverse cases many times when, if we had been the triers of fact, we might possibly have found contrary to the finding of the jury. As against this rule defendant cites *Garfield v. Hodges & Baldwin,* 90 Neb. 122, *Tyler v. Hoover,* 92 Neb. 221, and other cases, in support of the rule that, where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake or other means not apparent in the record, it will be set aside. Both rules are well established in this state, but in the cases where the rule invoked by defendant was applied, it will be found that there were facts and circumstances appearing in the record which so corroborated the testimony of the witnesses of the defeated party in the court below as to make it clear that the jury had not only discredited the witnesses on the one side, but had also disregarded the established facts and circumstances in evidence outside of the testimony of such witnesses, thus indicating that their verdict must have been found through passion, prejudice, mistake or some means not apparent in the record. In the present action there are no established facts and circumstances corroborating the witnesses of the defendant, the existence of which does not depend upon the oral testimony of such witnesses. After careful examination of the testimony, we cannot say that the jury were not warranted in believing the testimony of the plaintiff and discrediting that of the witnesses by whom it was sought to contradict him. We are compelled, therefore, to hold that there is sufficient evidence to sustain the verdict, and uphold the action of the jury sustained by an experienced trial court, all of whom saw the witnesses upon the stand, heard them give their testimony, and observed their demeanor while giving it.

The second assignment is misconduct on the part of counsel for plaintiff during the cross-examination of some of defendant's witnesses. It appears that plaintiff was at one time prosecuting an action in the federal court against defendant, upon the same cause of action involved here, which action was dismissed and the present action instituted. On the trial in that court it appears that defendant introduced as a witness Roscoe Grachiro, the employee who had been assisting Scarpello in using the air gun on the morning of and prior to the accident. Grachiro was in the courtroom throughout the present trial, and counsel for plaintiff, seeing that defendant was not going to offer him as a witness, for the possible reason, as counsel urges, that his testimony in the federal court was favorable to plaintiff, attempted to prove by the stenographer who reported the trial in the federal court Grachiro's testimony at that trial. Strenuous objection was made and sustained by the court. Plaintiff made several attempts by this witness to get before the jury Grachiro's testimony at that time. Counsel for defendant finally insisted that counsel should make his offer of proof to the reporter in the regular way. Thereupon the court ruled: "If you want to repeat any more, make the offer so that the jury cannot hear the questions and answers." When counsel made a similar attempt by a second witness, the tilt between counsel for the respective parties became somewhat animated. Judging from the record, we would say that it was a case of "give and take" between them. The trial court finally put an end to the matter in this apt language addressed to counsel for plaintiff: "I think you are within my rule yet, but you are right on the precipice and you ought to stop where you are. You know when you are on the danger line." We think the court outlined the situation very accurately in those words. Upon this admonition being given, counsel for plaintiff abandoned his attempt. We do not think the record shows any reversible error on this point.

The third assignment in the brief complains of instruction No. 12, given by the court on its own motion. By this instruction, the court told the jury: "By a preponder-

ance of the evidence is meant not necessarily the greater number of witnesses, but that amount of evidence which, taken on the whole, produces the stronger impression upon the minds of the jury and convinces you of its truth when weighed against the evidence in opposition thereto." It is conceded that this instruction states the law without question as applied to a normal situation, but it is insisted that in a case of this kind, where defendant introduced a large number of witnesses to sustain its position, and the plaintiff introduced but one, the natural effect of the instruction was to mislead the jury into believing that there was doubt about the credibility of the larger number of witnesess, and that the instruction in this case had the effect of accentuating this particular point. Counsel then state what, in their judgment, the jury should have been told under the situation presented, but they do not call our attention to any instruction of that kind as having been tendered by them and refused. We think the instruction was properly given.

The fourth assignment is that the court erred in permitting the reporter to read the testimony of a witness that had been taken at the former trial of the case in the federal court. This was the testimony of Doctor Owen, the oculist who treated plaintiff after his injury. When the offer was made, defendant admitted in the record "that Doctor Owen is out of the state and is now in the state of California," but objected on the ground that no sufficient foundation had been laid for the reading of his testimony. Counsel further stated that he did not object on the ground that the testimony was not exactly as given by Doctor Owen on the former trial, "where the parties were the same and where the subject matter and issues were the same, and where the doctor had been duly sworn under the forms of law," but based his objection "wholly on the ground that no sufficient showing is made as to why his deposition was not taken." The court did not err in permitting the testimony to be read. *City of Ord v. Nash,* 50 Neb. 335, where the rule is announced: "Where a witness is shown to be absent from the state, his testimony given at a former

trial of the same cause is admissible if otherwise unobjectionable." There were peculiar circumstances appearing in *Wittenberg v. Mollyneaux,* 59 Neb. 203, cited by defendant in support of its assignment of error, which show an exception to the rule above announced.

Some other minor points are discussed in brief of counsel, but everything necessary to a determination of the case is covered by the four formal assignments which we have considered. The only question in the case which has given us any trouble is that presented by the first assignment, viz., the sufficiency of the evidence. While we could easily have affirmed a judgment the other way upon the record before us, we feel that the facts will not warrant us in substituting our judgment for that of the trial court and jury in determining the important question—the credibility of the witnesses.

The judgment of the district court is therefore

AFFIRMED.

MORRISSEY, C. J., BARNES and HAMER, JJ., not sitting.

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## G. ROBERT HEWSON ET AL., APPELLEES, V. ROYAL HIGHLANDERS, APPELLANT.

FILED FEBRUARY 26, 1915. No. 17,980.

**Insurance:** FRATERNAL INSURANCE: SUICIDE CLAUSE. A provision against liability in case of death by suicide, contained in the application and certificate of membership in a fraternal beneficiary association, though not expressly authorized by its by-laws, is a binding part of the contract of insurance, if not in violation of the articles of organization of the association or of the statute under which it is organized.

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

*Hainer & Craft,* for appellant.

*George W. Berge, contra.*

FAWCETT, J.

On February 12, 1906, C. Clarence Hewson became a member of defendant association, and obtained from defendant a certificate of membership, designated in the petition as a policy of insurance, for $2,000, in which certificate the plaintiffs, who are minors and bring this action by their next friend, were named as beneficiaries. On April 23, 1911, Mr. Hewson died by his own hand. That he committed suicide is conceded. The defendant denied liability for the $2,000 death claim, and offered to pay to the beneficiaries an amount equal to the sum which the decedent had contributed to the fidelity fund of the association, which aggregated $51.20. The offer was declined by plaintiffs, and this action was commenced in the district court for Lancaster county. At the conclusion of the evidence plaintiffs moved for a directed verdict in their favor for the principal sum named in the certificate, and interest. The defendant moved for a peremptory instruction to the jury to return a verdict in favor of the plaintiffs for the sum of $51.20. The motion of defendant was overruled and that of plaintiffs sustained. In accordance with the direction of the court the jury returned a verdict in favor of the plaintiffs for $2,210, upon which judgment was entered, and defendant appeals.

The briefs on both sides concede that there is no issue of fact presented by the record and that it is for the court to determine the rights of the parties. The decedent's application for membership in defendant association was a partly written and partly printed application. The original is before us. It bears date January 18, 1906. The original certificate of membership is also before us. It bears date February 21, 1906. The application contains this agreement: "I also agree that should I commit suicide after my admission into the Fraternity, whether sane or insane, that this contract shall be null and void and of no binding force upon said executive castle; except that I agree that all payments made by me which have been

placed in the fidelity fund shall be accepted in full payment of all benefits to my beneficiary or beneficiaries, and that payment of same by the Royal Highlanders shall cancel all claims whatsoever." The evidence shows that the application correctly sets out the answers given by the decedent, and that he knew the contents of the application which he was signing. The benefit certificate recites: "That in case of the 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. * * * Both the edicts and application are made a part of this certificate."

We start out with the fact, alleged in the petition and admitted in the answer, that at all of the times in controversy defendant was a fraternal beneficiary association, organized and existing under and by virtue of the laws of this state, and doing business as such. This being true, defendant was authorized to enter into lawful contracts of membership with applicants applying therefor. At the time the decedent applied for admission to membership and received his benefit certificate the defendant had a complete set of published edicts, commonly designated in other societies as by-laws. Prior to 1901 the edicts were silent on the subject of suicide. In that year the executive castle amended them so as to provide exemption from liability in such cases. This exemption was retained in the amendment of 1905. The application and certificate were prepared in accordance with the edicts as thus amended, and, so far as the evidence shows, were thereafter exclusively used in admitting new members. Plaintiffs insist that in a fraternal society the certificate is not the contract; that the constitution of the society, its by-laws and the certificate constitute the contract. They also contend that the edicts of 1901 and 1905 were not legally adopted, and cite *Lange v. Royal Highlanders,* 75 Neb. 188, and *Briggs v. Royal Highlanders,* 84 Neb. 834, in support of their contention. It is true that in those cases we held that in adopting the edicts of 1901 and 1905 the

executive castle which adopted them was not a representative body, and as so constituted the defendant did not have a representative form of government, and for that reason we held that the edicts then adopted could not be invoked to defeat a recovery by the beneficiaries of one who had committed suicide, under a certificate issued prior to the abortive attempt to change the edicts of the society; but we did not hold in either of those cases that the association was not legally transacting business. On the contrary, in the *Lange* case on rehearing, 75 Neb. 199, we said: "It must be conceded that the defendant, by filing its articles of incorporation in compliance with the law in force at the time of its organization, acquired the right to carry on the business for which it was created." Nor did we hold in either of those cases that if the case then under consideration had been based upon a certificate which itself recited that the defendant should not be liable in the event of suicide, and the application upon which the certificate was issued also expressly stipulated that there should be no liability in case of suicide, the defendant would have been liable notwithstanding such stipulations. On the contrary, in the *Briggs* case, p. 841, in the concluding sentence of the opinion we said: "There being nothing in the certificate of membership issued to the assured, or in the edicts and by-laws of the defendant as they existed at the time he was admitted into membership and received his certificate, which exempted the defendant from liability in the event of suicide, we must hold that the judgment of the distric court was right"—and affirmed the judgment which had been entered in favor of the plaintiff.

As we have said, the edicts in force prior to the amendments of 1901 and 1905 were silent on the subject of suicide; and if the certificate issued to Mr. Hewson had also been silent on that subject, then under the authority of the *Lange* and *Briggs* cases the defendant would be liable. But here the benefit certificate itself, as well as the application upon which it was based, both expressly provided that in the event of suicide the defendant should not be liable. The question, therefore, to be decided is, could the

defendant make such a contract with applicants for membership? There is nothing in the statute which forbids the making of such a contract, nor is there anything in the edicts as they existed prior to the amendment of 1901 which forbids it. The contract is a reasonable one—one in the interest of the membership of the association. And if the defendant, in the regular course of its business, concluded that it would not longer continue to assume the risk of suicide, and inserted in the application to be signed by all persons subsequently applying for membership, and in all of its benefit certificates to be subsequently issued, an express agreement that the defendant should not be liable for death by suicide, we are unable to see any just theory upon which it should be held that such a contract is not lawful and entitled to be enforced as made. An applicant for membership knows when he signs his application that that is an important condition of his admission into the society. If he voluntarily signs the application and therein agrees to such condition and accepts the benefit certificate issued thereon and containing the same condition, we must enforce the contract as made. To do otherwise would be to make a new contract for the parties and give to the applicant, for the benefit of his beneficiaries, a contract which the association itself would not have entered into. This we must decline to do. *McCoy v. Northwestern Mutual Relief Ass'n*, 92 Wis. 577, is squarely in point, and cites numerous cases in its support. Taking the certificate and the application together, it is clear that the defendant never in any manner agreed to pay for the death of Mr. Hewson if caused by his own hand. Its only agreement with him, in the event of suicide, was to pay to the beneficiaries named in the certificate the money which, at the time of his death, the decedent had contributed to the fidelity fund of the association. This amount it offered to pay, and its motion at the close of the trial, to direct a verdict for the plaintiffs for that amount, should have been sustained.

The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judg-

ment in favor of the plaintiffs, in accordance with the terms of defendant's motion entered at the close of the former trial.

REVERSED.

MORRISSEY, C. J., not sitting.

ROSE, J., dissents.

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KEARNEY WATER & ELECTRIC POWERS COMPANY, APPELLEE, v. ALFALFA IRRIGATION DISTRICT ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 18,355.

OPINION on motion to modify former judgment herein reported *ante*, p. 139. *Former judgment of affirmance modified.*

SEDGWICK, J.

Within the time allowed for an application for rehearing, a motion was filed by plaintiff to modify the judgment of this court and the decision of the state board, so as to fix the date of the plaintiff's appropriation September 10, 1882, instead of September 1, 1886. Notice of this application was given to all parties interested, with leave to file briefs upon the question if desired. Upon further examination of the record, we are satisfied that an error has been made in this regard. The state board found "that the work of excavating and constructing the canal was begun on the 10th day of September, 1882, * * * and the canal completed as reconstructed by June 1, 1886." Under the law, as at the time existed, the date of the appropriation was the date of the commencement of the work which was afterwards completed and the water thereby applied to a beneficial use. The priority of the plaintiff's appropriation is therefore September 10, 1882, and our former judgment and the order of the state board are modified accordingly.

FORMER JUDGMENT MODIFIED.

## IN RE ESTATE OF WILLIAM W. WILSON.

## STEPHEN E. COZAD, ADMINISTRATOR, ET AL., APPELLANTS, V. CORA M. HIBNER, EXECUTRIX, APPELLEE.

FILED FEBRUARY 26, 1915. No. 18,830.

1. **Executors and Administrators:** ACCOUNTING: INTERLOCUTORY ORDERS. Orders of the probate court adjusting or correcting accounts of an administrator, made while he is acting as such administrator, are interlocutory and not final until his discharge as administrator and final settlement of his accounts upon such discharge.

2. ———: ———: APPEAL: JURISDICTION. Upon appeal to the district court from an order of the county court adjusting or correcting the accounts of an administrator, the district court has jurisdiction of the matters tried in the county court from which the appeal is taken.

3. ———: ———: ———: ———. When objection is made in the county court to certain specified items in the accounts of an administrator and trial is had in that court as to those items only, appeal to the district court from the decision thereon will give the district court jurisdiction only of the matters tried and appealed from.

4. ———: ———: ———: TRIAL BY COURT. Upon a former appeal of these parties it was determined by this court that objections to the report of an administrator should, upon appeal to the district court, be tried by the court, and not by a jury.

5. **County Courts:** JURISDICTION: EQUITY POWERS. The county court has exclusive original jurisdiction of the estate of deceased persons. In exercising that jurisdiction it may incidentally determine equitable questions, but the county court has no general equitable jurisdiction.

6. **Executors and Administrators:** ACCOUNTING: OBJECTIONS. Upon appeal from the county court from an order correcting the accounts of an administrator, a pleading styled a "petition in equity," filed in behalf of the estate, alleging grounds for disallowing items of credit and for additional debits in the administrator's report must be treated as objections to his report.

7. ———: ———: INTEREST. When an administrator in his report to the county court obtains an order allowing him credit for a certain sum of money as paid out by him in behalf of the estate, which sum he has not paid out, but thereafter retains for his

own use for several years, he may properly, in the discretion of the court, be charged with interest on such sum from the time that he obtained possession thereof as his own money and while he so retains it.

8. ———: ———: ———. An administrator is not chargeable with interest on money which he holds as administrator subject to the order of the court, unless he received interest thereon, or the circumstances are such that he might and ought to have received such interest. He cannot be allowed interest on money paid out by him for the estate while he holds a general balance in his hands.

9. ———: ———: ATTORNEY'S FEES. An administrator is not entitled to charge against the estate attorney's fees and other expenses incurred by him in the contest with the heirs of the estate as to his alleged misappropriation of the funds of the estate.

10. ———: ———: COSTS. In such a contest, if there has been litigation between the administrator and the heirs of the estate and final judgment determining the liability for costs thereon, the administrator in his final settlement with the estate should be allowed such costs as are adjudged in his favor in such litigation, but not costs adjudged against him therein.

11. ———: ———: COST OF BOND. An administrator is entitled to credit for the cost of procuring and continuing his bond as administrator furnished by a bonding company under sec. 1500, Rev. St. 1913.

12. ———: ———: APPEAL: DISPOSITION OF CAUSE. When the county court has made a finding and order as to the heirs and the proportion of the estate to which each is entitled, and afterwards there is an appeal to the district court from an order correcting the accounts of the administrator, the district court, after determining the debits and credits of the administrator, should remand the cause to the county court for settlement of subsequent costs and expenses and for final distribution.

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

*Robert Ryan* and *Mockett & Peterson,* for appellants.

*Tibbets, Anderson & Baylor* and *Claude S. Wilson, contra.*

SEDGWICK, J.

William W. Wilson died in 1901, and George E. Hibner was appointed administrator of his estate by the county

court of Lancaster county. In 1906 Hibner filed a report of his doings as administrator, and asked for an order approving his report and for his final discharge. Objections were filed, and on the 26th day of June, 1906, the court made an order upon the report and the objections. In this order the court fixed the compensation of the administrator for all services rendered by him, including services which he had rendered as special administrator, in the sum of $2,000. From this allowance of $2,000 the administrator appealed to the district court, and upon hearing in that court the order was made allowing a larger amount for his services, instead of the $2,000 allowed by the county court. From this judgment of the district court the heirs appealed to this court, and the judgment of the district court was reversed, because of the improper allowance of certain items. *In re Estate of Wilson,* 83 Neb. 252. Upon another trial in the district court $3,500 was allowed the administrator for his services, instead of the $2,000 formerly allowed by the county court, and upon appeal to this court the judgment was affirmed. 86 Neb. 175.

After the mandate of this court affirming that judgment had been filed in the district court, the heirs of Wilson filed in the county court a petition, alleging that in the former report of Mr. Hibner as administrator he had obtained a credit of $4,500, to which he was not entitled, as money paid out by him to one Evans in the settlement of Evans' claim that he was heir to the estate. It was alleged that in fact he had not paid out this amount, but still had it in his hands. It was also alleged that the administrator had a false credit of $23.25 in his report for expenses in relation to that matter. The heirs appear to have treated this as an equitable proceeding to modify the former order of the court upon the administrator's report, and they asked leave to file separate petitions. This leave was granted, and separate petitions were filed by each of the heirs, asking the county court to allow each of them such part of the $4,500 as it was claimed he was entitled to. Upon hearing in the county court, that court found that the allegations of the heirs were true; that the $4,500 ought to be distributed

among the heirs. From this order of the county court the administrator appealed to the district court in January, 1911. In February, 1911, the administrator filed in the county court a supplemental report showing receipts and disbursements for the period subsequent to the order of the county court upon the former report. Objections were filed to this supplemental report, and a hearing was had and an order made thereon, from which an appeal was taken to the district court. In the district court it was ordered that these two matters should be tried together. In the meantime Mr. Hibner died, and Stephen E. Cozad was appointed as administrator in his place. The new administrator filed in the district court a petition styled a petition in equity, setting out substantially the same matters as were alleged in the petitions of the heirs that had been filed in the county court, and alleging some other matters also. Upon trial in the district court, that court found that the reports of Mr. Hibner as administrator were right, and they were approved in all particulars, except in two specified particulars. From this order of the district court both parties have appealed to this court.

The parties in the briefs discuss questions of jurisdiction and innumerable other questions which it will be impossible to review here separately.

It will be observed that the controversy relates entirely to the accounts of the administrator and is between the administrator and the estate. We have observed no final order of the court discharging the administrator, and while he was serving as administrator orders of the court upon his accounts as such administrator were interlocutory only, and not final orders. *Bachelor v. Schmela,* 49 Neb. 37. The county court, therefore, had complete jurisdiction over the accounts of the administrator until his final discharge.

Upon an appeal to the district court that court would have jurisdiction of the matter tried in the county court from which the appeal was taken. In the proceedings begun by the heirs in the county court to modify the report of the administrator of 1906, the application of the heirs was specific and related to only two items of the report,

as above stated. Upon appeal from that order, therefore, the only question presented was as to those two items. When the administrator filed his supplemental report in February, 1911, that report purported to present his doings as administrator and his debits and credits subsequent to the former order of the county court. Objections were made to this report by the heirs, but there was no attempt to review any of the proceedings of the administrator except those contained in the supplemental report. The county court made an order upon the matters set forth in the supplemental report, and an appeal was taken to the district court. This appeal, therefore, would remove to the district court all of the matters involved in the supplemental report and the objections thereto.

It was determined upon the first appeal to this court from the allowance made to the administrator that the matter should have been tried by the court itself, and not by a jury. 83 Neb. 252. Such matters are, in the first instance, determined in the county court without a jury, and if appealed to the district court are to be determined in the same manner. The county court has exclusive original jurisdiction of the estates of deceased persons. In exercising that jurisdiction it may incidentally determine equitable questions, but the county court has no general equitable jurisdiction. An appeal, therefore, from the county court to the district court gives that court no general equitable jurisdiction. This was a proceeding in probate to correct the account of the administrator. The petitions filed and styled petitions in equity should therefore be treated as objections to the account of the administrator.

The administrator had not paid out the $4,500 for which he had been credited. The money was still in his hands, and there was no claim pending against the estate therefor. The district court, therefore, did right in charging his account with that amount. The district court also charged him with interest thereon from the time that he improperly obtained credit in the county court therefor, and this interest was also a proper charge. The court

refused to charge him with interest prior to the time that he obtained the improper credit, and this order was correct, because it does not appear in the record, so far as we have observed, that the administrator received any interest on the money prior to that time or could reasonably have received such interest. Upon the first appeal to this court, above referred to, it was determined that the administrator is entitled to compensation for services rendered the estate, and in a proper case may employ attorneys, but he is not entitled to reimbursements for attorney's fees or other expenditures incurred by him in his individual contest with the estate. The item of $23.25 expense is not, so far as we have observed, shown to have been improperly allowed.

Objection is made to the allowance of various items in the supplemental report filed in the county court in February, 1911. There were items in that report for expenses of continuing his bond as administrator which were paid by the administrator to a bonding company. All of these items were subsequent to the act of 1905, and were proper charges under that act. Rev. St. 1913, sec. 1500. Prior items of a similar nature were adjusted in the order of 1906, and were not included in the objections made to that adjustment. The district court, therefore, had no jurisdiction to review those items.

In the supplemental report of 1911, which was duly appealed from, the court allowed the administrator fees for attorneys employed by him in the contest between himself and the estate as to the settlement of his account and in the various appeals therefrom to the district and this court. Under the former holding of this court in the appeal referred to, these items were improperly allowed. The fees appear to be reasonable and just, but they were incurred by the administrator, not for the benefit of the estate, but in the contest against the estate, and such fees are chargeable to the administrator himself. These fees and costs paid by his attorneys as allowed by the county court amounted to $932.25. There is one item for services

in making first settlement in county court which is not shown to be improperly allowed, amounting to $100. The remainder of these items should be charged to the administrator. The district court allowed the administrator on account of these fees $532.25 and interest thereon, amounting at the date of the decree to $611.72. Interest is not charged against the administrator on his general account, but only on the item of $4,500 from the time that he converted that amount to his own use by improperly taking credit therefor in his report. No interest, therefore, should be allowed him on his credits. There should therefore be charged to his account the further sum of $511.72 on account of the attorney's fees and costs improperly allowed.

The district court also allowed the administrator three items of court costs and expenses in the district court and this court in that litigation, which are objected to by the heirs, as follows: Printing brief $14.50; taking Evans' deposition $16.36; attorney's fees in Evans case $20; and the following items of costs improperly allowed to the attorney of the administrator: Commencement fee district court $5; filing fee 75 cents; transcript for appeal to district court $23.25; filing fee district court second appeal $3.25. The right to these costs was of course adjudicated in those actions themselves, and he should be allowed credit only for those costs that were taxed in his favor. Objection is also made to the allowance of compensation to the administrator for his services during the time covered by the supplemental report, but it was determined upon the appeal referred to that the administrator is entitled to such compensation. The trial court found that there was no such wilful malfeasance on the part of the administrator as would forfeit his rights as administrator, and, so far as we have observed, this finding is supported by the evidence.

It is objected that the district court should have determined all of the rights of the various heirs and the amount to which each is entitled, but we think that in this the trial court did right. The county court in the original order made a finding as to the heirs and the proportion of

the estate to which each is entitled, and that order, so far as we have observed, is not appealed from and is not now seriously questioned. The matter presented to the district court upon appeal was as to the account of the administrator, and the district court, after having settled those items of account, ordered: "That distributions be made in the proportions shown in the court's decrees, except as settlements have been made and advancements made, so as to give to each heir the amount due as may be found by the court after payment of costs. That this decision be certified to the county court for such proceedings as may be necessary in accordance therewith." This was the proper disposition of the matter.

The judgment of the district court is therefore modified, so as to add to the charges against the administrator the amount of attorneys' fees improperly allowed, $511.72, and so as to direct the county court to adjust the court costs specified in this opinion in accordance with the final judgments rendered in the litigation in which those costs were incurred, allowing to the administrator credit for those items only that were taxed in his favor. Interest also will be charged against the administrator's account on the $4,500 to the date of the final order hereon in the county court, and on the whole balance due the estate from the administrator from the entry of such final order until the same is paid to the present administrator. As so modified, the judgment of the district court is affirmed. Each party will be taxed with his own costs in this court.

MODIFIED AND AFFIRMED.

MORRISSEY, C. J., BARNES and HAMER, JJ., not sitting.

EARNEST A. CALLING, APPELLEE, V. ARCHIE S. GILLAND, APPELLANT.

FILED FEBRUARY 26, 1915. No. 18,871.

**County Commissioners:** TERM OF OFFICE. Under the constitutional amendment of 1912 and the statute of 1913 (Rev. St. 1913, sec. 1955), a county commissioner, elected in 1912 in a county not under township organization and having three commissioners, holds his office for a term of four years, beginning in January, 1913, and his successor will hold for the remainder of the four-year term ending January, 1919.

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

*H. D. Rhea* and *F. J. Byrd,* for appellant.

*E. A. Cook* and *W. A. Stewart, contra.*

SEDGWICK, J.

At the general election in the fall of 1912 the plaintiff was elected to the office of county commissioner for the third commissioner's district of the county of Dawson. Dawson county at that time was not under township organization and had three commissioners. Under the law as it then existed one county commissioner was elected each year for the term of three years. *Best v. Moorhead,* 96 Neb. 602; *Saling v. Bahensky,* p. 789 *post.* The term, therefore, for which the plaintiff was elected would expire in January, 1916. The constitutional amendment of 1912 provided for biennial elections (Const. art. XVI, sec. 13), and the legislature of 1913 enacted a general statute for the purpose of harmonizing the statute then existing with the constitutional amendment. It repealed some of the former acts. It provided that, in counties not under township organization having three commissioners, "two commissioners shall be elected in the year 1914 and every fourth year thereafter, and one commissioner shall be elected in the year 1916 and every fourth year thereafter."

Rev. St. 1913, sec. 1955. Construed literally, this provision would have limited the plaintiff's term to two years, ending in January, 1915; that is, his successor would be elected at the general election in 1914; but the constitutional amendment referred to provided "that no office shall be vacated thereby, but the incumbent thereof shall hold over until his successor is duly elected and qualified." It was held in *Best v. Moorhead, supra,* that the statute requiring two commissioners to be elected in 1914 could not apply to an incumbent whose term of office would not expire until January, 1916. The plaintiff therefore is entitled to hold the office until January, 1917, which is two years of the term of his successor, which term expires in January, 1919.

This is the only question presented and discussed in the briefs, and the trial court having held in accordance with the views above expressed, its judgment is

AFFIRMED.

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

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ROBERT SALING, APPELLANT, V. K. D. BAHENSKY, COUNTY CLERK, APPELLEE.

FILED FEBRUARY 26, 1915. No. 18,933.

1. **County Commissioners:** TERM OF OFFICE. Section 55 of the act of 1879 (laws 1879, p. 353), "Concerning counties and county officers," as amended by chapter 46, laws 1905 (Rev. St. 1913, sec. 980), fixes the terms of county commissioners of all counties at four years.
2. **Counties:** OFFICERS: TERM OF OFFICE. Chapter 51, laws 1907, which amends a section of the general election law, provides that laws creating county offices shall control as to the election of county officers, and the provisions in regard to the terms of such officers do not apply when the statute creating the office fixes the term.
3. **Elections:** INJUNCTION: QUÆRE. Whether injunction is the proper remedy in any case to control the action of the county clerk in arranging the general election ballot, quære.

APPEAL from the district court for Howard county: JAMES N. PAUL and JAMES R. HANNA, JUDGES. *Affirmed.*

*W. T. Thompson* and *T. T. Bell,* for appellant.

*Charles G. Ryan, R. R. Horth* and *Charles Dobry, contra.*

*Reese, Reese & Stout* and *Hainer, Craft & Edgerton, amici curiæ.*

SEDGWICK, J.

At the primary election in 1914 the relator and Frank Bowers and William Johnson were nominated as candidates for the office of county commissioner for Howard county. Thereafter the relator began this action in the district court against the respondent, who is county clerk of that county, to restrain him from putting the names of Bowers and Johnson upon the official ballot as candidates for that office. The district court granted a preliminary restraining order and afterwards, upon final hearing, dissolved the restraining order and dismissed the proceedings, and the relator has appealed.

The relator was elected to the office of county commissioner at the general election in the fall of 1911, and contends that his term was for four years and would not expire until January, 1916, and therefore there was no vacancy in that office to be filled at the election of 1914.

1. It is objected that injunction is not an appropriate remedy in such case. Contest of election provided by statute or, when that remedy is not applicable, the writ of *quo warranto* is the proper method of trying the right to public office. If the name of one who has been regularly nominated to an office is kept from the ballot by a restraining order or a temporary injunction, he may be prevented from being a candidate at the election, although it is finally determined in the same case that he was entitled to a place on the ballot. Thus he may, by a preliminary order, without any hearing, be deprived of a right that can never be restored to him. If injunction is the proper remedy,

the decision must finally depend entirely upon the relator's right to the office. If the relator's term has not expired, the election of a successor will not necessarily deprive him of the office. The question can still be tested by *quo warranto* proceedings. In *Best v. Moorhead*, 96 Neb. 602, the relators claimed that their terms as county commissioners had not expired and, as in this case, they sought to restrain the county clerk from placing the names of rival candidates upon the ballot. The only difference between that case and the case at bar, so far as this point is concerned, is that it related to the primary ballot, and in the case at bar the election ballot is in question. They began in time so that the case was disposed of in this court before the primaries were held. The question whether injunction was the proper remedy was not pressed and was not considered. In the case at bar the respondent says in the brief that the contested names were placed on the ballot, and relator was also a candidate at the election, but was defeated. The case is therefore purely academic so far as the form of the ballot and the names appearing thereon are concerned; but there are other cases pending in this court involving the question of the length of terms of county commissioners in counties not under township organization and having three commissioners. In some of them at least the question is being properly contested by *quo warranto* and, as we consider that we are already committed upon the question of the length of these terms in *Best v. Moorhead, supra,* we have concluded to state some additional reasons for that decision.

2. It was suggested in *Best v. Moorhead, supra,* that "the statutes governing this question are conflicting and inconsistent and cannot be literally enforced." The legislature of 1879 enacted two statutes, one entitled "An act to provide a general election law, the procedure relative to contested elections, and the filling of vacancies in office" (laws 1879, p. 240), and the other entitled "Concerning counties and county officers" (laws 1879, p. 353). The act "Concerning counties and county officers" was a comprehensive statute of 154 sections. It provided that the

board of county commissioners shall consist of three persons (section 53), and that, "at the first election held to choose the board of commissioners under this act in any county, the person having the highest number of votes shall continue in office for three years; the next highest two years, and the next highest one year; * * * and each commissioner elected thereafter, in pursuance of the foregoing section, shall hold his office for three years, and until his successor is elected and qualified." Section 55. This section was intended to apply to all counties from the time that the act took effect, and not merely new counties organized after that, as suggested in the brief, since section 11 of the act specifically provides for the first election in new counties. This act was afterwards very frequently amended, for the purpose of providing for five commissioners instead of three in Douglas county and in such other counties as might elect to have that number, and for various other purposes, from the time of its first enactment until the legislature of 1905. In 1905 the legislature attempted to adopt the policy of biennial elections. It enacted a statute specifically for that purpose. Laws 1905, ch. 65. That statute was held to be unconstitutional, as the constitution expressly fixed the terms of many officers to begin in odd-numbered years, and that act undertook to change those same terms to begin on even-numbered years, and for other reasons. The legislature of 1905 (laws 1905, ch. 46) also enacted a statute, entitled "An act to amend sections 54 and 55, of art. I, ch. 18 of the Compiled Statutes," etc. These were sections 54 and 55 of the original act of 1879, "Concerning counties and county officers," as amended. Section 54 had been amended from time to time and finally in 1891 (laws 1891, ch. 21). Section 54 of the original act provided for dividing counties into three districts, and that one commissioner should be elected from each district, and section 55 fixed the terms of office of the commissioners. This section was as follows: "At the first election held to choose the board of commissioners under this act in any county, the person having the highest number of votes shall continue in office for three

years; the next highest two years, and the next highest one year; but if any two or more persons have the same number of votes, their term of office shall be determined by the board of canvassers, and each commissioner elected at the first general election, as herein provided, shall hold his office for three, two or one years, as the case may be, and until his successor is elected and qualified, and each commissioner elected thereafter, in pursuance of the foregoing section, shall hold his office for three years, and until his successor is elected and qualified." It was intended to apply to all counties of the state, and not merely counties thereafter organized. Section 11 of the act provided for the election of commissioners in new counties. Chapter 46, laws 1905, amended said section 55. The only change made was to make the term of office four years instead of three. It amended a section of the act "Concerning counties and county officers," and the manifest intention was to make the term four years in all counties of the state. The general election law provided that the provisions of an act creating an office should control as to the election of such officers and their terms of office. It was held in *Best v. Moorhead, supra,* that this amendment of the act concerning counties and county officers had the effect to fix the terms of county commissioners in all counties of the state.

The general election law of 1879 (laws 1879, p. 240) named the officers to be elected, state, district, county, township and precinct, and generally stated incidentally the term of office. Section 7, after providing for the election of various officers of counties not under township organization, contained these words: "And one county commissioner shall be elected annually who shall serve three years." This was all that was said in the act in regard to county commissioners and their terms of office. The act concerning counties and county offices created the office of county commissioner, and provided at large the duties of that office and the time and manner of the election. If there is a conflict between the general election law and the law concerning counties and county officers as to the

election of county commissioners the latter act would of course control, under the provision of the general election law above quoted, even if it would not control without such provision. A statute was enacted in 1907 (laws 1907, ch. 51) which purports to amend section 7 of the general election law and still retains the words: "One county commissioner shall be elected annually who shall serve three years"—which is the only reference to county commissioners, and it also contains the provision that county officers "created by statute or that may be hereinafter created shall be elected at such general election as may be provided in the law creating the office or offices." It repeals the former section 7 of the general election law, but does not repeal nor mention the act in relation to counties and county officers. The act was enacted after the general election law of 1905 was declared unconstitutional, and was intended to take the place of that statute, and did not intend nor purport to repeal or amend the act relating to counties and county officers, but expressly provided that that act should control as to the election of such officers. The statute of 1905, as we have already seen, makes the term of county commissioners four years, and in *Best v. Moorhead, supra,* it was held to be constitutional and valid for that purpose.

The relator's term of office was four years, beginning in January, 1912. Without determining whether the process of injunction may be used under any circumstances to control the action of the county clerk in making up the official ballot, we cannot find that there was any abuse of discretion in dismissing the action under the peculiar circumstances in this case.

AFFIRMED.

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

KATHERINE FERBER, APPELLANT, V. FRANK LEISE ET AL., APPELLEES.

FILED FEBRUARY 26, 1915. No. 17,836.

1. New Trial: RELIEF IN EQUITY. A court of equity will grant a new trial in a proper case where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript of the testimony in time.
2. ———: ———: PETITION. The allegations of the petition set forth in the opinion *held* to state a cause of action in equity for a new trial in order to preserve the right of appeal to this court. *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100.

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

*R. J. Millard, J. F. Boyd, C. A. Kingsbury, Edward E. Baron* and *Harding & Oliver,* for appellant.

*Wilbur F. Bryant, B. Ready* and *Flansburg & Flansburg, contra.*

HAMER, J.

This case was brought for the purpose of obtaining a new trial in a case of the same title, where the petition of the plaintiff was dismissed. The defendant objected to the introduction of any evidence upon the ground that the petition did not state facts sufficient to constitute a cause of action. The court sustained the objection, dismissed the case, and the plaintiff has appealed. The question therefore is solely one of sufficiency of the petition, which the objection admits to be true.

The petition alleged, in substance, that on November 13, 1911, there was tried in the district court for Cedar county, Nebraska, an action wherein the plaintiff herein was the plaintiff and the defendants herein were the defendants; that on said day the evidence was taken, the arguments of counsel made, the cause submitted to the court and taken under advisement to be decided at a future day

of said term; that at the time the case was submitted on November 13, 1911, counsel for plaintiff stated in open court, in the presence and hearing of the judge of the district court who was then presiding, that they could not be present at the time said case would come up for final decision, and requested the court, in case the decision was against the plaintiff, to fix the amount of the supersedeas bond, and to give the plaintiff 40 days in which to prepare and submit a bill of exceptions to opposing counsel, and that this request was granted, the said judge stating that he would comply with it; that on November 14, the day after said case was submitted, it came up for final hearing in the absence of the plaintiff and her counsel, the court announcing its decision finding for the defendants and dismissing plaintiff's cause of action, and fixing the supersedeas bond in the sum of $200, but failed to allow 40 days to prepare and submit to defendants a bill of exceptions, as requested and agreed upon; that R. J. Millard, assistant counsel for plaintiff, applied to the official reporter for a transcript of the evidence, but the reporter was not able to prepare and furnish the same within 15 days from the adjournment *sine die* of the said November term of said court, and failed to do so; that said term of said court was adjourned *sine die* November 17, 1911; that the plaintiff had relied upon being able to obtain a transcript of said evidence from the reporter, and had not taken the same in writing; that it was impossible to take the same in longhand at the time of the trial, and the reporter was furnished under the law to take said evidence in shorthand; that the failure to prepare said bill of exceptions was due solely to the inability of the reporter, and not to the negligence of her attorneys; that within the time allowed by law the plaintiff gave supersedeas bond in the sum of $200, which was duly approved; that on December 20, 1911, the official reporter had prepared and delivered to said R. J. Millard a transcript of the evidence in said case, and on said day said Millard served the same on defendants through one of their attorneys, who, on December 29, 1911, returned the same with the objection indorsed

thereon that it was not presented within the time required by law; that on December 29, 1911, the bill of exceptions was presented to the trial judge by the plaintiff, and on January 5, 1912, plaintiff filed with said judge a motion, supported by affidavit, asking for extension of the 40 days from the expiration of the 15 days after the adjournment of the court *sine die,* being the time fixed by law for serving a bill of exceptions, and that said judge denied the motion and disallowed said bill; that within 40 days of the time the court adjourned *sine die* the bill of exceptions had been prepared and presented to opposing counsel by the plaintiff, and because of the neglect or refusal of the said judge of the district court to give the said 40 days, as he had announced that he would do, the plaintiff was denied the opportunity of perfecting her bill of exceptions.

From this statement of the facts it is evident that the plaintiff was misled by the statements of the court and lulled into the belief that the time to prepare the bill of exceptions would be extended. It is a matter of common knowledge that this 40 days extension is made, as a matter of course, in perhaps the majority of the cases tried in the district courts of this state. On account of the failure to enter this order the next day as alleged, and the further inability of the court reporter to furnish the stenographic report of the testimony within the 15 days allowed by statute, the plaintiff was deprived of the right of review in this court guaranteed to her by the constitution. In *Holland v. Chicago, B. & Q. R. Co.,* 52 Neb. 100, it is held that a litigant should not be deprived of the right to have his case heard in the court of last resort on account of the inability of the official stenographer to furnish him with a copy of the testimony, and that if the person desiring the transcript is without fault, and in consequence of this inability a bill of exceptions cannot be had, a court of equity in a proper case will grant a new trial. It appeared in that case that the reporter had lost a part of his stenographic notes and was therefore unable to furnish a transcript. The petition therein contained the averments that, in a case wherein the appellant had been plaintiff and the

appellee defendant, there had been a judgment adverse to defendant; that within the 40 days allowed by the court for settling a bill of exceptions the plaintiff applied to the stenographic reporter of the court for a transcript of the evidence; that the reporter was unable to furnish it on account of having lost a part of his notes; that the failure to prepare the bill was due solely to the loss of said notes; and that plaintiff, by reason of the inability to procure a bill of exceptions, was unable to secure a review of his case in the supreme court. The district court dismissed the petition, but the judgment was reversed and the cause remanded by this court. Similar holdings were made in *Curran v. Wilcox,* 10 Neb. 449; *Richards v. State,* 22 Neb. 145; *State v. Gaslin,* 32 Neb. 291; *Mathews v. Mulford,* 53 Neb. 252; *Zweibel v. Caldwell,* 72 Neb. 47, 53. In the first opinion in the *Zweibel* case it was stated that, in the absence of any showing of error upon the trial, "the loss, without fault, of one's constitutional right of review would seem sufficient to warrant a new trial, and that prejudice will be presumed." A motion for rehearing was filed. The motion was overruled, and the court adhered to the former judgment, but an opinion was written, which held: "It must appear that there was a genuine controversy in the law action, and that in the trial thereof matters were determined adversely to the party complaining to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault." None of the former cases are mentioned or overruled either in the opinion or in the syllabus. This being so, counsel for plaintiff was justified in relying upon the doctrine of the cases cited, and in filing a petition substantially in conformity with the petitions in cases where the relief had been granted. The original case was tried in the district court without a jury, and is said in the briefs to be an action in equity in which a motion for a new trial is not essential to a review.

It is claimed that it must be alleged and shown that there was error in the court below in favor of the party

who seeks relief. It is enough that he has been denied his constitutional right of review of the proceedings. It is not a case alone where he has been beaten in a meritorious controversy alleged and proved. It is just a case where he has been denied the right to review the proceedings of the court below.

Section 24, art. I of the constitution of the state, reads: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." It will be seen that this section says "all civil cases." It does not say all meritorious cases, but all civil cases. This means that none is to be excluded. If the power was forbidden to be exercised except in those cases where errors are alleged and proved, or when merit must first be shown, then the appellate court might consider the case before it was properly reached, and so not have an opportunity to consider it as it ought to be considered; or it might refuse to consider it at all. In any event, the people, by the adoption of this provision of the constitution, have said to the supreme court, you must not deny "the right to be heard," and this right applies to *all civil cases.*

It is apparent from the petition that the plaintiff was not at fault, and that her failure to present the bill of exceptions within the time limited was due wholly to the inability of the official stenographic reporter to prepare the transcript of the evidence.

The petition states a cause of action, and the judgment of the district court is

REVERSED.

MORRISSEY, C. J., not sitting.

ROSE, J., dissenting.

Under the technical rules of law announced by the majority, cases long since fairly tried and correctly determined may now be reopened and tried over again. A plaintiff whose suit was properly dismissed and whose petition stated no cause of action may have a new trial granted at a subsequent term of court without alleging that he was injured or prejudiced by the dismissal. Parties with real

controversies may be delayed by a litigious person having no grievance to redress in court, though his lawsuit was fully and fairly tried and decided without error. The dispatch of judicial business and the proper procedure in courts of justice will be disturbed by the decision announced by the majority. A plaintiff may obtain more by negligence in failing to assert his rights in court than by making a timely demand for statutory relief. Alleged oral remarks of a judge in advance of a decision may have a greater import in determining rights than a solemn judgment when recorded in the journal of the court. These are unavoidable deductions from the decision of the majority.

The majority, in sustaining the petition herein, authorize a new trial in an independent suit at a subsequent term of court without requiring plaintiff to allege that her dismissed petition in the original case stated a cause of action. The petition for a new trial does not contain an allegation showing that the court committed an error, or that plaintiff was prejudiced by the decision. It does show, however, that plaintiff could have conferred appellate jurisdiction on the supreme court by filing in the office of the clerk a transcript of the judgment without a bill of exceptions. Did the trial court refuse to perform any duty enjoined upon him by law in connection with the bill of exceptions? If so, upon a proper application to the appellate court, either in the appeal or in an original action for a writ of mandamus, the performance of that duty would have been coerced. By the assertion of legal rights a resort to equity for relief could have been avoided. The first rule of law announced by the majority to justify a new trial is stated in the syllabus as follows: "A court of equity will grant a new trial in a proper case where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript of the testimony in time."

The petition for a new trial shows on its face that plaintiff was not deprived of a bill of exceptions "by reason of the inability of the stenographic reporter to furnish a tran-

script of the testimony in time." The statutory time, had it been properly extended, was ample. Within that time the reporter, in fact, extended his notes. The petition shows that plaintiff understood an extension of time was necessary, because she orally asked for it in advance of a decision, and relied on an oral announcement from the bench, ignoring the public journal, which disclosed the truth. The petition for a new trial shows on its face that plaintiff was deprived of a bill of exceptions through failure of the trial judge to conform to an oral announcement of his purpose to allow plaintiff 40 days for the preparation of a bill of exceptions, in the event of a dismissal, and through failure of her counsel to discover the omission and to procure such an order within the statutory period. Under the facts pleaded in the petition for a new trial, it was the duty of plaintiff to ascertain from the journal that the trial judge had forgotten to grant an extension of time, to remind him of that fact, and to procure the necessary order. This negligence on the part of plaintiff was not an "unavoidable casualty," within the meaning of that term as used in the statute enumerating the grounds for setting aside a judgment after expiration of the term at which it was rendered. Code, sec. 602 (Rev. St. 1913, sec. 8207). Had plaintiff procured a bill of exceptions and prosecuted her appeal to the supreme court within the time allowed by law, a new trial would not have been granted, unless the petition stated a cause of action and the record disclosed a prejudicial error. After expiration of the term at which the judgment was rendered, the majority, by sustaining the petition in equity, have authorized a new trial, for what, in reality, is plaintiff's negligence, without knowing that a cause of action was stated in the original petition, and without a showing that there was error in the proceedings. Under the rules announced by the majority, therefore, plaintiff may obtain more by negligence than by a proper and timely assertion of legal rights. The constitutional right of appeal was never intended to make a farce of appellate procedure or of equity jurisdiction by reopen-

ing litigation settled by a fair trial and a proper judgment. The law, after a full hearing, was once declared by a unanimous court to be different from the decision in the present case. In *Zweibel v. Caldwell,* 72 Neb. 53, it was said:

"In an action in equity to obtain a new trial of an action at law on the ground that the party complaining has been deprived of the right to have his case reviewed in the supreme court, it must appear that there was a genuine controversy in the law action, and that in the trial thereof matters were determined adversely to the party complaining to the prejudice of his interests, and that he was by fraud or accident deprived of his constitutional right to be heard thereon in the court of last resort, and that he was himself without fault."

I am unwilling to depart from this wholesome doctrine, and therefore dissent from the opinion and judgment of the majority.

SEDGWICK, J., concurs in above dissent.

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WILLIAM I. TOOP ET AL., APPELLEES AND CROSS-APPELLANTS, V. FRANK PALMER ET AL., APPELLANTS AND CROSS-APPELLEES.

FILED FEBRUARY 26, 1915. No. 17,852.

**Vendor and Purchaser:** FRAUD: RIGHT TO RELIEF. Plaintiffs, citizens of this country and residents of sister states, were sole heirs of the owner of a farm, in Butler county, who died intestate and without issue. There were living nonresident aliens of the same degree of kinship to the decedent as plaintiffs. Plaintiffs had not been advised as to their legal rights, and supposed that their alien kinsmen were joint heirs with them to the said farm, in the proportions of one-third to them and two-thirds to such aliens. Defendant Palmer, acting for himself and for those who subsequently formed the defendant land company, with full knowledge of the mistaken belief under which plaintiffs were laboring, induced them to sell the land to him for a sum based upon the valuation of a one-third interest therein. He at the time did not inform plaintiffs of their mistake, but added to their belief that

they only owned a one-third interest by representing to them that he intended to purchase the other two-thirds interest from the alien heirs. *Held* a fraudulent transaction from which plaintiffs are entitled to be relieved, as against the defendant Palmer and all others acting in concert with him in said fraudulent transaction, or who subsequently obtained any title or interest in the land, directly or indirectly, with knowledge of his fraud.

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

*R. S. Norval, L. S. Hastings* and *E. A. Coufal,* for appellants.

*Hall & Bishop, R. C. Roper* and *C. M. Skiles, contra.*

HAMER, J.

The defendants, Frank Palmer and the Ulysses Land Company, appeal from the judgment of the district court for Butler county. John Toop, who was born in England, located in Butler county, Nebraska, during the year 1884. He continued to reside in that county until July 28, 1897, when he died intestate, seized in fee of 160 acres of land in that county near Ulysses, and being the premises in controversy. He left surviving him Sarah A. Toop, his widow, who resided with him upon the premises, and the following next of kin, to wit: The children of Betsey Orchard, who was a deceased sister; and the children of William Toop, who was a deceased brother, all of whom were English citizens and residents of England, and shall hereafter be referred to as such English kin; Emily Tremlin, of Pinconning, Michigan, and Sarah Jane Dyer, of Kane county, Illinois, being the children of Mary Ann Plowman, a sister of Mr. Toop; and William I. and Jesse Toop and Florence Behrend, all of Auburn, Iowa, who were the grandchildren of Mrs. Plowman, the surviving issue of William Toop, a deceased son of Mary Ann Plowman.

Unless the English kin inherit, the sole heirs at law of John Toop at his death, aside from his widow, were Mrs. Tremlin and Mrs. Dyer. The English kin were related to John Toop in the same degree as were Mrs. Tremlin and

Mrs. Dyer. Whether or not they inherit depends upon the efficiency of our statute barring aliens from inheriting, which is now in litigation in the supreme court of the United States in an action pending between the English kin and the defendants in this action. When John Toop died in 1897, he left a widow, who died in 1907. He left as next of kin children of a brother and sister, who were nonresident aliens, being citizens of England, above referred to, and he also left the children of a sister, the latter being residents and citizens of the United States, residing in Iowa, Illinois, and Michigan. It is claimed by the appellees that it is conceded, under section 10874, Ann. St. 1911, that nonresident alien heirs could not, and did not, inherit farm lands, and that no treaty was then in force abrogating the statute. It is therefore claimed by the appellees that it is conceded that the children of the deceased sister who reside in the United States, and were citizens of the United States, took the whole of the farm lands of which John Toop died seized, being a quarter section of farm land near Ulysses, valued at $20,000. There is also some town property, which is not in issue in this suit.

Soon after the death of Sarah A. Toop, the widow of John Toop, Frank Palmer, the principal defendant, talked to his brother Alfred R. Palmer, Reed Rihard, H. L. Pence and H. C. Withers about buying land. This talk was in the flouring mill at Ulysses, being the place where Pence worked, and where it is claimed these parties then met to talk over their business ventures. It is claimed by the appellees that Frank Palmer, before the meeting at the mill, had advised with two different attorneys as to whether the English heirs could inherit, and that he stated at the meeting that he had been advised that the English heirs did not inherit. It is also claimed by the appellees that those present at the meeting had good reason to believe that the American heirs did not know of the statute barring the English kin from inheriting, and were of the belief that the foreign kin took two-thirds of the estate.

It is further claimed by the appellees that, four or five days after the meeting at the mill, Palmer went to Iowa and Michigan to buy out the American heirs. The American heirs believing that they took but one-third of the estate, and being assured by Frank Palmer that such was the fact, and that he expected to buy out the English heirs, were quieted by these assurances, and, being ignorant of the real value of the farm, quitclaimed their interest in it to Palmer for a total sum of $5,000. At the time they did this, it is claimed by the appellees that these American heirs believed that they were selling and conveying one-third interest in the farm only, and that the English kin were entitled to the other two-thirds, which Palmer had stated to them he intended to buy.

On January 8, 1906, prior to this suit, Sarah Jane Dyer had conveyed to William I. Toop what they then both believed to be a one-third interest, but what was, in fact, as it is claimed by the appellees, a one-half interest. Before the commencement of this suit an amicable adjustment of their mistake was arranged between them to the satisfaction of both parties. For the purpose of this suit it is claimed by the appellees that William I. Toop has succeeded to all the rights and interests of Sarah Jane Dyer, and the latter does not ask for any relief in this suit. The only owners of the land, therefore, at the commencement of this suit, were William I. Toop and Mrs. Tremlin, who owned a half interest each; the other plaintiffs, as it is claimed by appellees, probably not inheriting under the construction of our statutes.

When Frank Palmer returned from Iowa and Michigan with his quitclaim deeds, he immediately placed them on record, and then claimed to be sole owner of the quarter section, which, it is claimed by appellees, is of the value of $16,000 to $20,000, and for which he had only paid $5,000. It is said that he then called together the same parties who had met at the mill and planned his trip, "the mill conspirators," and suggested the organization of the Ulysses Land Company, to play the role of "innocent purchasers." It is claimed by the appellees that Palmer then became presi-

dent and manager of this Ulysses Land Company, the chief purpose of which, if not the only purpose, being to hold the title as an "innocent purchaser." Palmer then conveyed to this company. It is further claimed by the appellees that, with the view to further cover up the property, the company borrowed $6,000 of the Northwestern Mutual Life Insurance Company, although, as it is claimed by the appellees, the evidence shows that this land company had no use for the money. It is then said by the appellees that Pence moved to Kentucky, being first paid $1,000 for his interest in the spoils of the conspirators, although he had not put a dollar into the deal.

When the American heirs learned that the English heirs did not inherit, they brought suit to cancel their deeds to Palmer on the ground of fraud and conspiracy, misrepresentation, and mistakes of fact, and tendered back to defendants the $5,000 paid them by Palmer.

The district court found for the plaintiffs, setting aside the deeds and decreeing that the $5,000 tendered should be applied on the $6,000 mortgage of the Northwestern Mutual Life Insurance Company, but allowing the defendants to retain the $1,000 remainder of the loan. The defendants appeal generally, and the plaintiffs appeal from that part of the decree allowing the defendants to retain the $1,000 mentioned.

It is claimed by the appellees that Frank Palmer, who personally procured the deeds above mentioned, was the principal participant in a series of fraudulent acts. Some of the matters charged against Mr. Palmer do not appear to have any connection with this case, and as to these matters we will not take any time or expend any labor; we will consider those matters only which appear to be connected with this transaction. It is charged that his brother, Alfred R. Palmer, his wife, Lillian Palmer, Reed Rihard, his business partner, and H. C. Withers and H. L. Pence, his two intimate friends, were engaged with him in the organization of the Ulysses Land Company. The answer denied all of the alleged fraudulent acts upon the part of Palmer and his associates. Palmer testified that he

never told any of the persons associated with him in the deal what he paid for the land, nor "anything about how he got the deeds," not even his wife.

Mr. Pence testified that they met at the mill about four days before Palmer went to Iowa and got the quitclaim deeds which the court below canceled and set aside. The witness further testified that at this meeting "Frank Palmer said he knew of land that he thought would be for sale soon, known as the Toop estate." The understanding of the American heirs seems to have been that two-thirds would go to the English heirs and one-third to the American heirs. The American heirs were the sole and only heirs who did inherit. Palmer stated in a conversation with Mr. McGovan that he felt pretty safe because he had the opinion of the two lawyers, naming them, that the English heirs did not inherit. The scheme to get the deeds appears to have been a joint affair, although Palmer was more active in the transaction than any one else. Mr. Pence admitted that Mr. Palmer paid him $1,000 for his share of the profits in the transaction. This fact was also stated by Mr. Palmer to S. E. Robey. Whatever Pence got out of the deal, whether it was $1,000 or $775, or any other sum, he was in any event well paid, because he did not invest a cent. Mr. Pence claims that the organization of the company was suggested by Mr. Palmer after he got back from buying the land and when he "got the deeds for it in his name." The parties who organized the company seem to have all participated in the transaction.

It is claimed on behalf of the appellees that there is no evidence in the record showing that Palmer sought to relieve the American heirs of their belief that the English heirs took two-thirds of the estate. As a matter of fact, William I. Toop was the owner of one-half of the estate. Mr. Toop believed that the English heirs had a two-thirds interest in the estate. He told Palmer at the bank before the contract was signed for his share that he (Toop) in 1906, while the widow was still living, had tried to buy out the English heirs, but had failed. Mr. Palmer then

remarked "that he wanted to buy them out if he could buy them right."

The evidence shows that Palmer undertook to establish in the minds of the American heirs, who actually inherited the property, the idea that their interest was a comparatively small interest, because of the fact that the English kin were also heirs and that they held two-thirds of the estate. An examination of the testimony shows that this idea was continually kept before the heirs that Mr. Palmer met. Palmer knew that there were no English heirs; that, while they were English kin, they were not heirs, and could not inherit the property; and that, by reason of that fact, the interest of the American heirs was very much increased. He successfully practiced this deception. He knew that the representations that he was making to Toop and the other heirs were fraudulent, and he made these representations apparently with the intent to deceive and obtain this property for little or nothing. The evidence also shows that the Ulysses Land Company was organized in furtherance of the scheme to defraud the plaintiffs. This is one of the cases where the facts cannot be dwelt upon without saying things that seem to be harsh.

The knowledge which the defendants had of the actual condition of the title and ownership of the land they kept to themselves, and they thereby deceived and misled the plaintiffs as to material facts within their knowledge, when common honesty required a truthful statement. To deny the plaintiffs relief would be to shield and encourage fraud. We are unable to find any reason for setting aside the judgment of the district court. We think it is right, and it is

AFFIRMED.

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

JOHN MOLL, APPELLANT, V. ADOLPH HAGERBAUMER ET AL., APPELLEES.

FILED FEBRUARY 26, 1915. No. 17,938.

**Easements:** PRESCRIPTIVE TITLE. Where the use of a "way" is permissive, and the access to it is through a gate, which is kept locked and under the control of a third party, there is no such adverse right as may become the foundation of a title obtained by prescription.

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

*C. E. Abbott,* for appellant.

*F. W. Button, contra.*

HAMER, J.

The plaintiff, John Moll, appeals from a decree of the district court for Dodge county, Nebraska. He brought the suit to enjoin the defendants, Adolph Hagerbaumer and Charlotte Hagerbaumer, his wife, from maintaining fences interfering with the use by the plaintiff of what he claimed as a private way and easement. The plaintiff claimed to have owned for more than 40 years the right of ingress to a certain tract of land owned by him, and to reach which it was necessary to travel across the defendants' land. The plaintiff filed his petition June 19, 1911. He claimed that for more than 40 years he had, by himself and through his grantor, owned in fee simple and been in possession of the east half of the northeast quarter of the northeast quarter of section 25, township 19, range 8, Dodge county, Nebraska, together with a private way and easement eight feet wide extending from the north line of said land northerly across the east half of section 24, township 9, range 8, and connecting with the public road in the south one-half of the northwest quarter of section 19, township 19, range 9, all in Dodge county, Nebraska. He alleged title by mesne conveyances, and also by adverse

possession, of both the land and said "way" for more than 40 years. He also alleged that for more than 40 years immediately preceding the filing of his petition the said private "way" had been the only means of ingress to and egress from the said small tract of land above described as belonging to him.

The land belonging to the plaintiff is a small tract. It appears that there were a number of small tracts of land, containing usually about ten acres, which joined the Hagerbaumer land. When the Hagerbaumer land was fenced, these parties who owned the small tracts were obliged to cross the Hagerbaumer land in order to reach the little tracts which they owned. These tracts appear to have been ten-acre tracts. In order to go to the land, the gate which opened into the Hagerbaumer land off the road would have to be opened. This gate was kept closed, and before the gate could be opened it would be necessary to get the key. This key was kept at the Hagerbaumer residence, and Moll and the others would go to the Hagerbaumer residence and get the key and open the gate, and then go to the small tract of land owned and used by them. Hagerbaumer himself owned one of these little tracts of land. Although Moll had to go to Hagerbaumer's house to get the key to open the gate, and then had to drive across Hagerbaumer's land, he claimed that he had a right to this private way.

The question presented is whether the "way" was owned by the plaintiff by prescription. He does not seem to have purchased it. He had to get the key which opened the gate into the Hagerbaumer tract from Hagerbaumer's house. It is shown apparently that the right to the private road or way was permissive. If the defendant controlled it by reason of a gate which he kept closed, and which the plaintiff could only open when he got permission from the defendant, the right to travel the "way" was permissive only. Wolcott, Geisler and Peters testified that the right to go over this "way" to the plaintiff's timber land was permissive. It seems that the other owners recognized this right to their timber land as permissive. These

tracts ran across the Hagerbaumer land and cut it up. They seem to have injured the pasture. If access to these private roads was through the Hagerbaumer gate, which Hagerbaumer kept locked, then there was no right of entrance until Hagerbaumer concluded to give these parties the key. Can an adverse right be founded upon permission of this sort? If the beginning was permissive and the "way" a mere license, then it could not ripen into a prescriptive right, however long it might be continued. *Bone v. James,* 82 Neb. 442; 14 Cyc., 1150. A prescriptive right will not commence to run until some act or fact exists giving the party, against whom it is claimed, a cause of action. *Roe v. Howard County,* 75 Neb. 448, 5 L. R. A. n. s. 831; *McCutchen v. McCutchen,* 77 S. Car. 129, 12 L. R. A. n. s. 1140.

In this case the "way" began permissively. Thereafter there was interruption all the time. The gate was a perpetual notice that the way was permissive. The witnesses all testified that the owner held the key. The fact that there was a gate which permitted egress from the "way" and ingress to it must rebut any claim, of adverse user. *Warth v. Baldwin,* 84 S. W. (Ky.) 1148; *Ingraham v. Hough,* 1 Jones' Law (N. Car.) 39; *Luecken v. Wuest,* 31 Ill. App. 506.

To establish a private right of way by prescription, the line of the traveled road must be definite. The practice of passing over land in different directions, however long continued, does not establish a right of way by prescription. 14 Cyc. 1156; *Smith v. Nofsinger,* 86 Neb. 834. The rule that a definite traveled road is necessary to a prescriptive right is a wholesome one. If it were not so, a man's land might be confiscated for roads.

The plaintiff's rights are no greater than the other owners of timber lands. If the plaintiff has a prescriptive right across the pasture, then so have the others, and, as a result, Hagerbaumer's land is confiscated for private roads. In any event we think the plaintiff was a mere licensee.

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

AFFIRMED.

CHARLES J. DEUPREE, APPELLEE, V. SIDNEY D. THORNTON, JR., ET AL., APPELLANTS.

FILED FEBRUARY 26, 1915. No. 17,942.

**Conspiracy: DAMAGES.** A mere tacit understanding between conspirators to work to a common unlawful purpose is all that is essential to a guilty combination. Damages caused thereby may be recovered by the party injured.

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

*S. D. Thornton* and *M. F. Harrington,* for appellants.

*H. C. Vail* and *E. D. Kilbourn, contra.*

HAMER, J.

This is an appeal from the judgment of the district court for Antelope county. The case was tried before Judge Welch and a jury. The verdict was for $3,000, and judgment was rendered upon it, and a motion for a new trial overruled. The plaintiff was a married man living with his wife and daughter in a little hotel in the village of Orchard, in Antelope county. His business was conducting this hotel. He did it by serving meals and lodging to his customers and to the public in the ordinary course of hotel business. The defendants are charged with conspiring together to destroy the plaintiff's business as a hotel keeper by charging that his hotel was a house of ill fame resorted to for purposes of prostitution. The defendant Thornton, Jr., was a banker; Lindquist and Goldsmith were merchants; Fletcher was a lumber dealer; and Hicks was engaged in the livery business. Thornton was chairman of the village board; Lindquist, Goldsmith, and Fletcher, and one Archie D. Joyce, who is not a party to the case, were members of the village board. Hicks was the village marshal. It is charged that they made a wicked contrivance, being in substance as follows: "Mr. Deu-

pree: Notice is hereby given that we, the undersigned town board and citizens of Orchard, have absolute evidence that you are keeping a house of ill fame, and that you are hereby notified to leave town in ten days." This was signed by Lindquist, Thornton, Goldsmith, Archie D. Joyce and John Thomas Fletcher. It is claimed that the defendants induced the plaintiff's customers to leave the hotel. There is testimony in the record tending to show that Hicks would meet commercial travelers and others who were on their way to the hotel, and that he would inform them that the hotel was a house of prostitution, and in this manner he would prevent people from going to the hotel, The evidence tends to show that the plaintiff ran the hotel from October, 1907, to October, 1909; that during October, November and December of 1907 the plaintiff made about $500 a month profit by reason of his hotel business. Toward the latter part of the two years he was unable to make expenses, and finally had to quit, and became a carpenter in another village.

The plaintiff testified that the defendant Fletcher told him that a petition was being circulated against the hotel; that there was a notice directed to the plaintiff telling him that the town board and citizens of the village of Orchard had absolute proof that he was keeping a house of ill fame, and that the notice directed the plaintiff to quit town within ten days, and that the same was signed by the defendants. This appears to have been in June, 1908. Lindquist told him that he had signed the petition, and that it was in circulation, and Goldsmith told him that he had signed the petition and of circulating the same, and said that the town board and other citizens had signed the petition. There is testimony tending to show that Hicks would meet the trains when they came in, and would tell the traveling men that the plaintiff's house was not a decent house, that it was not a fit place for a man to stop, and that nobody stopped there. He also characterized the house as a house of prostitution, using a defamatory and vulgar term in characterizing it. Alonzo Andrews testified that Hicks presented the petition to him in the bar-

ber shop, and told him that the plaintiff was running a house of ill fame. Andrews saw a number of names on the paper. The defendant Goldsmith admitted that he signed the petition in May or June, 1908. Bert Johnson testified that he heard there was a petition in circulation. Tom Drayton admitted that he knew the petition was being circulated. Herman Brewster was seen by Hicks in the barber shop. Hicks wanted to know of him if he wanted that sort of a house kept in town, using a very offensive term. Thornton admitted that he signed the paper, but claimed that he did not know what it was. He said he did not remember whether it was Lindquist or Hicks or John Thomas Fletcher who brought the paper to him. Thornton testified that the defendants and others were talking about the hotel and said that Deupree should be run out of town. After that they met in Bone & Fletcher's office. Goldsmith admitted signing the paper, and Fletcher admitted it, and also admitted that he talked the matter over with the other defendants. Several witnesses testified that the hotel had a good reputation until after this petition was circulated. There was some testimony to the effect that two or more of the girls did not have a very good reputation, but the plaintiff's wife testified that she discharged them. There was some testimony tending to show that the plaintiff knew of specific cases where a disreputable woman had been brought to his house. The plaintiff denied the truth of this testimony.

In *Farley v. Peebles,* 50 Neb. 723, it is held: "A conspiracy, like other facts, may be proved by circumstantial evidence, and one means of proof is by showing overt acts of the individuals charged with conspiring. From the fact that different persons at different times by their acts pursue the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object."

A person has a right, under the law, as between himself and other persons, to pursue his calling or business without interference or obstruction from others, and an in-

fringement of this right by others is an illegal act. *Van Horn v. Van Horn,* 52 N. J. Law, 284, 10 L. R. A. 184.

An agreement among the merchants of a town or village not to buy any goods of drummers who boarded at a certain hotel, the owner of which has incurred the displeasure of members of the combination, is an unlawful conspiracy, and, when put into execution to the injury of the owner of the hotel, he is entitled to recover damages. *Webb v. Drake,* 52 La. Ann. 290, 26 So. 791.

Where the gist of the action is injury done to plaintiff's business, it is proper to show the extent and character of the business and its volume, both before and after the publication of the libelous article. *Bee Publishing Co. v. World Publishing Co.,* 59 Neb. 713.

The evidence shows that Thornton, Goldsmith, Lindquist and Fletcher signed the petition and Hicks circulated it. Whatever the purpose of the defendants may have been, they seem to have succeeded in destroying the business of the plaintiff.

A mere tacit understanding between conspirators to work to a common purpose is all that is essential to a guilty, actionable combination. *Patnode v. Westenhaver,* 114 Wis. 460.

As to the extent of the damages, we will quote from the case of *Thomas v. Shea,* 90 Neb. 823: "The entire publication was a vicious assault upon plaintiff in his profession of attorney at law. It strikes at his means of livelihood. If the accusations are true, he is unfit to be county attorney or to act professionally for an honest client. Those who believe the charges will not employ him, if they want honest service. * * * In determining compensatory damages in such a case, no method of exact computation can be devised, and the amount of recovery must generally be left to the sound discretion of the jury. Having asserted on appeal that the recovery is excessive, it is incumbent on defendant to establish the error."

There is a conflict of evidence. It has been determined against the defendants. We see no error which justifies a

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

AFFIRMED.

MORRISSEY, C. J., not sitting.

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JOHN F. STOUT, APPELLEE, V. OMAHA, LINCOLN & BEATRICE RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 26, 1915. No. 17,945.

**Action: JOINDER: CONTRACT: QUANTUM MERUIT.** An action on a *quantum meruit* may be joined in a petition with an action on an express contract, and a verdict and judgment will satisfy the liability as to both claims where they have their origin in the same transaction.

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

*D. J. Flaherty,* for appellant.

*Halleck F. Rose, Wilmer B. Comstock, Arthur R. Wells* and *E. C. Strode, contra.*

HAMER, J.

This is an appeal from a judgment of the district court for Lancaster county. The plaintiff, John F. Stout, sued personally and as the surviving partner of Hall & Stout, to recover for services rendered by said Hall & Stout as attorneys for the defendant. Two causes of action are alleged, one upon a *quantum meruit* and the other upon an account stated. Upon the *quantum meruit* the petition seeks to recover for the reasonable value of the services. On the express contract of settlement the plaintiff seeks to recover $3,000 claimed to have been agreed upon between the parties. Both causes arise out of the same transaction —the services as attorneys. In the plaintiff's brief it is alleged that the purpose of including the two causes of action was to permit the introduction of proofs that would

sustain a recovery on one theory or the other, and so avoid a possible miscarriage or the necessity of resorting to a subsequent suit. There was a jury trial, and the jury rendered a verdict for the plaintiff in the sum of $2,800, and interest thereon from April 28, 1909, in the sum of $604.33. On this verdict a judgment was rendered for the plaintiff for the full amount, and a motion for a new trial was overruled.

In a very clear instruction to the jury the court told them: "The plaintiff's petition contains two causes of action, both of which are for recovery for the same services performed by Hall & Stout as attorneys at law for defendant. One cause alleges an express promise and agreement of defendant to pay the specific sum of $3,000 therefor, made about the month of July, 1909. The other alleges the reasonable value of said services to be the sum of $6,000. Plaintiff can have but one recovery, based on one or the other of these causes of action, and a recovery on either cause will satisfy the whole claim, which has been merely set forth in varying forms to meet whatever view the jury may take of the evidence."

It is contended by the plaintiff that the joinder of the two causes of action in the same petition is permissible and is expressly authorized by statute under section 7657, Rev. St. 1913: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either of the following classes: First, the same transaction or transactions connected with the same subject of action; second, contracts, express or implied."

In *Scott v. Flowers,* 60 Neb. 675, this court held that a cause of action for false imprisonment might be joined in the same petition with the cause of action for malicious prosecution when both arose out of one and the same transaction.

In *Williams v. Planters Ins. Co.,* 57 Miss. 759, it was held that, where some counts in the declaration aver the

imprisonment in consequence of an alleged malicious prosecution, neither converts the action into trespass and neither constitutes misjoinder.

In *Neil v. Thorn,* 88 N. Y. 270, the charge was: "This is an action for malicious prosecution. There is also in the complaint a charge for false imprisonment, but it all arises out of the same transaction. If there is a cause of action for malicious prosecution, there is also one for false imprisonment. If the whole thing was justifiable then there is neither." The New York court of appeals held: "That while, in the strict and technical sense, evidence to sustain an action for false imprisonment would not sustain one for malicious prosecution, yet as the complaint in fact contained but one cause of action, i. e., malicious prosecution which included the arrest, and as the statement in no way subjected defendants to increased damages there was no error authorizing a reversal."

In *Brinkman v. Hunter,* 73 Mo. 172, it is said in the body of the opinion: "It is well settled in this state that the provision of the code requiring the plaintiff to set forth in his petition 'a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition,' does not prohibit the statement of a single cause of action in different counts, for the purpose of so varying the form of the statement as to meet any possible state of the proof. * * * Where two distinct and different claims are based upon the same instrument, although the plaintiff may be entitled only to a single satisfaction, both may be stated in the same petition, and should, of course, be stated in different counts. *Birdseye v. Smith,* 32 Barb. (N. Y.) 217; Bliss, Code Pleading (3d ed.) sec. 120. In neither case can the court compel the plaintiff to elect upon which count he will proceed."

In *Badger Telephone Co. v. Wolf River Telephone Co.,* 97 N. W. 907 (120 Wis. 169), it was held: "Under Rev. St. 1898, sec. 2647, authorizing the uniting of causes of action on contract arising out of the same transaction, or connected with the same subject of action, a cause of action to recover the reasonable value of certain personal property

sold to defendant was properly joined with an action to recover on a contract for the sale of the same property, to be paid for in capital stock of defendant corporation; plaintiff having alleged delivery of the property, and a demand on defendant to deliver the stock and its refusal, together with the cash value of such stock."

In *Waterman v. Waterman,* 81 Wis. 17, it was held that an action for a *quantum meruit* could be joined with an action on an express contract.

In *Cowan v. Abbott,* 28 Pac. 213 (92 Cal. 100) it was held: "Under Code Civil Procedure, sec. 427, providing that plaintiff may unite several causes of action in one complaint arising out of contracts, plaintiff may allege (1) that he rendered services reasonably worth a certain sum; and (2) an express contract, whereby defendants agreed to pay him the salary usually paid for such services, reasonably worth a stated amount, and, in addition, a bonus of $1,000 if he accomplished a certain result."

The defendant was not subjected to any hazard of double recovery. A single verdict with judgment upon it must extinguish the liability. The instruction of the trial court sufficiently protected the defendant.

The evidence shows a large amount of legal labor, most of it of a not very important character. What amount should be paid for these services was submitted to the jury under the instructions of the court. These instructions seem to be fair. There is evidence to sustain the verdict. The judgment of the district court is

AFFIRMED.

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

EMIL J. STRAHL, APPELLEE, V. ROME MILLER, APPELLANT.

FILED MARCH 13, 1915. No. 18,021.

1. **Inkeepers:** INJURY TO GUEST: LIABILITY. An innkeeper is not an insurer of the safety of his guest; but he is bound to exercise reasonable care for the comfort and safety of the guest while in his hotel, and if the guest is injured through the negligence of the innkeeper or his employees the innkeeper is liable therefor.
2. **Constitutional Law:** INNKEEPERS' ACT. The act of 1883 (laws 1883, ch. 47), known as the "Nebraska Hotel Act," does not contravene the provisions of the fourteenth amendment to the constitution of the United States, or deprive an innkeeper of life, liberty or property without due process of law, and is a valid enactment.
3. **Innkeepers:** INJURY TO GUEST: RIGHT OF ACTION. This act confers upon a guest at a hotel the right to maintain a cause of action against the proprietor for injuries received through the negligence of the proprietor or his servants.
4. **Instructions** given by the court, when construed together, found to properly state the law applicable to the evidence.

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

*John C. Wharton* and *Edgar M. Morsman, Jr.*, for appellant.

*John A. Moore, H. S. Daniel* and *Brome & Brome, contra.*

MORRISSEY, C. J.

Appellee, Emil J. Strahl, January 22, 1911, became a guest at the Millard Hotel in Omaha; the hotel being owned by appellant, Rome Miller. The building was five stories high, and had more than fifty rooms, and was not of fire proof construction. Appellee was assigned to room 404, which was on the fourth floor of said hotel, and retired about 10:30 P. M. During the night a fire occurred in the hotel, and appellee undertook to escape by means of a rope fire escape, and in doing so suffered bodily in-

juries. He brought this suit in the district court for Douglas county against the proprietor of the hotel, alleging that while he was a guest at said hotel a fire broke out therein, and that by reason of the negligence of defendant and his employees it was not properly discovered or controlled, and that a portion of the hotel was burned; that the halls were filled with smoke and gases endangering the lives of the guests and inmates; that appellant and his employees failed and neglected to awaken or give notice to the appellee of the existence of the fire; that appellant failed and neglected to maintain a competent night watchman for watch service; that said hotel was not properly patrolled, examined or inspected for the purpose of guarding against fire and safeguarding the lives of the guests, and that the employees of the appellant neglected and carelessly failed to be at their posts of duty, etc.; that the appellant was guilty of negligence, in that he did not maintain an efficient or sufficient system of fire gongs for arousing guests in case of fire, and that he did not, as soon as the fire was discovered, ring or cause to be rung the fire gong on the floor on which appellee was sleeping, nor did he ring or cause to be rung a telephone in the room occupied by appellee, or in any way awaken or arouse appellee to notify him of the existence of the fire, nor did he give or cause to be given to appellee information as to the location of the stairways leading from the fourth floor, and that the hotel was not equipped with a sufficient number of stairways, and that appellant was negligent in failing to operate the elevator leading to and from the fourth floor, and in refusing to respond to plaintiff's demand to be removed from said floor, and in failing to have any light, sign or notice indicating the location of the elevator; that appellee's room was equipped with a rope fire escape, which appellant represented could be used in escaping from said room in case of fire, and that said fire escape was too small and was insufficient for this purpose, and that appellant negligently failed to give appellee proper directions for the use of said rope fire escape; that by reason of the said negligence of appellant he has been damaged in the sum of $15,000.

The answer denies all the averments of negligence contained in the petition, and contains an affirmative defense of contributory negligence.

There was a trial to a jury, and a verdict of $6,500 for appellee, and appellant brings the cause here for review.

The evidence discloses that appellee went to his room on the fourth floor of the hotel about 10:30 P. M.; that he awoke about 3:30 A. M., and about five minutes thereafter he detected the odor of smoke; that he arose and turned on the electric light, opened the door, and took down the telephone receiver and asked the office where the fire was, but received no response; he then dressed and went to the elevator shaft, feeling his way along the walls; that the smoke was so thick he could not see the light in the hall; that when he reached the elevator it was not running, but he heard some one holler, "Take the stairway;" that he did not know the location of the stairway, and returned to his room, tried to telephone the office, but received no response, untangled the rope fire escape, threw it out of the window, and tried to go down hand over hand. He testified that he had looked over this fire escape the evening before, and commented to himself, "Well, in case of a fire, a fellow would have a fat chance of getting down on that rope, it is so thin;" that it was equipped with a metal piece to regulate the speed of descent, but that this metal piece would not work, and that he slid down the rope, finally landing on a platform below, and sustained the injuries of which he complains.

His wife and son testified that they visited the room the next morning, and that the rope was very thin. They describe it as being like "a window cord," and the son claims to have thrown the rope out of the window, and that it did not reach within several feet of the platform below, on which the appellee fell. Appellant offered in evidence a five-eighths inch hemp rope fire escape, equipped with a patented metallic appliance to facilitate its use; the rope being of sufficient length to reach from appellee's room to the landing below. Appellee denies that this is the rope fire escape which was in his room the night of the fire,

and on this question there is a direct conflict of the evidence.

It is undisputed that the smell of smoke was detected by one of the employees in the hotel about 1:30 A. M., and that later a guest called the attention of the night clerk to the smell of smoke; that the clerk did nothing further than to look into the cuspidor to see if paper, or some like combustible matter, might be burning there. And this was two hours before the appellee awoke to find the halls filled with smoke. These facts, together with the testimony relating to the fire gongs, fire escape, and the general conduct of appellant's agents, were all properly submitted to the jury.

Exceptions are taken to the instructions of the court, and it is insisted by appellant that no common law liability rests upon an innkeeper to protect his guests from injury by fire, and that the act of 1883 relating to innkeepers contravenes both the state and federal constitutions, in that it deprives the innkeeper of life, liberty and property without due process of law. These points we do not think are well taken. The weight of authority upholds the doctrine of a common law liability. The hotel keeper is under obligation to protect his guests from danger when it is reasonably within his power so to do. *Clancy v. Barker,* 71 Neb. 83. Section 3104, Rev. St. 1913, the act complained of, reads as follows: "In hotels or lodging houses containing more than fifty rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire, and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock P. M. and 6 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper

of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates." This is sufficient to attach a civil liability to the innkeeper for negligence in not properly safeguarding his guest. While an innkeeper is not an insurer of the safety of his guest, yet he may not omit to do the things that are reasonably necessary for his safety and protection. 11 Am. & Eng. Ency. Law (1st ed.) 32. The law seems to be well settled that, when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. But it must be affirmatively shown that the plaintiff suffered some injury in consequence of the failure of the defendant to comply with the statute, and that such injury resulted proximately from such failure. The fact that the statute does not in terms impose civil liability is immaterial. It is not necessary to the maintenance of an action that the statute so expressly provide. "The fact that the statute or ordinance in question does not in terms impose a civil liability for its violation does not affect evidence of its violation as going to show negligence." 21 Am. & Eng. Ency. Law (2d ed.) 483, and cases cited. *Wolf v. Smith,* 149 Ala. 457, 9 L. R. A. n. s. 338.

Exceptions were taken to the instructions given by the court; but the instructions appear to be based upon the evidence, and, taken as a whole, no prejudicial error is disclosed.

The question of contributory negligence was properly submitted. The jury were told that, if "failure of the plaintiff to exercise the care that a man of ordinary prudence would have exercised in the circumstances was the proximate cause of the alleged injury, then the defendant is not liable, * * * even though you might also find that the defendant was negligent in not discovering the fire earlier, or in not notifying the plaintiff promptly of its existence."

No complaint is made of the amount of recovery. The issues appear to have been properly submitted to the jury, and the judgment is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

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SARAH J. JONES, APPELLEE, V. CITY OF AURORA, APPELLANT.

FILED MARCH 13, 1915. No. 18,032.

1. **Eminent Domain:** MUNICIPAL CORPORATIONS: VACATION OF STREETS: DAMAGES: RIGHT OF ACTION. A city ordinance which contains a provision for the "opening, vacating or altering" of streets, and which provides for the election of *freeholders* to act as a board of assessment to assess and award damages to property owners injured by the "opening or alteration" of streets, is not in conformity with section 5133, Rev. St. 1913, providing for the "vacation" of streets, and providing a method of assessing damages therefor, and no action taken thereunder can be pleaded in bar of a property owner's right to maintain an action for damages in the courts.
2. ———: ———: ———: "FREEHOLDER:" "HOUSEHOLDER." The words "freeholder" and "householder" as used in the statute are not synonymous terms.
3. ———: ———: ———: COMPENSATION. When streets of a city are vacated by competent authority, the city must make adequate compensation to abutting property owners whose property is injured thereby.

APPEAL from the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Affirmed.*

*John A. Whitmore,* for appellant.

*R. J. Nightingale* and *H. S. Nightingale, contra.*

MORRISSEY, C. J.

Action to recover damages alleged to have been occasioned to plaintiff's property by the vacation of certain streets in the city of Aurora. There was a trial to a jury

in the court below, a verdict and judgment in favor of plaintiff for $400, and defendant appeals.

The facts briefly stated are as follows: Plaintiff is the owner of lots 10, 11 and 12, constituting the northeast corner of block 23 in the South addition to that city. F street runs east and west, and bounds the property on the north. Eleventh street runs north and south and bounds the property on the east. The lots mentioned front on Eleventh street, and F street makes the north boundary line of lot 12. There is also an alley running north and south through the block at the rear of the lots. The main part of the city lies north of the plaintiff's property and was formerly reached by traveling over Eleventh street. In August, 1911, the city council of defendant passed and adopted a resolution vacating and closing that part of F street which lies immediately north of plaintiff's premises, and on which this property abuts, and vacating and closing Eleventh street from the point where it touches the northeast corner of plaintiff's property for some distance to the north, thereby cutting off plaintiff from direct communication with the main portion of the city over Eleventh street and leaving her premises at the end of a pocket street, and, by closing F street, ingress and egress to the alley was closed at its intersection with said street. These lots were improved, and had for more than 20 years been used by plaintiff as a residence property. Eleventh street was not vacated immediately in front of plaintiff's property, but from the north line thereof. Plaintiff's petition alleged that prior to the vacation proceedings her property was desirable, attractive and convenient as a residence property, enjoying an east and north frontage, with full right of passage over F and Eleventh streets, and that by the vacation proceedings it has been made unattractive and inconvenient and left lying at the end of a cul-de-sac, or pocket street, with no direct access to the business part of the city over Eleventh street and no right of passage up and down F street, and with no means of ingress and egress to and from the north end of the alley, and claimed damages in the sum of $800. Defendant admits the closing of

the streets, but alleged that in the vacation thereof it had proceeded by virtue of the laws of the state relating to cities of its class, a city of the second class having less than 5,000 inhabitants, and under and by virtue of the authority vested in said city by its Ordinance No. 5, which ordinance had been in force and effect since October 8, 1906, and alleged that proceeding under the terms of this ordinance the defendant city in all things complied with the general laws of the state, and that the plaintiff had due notice of the pendency of the proceedings to vacate, and that she duly and seasonably filed her claim for damages, and that "the same was duly heard and considered by a board of five disinterested householders and freeholders, regularly and legally elected under the provisions of said Ordinance No. 5, and that damages in the sum of $100 were regularly and duly allowed to the plaintiff by the said board of assessors, and that the defendant, the city of Aurora, offered and tendered to the plaintiff such amount of damages," and that the tender is still good; that by said appraisal and award there was a final judgment in favor of plaintiff, from which she had not appealed, although the time for such appeal had long since elapsed.

By reply the plaintiff alleges that the assessment proceedings and award of damages were wholly without jurisdiction or authority of law and were ineffective to bar the right of the plaintiff to recovery.

There are a number of errors relied upon for reversal; the first being the refusal of the court to admit in evidence Ordinance No. 5 pleaded in the answer of defendant. By section 4 of this ordinance it provides a method for "opening, vacating or altering" streets, avenues or alleys. Section 8 provides: "If the determination of said council be in favor of opening or altering the street, avenue or alley they shall at the same or the next regular meeting, elect five disinterested *freeholders* of the city who shall, in the discharge of their duties, act under oath faithfully and impartially to make the assessment to them submitted, and assess and report in writing to said council the value of the property taken or injured by the proposed opening or

alteration, which said assessment shall be upon actual view and upon a day appointed by said council not less than sixty nor more than ninety days after the election of the assessors." These sections do not provide for the assessment of damages by reason of the *vacation* of a street, but only for damage resulting from the opening or altering of a street. It will be noted, also, that the ordinance provided for the election of five disinterested *freeholders*, whereas section 8941, Ann. St. 1909 (Rev. St. 1913, sec. 5133), under which this ordinance purports to be drawn, and the only authority for making award of damages provides that the assessment shall be made by "five disinterested *householders*."

A householder is defined as the "head or master of a family; a person who occupies a house and has charge of and provides for a family therein." 15 Am. & Eng. Ency. Law (2 ed.) 774. Householder implies the idea of a domestic establishment, or the management of a household. It implies residence. A freeholder is one who holds land in fee, or for life, or for some indeterminate period, and residence is not an element of the term. That "householders" and "freeholders," as used in the statute and ordinance, are not synonymous terms is too obvious to require discussion. "Householders" is not synonymous with "freeholders" as the latter term is used in a constitutional provision that compensation for property taken for public use shall be ascertained by a jury or board of not less than three freeholders. *Grossman v. Patton,* 186 Mo. 661.

Statutes of this kind must be strictly followed, and there is such a departure from the statutes as vitiates the ordinance, and it follows that the court was right in excluding it.

The ordinance being properly excluded, the record and proceedings of the council and the report and proceedings of the board of assessors were also properly excluded.

Objection is urged to an instruction given which permits a recovery for damage to the three lots, whereas only lot 12 actually abuts the vacated streets. It is said no recovery can be had on account of lots 10 and 11 because they

do not actually abut the vacated streets, and, further, that in the vacation of Eleventh street she suffers only the inconvenience common to the general traveling public. *Enders v. Friday,* 78 Neb. 510, *Lee v. City of McCook,* 82 Neb. 26, and *Van Valkenberg v. Rutherford,* 92 Neb. 803, are cited, but in these cases no part of the property abutted on the vacated part of the street.

*Enders v. Friday, supra,* is an injunction suit to prevent the mayor and city council of the city of Norfolk from closing part of a street and surrendering possession thereof to a railroad company for depot purposes without paying the plaintiffs for damages to their property, which bordered upon and lay adjacent to a part of the street which was not included in the contemplated vacation. The trial court sustained a demurrer to the petition. In a discussion of the case this court said: "There is nothing to indicate how far west of the vacated part of the street the lots of the plaintiffs are located, and no statement whatever that any of the lots abut upon that part of the street proposed to be vacated"—and upheld the judgment dismissing plaintiffs' petition.

*Lee v. City of McCook, supra,* is also an injunction suit wherein the plaintiffs sought to restrain the mayor and council of the city of McCook from vacating a street or roadway which it was intended should be occupied by railroad tracks, yards, and switches. The petition disclosed that plaintiffs were the owners of considerable property in and about the city of McCook, but no part of their property abutted upon or lay adjacent to the roadway sought to be vacated, and the court, applying the general rule that only those property owners whose property abuts upon that part of the street vacated are entitled to damages, sustained a demurrer to the petition.

In *Van Valkenberg v. Rutherford, supra,* a suit was brought by plaintiff to annul the action of the mayor and council, and reopen a street. The court found that the plaintiffs owned real estate in the city, but none of it abutted that part of the street vacated, and again applied the general rule, and the petition was dismissed.

In the instant case, the three lots are used as one tract, having common improvements, and, in assessing damages, must be treated as a single piece of property, abutting on the vacated portion of the streets. In closing these streets and placing plaintiff's property at the end of a pocket street, her damage is different from that of the general traveling public, and she suffered damage special and peculiar to this property, and different from that of the general public.

In *Vanderburgh v. City of Minneapolis,* 98 Minn. 329, where the facts are closely analogous, the court said: "Plaintiff owned certain lots fronting on First street in the city of Minneapolis. The city, by action of its council, vacated that portion of said street from the line of plaintiff's lots to the right of way and depot grounds of defendant railway company, thus cutting off plaintiff's right of ingress and egress from that direction and leaving his property fronting on a cul-de-sac or blind alley. Held, That by the vacation of the street plaintiff suffered an injury special and peculiar to his property, not common to the public at large, and is entitled to compensation under the provisions of our amended constitution which forbid the taking or damaging of private property for a public use without compensation."

No error is found in the record, the verdict does not appear excessive, and the judgment is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

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CLAUDE B. CALBREATH, APPELLANT, V. SAMUEL E. BAMFORD, APPELLEE.

FILED MARCH 13, 1915. No. 18,034.

**Appeal:** INADEQUATE DAMAGES. When the evidence is conflicting, a judgment will not be reversed solely because the amount recovered is too small, where the jury has been properly instructed on the measure of damages.

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

*J. W. James* and *Karl D. Beghtol,* for appellant.

*Charles E. Bruckman, contra.*

MORRISSEY, C. J.

In 1910 plaintiff, who is a physician and surgeon, was practicing his profession in Iowa, and the defendant, who is also a physician and surgeon, was practicing his profession at Hastings, Nebraska. There was an old family acquaintanceship existing between them, and plaintiff, being desirous of finding a new field for his talents, began a correspondence with the defendant which culminated in a partnership agreement between the two. Plaintiff paid defendant $1,000 for a one-half interest in the business and office equipment. Under this agreement they were to carry on the practice of medicine and surgery and divide the earnings equally.

After making this agreement and paying over the $1,000 as the contract provided, plaintiff removed to Hastings and engaged in the practice as contemplated by the parties. Difficulties soon arose, and this suit was instituted in the district court for Adams county. The petition contained two causes of action. As a first cause of action it is alleged that, in order to induce the plaintiff to enter into the agreement, the defendant falsely and fraudulently represented the volume of business which he had done, and that, by reason of the fraud so practiced upon him, he had suffered damage in the sum of $1,000. For a second cause of action plaintiff alleged that soon after making the partnership agreement, heretofore referred to, the defendant sold a one-half interest in a certain drug stock and store to plaintiff, representing to him that he had recently purchased the same for $6,000 and that it was worth that sum, and plaintiff, relying upon these representations, paid $3,000 for a one-half interest in said stock; that the representations so made were untrue, and were made for the purpose of cheating and defrauding the plaintiff, and by

reason of the fraud so practiced he was damaged in the sum of $1,000; and there was a prayer for damages on the two causes of action in the sum of $2,000.

Defendant admitted the formation of the partnership and the receipt of the money, but denied that fraud had been practiced on the plaintiff. As an affirmative cause of action the defendant alleged that plaintiff misrepresented his professional ability; that he neglected the business; and that his habits and conduct were such that he drove business away from the firm, and the business built up by defendant was almost ruined, and prayed judgment for $2,500.

For answer to the second cause of action, defendant admitted selling an undivided one-half interest in the drug-store to plaintiff for $3,000, but alleged that he did not have personal knowledge of the business or of the value of the stock; that he had only recently purchased the stock, and before doing so he made inquiry as to its value, and was assured that it had recently invoiced at $7,000, and was advised that the stock of goods and location were worth $6,000, and he purchased at that price; that the plaintiff expressed a desire to purchase an interest therein, and after defendant detailed all the facts in relation thereto the deal for a one-half interest was made; that later plaintiff and defendant exchanged the drug business for real estate which they took at an agreed valuation of $6,500, and which they still owned, and asked that said cause of action be dismissed and he be given judgment on his counterclaim.

The issues were submitted to a jury, which returned a verdict for one dollar in favor of the plaintiff. Plaintiff appeals, urging as ground for reversal that the amount of recovery is inadequate.

There is more or less conflict in the evidence, and from an examination of the record we cannot say that the verdict of the jury is not fully warranted.

There is no question of law involved. No complaint is made in the brief against the rulings or instructions of the court. All disputed questions of fact having been prop-

erly submitted to the jury, and the evidence being sufficient to sustain the verdict, under the general rule governing cases of this character, we cannot interfere with the findings of the jury, and the judgment is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

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ANGUS CAMPBELL, APPELLANT, V. MARY A. HOBBS ET AL., APPELLEES.

FILED MARCH 13, 1915. No. 18,039.

**Appeal:** AFFIRMANCE. Where no errors of law appear in the record and the judgment of the trial court is sustained by the pleadings and the evidence, it will be affirmed.

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

*Stewart, Williams & Brown,* for appellant.

*William B. Price, Ray J. Abbott* and *Hastings & Ireland, contra.*

MORRISSEY, C. J.

Plaintiff was the owner of a house and lot in the city of Lincoln, and on March 1, 1909, he entered into an agreement for the sale thereof to defendant Hobbs. A writing purporting to contain the terms under which the sale was made was drawn up and signed by each of the parties. In the body of the instrument it is provided that plaintiff shall convey the premises free and clear of all liens and incumbrances except certain taxes, and the consideration is fixed at $2,500, but a special clause inserted reiterates the price, shows the payment of $275 in cash, and an agreement on the part of defendant to make a further payment of $128 on or before April 15, 1909, and $28 each suc-

ceeding month until the full sum of $2,225 is paid, with interest, etc. It then concludes by saying that the purchaser shall take the title subject to a mortgage of $1,500 given to Crete Loan & Savings Association, with interest at 6 per cent. The defendant went into possession of the premises immediately and made instalment payments from time to time until November 11, 1911, when he and plaintiff figured up the balance due on the amount to be paid in excess of the mortgage and found it to be $80. This sum was paid, and plaintiff delivered a warranty deed for the premises. The deed was in due form, but was made subject to a mortgage for $1,500 in favor of the Crete Loan & Savings Association, which mortgage and interest and taxes for 1911 the grantee assumed and agreed to pay. At the time the so-called "articles of agreement" was signed the real estate was subject to a mortgage of $1,300, but in compliance with an oral agreement between the parties plaintiff secured a new loan of $1,500 from the Crete Loan & Savings Association, and procured the cancelation of the former mortgage. In order to secure this loan plaintiff subscribed for 15 shares of stock in this association, and this stock was pledged as collateral security for the loan, and from month to month thereafter there was paid upon said loan and stock the sum of $15, thirty-four payments thus being made. It is admitted that one-half of this amount went to pay the interest on the loan, and the remainder to pay the dues and assessments on the stock, and that the withdrawal value of the stock at the time the deed was delivered was $273.60.

Plaintiff brought this action in the district court for Lancaster county, claiming to be the owner of the stock and entitled to the benefit of his payments thereon, and alleged that the defendant Crete Loan & Savings Association refused to surrender the stock to him or to pay him the sum due thereon, and that the defendant Hobbs claimed the same, or some right therein and refused to permit the transfer of the stock to him, or to pay him the amount due thereon, and prayed that he might be decreed to be the owner of said shares of stock and of the amount of ac-

crued earnings thereon, and that the defendants Hobbs be adjudged to have no right or interest therein, and for equitable relief. The loan association, omitting the formal parts, set out the mortgage and alleged that the stock had been given as collateral security thereto; that it was ready and willing to surrender up the certificates of stock to whomsoever the court might order any time the mortgage loan was paid. The defendants Hobbs answered, admitting the purchase of the property for an agreed consideration of $2,500, and alleged that they had paid the plaintiff the sum of $1,000, together with the accrued interest, and that the plaintiff and his wife had executed and delivered to them a warranty deed to the property described, subject to this mortgage in favor of the Crete Loan & Savings Association, and this mortgage was a part of the purchase price. The court entered a decree in favor of defendants Hobbs, and plaintiff appeals.

The original written agreement is somewhat ambiguous and contradictory, and from an examination of the record we reach the conclusion that the parties themselves did not look to it as a paper containing the entire agreement. Defendant made instalment payments from time to time until November 11, 1911, when he and plaintiff made a settlement, and agreed that there was $80 due the plaintiff. This was paid, and on receipt thereof plaintiff delivered his warranty deed to the defendant. The deed shows that it was made subject to this mortgage of $1,500 and interest, and taxes for 1911. At the time of the delivery of the deed there appears to have been a complete settlement between the parties and it is not contended that there was any mistake in figuring the amount when this balance of $80 was agreed upon. While the plaintiff now contends that he made some mention of a retained interest in the stock of this association, this is directly contradicted by the testimony of the defendant. The defendant's wife was not called as a witness, but it is admitted in the record that, if called, she would testify on this point substantially the same as her husband. On this point the defendant is not only corroborated by his wife, but all of the circum-

stances corroborate him. From this time on plaintiff ceased to pay any dues or assessments on said stock, while the defendant immediately assumed their payment. The conduct of the parties clearly indicates that at the time of this settlement the plaintiff led the defendant to believe that he was taking title to this stock, together with title to the realty. It is agreed that they figured up the amount due and found it to be $80. The plaintiff received the money, delivered the deed, they shook hands and parted, and it was two or three months afterward before plaintiff made any demand for the stock or for any credit on account thereof.

The court was warranted in finding that when the plaintiff deeded the land to the defendant he also transferred the stock to the defendant. From that time on the defendant paid, not only the interest on the money loaned, but also the premiums on the stock. The plaintiff insists that it was with the understanding that he should be reimbursed for the premiums that he had paid upon the stock up to that time, but no such understanding was expressed to the defendant. The stock may have been burdened with risks and uncertainties that are not shown in this record, and the defendant plainly understood that he was taking the stock with the land with all of its burdens and risks. The agreement between the parties being indefinite and uncertain and intended in a different sense by the parties, it would seem to come within the rule that in such case the construction should prevail that the plaintiff had reason to suppose the defendant understood it to have. Rev. St. 1913, sec. 7909.

The judgment of the court is fully sustained by the evidence, and is

AFFIRMED.

BARNES and ROSE, JJ., not sitting.

STATE, EX REL. JOHN STEVENS, APPELLANT, V. J. T. NICKERSON, COUNTY CLERK, ET AL., APPELLEES.

FILED MARCH 13, 1915. No. 18,816.

**Licenses: HUNTING AND FISHING: STATUTE: CONSTITUTIONALITY.** The provisions of section 2695, Rev. St. 1913, imposing license fees upon persons desiring to hunt and fish in this state and requiring such fees to be paid to the state treasurer for the benefit of the state school fund, are not in conflict with section 5, art. VIII of the constitution.

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

*John Stevens, pro se.*

*Willis E. Reed, Attorney General,* and *L. B. Fuller, contra.*

BARNES, J.

Action in the district court for Furnas county for a peremptory writ of mandamus to compel the respondent J. T. Nickerson, as county clerk of said county, to pay over to the county treasurer the money collected by him for hunting and fishing licenses for the year 1913. An alternative writ was allowed and issue joined thereon. The only question presented for determination is whether such license money belongs to the county school fund or the state school fund. The district court found for the respondents and denied the application for a peremptory writ, and the relator has appealed.

It is contended that the district court erred in refusing the relief prayed for, and in giving force and effect to that part of section 2695, Rev. St. 1913, which is alleged to be in direct conflict with section 5, art. VIII of the constitution of the state. That section of the constitution reads as follows: "All fines, penalties, and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively, where

the same may be levied or imposed, and all fines, penalties and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." The legislature, at the session of 1901, passed an act to protect fish and game, insectivorous, song and other birds, within the state of Nebraska, and to provide penalties for the violation thereof, and to create a game and fish commission for the state of Nebraska and define its powers and duties. Laws 1901, ch. 36.

By section 1, art. IV of the above act (Rev. St. 1913, sec. 2695) it was provided: "The game and fish commissioner shall, upon application and the payment to the state treasurer of the fee required, issue to any nonresident of this state, a license authorizing such licensee in person within this state to hunt for and kill game, and to fish for and take fish, during the open season for such game and fish, and to have in his possession and dispose of the same subject to all of the restrictions imposed by this chapter: *Provided,* the commissioner may deliver to the county clerks of the several counties blank licenses bearing his signature or a facsimile thereof, and the same may in such case be issued by such clerks in the name of the commissioner upon the terms and conditions above prescribed. All blank licenses delivered to the several county clerks shall be numbered by the commissioner, and when such license shall have been issued by the county clerk of any county as herein provided, he shall immediately notify the state treasurer by mail stating the number of such license, the name and residence of the licensee, and the date when issued, and shall remit the license fee to said state treasurer, who shall keep a record of all licenses issued under this chapter, which shall be open for inspection as in case of other public records of the state." Section 3, art. IV of the same act, provides that licenses may be issued to

residents of the state under the same terms and conditions as in case of licenses to nonresidents of the state. It is apparent that where the game and fish commissioner has delivered to a county clerk of any county a supply of licenses, and said clerk issues them to applicants and collects the license fee, he is acting as a representative of the state game and fish commissioner, who alone has the power to impose the license.

It is argued that the money derived from the sale of hunting licenses is license money arising under the general laws of the state, and that such money cannot constitutionally go anywhere except into the treasury of some county; that Furnas county has a better claim to the money than any other county. This would be so if the license was levied or imposed in Furnas county. The act providing for the issuance of such licenses distinctly says that the license shall be issued by the state game and fish commissioner. It is imposed by the state without reference to any county, and for the benefit of all the schools of the state. To sustain appellant's contention would require us to declare the provisions of the act relating to game and fish unconstitutional. In *Pleuler v. State,* 11 Neb. 547, 555, it was said: "To justify a court in pronouncing an act of the legislature unconstitutional, it must be clear and free from reasonable doubt that it is * * * clearly forbidden by the paramount law."

The constitution does not specifically forbid the imposition of a license by the state at large. The legislature was constitutionally free to provide by what authority the licenses in question should be imposed upon those desiring to hunt and fish. The constitutional provision applies only to license money imposed by a county or some minor municipal corporation, and when a county imposes a license by virtue of a general law authorizing it so to do, such license money belongs to the county school fund. It does not forbid the state itself to impose licenses and direct how such money shall be used for the benefit of the schools. The legislature can exercise such general powers as are not forbidden by the constitution. The New Standard Dic-

tionary defines *impose* as to "levy or exact as by authority." It is apparent that the legislature meant to confer authority upon the state treasurer to collect the license moneys in question. The game and fish commissioner and the various county clerks are agents of the state, and there is no conflict between the provisions of the act and those of the state constitution. The intent of the legislature does not seem obscure.

We are unable to see how the trial court could have rendered any other judgment than the one which he pronounced in this case. The judgment of the district court is therefore

AFFIRMED.

LETTON and FAWCETT, JJ., not sitting.

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JOHN WRIGHT, APPELLEE AND CROSS-APPELLANT, V. SELDEN-BRECK CONSTRUCTION COMPANY, APPELLANT; FIRST NATIONAL BANK OF LINCOLN, APPELLEE.

FILED MARCH 13, 1915. No. 17,982.

1. **Negligence:** OPERATION OF ELEVATOR. It is not negligence *per se* to operate an elevator without a call bell in an unfinished building, not open to the public, but only to employees and licensees of the contractor.
2. ———: ELEVATOR ACCIDENT: CONTRIBUTORY NEGLIGENCE. One who desires to call an elevator in an unfinished building should act with care and caution. An elevator shaft is a place of danger, and if one carelessly thrusts his head, through an opening in the door, into the shaft, and on account of such negligence he suffers injury, he is not entitled to recover damages.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed as to the First National Bank and reversed as to the Selden-Breck Construction Company.*

*Greene, Breckenridge, Gurley & Woodrough,* for appellant.

*Burr, Green & Green, C. S. Allen* and *Hall & Bishop, contra.*

LETTON, J.

In 1911 the Selden-Breck Construction Company was engaged in constructing an eight-story office and bank building for the First National Bank of Lincoln, under a contract with that bank. This action is to recover damages against the owner and contractor for negligence in operating an elevator in the building. Verdict and judgment against the contractor, and in favor of the bank. Defendant Selden-Breck Construction Company appealed, and plaintiff has filed a cross-appeal against the bank.

On Sunday, April 30, 1911, the plaintiff, with one McKee, was helping to move the office furniture of the Western Fire Insurance Company by which they were employed, into rooms on the fifth floor to be occupied by it in the new building. The building was not entirely completed, but under the terms of the contract it was to be finished and delivered to the owner on the next day, May 1, 1911. There were two elevators in the elevator shaft. The elevator on the north side was being used by the workmen, and on this day by those moving into the building. The building was not open to the public. There were double sliding doors of metal in place in front of each elevator, with spaces for four panes of glass in each, but the glass had not been inserted. No call bells had been installed, and it was necessary to call for the elevator when wanted. On the north elevator the steel frame and the permanent floor of the car were in position, but a temporary plank floor had been laid over it, and a temporary cage of boards had been constructed to be used until the building was finished. The other elevator was not in use. At noon Curtis, the elevator operator who had been operating it for the contractors, went to lunch, and one Brackett took his place at the direction of Mr. Holmes (who was the president of the Western Fire Insurance Company, and was also the manager of the building for the bank) and Mr. Cunningham, the engineer of the building for the bank.

A few moments afterwards the plaintiff and McKee, who were still upon the fifth floor, wanted to descend. They went to the elevator shaft, the doors of which were closed. There was a full-sized outside window in the shaft—opposite the doors. Each put his head through one of the empty panes in each door, for the purpose of calling the elevator. Almost immediately the elevator descended from the sixth floor, striking each upon the back of the head. Plaintiff's jaw was caught between the bottom of the elevator and the bar across the door, breaking the bone and causing other severe injuries. The instant Bracket, who was operating the elevator, saw the men's shoulders, he reversed the lever, and this undoubtedly saved their lives.

The allegations of negligence are that the car was being operated by a conductor without a license; that on account of the absence of a call bell the defendants instructed the plaintiff to call the conductor orally; that the elevator car was unfinished, and was being run contrary to the laws of the state of Nebraska and ordinances of the city of Lincoln; that the defendants were negligent in "operating, managing and controlling said elevator car, and in running and in stopping the same," and "in not giving notice to plaintiff of the time when said car would be lowered to and approach said fifth floor of said building, and in not placing a guard or a railing or protection in front of said iron doors and windows of said car." It is also alleged that "plaintiff, obeying the instructions and invitations of said defendants and their servants, stepped to said elevator on the fifth floor of said building on the 30th day of April, 1911, to call said conductor orally to stop said car at the fifth floor, and, while in the act of so doing, the defendants" carelessly and negligently ran the car so that it struck plaintiff on the head and caused severe injuries, which are specifically described. The answers are general denials and pleas of contributory negligence.

It is necessary to examine the evidence in order to determine the principal questions involved. Brackett, who is an elevator operator, testified, for the plaintiff, that the elevator was in all respects, except as to the steel cage, in

the same condition as it now is; that electric wires and the balancing chain were hanging below the floor of the car. This chain is shown by other testimony to be 200 feet long, and to be connected at one end to the bottom of the car floor, and at the other to the counter-balance weights, so that when the elevator is at the top of the shaft the entire length of the chain hangs below in plain sight. He had been instructed to take charge of the elevator until 1 o'clock, while Curtis, the conductor employed by the contracting company, went to lunch. Just after he had taken charge of the car some one called for the car to come to the sixth floor. When he reached there the man had gone. He started the car down, and the accident occurred. Most of the workmen had gone to lunch at the time, and there was very little noise in the building. There was no top or covering over the car, and if one stood back from the door at the fifth floor and called for the car he could hear him when he was at the bottom of the shaft. The car was in perfect running order. He was employed by Mr. Holmes, and had been helping the insurance company to move that morning, but he was to run the elevator in the completed building.

Mr. McKee testified that he worked for the Western Fire Insurance Company; that he went up and down a number of times that morning before the accident; that the only way to call the car was "to holler for it through the window." He says he also called by putting his head through the door where the window would be. At the instant before the accident "I put my head in there, I couldn't see anything or hear any elevator coming. Everything was quiet; not a sound. The elevator never made a noise; there was no noise when we went to the elevator shaft; there wasn't a sound." On cross-examination he testified that there was noise of moving desks at the time and a noise on the first floor; that when he was not using the elevator he was not in a position where he could see whether it was going to the sixth, seventh or eighth floor; and that he heard men at work above the fifth floor. Mr. Taylor, another employee of the insurance company, testified that

about a score of workmen were in the building, several in the stories above the fifth floor; he does not remember seeing any chains or wires attached to the bottom of the car.

The plaintiff testified that he went up and down about 10 or 20 times that morning; that he went no further than the fifth floor that day, and did not see the elevator go higher; that a great many men were working in the building; and the noise disturbed him in calling for the elevator. He said, "We always would look to see where the elevator was, if there was anything moving, or if it was coming or if it was going; and there was nothing in sight, so I put my head in and called for it. Q. How light was it in there? A. *As light as day; in fact, it was midday.* Q. Did you hear anything? A. No, sir. Q. What did you do when you put your head in there? A. Called for the elevator to come up. Q. Which way was your mouth or head then? A. Down; face down. Q. How long did you have your head in there before you were injured? A. About a second." On cross-examination he testified that he knew the car was drawn by cables, and that he did not see the cables, and that the shaft was empty when he looked in. On redirect examination he was questioned as to a conversation with Curtis, the elevator man, and Mr. Holmes, the first time he went up in the elevator, and was asked to state fully what Curtis said as to the height the elevator would run. A number of questions directed along this line had previously been excluded, but the objection to this one was overruled. A motion was made to strike out the answer as incompetent, irrelevant, and immaterial, and not relevant to any issue in the case, which was overruled. He then testified that in the morning of that day Curtis, Taylor and himself were going up with the first load of books, papers, desks, etc.; that Mr. Holmes said to the operator, "We go to the fifth floor," and that Curtis said, "Then during the time that you are moving in I don't go above the fifth floor." There is a great mass of evidence more or less relevant, but the gist of that in behalf of the plaintiff material to the determination of the case has been outlined.

Were the defendants or either of them guilty of negligence? The building was incomplete, but the elevator, except for the absence of the call bell was in perfect running order. When plaintiff elected to use the elevator in its unfinished condition he was bound to govern his conduct accordingly. He was as fully aware of all the circumstances as the defendants were, and knew the manner in which it was necessary to call for the elevator. There is no proof that the construction company invited the Western Fire Insurance Company or its employees upon the premises. The fact seems to be that that company began to move on that day for its own accommodation. We must consider the plaintiff's case regardless of the testimony for the defense, which denies much of plaintiff's evidence and is to the effect that any one looking in the shaft could tell at once by the absence of the suspension cables that the car was above that floor, and that the bottom of the car at the sixth floor could be plainly seen from the lobby outside of the doors on the fifth floor.

Unless it was negligence, as a matter of law, to use the elevator without a call bell, no negligence in its operation has been shown. We are satisfied that under all the circumstances it was not negligence *per se* to so operate it, and that it could be used without danger by one calling into the shaft while standing outside of the bars. There is absolutely no evidence that any one ever failed in getting a response while calling in this manner. That plaintiff and his witnesses did not call in this manner is not material. They should have done so. We are convinced that plaintiff was guilty of gross contributory negligence in thrusting his head through the opening. He had no right to place any part of his person beyond the barrier of the door and into a place so full of dangerous possibilities as an elevator shaft, more especially in a new eight-story office building with modern high-speed elevators. His action amounted to the opening of the closed door, which he had no right to do, or, rather, it had the same effect. Ordinary care and prudence should have warned him that it was exceedingly dangerous to place his head into the

elevator shaft. The supreme court of Massachusetts say in *Ramsdell v. Jordan,* 168 Mass. 505: "It is so plainly dangerous for a person to put his head into an elevator well for the purpose of shouting up the shaft for the car to come down that the verdict for the defendant was rightly ordered." *Knapp v. Jones,* 50 Neb. 490; *Bedell v. Berkey,* 76 Mich. 435; *Guichard v. New,* 41 N. Y. Supp. 456; *Kappes v. Brown Shoe Co.,* 116 Mo. App. 154, 90 S. W. 1158; *Knox v. Hall Steam-Power Co.,* 23 N. Y. Supp. 490; *Dieboldt v. United States Baking Co.,* 25 N. Y. Supp. 205; *Mau v. Morse,* 3 Colo. App. 359. The latter case is very similar in its facts to this. The court say: "If a man, in his sound senses, with his eyes open, voluntarily and deliberately, even if carelessly, thrust himself into the jaws of death, we know of no theory upon which any one can be held responsible for the consequences of his act but himself."

As we view the case, it is unnecessary to consider the merits of the cross-appeal, since we find no negligence in the operation of this car by Brackett. It is not contended that Curtis was in the service of the bank. The elevator was under the control and management of the construction company at the time of the accident, though Curtis was relieved by Brackett for the lunch hour. It was using it for its workmen, and incidentally to accommodate tenants who were moving in. *Fuller Co. v. McCloskey,* 228 U. S. 194. The opinion in the case of *Munsey v. Webb,* 231 U. S. 150, on which much stress is laid by the plaintiff, seems to have little relevancy to the question involved here.

It is argued that, on account of the statement and promise made by Curtis, plaintiff was misled and believed there was no danger in putting his head into the shaft. This promise and its breach are not alleged as a ground for recovery. "Where a pleader relies upon one or more specific acts or omissions as negligence, then evidence of any act or omission not within some of such specifications is irrelevant." *Omaha & R. V. R. Co. v. Wright,* 49 Neb. 456. *Elliott v. Carter White-Lead Co.,* 53 Neb. 458. We are convinced that this evidence was erroneously admitted, and that instruction No. 8, which places this is-

sue before the jury and instructed them that, "if you believe from the evidence that the plaintiff was informed that the elevator would not go higher than the fifth floor, and that he believed and had reason to believe that such was the case, then the question whether or not he would be guilty of negligence, or contributory negligence, in thrusting his head into the shaft becomes one for you to determine from all the facts and circumstances of the case," should not have been given. But taking the testimony as to this statement as true, and considering it as within the issues, we are unable to see how it afforded any justification for the plaintiff's act. In the first place, the most natural meaning to be ascribed to the statement, under the circumstances in which it was made, with men at work all over the building, and with the elevator filled with furniture, books, etc., is that, when Mr. Holmes said, "We go to the fifth floor," and Curtis said, "Then during the time you are moving in I don't go above the fifth floor," he meant that he would not go above the fifth floor while carrying their effects; not that he would cease to operate the elevator above that floor. Another consideration is that the statement only had reference to what Curtis himself would do. It did not constitute a promise or agreement that the elevator would not be taken by others above that floor. His statement had reference to his own action alone, and not to that of any other operator. He could not control the action of his employer or of any other of the employees and plaintiff had no right to assume, if he did assume, that he could do so. In whatever light we view this conversation, we can see nothing in it which would justify the plaintiff in projecting his head or body beyond the barriers and through the door into such an exceedingly dangerous situation.

The judgment of dismissal as to the bank is affirmed. The judgment against the construction company is reversed.

JUDGMENT ACCORDINGLY.

MORRISSEY, C. J., not sitting.

EDEN D. HUFF, APPELLEE, V. GRAND LODGE, BROTHERHOOD OF RAILROAD TRAINMEN, APPELLANT.

FILED MARCH 13, 1915. No. 18,029.

1. **Insurance:** CONTRACT: LIMITATION OF LIABILITY. Section 68 of the constitution of the defendant association, of which plaintiff was a member, provides for indemnity upon claims for total disability resulting from certain specified injuries. Another section provides that all claims for disability not coming within the terms of section 68 should be held to be addressed to the systematic benevolence of the order, and should in no case be made the basis of any legal liability on its part. *Held*, That the contract limiting the liability of the association to the disabilities described in section 68 is a valid contract; that such an association may limit the class of risks which it will assume, and that the defendant is not bound to pay claims other than those which it specifically agreed to pay by the terms of the certificate and constitution.

2. ———: BENEFICIAL ASSOCIATION: BENEVOLENCE. It is not against public policy for the members of such an association to agree with each other that a portion of the funds which they contribute may be applied to the relief of members for whose injuries or disabilities no legal liability exists against the association. The mere fact that the objects of this benevolence are to be selected by a beneficiary board does not alter the situation nor create an obligation on the part of the association to pay all claims for total disability arising from causes not covered by the insurance contract.

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

*Lincoln Frost* and *Walter L. Pope,* for appellant.

*W. B. Price, Ray J. Abbott* and *A. E. Howard, contra.*

LETTON, J.

This action was brought in the lifetime of the plaintiff, Eden D. Huff. A judgment was rendered in his favor in the district court. After the case came here on appeal his death was suggested, and the cause revived in the name of his administrator. The action is based upon a beneficiary

certificate issued by the defendant, a fraternal beneficiary association.

The petition alleges that Huff was a member of the association; that on or about the 8th day of October, 1910, he became totally disabled by reason of paralysis, and is now totally disabled, and entitled to the benefits of the beneficiary contract; that "the grand lodge has established and maintained various funds as follows: A general fund, a beneficiary fund, a beneficiary reserve fund, a protective fund, and a convention fund—and that a part of the assessments which this plaintiff has paid to the grand lodge has been segregated in said funds, and that he is entitled to the benefits by reason thereof, and that that portion of the constitution and general rules of said Brotherhood of Railroad Trainmen which reads as follows: 'And shall in no case be made the basis of any legal liability on the part of the brotherhood'—is null and void, for the reason that it is against public policy and contrary to law;" that due and proper proofs of his disability have been furnished as provided for in the general rules and constitution by the defendant; that he has promptly and regularly paid all dues, fines and assessments, but that defendant refuses to pay him the benefits provided for in the constitution and general rules. A general demurrer to the petition was filed, which was overruled. Defendant elected to stand upon the demurrer and not plead further. The court found for plaintiff and entered judgment for $1,500, the full amount of the certificate. A copy of the certificate and of the constitution and general rules of the order was attached to the petition and made a part of it.

The beneficiary certificate sets forth that the plaintiff "is entitled to all the rights, privileges and benefits of membership and to participate in the beneficiary department, class C of said brotherhood, to the amount set forth in the constitution thereof, which amount, in the event of his total and permanent disability, as defined in section 68 of the constitution, shall be paid to him, or at his death shall be paid to Addie Huff, his wife, if living."

Section 60 provides in part: "There shall be three classes of beneficiary certificates, namely, Class A, $500; Class B, $1,000; Class C, $1,500. Each class shall be evidenced by a beneficiary certificate to be issued under the hands of the president and general secretary and treasurer, and in the name and under the seal of the grand lodge. Each certificate shall show in which class it is issued, and provide for the payment, in accordance with this constitution, of the full amount of such class upon the death of the member insured therein, or upon his becoming totally and permanently disabled within the meaning of section 68."

Section 68 provides: "Any beneficiary member in good standing who shall suffer the amputation or severance of an entire hand at or above the wrist joint, or who shall suffer the amputation or severance of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise."

Section 69 provides for the manner in which proof of total disability shall be made and acted upon.

Section 70 is as follows: "All claims for disability not coming within the provision of section 68 shall be held to be addressed to the systematic benevolence of the brotherhood, and shall in no case be made the basis of any legal liability on the part of the brotherhood. Every such claim shall be referred to the beneficiary board, composed of the president, assistant president, and general secretary and treasurer, who shall prescribe the character and decide as to the sufficiency of the proofs to be furnished by the claimant, and, if approved by said board, the claimant shall be paid an amount equal to the full amount of the certificate held by him, and such payment shall be considered a surrender and cancelation of such certificate; provided that the approval of said board shall be required as a condition precedent to the right of any such claimant to bene-

fits hereunder, and it is agreed that this section may be pleaded in bar of any suit or action at law, or in equity, which may be commenced in any court to enforce the payment of any such claims. No appeal shall be allowed from the action of said board in any case; but the general secretary and treasurer shall report all disapproved claims made under this section to the board of insurance at its next annual meeting for such disposition as such board of insurance shall deem just and proper."

Section 71 provides for the manner in which proof of benevolent claims made under section 70 shall be made, which differs from that under section 68.

The appellant contends that the insurance contract as contained in the certificate, the constitution and the by-laws does not cover or include a disability of the nature described in the petition; that the certificate indemnifies only for and against death and permanent disabilities of the nature described in section 68, and that since the disability of the insured was not within the provisions of that section, no liability exists. It also contends that the provisions by which claims for disability not coming within the provisions of that section shall be considered as addressed to the systematic benevolence of the brotherhood and may be considered by the beneficiary board is a valid agreement; that as to this class of claimants there is no fixed and binding obligation resting upon the society. On the other hand, the appellee insists that "the order has no inherent power of itself to deny its members the privileges and benefits prescribed by the general rules and laws governing it; that is to say, when a member does all the things which are required of him to be done, then they cannot deny the things which they promised to do and for which the member has paid his money." The appellee also contends that the portion of section 70 (which refers only to disabilities not mentioned in section 68) which provides "that this section may be pleaded in bar of any suit or action at law, or in equity, which may be commenced in any court to enforce the payment of any such claims," is void as against public policy.

In the view we take of this case, it is unnecessary to consider the latter contention. The crucial question is whether it was within the power of the parties to the insurance contract to make an agreement of this nature. In substance the contract is that, in consideration of the payment of certain assessments, the society will pay to the beneficiary, in case of death of the insured, or to the insured, if he "shall suffer the amputation or severance of an entire hand at or above the wrist joint, or * * * of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, * * * *but not otherwise,*" the sum of $1,500. This is an absolute obligation covering death, and certain specific injuries. These alone are the injuries for which indemnity is definitely provided and which there is a legal duty to pay. Such a contract is valid under the statute of this state which was in effect at the time the contract was made, and in the absence of proof it must be presumed that the statutes of the state of Ohio, where the association is organized, and of the state of Kansas, where the contract was made, are in nowise different. It was argued that the association has no power to provide that claims not falling under the provisions of section 68 may be paid, if approved by the beneficiary board, and that consequently all cases of total disability of whatever nature must be paid. This is a *non sequitur*. The argument goes too far. If the board has no power to distinguish and exclude claims for disabilities other than those described in section 68, it can only be because the society has no power to limit the risks it will carry to disabilities arising from the injuries included in that section. It is obvious that this cannot be the law. To so hold would prevent an association from classifying and limiting the risks which it will contract to indemnify against. The statutes permit and provide for such classification, and the contract here is not invalid.

We find nothing in the statutes or in the constitution and by-laws to prevent the members of this association from agreeing with each other that a portion of the funds

which they contribute may be applied to the relief of members for whose injuries no legal liability exists but for whose distressful situation a fraternal feeling might justify relief. The mere fact that the objects of this benevolence are to be selected by a special board from among the members is not important. Many benevolences are created by the contributions of many individuals to a benevolent fund, which it is agreed, either expressly or impliedly, shall be disbursed by a board or committee to whom applications for relief are made. *Pool v. Brotherhood of Railway Trainmen,* 143 Cal. 650.

Deceased became a member knowing the limitations of the insurance contract. It has not been changed since he became a member, and he, as well as all other members, became bound by the mutual agreement. The disability upon which the action is based is not embraced within the provisions of the contract.

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

REVERSED AND DISMISSED.

ROSE, J., not sitting.

FAWCETT, J., dissenting.

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## CHARLES DILLEY V. STATE OF NEBRASKA.

FILED MARCH 13, 1915. No. 18,768.

1. **Criminal Law:** MOTION FOR CONTINUANCE: COUNTER SHOWING. Since the enactment of section 7889, Rev. St. 1913, it is proper to allow a counter showing to be filed against a motion for continuance.
2. ———: APPEAL: REFUSAL OF CONTINUANCE. A judgment will not be reversed by the supreme court on account of the refusal to grant a continuance unless there has been an abuse of a sound legal discretion by the district court.
3. **Shooting with Intent to Wound:** SUFFICIENCY OF EVIDENCE: INSTRUCTION: MENTAL RESPONSIBILITY. Evidence examined, and *held* to support the verdict, and that, when considered in connection with instruction No. 11, the question of defendant's mental responsibility was properly submitted to the jury by that instruction.

ERROR to the district court for Dawes county: RALPH W. HOBART, JUDGE. *Affirmed.*

*Fisher & Rooney,* for plaintiff in error.

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

LETTON, J.

Plaintiff in error, hereinafter termed the defendant, was convicted of shooting with intent to wound, which judgment he seeks to review. The facts seem to be that on July 28, 1914, the defendant became engaged in an altercation with one Munkres, a barber, at the latter's place of business at Chadron, Nebraska. Munkres put him out of the barber shop, slapped him and kicked him. About 10 or 15 minutes afterwards, when Munkres was in the back part of the barber shop, the defendant came to the front door and shot at him through the screen door four times, one of the bullets striking him in the hip and passing through the groin. Defendant was arrested in the alley at the back of the barber shop a few minutes afterwards and placed in the county jail. At that time, and while under the impression that he had not wounded Munkres, he said that he wished he had hit him. On August 4 an information was filed containing a count charging shooting with intent to kill, and another count charging shooting with intent to wound. On the same day, without objection, the cause was set for trial on August 10. On that day defendant filed a motion for continuance on the ground: (1) That one Dickenson, who had left the state, would testify that he saw the plaintiff kicked and otherwise abused by Munkres before the shooting; and (2) that, if given time, he could procure the testimony of witnesses in South Dakota to the effect that he was a dipsomaniac for a long time prior to the date of the offense, that he was for a long period of time incapable of judging right from wrong, and was a constant user of intoxicating liquors. A counter showing was filed, and the motion for a continuance was overruled. This is assigned as error.

The state admitted in open court that Dickenson, if present, would testify as stated in the affidavit, and other witnesses testified in open court as to the assault upon defendant before the shooting. At the trial defendant also proved that he had been addicted to the use of intoxicating liquors, had taken a liquor cure some time before, and that he had been drinking heavily a short time before the shooting took place. It was also shown that he had left South Dakota more than a year before that time. It is also said that the trial court erred in permitting a counter showing to be filed, and a number of early cases in this court are cited to this effect. Counsel evidently has overlooked the subsequent adoption of section 7889, Rev. St. 1913, allowing the filing of such a counter showing, and providing as to continuances: "No reversal of such cause or proceeding by the supreme court shall be had on account of the action of the court in granting or refusing such application, except when there has been an abuse of a sound legal discretion therein by the lower court." No abuse of legal discretion occurred. These assignments are not sustained.

The remaining complaints are that the court erred in refusing expert testimony offered on the question of insanity, in failing to instruct upon that question, and that there is no evidence contradicting the testimony of defendant that he was insane when the offense was committed.

The defendant's testimony is that Munkres kicked him in the stomach, and that this caused such pain and terror on his part that he did not remember anything that took place from that time until he was arrested a few minutes after the shooting. The evidence is conflicting as to what part of his body was kicked, and it also shows that after the assault he walked a distance of about a block to his room and procured the revolver with which the shooting was done. It is also shown that when he was arrested, 10 or 15 minutes afterwards, he seemed to have full possession of his faculties.

A number of the questions propounded to the medical expert and excluded did not properly reflect the evidence.

He was permitted to answer others, and did testify that such a lapse of memory might occur from excessive alcoholism.

Considering the evidence in connection with instruction No. 11, we think the question as to the responsibility of the defendant for his actions was properly submitted to the jury by that instruction. We are satisfied also that the jury gave proper weight to defendant's testimony as to his evanescent lapse of memory as tending to throw light upon his mental condition.

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

AFFIRMED.

MORRISSEY, C. J., not sitting.

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ALICE FITZGERALD, ADMINISTRATRIX, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 17,969.

1. **Negligence:** QUESTIONS FOR JURY. Issues of negligence and contributory negligence are questions for the jury, where the evidence is sufficient to sustain a verdict in favor of plaintiff.
2. **Street Railways:** STREET INTERSECTIONS: RIGHTS OF DRIVER OF VEHICLE. At a street intersection the driver of a vehicle may attempt to cross a street railway track ahead of an approaching car, where he is justified in believing there will be sufficient time to do so, if the car is operated at its usual and ordinary rate of speed.
3. ———: ———: COLLISION: INSTRUCTIONS. In an action to recover from a street railway damages for negligently running into a vehicle at a street intersection, the case may be submitted in the double aspect of permitting the jury to find whether defendant failed to exercise ordinary care in controlling the speed of the car, or to find whether the motorman, after discovering the peril of the driver, failed to use ordinary care to avoid a collision, where those issues are raised by pleadings and contested by proofs.
4. **Witnesses:** REDIRECT EXAMINATION. Error cannot be predicated on rulings permitting answers to questions properly propounded to

plaintiff's witnesses on redirect examination to explain opinions expressed in answer to similar questions propounded to the same witnesses on cross-examination.

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

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

*Smyth, Smith & Schall, contra.*

ROSE, J.

The action is one to recover damages in the sum of $10,000 for alleged negligence resulting in the death of Michael Fitzgerald. Defendant operates a street railway in Omaha, and with double tracks occupies a strip 15 feet wide in the center of Farnam street, a public thoroughfare running east and west with a paved roadway 42 feet in width. On the north track the cars run west, and on the south track they run east. Thirty-eighth avenue crosses Farnam street at right angles. Fitzgerald, seated in the county ambulance, May 27, 1911, drove a team of horses northward on the east side of Thirty-eighth avenue. After the horses had crossed the street railway tracks on Farnam street the ambulance was struck by a west-bound street car. Fitzgerald was thrown to the pavement and was fatally injured. His widow, as administratrix of his estate, is plaintiff. She pleaded that defendant ran the car at a negligent rate of speed, and failed to exercise ordinary care to avoid a collision after her husband's peril had been discovered. Defendant denied that it was guilty of the negligence charged, and pleaded contributory negligence on the part of the driver of the ambulance. The jury rendered a verdict in favor of plaintiff for $5,000, and from a judgment for that sum defendant has appealed.

Error in refusing to direct a verdict for defendant is the first assignment presented. It is asserted that the evidence is insufficient to show actionable negligence of the motorman. It is also urged that the accident was caused by the negligence of the driver of the ambulance. In this con-

nection it is insisted that the car was approaching Thirty-eighth avenue at a lawful rate of speed; that the horses turned to the right in the intersection, indicating a purpose on the part of the driver to go east on Farnam street without crossing the tracks, but that, instead of doing so, he drove northward in front of the approaching car when a collision was inevitable, though he could have seen and heard the car had he looked and listened; that the gong was sounded; that the car was under control; and that it was stopped at the point of impact. There is some proof tending to support the theory of defendant, but its conclusions are not unavoidable deductions from the evidence and the law. There were several eyewitnesses. The ambulance attracted attention. It was a heavy vehicle with a red cross on the sides of the cover. The motorman recognized it as the county ambulance. When it appeared in the intersection two automobiles and a wagon, which had approached from the west on the south side of Farnam street, were stopped to let it pass. The occupant of the wagon testified that the ambulance passed within about six feet of him; that the horses came into the intersection on a slow trot, without showing an inclination to turn east, and went straight north; that they did not stop as they passed over Farnam street; and that their gait at the time of the collision was the same as when they entered the intersection. Occupants of the automobiles testified to the facts as they observed them. The testimony of the witnesses mentioned and of others tends to prove the following facts: As Fitzgerald reached Farnam street he leaned forward and looked eastward, when the approaching car was 140 feet or more east of Thirty-eighth avenue, but could not see it because his view was obstructed by an east-bound car. The motorman watched the ambulance while his car ran 150 feet. The collision occurred in the intersection near the center line of Thirty-eighth avenue. Testimony tending to prove the facts thus narrated is believable. According to the testimony of the motorman he approached the crossing at a speed of 10 or 12 miles an hour, and he applied the brakes, reducing the rate to 8

or 9 miles an hour after he saw the ambulance, but released the brakes because, as he asserted, the horses veered to the east—a contradicted statement. These estimates of speed, however, are not necessarily conclusive. The horses were trotting when they came into the intersection, and there is proof that the gait was not changed until they had crossed the tracks while going north without deviation. In *Harris v. Lincoln Traction Co.*, 78 Neb. 681, Commissioner Duffie said: "It is common knowledge that horses in a trot move at the rate of about 7 miles to the hour or 10 feet to the second." Whatever may have been the speed of the horses driven by Fitzgerald, it may fairly be inferred from evidence in the present case that the car, after the motorman had seen them approaching the track at right angles, exceeded his estimated speeds, and that it ran more than three times as far as the horses trotted before it reached the place where the collision occurred. Triers of fact are not compelled, as a matter of law, to disregard such inferences or to accept as verity the estimates of the alleged wrongdoer. Besides, when the reciprocal rights and duties of the street car company and the driver of the ambulance at public crossings are considered, with their relative situations and their obvious movements, a speed of 10 or 12 miles an hour may be evidence tending to show negligence. The car was running up grade. The motorman ran at least 150 feet while watching the ambulance. With the car that distance from the crossing, and with the heads of the horses within perhaps 30 feet of the track on which the car was running, it cannot be said, as a matter of law, in view of all the circumstances of which there is proof, that defendant was not guilty of actionable negligence, or that the driver of the ambulance was chargeable with contributory negligence. As a matter of right, a motorman who at the distance of 150 feet sees a team on a trot, 30 feet from a crossing, approaching the track at right angles, cannot maintain his speed until a collision is inevitable. *McKennan v. Omaha & C. B. Street R. Co., ante,* p. 281; *Kennedy v. Third Avenue R. Co.*, 52 N. Y. Supp. 551.

In *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209, the following language was used: "Whatever the rule in some states may be with respect to the rights of pedestrians and street cars upon the streets of a city, the law in this state is settled that neither the street car nor the pedestrian has any priority or privileged right over the other; that an electric street railway company and an ordinary traveler upon the street are required to observe an equal degree of care to prevent accidents, and that neither has a right of way superior to that of the other."

In *Omaha Street R. Co. v. Mathiesen*, 73 Neb. 820, it was said: "If the driver of a vehicle who arrives at a street intersection and who sees an approaching car is justified in believing that there will be sufficient time for him to cross the track before the car, if run at its usual and ordinary rate of speed, will reach the point of crossing, he cannot be said as a matter of law to be guilty of negligence in attempting to cross, and the question is a question of fact for the jury, to be determined from all the evidence before it. What an ordinarily prudent and cautious person would do under like circumstances is peculiarly a question for the jury."

In the present case the issues of negligence and contributory negligence were questions for the jury. In *McGahey v. Citizens R. Co.*, 88 Neb. 218, the opinion reads: "The court therefore was justified in submitting the cause in a double aspect; that is to say, to permit the jury to find whether the defendant was negligent in failing to exercise reasonable care to control the speed of its car at the time of and shortly preceding the accident, or to find whether the motorman, after discovering the plaintiff's perilous situation, brought about possibly by his own negligence, failed to use ordinary care to avert the accident."

The first assignment of error is overruled.

Rulings in giving and in refusing instructions are criticised, but, if there has been no mistake in what has been said already in regard to the evidence and to the law applicable thereto, there is no prejudicial error in the charge or in the refusal to give requested instructions.

Defendant also complains of assigned error in permitting witnesses to answer the following questions:

"From what you observed from the position of the car, and of the position of the wagon as it approached to cross the west-bound track, did it, or did it not appear to you—how did it appear to you as to whether or not the driver would have time to cross before the car struck him?"

"And you say that at that time when he looked that he could not see the west-bound car because the east-bound car cut off his view; is that right?"

These questions were propounded to plaintiff's witnesses on redirect examination to explain opinions expressed in answer to similar questions propounded to the same witnesses on cross-examination. For this reason, objections to the questions quoted were properly overruled.

There is no prejudicial error in the record, and the judgment is

AFFIRMED.

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A. G. DAVIS COMPANY, APPELLEE, V. EMMA H. HOLMES, APPELLANT.

FILED MARCH 13, 1915. No. 18,020.

**Mechanics' Liens:** FORECLOSURE: CROSS-PETITION: FINDINGS. Where defendant, in a suit to foreclose a mechanic's lien, files a cross-petition for damages resulting from a fire negligently started by plaintiff, findings that "the defendant is not entitled to recover upon her cross-petition" and that "defendant take nothing by her cross-action" dispose of the issues of fact raised by the cross-petition and answer thereto.

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

*Field, Ricketts & Ricketts,* for appellant.

*Burr, Greene & Greene, contra.*

ROSE, J.

Plaintiff commenced this action to foreclose two mechanics' liens for painting and repairing defendant's dwelling-house in the city of Lincoln, the amount of one lien being $225, and of the other $12.15. Defendant filed a cross-petition demanding $2,000 in damages alleged to have been caused by fire negligently started by plaintiff's workmen. Upon a trial the district court foreclosed plaintiff's liens and dismissed the cross-petition. Defendant has appealed.

For the purposes of review the cross-demand of defendant is the only matter in controversy. She insists that the evidence shows the fire was caused by the negligence of plaintiff's employees and that therefore she is entitled to recover resulting damages. The trial court found that "the defendant is not entitled to recover upon her cross-petition," and ordered that "the defendant take nothing by her cross-action." The evidence justifies the conclusion reached by the trial court.

There is no error in the record, and the judgment is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

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## THOMAS J. BROWN V. STATE OF NEBRASKA.

FILED MARCH 13, 1915. No. 18,671.

1. **Larceny**: POSSESSION OF STOLEN PROPERTY: INFERENCE. In a prosecution for larceny, the jury, in determining the inference to be drawn from the possession of recently stolen property, should consider whether accused kept and sold it openly, where there is proof of that fact.

2. ———: ———: INSTRUCTION. In a prosecution for larceny, an instruction referring directly to defendant's possession of stolen property, and requiring the jury to consider it carefully, where there is nothing else from which the guilt of defendant could be inferred, should likewise call attention to proof, if any, that he kept and sold the property openly.

ERROR to the district court for Cherry county: WILLIAM H. WESTOVER, JUDGE. *Reversed and dismissed.*

*Walcott & Walcott* and *Allen G. Fisher,* for plaintiff in error.

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

ROSE, J.

In a prosecution by the state in the district court for Cherry county, Thomas J. Brown, defendant, was convicted of stealing seven cows belonging to Thomas Byron, and for that offense was sentenced to serve in the penitentiary a term of not less than one nor more than ten years. As plaintiff in error he now presents for review the record of his conviction.

Defendant was formerly convicted of the same offense, but his sentence was set aside for error in the proceedings. The circumstances relating to the loss of the cows and to defendant's possession thereof several months later are narrated at some length in the former opinion and need not be restated here. *Brown v. State,* 88 Neb. 411. In reviewing the record of the first conviction it was said:

"These cattle had been openly in possession of the defendant for about six months. There was therefore little, if any, presumption of guilt from the possession of the stolen property."

In the present record there is no evidence to sustain the conviction, unless the guilt of defendant may be inferred from his possession, which he and his witnesses explained as follows: In November, 1909, a man from Marsh Lake, giving the name of W. M. Hammers, came to defendant's house and asked for dinner. During the meal Hammers mentioned that he was driving the cattle to Valentine to market. After dinner they were sold to defendant. On the night of the arrest defendant drove home from Arabia to inform his wife and to get a book in which he had written the name of the seller. He did not go into the house because his wife, who was sick, had gone to sleep. The book

was produced at the first trial, but had been lost before the second. The cows described in the information were branded, but defendant did not know what the brand was. They were kept with his own cattle in an open pasture crossed by two roads. His wife testified that he bought the cows, but her previous statements indicated that she did not know about the sale. Another witness stated that a man with a bunch of cattle turned into defendant's place early in November, 1909. After defendant's possession had been thus explained, witnesses for the state testified there was no one named Hammers at Marsh Lake or in that vicinity. With defendant's possession explained in the manner indicated, the trial court gave the following instruction:

"You are instructed that the possession of stolen property recently after the larceny thereof, when unexplained, may be sufficient to warrant a jury in inferring the guilt of the party in whose possession it is found. Whether such inference should be drawn is a question of fact exclusively for the jury. In this case you should carefully consider the evidence of the state as to the defendant's possession of the stolen property, the length of time he had such possession, his explanation of the way he came into possession of the cows, as well as all the other evidence in the case, and then draw such inference therefrom as you may be convinced the evidence warrants."

Though there was no direct evidence that defendant had stolen the cows, the instruction refers directly to his possession—the only circumstance from which his guilt could be inferred—and directs the jury to consider it carefully, without making any direct reference whatever to evidence that he had kept and sold the animals openly. The law is that the jury, in determining the inference to be drawn from the possession of recently stolen property, should consider whether accused kept and sold it openly, where there is proof of that fact. *State v. Fitzgerald*, 72 Vt. 142. An instruction referring directly to possession and requiring the jury to consider it carefully, where there is nothing else from which the guilt of accused can be inferred, should

likewise call attention to proof, if any, that he kept and sold the property openly. In this respect at least the instruction cannot be approved.

Considering that there is no direct evidence of the guilt of defendant, that a considerable time elapsed before the missing animals were found in his possession, that he testified to having purchased them from a stranger, that he openly kept and sold them, and that he is entitled to the presumption of innocence, his conviction rests on inference and conjecture too uncertain to satisfy the demands of the criminal law. The weakness of the prosecution was pointed out in the former opinion. It was not materially strengthened when the case was retried. For these reasons, the conviction is set aside and the prosecution is dismissed.

REVERSED AND DISMISSED.

MORRISSEY, C. J., not sitting.

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JOHN M. HENRY, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED MARCH 13, 1915. No. 18,740.

1. **Appeal:** LAW OF THE CASE. The determination of a question on appeal becomes the law of the case, and will not ordinarily be reexamined on a subsequent appeal in the same case.
2. ———: NEGLIGENCE: CONFLICTING EVIDENCE. In an action for personal injuries, negligence and contributory negligence, where there is a substantial conflict in the evidence, are questions for the jury, and their findings on those issues will not be set aside on appeal unless clearly wrong.
3. **Evidence:** OBJECTIONS: FOUNDATION. In an action for personal injuries caused by electricity, an objection to admitting in evidence, on the ground that no foundation had been laid, an electric switch, may be overruled, where counsel for defendant in the opening statement pointed it out as the identical switch by which plaintiff was injured.
4. ———: CARLISLE TABLE. The Carlisle table of expectancy may be admitted in evidence in the trial of an action for personal inju-

ries resulting in the permanent impairment of plaintiff's earning capacity, age and good condition of health at the time of the injury being shown.

5. **Appeal:** RULING ON EVIDENCE. A judgment will not be reversed on account of a ruling on evidence, where the record shows that appellant was not prejudiced thereby.

6. **Trial:** INSTRUCTIONS. Where instructions as a whole correctly state the law applicable to the evidence, they will not be condemned as erroneous, though an isolated statement might be open to criticism.

7. **Damages.** A verdict for $6,500 in favor of a healthy young man with a good earning capacity, which was permanently impaired at the age of 21, *held* not excessive, where the evidence shows that he suffered pain and anguish from an electric burn resulting in a severe shock and in the loss of the thumb and the index finger of his left hand.

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

*Fred C. Foster* and *D. H. McClenahan,* for appellant.

*W. B. Comstock, contra.*

ROSE, J.

This is an action by an employee in the water department of the city of Lincoln to recover from his employer damages in the sum of $10,000 for personal injuries sustained September 3, 1908. At that time plaintiff had been in the employ of defendant for a month as a motor-tender at the Rice pumping station near the intersection of Twenty-fourth and N streets. He worked alone at the bottom of a cylindrical pit 50 feet deep and 25 feet in diameter, where two pumps, propelled by electricity were located. Intending to prime one of the pumps, which had lost its suction, plaintiff stepped onto a 12-inch wheel on a perpendicular valve-stem extending a foot or more above the floor of the pit and, by the turning of a similar wheel on the end of a horizontal valve-stem about five feet higher, attempted to open a valve between a water main and the pump. The wheel under him turned and he lost his balance. In attempting to protect himself from a fall, he

threw out his left hand, which came in contact with an electric switch or switch-handle less than three feet from where he had stood. Electric burns resulted in the amputation of the thumb and the index finger and a neuroma followed. In substance the negligence charged, in view of the situation and conditions shown by the petition, consisted in the failure: To warn plaintiff of danger or to instruct him how to avoid injury; to cover, or provide a guard for, the switch; to ground the switch or to connect the trip-coils; to provide sufficient space between the switch and the valve-stems; to furnish sufficient insulation for the switch and the switch-handle; to provide a switch sufficient for 4,400 volts, that amount of electromotive force having been used with a switch designed for 2,500 volts; to provide a covering for the damp floor; to place the upper valve within reach of the floor, or provide proper means for reaching and operating it; to furnish a safe place to work. Defendant in its answer denied negligence, and pleaded the performance of its duties to plaintiff, assumption of risk and contributory negligence. From judgment on a verdict in favor of plaintiff for $6,500, defendant has appealed.

Failure of plaintiff to file with the city clerk a statement of his claim within 30 days from the date of his injury is argued as a ground of reversal, and the city charter is cited to sustain the argument. Rev. St. 1913, sec. 4582. The identical point under the same petition was decided adversely to defendant on a former appeal. *Henry v. City of Lincoln,* 93 Neb. 331. The former ruling is therefore the law of the case and will not now be reexamined. *Bettle v. Tiedgen,* 85 Neb. 276.

The assignment to which the principal argument applies is alleged error in the refusal to direct a verdict for defendant on account of the insufficiency of the evidence to show that the proximate cause of plaintiff's injuries was the actionable negligence of defendant. The question is a perplexing one. The vital issues are complicated by many charges of negligence. The evidence is voluminous and much of it is the testimony of experts on the subjects of

electricity and electrical appliances. The relation of different items of proof to a particular charge of negligence is not always clear. The identical switch of which plaintiff complains was before the trial court and the jury, but it is not in the record for review. Some of the witnesses testified with reference to the switch as it appeared before them. Their testimony may have had a definite import in the trial court, but it is not all intelligible on appeal, in absence of the exhibit to which it relates. There appears, however, to be proof of each charge of negligence, though this is vehemently controverted by defendant. The circumstances and conditions under which plaintiff worked at the bottom of the pit are disclosed. The record contains proof tending to show: As a motor-tender plaintiff was inexperienced. He was not familiar with the danger of electromotive force or with the means of controlling and applying it. The switch or the switch-handle was uncovered and unguarded. It was not grounded. At the time of the injury it was subjected to a test of 4,400 volts, while it was designed for 2,500 volts, the latter having been stamped on the instrument itself by the manufacturer. It was insufficient for so severe a strain, the insulation being impaired and the danger being increased by dampness in the pit. The weather was warm. Water had collected on and dripped from the pipes. The floor was wet and uncovered. The space between the valve-stems and the electric switch was too narrow for safety. The wheel on the perpendicular valve-stem was the only means of reaching the valve above and the latter was too high to be operated from the floor. An experienced motor-tender who worked in plaintiff's absence frequently turned the upper valve while standing on the wheel below. Plaintiff was not warned of existing danger or instructed how to prevent injury. What has been thus said may be deduced from the proofs. The narrative is not intended as a statement of facts. It is meant for a summary indicating the nature of the testimony on which plaintiff relies. All of the proof tending to show actionable negligence is contradicted, but the issues of fact were for the jury and they were deter-

mined adversely to defendant. The conclusion is that the evidence is sufficient to sustain findings that negligence in the use of the electric switch and switch-handle, when considered with the strain to which it was subjected, under all of the circumstances and conditions proved, was the proximate cause of the injury, that plaintiff was not guilty of contributory negligence, and that he did not assume the risk of the injuries inflicted. It follows that there was no error in refusing a peremptory instruction for defendant.

Another assignment challenges a ruling admitting the electric switch in evidence. The objection at the trial was: "No foundation laid." This objection was properly overruled because counsel for defendant had, in his opening statement to the jury, pointed to the switch as the identical one described in the petition.

It is also contended that the trial court erred in admitting in evidence the Carlisle table showing the expectancy of life at the age of 21. Plaintiff was not quite that old when injured. His good health was shown. There was evidence that his earning capacity was permanently impaired by his injuries. These are circumstances under which tables of expectancy are admissible.

There were also objections to rulings on evidence relating to the character and the use of the switch and to plaintiff's earning capacity before and after the injury, but in these respects error is not affirmatively shown.

The following instruction is challenged as erroneous: "You are instructed that the burden of proof in this case is upon the plaintiff to prove, by a preponderance of the evidence, all the material allegations in his petition. That is to say, that, at the time of the accident alleged, the defendant was guilty of negligence, as stated in the petition; that, as the proximate result of such negligence, the plaintiff sustained injuries, as alleged in the petition, and, by reason of said injuries, the plaintiff has been damaged, as alleged in the petition, and the amount of such damages. When the plaintiff has shown these facts, then the burden of proof is upon the defendant to prove, by a preponderance of the evidence, the allegations of its answer, con-

stituting its defense to plaintiff's action. That is to say, that any injuries received by the plaintiff were the proximate result of his own negligence, or that his own negligence contributed thereto, as a proximate cause thereof."

The principal criticisms are: "This instruction shifts the burden of proof and requires the defendant to prove the allegations of its answer, regardless of whether the plaintiff, by his pleadings and evidence, showed that he was guilty of contributory negligence. It also requires the defendant to establish its freedom from negligence by a preponderance of the evidence."

When the entire charge is considered, the instruction is not open to the objections urged.

Another instruction contains the following language: "It is also a general rule of law that, where both parties are in the wrong, no liability arises. That is to say, even though you should find the defendant negligent, as alleged in the petition, yet if you should further find that the plaintiff's own negligence also contributed as the proximate cause of the injury sustained, then in such case no liability would arise against the defendant."

Another part of the charge reads: "You are instructed that the burden of proving negligence rests upon the party alleging it, and where a person charges negligence on the part of another as a cause of action he must prove the negligence, by a preponderance of the evidence, and in this case, if the jury find that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover, and the jury should find the issues for the defendant."

The charge as a whole required the jury to find, as conditions of the right of plaintiff to recover, that negligence pleaded by him was established by a preponderance of the evidence and was the proximate cause of his injuries. When the instructions are properly interpreted, the jury were not permitted to find for plaintiff if he was guilty of contributory negligence. The burden of proving that defense was not placed on defendant, unless the allegations of the petition were established. In view of what has been said

in regard to the evidence, there is no prejudicial error in the giving or refusing of instructions.

The recovery is vigorously assailed as excessive, but a substantial reason for setting aside the verdict on this ground has not been suggested. Plaintiff was a minor in good health when his hand was burned. He was shocked and his injuries were distressing. He had a good earning capacity, which was permanently impaired. He lost the thumb and the index finger of his left hand. In the cicatrix there was a sensitive neuroma at the time of the trial. To remove it would require an operation. The utility and beauty of a perfect human hand represent the activity and development of the race. The hand protects other parts of the body. Its movements respond to the will and add grace and charm to oral expression. By a caress the hand may communicate the impulses of the heart to others. When it becomes repulsive by a deformity it may produce mental anguish—an element of damage. On appeal it is difficult to determine how much the jury may properly award for pain and suffering and other indefinite, though substantial, elements of recovery. Interference with a verdict as excessive must rest on substantial grounds.

No prejudicial error has been found, and the judgment is

AFFIRMED.

BARNES, J., dissents.

LETTON, J. I believe the recovery should not exceed $4,500.

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W. F. H. ARMSTRONG, TRUSTEE, ET AL., APPELLEES, V. DAVID C. PATTERSON, APPELLANT.

FILED APRIL 3, 1915. No. 17,884.

**Limitation of Actions:** DOMESTIC JUDGMENTS. A domestic judgment is a specialty within the meaning of section 10 of the code (Rev. St. 1913, sec. 7567), and an action thereon is barred by the statute

of limitations after five years from the date of the judgment. *Snell v. Rue*, 72 Neb. 571, overruled.

REHEARING of case reported *ante*, p. 229. *Former judgment of affirmance vacated and judgment of district court reversed and action dismissed.*

*T. L. Norval* and *M. O. Cunningham* appeared on rehearing as additional counsel, *amici curiæ*.

SEDGWICK, J.

Our former opinion in this case *ante*, p. 229, followed *Snell v. Rue*, 72 Neb. 571, reluctantly, to be sure, but under the impression that "to establish such a limitation now would be legislation, and is not within the province of the courts." A rehearing was had, and we have been greatly assisted by eminent counsel as well as by the defendant himself. It appears that in *Snell v. Rue, supra*, the contention was that actions on domestic judgments were limited by section 16 of the code: "An action for relief not hereinbefore provided for, can only be brought within four years after the cause of action shall have accrued." Code, sec. 16. Whether a domestic judgment is a specialty within the meaning of section 10 of the code was not much considered. In the opinion it is said: "Where the right of enforcement of a judgment by execution still exists after the bar which it is claimed the statute interposes to an action has taken effect, the bar is of no avail so far as preventing the collection of the debt is concerned. Hence the statute fails of its purpose as a statute of repose. We cannot believe that the legislature intended to fix such a short time (four years) within which an action upon a domestic judgment might be maintained, and at the same time leave the judgment open to enforcement by execution." This appears to be the only point that was insisted upon or presented in the brief of counsel in that case. The court, by way of argument, referred to *Tyler's Ex'rs v. Winslow*, 15 Ohio St. 364, with apparent approval, but not with the purpose of deciding whether such judgment is a specialty. In our former opinion herein, it was suggested

that *Tyler's Ex'rs v. Winslow* had since been greatly discredited, if not overruled, by later decisions of that court, and we affirmed the judgment of the district court because it appeared that our former decision had been followed, and under the supposition that greater harm would come from overruling *Snell v. Rue* than would ensue from upholding it until the legislature could establish a more reasonable rule. There seems to be some inconsistency in providing by statute that an action on a domestic judgment is barred in five years, and that it may nevertheless be revived and enforced at any time within ten years. But this inconsistency is not so great as to provide that there is no limitation, and that an action can be maintained thereon when it has been dormant for a length of time "whereof the memory of man runneth not to the contrary." We are, upon further consideration, convinced that the legislature never intended to remove all limitations of such actions, and that such judgment must be regarded as a specialty within the meaning of section 10 of the code (Rev. St. 1913, sec. 7567). *Snell v. Rue,* 72 Neb. 571, is overruled.

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

REVERSED AND DISMISSED.

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3. Error must be affirmatively shown. *Haight v. Omaha & C. B. Street R. Co.* ..... 293

4. The assigning of a wrong reason for a correct judgment is not ground for reversal. *Kanaly v. Bronson* ..... 322

5. A decree in equity depending solely on the credibility of witnesses who testified orally will not ordinarily be disturbed. *McLaughlin Bros. v. Hilliard* ..... 326

6. An order granting a new trial will not be reversed, where abuse of discretion is not shown. *Olson v. Farnsworth*.... 407

7. Disallowance of nominal damages *held* not reversible error, where it did not affect a substantial right or prevent plaintiff from recovering costs. *Braun v. Peet* ..... 443

8. A dismissal for insufficiency of evidence, instead of a peremptory instruction for defendant, is not ground for reversal. *Braun v. Peet* ..... 443

9. Where the evidence is insufficient to sustain a verdict for plaintiff, it is not error to dismiss the action. *Beber v. Beebe & Runyan Furniture Co.* ..... 446

10. Where an objection to an improper remark of counsel is sustained, the judgment will not be reversed on account thereof, unless complainant's rights are prejudiced thereby. *Krum v. Sullivan & Schaberg Transfer & Fuel Co.* ..... 491

11. Where part of an answer is stricken and no exception taken, and an amended answer is filed on which the case is tried, error cannot be predicated on such ruling. *Pitela v. Roublicek* ..... 561

12. A judgment will not be reversed, where it is the only one sustainable under the pleadings and the evidence. *Wakefield v. Wakefield* ..... 652

13. Error cannot be predicated on the exclusion of evidence not within the issues. *Aegerter v. Ronspies* ..... 656

14. Where the record affirmatively shows that there is no question presented which has not heretofore been expressly decided by the supreme court, the appeal will be dismissed. *In re Williams* ..... 726

15. Counsel should comply with the rules as to briefing, yet if they do not, the court will correct any manifest error such as would cause a miscarriage of justice. *Winterringer v. Sellen* ..... 739

**Appeal and Error**—*Continued.*

16. A question decided on an appeal will not ordinarily be reexamined on a subsequent appeal in the same case. *Henry v. City of Lincoln* ..... 865

17. A judgment will not be reversed because matters are submitted to the jury which, though actually tried, should have been eliminated if either party had so requested. *Weber v. Towle* ..... 233

18. A party cannot complain of an instruction given at his request. *McKennan v. Omaha & C. B. Street R. Co*..... 281

19. Where plaintiff's claim for damages and defendant's counterclaim for trespass were submitted under proper instructions, the verdict will not be set aside unless clearly wrong. *Norman v. Kusel* ..... 400

20. Where a jury disregards instructions and renders a verdict so excessive that it must have been the result of passion or prejudice, the judgment will be reversed. *Hutchinson v. Western Bridge & Construction Co*..... 439

21. The giving of an instruction containing an inaccurate explanation of terms correctly used therein is not ground for reversal, where it does not mislead the jury. *Usher v. American Smelting & Refining Co*..... 526

22. An error in defining "fellow servant" is immaterial, where the undisputed evidence shows that such relation did not exist and the jury so find. *Wenquist v. Omaha & C. B. Street R. Co*..... 554

23. A judgment on conflicting evidence will not be reversed for inadequacy in amount, where the jury were properly instructed on the measure of damages. *Calbreath v. Bamford* 830

24. A judgment sustained by the pleadings and evidence will be affirmed. *Campbell v. Hobbs* ..... 833

25. A judgment will not be reversed for nonprejudicial rulings on evidence. *Henry v. City of Lincoln* ..... 865

26. Findings of fact on conflicting evidence will not ordinarily be set aside. *DeNoon v. Lincoln Traction Co*..... 1

27. Findings of a jury will not be disturbed where the evidence is conflicting. *Kohl v. Munson* ..... 170

28. A verdict on conflicting evidence will not be set aside unless manifestly wrong. *Haight v. Omaha & C. B. Street R. Co*.. 293
*Langdon v. Withnell* ..... 335
*Williams v. Western Travellers Accident Ass'n* ..... 352
*Olson v. Farnsworth* ..... 407

**Appeal and Error**—*Concluded.*

*Fourth Nat. Bank v. Rutherford* ..... 697
*Haar v. Howard* ..... 761

29. A verdict on conflicting evidence will not be disturbed, unless the whole record shows it to be clearly wrong. *Weber v. Towle* ..... 233

30. A verdict not clearly wrong on the questions of fact will be sustained. *Wenquist v. Omaha & C. B. Street R. Co*..... 554

31. A verdict will not be set aside as unsupported by the evidence, unless clearly wrong. *Nofsinger v. Paup* ..... 599

32. A verdict sustained by substantial evidence will not be disturbed unless clearly wrong. *Davis v. Manning* ..... 658

**Arbitration and Award.** See COUNTIES AND COUNTY OFFICERS, 5.

1. An arbitration award given to one of the arbitrators for delivery *held* binding, though not delivered but produced in court on an order therefor. *Hughes v. Sarpy County* ..... 90

2. An arbitration award *held* not void for want of notice of a meeting of the arbitrators to view the premises, where no hearing was contemplated. *Hughes v. Sarpy County* ..... 90

3. Submissions of controversies to arbitration will be liberally construed to give effect to the intention of the parties. *Hughes v. Sarpy County* ..... 90

4. The burden of proof is on the party seeking to impeach an arbitration award. *Hughes v. Sarpy County* ..... 90

**Assault and Battery.** See LIMITATION OF ACTIONS, 4.

1. Evidence *held* insufficient to sustain a conviction of assault. *Fink v. State* ..... 5

2. Instruction defining assault *held* proper. *Mauder v. State* 380

3. An instruction on what constitutes the offense of assault *held* not prejudicial. *Mauder v. State* ..... 380

4. The rule that where the victim in good faith withdraws from a mutual combat, and is afterwards assaulted, he may recover damages, does not apply where the party assaulted strikes his assailant immediately on escaping from the attack. *Eisentraut v. Madden* ..... 466

5. Plaintiff cannot recover for an assault and battery where he was the aggressor, unless defendant used more force than was necessary. *Nofsinger v. Paup* ..... 599

6. Evidence *held* to sustain a conviction of shooting with intent to wound. *Dilley v. State* ..... 853

**Attorney and Client.**

Where an attorney agrees upon his compensation for a specified service, he cannot ordinarily contract for greater compensation for such service while the service is being rendered. *Olson v. Farnsworth* ..... 407

**Bankruptcy.**

1. An act of fraud, embezzlement, misappropriation or defalcation does not except a debt from a discharge in bankruptcy, unless the debtor created it while acting as an officer or in a fiduciary capacity. *Martin v. Starrett* ..... 653
2. The managing partner of a firm composed of two members is not an "officer," within sec. 17 of the bankruptcy act of 1898. *Martin v. Starrett* ..... 653
3. The term "fiduciary capacity," as used in sec. 17 of the bankruptcy act of 1898, applies to technical trusts, and not to those arising by implication of law. *Martin v. Starrett* .... 653
4. During the existence of a partnership formed to conduct a banking business, the managing partner does not act "in any fiduciary capacity," within sec. 17 of the bankruptcy act of 1898. *Martin v. Starrett* ..... 653

**Bastardy.**

1. Where complainant's evidence was, by agreement, taken in shorthand, and transcribed and certified by the magistrate, an objection that it was not reduced to writing by the magistrate, *held* properly overruled. *Newman v. Dovey* ..... 624
2. An objection to the complaint filed before the birth of the child, that it did not state that the child was born alive, should be overruled. *Newman v. Dovey* ..... 624

**Bills and Notes.**

1. In an action by one party to a note against another to recover the one-half of the debt paid by plaintiff, parol evidence is admissible to show the capacity in which they signed the note. *Cox v. Ellsworth* ..... 392
2. Instructions as to plaintiff's right to recover on a note *held* not prejudicial. *Cox v. Ellsworth* ..... 392
3. Evidence, in an action on a note, *held* to show that defendant did not sign the note, and that plaintiff was not a *bona fide* purchaser. *Powell v. Deuchler* ..... 296
4. Where a negotiable note is purchased after maturity from an innocent holder, the purchaser takes it free from equities and defenses between the original parties. *Douglass v. Burton* ..... 483

**Bills and Notes**—*Concluded.*

5. Where the uncontradicted evidence shows that plaintiff purchased a note sued on after maturity from an innocent holder, the court should direct a verdict for plaintiff. *Douglass v. Burton* ..... 483
6. Where defendant pleads total failure of consideration for a note, and proves only partial failure, *held* not error to refuse to submit that defense. *Aegerter v. Ronspies* ..... 656

**Brokers.**

1. Where the owner lists personalty with several agents, giving no one an exclusive agency, the agent effecting the sale is entitled to the commission. *Goodwin v. Haller* ..... 209
2. Evidence, in an action for commission, *held* to sustain verdict for plaintiff. *Goodwin v. Haller* ..... 209

**Burglary.**

1. Evidence *held* insufficient to sustain a conviction of burglary. *Hayward v. State* ..... 9
2. Under sec. 8643, Rev. St. 1913, to prove burglary, there must be evidence of an unlawful breaking and entry with felonious intent. *Hayward v. State* ..... 9
3. An instruction that, if the jury believed "beyond a reasonable doubt" that the accused entered the building without unlocking the door, or without using force, they should acquit him, *held* erroneous. *Hayward v. State* ..... 9
4. In a trial for burglary, an instruction containing the clause, "although the entry might have been effected through a door already open," *held* erroneous for ambiguity. *Hayward v. State* ..... 9

**Carriers.** See NEGLIGENCE, 10, 11.

1. A street railway company must exercise greater care in transporting children than in transporting adults. *Dore v. Omaha & C. B. Street R. Co* ..... 250
2. It is not negligence, as a matter of law, for a child of seven, after signaling a street car to stop, to leave his seat and stand in the doorway. *Dore v. Omaha & C. B. Street R Co*... 250
3. It is not such contributory negligence as will preclude recovery for injuries, for a passenger to stand on the front step of a crowded street car while in motion. *Kadner v. Omaha & C. B. Street R. Co* ..... 678
4. Permitting passengers to stand on platforms and steps of an overloaded street car *held* evidence of negligence. *Kadner v. Omaha & C. B. Street R. Co* ..... 678

**Carriers**—*Concluded.*

5. A person standing on the steps of a moving street car, not being able to secure a seat or standing room within, is presumed to be there with the consent of those in charge of the car. *Kadner v. Omaha & C. B. Street R. Co* ..... 678

6. Under the evidence, in an action for injuries from being thrown from a crowded street car, *held* that the questions of negligence and contributory negligence were for the jury. *Kadner v. Omaha & C. B. Street R. Co* ..... 678

**Chattel Mortgages.**

1. A bill of sale, purporting on its face to convey the property absolutely, may be shown to have been given as security only. *Weber v. Towle* ..... 233

2. In determining whether a bill of sale was given as security, evidence as to whether the debt was canceled and the evidence thereof surrendered when the bill of sale was made is material. *Weber v. Towle* ..... 233

3. Whether a bill of sale was given as security for a debt *held*, under the evidence, a question for the jury. *Weber v. Towle* 233

**Compromise and Settlement.**

1. A *bona fide* dispute as to the amount due on an account is a sufficient consideration to uphold a settlement thereof. *Hileman v. Maxwell* ..... 14

2. Where an insurer fraudulently secures the indorsement of a check containing a receipt in full, the receipt is no defense to an action on the policy. *Williams v. Western Travelers Accident Ass'n* ..... 352

**Conspiracy.**

A mere tacit understanding between conspirators to work to a common unlawful purpose is all that is essential to a guilty combination. *Deupree v. Thornton* ..... 812

**Constitutional Law.**

1. Ch. 178, laws 1909, authorizing Sherman county to pay for articles purchased when there was no money in the county treasury to pay for same, *held* not unconstitutional. *Gibson v. Sherman County* ..... 79

2. Ch. 178, laws 1909, authorizing Sherman county to pay for articles purchased under an invalid contract, *held* not void as an exercise of judicial power. *Gibson v. Sherman County* 79

3. Ch. 63, laws 1911, pertaining to bawdy-houses, except possibly secs. 5 and 8, *held* valid. *State v. Fanning* ..... 224

**Constitutional Law**—*Concluded.*

4. The constitutionality of the "Slocumb Law" (Rev. St. 1913, ch. 40) having been often passed upon will not be re-examined, where no special reason for its unconstitutionality was assigned. *Yechout v. Tesnohlidek* ..... 387

5. Ch. 47, laws 1883, requiring innkeepers to provide for the safety of guests, *held* constitutional. *Strahl v. Miller* ..... 820

**Contempt.**

1. The affidavit in a contempt proceeding is jurisdictional. *Belangee v. State* ..... 184

2. An affidavit alleging material facts on information and belief will not give a court jurisdiction of a contempt proceeding. *Belangee v. State* ..... 184

3. Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts. *Belangee v. State* ..... 184

**Continuance.** See CRIMINAL LAW, 29, 30.

The absence of a witness is not ground for a continuance, where his testimony would be inadmissible under the issues. *Aegerter v. Ronspies* ..... 656

**Contracts.** See GAMING.

1. A certain contract *held* to be a contract by defendant to "order all the material and superintend all the work," for a building, and not to be an ordinary building contract. *Sharp v. National Fidelity & Casualty Co* ..... 41

2. Evidence, in an action on a building contract, *held* to sustain a finding that the principal delays in construction were due to the owner's acts. *Sharp v. National Fidelity & Casualty Co* ..... 41

3. A contract for personal services is usually dissolved by the death of either party. *Homan v. Redick* ..... 299

4. Where a contract is so far personal that the representative of one party is not liable for nonperformance, the representative of the other party is not liable for a like failure. *Homan v. Redick* ..... 299

5. Where A employed B to manage property and collect rents, the fact that A's executors permitted B to manage the property and collect rents for some time after the death of A did not constitute a ratification of the contract. *Homan v. Redick* ..... 299

**Contracts**—*Concluded.*

6. Where defendant, by misrepresentations, induced plaintiff to deed him land for land of far less value, equity will grant relief. *Buchanan v. Wilson* ..... 369
7. Where plaintiff, though not wholly insane, was in such weak mental condition as to enable defendant to take advantage of him in an exchange of lands, *held* that plaintiff could rescind the contract and recover his property. *Buchanan v. Wilson* ..... 369
8. A stipulation that the contractor will provide all material and perform all the work constitutes a promise to satisfy lawful claims of mechanics and laborers. *Sailling v. Morrell* ..... 454
9. Where an agreement was indefinite, *held* that, under sec. 7909, Rev. St. 1913, that construction should prevail which plaintiff had reason to suppose defendant understood it to have. *Campbell v. Hobbs* ..... 833

**Corporations.**

1. A contract pertaining to a corporation's business, executed in its name by its president, will be presumed to have been authorized. *Omaha Wool & Storage Co. v. Chicago G. W. R. Co.* ..... 50
2. After forfeiture of charter under ch. 25, laws 1909, for nonpayment of the occupation fee, an action cannot be prosecuted in the corporate name. *Havens & Co. v. Colonial Apartment House Co* ..... 639
3. Sec. 144m, ch. 16, Comp. St. 1909, authorizing dissolved corporations to sue in the corporate name, *held* not to apply to a corporation whose charter has been forfeited under ch. 25, laws 1909. *Havens & Co. v. Colonial Apartment House Co.* ..... 639

**Counterclaim.** See SET-OFF AND COUNTERCLAIM.

**Counties and County Officers.** See CONSTITUTIONAL LAW, 1, 2. LIMITATION OF ACTIONS, 1, 2. TAXATION, 1.

1. A county treasurer is not liable on his bond for interest which he has been unable to collect, unless collection has been prevented by his negligence. *Furnas County v. Evans* 54
2. Where a county has recognized its moral liability for property obtained under an invalid contract, its allowance by the county board will not be set aside at the instance of a taxpayer. *Gibson v. Sherman County* ..... 79

**Counties and County Officers**—*Continued.*

3. Where the record on appeal from the allowance of a claim by the county board shows that the claim was acted on by the board, failure of the record to show that the claim was filed with the county clerk will not deprive the court of jurisdiction. *Gibson v. Sherman County* ..... 79

4. Formal pleadings are not necessary in presentation of a claim to a county board. *Gibson v. Sherman County* ..... 79

5. County boards have authority to submit matters in dispute to arbitration either under the statute or the common law. *Hughes v. Sarpy County* ..... 90

6. A county treasurer is not liable for the safe-keeping of county funds, including state taxes, deposited by him in a depository bank which has given bond pursuant to ch. 50, laws 1891. *Lancaster County v. State* ..... 95

7. Where a county treasurer is relieved from liability on his bond for loss of funds in a depository bank, the county, in the absence of extraordinary circumstances, is not liable to the state for state taxes included in such funds. *Lancaster County v. State* ..... 95

8. Where a county treasurer mistakenly pays to the state treasurer from county funds an amount equal to state money deposited by the county in a depository bank, and lost through failure of the bank, the county may, under permission of the state senate, recover such money from the state. *Lancaster County v. State* ..... 95

9. An order of the county board *held* not invalid because one of the commissioners had moved into another commissioner district. *Horton v. Howard* ..... 575

10. Bonds for a courthouse voted at a special election *held* not invalid because one of the members of the county board had moved into another commissioner district when the order for the election was passed. *Horton v. Howard* ..... 575

11. Evidence in a suit to enjoin the registration of county bonds *held* to sustain judgment for defendant. *Horton v. Howard* ..... 575

12. Notice of bond election *held* sufficient. *Horton v. Howard*.. 575

13. Under sec. 13, art. XVI of the constitution, and sec. 1955, Rev. St. 1913, *held* that a county commissioner elected in 1912 would hold his office for four years, beginning January, 1913, and his successor would hold for the remainder of the four-year term ending January, 1919. *Calling v. Gilland*.. 788

**Counties and County Officers**—*Concluded.*

14. Sec. 55, p. 370, laws 1879, as amended by ch. 46, laws 1905, fixes the terms of county commissioners of all counties at four years. *Saling v. Bahensky* ..... 789

15. The general election law in regard to the terms of county officers does not apply where the statute creating the office fixes the term. *Saling v. Bahensky* ..... 789

**Courts.**

1. In probate proceedings the county court is a court of record, and its judgments are entitled to the presumptions that attach to the records of such courts. *Herter v. Herter* .... 260

2. While the county court may incidentally determine equitable questions in probate matters, it does not have general equity jurisdiction. *In re Estate of Wilson* ..... 780

**Criminal Law.** See ASSAULT AND BATTERY, 1, 2, 6. BURGLARY. DISORDERLY HOUSES. INDICTMENT AND INFORMATION. LARCENY. RAPE. RECEIVING STOLEN GOODS. ROBBERY. WITNESSES, 1, 2.

1. Refusal of a cautionary instruction as to the testimony of a sheriff *held* proper. *Hudson v. State* ..... 47

2. An instruction as to malice *held* erroneous. *Jones v. State*.. 151

3. A confession is incompetent in evidence, unless first shown to have been voluntarily made. *Jones v. State* ..... 151

4. An involuntary confession is not competent evidence against the accused for any purpose. *Jones v. State* ..... 151

5. Evidence that the accused has admitted guilt or important facts, if competent, is not admissible in rebuttal, but only as evidence in chief. *Jones v. State* ..... 151

6. In a prosecution for obtaining money by false pretenses, a telegram sent by the drawee bank to the bank cashing the check *held* inadmissible, as hearsay. *Rogers v. State*..... 180

7. Where the record does not affirmatively show any prejudicial error, the judgment will be affirmed. *Black v. State* 273

8. A verdict on conflicting evidence will not be disturbed. *Mauder v. State* ..... 380

9. An instruction that the testimony of any witness who wilfully testifies falsely as to a material fact may be disregarded, and that the credibility of witnesses is for the jury, approved. *Mauder v. State* ..... 380

10. Instruction defining reasonable doubt *held* proper. *Mauder v. State* ..... 380

**Criminal Law**—*Continued.*

11. Failure to instruct on a lesser offense included in the crime charged *held* not error, where there was no request therefor. *Curtis v. State* ..... 397

12. Where, in a prosecution for robbery, intoxication of the accused was proved, failure to instruct thereon *held* not error, in the absence of a request therefor. *Curtis v. State* ..... 397

13. A verdict of guilty on conflicting evidence will not be set aside unless clearly wrong. *Curtis v. State* ..... 397

14. Where the evidence in the county court is certified to the district court on a petition in error, the supreme court will examine the entire proceeding, and affirm or reverse the judgment of the district court as the law demands. *Cooper v. State* ..... 461

15. A voluntary confession, made before arrest and before an accusation had been made, *held* properly received in evidence. *Shellenberger v. State* ..... 498

16. Where accused was below the average in intelligence, and the evidence, unaided by his confession, would not sustain a conviction, evidence that he had made a false confession of another murder in 1890 was not too remote to be admissible. *Shellenberger v. State* ..... 498

17. A nonexpert witness may give his opinion on the question of sanity, after testifying to the facts on which he bases his opinion. *Shellenberger v. State* ..... 498

18. Error cannot be predicated on the admission of irrelevant testimony, where no motion to strike same was made. *Shellenberger v. State* ..... 498

19. An instruction that defendant's confession, if he made one, is competent evidence to prove his connection with the crime, without qualification, *held* erroneous. *Shellenberger v. State* 498

20. Instructions defining reasonable doubt criticised. *Shellenberger v. State* ..... 498

21. A cautionary instruction as to the evidence of police officers is proper only when the officer is a witness for the state. *Shellenberger v. State* ..... 498

22. Refusal of a requested instruction is not error, where its substance is given in a different form. *Kurpgeweit v. State* 713

23. An instruction that accused is entitled to the presumption of innocence as a matter of evidence *held* not erroneous, when construed with another instruction defining evidence. *Kurpgeweit v. State* ..... 713

**Criminal Law**—*Concluded.*

24. In a prosecution for larceny, the court may, in its discretion, permit the state to withdraw its rest and prove the ownership of the property. *Kurpgeweit v. State* ..... 713

25. A conviction will not be reversed unless error is affirmatively shown. *Kurpgeweit v. State* ..... 713

26. Receiving stolen property in Nebraska may be prosecuted in this state, though the property was stolen in a foreign state. *Egan v. State* ..... 731

27. Affidavit of a juror, as to misconduct of the jury while deliberating, *held* properly disregarded. *Egan v. State* ..... 731

28. A memorandum of items of money paid is not competent in evidence as a book account. *Egan v. State* ..... 731

29. Under sec. 7889, Rev. St. 1913, a counter showing may be made against a motion for continuance. *Dilley v. State* .. 853

30. A judgment will not be reversed for refusal of a continuance, in absence of abuse of discretion. *Dilley v. State* ..... 853

**Damages.** See APPEAL AND ERROR, 23. EMINENT DOMAIN, 2. TELEGRAPHS AND TELEPHONES.

1. Testimony of parents of an injured child describing his sufferings, duration of sickness, and habits and conduct before and after the injury, *held* admissible to show the permanence of the injury. *Dore v. Omaha & C. B. Street R. Co*.... 250

2. Exhibition of scars of bodily injuries should not be permitted, unless they furnish evidence material to the issues. *McKennan v. Omaha & C. B. Street R. Co*..... 281

3. Where the measure of damages for breach of a contract of sale of good will is stipulated, the amount agreed on will be enforced, unless so excessive as to constitute a penalty. *Pankonin v. Gorder* ..... 337

4. A verdict for $1,500 for injury to a child *held* not excessive. *Dore v. Omaha & C. B. Street R. Co*..... 250

5. A verdict for $16,000 for permanent injuries to a man 36 years of age *held* not excessive. *Jones v. Chicago G. W. R. Co.* ..... 306

6. A recovery of $5,026 for permanent injuries to a teamster 24 years old *held* not excessive. *Krum v. Sullivan & Schaberg Transfer & Fuel Co*..... 491

7. A verdict of $10,000 for death *held* not so excessive as to justify setting it aside as the result of passion or prejudice. *Craig v. Chicago, St. P., M. & O. R. Co*..... 586

**Damages**—*Concluded.*

8. Where injuries were not permanent, verdict for $4,000 *held* excessive. *James v. Hayden Bros* ..... 619

9. A verdict for $6,500 for loss of the thumb and index finger of the left hand of a man 21 years old *held* not excessive. *Henry v. City of Lincoln* ..... 865

**Death.**

1. A presumption of death arises from the continued and unexplained absence of a person for seven years. *McLaughlin v. Sovereign Camp, W. O. W.* ..... 71

2. The presumption of death from absence is that the absentee died during the first seven years, but there is no presumption that his death occurred at any particular time. *McLaughlin v. Sovereign Camp, W. O. W.* ..... 71

3. An insurer cannot avoid its contract for an alleged violation of a by-law adopted during an unexplained absence creating a presumption of the insured's death, where there is no evidence that the insured was living when the by-law was adopted. *McLaughlin v. Sovereign Camp, W. O. W.* .... 71

4. Where absence of insured for more than seven years is shown, the burden is on the insurer of showing that he is alive. *Rosencrans v. Modern Woodmen of America* ..... 568

5. Evidence of eight years continuous absence *held* to warrant the presumption of insured's death. *Rosencrans v. Modern Woodmen of America* ..... 568

**Deeds.**

Deposit of a deed in a bank to be recorded after the grantor's death, and the recording thereof after the grantor's death, *held* a sufficient delivery to pass title. *Owings v. First Nat. Bank* ..... 257

**Disorderly Houses.**

Evidence *held* to sustain a conviction of leasing a house for immoral purposes, and of knowingly permitting the same to be so used. *Cooper v. State* ..... 461

**Divorce.**

1. Equity will not grant a divorce to a guilty petitioner, though the other party has been more culpable. *Peyton v. Peyton* 663

2. Where the evidence is oral and conflicting, the trial court's conclusion as to the reliability of witnesses will be given great weight. *Peyton v. Peyton* ..... 663

**Easements.**

Where the use of a way is permissive, and access to it is through a gate under control of another, there is no such adverse right as may ripen into a title by prescription. *Moll v. Hagerbaumer* ..... 809

**Ejectment.** See JUDGMENT, 8.

1. Plaintiff in ejectment must allege and prove a legal title and right of possession. *Reams v. Sinclair* ..... 542
2. A verdict in ejectment will not be disturbed where the evidence as to adverse possession is conflicting. *Koltermann v. Chilvers* ..... 673

**Elections.** See COUNTIES AND COUNTY OFFICERS, 10. MUNICIPAL CORPORATIONS, 3. SCHOOLS AND SCHOOL DISTRICTS, 3, 4.

1. Under sec. 2114, Rev. St. 1913, a contestant will be required, on motion, to set out the names of the persons whose votes are alleged to have been illegally received or rejected. *McWhorter v. Schramm* ..... 103
2. A contestant must prove the material allegations in his complaint, though the incumbent has not formally answered. *McWhorter v. Schramm* ..... 103

**Eminent Domain.** See WATERS, 11.

1. A city ordinance providing for "freeholders" to assess damages from the "opening or alteration" of streets, *held* not to conform to sec. 5133, Rev. St. 1913, providing for the "vacation" of streets. *Jones v. City of Aurora* ..... 825
2. No action taken under a city ordinance not conforming to sec. 5133, Rev. St. 1913, can be pleaded in bar of a property owner's right to sue for damages for vacation of a street. *Jones v. City of Aurora* ..... 825
3. The words "freeholder" and "householder," as used in sec. 5133, Rev. St. 1913, providing for vacation of streets and for election of householders to assess damages, are not synonymous. *Jones v. City of Aurora* ..... 825
4. Where streets are vacated by competent authority, the city must make adequate compensation to abutting property owners whose property is injured thereby. *Jones v. City of Aurora* ..... 825

**Equity.** See CONTRACTS, 6. COURTS, 2. JUDGMENT, 6. PRINCIPAL AND SURETY, 2. TAXATION, 10.

**Estoppel.** See WATERS, 5.

**Evidence.** See APPEAL AND ERROR. ARBITRATION AND AWARD, 4. BILLS AND NOTES, 1. CHATTEL MORTGAGES. CRIMINAL LAW. DAMAGES, 2. DEATH. ELECTIONS, 2. EXECUTORS AND ADMINISTRATORS, 1-4. INTOXICATING LIQUORS, 1-8, 18, 19, 21. MASTER AND SERVANT, 15. NUISANCE, 3. RAPE. RECEIVING STOLEN GOODS. SALES, 2. STATUTE OF FRAUDS. WITNESSES.

1. The introduction in evidence of only a part of county court proceedings will not rebut the presumption of the regularity of the proceedings. *Johnston v. Frank* ..... 180

2. Opinions derived from observation are admissible when, from the nature of the subject, better evidence cannot be obtained. *McKennan v. Omaha & C. B. Street R. Co*..... 281

3. Opinions based on observation of indications of pain and suffering, though observed some time after an injury, are admissible. *McKennan v. Omaha & C. B. Street R. Co*..... 281

4. Admission of evidence of all the circumstances under which a note was signed *held* not error, where part of the facts had been testified to by the opposite party. *Powell v. Deuchler* ..... 296

5. In an action for permanent injuries, annuity tables may be received and considered with other evidence. *Jones v. Chicago G. W. R. Co*..... 306

6. A witness cannot testify to the contents of a paper which he holds in his hands. *Corn Exchange Nat. Bank v. Ochlare Orchards Co*..... 536

7. A statement, by a party to an accident, of a fact directly connected therewith and made contemporaneously with the accident is competent evidence as part of the *res gestae*, if within his knowledge. *Wenquist v. Omaha & C. B. Street R. Co*..... 554

8. The preponderance of evidence is not determined alone by the greater number of witnesses. *Jerich v. Union P. R. Co.* 767

9. An objection to the admission in evidence of an electric switch, on the ground that no foundation had been laid, may be overruled, where counsel in the opening statement pointed it out as the switch by which plaintiff was injured. *Henry v. City of Lincoln* ..... 865

10. The Carlisle table of expectancy may be admitted in evidence in an action for injury resulting in permanent impairment of plaintiff's earning capacity; age and good condition of health at the time of the injury being shown. *Henry v. City of Lincoln* ..... 865

**Executors and Administrators.** See HOMESTEAD, 3-4.

1. The burden is on plaintiff to prove his allegation that the appointment of an administratrix was void. *Johnston v. Frank* ..... 190
2. Evidence, in a suit to set aside an administratrix's deed for fraud, *held* to sustain decree for defendants. *Johnston v. Frank* ..... 190
3. An order for an administrator's sale of land will be presumed to have been recorded before the sale. *Johnston v. Frank*.. 190
4. In a suit to set aside an administrator's deed for fraud, the burden of proof is on the plaintiff. *Johnston v. Frank*..... 190
5. Land other than the homestead may be sold when necessary to pay decedent's debts. *Johnston v. Frank* ..... 190
6. A claim by decedent's widow for money advanced in paying his debts may be allowed as a claim against his estate. *Johnston v. Frank* ..... 190
7. An administrator *held* entitled to credit for payments made in good faith on prior liens from proceeds of a sale of mortgaged property, though sec. 1477, Rev. St 1913, requires such sales to be made subject to existing liens. *In re Estate of Vasek* ..... 617
8. A pleading styled a "petition in equity," alleging grounds for disallowing items of credit and for additional debits in an administrator's report, will be treated, on appeal, as objections to the report. *In re Estate of Wilson* ..... 780
9. Where an administrator wrongfully obtains credit for money as paid out for the estate, he may be charged with interest thereon. *In re Estate of Wilson* ..... 780
10. An administrator is not chargeable with interest on money which he holds as administrator subject to the court's order, unless he received or should have received interest thereon. *In re Estate of Wilson* ..... 780
11. An administrator cannot charge against the estate attorney's fees and expenses incurred in a contest with heirs as to misappropriation of funds of the estate. *In re Estate of Wilson* ..... 780
12. An administrator *held* not entitled to an allowance for costs adjudged against him in litigation with the heirs. *In re Estate of Wilson* ..... 780
13. An administrator is entitled to credit for the cost of his bond furnished by a bonding company under sec. 1500, Rev. St. 1913. *In re Estate of Wilson* ..... 780

**Executors and Administrators**—*Concluded.*

14. Where, after apportionment of the estate, there is an appeal from an order correcting the administrator's account, the district court, after determining the debits and credits, should remand the cause for settlement of subsequent costs and final distribution. *In re Estate of Wilson* ..... 780

15. Orders of the probate court adjusting accounts of an administrator are not final until his discharge and final settlement of his accounts. *In re Estate of Wilson* ..... 780

16. On appeal from an order of the county court adjusting accounts of an administrator, the district court has jurisdiction of the matters from which the appeal is taken. *In re Estate of Wilson* ..... 780

17. Where objection is made to certain items in the account of an administrator and trial is had as to those items only, on appeal the district court has jurisdiction only of the matters tried and appealed from. *In re Estate of Wilson* ..... 780

18. Objections to the report of an administrator should on appeal be tried by the court, and not by a jury. *In re Estate of Wilson* ..... 780

**Fraud.** See SALES, 1, 2. VENDOR AND PURCHASER.

1. Where representations as to value are based on special knowledge obtained by an invoice, and are believed and acted on by the buyer to his injury, they amount to actionable fraud. *Giles & Son v. Horner* ..... 162

2. An instruction, in an action for breach of contract for the sale of goods, wherein defendant set up fraudulent representations, *held* misleading, as taking from the jury consideration of whether plaintiffs represented that they had invoiced the goods, thereby inducing defendant to buy. *Giles & Son v. Horner* ..... 162

**Fraudulent Conveyances.** See HUSBAND AND WIFE.

1. Where a debtor sells his stock of implements without complying with the bulk sales law (Rev. St. 1913, sec. 2651), and dies intestate and insolvent, a creditor may have a receiver appointed to impound the stock, have it sold, and the proceeds applied to his claim. *Scheve v. Vanderkolk* ..... 204

2. In a creditor's suit to impound goods sold in bulk in violation of the bulk sales law, the person in possession is a necessary party, but others through whose hands the goods have passed are not. *Scheve v. Vanderkolk* ..... 204

**Fraudulent Conveyances**—*Concluded.*

3. In a creditor's suit to impound goods sold in violation of the bulk sales law, other creditors may intervene. *Scheve v. Vanderkolk* ..... 204
4. Where a debtor sells goods in bulk without complying with the bulk sales law, and dies intestate and insolvent, creditors may impound the goods, without having first reduced their claims to judgment and having executions returned *nulla bona*, and without filing them in the probate court for allowance. *Scheve v. Vanderkolk* ..... 204
5. A purchaser in possession of goods sold without compliance with the bulk sales law holds the property in trust for the seller's creditors. *Scheve v. Vanderkolk* ..... 204
6. Fraud cannot be predicated on the transfer of the homestead interest by a debtor to his wife. *McCormick v. Brown* ..... 545
7. A transfer by a debtor to his wife of the amount of the homestead exemption, and of her statutory interest in the remainder, is not a fraud against his creditors. *McCormick v. Brown* ..... 545
8. Failure of a husband to pay his creditors from the proceeds of a sale of the homestead, as he had agreed, *held* not to bar the wife from claiming her interest in the proceeds of the sale. *McCormick v. Brown* ..... 545

**Gaming.**

1. In an action for commissions and money advanced for purchases of grain on the Chicago board of trade for future delivery, plaintiff's right to recover *held* to depend on whether the principal intended to become an actual buyer. *Sunderland & Saunders v. Hibbard* ..... 21
2. Evidence, in an action for commissions, *held* to show that the transaction was a gambling venture and speculation in the price of wheat in violation of sec. 8816, Rev. St. 1913, and contrary to public policy. *Sunderland & Saunders v. Hibbard* ..... 21
3. Courts will not aid either party to a gambling transaction. *Sunderland & Saunders v. Hibbard* ..... 21

**Guardian and Ward.**

Where a guardian is personally interested adversely to the estate of the ward, he must give bond on appeal, regardless of sec. 44, ch. 20, and sec. 234, ch. 23, Comp. St. 1911. *In re Williams* ..... 726

**Highways.**

1. Where a highway has been established under the statute and used for more than ten years, the rule as to establishment by prescription will not be strictly applied. *Wecker v. Dommer* ..... 728
2. Neglect to make a creek passable on the line of a highway *held* not of controlling importance in determining the establishment of the highway. *Wecker v. Dommer* ..... 728
3. Evidence *held* to show that a traveled way was a public road. *Wecker v. Dommer* ..... 728
4. Evidence, in an action for injuries caused by the negligent operation of automobiles, *held* to establish concurrent negligence by defendants, which rendered them jointly and severally liable. *Schweppe v. Uhl* ..... 328

**Homestead.** See FRAUDULENT CONVEYANCES, 6-8. HUSBAND AND WIFE, 2. QUIETING TITLE.

1. Evidence, in a suit to set aside an administrator's deed for fraud, *held* to show that the land in question was not the homestead of decedent. *Johnston v. Frank* ..... 190
2. The life estate in the widow in the homestead of her deceased husband and the estate in remainder in the children do not depend on occupancy. *Naiman v. Bohlmeyer* ..... 551
3. An administrator's sale of a homestead to pay decedent's debts is void. *Naiman v. Bohlmeyer* ..... 551
4. Where a widow buys the homestead at an administrator's sale, and afterwards conveys it by warranty deed, the grantee takes the widow's life estate, but the transfer is void as to the estate of the children. *Naiman v. Bohlmeyer* ..... 551
5. On the death of either spouse holding the fee to the homestead, the homestead vests in the survivor for life; their minor children, merely by virtue of such relation, having no homestead interest therein. *Weddle v. Specht* ..... 693

**Homicide.** See CRIMINAL LAW, 16.

**Husband and Wife.** See WILLS, 5, 6.

1. A wife's interest in her husband's real estate under ch. 49, laws 1907, cannot be alienated without her consent, nor subjected to his debts. *McCormick v. Brown* ..... 545
2. Where a husband sells the homestead, and the wife in good faith repurchases it with her share of the proceeds and the proceeds of a loan on the property, her title is not subject to claims of her husband's creditors. *McCormick v. Brown*.. 545

**Indictment and Information.**

An indictment for larceny under sec. 9057, Rev. St. 1913, may also contain a count for receiving stolen property. *Egan v. State* ..... 731

**Infants.** See JUDGMENT, 11.

**Injunction.** See MUNICIPAL CORPORATIONS, 7, 11. RAILROADS, 1. TAXATION, 11.

**Innkeepers.** See CONSTITUTIONAL LAW, 5.

1. Ch. 47, laws 1883, authorizes a guest at a hotel to sue the proprietor for injuries received through negligence of the proprietor or his servants. *Strahl v. Miller* ..... 820
2. In an action by a hotel guest against the proprietor for injuries, an instruction on contributory negligence *held* proper. *Strahl v. Miller* ..... 820
3. Where a guest is injured through negligence of an innkeeper or his employees, the innkeeper is liable therefor. *Strahl v. Miller* ..... 820

**Insurance.** See COMPROMISE AND SETTLEMENT, 2. DEATH, 3.

1. The policy of insurance and the application *held* to constitute the contract. *Cilek v. New York Life Ins. Co*..... 56
2. Where the application was dated June 13, 1899, and the policy issued June 23, which gave a grace of one month to pay annual premiums, and the insured died July 23, 1906, without having paid the premium for that year, *held* that the policy had not lapsed. *Cilek v. New York Life Ins. Co*..... 56
3. Under sec. 17, ch. 53, laws 1903, a mutual accident association could limit the time within which suit might be brought on policies not less than one year from the accrual of the right of action. *Williams v. Western Travelers Accident Ass'n.* ..... 352
4. Where the by-laws of a mutual accident association provided that no right of action should accrue within 90 days after receipt of proofs of loss, the question as to when the proofs of loss were received was for the jury. *Williams v. Western Travelers Accident Ass'n*..... 352
5. Where the evidence as to receipt of proofs of death within one year before commencement of action was conflicting, a general verdict for plaintiff will not be set aside on the ground that the action was commenced more than one year after receipt of such proofs. *Williams v. Western Travelers Accident Ass'n*..... 352

**Insurance**—*Concluded.*

6. Evidence, in an action against an accident association, whose by-laws provided that, for death from cerebral hemorrhage or heart failure, the amount payable should be limited to $500, *held* to sustain a finding that death did not result from either of such causes. *Williams v. Western Travelers Accident Ass'n* ..... 352

7. Where the beneficiary was induced by fraud to accept $100 in satisfaction of a $4,000 policy, *held* that a return of the $100 was not a condition precedent to suit on the policy. *Williams v. Western Travelers Accident Ass'n* ..... 352

8. Inconsistent provisions in an insurance policy will be construed most favorably to the assured. *Funke Estate v. Law Union & Crown Ins. Co* ..... 412

9. Under the by-laws of a mutual benefit association, *held* that the vice-president, in the absence of the president, did not become a member of the board of directors, of which the president was *ex officio* a member. *King v. Physicians Casualty Ass'n* ..... 637

10. Nonpayment of an assessment made by an illegal body will not authorize suspension of a member. *King v. Physicians Casualty Ass'n* ..... 637

11. A provision in an insurance policy against liability in case of death by suicide *held* valid. *Hewson v. Royal Highlanders* 774

12. A contract limiting the liability of a beneficial insurance association to disabilities described in its constitution *held* valid. *Huff v. Grand Lodge, B. of R. T* ..... 848

13. An agreement among members of a beneficial insurance association that a portion of the funds may be applied to the relief of members for whose disabilities no legal liability existed against the association *held* valid. *Huff v. Grand Lodge, B. of R. T* ..... 848

**Intoxicating Liquors.**

1. The burden is on an applicant for a liquor license to prove that a sufficient number of freeholders signed his petition. *Benson v. Olson* ..... 29

2. Evidence of petitioners *held* to establish *prima facie* that each was a freeholder and qualified to sign petition for liquor license. *Benson v. Olson* ..... 29

3. Evidence *held* to establish that an applicant for a liquor license was a man of respectable character. *Benson v. Olson*. 29

**Intoxicating Liquors**—*Continued.*

4. Affidavit of a newspaper publisher *held* to prove *prima facie* that notice of an application for a liquor license was published as required by sec. 3845, Rev. St. 1913. *Benson v. Olson* ..... 29
5. An affidavit of publication of notice of an application for a liquor license *held* sufficient, where no impeaching evidence was offered, to authorize the village board to act on the application. *Benson v. Olson* ..... 29
6. Where, on the hearing of an application for a liquor license, the remonstrant makes no claim of the nonexistence of an ordinance authorizing licenses, its existence will be presumed. *Benson v. Olson* ..... 29
7. Where one testified that he signed a petition for a liquor license, and produced a deed showing his full name to have the same initials as those signed to the petition, it was sufficient *prima facie* to identify him as the person who signed the petition. *Benson v. Olson* ..... 29
8. An offer to prove that members of a village board were disqualified to act on an application for a liquor license, by showing that they had formed an opinion as to the character of the applicant, *held* properly refused. *Benson v. Olson*.. 29
9. It is no defense to an action on a saloon-keeper's bond for loss of support that the husband and father of plaintiffs was a drunkard before the sales alleged in the complaint. *Yechout v. Tesnohlidek* ..... 387
10. A petition signed by 29 resident freeholders of a village containing 57 freeholders authorized the grant of a liquor license, where no remonstrance was filed prior to the hearing on the application. *Buckley v. Major* ..... 417
11. Where an applicant obtained a license without objection and sold liquors until he received notice of the filing of a remonstrance, *held* that he had not thereby forfeited his right to a license. *Buckley v. Major* ..... 417
12. The act of the territorial legislature of 1855 (laws 1855, p. 158) prohibiting the manufacture and sale of intoxicating liquors was repealed by the act of 1858 (laws 1858, p. 256). *State v. Excise Board* ..... 421
13. A petition for a liquor license, which does not allege that the applicant is a man of respectable character and a resident of this state, is insufficient. *Eyre v. Doerr* ..... 562
14. An amendment of defective petition for a liquor license will not validate prior proceedings taken thereon. *Eyre v. Doerr* ..... 562

**Intoxicating Liquors**—*Concluded.*

15. No action can be taken on an application for a liquor license until a petition is filed containing the allegations provided by statute and signed by the required number of resident freeholders. *Eyre v. Doerr* ..... 562

16. No liquor license can be issued unless an ordinance is first passed authorizing and regulating same. *Eyre v. Doerr*.... 562

17. An ordinance authorizing the sale of intoxicating liquors, without providing necessary regulations, is invalid. *Eyre v. Doerr* ..... 562

18. Where a remonstrance filed with the village board alleges that there is no ordinance authorizing issuance of a liquor license, the applicant must prove the existence of such an ordinance. *Winterringer v. Sellen* ..... 739

19. Oral testimony of a signer of a petition for a liquor license that he is the owner in good faith of certain specified real estate is *prima facie* evidence that he is a freeholder. *Winterringer v. Sellen* ..... 739

20. Where a small tract of land is conveyed to several persons to qualify them as freeholders in petitioning for, or to prevent, the granting of a liquor license, such persons are not thereby qualified as freeholders. *Winterringer v. Sellen*.... 739

21. An applicant for a liquor license need not establish the ownership of real estate for each of the petitioners, as in cases of trial of titles. *Winterringer v. Sellen* ..... 739

22. The petition for a liquor license must state the matters prescribed by statute, and must be signed by the requisite number of resident freeholders. *Winterringer v. Sellen* ..... 739

23. Where a remonstrance is filed denying the allegations of the petition for a liquor license, the applicant must prove such allegations. *Winterringer v. Sellen* ..... 739

**Judgment.** See COURTS, 1. LIMITATION OF ACTIONS, 10. MORTGAGES, 4. WILLS, 8, 9.

1. Where a judgment plaintiff has secured payment into court of a sum sufficient to satisfy his judgment, it is error to require the payment into court of further sums owing to defendant from third persons. *Montgomery v. Dresher* ..... 104

2. When the federal court for the district has rendered a deficiency judgment in foreclosure, an action on such judgment may be maintained without leave in the courts of the state, regardless of secs. 8257, 8259, Rev. St. 1913. *Armstrong v. Patterson* ..... 229

**Judgment**—*Concluded.*

3. The remedy for correcting a judgment after the term is limited to the grounds enumerated in sec. 602 of the code. *Girard Trust Co. v. Null* ..... 324
4. Under the evidence, a motion to correct a decree after the term denied. *Girard Trust Co. v. Null* ..... 324
5. Decree in a former suit *held res judicata* as to defendants' right to occupy the premises involved, for the time in controversy, on the terms and conditions under which they entered into possession. *Pankonin v. Gorder* ..... 337
6. A judgment based on a false return of service may be set aside in equity. *Larr v. Stein* ..... 488
7. Where, on defendant moving for a directed verdict, plaintiff does not ask to proceed further, but appeals from the judgment, he cannot afterwards litigate the issue. *Reams v. Sinclair* ..... 542
8. A judgment in ejectment for defendant because of the insufficiency of a deed in law, *held* not a bar to a subsequent suit in equity based on a claim that such deed conveyed an equitable title. *Reams v. Sinclair* ..... 542
9. Where a case is submitted on defendant's motion to direct a verdict, a judgment on the verdict so directed will be *res judicata* of the issues. *Reams v. Sinclair* ..... 542
10. A judgment creditor, by filing a transcript of his judgment in the district court, does not obtain a lien on land previously conveyed by the debtor by a recorded deed. *Whitfield v. Clark* ..... 626
11. Where, in partition, service is had on minor heirs represented by a guardian *ad litem*, the decree binds the minor heirs and cannot be collaterally attacked. *Weddle v. Specht*.. 693

**Judicial Sales.** See RAILROADS, 2, 4.

**Jury.** See TRIAL, 5-7.

1. To establish error for directing the sheriff to summon talesmen, instead of drawing from the regular panel, appellant must show that the regular panel had not been exhausted when such direction was made. *Haight v. Omaha & C. B. Street R. Co*..... 293
2. A juror, who was served with summons as a member of the board of trustees of a village, *held* not a party to a pending suit within sec. 8158, Rev. St. 1913, and subject to challenge for cause. *Krum v. Sullivan & Schaberg Transfer & Fuel Co*..... 491

**Jury**—*Concluded.*

3. Where a juror has consulted one of the attorneys, it is not ground for challenge for cause. *Krum v. Sullivan & Schaberg Transfer & Fuel Co* ..... 491

4. The overruling of a challenge for cause *held* not an abuse of discretion, where the juror stated that he had a general prejudice against corporations, but no prejudice against defendant, and that he could try the case impartially. *Kadner v. Omaha & C. B. Street R. Co* ..... 678

**Landlord and Tenant.** See PRINCIPAL AND AGENT, 2.

1. A contract of sale and lease, and a supplemental contract, *held* to constitute the contract between the parties. *Pankonin v. Gorder* ..... 337

2. A mere notice to vacate leased land *held* not an eviction, where the tenant disregarded it and later voluntarily vacated the premises. *Braun v. Peet* ..... 443

3. Failure of a landlord to furnish materials for repairs according to a lease is not an eviction, where the tenant was not damaged thereby. *Braun v. Peet* ..... 443

4. In an action for damages for an eviction of which there is no proof, evidence of the landlord's purpose to eject the tenant is immaterial. *Braun v. Peet* ..... 443

5. A landlord *held* liable to a tenant for injuries from a dangerous condition of a floor, known to the landlord, but not to the tenant. *Davis v. Manning* ..... 658

6. Evidence, in an action for injuries from a defective floor, *held* to sustain verdict for plaintiff. *Davis v. Manning* ..... 658

**Larceny.** See CRIMINAL LAW, 24

1. Unexplained possession of recently stolen cattle raises a presumption of guilt. *Kurpgeweit v. State* ..... 713

2. In determining the inference to be drawn from the possession of recently stolen property, the jury should consider whether accused kept and sold it openly, where there is proof of those facts. *Brown v. State* ..... 862

3. An instruction referring directly to accused's possession of stolen property, and requiring the jury to carefully consider it, where there is nothing else from which guilt can be inferred, should call attention to proof, if any, that he kept and sold the property openly. *Brown v. State* ..... 862

**Licenses.**

Sec. 2695, Rev. St. 1913, requiring license fees for hunting and fishing to be paid to the state treasurer for the state school fund, and not the county school fund, *held* not violative of sec. 5, art. VIII of the constitution, relating to license moneys. *State v. Nickerson* ..... 837

**Liens.** See JUDGMENT, 10.

**Limitation of Actions.** See ADVERSE POSSESSION. MORTGAGES, 5. MUNICIPAL CORPORATIONS, 14. TAXATION, 9.

1. Where payment of a just claim against a county, based on an invalid contract, was authorized by the legislature, limitations will not run against the claim until four years from the legislative authorization. *Gibson v. Sherman County*... 79
2. In an action by a county against the state by permission of the legislature under sec. 1180, Rev. St. 1913, *held* that the statute of limitations was no defense. *Lancaster County v. State* ..... 95
3. Where the pleadings show the time that has elapsed since the cause of action accrued, the question of limitations is for the court. *Armstrong v. Patterson* ..... 229
4. A civil action for assault and battery with circumstances of aggravation must be begun within one year, under sec. 13 of the code, and not four years, under sec. 12. *Borchert v. Bash* ..... 593
5. Limitations run against a bill to declare a deed a mortgage, in favor of a grantee in possession, from the time such possession becomes adverse. *Minick v. Reichenbach* ..... 629
6. Limitations do not run against a suit to remove a cloud from a landowner's title while he is in exclusive possession. *Essex v. Smith* ..... 649
7. Limitations do not begin to run against a mortgagor's right to redeem from a void foreclosure sale until possession is taken under the mortgage or the foreclosure. *Essex v. Smith* ..... 649
8. Where plaintiff amends his petition by stating a new cause of action, limitations run against the new cause of action until the amendment is filed. *Davis v. Manning* ..... 658
9. Where an amended petition does not state a new cause of action, the filing of the original petition and service of summons therein stops the running of limitations. *Davis v. Manning* ..... 658

**Limitation of Actions**—*Concluded.*

10. A domestic judgment is a specialty within sec. 10 of the code, and an action thereon is barred after five years from its rendition. *Armstrong v. Patterson* ..... 871

**Mandamus.** See ABATEMENT.

A peremptory writ of mandamus will not issue to compel the doing of an act inconsistent with the petition and the alternative writ. *State v. Matson* ..... 746

**Marriage.**

In a proceeding under sec. 2, ch. 25, Comp. St. 1911, to annul a marriage, plaintiff must prove that there was no subsequent voluntary cohabitation. *Kanaly v. Bronson* ..... 322

**Master and Servant.** See APPEAL AND ERROR, 22. NEGLIGENCE, 9.

1. Where an experienced workman selects a dangerous method of doing work, instead of a safe one equally open to him, he cannot recover for consequent injury. *Creighton v. Keens*.. 212
2. An employer has the right to assume that an employee of mature years is possessed of the usual powers of observation, and such knowledge and judgment as is acquired by common experience. *Creighton v. Keens* ..... 212
3. In an action for personal injuries, whether a foreman's peremptory order to an employee in a trench to raise alone one end of a heavy iron pipe constituted actionable negligence *held* a question for the jury. *Prediger v. Lincoln Traction Co*..... 315
4. A sister of decedent, to whom decedent contributed support, *held* to be a "dependent," and entitled to recover under the federal employers' liability act. *Richelieu v. Union P. R. Co.* ..... 360
5. Evidence, in an action for personal injuries, *held* to sustain verdict for plaintiff. *Krum v. Sullivan & Schaberg Transfer & Fuel Co*..... 491
6. A servant who uses defective, though not dangerous, machinery in obedience to the master's order does not, as a matter of law, assume the risk of injury. *Usher v. American Smelting & Refining Co*..... 526
7. An instruction that a master is not required to furnish the newest or safest appliances, but that if the appliances were reasonably safe the master was not liable, *held* properly refused. *Usher v. American Smelting & Refining Co*..... 526

**Master and Servant**—*Concluded.*

8. In an action for injuries by a servant against his master and its foreman, a verdict for the foreman and against the master is not inconsistent, unless the plaintiff would not have received the injuries but for negligence of the foreman. *Usher v. American Smelting & Refining Co* ..... 526

9. Evidence, in an action for personal injuries, *held* to sustain verdict for plaintiff. *Usher v. American Smelting & Refining Co* ..... 526

10. Evidence, in an action for injuries received while operating a gasoline engine, *held* to show contributory negligence, barring recovery. *Nickel v. Butke* ..... 539

11. Evidence *held* to authorize submitting to the jury whether defendant's inspectors misplaced the "controller," which was the primary cause of the accident. *Wenquist v. Omaha & C. B. Street R. Co* ..... 554

12. A recital in an instruction that "defendant having plead that the injuries complained of were caused by the act of a fellow servant," *held* not misleading, in view of the whole instruction. *Wenquist v. Omaha & C. B. Street R. Co* ..... 554

13. Where an employee is injured by the negligence of his employer, the contributory negligence of a fellow servant will not prevent recovery. *Wenquist v. Omaha & C. B. Street R. Co* ..... 554

14. A person injured through the negligence of the driver of a horse may recover from the master of the driver. *James v. Hayden Bros* ..... 619

15. An employer's oral promise to pay an employee his salary during a temporary disability may be shown by parol to be part consideration for a written release of liability for personal injuries. *Tylee v. Illinois C. R. Co* ..... 646

16. An employee does not assume the risk of actionable negligence of his employer. *Frish v. Swift & Co* ..... 707

17. Where an employee voluntarily goes outside the scope of his employment without the employer's knowledge and is injured, the employer is not liable. *Blackman v. Western Electric Co.* ..... 710

18. Evidence, in an action for injuries, *held* to sustain verdict for plaintiff. *Jerich v. Union P. R. Co* ..... 767

**Mechanics' Liens.**

In a mechanic's lien suit, findings *held* to dispose of issues raised by cross-petition for damages from fire caused by plaintiff's negligence. *Davis Co. v. Holmes* ..... 861

**Mortgages.**

1. The court may order money of a defendant in the clerk's hands applied on a deficiency judgment in foreclosure. *Montgomery v. Dresher* ..... 104
2. The mortgagee's remedy by foreclosure, in absence of a deficiency judgment, is exhausted by a sale of the property. *Eastern Banking Co. v. Robbins* ..... 318
3. A junior mortgagee's right to a deficiency judgment is not lost because the entire proceeds of the foreclosure sale were applied on prior liens. *Eastern Banking Co. v. Robbins* .... 318
4. A decree foreclosing a mortgage cannot be revived after confirmation of the sale. *Eastern Banking Co. v. Robbins* .. 318
5. Right to a deficiency judgment *held* lost by laches. *Eastern Banking Co. v. Robbins* ..... 318
6. After a foreclosure sale, the appraisement can be questioned only for fraud. *Bank of Salem v. Cornell* ..... 610
7. Where objections to appraisement and confirmation of sale were without merit, it was not reversible error to strike them. *Tiehen v. Cornell* ..... 615
8. A finding in a decree of foreclosure of the amount due will authorize the court, on confirmation of sale, to render a deficiency judgment. *Tiehen v. Cornell* ..... 615
9. A deed absolute in form passes the legal title, though intended as security. *Minick v. Reichenbach* ..... 629
10. Where the grantee under a deed given as security is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right to an accounting. *Minick v. Reichenbach* ..... 629
11. Evidence, in a suit to declare a deed a mortgage and to redeem, *held* to sustain decree for defendant. *Minick v. Reichenbach* ..... 629

**Municipal Corporations.** See EMINENT DOMAIN. RAILROADS, 1, 2.

1. Whether a petition for the removal of a commissioner, under sec. 5308, Rev. St. 1913, in a city where registration laws are in force, is signed by the requisite 30 per cent. of the qualified electors must be determined from the voters' register. *State v. Berg* ..... 63
2. Where any of the papers of a petition for the removal of a commissioner, under sec. 5308, Rev. St. 1913, have not been verified as required by sec. 5305, the city clerk should permit such verification, even after the petition has been filed. *State v. Berg* ..... 63

**Municipal Corporations**—*Continued.*

3. The words "highest vote cast," as used in sec. 5308, Rev. St. 1913, mean the highest vote cast both for and against any candidate or proposition at the preceding general city election. *State v. Berg* ..... 63
4. Sec. 5942, Rev. St. 1913, *held* not to authorize a railroad company to attain control of a city street for its right of way by condemnation or by contract with the city. *Omaha, L. & B. R. Co. v. City of Lincoln* ..... 122
5. Under sec. 4471, Rev. St. 1913, city authorities can compel railroads to conform to street grades at any time established. *Omaha, L. & B. R. Co. v. City of Lincoln* ..... 122
6. Courts will not interfere with established street grades unless the rights of others are unnecessarily injured. *Omaha, L. & B. R. Co. v. City of Lincoln* ..... 122
7. Where the evidence is conflicting as to the advisability of a city sewerage system, the courts will not enjoin the grading and paving of the streets pursuant to the plan adopted, nor restrain the city from requiring railroad tracks along such streets to conform to such grade. *Omaha, L. & B. R. Co. v. City of Lincoln* ..... 122
8. Where a city of the first class authorizes a railroad company to construct its road in a street in conformity to the grade then existing or afterwards established, and by subsequent ordinance establishes the grade, no other ordinance is necessary to compel the railroad to conform to the grade so established. *Omaha, L. & B. R. Co. v. City of Lincoln*.. 122
9. A city cannot deprive itself of control of its streets and the grades thereof. *Omaha, L. & B. R. Co. v. City of Lincoln* 122
10. Evidence, in a suit to disconnect land from a village, *held* to sustain decree for defendant. *Haney v. Village of Hyannis* ..... 220
11. Evidence, in a suit to enjoin grading a street, *held* to sustain decree enjoining grading a portion within the curb line. *Hilger v. City of Nebraska City* ..... 268
12. The mere establishment of a street grade does no damage for which a property owner may recover. *Hilger v. City of Nebraska City* ..... 268
13. Where a street grade had been established and the street reduced nearly to grade, the work of leveling the street may be completed without an estimate, bids, and assessment of damages, required by sec. 8601, Ann. St. 1911. *Hilger v. City of Nebraska City* ..... 268

**Municipal Corporations**—*Continued.*

14. Limitations will not begin to run against a lot owner's right to recover damages for grading a street until some action is taken by the city to change the street to grade. *Hilger v. City of Nebraska City* ..... 268

15. Under secs. 4418, 4475, Rev. St. 1913, governing cities of the first class, regulation of entrances to basements through sidewalks is within the reasonable discretion of the mayor and council. *State v. Armstrong* ..... 343

16. Permission by the mayor and council of Lincoln to construct a stairway to open in a sidewalk *held* not an abuse of discretion though such stairway restricted the use of the sidewalk. *State v. Armstrong* ..... 343

17. Permission to construct a stairway to open in a sidewalk may be given by resolution without an ordinance. *State v. Armstrong* ..... 343

18. Certain sections of the sidewalk ordinance of the city of Lincoln *held* not to prohibit openings in sidewalks for stairways and basement ways, in view of secs. 4418, 4475, Rev. St. 1913, and the practical construction thereof for many years. *State v. Armstrong* ..... 343

19. A village has no inherent power to levy taxes. *Union P. R. Co. v. Heuer* ..... 436

20. Ch. 20, laws 1885, as amended, construed with sec. 5108, Rev. St. 1913, *held* not to deprive villages of the power to levy taxes for water supplied under existing contracts or to maintain water-works. *Union P. R. Co. v. Heuer* ..... 436

21. A city cannot lawfully sanction the maintenance of houses of prostitution. *Cooper v. State* ..... 461

22. The duty of a city to keep its streets free from obstructions cannot be evaded or cast on another. *Cushman Motor Works v. City of Lincoln* ..... 519

23. A city must use reasonable diligence to keep its streets free from obstructions. *Cushman Motor Works v. City of Lincoln* ..... 519

24. Where a railroad company negligently constructs its road over a street under permit from the city, the city and the company are jointly and severally liable for resulting injury. *Cushman Motor Works v. City of Lincoln* ..... 519

25. Under subd. 61, sec. 129, art. 1, ch. 13, Comp. St. 1909, it is incumbent on a city to see that a railroad company using its streets constructs and keeps in repair ditches, sewers and

**Municipal Corporations**—*Concluded.*

culverts along or under its tracks. *Cushman Motor Works v. City of Lincoln* ..... 519

26. Procedure for submission of an ordinance under the initiative and referendum stated. *Eyre v. Doerr* ..... 562

27. An ordinance adopted under the initiative statute does not go into effect until 30 days after its adoption. *Eyre v. Doerr* ..... 562

28. It is actionable negligence to so drive a horse as to injure a pedestrian on the sidewalk. *James v. Hayden Bros.*. 619

29. The fact that unplatted agricultural land is incorporated in a village with the owner's tacit permission does not estop his grantee from proceeding under sec. 5090, Rev. St. 1913, to have it disconnected therefrom. *Joerger v. Bethany Heights* ..... 675

30. A decree disconnecting land from a village will not be reversed, where there is no important mistake of fact or law. *Joerger v. Bethany Heights* ..... 675

**Names.**

Under ch. 53, Rev. St. 1913, requiring sufficient and reasonable cause for a change of name, a decree is a matter of judicial discretion. *In re Taminosian* ..... 514

**Negligence.** See CARRIERS. HIGHWAYS, 4. INNKEEPERS. MASTER AND SERVANT. RAILROADS, 6, 7. STREET RAILWAYS.

1. Where evidence of contributory negligence is sufficient to sustain a verdict for plaintiff, it is a question for the jury. *Jones v. Chicago G. W. R. Co.* ..... 306

2. An issue of negligence is for the jury, where the evidence will sustain a verdict for plaintiff. *Prediger v. Lincoln Traction Co.* ..... 315

3. Whether a son was his mother's agent, so that his negligence will be imputed to her, *held* a question for the jury. *Craig v. Chicago, St. P., M. & O. R. Co.* ..... 586

4. Where the evidence is conflicting, negligence and contributory negligence are for the jury. *Frish v. Swift & Co.* ..... 707

5. The issues of negligence and contributory negligence are for the jury, where the evidence is sufficient to sustain a verdict for plaintiff. *Fitzgerald v. Omaha & C. B. Street R. Co.* ..... 856

**Negligence**—*Concluded.*

6. The issues of negligence and contributory negligence, where the evidence is conflicting, are for the jury, and their findings will not be set aside unless clearly wrong. *Henry v. City of Lincoln* ..... 865

7. The fact that the relationship between the driver of a wagon and the person riding therein is that of mother and son does not, as a matter of law, make the negligence of the driver imputable to the mother. *Craig v. Chicago, St. P., M. & O. R. Co*..... 586

8. The coupling together of two wagons driven along a street *held* not negligence rendering the owner liable for death of a child who climbed on the connecting pole. *Zigman v. Beebe & Runyan Furniture Co*..... 689

9. Where a servant is placed in a position of sudden peril he should act as a person of ordinary prudence, whether the emergency arises from accident, acts of third persons, or negligence of the master. *Frish v. Swift & Co*..... 707

10. Where a person desiring to call an elevator in an unfinished building carelessly thrusts his head into the shaft and is injured, he cannot recover damages. *Wright v. Selden-Breck Construction Co*..... 840

11. It is not negligence *per se* to operate an elevator without a call bell in an unfinished building. *Wright v. Selden-Breck Construction Co*..... 840

**New Trial.** See APPEAL AND ERROR, 6.

1. A new trial should be allowed, where material uncontradicted evidence has been disregarded by the jury. *Hileman v. Maxwell* ..... 14

2. Refusal of a continuance, whereby defendant was prevented from presenting its defense, *held* to be an abuse of discretion under sec. 1, ch. 39, laws 1911. *Richelieu v. Union P. R. Co*..... 360

3. A court of equity will grant a new trial where a party has been deprived of a bill of exceptions by reason of the inability of the stenographic reporter to furnish a transcript in time. *Ferber v. Leise* ..... 795

4. Petition *held* to state a cause of action in equity for a new trial to preserve the right of appeal. *Ferber v. Leise* ..... 795

**Nuisance.** See CONSTITUTIONAL LAW, 3.

1. A house maintained as a place for lewd men and women to congregate for immoral purposes is within the term "houses of lewdness," within ch. 63, laws 1911. *State v. Fanning*.... 224

**Nuisance**—*Concluded.*

2. Where a house is shown to be a place of lewdness, assignation or prostitution, the statute should be liberally construed in applying the remedy given. *State v. Fanning* ..... 224

3. In an action to abate a house as disorderly, evidence of the general reputation of the house and of persons who frequent it is admissible. *State v. Fanning* ..... 224

4. Evidence, in an action to abate a house as a nuisance, *held* insufficient to sustain decree for plaintiff. *State v. Fanning* 224

**Parties.** See FRAUDULENT CONVEYANCES, 2, 3.

1. Any person interested in a matter in litigation may become a party to the action. *Montgomery v. Dresher* ..... 112

2. Where a party interested in a matter in litigation has become a party to the action, it is error to dismiss his petition of intervention prior to final determination of the action on the merits. *Montgomery v. Dresher* ..... 112

**Pleading.** See ELECTIONS, 1. EMINENT DOMAIN, 2.

New matter of defense cannot be introduced under a general denial, but must be pleaded in the answer. *Yechout v. Tesnohlidek* ..... 387

**Principal and Agent.**

1. The furnishing of an office to an agent as part of his compensation *held* not to create a power coupled with an interest. *Homan v. Redick* ..... 299

2. Where an office is furnished to an agent as a part of his compensation, the relation of landlord and tenant does not exist. *Homan v. Redick* ..... 299

3. Where a principal accepts the benefits of a settlement made by an agent, he is bound by an oral agreement made by the agent to procure such settlement. *Tylee v. Illinois C. R. Co.* 646

**Principal and Surety.**

1. Sureties on a contractor's bond *held* liable to mechanics and laborers for breach of a condition of his contract which required him to satisfy lawful claims of mechanics and laborers. *Sailling v. Morrell* ..... 454

2. Where a clause in a surety bond of a contractor relieving the sureties from liability for nonperformance by the contractor was inserted by fraud or mistake, the bond may be reformed in equity. *Sailling v. Morrell* ..... 454

**Quieting Title.**

Children of a deceased owner of a homestead *held* entitled, under secs. 6267, 6268, Rev. St. 1913, to sue to have their title determined and quieted during the lifetime of the widow. *Naiman v. Bohlmeyer* ..... 551

**Railroads.** See MUNICIPAL CORPORATIONS, 4-9, 24, 25. SET-OFF AND COUNTERCLAIM.

1. Where a railroad company has constructed its tracks in a street pursuant to an ordinance, it may enjoin the city from an unreasonable removal of its tracks. *Union P. R. Co. v. City of Lincoln* ..... 198
2. A master commissioner's deed to a railroad in a foreclosure suit conveys to the purchaser the rights acquired by the original owner under a city ordinance authorizing it to lay its tracks in a street. *Union P. R. Co. v. City of Lincoln*.... 198
3. In an action for destruction of crops from flooding caused by a railroad embankment, a requested instruction that plaintiff could not recover if he knew before he leased the land that it would be overflowed, *held* properly refused, where there was no evidence that he could have anticipated such results. *Boyd v. Chicago, B. & Q. R. Co*..... 238
4. A decree requiring the purchaser of a railroad at a receivers' sale to pay all liabilities incurred by the receivers includes damages for personal injuries to one of their employees. *Jones v. Chicago G. W. R. Co*..... 306
5. A petition pleading facts which entitle plaintiff to relief under the doctrine of the last clear chance *held* not insufficient because it did not state the doctrine. *Jones v. Chicago G. W. R. Co*..... 306
6. The speed of an engine on a track on which switchmen stand to give signals may be evidence of negligence, where the engine approaches without signal or warning. *Jones v. Chicago G. W. R. Co*..... 306
7. Railroads must use such care at grade crossings as is commensurate with the probability of danger. *Craig v. Chicago, St. P., M. & O. R. Co*..... 426
8. Where a railroad company takes a bond from a contractor conditioned substantially as provided by sec. 7006, Gen. St. of Kansas, it is not liable to a subcontractor. *Finegan v. St. Joseph & G. I. R. Co*..... 474
9. The fact that a railroad contractor's bond, in accord with sec. 7006, Gen. St. of Kansas, is not filed with the register of deeds of the county where the work was to be performed,

**Railroads**—*Concluded.*

will not entitle a subcontractor to sue the railroad company. *Finegan v. St. Joseph & G. I. R. Co* ..... 474

10. In a suit against a railroad company in a county where a subcontractor resides, service of summons in another county on the contractor, who has given bond under sec. 7006, Gen. St. of Kansas, *held* not to give jurisdiction of the contractor. *Finegan v. St. Joseph & G. I. R. Co* ..... 474

11. Evidence, in an action by a subcontractor against the contractor and a railroad company, *held* insufficient to sustain the action against the railroad company. *Finegan v. St. Joseph & G. I. R. Co* ..... 474

12. A shipper cannot sue in the state courts for excessive freights collected on an interstate shipment, where the rate charged was the one authorized by the interstate commerce commission, and no order for reparation has been made by the commission. *Foster Lumber Co. v. Union P. R. Co* ..... 669

**Rape.**

1. Evidence *held* to sustain a conviction of rape. *Hudson v. State* ..... 47

2. Evidence of other acts of intercourse occurring shortly after the act charged *held* admissible. *Hudson v. State* ..... 47

3. Testimony of prosecutrix as to other acts of intercourse, occurring shortly after the act charged, may be considered, if supported by other evidence of such acts. *Hudson v. State* ..... 47

**Receiving Stolen Goods.** See CRIMINAL LAW, 26.

1. In a prosecution for receiving stolen property, the state must prove that the accused received the property, knowing it to have been stolen, and with intent to defraud the owner thereof. *Egan v. State* ..... 731

2. Evidence that accused participated in the larceny *held* competent to prove that he knew the property was stolen. *Egan v. State* ..... 731

**Robbery.**

Evidence *held* to sustain a conviction of robbery. *Curtis v. State* ..... 397

**Sales.**

1. Plea of fraud in procurement of plaintiff's consent to rescission of a contract *held* not sustained by the evidence. *Rex Sanitary Closet Co. v. Duster* ..... 87

**Sales**—*Concluded.*

2. Where defendant pleaded rescission of a contract sued on, and plaintiff replied that such rescission was procured by false representations, the burden was on plaintiff to establish that such representations were made and relied on. *Rex Sanitary Closet Co. v. Duster* ..... 87

3. Where a jobber, after an inspection and rejection of lumber, attempts to sell it under the seller's direction to "use to best advantage," it will not amount to an acceptance. *Columbia River Door Co. v. Cady Lumber Co* ..... 275

4. Evidence *held* to justify a purchaser in refusing to accept a shipment of lumber. *Columbia River Door Co. v. Cady Lumber Co* ..... 275

5. A rejected offer to return a purchased chattel to the seller may be withdrawn by subsequent acts of the purchaser in using the property as his own. *Aegerter v. Ronspies* ..... 656

6. Where a buyer planted potatoes warranted to grow, though in doubt as to their fitness, *held* that he did not thereby waive the warranty. *Backes v. Cook* ..... 685

**Schools and School Districts.**

1. Where school trustees let a contract for the erection of a school building, and require a bond which they deem sufficient, they are not individually liable to mechanics and laborers, though the bond is not conditioned in the exact terms of sec. 7117, Ann. St. 1911. *Sailling v. Morrell* ..... 454

2. To establish liability of school trustees for taking a bond not conditioned in the exact terms of sec. 7117, Ann. St. 1911, plaintiff must plead and prove that the action of the trustees was wilfully wrong. *Sailling v. Morrell* ..... 454

3. A proposition to issue school district bonds must be submitted separately from any other not germane thereto. *State v. Matson* ..... 746

4. Under sec. 6737, Rev. St. 1913, the selection of a schoolhouse site can be made only by a vote of two-thirds of the qualified electors present at a district meeting. *State v. Matson* ..... 746

**Set-Off and Counterclaim.**

A counterclaim for damages for injury to the rolling stock of a railroad company, caused by the negligent act of the driver of a vehicle, cannot be asserted against the beneficiaries in an action under Lord Campbell's Act. *Craig v. Chicago, St. P., M. & O. R. Co.* ..... 586

**Statute of Frauds.**

Parol evidence *held* admissible to prove an association between plaintiff and two others to procure a purchaser for land and to share the profits. *Kohl v. Munson* ..... 170

**Statutes.**

In determining the legislative intent in the amendment of a statute, the course of legislation and existing conditions under the former statute may be considered. *Union P. R. Co. v. Heuer* ..... 436

**Street Railways.** See CARRIERS.

1. In an action for injuries to a pedestrian at a street crossing, *held* that the questions of negligence and contributory negligence were for the jury. *DeNoon v. Lincoln Traction Co*.. 1
2. The public has a right to drive upon street car tracks, but not so as to interfere with the operation of the cars. *McKennan v. Omaha & C. B. Street R. Co*..... 281
3. While a motorman need not necessarily stop the car when he sees a person driving along the track, he must exercise reasonable care to avoid a collision. *McKennan v. Omaha & C. B. Street R. Co*..... 281
4. Where a motorman observes that a person driving along the track is unaware of his danger, he must use the care which an ordinarily prudent person would use to avoid a collision. *McKennan v. Omaha & C. B. Street R. Co*..... 281
5. Where the driver of a vehicle is injured while negligent, by impeding a street car, he cannot recover, unless those in charge of the car failed to exercise ordinary care to avoid a collision after realizing his danger. *McKennan v. Omaha & C. B. Street R. Co*..... 281
6. In an action for injuries received in a collision between a vehicle and a street car, instructions as to control and speed of the car *held* inconsistent with another instruction and prejudicial. *McKennan v. Omaha & C. B. Street R. Co*..... 281
7. The driver of a vehicle may attempt to cross a street railway track ahead of an approaching car at a street intersection, where he apparently has time to do so if the car is operated at its usual rate of speed. *Fitzgerald v. Omaha & C. B. Street R. Co*..... 856
8. Submission of a case in the double aspect of whether defendant failed to exercise ordinary care in controlling the speed of a car, or whether the motorman, after discovering decedent's peril, failed to use ordinary care, *held* not error. *Fitzgerald v. Omaha & C. B. Street R. Co*..... 856

**Taxation.** See COUNTIES AND COUNTY OFFICERS, 6-8.

1. A county is not an insurer of the safe-keeping of state taxes collected by it as trustee for the state. *Lancaster County v. State* ..... 95

2. The revenue law requires that personal property shall be listed and assessed with reference to the quantity held or owned on April 1. *Wood v. McCook Water-Works Co*..... 215

3. A person who owns personal property subject to taxation when it is returnable for assessment for any year cannot escape liability for the tax for such year by any subsequent disposition of it. *Wood v. McCook Water-Works Co*..... 215

4. A tax deed is void, where the notice to redeem stated that the time for redemption would expire November 8, and the time in fact expired November 7. *Stewart v. Ridenour* ..... 451

5. Under sec. 6437, Rev. St. 1913, construed with secs. 6442, 6447, 6456, *held* that a county board of equalization could increase an assessment July 1, though more than 20 days had expired after it met on June 10. *Farmers Co-operative Creamery & Supply Co. v. McDonald* ..... 510

6. A county board of equalization must equalize and correct assessments in time for the county clerk to prepare and forward an abstract of the assessment rolls to the state board on or before July 10 of each year. *Farmers Co-operative Creamery & Supply Co. v. McDonald* ..... 512

7. Personal property in the owner's possession at his residence in another state is not subject to taxation in Nebraska. *Preston v. Harlan County* ..... 667

8. Evidence, in a suit to enjoin collection of personal taxes, *held* to show that plaintiff was not a resident of Nebraska. *Preston v. Harlan County* ..... 667

9. Where the evidence required by sec. 214, art. I, ch. 77, Comp. St. 1903, shows that the tax deed is void, the owner may sue to quiet his title and to redeem at any time within ten years after the recording of the tax deed. *Lanigan v. Gilroy* ..... 754

10. Where assessments are void and the landowner cannot ascertain the amount to be levied, he need not make a tender as a condition to equitable relief. *Orcutt v. McGinley* ..... 762

11. An injunction to restrain collection of void irrigation taxes will not be denied because some have paid the void assessments. *Orcutt v. McGinley* ..... 762

**Telegraphs and Telephones.**

1. A telegraph company is liable, under sec. 7406, Rev. St. 1913, for damages from failure to correctly transmit and deliver a message, notwithstanding a printed agreement to the contrary. *American Express Co. v. Postal Telegraph-Cable Co* ..... 701
2. Where the sender of a message waives the contract and sues in tort, he can recover all damages from negligence, regardless of whether they might have been contemplated. *American Express Co. v. Postal Telegraph-Cable Co* ..... 701
3. A telegraph company is liable for a mistake made by an employee of another company over whose lines the sending company transmitted the message. *American Express Co. v. Postal Telegraph-Cable Co* ..... 701
4. In an action by an express company for failure to correctly transmit a message directing payment of money in plain words, *held* no defense that the company's rules required code words. *American Express Co. v. Postal Telegraph-Cable Co.* 701
5. Where the damages from failure to correctly transmit a message are proved by undisputed evidence and are liquidated, the court may direct a verdict for plaintiff. *American Express Co. v. Postal Telegraph-Cable Co.* ..... 701

**Torts.**

An act wrongfully done by the cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally. *Schweppe v. Uhl* .... 328

**Trial.** See APPEAL AND ERROR. BASTARDY, 1. BILLS AND NOTES, 2, 5, 6. BURGLARY, 3, 4. CARRIERS, 6. CHATTEL MORTGAGES, 3. CRIMINAL LAW. FRAUD, 2. INNKEEPERS, 2. MASTER AND SERVANT, 3, 7, 8, 11, 12. MECHANICS' LIENS. NEGLIGENCE, 1-6. RAILROADS, 3. STREET RAILWAYS, 1, 6, 8. TELEGRAPHS AND TELEPHONES, 5.

1. A general verdict is equivalent to a finding in favor of a party on all the issues and evidence. *Dore v. Omaha & C. B. Street R. Co* ..... 250
2. Considerable latitude is allowed in the opening statement. *Yechout v. Tesnohlidek* ..... 387
3. That counsel fails to prove all he expects to prove does not show that his opening statement was intentionally false. *Yechout v. Tesnohlidek* ..... 387
4. Where a verdict was against one of two defendants and silent as to the other, it will be presumed that the jury found in favor of such other defendant. *Cox v. Ellsworth* ..... 392

**Trial**—*Continued.*

5. A juror must not state to his fellow jurors material facts not in evidence, but within his personal knowledge. *Corn Exchange Nat. Bank v. Ochlare Orchards Co* ..... 536

6. Where a juror states in the jury room that he is a handwriting expert and can determine a disputed fact from an inspection of papers in evidence, it is not such misconduct as requires a reversal. *Corn Exchange Nat. Bank v. Ochlare Orchards Co* ..... 536

7. A juror's assertions of opinion and boasting of ability or expert knowledge do not constitute misconduct. *Corn Exchange Nat. Bank v. Ochlare Orchards Co* ..... 536

8. Where the court rules for defendant on a motion for a directed verdict, it may, in its discretion, allow plaintiff's request for leave to introduce further evidence. *Reams v. Sinclair* ..... 542

9. Where the verdict contains proper findings on the issuable facts submitted, clearly indicating the judgment which should be pronounced, severable matter outside the issues may be rejected as surplusage. *Hallett v. Ransom* ..... 643

10. Where a witness is absent from the state, his testimony given at a former trial is admissible. *Jerich v. Union P. R. Co*.... 767

11. Record *held* not to show misconduct of counsel in cross-examination of witnesses. *Jerich v. Union P. R. Co*..... 767

12. Where there is no evidence to sustain a judgment for plaintiff, the trial court should direct a verdict for defendant. *Furnas County v. Evans* ..... 54

13. Where the evidence is insufficient to support a judgment for plaintiff, it is error to refuse a peremptory instruction for defendant. *Shlik v. Armour & Co*..... 101

14. An instruction that a party alleging fraud must produce stronger proof than would be sufficient to establish a mere debt, and that the burden is on him to overcome the presumption of honesty, *held* erroneous, as requiring more than a preponderance of evidence. *Giles & Son v. Horner* ..... 162

15. All questions of fact on conflicting material evidence must be submitted to the jury. *Boyd v. Chicago, B. & Q. R. Co*.. 238

16. The credibility of witnesses and weight of testimony are for the jury. *Dore v. Omaha & C. B. Street R. Co*..... 250

17. Refusal of instructions covered by those given *held* proper. *Dore v. Omaha & C. B. Street R. Co*..... 250

**Trial**—*Concluded.*

18. Instructions should be construed as a whole. *Dore v. Omaha & C. B. Street R. Co* ..... 250
19. An instruction stating the law on an issue established in plaintiff's favor is not erroneous, for failure to require a finding on that issue as a condition of granting plaintiff relief. *Jones v. Chicago G. W. R. Co* ..... 306
20. A verdict in accord with the instructions as a whole will not be set aside because inconsistent with an isolated paragraph. *Prediger v. Lincoln Traction Co* ..... 315
21. Where different conclusions may be drawn from the facts proved, the matter at issue is for the jury. *Craig v. Chicago, St. P., M. & O. R. Co* ..... 426
22. Where the evidence is undisputed, the question at issue is for the court. *Craig v. Chicago, St. P., M. & O. R. Co* ..... 426
23. The giving of an instruction defining the issues, which includes allegations of the petition not supported by evidence, is ground for reversal, if misleading. *Hutchinson v. Western Bridge & Construction Co* ..... 439
24. Instructions should accord with the evidence. *Eisentraut v. Madden* ..... 466
25. The court need not tell the jury the reason for limiting the issues by instructions. *Corn Exchange Nat. Bank v. Ochlare Orchards Co* ..... 536
26. Where the evidence is clearly insufficient to sustain a judgment for plaintiff, the court should direct a verdict for defendant. *Mitchell v. Bressler* ..... 718
27. Instructions *held* to submit all the issues, including defense of set-off. *Haar v. Howard* ..... 761
28. An instruction that the burden was on defendant to prove that the terms of a contract were as claimed in support of a set-off *held* proper. *Johnson v. Schmoller & Mueller Piano Co.* ..... 765
29. An instruction that by a preponderance of the evidence is not necessarily meant the greater number of witnesses *held* not erroneous. *Jerich v. Union P. R. Co* ..... 767
30. An objectionable clause will not render instructions erroneous, where, considered as a whole, they correctly state the law. *Henry v. City of Lincoln* ..... 865

**Vendor and Purchaser.**

In a suit to cancel deeds procured by fraud, decree for plaintiffs affirmed. *Toop v. Palmer* ..... 802

**Venue.** See RAILROADS, 10.

1. A change of venue should be denied where it does not appear that a fair and impartial trial cannot be had. *Boyd v. Chicago, B. & Q. R. Co* ..... 238
2. Overruling of a motion for a change of venue will not be disturbed unless an abuse of discretion is shown. *Boyd v. Chicago, B. & Q. R. Co* ..... 238
3. In passing on a motion for a change of venue, the district court is vested with a sound legal discretion. *Boyd v. Chicago, B. & Q. R. Co* ..... 238

**Waters.** See TAXATION, 11.

1. Prior to 1889 (laws 1889, ch. 68) there was no method of claiming appropriation of water for irrigation except the construction of works and diversion of the water to a beneficial use, and the appropriator was not required to declare the amount of his claim until his right was challenged. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139
2. After the act of 1889 (laws 1889, ch. 68) an appropriator of water for irrigation whose right had been established by the completion of his works, and who desired to increase the amount, must proceed under that act. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139
3. An appropriator of water for irrigation prior to 1889 (laws 1889, ch. 68) was limited to the capacity of his works as then completed and the water diverted within a reasonable time. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139
4. Appropriators of water for irrigation subsequent to 1889 (laws 1889, ch. 68) must take notice of the rights of prior appropriators. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139
5. Where appropriators of water for irrigation construct their works subsequent to 1889 (laws 1889, ch. 68), prior appropriators are not estopped by their silence to assert the priority of their appropriation. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139
6. An appropriation of water for irrigation under laws 1877, p. 168, not determined by the state board of irrigation, *held* not affected by adjudications of subsequent appropriations under ch. 69, laws 1895, requiring the board to determine all appropriations of water recorded under prior acts, and ch. 153, laws 1911, extending such provision to all appro-

**Waters**—*Continued.*

priations. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

7. Under ch. 153, laws 1911, as amended in 1913 (Rev. St. 1913, sec. 3412), one who has constructed a canal to carry water for hire has made an appropriation which continues as a developing right for such time as is reasonable. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District*.. 139

8. Appropriations can only be made of water not previously appropriated. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

9. Prior appropriators need not notify subsequent appropriators of their rights. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

10. Appropriations of water for irrigation and appropriations for power purposes are equally protected under laws 1877, p. 168, and ch. 68, laws 1889. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

11. Appropriations of water for power purposes, completed under the act of 1877, became vested rights, and could not be taken away without compensation. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

12. Sec. 21, ch. 153, laws 1911, providing that no permit to irrigate lands shall be allowed without consent of the owners, applies to adjudications of appropriations under prior acts. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

13. In an adjudication in a case begun soon after ch. 153, laws 1911, took effect, the state board of irrigation properly allowed the applicant to obtain and file consent of the landowners while the proceedings were pending. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

14. Water can be appropriated only for a reasonable use. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

15. The right to use water appropriated must be exercised so as not to deprive the community of its use without benefit to any one. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

16. The state board of irrigation may, by regulations, allow subsequent appropriators such use of water as will not substantially deprive a prior appropriator of his beneficial use thereof. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

**Waters**—*Concluded.*

17. The determination by the state board of irrigation of the amount and priority of an appropriation of water is without prejudice to such subsequent regulations as will insure a proper use of the rights so determined. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

18. Evidence, in proceedings to determine priority of water rights, *held* to sustain the findings of the state board of irrigation as to the priority of plaintiff's rights. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

19. Under sec. 3408, Rev. St. 1913, providing for appeal, findings of the state board of irrigation on conflicting evidence will not be disturbed unless clearly wrong. *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District* ..... 139

20. An upper proprietor cannot obstruct a stream so as to deprive a lower proprietor of water for domestic use, unless such use will deprive the upper proprietor of water necessary for his own use. *Norman v. Kusel* ..... 400

21. Where an upper proprietor needlessly and wilfully deprives a lower proprietor of water for domestic purposes, he is liable for damages occasioned thereby. *Norman v. Kusel* ..... 400

22. In the interest of good husbandry, the flow of surface waters along natural depressions through farm lands may be accelerated by artificial means. *Steiner v. Steiner* ..... 449

23. A completed appropriation of water for power under the law of 1877 is a vested right, of which subsequent appropriators for irrigation must take notice; and the priority, if unchallenged, is not lost by failure to demand an adjudication under the law of 1895. *Gearhart & Benson v. Frenchman Valley Irrigation District* ..... 764

**Wills.**

1. A will should be construed to carry out the intention of the testator as therein expressed, and considering the circumstances under which it was made. *Herter v. Herter* ..... 260

2. The word "comp" in a will devising land in "comp" construed, and *held* to mean "company" and to include all the heirs. *Herter v. Herter* ..... 260

3. Heirs will be disinherited only by express words or necessary implication and the disposition of the estate to another. *Herter v. Herter* ..... 260

4. It will be presumed that the ancestor intended that his property should go in the channel of natural descent. *Herter v. Herter* ..... 260

**Wills**—*Concluded.*

5. The wife cannot devise real estate so as to deprive her husband of the interest given him by sec. 1265, Rev. St. 1913. *Richardson v. Johnson* ..... 749
6. Where a married woman devises her husband a less estate than is provided for him by sec. 1265, Rev. St. 1913, he may renounce the will and elect to take the estate given him by law. *Richardson v. Johnson* ..... 749
7. No particular form of words is required to constitute an election under sec. 1271, Rev. St. 1913. *Richardson v. Johnson* ..... 749
8. Where the county court had acquired jurisdiction to probate a will, failure to record a continuance by agreement *held* not to deprive the court of jurisdiction. *In re Estate of Vodvarka* ..... 757
9. A motion to open a decree probating a will should set forth facts sufficient to show a *prima facie* defense against the probate of the will. *In re Estate of Vodvarka* ..... 757

**Witnesses.**

1. One accused of crime cannot be cross-examined, and afterwards contradicted in respect to incompetent matters. *Jones v. State* ..... ..... 151
2. Accused cannot be cross-examined to impeach the contents of an involuntary confession. *Jones v. State* ..... 151
3. A witness cannot be examined as to immaterial matters as a foundation for impeachment. *Corn Exchange Nat. Bank v. Ochlare Orchards Co*..... 536
4. Permitting answers to questions on redirect examination to explain opinions expressed on cross-examination *held* not error. *Fitzgerald v. Omaha & C. B. Street R. Co*..... 856