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PAUL PETERSON, APPELLEE, V. HARTFORD FIRE INSURANCE COMPANY, APPELLANT.

FILED MARCH 4, 1916. No. 18743.

Compromise and Settlement: FRAUD: EVIDENCE. Evidence examined, its substance set out in the opinion, and *held* to support the verdict.

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

Gurley, Woodrough & Fitch, for appellant.

Herman Aye, A. W. Jefferis and *F. S. Howell, contra.*

MORRISSEY, C. J.

This is an action to recover on a settlement of a liability created by a policy of fire insurance. From a verdict and judgment in favor of plaintiff, defendant appeals. This is the second time the case has been in this court. The former opinion is found in 93 Neb. 448; the opinion being controlled by its companion case, *Springfield Fire & Marine Ins. Co. v. Peterson,* 93 Neb. 446. The facts are sufficiently stated in the two cases mentioned and will not be repeated here. On the retrial of the case, defendant filed an amended answer alleging that the agreement of compromise and settlement was fraudulently procured, and the court instructed the jury to the effect that the question to be determined was: Did the defendant enter into the adjustment and compromise settlement by reason of any fraudulent representation or deception practiced by plaintiff? No complaint is made of this instruction, and we will assume that this issue was practically the only one on which the jury passed. Defendant contends that the adjustment and settlement on which recovery is had was so clearly shown to have been obtained by fraud that there is no room for an honest difference of opinion, and therefore the verdict and judgment are not sustained by sufficient evidence. This is the only point urged in the brief, and will be the only question considered.

There is now no contention that there was any fraud in procuring the insurance, or that the property was over-insured. Neither is there any suggestion that there is any suspicious circumstance connected with the fire. During the fire the linotype machine was drenched with water and became covered with debris. The roof was burned off the building, and plaster and cinders literally covered the machine. The timbers on which the machine rested were burned to such an extent that plaintiff and defendant's adjuster thought it unsafe to go about the machine very much for fear the timbers might give way, and they, together with the machine, be precipitated into the basement. The adjuster did not regard himself as competent to pass on the damage, and between them it was arranged to have an experienced linotype man from Omaha look the property over. At the suggestion of plaintiff, a man named Bush, who had helped to install the machine, was procured, and he, together with plaintiff, looked the machine over; but, for the same reasons that deterred the adjuster and plaintiff from making a careful examination, he refrained from removing the debris from the machine, but took a long distance view of it, and then made a report in writing stating: "Upon inspection I found the following parts necessary to equip the machine so as to put it in running order." He then gave a list of parts by taking a catalogue of parts, listing them, with the prices given in the catalogue. This report showed the total amount required to be approximately $1,900. Bush read from this catalogue while Peterson did the writing, and together this statement was prepared. The claim is now made that this report of loss was worked out by Peterson and Bush for the purpose of defrauding defendant; that it is untrue; that defendant was deceived thereby; and therefore a recovery cannot be had thereon.

Plaintiff testified that, after this report had been made to the adjuster, he had a conversation with the adjuster, that they went over the matter together, and the adjuster said that the statement made by Bush was not a state-

ment of the loss, and did not purport to be the loss at all, but that it was a statement of what it would cost to "rebuild the machine," while defendant was liable only for the actual loss, and he made an offer to pay the amount on which settlement was finally made. There is a letter in the record from the adjuster which fully corroborates the testimony of the plaintiff. It says: "We are unable to understand from what Mr. Bush figured in making his estimate, as to our minds it is entirely out of proportion with the actual damage sustained by fire, and we must say to you frankly that we cannot consider this estimate as a basis for settlement." The correspondence discloses that after Bush made his report defendant had arranged for an expert from the factory making the linotype machine to inspect the loss. And this inspection would have been made had not plaintiff accepted defendant's offer of settlement. It is quite evident that neither plaintiff nor defendant's adjuster removed the debris from the machine or made as careful an examination as they ought to have made before undertaking to adjust the loss. No doubt, each honestly believed that the machine was greatly damaged. It subsequently developed that the debris which fell on the machine had protected it from the fire and that it had suffered very little damage.

Defendant, in its brief, lays much stress upon the language of the report made by Bush and the fact that it was prepared in the office of plaintiff and to some extent, at least, under his direction. But the subsequent conduct of defendant's adjuster and his correspondence fairly show that he did not rely upon this statement, and we think it may be reasonably inferred that, having seen the property, he relied on his own judgment and thought at the time he was making an advantageous settlement. Here we have two parties dealing at arm's length, each seeking to make the best settlement attainable. They do make a settlement. Afterwards it is discovered that one has gained an advantage thereby, but for this reason alone we cannot set their agreement aside. If, when the debris was

removed and the machine examined, it were found that the damage exceeded the amount of the settlement, it is not unlikely defendant would have taken advantage of the agreement made and would have enforced it. The verdict of the jury has ample support in the evidence, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

CHARLES B. WRIGHT ET AL., APPELLEES, V. LIZZIE PFRIMMER, APPELLANT.

FILED MARCH 4, 1916. No. 18363.

1. **Deeds:** COVENANTS: RIGHT TO ENFORCE. Where the owner of a tract of land subdivides it into lots and makes public a general plan of improvement or development and executes deeds to the lots with uniform restrictive covenants pursuant to the general plan, purchasers may enforce such covenants against each other.
2. ———: ———: ———. Purchasers of lots cannot enforce against each other restrictive covenants imposed upon their respective lots in a deed to their common grantor, when such covenants were not part of a general plan of improvement, but were imposed for the benefit of other land retained by the original owner.
3. ———: ———: ENFORCEMENT: BURDEN OF PROOF. In a suit by a prior grantee to enforce a restrictive covenant in the deed of a subsequent grantee from the common grantor, the burden is on plaintiff to prove that such covenant was intended for the benefit of his land.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Reversed and dismissed.*

Mahoney & Kennedy, for appellant.

Warren Switzler and *H. W. Morrow, contra.*

BARNES, J.

This is a suit to enjoin defendant from using a residence lot in Omaha for rooming and boarding purposes in alleged violation of restrictive covenants in her deed. From a decree granting an injunction, she has appealed.

Plaintiffs are not parties to the conveyance through which defendant acquired title, and their right to an injunction is challenged on the ground that the restrictive covenants do not inure to their benefit. The covenants in question are as follows:

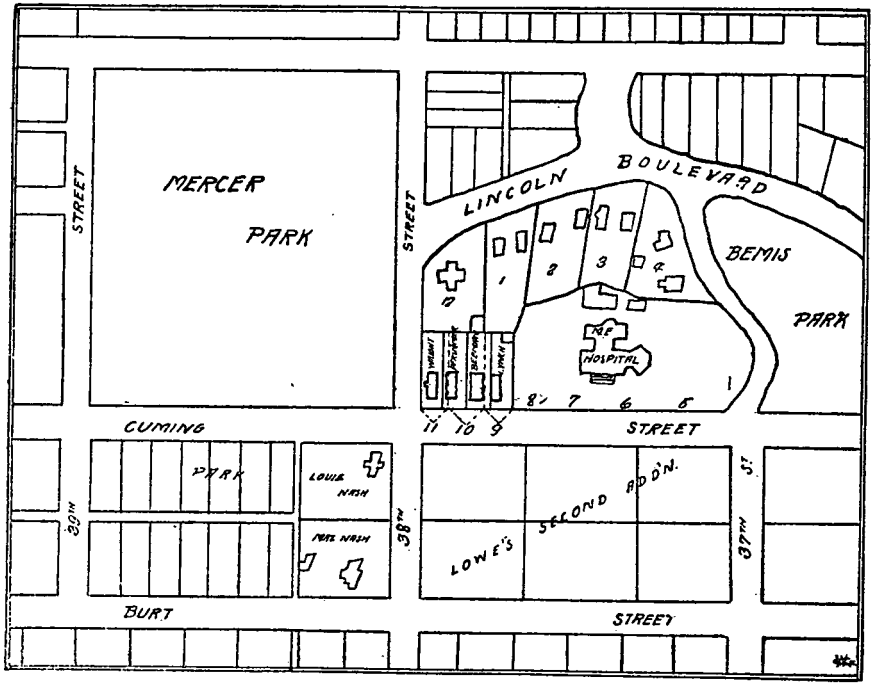
"Subject, however, to * * * the following restrictions and agreements which shall be considered and construed as covenants running with the land for a period of 25 years from the 17th day of May, A. D. 1909:

"(1) That for 25 years from the above date, said property shall be used for residence purposes exclusively and there shall only be erected thereon one separate private residence with the necessary stables and other outhouses in connection therewith, the residence herein specified not to include any apartment house, flat or connected house of any description.

"(2) That any residence erected on said property shall be fronted on Cuming street and the front line thereof shall be placed as nearly as practicable in line with the residence now located on west 50 feet of lot 11, block 12, Bemis Park.

"(3) That any residence erected on said property shall cost not less than $3,500."

The accompanying map is an aid in understanding the facts:



Defendant owns a lot composed of parts of lots 10 and 11, in block 12, Bemis Park, an addition to Omaha. Lots 9, 10 and 11 were originally owned jointly by Mrs. E. W. Nash and her son-in-law, L. F. Crofoot, and were afterwards subdivided into four lots. The grounds of the Methodist Hospital, east of these lots, had been purchased at an earlier date from Mr. Nash without restrictions. Diagonally across the intersection of Cuming and Thirty-eighth streets, Mrs. Nash owned a tract of land having a frontage of 150 feet on Cuming street, where she had resided for many years. Of the four lots mentioned, the one on the east was conveyed to plaintiff Wright on June 27, 1907. The lot adjoining the hospital grounds was conveyed to Frederick L. Smith, December 11, 1906. Sub-

sequently, Mrs. Nash conveyed all of her real estate, for the purpose of management, to the C. B. Nash Company, in which she was the principal stockholder. May 17, 1909, George W. Garloch purchased the other two lots subject to the restrictions contained in defendant's deed, and, after building a house on each, sold the lot adjoining the Wright property to defendant March 15, 1909, and the other to plaintiff Beeman March 5, 1910.

The covenants in the Smith deed were as follows:

"Subject, however, to the following covenants which are hereby expressly made to grantors, their heirs, executors, administrators and assigns, by Frederick L. Smith, for and as binding upon himself, his heirs, executors, administrators and assigns, to wit: (1) That said property shall be used for residence purposes only; (2) that any residence erected thereon shall cost not less than twenty-five hundred dollars ($2,500) and that the front line of same shall stand at least thirty-five (35) feet from the south line of said property; (3) that these covenants shall be considered and construed as covenants running with the land."

The covenants in the Wright deed were as follows:

"Subject to the following restrictions and agreements which shall be considered and construed as covenants running with the land:

"(1) That said property shall be used only for the purpose of erecting thereon one separate, detached private residence. The term residence as herein used shall not include an apartment house, brick flats, or connected or adjoining houses of any description.

"(2) That said residence shall cost, when completed, not less than $4,500.

"(3) That said residence, when erected, shall front south on Cuming street, and the front line thereof shall stand at least thirty feet from the south line of said property."

May the restrictive covenants in defendant's deed be enforced at the suit of plaintiffs, who are not parties to

that deed? Authorities on this subject are collected in 37 L. R. A. n. s. 12, in a note to *Korn v. Campbell,* 192 N. Y. 490. In general, such a covenant may be enforced by another grantee of the common grantor only when it was made for the benefit of the adjacent land. When similar covenants are inserted in deeds from the common grantor pursuant to a general plan of improvement or development made public by the grantor, each grantee has such an interest in the restrictive covenants in the other deeds, in view of the general plan under which he purchased, that he may enforce such covenants against other grantees. When a general plan of improvement has not been published by the grantor, one grantee can enforce the covenants against another only when they were intended for the benefit of the adjacent lots. The intention to give such right to enforce the covenants must be expressed in the deeds themselves, or must be evident from the covenants in the deeds when viewed in the light of the surrounding circumstances. *De Gray v. Monmouth Beach Club House Co.,* 50 N. J. Eq., 329; *Sailer v. Podolski,* 82 N. J. Eq. 459; *Hays v. St. Paul M. E. Church,* 196 Ill. 633.

Restrictive covenants being in derogation of the landowner's free use of his property, one who claims a right to enforce such covenants has the burden of proving that they were made for his benefit. *McNichol v. Townsend,* 73 N. J. Eq. 276; *Sharp v. Ropes,* 110 Mass. 381.

It is contended that plaintiffs may maintain this action, and *Roberts v. Scull,* 58 N. J. Eq. 396, is cited as sustaining this contention: "But this rule, while operative to enable a subsequent purchaser of land to be benefited by a restrictive covenant to enforce it against the prior purchaser, who made it, and against his assigns, with notice of it, does not work inversely to support the claim of a prior purchaser from the original owner to enforce a restriction imposed by the latter upon a lot subsequently conveyed. *De Gray v. Monmouth Beach Club House Co.,* 50 N. J. Eq. 329. * * * In order to entitle prior purchasers from a common vendor, or those claiming under

them, to enforce such covenants, it must be shown that they are parts of a general plan adopted for the development and improvement of the property by laying it out in streets and lots, prescribing a uniform building scheme, regulating size and style of houses, or uses to which the buildings may be put. *De Gray v. Monmouth Beach Club House Co., supra.*"

It is also claimed by defendant that plaintiff Beeman, being a subsequent purchaser, is not in a position to enforce the restrictive covenants imposed upon defendant's lot. It should be observed that Garloch, in 1909, purchased the two middle lots from the original owner, who imposed the restrictions sought to be imposed in this action. He sold one lot to defendant in 1909, and the other lot to plaintiff Beeman in 1910. The question is: May Beeman enforce the covenant imposed upon Garloch, and the two middle lots in the original deed to Garloch, by the original owners of the four lots? There are not many cases which bear directly on this subject, but the weight of authority denies Beeman's right to sue. In the note to *Korn v. Campbell, supra* (p. 22), the annotator says: "Ordinarily, where the owner of a tract of land sells part of it subject to restrictions, it is a purchaser of part of the land retained who seeks to enforce the restrictions; but where the land sold burdened with the restriction is afterwards divided up, and passes into the hands of different purchasers, the question has been raised whether such purchasers from the original vendee can enforce, as between themselves, the restrictions imposed upon their grantor's land. The courts are not in harmony on this question, but in this class of cases it would seem that the rights of portions of the servient estate to enforce the restriction would be exceedingly doubtful, since the restriction was imposed for the benefit of a different tract of land; that is, the land retained by the grantor—the dominant estate."

The only case cited holding that the action can be maintained is *Winfield v. Henning,* 21 N. J. Eq. 188, where

it is said: "This view is supported by the dictum of Lord Romilly, in a case heard before him at the Rolls, in 1866, *Western v. Macdermot,* 1 Eq. Cas. L. R. (Eng.) *499; and by a decision of the supreme court of Rhode Island, *Greene v. Creighton,* 7 R. I. 1." The Rhode Island decision is not authority for the rule.

The supreme court of Massachusetts, however, has held that such an action cannot be maintained. *Jewell v. Lee,* 14 Allen (Mass.) 145. In that case, Bigelow, C. J., said: "The main ground on which the plaintiff rests his claim to equitable relief is that the condition annexed by the original owner and grantor to his grant of the entire tract of land, of which the plaintiff and defendant now by mesne conveyances severally hold distinct parcels, constitutes a perpetual restriction on the use of the part now owned by the defendant, in the nature of a servitude or easement, on the observance of which the plaintiff, as the owner of the other part of the original parcel, has a right to insist. It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improving or rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. But, in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law. The benefit of the condition would in such cases enure only to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who hold it or any part of it subject to the condition. Indeed, no restriction on the use of land and no condition annexed to its possession and enjoyment can be for the benefit of

the grantee or those holding his estate in the granted premises, unless it be as a consideration of some restriction on other land, which may operate as an advantage or convenience in the use and occupation of the granted premises. Inasmuch as a grantee can restrict the use of land of which he is the owner according to his own will and pleasure, it is clear that he can derive no benefit from a restriction or condition as such imposed on its use or enjoyment by any prior grantor."

The grantor in this case did not make public a general plan of improvement of the lots sold. The covenants in the deeds to the lots are not uniform. In the lot first sold, and the one farthest from the Nash residence, there is no express prohibition of flats or apartments as in the other deeds. In the deed to the two middle lots the covenants are limited to a 25-year period, after which time business buildings are not prohibited on those two lots. The grantor retained land near the property sold. If the latter were devoted to business uses or to the erection of apartment houses or hospitals, it would affect the use and enjoyment of her residence property. The insertion of restrictive covenants in all the deeds, while some evidence of an intent to develop the lots under a general plan, is consistent with a purpose of protecting the property retained by the grantor as a residence. There is nothing in the deeds, outside of the fact that covenants were inserted in all of them, that indicates that they were inserted for the benefit of other grantees. There is no covenant to insert such restrictions in subsequent deeds to the adjoining lots. Defendant is bound by the knowledge imparted to her by the language of the deed, and the surrounding circumstances, and not by the secret intentions of the grantor or what was orally promised to the other grantees. *Hays v. St. Paul M. E. Church, supra.*

We are of opinion that plaintiffs have not met the burden of proving that the covenants in the deeds from Mrs. Nash were not made exclusively for her benefit, but were made for the benefit of other grantees of adjoining land.

It is insistd that, as to Beeman, he can enforce the covenants under the rule that, where the owner of two lots inserts restrictive covenants in a deed conveying one of the lots, such covenants may be enforced by the grantor or grantee of the remaining lot. That rule is not applicable to the facts in this case. While the deed to defendant from Garloch, the owner of the two middle lots, did contain the restrictive covenants, they were merely the covenants inserted by his grantor. While the authorities on the questions presented are not entirely in harmony, we feel constrained to follow what seems to be the rule, above stated.

We are also of the opinion that plaintiffs have failed to show such a use of defendant's premises as amounts to a violation of the covenant contained in her deed.

The decree of the district court is therefore reversed, and the action is dismissed.

REVERSED AND DISMISSED.

MORRISSEY, C. J., and LETTON and SEDGWICK, JJ., dissenting.

Independent of the covenants in the Nash deed, plaintiff Beeman is entitled to the relief sought. Garloch was the owner of two lots. He sold one of them with a restrictive covenant in the deed for the benefit of the lot which he retained. About ten months afterwards he sold the latter lot with a like covenant to plaintiff Beeman. The rule is that where the common grantor of two adjoining lots sells one and retains the other, and inserts in the deed of the one sold a covenant restricting the manner in which buildings to be erected on the lot sold may be used or where or how they shall be built, which covenant is plainly for the benefit of the lot which he retains, and he afterwards sells the latter lot, the covenant passes to the purchaser of the same, and he may enforce it against the owner of the other lot. The majority opinion holds that the restriction in Garloch's deed to defendant cannot be enforced by Beeman because that restriction was the same

in substance as in Garloch's deed from Nash. No reason is given for this statement, and we apprehend that no reason can be given for holding that Garloch could not enforce the same restriction on the property deeded by him that was in the deed under which he himself took title. Repeating a quotation in the majority opinion from *Jewell v. Lee,* 14 Allen (Mass.) 145, "inasmuch as a grantee can restrict the use of land of which he is the owner according to his own will and pleasure," the restriction in Garloch's deed to defendant would be enforceable by either Garloch or his subsequent grantee.

FRED NELSON, APPELLEE, V. PETER E. NELSON, APPELLANT.

FILED MARCH 4, 1916. No. 18649.

1. **Contracts:** RESCISSION. "Payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress." *Weber v. Kirkendall,* 44 Neb. 766.
2. **Trial:** EXCLUSION OF EVIDENCE. An itemized receipt prepared by the attorney of a party, which the opposite party refused to accept, is not binding on the party refusing to accept it, and may be excluded without error when offered in evidence.
3. **Verdict:** AMOUNT. Plaintiff claimed $2,000 damages for failure of the defendant to properly care for his cattle while in defendant's possession, and $208 for a failure to return four head thereof. *Held,* that a verdict for $208 for those items was not excessive.
4. **Novation.** An agreement between two parties that one of them shall pay a third person an amount of money for which they were separately liable in equal parts does not create a novation unless and until the third party sanctions such an agreement.

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

Byron G. Burbank, for appellant.

William Baird & Sons, contra.

BARNES, J.

This was an action at law in which plaintiff sought to recover damages arising out of an exchange of properties between himself and defendant. The petition contained six counts or causes of action. The issues made by the pleadings were submitted to a jury in the district court for Douglas county, and resulted in a verdict by which plaintiff recovered on his first, second, third and fifth causes of action. The verdict as to the fourth and sixth causes of action was for the defendant. Judgment was rendered on the verdict for $1,284.63 in favor of plaintiff, and the defendant has appealed.

The record discloses that plaintiff, by his petition, sought to recover on his first cause of action the value of 18 head of cattle which defendant failed to deliver to him according to the terms of their contract, amounting to $540, and for $25 worth of furniture which defendant failed to deliver to plaintiff under his agreement. The plaintiff sustained this cause of action by sufficient evidence. Defendant contends, however, that the trial court erred in receiving the evidence of the plaintiff as to the value of the cattle because he was not interrogated as to their market value. According to the record, the parties agreed in writing, when they exchanged properties, that the grown cattle were worth $40 a head, and the calves, if any, were worth $20 each. Plaintiff was unable to see the cattle, by reason of the failure of defendant to deliver the 18 head. He was compelled to rely on the value fixed by the agreement, made when the exchange of properties was consummated, and his testimony fixing the average value at $30 a head was admissible. On this count, the verdict of the jury was for $540, and, being sustained by the evidence, this court will not set it aside.

As to the second cause of action, it appears that in the exchange of properties plaintiff gave the defendant two

notes, one for $469, due January 11, 1913, and one for $1,617, due October 11, 1913, each bearing interest at 6 per cent., secured by a chattel mortgage on the 275 head of cattle which defendant agreed to deliver to the plaintiff; that defendant also agreed to assign and deliver certain leases of grazing lands to the plaintiff and convey to him two lots in Pine Bluffs, Wyoming, before the first of the said notes should become due. Defendant failed to assign said leases and convey the said lots to plaintiff within the time agreed upon, and when the first of the notes became due he seized the cattle under his chattel mortgage and proceeded to advertise the same for sale for the whole amount due on both notes. In order to obtain possession of the cattle, plaintiff was obliged to, and did, pay the defendant the sum of $2,590.15, which was $504.15 more than the sum due on both notes, and by the second cause of action plaintiff sought to recover that amount. The jury gave him a verdict on that count for $449.13, and, as we view the record, the evidence sustains that amount.

"Payments or concessions exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by immediate hardship or irreparable injury, may be avoided on the ground of compulsion, although not amounting to technical duress." *Weber v. Kirkendall*, 44 Neb. 766. *First Nat. Bank v. Sargeant*, 65 Neb. 594; 30 Cyc. 1308.

It is contended, however, that the verdict as to this cause of action was excessive, in that defendant should have been allowed a credit of $141.91. This contention cannot be sustained, because there is no claim for that amount in the pleadings, and it is quite clear that the jury were not entitled to consider that item.

Defendant also contends that the trial court erred in excluding a receipt prepared by his attorney, which was offered to plaintiff at the time he paid the $2,590.15 to the defendant in order to obtain possession of his cattle. The record shows that the plaintiff refused to accept this

receipt, and therefore was not bound by it. At most, it was a self-serving document prepared by defendant's attorney for the evident purpose of preventing plaintiff from maintaining a suit to recover the amount of money paid by him in excess of the sum due on the chattel mortgage. The court did not err in excluding this pretended receipt.

Plaintiff, by his third cause of action, sought to recover the value of four head of cattle, taken under the mortgage, which were not returned to him by the defendant, and $2,000 damages to the cattle while they were in defendant's possession. The jury returned a verdict on this cause of action for $208, which was the reasonable value of the cattle not returned, and refused to allow plaintiff any damages for defendant's failure to properly feed and care for the stock while they were in his possession. An examination of the record fails to furnish any reason for setting aside the verdict on that cause of action.

Plaintiff's fifth cause of action was to recover the sum of $87.50, one-half of the commission claimed by one Davis, who negotiated the exchange of properties. It appears that Davis owed the plaintiff, and it was agreed that plaintiff should pay him the whole commission, of which defendant was to pay one-half. But Davis refused to release the defendant, who afterwards paid him $87.50. The testimony shows that, in a suit between plaintiff and Davis, plaintiff did pay Davis $100, but we are of opinion that defendant was not released from paying one-half of the commission, and was entitled to receive credit for the $87.50, which he paid. The verdict of the jury on that count cannot be sustained.

By the sixth and last cause of action, plaintiff sought to recover the sum of $15 for borrowed money. The jury properly found for him on that count.

Numerous errors are assigned by counsel for defendant, but after a careful review of the record we are of opinion that they cannot be sustained.

The cause was fairly tried, was properly submitted to the jury, and, if plaintiff files a remittitur for $87.50 within 20 days from the filing of this opinion, the judgment of the district court will stand affirmed; each party to pay his own costs of this court.

AFFIRMED.

SEDGWICK, J., not sitting.

GRACE M. HOOPES, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MARCH 4, 1916. No. 18553.

1. **Municipal Corporations:** PUBLIC IMPROVEMENTS: NOTICE. Published notice directed to "owners of lots within" an improvement district, as shown by an ordinance and a public plat, and to the "owners of lots abutting on or adjacent to" a street designated by name, that a petition has been filed for the paving of such street, may be binding on the owner of a lot 49 feet from the street to be improved but connected therewith by another street and an alley. Rev. St. 1913, sec. 4295.
2. ———: ———: PETITION: FINDING OF COUNCIL. The legislature in enacting a city charter may make the finding of a city council that a petition for the creation of an improvement district is "regular, legal and sufficient," conclusive except upon appeal, notice of the petition and of the making of an assessment being required. Rev. St. 1913, sec. 4299.

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

Charles S. Elgutter, J. W. Schopp and *W. D. Griffin,* for appellant.

John A. Rine and *W. C. Lambert, contra.*

ROSE, J.

This is a suit to enjoin the collection of a special assessment of $132.75 against lot 13, block 8, Creighton's First addition to Omaha, for curbing and paving. The lot de-

scribed is owned by plaintiff and fronts on Thirty-third street, but is in improvement district No. 1204 which was created by ordinance for the purpose of curbing and paving Arbor street between Thirty-second avenue and Thirty-fifth street. The city of Omaha and its treasurer are defendants. From a dismissal of the action, plaintiff has appealed.

It is insisted that the petition for the improvements is not signed by "the record owners of a majority of the frontage of taxable property in such district," as required by the city charter. Rev. St. 1913, sec. 4287. In this connection it is argued by plaintiff that the council was without jurisdiction to order the improvements, and that therefore the assessment is void. Defendants take the position that the city council, as authorized by law, made a conclusive finding that the petition was "regular, legal and sufficient." Rev. St. 1913, sec. 4299. Plaintiff assails the finding as void on the ground that published notice of the filing of the petition was fatally defective. Attention is thus directed to the terms of the city charter and to the publication of notice. The statute provides:

"The city council shall by resolution direct the city clerk to cause a copy of the petition to be published for three days in the official paper of the city, with a notice thereto attached directed to the property owners generally in the district that they shall have twenty days from the first day's publication of the petition and notice to file a protest in the office of the city clerk against the regularity or sufficiency of the petition or any signature thereon." Rev. St. 1913, sec. 4295.

In the published notice reference was made to the property owners and to their realty as follows: "To the owners of all lots, lands, tracts and parcels of land within street improvement district No. 1204, and to the owners of all lots, lands, tracts and parcels of land abutting on or adjacent to that part of Arbor street from Thirty-second avenue to Thirty-fifth street in the city of Omaha, Nebraska."

Since plaintiff was not designated by name, was there a sufficient description of her property to charge her with notice as owner? Her lot was in the improvement district as shown by an ordinance and by a public plat. Was she the owner of "land abutting on or adjacent to" that part of Arbor street between Thirty-second avenue and Thirty-fifth street? Her lot fronts on Thirty-third street, a thoroughfare entering Arbor street at right angles. Between Arbor street and the property of plaintiff there is nothing but a corner lot 49 feet wide. From the rear of her premises to Arbor street, a distance of 49 feet, there is an alley. Notice of a purpose to improve Arbor street at that place would naturally arrest the attention of persons owning property there. The question is: Was the publication technically sufficient for that purpose?

In 2 Page and Jones, Taxation by Local and Special Assessment, sec. 751, it is said: "In the absence of a statute specifically requiring it, it is not necessary that a notice be given to the property owners by name. It may be addressed generally to the owners of land, designated in a certain manner; as to the owners of land abutting upon a specified part of a designated street. * * * If the notice shows what land is to be affected, it is sufficient if it is addressed 'To whom it may concern,' or to 'all interested.' * * * The notice must, however, give either the name of the property owner or such reference to his property that it may be determined thereby."

The notice was directed to the owners of lots "abutting on or adjacent to" that part of Arbor street between Thirty-second avenue and Thirty-fifth street. The word "adjacent," in the popular sense thus used, obviously means something in addition to, or different from, "abutting." It may fairly include plaintiff's lot. In construing the word "adjacent," it was said in *Dunker v. City of Des Moines,* 156 Ia. 292: "The word 'adjacent' is, at least, somewhat indefinite. Ordinarily, it means 'to lie near, close, or contiguous.' Webster. Even in its strictest sense it means no more than lying near, close, or contigu-

ous, but not actually touching." This definition is approved in *Hennessy v. Douglas County,* 99 Wis. 129; *Northern P. R. Co. v. Douglas County,* 145 Wis. 288. The conclusion is that the notice in the present case was sufficient to inform plaintiff that her property would be affected by the proposed improvement.

Since plaintiff is bound by the published notice, is she precluded by the finding of the city council that the petition was sufficient? The city charter provides:

"In case no protest is filed within the time hereinbefore provided, the city council shall have the power at any regular or special meeting, without further notice, to find, adjudge and determine by resolution that such petition is regular, legal and sufficient." Rev. St. 1913, sec. 4298.

"In either case, such resolution of determination and adjudication shall be final and binding as the final order, judgment and determination of a court of inferior jurisdiction; and after the passage of such resolution adjudging said petition to be regular, legal and sufficient, no court shall entertain any action for the purpose of attacking the regularity, legality or sufficiency of such petition, except upon appeal as hereinafter provided." Rev. St. 1913, sec. 4299.

Where the statute makes the filing of a proper petition jurisdictional, the finding of the city council that the petition is sufficient is not conclusive, if, in fact, it is defective. *Morse v. City of Omaha,* 67 Neb. 426. In that case, however, it was said: "In the statute under consideration there is an entire absence of any provision tending to make the action of the city council in passing upon the petition final and conclusive."

The present charter of Omaha makes the findings of the council final. The council acted under the statute and sustained the petition. Plaintiff did not appeal. She is therefore bound by the decision, if the statute is valid. A similar provision in the Denver charter was sustained in *Londoner v. City and County of Denver,* 210 U. S. 373, wherein it was said:

"In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed. * * * The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work did not include any assessment, or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. *Voight v. Detroit,* 184 U. S. 115; *Goodrich v. Detroit,* 184 U. S. 432. The legislature might have authorized the making of improvements by the city council without any petition. If it chose to exact a petition as a security for wise and just action it could, so far as the federal Constitution is concerned, accompany that condition with a provision that the council, with or without notice, should determine finally whether it had been performed."

The invalidity of that part of the city charter authorizing the city council to pass on the sufficiency of a petition for an improvement and making its decision final, unless set aside on appeal, has not been shown. Notice of the filing of the petition for the improvement having been given pursuant to law, the council's adjudication that it was "regular, legal and sufficient," is final. This conclusion makes a discussion of other questions unnecessary and results in the affirmance of the judgment of the district court.

AFFIRMED.

SEDGWICK, J., not sitting.

JULES ALTHAUS V. STATE OF NEBRASKA.

FILED MARCH 4, 1916. No. 19411.

1. **Constitutional Law: BROKERS: INTEREST.** The act fixing the maximum rate of interest at 10 per cent. per annum, providing for the issuance of a license, and authorizing licensed money-lenders to charge a brokerage fee not exceeding one-tenth of the money actually lent and, in exceptional cases, an examination fee of 50 cents, in addition to interest, is not unconstitutional as being a "local or special law * * * regulating the interest on money," nor as denying "the equal protection of the laws." Laws 1915, ch. 204.

2. ———: ———: **VALIDITY OF STATUTE.** The act conferring upon the secretary of state, after a hearing, power to reject an application for a license to lend money is not unconstitutional as conferring upon that officer arbitrary power. Laws 1915, ch. 204, sec. 3.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

Smyth, Smith & Schall, for plaintiff in error.

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

J. P. Palmer, amicus curiæ.

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Jules Althaus was convicted of violating a statute fixing the maximum rate of interest at 10 per cent. per annum, providing for the issuance of a license, and authorizing licensed money-lenders to charge a brokerage fee not exceeding one-tenth of the money actually lent and, in exceptional cases, an examination fee of 50 cents, in addition to interest. Laws 1915, ch. 204. For that offense defendant was sentenced to pay a fine of $25. As plaintiff in error he now presents for review the record of his conviction.

Defendant challenges the constitutionality of the act under which he was prosecuted. In substance, the statute provides that it shall be unlawful to make a loan of money at a rate of interest in excess of 10 per cent. per annum, but empowers the secretary of state to issue to an applicant who pays an annual fee of $60 and executes a bond for $2,000 signed by a duly approved surety company a license authorizing the licensee to charge, in addition to interest, a brokerage fee equal to one-tenth of the amount of money actually lent and, in cases where the loan does not exceed $50 and is not secured by personal property, an examination fee of 50 cents. Laws 1915, ch. 204.

Defendant's principal objections to the act are that it violates section 15, art. III of the Constitution, prohibiting local and special laws regulating the interest on money, and creates an unreasonable and arbitrary class of money-lenders who are permitted to exact the equivalent of 20 per cent. interest per annum. The power of the legislature to regulate interest cannot be questioned. *State v. Carey,* 126 Wis. 135, 11 L. R. A. n. s. 174. Legislation like that under consideration is within the police power of the state. *Griffith v. State of Connecticut,* 218 U. S. 563. The evils against which the law is directed had become a public scandal. The rapacity of money-lenders who impounded chattels and wages to secure small loans to those in pecuniary distress had become intolerable. Persons engaged in that business were practically uncontrolled. Many of their operations were secret, but the iniquity of their compensation for the use of money created a demand for the restraints of police power. The act in controversy not only puts a limit on exactions for the use of money, but provides punishment for the violation of its provisions and opens to official scrutiny the transactions of all who are authorized to charge limited fees in addition to interest at the rate of 10 per cent. per annum. The law assailed regulates the interest chargeable by two classes—unlicensed lenders of money limited to 10 per cent. per annum,

and licensed lenders authorized to make an additional charge, called a "brokerage fee," not exceeding one-tenth of the money actually lent and, in exceptional cases, to charge an examination fee of 50 cents. The latter class is open to all who comply with the terms of the statute. One class of borrowers may be required to pay more for their loans than others, but this condition already existed and was not created by legislation. The lawmakers recognized a class of borrowers from whom exorbitant rates of interest had been exacted under existing conditions and attempted to afford them some measure of protection. Those making such loans are required to obtain a license. Their methods of doing business are regulated. The act makes no discrimination against any class of borrowers. It is not unconstitutional as being a "local or special law * * * regulating the interest on money." The better rule is that the classification is neither unreasonable nor arbitrary. It is also clear that the act does not deny the equal protection of the laws. *Reagan v. District of Columbia,* 41 App. D. C. 409; *Griffith v. State of Connecticut,* 218 U. S. 563.

Defendant relies upon *Commonwealth v. Young,* 248 Pa. St. 458. It must be conceded that the opinion in that case is not in harmony with the views herein expressed. The philosophy of the legislation, the police power under which it was enacted, proper classification in regulating the interest on money, and existing conditions calling for a remedy do not seem to have been recognized by the Pennsylvania court.

Defendant further insists that the act is void because a section thereof requires the applicant to furnish a bond executed by a surety company. Laws 1915, ch. 204, sec. 4. The determination of this question is not necessary to a decision, for the reason that a ruling thereon in favor of defendant would not affect the validity of the act as a whole or result in an acquittal.

It is further argued that the act is unconstitutional because it confers upon the secretary of state arbitrary

power to reject applications for licenses without providing a method for reviewing his acts. There is no attempt to vest an arbitrary authority in the secretary of state. Adequate remedies exist for the protection of any legal rights infringed by the unwarranted rejection of an application for a license.

Invalidity of the act has not been shown. The judgment is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

HAMER, J., dissenting.

The act under consideration in this case should be entitled an act to license usurers and their assistants to live off the poor. This act is claimed to have been provided especially for the benefit of the unfortunate. The first section contains a proviso that the person who contemplates the loaning of money at the illegal rate specified and under the conditions provided shall be entitled to a license from the secretary of state to engage in his peculiar business. He is guaranteed a protection that other money-lenders do not enjoy. He is exempt from the operation of the usury law if he has a license. To get a license he has to pay the secretary of state $60 per annum. He must also give a bond in the sum of $2,000 conditioned for the faithful performance of his duties as licensee, and the prompt payment of any judgment which may be recovered against him. Deputy inspectors shall be appointed in each county in the state and they are to inspect the books and records of these licensed money-lenders. The inspectors shall receive for their services $5 a day to be paid by the person or corporation that borrows the money. While this act purports to have been passed for the benefit of the unfortunate who are poor, it enables the collection of oppressive rates from those who are probably distressed. I do not question the good intent of the legislators who passed the act upon the theory that they were helping somebody, but I doubt its efficiency, and I think it is

clearly unconstitutional. It discriminates between borrowers, and compels those who are least able to pay, to pay the highest rates. It also places the licensee beyond attack. The opinion of the majority should declare the act unconstitutional and void. That would give an opportunity for a new act to be passed in which the poor become actual beneficiaries.

HARRY WHETSTONE V. STATE OF NEBRASKA.

FILED MARCH 4, 1916. No. 19414.

Rape: EVIDENCE: CORROBORATION. In a prosecution for rape upon a female child not previously unchaste, proof of facts and circumstances justifying a finding, independently of her own testimony, that accused had the opportunity and the inclination to ravish her may be sufficient corroboration of direct and positive evidence by her that he did so.

ERROR to the district court for Keya Paha county: R. R. DICKSON, JUDGE. *Affirmed.*

Ed. D. Clarke, Ross Amspoker, Allen G. Fisher and *William P. Rooney,* for plaintiff in error.

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

ROSE, J.

In the district court for Keya Paha county, defendant was convicted of rape, and for that offense was sentenced to serve a term of four years in the penitentiary. As plaintiff in error, he presents for review the record of his conviction.

Defendant insists that the sentence cannot be upheld because the verdict, as he views the evidence, is supported only by the uncorroborated testimony of prosecutrix. She was called as a witness, and in direct and positive

terms testified to defendant's felonious act as charged in the information and to the time, place and manner of its commission. She was at the time 15 years and 10 days old. Unless she committed perjury, she was not previously unchaste. Evidence to that effect is not disputed in the record. Her story is believable. A motive for false testimony on her part is not disclosed. Defendant was not eligible as an honorable suitor, because he already had a wife. At the time of the trial prosecutrix was not disturbed by prospects of maternity or by pecuniary demands of illegitimate offspring. There is no intimation of a purpose from any source to demand or extort money from defendant. According to the story of prosecutrix, the offense was committed Saturday night, June 26, 1915, at the home of Harrison Morrison, a farmer living with his wife and two children five miles west of Norden. Prosecutrix was a relative of Morrison and had been in his home a few days in the capacity of a domestic. In addition to her testimony, there is proof of these facts: During the afternoon of the day mentioned, defendant, alone in a buggy, drove in a roundabout way to the home of Morrison, knowing that it was the latter's custom to visit Norden with his wife and children Saturday afternoon. Defendant knew that prosecutrix had left her home a few days earlier to go to Morrison's. When defendant arrived there in the afternoon, all of the Morrison family, including prosecutrix, were absent. Defendant waited there alone until they returned from Norden, though he said he had started to that village, a place to which he did not go. In the evening he and prosecutrix conversed for a time in a little vestibule opening into the kitchen of the Morrison home. Night came on and defendant did not leave. He was asked to stay all night, but declined. Finally, his host evinced an intention to retire for the night. Whereupon defendant intimated that he was about to start home. After the Morrisons had all gone to the second floor of the house to retire for the night, defendant went from the kitchen into the sitting-room downstairs,

found prosecutrix there alone, and conversed with her. Though he had previously stated that he had stopped at Morrison's for protection from the rain, and had declined an invitation to stay all night, he left in the rain immediately after he had had the time and the opportunity to commit the crime. Proof of these corroborating facts and circumstances does not depend on the testimony of the prosecutrix. Evidence of the opportunity to commit the crime is uncontradicted. The inclination of defendant to ravish prosecutrix may fairly be inferred from the outlined facts and circumstances proved by other witnesses. Corroboration of a similar nature was held sufficient in *State v. McCausland,* 137 Ia. 354, the court saying:

"It was shown by the testimony of persons other than the prosecuting witness that defendant was seen with this young girl in a public place at a late hour on the night when the crime is alleged to have been committed, and circumstances were shown from which the jury could be justified in finding that he accompanied her from the place where they were first seen together through the street, and up a flight of stairs, where they entered a darkened room, which according to the story of the prosecutrix was the scene of the offense."

The direct and corroborating evidence is sufficient to sustain the conviction.

Other assignments of error are directed to the conduct of the presiding judge in interrupting the examination of witnesses, in preventing the answering of questions, and in asking other questions. In these respects the record shows that the trial court protected the rights of defendant, prevented error, and avoided unnecessary cross-examination, without making a mistake or prejudicing defendant.

Complaint is also made of rulings in giving and refusing instructions. No debatable question is raised by such rulings. The charge is exceptionally free from error. Every right of defendant was safeguarded. The instruc-

tions given covered the entire case and conformed to established rules of law applicable to the evidence.

AFFIRMED.

FAWCETT, J., not voting.

SEDGWICK, J., dissenting.

The crime of rape is one of the most detested of crimes. It is a crime against the virtue of womanhood. "The object of the statute is to protect the virtuous maidens of the commonwealth, to protect those girls who are undefiled virgins; and a female under 18 years of age and over 15 years of age who has been guilty of unlawful sexual intercourse with a male is not within the act." *Bailey v. State,* 57 Neb. 706. If this young girl was previously chaste and was ruined by this defendant, he richly deserves the punishment for rape which the statute provides may be 20 years in the penitentiary. If she was not a pure girl, the crime which this defendant has committed, if he has done the act charged, is principally in degrading himself and indirectly injuring his wife and children. That crime is not rape; it is adultery, and the punishment is a short term in the county jail. When the crime of rape is committed against a girl under the age of consent, the substance of the crime is the violation of her chastity, and must be proved beyond a reasonable doubt. "Where the prosecutrix is over 16 years of age at the time of the alleged commission of the crime, the evidence should show, beyond a reasonable doubt, that she was not previously unchaste." *Burk v. State,* 79 Neb. 241. The prosecuting witness, when she was asked the direct leading question by her attorney, said that she was not previously unchaste. The opinion makes a feeble attempt to show that she was corroborated as to the act itself, but there is no intimation in the evidence or in the majority opinion that she was corroborated as to her purity. "Unless she committed perjury, she was not previously unchaste. Evidence to that effect is not disputed in the record." This is all that is said in the opinion on this subject. There is such a great, such an immeasurable distance between a pure girl

and one who has trifled away or has been robbed of her virtue, that the law may well punish him who deliberately plans to destroy her by the extreme penalty. It is presumably just and reasonable that the gravamen of such a crime should be proved so as to remove all reasonable doubt of the guilt of the man charged. If it is required that the prosecuting witness should be corroborated in any particular, there is greater reason to require it upon this issue than upon any other. Generally, a wanton girl will not hesitate to swear to her own purity. When she yields her virtue, she yields all, and rarely retains a high regard for truth. If truthful, she is generally virtuous, and *vice versa*. A virtuous girl is known by all her acquaintances to be virtuous. It is no hardship to require conclusive proof. A wanton woman advertises that fact by her conduct and demeanor wherever she goes.

There is not only no corroboration as to the chastity of the girl, but also a total failure of corroboration as to the act itself. Everything named in the opinion as corroboration is equally consistent with innocence as with guilt. Morrison and his family were not in the habit of going to Norden every Saturday. It was only occasionally that they did so. They would be more likely to take the girl with them than to leave her at home alone. The defendant was as much in the habit of driving Saturday as were they. He and the Morrison family were old-time acquaintances and friends. The fact that defendant drove out of his way to go to Morrison's is equally consistent with innocence on his part. That he remained there in the storm until Morrison returned and did not go to Norden, that he visited with the family, and conversed with the girl for an hour "in the vestibule opening into the kitchen," furnishes no corroboration. They passed the evening in the usual social manner, and at about 10 o'clock Mr. Morrison asked the defendant to stay for the night. He declined, saying that he must be at home in the morning early to care for his stock. Mr. Morrison then announced that he would retire for the night. Mrs. Morri-

son started at once for their room at the head of the stairs, and Morrison followed her within a minute or two. Within five or ten minutes thereafter the defendant left for his home. In the meantime it is alleged that this crime was committed. The lights were burning, the doors were open, and considerable noise in any part of the little house could be heard throughout the building. The details of the commission of the alleged crime in those five or ten minutes are given solely by the prosecutrix, and this testimony of hers can, of course, furnish no corroboration of itself. Twice during the evening and after the two children had retired, Mr. and Mrs. Morrison went out of the house, and were gone one or two minutes; once when it was thought an automobile in which they were interested was passing, and once to close the door of the chicken house a couple of rods distant, and on one of these occasions the defendant and the girl were standing in the hall talking. The defendant had left his hat and gloves in the sitting-room, and he testifies that when Morrison declared that he would retire for the night the girl went into the sitting-room to get his (defendant's) hat and gloves for him, and he followed through the hall door which was left open, and could not at once find his hat and gloves, which delayed him possibly five minutes, and as soon as they secured his hat and gloves he went home.

In all this there is no proof of a single fact that tends to prove a disposition on his part to commit such a crime. Proof of opportunity alone without indication of any improper conduct will, of course, not amount to corroboration. The proof of opportunity is not sufficient. The evidence of Mr. and Mrs. Morrison shows that, when Morrison announced that he would retire, it amounted to an invitation to defendant to either stay for the night or go, and defendant acted accordingly. He started at once for his hat and gloves, and Morrison says he had left the house within five or ten minutes. Was a chaste and virtuous girl ruined in those five or ten minutes? Neither

the act itself nor the chastity of the girl is proved beyond a reasonable doubt.

HAMER, J., dissenting.

I dissent from the opinion of the majority.

1. There was no evidence tending to corroborate the testimony of the prosecutrix that she was chaste. I have read all the evidence. The girl and the man talked together after the Morrison family went upstairs to retire. Up to that time I am unable to find anything which tends to corroborate her story. Defendant was a young married man, and while he visited with Morrison he also talked to the girl in the sociable and easy way which is not uncommon in the country, where people do not isolate themselves, but visit and talk together. It was not at all strange that the defendant and Morrison should visit each other. They were in the habit of doing so. They exchanged work together at times. They were probably the very best of friends. I am unable to find any sort of corroboration in the story recited by the prosecutrix. If the crime was committed, as she says it was, it is difficult to understand how she could have been chaste at that time. She testified that they went into the front or south room, and then that he blew out the light which was burning there. She got a rocking chair and sat in it. That she did not intend to go away is apparent from the fact that she sat in the chair and did not go upstairs. If she had been a good girl and chaste, she would have cried out, and Mr. and Mrs. Morrison, who were lying awake in the bed upstairs and only a few feet distant from her, would have been down stairs in two or three seconds. If the prosecutrix was guilty, then the man was guilty, but he could not be guilty of rape, for the woman was not chaste.

2. The charge against the defendant is that the girl was under the age of 18 years, to wit, of the age of 15 years; that she was not previously unchaste; that the defendant unlawfully and feloniously made an assault upon her; and that he unlawfully and feloniously ravished and

carnally knew her. The charge is under the last clause of section 8588, Rev. St. 1913, and contemplates that the act is done with the consent of the prosecutrix. The information does not allege that the act was committed "with her consent." The necessary provision of the statute is left out. The necessary facts therefore were not in the information. The language of the statute is, "shall carnally know or abuse any female child under the age of 18 years with her consent." In *Bailey v. State,* 57 Neb. 706, it is said in the body of the opinion: "To sustain a criminal conviction it is not enough for the state to show that the person indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law." In *Burk v. State,* 79 Neb. 241, it is said in the syllabus: "The evidence should show, beyond a reasonable doubt, that she was not previously unchaste." There was no evidence touching this subject. In the body of the opinion in *Burk v. State, supra,* it was said that, if the case had to be tried over again, it would seem necessary for the state to produce some corroborating evidence as to the principal fact, "and of the previous chastity of the prosecutrix."

3. The fourth instruction is to effect that the offense must be committed with a "female under the age of 18 years with her consent." The defendant was not tried for the offense described in the statute, and he was not tried for the offense set out in the instruction. To proceed against the accused as if he unlawfully and feloniously ravished and assaulted her could not well have been otherwise than to the prejudice of the defendant. He was tried for violence.

4. Section 6 of the instructions given by the court contains the following: "The doubt which the juror is allowed to retain in his own mind, and under which he should render his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict, is not a reasonable doubt, and a juror is not

allowed to create sources of material doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of fact different from that established by the evidence. Hence, if, after a careful and impartial consideration of all the evidence, you can say that you feel an abiding conviction of the guilt of the defendant and are satisfied to a moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously on the truth of the charge made against the defendant, then, and in that event, you are as jurors satisfied beyond a reasonable doubt. A reasonable doubt does not consist of possible or conjectural doubt, but a doubt that would justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case."

To say that a juror must justify himself for what he does as a juryman is to make him an object of suspicion. The tendency of that sort of an instruction is to intimidate the juror. That instruction originated in the anarchist cases tried in Chicago. Apparently it was framed to compel the jurors to disregard the doctrine of reasonable doubt.

5. In instruction 11, given by the court on its own motion, it is said that the prosecutrix need not be "corroborated" by the testimony of other witnesses; that it is sufficient if she shall be corroborated as to the material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn. Some rule should have been laid down by the trial judge enabling the jury to rest their conclusion upon facts shown to exist in the case not dependent upon the testimony of the prosecutrix. This was not done.

6. The alleged facts as the prosecutrix recites them do not seem probable. According to her testimony, Mr. and Mrs. Morrison went up to bed. They put a light on the bureau at the head of the stairs. There were no doors

in the way, and the light shone down to where the prosecutrix and the defendant were. There was also a stovepipe hole up through the ceiling. With the light shining down the stairway where Morrison and his wife had just retired to bed and were then awake, is it probable that the prosecutrix and the defendant would have taken their chances of discovery? "Q. Well, wait a minute; it shined down while they were up there? A. I suppose it did. Q. And you could see the light? A. No, I could not see the lamp, I could see the light. Q. Well, that is what I asked you, the light shone down stairs on you and Harry Whetstone, didn't it? A. Yes, sir. Q. And if either Mr. or Mrs. Morrison looked down from up there, they could see you standing there? A. Well, we wasn't there very long."

Mrs. Morrison testified that there was a light up at the head of the stairs nearly all the evening, and that it shone down where the defendant and the prosecutrix were standing. If the testimony of the Morrisons is truthful, the probability of the defendant's guilt would seem to be remote. Whatever the facts may be, they are not shown by the evidence to have had intercourse.

7. This man should not be sent to the penitentiary on the evidence presented against him. If this man is guilty of anything, it is adultery. There is no penitentiary sentence for that. Of course, we ought not to disregard legal rights. "A single act of sexual intercourse by a married man with an unmarried woman constitutes the crime of adultery." *State v. Byrum*, 60 Neb. 384. This defendant can be prosecuted for adultery under the facts shown, and, if found guilty, could be imprisoned in the county jail not exceeding one year. Section 8767, Rev. St. 1913.

GUS TESKE, APPELLANT, V. CARL BAUMGART, APPELLEE.

FILED MARCH 4, 1916. No. 18573.

Bills and Notes: ACTION: DEFENSE OF ALTERATION: BURDEN OF PROOF. The rule must be considered settled in this state that, in an action upon a promissory note, which is regular upon its face, the burden of establishing a defense that the instrument had been fraudulently altered by the holder thereof after its execution and delivery is upon the defendant; and the fact that such a defense may be shown under the general issue does not change the rule. *Ohio Nat. Bank v. Gill Bros.*, 85 Neb. 718, in so far as it conflicts herewith, is overruled.

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

A. M. Post, for appellant.

Reeder & Lightner and *R. P. Drake, contra.*

FAWCETT, J.

Action on a promissory note. Judgment for defendant. Plaintiff appeals.

The first three assignments of error may be considered together. Under these assignments it is contended that the court erred in giving instructions 3 and 5 on its own motion, thereby imposing upon plaintiff the burden of proof as to a claimed alteration of the note in suit.

The original note for $1,620 was introduced in evidence and is before us. It bears no evidence whatever upon its face of any alteration either before or after its execution. The petition is in the usual form. The answer is a general denial, followed by lengthy allegations of affirmative matters pleaded as set-off. No further attention need be paid to this branch of the case, as judgment went against the defendant on his set-off, and he has not appealed.

On the trial plaintiff called defendant to the witness stand for the purpose of proving the execution of the note. During the examination defendant made the following

admission in the record: "The defendant admits that the signature attached to exhibit 1 is his genuine signature, but does not admit the remainder of the instrument." Plaintiff had possession of the note and produced it at the trial. This was *prima facie* evidence of delivery and ownership. *Gandy v. Estate of Bissell,* 72 Neb. 356. This, together with the admission of the execution of the note, made a complete case for plaintiff in chief, and he rested. It is now contended that the general denial in the answer cast upon plaintiff the burden of proving that the note in suit is the identical note, in form, date and amount, that was signed by the defendant. If this contention is sound, defendant was entitled to a directed verdict when plaintiff rested. No such motion was made, but, on the contrary, defendant proceeded to develop his defenses, the principal of which was that the note in suit was not given on the day of its date, nor until the 30th day of October following, at which time, he testified, he had a settlement with plaintiff, at which the balance due plaintiff was ascertained to be $620; that he looked at the figures on the note when he signed it, and the figures were "six and two and naught, and the two little naughts;" that he was unable to read the written portion of the note at that time, as he cannot read English. He also testified that this was done in plaintiff's house, and that no one was present at the time. In this he is directly contradicted by plaintiff and his wife, who both testify that they were present when the note in suit was signed. It will be seen, therefore, that defendant recognized the fact that plaintiff had made out a case, and that the burden was upon him to prove that the note, which he had executed and delivered, and which was regular upon its face, had been materially altered after its execution and delivery. There are cases to be found which hold that this defense cannot be shown under a general denial; but the law in this state is the other way. In *Gandy v. Estate of Bissell, supra,* we held that a fraudulent alteration of a note might be shown under the general issue. The fact that

such a defense may be shown under the general issue does not, however, change the rule that in making such defense, where the note is regular upon its face, the burden is upon the defendant.

This is the rule announced in *McClintock v. State Bank,* 52 Neb. 130, *Colby v. Foxworthy,* 80 Neb. 239, *Anderson v. Chicago & N. W. R. Co.,* 88 Neb. 430, and *Musser v. Musser,* 92 Neb. 387. This rule has never been departed from in this state, except in *Ohio Nat. Bank v. Gill Bros.,* 85 Neb. 718, which is strongly relied upon by defendant upon this appeal. In that case the action was upon a promissory note, and the answer a general denial. We there forsook the beaten path, and held that the burden was upon the plaintiff to show the execution and delivery of the instrument sued on, and that evidence in defense tending to show a material alteration of the note after its execution and delivery does not shift the burden of proof to the defendant. It is evident that we in that case had more in mind the doctrine of the shifting of the burden in a civil action; the rule in this state being settled that in a civil action the burden never shifts. That rule is not in conflict with the rule that, in an action upon a promissory note, which is regular upon its face, plaintiff's case is complete when he proves the execution of the note, has it in his possession, and produces it at the trial. The defense of fraudulent alteration of such note is an affirmative defense, and, like all such defenses, must be established by the one who asserts it, by a preponderance of the evidence.

In an able opinion in *Anderson v. Chicago & N. W. R. Co., supra,* written by the same member of the court who wrote the opinion in *Ohio Nat. Bank v. Gill Bros. supra,* we returned to "the beaten path." In that action plaintiff sought to recover damages from the railroad company for unlawful discrimination in failing to furnish certain cars for the shipment of cattle from Cody, Nebraska, to South Omaha. In its answer defendant alleged that the

only order for cars for the shipment of cattle made by plaintiff was on October 14, 1907, at which time plaintiff made and signed an order on the book kept by defendant company at Cody, in accordance with the provisions of section 10555, Ann. St. 1909. To this answer plaintiff replied by general denial. On the trial he admitted that he had signed the order. In the opinion (p. 434) it is said: "The record discloses that the written order in question bears upon its face no evidence of any change or alteration whatsoever; and, the plaintiff having admitted that he signed it, the burden of proving that it had been changed or altered after he had appended his signature thereto was upon him according to the well-settled rule which has been adopted in this state"—citing *McClintock v. State Bank* and *Colby v. Foxworthy, supra,* and *Dorsey v. Conrad,* 49 Neb. 443.

It is unnecessary to set out instructions 3 and 5 complained of. It is sufficient to say that they placed the burden upon the plaintiff of satisfying the jury by a preponderance of the evidence that the note in suit "is the identical note executed by the defendant on the 19th day of July, 1911, and that it was then a note for $1,620." This was error for which the judgment must be, and is,

REVERSED.

ROBERT A. LENHART, APPELLEE, V. MAX L. WOLFSON, APPELLANT.

FILED MARCH 4, 1916. No. 18592.

Landlord and Tenant: ACTION FOR RENT: EVIDENCE. The record examined, its substance set out in the opinion, and *held* that under the pleadings and evidence the verdict returned by the jury is the only verdict that could have been sustained.

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

Weaver & Giller, for appellant.

I. J. Dunn, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, for a balance due for rent of a store building in the city of Omaha, defendant appeals.

The petition alleges the leasing to defendant for one year of certain real estate known as 922 and 924 North Sixteenth street, in the city of Omaha, at an agreed rental of $90 a month, payable monthly in advance; that defendant is in arrears for the last four months of the period covered by the lease. A copy of the written lease is attached and made a part of the petition. It shows that it was entered into May 29, 1911, for one year, beginning June 1, 1911. The answer admits that defendant entered into possession of the premises under the lease, for the stipulated rental, and payable in advance on the first of each month, as alleged in the petition. Further answering, defendant alleges that after the execution of the lease, and in the month of November, 1911, plaintiff and defendant, by mutual consent and agreement, terminated the lease, and defendant was thereby released from the obligations thereof, and all the rights and privileges thereunder were assigned by defendant, with plaintiff's knowledge, consent and acquiescence, to one Miller, who became thereunder the tenant of plaintiff; that plaintiff thereafter collected and received rents from Miller for the premises under the lease, and fully recognized and accepted Miller as his tenant thereunder. For reply plaintiff denies all of the allegations in the answer, except that plaintiff consented to Miller's occupying the premises as a subtenant of the defendant, and that plaintiff received some rent from Miller.

Two errors are relied upon for reversal: (1) That the court erred in giving instruction No. 2; (2) error in refusing to allow defendant to show that one Shaw was plain-

tiff's agent and had charge of the collection of the rents and the management of the property in controversy.

It is not disputed that no rent was paid to plaintiff for the last four months of the year covered by the lease. The record shows that in November, 1911, defendant, who was engaged in the mercantile business in the leased premises, sold his business to one Miller. His contention is that at the time he made that sale plaintiff orally agreed to take Miller as his tenant and release defendant; that on the 14th of that month he gave plaintiff a check, and indorsed on the back thereof the following: "This check is in full payment and settlement for rent and cancel of lease on said building." Under that indorsement appears the signature of plaintiff. Defendant testifies that this indorsement was on the back of the check when he delivered it to plaintiff. This plaintiff denies. Plaintiff denies that he ever released or agreed to release defendant, but that, on the contrary, he told him he would not release him, for the reason that he knew nothing about Miller, but knew that defendant was good. It further appears that later on Miller sold his stock of groceries and had them taken out of the building; that when he did so defendant attached the goods and instructed the constable to put them back in the building; that in suing out the attachment defendant filed an affidavit in which he stated that the sum of $180 was due him from Miller for rent of the premises in controversy; that the claim was just, and that he was entitled to recover the same. The summons commanded Miller to appear at the time stated therein to answer to the action of M. L. Wolfson (defendant), "who sues to recover $180 for rent of 922 and 924 North Sixteenth street." Miller was called as a witness for plaintiff, and testified that defendant told him in November, 1911, that Mr. Burnett would collect the rent; that both defendant and Burnett demanded the rent from him for February and March, 1912; that defendant demanded the rent from him a number of times in March, 1912; that at the trial in justice court defendant testified that Miller was

indebted to him for rent in the sum of $180. Mr. Yale C. Holland was called as a witness, and testified that he was attorney for Miller in the litigation in justice court, and that at that trial defendant testified that Miller was indebted to him in the sum of $180 for rent. A number of affidavits used in the justice court were introduced in evidence, in all of which defendant swore that Miller was indebted to him for $180 rent of the premises in controversy. Defendant now seeks to escape the consequences of this assertion by him of his rights under the lease several months after the date when he claims it had been canceled, by offering to show that one Shaw was the agent of plaintiff for the collection of the rents of these premises, and that he brought the attachment suit in the justice court at the request of Shaw, for the purpose of protecting the rights of plaintiff. Shaw had departed this life prior to the time of trial. The trial court refused to permit this proof, and by instruction No. 2 instructed the jury that the only issuable fact in the case for their consideration was, "was the lease terminated by the mutual consent of the plaintiff and the defendant in November, 1911. If the said lease was terminated at that time by the mutual consent of the said parties, then plaintiff cannot recover; but, if it was not terminated, then the plaintiff would be entitled to recover the sum of $360 and interest." As before stated, the giving of this instruction and the refusal of the court to allow defendant to show that Shaw was plaintiff's agent and had charge of the collection of the rents and management of the property in controversy are the grounds of defendant's claim for reversal. We do not think the court committed error in either instance. Under the pleadings of the parties the only question was the one which the court submitted under instruction No. 2. The proffered evidence as to Shaw was properly refused for two reasons: (1) Even if it were shown that Shaw was the agent of plaintiff for the collection of the rents and management of the property, that would not authorize him to bind plaintiff by an arrangement with a third party to institute

an action in such party's own name for the benefit of his principal. Special authority to do anything of that kind would have to be shown. (2) To have permitted this line of proof would have been to permit the defendant to convict himself of perjury in the execution of a number of affidavits and in his testimony given on the trial in the justice court, would have permitted him now to take a position directly at variance with the position he then took and sought to sustain in a court of justice.

The record in this case, viewed from any standpoint, shows that the verdict returned by the jury was the only verdict which could have been sustained.

AFFIRMED.

STATE, EX REL. GEORGE E. HALL, STATE TREASURER, RELATOR, v. WILLIAM G. URE, TREASURER OF DOUGLAS COUNTY, RESPONDENT.

FILED MARCH 4, 1916. No. 19215.

1. **Mandamus:** PUBLIC FUNDS: PAYMENTS BY COUNTY TREASURERS. Under sections 6515 and 6516, Rev. St. 1913, the auditor of public accounts is the proper official to institute and direct legal proceedings in the name of the state for the failure of any county treasurer to make settlements with the auditor and pay over to the state treasury funds in his hands belonging to the state, when required by law to make such settlements and payments. But where demand has been made by the state treasurer upon a county treasurer for payment by the latter into the state treasury of all funds in his hands belonging to the state, at times other than the two dates fixed in section 6507, and the county treasurer admits that he has in his hands the amount of state funds demanded, so that nothing remains to be done by the county treasurer except to perform the mere ministerial act of paying over the sum so admitted, and he fails or refuses to perform such duty, the state treasurer may by mandamus compel performance.

2. **County Treasurers:** STATE FUNDS: SETTLEMENTS: REASONABLENESS OF DEMAND. Section 6507, Rev. St. 1913, examined, and *held*, that the times when county treasurers are required to pay over state

funds in their hands are the two dates therein fixed and such other times as the state treasurer shall require. *Held*, further, that it is the duty of the state treasurer, in making demand for settlement by county treasurers at times other than the two dates fixed in the statute, to fix reasonable times for compliance with such demand, and that a demand for monthly settlements is reasonable.

3. Mandamus: STATE FUNDS: RECEIPTS: DUTY OF STATE TREASURER. When a county treasurer pays into the state treasury funds belonging to the state, it is the duty of the state treasurer to issue duplicate receipts therefor, file one of such duplicates in the auditors's office, and deliver the other, countersigned by the auditor, to the county treasurer making such payment; and, for his refusal to obtain and deliver such receipt, mandamus will lie.

Original proceeding in mandamus by relator, as state treasurer, to compel respondent, as county treasurer, to pay over moneys in his hands collected for the state. *Writ allowed.*

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

Mahoney & Kennedy, George A. Magney and *William C. Ramsey, contra.*

FAWCETT, J.

This is an original action in this court by the relator as state treasurer, for the writ of mandamus to compel respondent, county treasurer of Douglas county, to pay over to relator $170,000, which relator alleges respondent had in his hands, being moneys which had been collected by him as county treasurer prior to June 1, 1915, for the use and benefit of the state. An alternative writ was issued, returnable June 17, 1915. A hearing, quite informal in character, was had, the respondent appearing in person and by Mr. William C. Ramsey, deputy county attorney, and the relator by Mr. George W. Ayres, special assistant attorney general. At this informal hearing it was conceded by respondent that he had in his hands at the time more than the sum named by relator, but he insisted that he should not be required to pay the money over to relator for several reasons: (1) That the state treasurer was

without authority to compel a county treasurer to remit state taxes to him whenever it pleased his fancy; (2) that before a county treasurer could be required to pay money over to the state treasurer he was entitled to a statement from the auditor of public accounts, showing the amount of state taxes which the county treasurer should pay into the state treasury; (3) that as county treasurer he was entitled, when paying money over to the state treasurer, to the receipt of the state treasurer duly countersigned by the auditor of public accounts, and that the relator had uniformly refused to furnish him such a receipt; and (4) that the state treasurer was without authority to bring this action, the auditor of public accounts being the one, and the only one, duly authorized by statute to institute such proceedings. The result of the informal hearing was that the court granted a peremptory writ, ordering respondent to pay over to relator $170,000. This writ was issued June 24, 1915, and served two days later. On June 29, 1915, by agreement of parties, the peremptory writ was vacated on condition that respondent at once pay over to relator all state funds in his hands, such payment to be without prejudice to the right of respondent to answer the alternative writ and have a hearing of the case upon the merits. Respondent complied with the condition and paid over to relator $187,100. His answer was filed in due time, briefs were filed by both parties, and the case was submitted on the briefs and oral arguments at the bar.

It is pleasing to note that there is no question of shortage in the accounts of the respondent, nor any claim of incompetency. In the brief of counsel for relator it is gracefully conceded that the important office of county treasurer of Douglas county is "so efficiently presided over by the respondent himself." The question before us, therefore, is devoid of sentiment or sympathy, and calls for a plain determination of the duties and responsibilities of the two public officials involved, in their relations to and with each other.

The question confronting us at the threshold of the case is: Can the relator, as state treasurer, maintain this action, or should it have been brought by the auditor? Section 5546, Rev. St. 1913, declares it to be one of the duties of the auditor "to direct prosecutions in the name of the state for all official delinquencies in relation to the assessment, collection and payment of the revenue against all persons who by any means become possessed of public money or property due or belonging to the state and fail to pay over or deliver the same." Section 6515 provides: "Upon the failure of any county treasurer to make settlement with the auditor, the auditor shall sue the treasurer and his surety upon the bond of such treasurer, or sue the treasurer in such form as may be necessary, and take all such proceedings, either upon such bond or otherwise, as may be necessary to protect the interest of the state." Section 6516 provides: "Such suit shall be brought in behalf of the state in the district court of the county in which such treasurer holds office or resides, and process may be directed to any county in the state. If (In) any proceedings against any officer or person, whose duty it is to collect, receive, settle for or pay over any of the revenues of the state, whether the proceeding be by suit on the bond of such officer or person or otherwise, the court in which such proceeding is pending shall have power, in a summary way, to compel such officer or person to exhibit on oath a full and fair statement of all moneys by him collected or received, or which ought to be settled for or paid over, and to disclose all such matters and things as may be necessary to a full understanding of the case, and the court may, upon hearing, give judgment for such sum or sums of money as such officer or person is liable in law to pay."

Under these sections of the statute it is clear that the auditor is the proper official to bring an action against a county treasurer, like the one at bar, and in such action summarily compel such treasurer to exhibit on oath a full and fair statement of all moneys by him collected or received, and to disclose all such matters and things as

might be necessary to a full understanding of the case; and the court upon such hearing would have the power to give such judgment as the evidence would require. If such an action had been instituted, this court would have been relieved of much unnecessary time and labor. But, however preferable such a course might have been, was such course exclusively the one which should have been pursued? That depends upon another proposition. If the respondent, when called upon by the relator to pay over moneys in his hands, had promptly furnished the auditor full information as to the condition of his accounts by exhibiting to him his accounts and vouchers, as required by section 5547, he would have been under no obligation to turn over the money in his hands until the auditor had passed upon the statement so furnished. When the auditor had examined, adjusted and settled the account, whether by an independent investigation, or by accepting the statement of the county treasurer as correct, and fixed the amount which he should pay over to the state treasurer, nothing would remain for the county treasurer to do but to perform the mere ministerial act of transferring the state funds from his own control to that of the state treasurer; and, if he refused to perform this mere ministerial duty, we think the state treasurer could by mandamus compel performance; this upon the theory that the money had, by the forms of law, been duly found to belong to the state, and that the treasurer was entitled to have the custody and control of the same. Again, when the state treasurer makes demand upon a county treasurer to pay over state taxes collected by him, and the treasurer admits that he has in his hands, belonging to the state, moneys to the amount of the state treasurer's demand, then, so far as the custody of that particular sum of money is concerned, it is immaterial that the auditor has not made an examination, and the rule then would be the same as that above stated, viz., that the amount of the sum demanded being admitted to be state money, and in the hands of the county treasurer, that admission is equiva-

lent to an admission that the state treasurer is entitled to the custody of the money demanded. It then becomes the duty of the county treasurer to pay it over. The question as to the amount he must pay over calls for no exercise of judicial discretion or of expert ascertainment. His duty in such case, as in the other, is purely ministerial, that of delivering the sum involved to the state treasurer. That is this case. We therefore hold that the treasurer's right to maintain this action cannot be questioned by the respondent.

We come now to what we regard as the real merits of this controversy. Section 6507 provides: "The treasurers of the several counties shall pay into the state treasury all funds in their hands belonging thereto on or before the tenth day of February and the tenth day of October in each year, and at such other times as the state treasurer shall require." Section 6508 provides: "Upon ascertaining the amount due to the state from any treasurer or other person, the auditor shall give such person a statement of the amount to be paid, and upon the presentation of such statement to the state treasurer, and the payment of the sum stated to be due, the treasurer shall give duplicate receipts therefor, one of which shall be filed in the auditor's office, and entered in a book to be kept for that purpose, and the other shall be countersigned by the auditor and delivered to the person making the payment, and no payment shall be considered as having been made until the treasurer's receipts shall be countersigned by the auditor as aforesaid."

It will be seen that section 6507 expressly provides for payments by county treasurers twice a year, and it is contended by respondent that the state treasurer has no authority to call for settlements at any other time unless there exists a necessity for the state to make such call. We do not think this contention is sound. The state is not compelled to allow large sums of money to remain idle in the various county treasuries, when if it were paid into the state treasury it could be deposited in depository

banks at 3 per cent. interest, or used to pay state warrants which draw 4 per cent. This fact alone would be sufficient justification on the part of the state treasurer to call for monthly settlements by county treasurers. We agree with counsel for respondent that the state treasurer cannot make these calls at his mere whim, or at unreasonable times, as, for instance, every week, or daily, as the brief says he might do if his right to call for monthly settlements should be sustained. No such purpose on the part of the legislature can be gleaned from the statute in question, nor would the courts ever sanction such unreasonable procedure on the part of the state treasurer. Monthly settlements are not burdensome in any line of trade or commerce, and we are unable to see why they should be considered burdensome or unreasonable as applied to the business of the state. We therefore hold that the state treasurer, under the provisions of section 6507, has the right to call upon the county treasurers for monthly payments of state moneys in their hands.

When a call is made upon a county treasurer for payment of moneys in his hands, belonging to the state, what is his duty? Section 5547 answers the question, viz.: "All county treasurers, or other persons who are by law required to make settlements or pay money into the state treasury at certain specified times, shall, on or before such date, exhibit their accounts and vouchers to the state auditor, who shall, as soon as practicable, examine, adjust and settle such accounts and report to the state treasurer the balance found due the state." It may be contended that the term, "at certain specified times," refers to the times specified in the statute; but we think this is too narrow a construction. It would have been easy for the legislature to have said that the treasurer should make settlements or pay money into the state treasury at "the times specified in the statute." It did not do that, but used the language, "at certain specified times." Those times should, therefore, be construed to be the two dates fixed in section 6507, *supra,* and "such other times as the

state treasurer shall require." Giving the statute that construction, then it was the duty of the respondent, when called upon by the relator to pay over all state moneys in his hands by a certain date, to exhibit to the auditor, before such date, his accounts and vouchers for examination. We do not mean by this that it was the duty of the respondent to transport all his books and papers from his office in Omaha to the auditor's office in Lincoln for examination; but we think it was his duty to prepare a statement of the state moneys then in his hands and present that statement, with his vouchers, to the auditor. We think it is the duty of a county treasurer, when called upon by the state treasurer to make monthly payments of state moneys in his hands, to disregard anything in the demand of the state treasurer which savors of dictation or assumption of powers which do not belong to him, and to proceed in good faith to comply with the requirements of the statute by promptly sending to the auditor a statement of the moneys in his hands which would be subject to the demand so made. He cannot fail to do that and then justify his refusal on the ground that the auditor has not performed the duty imposed on him by statute. We think a fair construction of section 5547, *supra,* imposes upon the county treasurer the duty of making the first move in the making of such settlement by exhibiting to the auditor his accounts and vouchers as therein stated. This the respondent failed to do.

Another claim by respondent is that, under the provisions of section 6508, which provides that, when payment is made by a county treasurer to the state treasurer, the latter shall give duplicate receipts therefor, one of which shall be filed in the auditor's office, and the other countersigned by the auditor and delivered to the county treasurer making the payment, he is not required to make payment until he is furnished such receipt, for the reason that the section of the statute just referred to further provides, "and no payment shall be considered as having been made until the treasurer's receipts shall be countersigned by

the auditor as aforesaid." The respondent shows, and the showing is not disputed but in fact is conceded, that prior to the commencement of this action the relator had at all times refused to give him a receipt countersigned by the auditor. Relator contends that it is the duty of a county treasurer to pay over the state moneys, obtain his duplicate receipts, and himself take them to the auditor and file one, and have the other countersigned; while the respondent contends that it is the duty of the state treasurer to file one of the duplicate receipts in the auditor's office, procure the other to be countersigned by the auditor, and deliver such countersigned receipt to the county treasurer. We think the contention of the respondent is sound on this point. He is not required to bring the money with him to the state treasurer's office and pay it over. Under the provisions of section 6507, *supra,* the sum so paid by the county treasurer to the state treasurer "shall be the identical state warrants if any received by the treasurer for payment of the taxes, or in coin or in treasury notes of the United States." In addition to this, it appears from the record before us that, when the relator made his demand upon the respondent, he advised him that he could "make such remittances by bank draft or some form of exchange which is payable at face value in Lincoln or Omaha." When, therefore, state funds are remitted to the state treasurer by a county treasurer, by either of the methods prescribed in the statute, or in the treasurer's demand, it is his duty to send to the remitting treasurer a receipt duly countersigned by the auditor. If he refuses to send such a receipt, mandamus will lie to compel him to do so. In like manner, if the auditor, in a proper case, should refuse to countersign such receipt, mandamus would lie to compel him to perform that duty. The relator now recognizes the fact that that duty rests upon him, and when respondent made the payment, hereinbefore referred to, relator sent him such a receipt, and in the brief of the attorney general, on behalf of the relator,

it is stated, in substance, that there will be no further refusal to perform that duty.

In the light of what we have said, we think the peremptory writ issued on June 24, 1915, was properly issued, and, such writ having been vacated for the purpose of the present hearing, it is ordered that it shall again issue; each party to pay one-half of the costs.

WRIT ALLOWED.

SEDGWICK, J., concurring.

Since the county treasurer admits in his return to the writ that he has the money of the state in his hands as alleged in the writ, and that a demand for the same has been made by the state treasurer, I think the money should be transferred from the county treasury to the state treasury, and that the duty to see that it is done devolves upon the state treasurer, who can maintain this action for that purpose.

I do not think that section 6507, Rev. St. 1913, contemplates that the state treasurer shall by general order require monthly settlements by county treasurers in addition to the semi-annual settlements which the section requires. This construction of the statute places a burden upon the auditor not contemplated by the statute. The section relates only to payment of state funds into the state treasury. When, as in this case, it is conceded that a county treasurer has a large amount of state funds in his hands, the state treasurer may require that it be paid into the state treasury. No formal settlement with the county treasurer is necessary in such case.

Section 6508 relates to the semiannual settlements required by the statute. When upon such settlements the auditor has determined the amount due, he gives the county treasurer a statement of the amount. The county treasurer presents this statement with the money to the state treasurer, and he "shall give duplicate receipts therefor." These duplicate receipts are not evidence protecting the county treasurer unless he files one of them with the

state auditor and procures him to countersign the receipt retained by the county treasurer. The county treasurer is the only one interested in having this receipt conclusive that payment has been made, and he cannot obtain a valid receipt unless he presents the duplicate receipts which the state treasurer is required to give, and procures the auditor to countersign his receipt. Thus it is made certain that the auditor will have official notice of the payment by the county treasurer. If the county treasurer sees that this is done, he will have a good receipt, otherwise not. If he leaves it to some other person to present to the auditor the duplicate receipts which the state treasurer gives, he assumes the risk of having no legal evidence of the payment he has made.

EMIL MUZIK V. STATE OF NEBRASKA.

FILED MARCH 4, 1916. No. 19362.

1. **Criminal Law**: EVIDENCE: EXHIBITS. *McKay v. State*, 90 Neb. 63, and *Flege v. State*, 93 Neb. 610, examined, and *held*, that the rule announced in paragraph 7 of the syllabus in the former, and in paragraph 3 of the syllabus in the latter, does not, and was not intended to apply to facts or exhibits which tend to prove or disprove the guilt or innocence of the accused, or his sanity, or the degree of his crime.
2. ———: INSTRUCTIONS: INSANITY. Instruction No. 15, examined and considered in the opinion, criticized as to form, but *held* to have fairly presented to the jury the law relating to the defense of insanity as applied to the evidence introduced at the trial.
3. **Homicide**: SUFFICIENCY OF EVIDENCE: REDUCTION OF SENTENCE. The evidence examined, its substance set out in the opinion, and *held*, sufficient to sustain the verdict of guilty of murder in the first degree, but insufficient to sustain the imposition of the death penalty.

ERROR to the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Sentence reduced.*

J. E. Bednar and *W. W. Hoye*, for plaintiff in error.

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

FAWCETT, J.

Plaintiff in error, whom we will designate as defendant, was convicted in the district court for Douglas county of murder in the first degree. The jury fixed the penalty of death, and sentence was pronounced accordingly. Defendant prosecutes error.

The assignments of error are: (1) The giving of instruction No. 15; (2) error in overruling defendant's motion for a new trial; (3) that the verdict is not sustained by sufficient evidence, is excessive, and was the result of passion and prejudice on the part of the jury.

The second assignment will first be considered. It is divided into three subheads, which are discussed together in the brief. The victim of defendant's deed was his wife. The crime was committed on the morning of March 5, 1915, and before Mrs. Muzik was fully dressed. The evidence shows that defendant at one time had been employed in the packing houses of South Omaha, but for more than a year preceding the tragedy had done no work of any kind; that Mrs. Muzik was earning the support of the family by her own labor. On the morning in question she chided the defendant for not getting up and starting a fire sooner, as she had to get to work. We give her own statement to her neighbor, Mrs. Smith, immediately after the tragedy. Mrs. Smith testified that about a quarter to 7 in the morning Mrs. Muzik came to her home carrying her child in her arms; that after she opened the door she "hollered;" that witness ran to meet her; that she was dressed only in her underwear, and had on one stocking and slipper, with a coat thrown around her. "She started to holler and call my name, call 'Mrs. Smith,' and I asked her what is the matter, and she says, 'Oh, my, Muzik cut me; cut my throat.' I says, 'Why?' * * * She says, 'I don't know.' I says, 'Did you have

a quarrel?' 'No,' she says, 'I just told him why don't he get up and start a fire sooner; I have to get to work.' And she says, 'He took me and put me on the floor and took a knife and cut me.'" The witness was then asked to describe the appearance of Mrs. Muzik at that time. In doing so she told how the blood was oozing through a cloth that she had around her neck, and how it had run down over her garments. Her testimony shows that Mrs. Muzik presented a decidedly bloody appearance. Other witnesses, who immediately visited the scene of the tragedy, described the condition and appearance of the room in which the deed was committed. This description was more or less graphic, one witness stating that it resembled a slaughter house. The knife with which the deed was committed was also introduced in evidence and exhibited to the jury. It was a thin-bladed, steel table knife, with a sharp edge, and was covered with blood.

In the opening statement to the jury at the beginning of the trial counsel for defendant admitted that defendant killed his wife, and urged insanity as his defense. It is now contended that, inasmuch as the killing was admitted, the testimony with regard to the bloody condition of Mrs. Muzik and the similar condition of the room where the deed was committed and the exhibition of the knife could serve no purpose in the case except to inflame the passions and excite the prejudices of the jury, and that under the rule announced in *McKay v. State,* 90 Neb. 63, and *Flege v. State,* 93 Neb. 610, their admission was prejudicial error. The rule announced in those cases is that in a criminal prosecution an accused is entitled to a trial upon competent, relevant evidence, evidence which at least tends to establish his guilt or innocence, and that evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury, should not be admitted. There is a clear distinction between those cases and the case at bar. In each of those cases there was no doubt that a deliberate, cold-blooded murder had been committed, and the only

question was the identity of the slayer. In the case at bar there was no question as to the identity of the slayer, but the questions before the jury were his sanity and the degree of his crime. The nature of the crime, the conditions surrounding it, the appearance of the parties, the kind of instrument used, would all tend to throw light upon the two important questions: First, was it a deliberate, premeditated killing which would make it murder in the first degree; and, second, was it made by one who was sane, or did it appear to be the work of an insane person? The rule announced in the *McKay* and *Flege* cases does not, and was not intended to, apply to a case like the one at bar.

Under the first assignment, numerous objections are made to instruction No. 15. These objections, while skilful, are hyper-technical to a degree which, while they might have availed in former years, no longer meet with favor in the appellate courts of the land. While it must be conceded that the instruction is considerably involved in its statement—so much so that we cannot commend its form and want of clearness—yet we are all agreed that, under the facts in this case, we cannot hold that it constitutes prejudicial error. Taken as a whole, we think it fairly presented to the jury the law relating to the defense of insanity generally, and particularly so under the evidence in this case. We are unable to see how the jury could have listened to it as it was read to them from the bench, or have examined it after retiring to deliberate on the case, without fully understanding that it imposed upon the state the burden of overcoming the evidence offered by the defendant to rebut the presumption of sanity by evidence establishing beyond a reasonable doubt that the defendant was, at the time of the commission of the offense with which he was charged, possessed of a mind that at such time discerned between moral right and wrong with reference to his act, and that at such time he did know the nature and quality of his act.

Was the evidence sufficient to sustain the verdict, and is the verdict so excessive as to show passion and prejudice on the part of the jury? As has already been stated, the killing was admitted, so that the only question really to be considered under this assignment is whether the verdict is so excessive as to show passion and prejudice. That it was a brutal murder is not denied; but it is urged that the defendant was insane at the time. The evidence on this point, briefly stated, is that after he quit working in the packing houses, more than a year prior to the tragedy, defendant remained in the house constantly, or so nearly so that his nearest neighbors never saw him outside but once or twice during that time. He would sit apparently musing, and would draw the blinds, either to shut out the light or to avoid observation from outsiders. Mrs. Muzik worked in a restaurant, and would bring his meals to him. The little seven-year-old daughter testified: "He cut my mamma's throat. Q. And what else did he do after he did that? A. He clapped his hands and ran outdoors. * * * He laughed and he clapped his hands." The testimony of those who knew the defendant as to his actions prior to the tragedy and to his actions and conversation immediately afterward, and the testimony of the chief of police, who had him in custody from the time of the tragedy until his victim died two days later, so clearly sustain the verdict of the jury finding the defendant guilty of murder in the first degree that we cannot set it aside.

We are, however, impressed with the conviction that the death penalty should not be imposed. There is enough in the evidence to show that, while the defendant understood and comprehended the nature of the deed committed, and understood and comprehended the difference between right and wrong, his mind was nevertheless abnormal. According to the statement of Mrs. Muzik immediately after the tragedy, he had several times threatened to kill her. It may be said that this was proof of premeditation; and so it would be in the case of a normal mind, but in the

present case it has some tendency to show an abnormal mind which for more than a year had been brooding over actual or fancied troubles. The defendant was in good health, able to work, and, up to the time that he voluntarily imprisoned himself in his own home, he had, so far as the evidence shows, performed his duties as a husband and father to his wife and child. It is hard to conceive of a man who is absolutely normal in all respects acting as the evidence shows the defendant acted during the last year or more before he committed this horrible crime. *Hamblin v. State,* 81 Neb. 148, 168, in many respects presents a similar situation to the one at bar. We there stated that a solution of the motive which prompted the act was an impossibility; that we were fully persuaded that the defendant should never be given his liberty, for the reason that he would be a menace to those with whom he might associate. In this case, as in that, the evidence tends strongly to convince us that, owing to defendant's mental condition, "there may be grave doubts as to his responsibility for his acts at the time of the tragedy, and yet he is neither an idiot, an imbecile, nor a maniac. We can find no justification for taking his life, nor should he ever be discharged from confinement."

Upon a grave consideration of the whole record, we feel constrained to hold that this case comes within section 9179, Rev. St. 1913, which provides that in all cases pending in this court on error we may reduce the sentence rendered by the district court when in our opinion the sentence is excessive, in which case it is made our duty to render such sentence against the accused as in our opinion may be warranted by the evidence. Acting under the wise provision of that statute, the verdict of the jury in the district court, finding the defendant guilty of murder in the first degree, is affirmed, but that part of the verdict fixing the penalty at death and the judgment of the district court imposing the death penalty are reduced to life imprisonment.

The judgment of this court, therefore, is that the defendant be imprisoned in the state penitentiary at hard labor during his natural life, but without solitary confinement. As thus modified, the judgment is affirmed.

SENTENCE REDUCED.

LETTON and HAMER, JJ., not sitting.

HINDS & LINT GRAIN COMPANY, APPELLANT, V. FARMERS ELEVATOR COMPANY, APPELLEE.

FILED MARCH 4, 1916. No. 18222.

1. **Principal and Agent: SPECULATIONS OF AGENT: LIABILITY OF BROKERS.** If a corporation owning an elevator in this state puts an agent in charge of the elevator to buy grain and ship the same to market, and instructs the agent not to speculate in grain, and the agent pays to brokers the money of his principal to be used in gambling speculations, such brokers who take and so use the money with knowledge of the facts will be liable to the owner thereof.
2. **Set-Off.** The claim of the corporation for money so wrongfully paid by the agent to the broker is in the nature of an action for money had and received and is a proper subject of set-off in an action on contract.

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

Charles S. Roe and *A. A. Bischoff*, for appellant.

Livingston & Heinke, contra.

SEDGWICK, J.

The plaintiff is a firm engaged in dealing in grain in Kansas City, Missouri. The defendant is a corporation under the laws of this state, and owns an elevator at Burr, Nebraska, and was engaged there in buying and shipping grain. The defendant employed one Beckman, who had

the management of defendant's business at Burr in buying and shipping grain. The plaintiff alleged that it contracted grain from the defendant which the defendant refused afterwards to deliver, and asked to recover the difference between the purchase price of the grain and the value of the grain at the time of the agreed delivery. The defendant alleged that its agent Beckman, without the knowledge of the defendant, and wrongfully, engaged in gambling contracts of speculation through this plaintiff, and that the plaintiff applied some of the proceeds of the defendant's grain upon the settlement of its gambling contracts with the defendant's agent; and also as a second claim that the defendant's agent wrongfully and without the consent of the defendant paid to the plaintiff, on account of said gambling contract, money belonging to the defendant, and that the plaintiff received the same with notice that the said agent was without authority to use the defendant's money for said purpose. The trial court found the plaintiff's claim against the defendant to be as alleged, and found in favor of the defendant on its two claims against the plaintiff, and entered a judgment in favor of the defendant for the balance so found. The plaintiff has appealed.

The plaintiff contends that there is not sufficient evidence to justify the finding that the plaintiff appropriated the proceeds of the defendant's claim upon its dealings with the defendant's agent, but this contention does not appear to be much discussed in the briefs. The principal contention of the plaintiff appears to be that the defendant's claim is not a proper subject of set-off. The evidence shows that the capital stock of the defendant company was $5,000, and that the highest amount of indebtedness it could incur was two-thirds of its subscribed capital stock; that the by-laws of the defendant company provided: "No officer, employee, or member of this corporation shall be allowed to speculate in grain, or other commodities, using the seal of the corporation therefor." The evidence also shows that the agent was in fact speculating in grain

on his own account; that none of the officers of the defendant company had any knowledge or notice of such transaction on the agent's part; that the agent from time to time financed his gambling deals with the plaintiff by drawing the company's checks in favor of the plaintiff. Each of these checks had the following notice indorsed on the back: "Banks will please note: Not payable unless the following instructions are strictly adhered to: Must be filled out in ink, and must be signed by our agent, and must be payable for grain only. Gross, tare and net pounds to be noted. Price per bushel must be noted." On the left of the face of the check were the words: "This stub must not be detached from check." The stub attached to the check contained the words: "Agents must fill out this space"—followed by blanks indicating that the kind of grain for which payment was made should be stated on the stub, the gross weight of the grain, tare, and net weight, and the number of bushels and price per bushel. There can be no doubt that the plaintiff had ample notice that the agent was transcending his authority and was using the money of the defendant without any authority to do so. Under such circumstances the plaintiff was liable to the defendant for this money so appropriated by it, under the well-established rule of this state. *Mendel v. Boyd*, 3 Neb. (Unof.) 473; *Farmers Co-operative Shipping Ass'n v. Adams Grain Co.*, 84 Neb. 752. The defendant had no part in the illegal transaction of the plaintiff. The plaintiff took the defendant's money without authority, and the defendant's claim is in the nature of an action for money had and received, and is a proper subject of offset.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

STATE OF NEBRASKA, APPELLEE, V. EDWARD L. TEMPLE, APPELLANT.

FILED MARCH 4, 1916. No. 18402.

1. **Municipal Corporations:** POWERS. "A municipal corporation possesses only such powers as are expressly conferred upon it by statute, or are necessary to carry into effect some enumerated power." *State v. Irey*, 42 Neb. 186.

2. ———: BOARD OF HEALTH: POWERS: SLAUGHTERHOUSE. The board of health of a city of the second class having more than 1,000 and less than 5,000 inhabitants has no jurisdiction to provide by "regulation" that to keep and maintain a slaughterhouse outside of the city is a crime, and fix the punishment therefor to be enforced by criminal prosecution.

3. ———: ———: REGULATIONS: VALIDATION BY ORDINANCE: SLAUGHTERHOUSE. An ordinance of a city of the second class having more than 1,000 and less than 5,000 inhabitants, which gives the mayor "jurisdiction and with authority over all places and territory within the limits of said city and within five miles thereof to enforce the rules, regulations and ordinances of the board of health of said city," does not give validity to a "regulation" of the board of health which attempts to make it criminal to maintain a slaughterhouse outside of the city, and to provide a punishment therefor.

4. **Quære.** Whether the mayor and council of such city can by ordinance make it criminal to maintain such slaughterhouse is not decided.

5. **Municipal Corporations:** BOARD OF HEALTH: POWERS: SLAUGHTERHOUSE. Section 5015, Rev. St. 1913, does not confer upon the board of health, authorized thereby, power to adopt a "regulation" making it criminal to maintain a slaughterhouse outside of the city, and providing punishment therefor by criminal prosecution.

6. ———: ———: ———: ———. Section 5017, Rev. St. 1913, does not authorize the board of health to make and enforce such "regulation."

7. ———: ———: ———. Section 5106, Rev. St. 1913, which confers certain powers upon villages and cities of the second class, does not extend those powers to the board of health.

8. **Nuisance:** INJUNCTION: PARTIES. To keep and maintain a nuisance is made criminal by section 8845, Rev. St. 1913, and this ap-

plies to all common law nuisances. A nuisance may be enjoined in equity, and such action may be maintained by a city of the second class or a village.

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

E. P. Clements and *Frank J. Taylor,* for appellant.

T. T. Bell, contra.

SEDGWICK, J.

The board of health of the city of St. Paul adopted regulation No. 1, "to secure the general health and to prevent nuisances within the limits of said city, and providing penalties." Among many other things, this regulation recited: "It shall be unlawful for any person to erect, keep or mantain any slaughterhouse within the limits of the city of St. Paul, or within one hundred and thirty (130) rods outside the city limits on the east, and 160 rods outside of the city in all other directions; and no slaughterhouse shall be kept or maintained within 20 rods of any dwelling house or public traveled road at any place within one mile of said city limits." A complaint was filed in the police court of the city charging that this defendant did unlawfully maintain a slaughterhouse "within 130 rods of the east corporate line of said city, to wit, within 35 rods thereof." He was found guilty in the police court, and appealed to the district court for Howard county, where he was tried by the court without a jury, and again found guilty and sentenced to pay a fine and the costs of prosecution. The defendant has brought the case to this court for review and assigns several grounds for reversal; the principal one being that the regulation of the board of health is void for want of jurisdiction or power to make it. "Any fair, reasonable doubt concerning the existence of power (of the city itself) is resolved by the courts against the corporation, and the power is denied.

* * * These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations." 1 Dillon, Municipal Corporations (4th ed.) sec. 89. "A municipal corporation possesses only such powers as are expressly conferred upon it by statute, or are necessary to carry into effect some enumerated power." *State v. Irey,* 42 Neb. 186.

The prosecution relies upon sections 5006, 5015, 5017, 5106, Rev. St. 1913. Section 5006 provides: "The mayor shall have such jurisdiction as may be vested in him by ordinance, over all places within five miles of the corporate limits of the city, for the enforcement of any health or quarantine ordinance and regulation thereof, and shall have jurisdiction in all matters vested in him by ordinance, excepting taxation, within one-half mile of the corporate limits of said city." The mayor and council enacted an ordinance that the mayor be and "he is hereby vested with jurisdiction and with authority over all places and territory within the limits of said city and within five miles thereof to enforce the rules, regulations and ordinances of the board of health of said city, and the quarantine ordinances and regulations of said city, city council and board of health." It seems to be contended that this ordinance is a recognition of the jurisdiction and power of the board of health to make the regulation in question, and would therefore give some force and effect to that regulation as an ordinance of the city. It is not necessary to determine in this case whether the mayor and council of a city of the second class having more than 1,000 and less than 5,000 inhabitants have jurisdiction by ordinance to prohibit slaughterhouses outside of the city limits and within five miles of the city. Whatever may be thought of the power of the mayor and council in that regard, it is manifest that this ordinance was not intended, and could not have the effect, to give vitality and force to the regulation of the board of health in the matter in question.

Section 5015, Rev. St. 1913, gives the mayor and council of the city power "to make regulations to prevent the in-

troduction of contagious or infectious diseases into the city, to make quarantine laws for that purpose and to enforce the same within five miles of the city; to create and establish a board of health to consist of the mayor, who shall be chairman, the city physician, who shall be secretary, the president of the city council and the marshal of such city." It then contains the provision: "A majority of such board shall constitute a quorum to enact ordinances for the enforcement of all rules, regulations and orders of said board, and provide fines and punishments for the violation thereof." There is no doubt that the legislature could authorize a municipal corporation to enact suitable ordinances for the government of the city and "provide fines and punishments for the violation thereof." It may well be doubted whether the legislature could confer such power on the board of health. However that may be, it is manifest that it is not the purpose of this section to confer such power as the board of health has undertaken to exercise in the regulation in question. The section relates to quarantine and the prevention of contagious and infectious diseases in the city. The legislature could not have intended to empower a board of health to define and provide punishments for crimes committed outside of the city. If such board could be given such powers and could exercise them outside of the city, by the same reasoning they could exercise them anywhere within five miles of the city limits, which, of course, was never intended by the legislature.

Section 5017 gives the city the general power "to make regulations to secure the general health of the city, and to prevent and remove nuisances, and to provide the city with water," and has no relation to the question before us.

Section 5106 gives to villages and cities with less than 5,000 inhabitants power "to make all such ordinances, bylaws, rules, regulations and resolutions not inconsistent with the laws of the state, as may be expedient, in addition to the special powers in this chapter granted, for maintaining the peace, good government and welfare of

the corporation, and its trade, commerce and manufactories, and to enforce all ordinances by inflicting fines or penalties for the breach thereof, not exceeding one hundred dollars for any one offense, recoverable with costs, and in default of payment to provide for confinement in prison or jail, and at hard labor upon the streets or elsewhere for the benefit of the city or village." It does not relate to the power conferred upon boards of health.

Section 8845, Rev. St. 1913, makes it unlawful to erect, keep up or continue and maintain any nuisance, and has been held to make all common-law nuisances crimes. *State v. DeWolfe,* 67 Neb. 321. It has also been held that a nuisance may be enjoined in equity. *Todd v. City of York,* 3 Neb. (Unof.) 763. A village may maintain such action. *Village of Kenesaw v. Chicago, B. & Q. R. Co.,* 91 Neb. 619. We do not mean to be understood as holding that the mayor and council of a city cannot by ordinance prevent the maintenance of a slaughterhouse in the vicinity of a city of this class. That question is not involved in this case. The regulation of the board of health under which this defendant was prosecuted is invalid.

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

REVERSED AND DISMISSED.

LETTON, J., concurs in the conclusion.

ROSE, J., dissents.

AGNES JACQUITH, APPELLEE, V. EDGAR H. MASON, ADMINISTRATOR, ET AL., APPELLANTS.

FILED MARCH 4, 1916. No. 18469.

1. **Corporations:** OFFICERS: TRUST RELATION. The president of a corporation, who is also a director and stockholder, is not only the agent of the corporation, but is also in many respects a trustee for the stockholders as such.

2. ———: ———: LIABILITY. It is the duty of such president and manager of the corporation, who learns that the entire stock of the corporation can be sold at a certain favorable price, and disposes of his own stock accordingly, to inform other stockholders, who he knows are anxious to dispose of their stock, and if he fails to do so, but purchases their stock at a less price and immediately sells it at a profit, he will be liable to such stockholder for the profit so realized.

3. ———: ———: ———. In such case one who, with knowledge of all the conditions, joins with such president in purchasing the stock and realizing profit thereon will be also liable.

4. Evidence indicated in the opinion is found sufficient to support the findings and judgment.

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

Duncan M. Vinsonhaler and *Gurley, Woodrough & Fitch,* for appellants.

McGilton, Gaines & Smith, contra.

SEDGWICK, J.

Some time prior to October, 1909, this plaintiff, being the owner of 201 shares of the face value of $100 each of the capital stock of the Underwriters Insurance Company, placed the same in the hands of Burns, a stock broker, for sale. Afterwards Burns sold the stock for $75 a share. Soon afterwards, the stock was sold to one Montgomery for $110 a share. Plaintiff began this action in the district court for Douglas county against William C. Sunderland and Sherman Saunders, alleging that Sunderland was a stockholder, director and president of the Nebraska Underwriters Insurance Company, and that he, acting through and joining with Saunders, fraudulently purchased the plaintiff's stock for $75 a share to enable them to transfer the whole capital stock to Montgomery at $110 a share. She asked for a judgment against the defendants for the difference between $75 and $110 a share. Sunderland answered that the facts in the petition failed to state a cause of action against him, coupled

with a general denial of all the allegations in the petition. Saunders denied generally all of the allegations of the petition. While the action was pending, both Saunders and Sunderland died, and Maria B. Sunderland, executrix, was substituted for the defendant Sunderland, and Edgar H. Mason, as administrator, was substituted for the defendant Saunders. The trial in the district court resulted in a verdict and judgment in favor of the plaintiff for the amount asked for, $7,035 and interest, amounting to $8,020.13.

The defendants contend that the evidence is not sufficient to support the verdict; that the verdict and judgment are contrary to law, and that the court erred in certain instructions given to the jury.

The briefs are not a compliance with rule 12 (94 Neb. XI). The parties do not agree as to the evidence, and, in making their respective statements as to the substance of the evidence, they do not always refer "with particularity by question and page to the evidence in the record supporting the contention made." The latter part of the rule, relating to the statement of the propositions of law relied upon and the authorities supporting them, is not carefully observed.

Sunderland and Saunders were partners, carrying on a business distinct from that of the insurance company. The plaintiff's husband was recently deceased, and in his lifetime he had been the owner of this stock and somewhat interested in the affairs of the company, and for several years no dividend had been paid to the plaintiff on her stock. This was all the information that the plaintiff had in regard to the probable value of the stock, and because she was receiving no dividends thereon she thought it was necessary to sell the stock. She authorized the broker to sell it at $75 a share. She testified that some time before the transaction complained of she had conversation with the president, Sunderland, in regard to the dividends, but was given no information in regard to the condition of the company nor the probable value of the

stock. Mr. Montgomery had some stock in the company, and, together with his partner, Funkhauser, was largely interested in a rival company. It would appear that from the evidence the jury might have found that the defendant Sunderland on the 8th of October, 1909, went to the office of Montgomery and Funkhauser, in Chicago, with a view to negotiation as to the capital stock of the insurance company, and learned that Montgomery would purchase the entire stock of the Underwriters Insurance Company and pay $110 a share therefor, and that thereupon Sunderland contracted his stock at that price. It was not inconsistent with the evidence that he gave Montgomery to understand that the remainder of the stock could also be purchased at that price, and that it was because of that understanding that he was able to sell his own stock. A few days later, after Mr. Sunderland's return, Mr. Love, who was an acquaintance of Sunderland and Saunders and had some stock in the insurance company, contracted with the broker Burns for the plaintiff's stock at $75 a share. The plaintiff thereupon signed a blank assignment of the stock and delivered it to Mr. Love, and the stock was afterwards found to be assigned to Mr. Saunders and to be on deposit in the United States National Bank of Omaha, as collateral security for the sum of $15,000, about the amount that was paid for the plaintiff's stock. Afterwards Mr. Saunders, within a few days, sold the stock to Montgomery.

The defendants contend that the evidence will not warrant the finding that Sunderland and Saunders were interested in the purchase of plaintiff's stock. Mr. Love testified that he was himself trying to get a controlling interest in the company, and evidently desired the jury to believe that he bought plaintiff's stock with that in view, and that when he found he could not succeed in getting a controlling interest in the company he sold a one-half interest in the stock to Mr. Saunders for the price that he had paid plaintiff. He testified that he sold a half interest in the stock to Saunders, and said that he would have

been "stuck" if "they" had not bought the stock from him, indicating that some third party was interested in the deal. Mr. Saunders' testimony is inconsistent with the idea that Love alone bought the stock for his personal interest. Saunders testified: "Q. That is, before the 14th of October, you and Mr. Love were entering into negotiations for the purchase of the stock of the Nebraska Underwriters Insurance Company? A. Yes, sir. Q. You were acting together in the matter? A. Yes, sir. Q. And this stock was purchased from Mrs. Jacquith, in which you and Mr. Love were together in that transaction? A. Yes, sir. Q. And while you didn't furnish, at the time, one-half of the money, you became obligated, and furnished your half of it? A. Yes, sir." There is direct evidence that Mr. Sunderland stated that himself and Love and Saunders had planned together to buy the whole stock of the company, and there are many circumstances in the evidence indicating that when Sunderland learned that the entire stock could be sold to Montgomery for $110 a share he communicated this fact to his business partner, Saunders, and they through Mr. Love procured the plaintiff's stock with the purpose of selling it to Montgomery with Sunderland's own stock. The books of Sunderland and Saunders show that Sunderland participated in the profits that were realized on the plaintiff's stock.

It is insisted: "The defendant Sunderland might have lawfully purchased the plaintiff's stock himself or through an agent or in any other manner, regardless of his information at the time of purchase, so long as he was not guilty of actively misleading her in respect thereto." This court in *Barber v. Martin*, 67 Neb. 445, stated the following as a general proposition of law: "The general manager of a corporation, in effectuating a sale of the entire capital stock of his company, acts as the agent of all the stockholders, and he cannot receive and retain a secret compensation from the vendee for effectuating the con-

tract of sale." This is a little stronger than was necessary under the facts in that case. It appears that the trial court had instructed the jury: "You are instructed that the sole questions for you to determine in this case from the evidence are: (1) Did the defendant Barber in selling said 18 shares of stock which originally belonged to the plaintiff act as her agent and representative? If he did not, you need not consider the case any further, but return a verdict for defendant." If this instruction was not strictly accurate in view of the facts developed in that case, the error, if any, was prejudicial to the plaintiff, and not to the defendant, and so it may justly be said that, so far as the consideration of that case is concerned, the instruction was not erroneous, requiring a reversal.

The supreme court of Kansas has had occasion to discuss quite at large a similar question, and declares the law to be: "The managing officers of a corporation are trustees not only in relation to the corporate entity and the corporate property, but they are also, to some extent and in many respects, trustees for the corporate shareholders. * * * The fact that the directors and managing officers of a corporation are quasi-trustees for the stockholders does not prohibit them from dealing with the latter. The only restriction is that in such dealing their conduct be fair, open, and above reproach. Because of the trust relation and the better opportunity afforded for acquiring information, before any director or managing officer of a corporation, having a knowledge of the condition of its affairs, can rightfully purchase the stock of one not actively engaged in the management, he must inform such stockholder of the true condition of affairs." *Stewart v. Harris*, 69 Kan. 498. As applied to the facts in that case, the court approved of the following language in the instructions of the trial court: "You are instructed that the president, or other managing officer of a corporation doing business as a bank, stands in relation of a trustee to all the stockholders who are not themselves engaged in the entire management of the bank, and, be-

fore any managing officer of a bank who is acquainted with its condition and affairs can rightfully purchase the stock of such bank from stockholders who are not actively engaged in the management and operation of the bank, such managing officers must inform such stockholders of the true condition of the bank and its affairs and assets, and must give to such stockholders all the information affecting the value of the stock which such managing officer himself possesses." In the opinion the court referred to the case of *Board of Commissioners of Tippecanoe County v. Reynolds,* 44 Ind. 509, 15 Am. Rep. 245, as the leading authority holding a contrary view. The fact that that decision was rendered by a divided court was mentioned, and it was then said: "The rule laid down has met with much criticism. The position taken leaves the stockholders' interest in the corporation and all matters affecting its value wholly in the charge and keeping of the managing officers of the corporation, and leaves the stockholders their legitimate prey. We cannot give the sanction of our approval to the views they expressed."

Other courts have refused to state the rule as strongly for the plaintiff as this. The supreme court of Georgia considered a case in one respect more nearly identical with the case at bar. That court declared the rule to be: "Where a director purchases shares from a stockholder at 110, concealing the fact that there is a contemplated sale of the entire plant of the company, which makes the stock worth 185, the concealment of such material fact entitles the shareholder to rescind the sale, or to other appropriate relief." *Oliver v. Oliver,* 118 Ga. 362. Mr. Justice Lamar in the opinion of the court discusses very clearly the relation which a director bears to any regular stockholder: "But the fact that he is trustee for all is not to be perverted into holding that he is under no obligation to each; the fact that he must serve the company does not warrant him in becoming the active and successful opponent of an individual stockholder with reference to the latter's undivided interest in the very property committed to the direc-

tor's care. * * * No process of reasoning and no amount of argument can destroy the fact that the director is, in a most important and legitimate sense, trustee for the stockholder. *Jackson v. Ludeling,* 21 Wall. (U. S.) 616; 2 Pomeroy, Equity Jurisprudence (2d ed.) sec. 1090. Not a strict trustee, since he does not hold title to the shares; not even a strict trustee who is practically prohibited from dealing with his *cestui que trust;* but a quasi-trustee as to the shareholder's interest in the shares. * * * If, however, the fact within the knowledge of the director is of a character calculated to affect the selling price, and can, without detriment to the interest of the company, be imparted to the shareholder, the director, before he buys, is bound to make a full disclosure. In a certain sense the information is a quasi-asset of the company, and the shareholder is as much entitled to the advantage of that sort of an asset as to any other regularly entered on the list of the company's holdings."

If the jury in the case at bar believed that the president and manager of the corporation had found an opportunity to dispose of all the stock of the corporation at a price beyond its supposed value, and had disposed of his stock at that price, knowing that the purchaser expected to take all of the remaining stock, and through his partner and a third person procured the stock of the plaintiff at a much less price with the purpose and intention of disposing of the same as he had already disposed of his own, knowing at the time that the stockholder from whom he so purchased was not familiar with public transactions, was wholly unacquainted with the condition of the corporation, the value of the stock or the opportunity to sell the same, the jury would be justified in finding a verdict for the plaintiff.

The objection that the stock was not really worth more than the plaintiff obtained for it does not appear to have any merit. The condition was the same as though the president had ascertained that the property of the company could be sold at such a price as to make the value

of the stock at $110 a share. The defendant knew that the stock could be sold for that amount, and apparently it was upon the understanding that all of the stock would be so sold that the defendant was enabled to make so advantageous a sale of his own stock.

There is perhaps a slight variance between the allegations of the petition as amended and the proof, but this slight variance is not made a subject of discussion in the briefs, and under the circumstances the case should be determined upon the evidence as submitted to the jury. The instructions of the court to the jury are severely criticised. It may be said that these instructions do not as clearly present the case to the jury under the evidence as might be desired; but, so far as we have observed, any defect in the instructions in that regard would not result in prejudice to the defendant, but rather to the plaintiff herself. The instructions given by the court are quite lengthy and somewhat involved, and the proper limits of this opinion will not admit of a detailed discussion of them. It does not appear from the record that the defendants offered proper instructions setting forth their theory of the case.

We have found no error in the record that requires reversal, and the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

STATE, EX REL. T. N. HINSON, APPELLEE, V. JOHN T. NICKERSON, APPELLANT.

FILED MARCH 4, 1916. No. 18552.

1. **Municipal Corporations: TAXATION.** A city can tax for city purposes only property "within the city." Property is taxed when the tax is levied, and not when it is valued by the assessor.

2. ———: ———. Taxes cannot be levied upon property for city purposes after it has been detached from the city by the judgment of a court of competent jurisdiction.

APPEAL from the district court for Furnas county: ERNEST B. PERRY, JUDGE. *Reversed and dismissed.*

Lambe & Butler and *J. F. Fults,* for appellant.

J. B. Smith and *John Stevens, contra.*

SEDGWICK, J.

This is an action in mandamus brought by relator as a citizen and taxpayer of Beaver City, in the district court for Furnas county, against respondent, county clerk of that county, to compel respondent to enter on the tax list the property of B. F. Seibert and others, so that said property may be held subject to the tax levied for city purposes by the city of Beaver City for the year 1913. A peremptory writ was issued, and respondent has appealed.

On and prior to April 1, 1913, the property herein sought to be subjected to the city tax was within the corporate limits of the city, and was duly listed and assessed for taxes for that year by the assessor of Beaver City. July 1 following Seibert and the other property owners procured a judgment and decree of the district court detaching their real estate from the city. This decree was not appealed from and is in full force and effect. Taxes were assessed and levied for city purposes for the year 1913, but the county clerk refused to extend the levy and assessment against the property covered by this decree.

Property "within the city" can be taxed for city purposes. This property was "within the city" until July 1. After that time it was not within the city. The question is, then: When was it "taxed?" Is the property taxed when the assessor lists it and it is valued for taxation, or is it taxed when the levy is made? The levy was made by the county board about 10 days after the property was put out of the city.

An exactly similar case has been decided by the supreme court of Utah, *Gillmor v. Dale,* 27 Utah, 372. The syllabus

shows how exactly like our statute theirs is. It is as follows: "Revised Statutes 1898, sec. 2516, provides that the assessor must before the first Monday in May assess all property subject to taxation; and sections 2595, 2596, and 2597 declare that every tax has the effect of a judgment, and every lien the force and effect of an execution, and that every tax upon real property is a lien against the property assessed. Section 206, subd. 3, authorizes city councils to levy and collect taxes on real and personal property as provided by law, and Const., art. XIII, sec. 10, provides that all corporations or persons shall be subject to taxation within the territorial limits of the authority levying the tax. By Revised Statutes 1898, secs. 253 and 2689, city councils are required, on or before the first Monday in July, to fix the rate of taxes, and levy the same on property within the city; and by section 2694 the tax so levied becomes a lien on the property assessed from the same time, and subject to the same conditions, prescribed in sections 2595, 2596 and 2597. Certain real estate within the limits of the city had been assessed, but, before the rate of taxes had been fixed by the council or any levy had been made, a judgment was rendered disconnecting the property from the city, and providing that it should no longer be subject to any liabilities, obligations, or taxes, or to the further imposition of taxes. *Held,* that the tax did not become a lien upon the property so severed." In the opinion the court said: "The city council was not authorized, either under the Constitution or by the provisions of the Revised Statutes, to levy a tax, except on property within its corporate limits, and any levy upon property not within such limits is without authority and void."

In *Wood v. McCook Water-Works Co.,* 97 Neb. 215, the company was held liable for the tax, whether it transferred its property after assessment to one who could be taxed or to one who could not be taxed. There was no difference in that respect, and it was held that transferring the property to the city itself, which could not be taxed, did

not relieve the company from payment of the tax for that year. It was held to be a question of ownership, and not a question of power to tax. When it is a question of ownership, it is the ownership on April 1 that controls. When it is a question of power to tax, that power must exist when it is assumed to exert the power; that is, when the property is taxed. The property is taxed by the city when the city levies the tax.

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

REVERSED AND DISMISSED.

ROSE, J., dissents.

STATE, EX REL. GEORGE A. MAGNEY, COUNTY ATTORNEY, APPELLANT, V. RICHARD C. HUNTER ET AL., APPELLEES.

FILED MARCH 4, 1916. No. 19520.

Constitutional Law: COURTS: MUNICIPAL COURT. Chapter 182, Laws 1915, establishing a municipal court for cities of the metropolitan class, is not unconstitutional.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

H. H. Bowes and *John G. Kuhn,* for appellant.

John P. Breen, contra.

SEDGWICK, J.

In 1915 the legislature enacted a statute to create a municipal court in cities of certain classes. Laws 1915, ch. 182. It applied to each city of the metropolitan class, and was approved April 9, 1915, and could not "take effect until three calendar months after the adjournment of the session at which it was passed." Const., art. III, sec. 24. In October, 1915, the governor appointed the re-

spondents as judges of the municipal court of Omaha, a city of the metropolitan class, and on the 3d day of November, 1915, the relator filed his petition in *quo warranto* in the district court for Douglas county to try the right of respondents to exercise the duties of that office. The district court found the issues in favor of the respondents and dismissed the petition and the relator has appealed.

The contention is that the act is unconstitutional, and that there was no vacancy within the meaning of the act, and therefore the governor could not appoint. Many reasons are urged for considering the act unconstitutional. It is said it violates ten separate sections of the Constitution. It will, of course, be impossible to discuss in this opinion all of these objections at large. It does not violate section 11, art. III of the Constitution, by amending another existing law without repealing the same. It is contended that the act is not complete in itself because it provides that in certain respects the procedure in this court shall be the same as in the district court, and in other respects as in the county court, and does not itself provide in detail for these matters. The maxim *"Certum est quod certum reddi potest,"* applies. The procedure is made certain in this act by providing what manner of procedure shall govern.

The act properly provides for the payment of the salaries of the judges and clerk of the court, and in that respect does not amend or interfere with the salaries of any other officers. The proviso that the answer or demurrer shall be filed on or before the first Monday after the return day and the reply or demurrer of the plaintiff on or before the second Monday after return day in cases where the practice of the district court is provided for does not render the act unconstitutional.

The provision that unclaimed witnesses' fees shall be forfeited to the city does not require that fines and forfeitures shall be paid to the city instead of the school fund, and does not amend the existing statute upon that subject.

The act does not violate section 19, art. VI of the Constitution, which provides that "all laws relating to courts shall be general, and of uniform operation," because it applies only to certain counties, and not to all counties of the state. The Constitution does not prohibit the establishment of courts of local jurisdiction, and it especially provides that the legislature may establish courts inferior to district courts "for cities and incorporated towns." The jurisdiction of such courts is, of course, limited to the cities and towns for which they are established. The act makes this court a court of record, and does not give the judges thereof jurisdiction at chambers, but this is not a violation of section 23, art. VI of the Constitution, which only authorizes, but does not require, the legislature to give the judges of such courts jurisdiction at chambers.

The statute does not violate the Constitution because it fails to make direct provision for trial by jury. This is covered by the general provision governing procedure.

The provision giving this court concurrent jurisdiction with the district court in certain cases does not give the right of appeal to this court from justice of peace courts. County courts generally have concurrent jurisdiction with district courts in certain cases, and no appellate jurisdiction has been claimed for county courts.

Transcripts of judgments of county courts are filed in the district court of any county in the state. The provision that transcripts form the judgments of this court may be also so filed is not invalid.

The provision that judges of this court shall have and exercise the ordinary powers and jurisdiction of a justice of the peace does not invalidate the act as conferring power upon the judges instead of upon the court. This provision in the same words as to county courts has never been so construed nor questioned.

The fact that the act applies to only one city, as the cities of the state are now populated, does not make it class legislation. It will apply to other cities also when they have attained the necessary number of people. The

Honorable W. A. Redick, before whom this case was heard in the district court, remarked in a scholarly opinion which we find in the record: "It is somewhat difficult to fathom the reasons of the legislature for establishing a municipal court for the city of Omaha and one for the city of South Omaha, and failing to provide for such a court in the city of Lincoln, and I shall not attempt a solution of this problem, as I do not deem it necessary. Assuming that the legislature has the power to create municipal courts for cities of the different classes, I think it must be conceded that incident to such power the legislature may select, in its discretion, those classes which are to be included in the provisions of the act, and, unless it can be affirmatively asserted that the action of the legislature is absolutely without logical support, the courts may not interfere with such discretion." This seems to answer the objection which is indicated therein.

The number of inhabitants of a city is not so unreasonable a basis for classification as to require the courts to interfere with the discretion of the legislature. The decision of the supreme court of Minnesota in *State v. Ritt,* 76 *Minn.* 531, is relied upon as holding otherwise. That case, in an opinion by Mitchell, J., held that a statute of that state which provided that a county assessor should be elected in each county having a population of not less than 100,000 and not over 185,000 inhabitants "is invalid, as being special legislation regulating the affairs of counties, in violation of section 33, art. IV of the Constitution; the attempted classification by population, as applied to the subject of the act, being incomplete, arbitrary, and evasive of the provisions of the Constitution." The court states what it considers the only theory upon which such a basis of classification would be proper, and says: "There is no apparent reason suggested by necessity, or by the difference in the situation or circumstances of counties having a population of not less than 100,000 and not over 185,000 and counties having a population of over 185,000, why the county assessor system should be applied

to the former, and the latter left under the local assessor system in the same class with counties having a population of less than 100,000. The attempted classification is therefore arbitrary and incomplete, for the reason that it does not include all the members of the same class, but excludes some whose conditions and wants render such legislation equally necessary and appropriate to them as a part of the same class." We would not be so confident that, because "no apparent reason" was suggested to the minds of the judges, there could not possibly be a sufficient reason in the minds of the legislators. They are in better position to know the "conditions and wants" of different classes of population than are the courts. If the legislature has made a mistake as to the condition and wants of the counties of the largest population, would that compel the court to hold that suitable provision for the condition and wants of counties not quite so populous must be overthrown? This court considers that we cannot be too careful to avoid interference with the legislature's determination of questions of public policy. We do not assume to determine such questions. Even if compelled to hold the application of this statute to cities of less than 40,000 population invalid, we would hesitate to declare it unconstitutional in its application to cities of the metropolitan class.

The question whether the governor was authorized to appoint the members of this court when the statute took effect appears to be presented by the record, but is not insisted upon by the parties, and without further investigation we have concluded to affirm the judgment of the district court.

AFFIRMED.

MINNIE BERGMANN ET AL., APPELLEES, V. EMIL KOEHN ET AL., APPELLANTS.

FILED MARCH 4, 1916. No. 18568.

1. **Intoxicating Liquors:** CIVIL ACTION: LIABILITY. A licensed saloon-keeper who sells intoxicating liquor to another, which causes or contributes to his death, is liable to the wife and minor children of the deceased, constituting one family, for all of the damages to their means of support which they have sustained by reason of such sales.

2. ———:———: VERDICT: JUDGMENT. In an action against the saloon-keeper and his surety for damages, in which the jury has returned a verdict against both defendants for $9,000, the trial court has the power to render a judgment against the principal defendant for the full amount of the verdict, and may also render judgment against the surety for the sum of $5,000, which is the amount for which the surety company is liable on its bond.

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

Willis E. Reed, Jack Koenigstein and *Charles G. McDonald,* for appellants.

Charles H. Kelsey, contra.

HAMER, J.

The plaintiff brought suit in the district court for Madison county for herself and minor children against Martin A. Sporn, a licensed saloon-keeper doing business in the city of Norfolk. She joined as a defendant the Title Guaranty & Surety Company, of Illinois, which had furnished Sporn his bond under the provisions of chapter 40, Rev. St. 1913. She also joined Emil Koehn and his surety, together with Seiler & Benning and their surety. She prayed for a judgment for $17,000 damages, which she alleged had been sustained on account of the death of her husband, William Bergmann, whose death was caused by the sale of intoxicating liquors furnished

him by the defendant saloon-keepers. On the trial the action was dismissed as to defendants Koehn and Seiler & Benning and their bondsmen. The jury returned a verdict against Sporn and the Title Guaranty & Surety Company for the sum of $9,000, and each defendant has appealed.

It is contended that the evidence is insufficient to sustain the verdict. The record shows conclusively that plaintiff's husband was a frequenter of defendant Sporn's saloon, and from time to time had bought intoxicating liquors from him; that on the 14th day of June, 1913, he visited the defendant's saloon, in the city of Norfolk, and there purchased and drank intoxicating liquors until he became drunk. At about 7 o'clock on the evening of that day Bergmann started to go to his home, some three or four miles south of the city. He was driving his team of horses and a light buggy south on Thirteenth street and the highway which connected with that street, which highway crossed the main track of the Chicago & Northwestern railroad at right angles. While he was so driving on his way home he collided with the regular passenger train at the railroad crossing and was instantly killed. The evidence shows that he was intoxicated to such an extent that he failed to notice the approach of the train. The record shows that Bergmann was at that time 33 years of age; that he was a successful farmer; that he was an industrious man; kind to his family; and that he contributed to their support a sum in excess of $500 each year, with an increasing amount from year to year. The plaintiff was his wife. They had two minor daughters, one aged about two years and the other an infant. It follows, therefore, that the verdict was sustained by the evidence, and was not excessive as to the principal defendant. This court has often held that in such cases the person who sold and furnished the intoxicating liquors to the deceased is liable for all the damages occasioned by such sales. *Horst v. Lewis,* 71 Neb. 365; *Schick v. Sanders,* 53 Neb. 664; *Roose v. Perkins,* 9 Neb. 304; *Wardell v. McConnell,* 23 Neb. 152.

It appears that the court rendered a judgment against Sporn for the full amount of the verdict, but as to the surety company judgment was rendered against it for the sum of $5,000 only, which was the amount of the bond. It is contended that the court had no power to render such a judgment. In answering this contention, it is sufficient to say that the surety company cannot complain of the action of the trial court. That company, by its bond, undertook to become surety for the saloon-keeper to the amount of $5,000, and the judgment rendered did not exceed the amount of its liability.

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

AFFIRMED.

SEDGWICK, J., not sitting.

STATE, EX REL. AUGUST C. HARTE, RELATOR, V. HARLEY G. MOORHEAD, RESPONDENT.

FILED MARCH 7, 1916. No. 19510.

1. **Mandamus:** PARTIES: ACT CREATING COMMISSIONER DISTRICTS: CONSTITUTIONALITY. An elector of a county has such interest in the government of the county as to enable him to challenge the constitutionality of a statute which attempts to divide the county into commissioner districts and fix the basis of representation in the county board, on the ground that such statute deprives the voters of the county of equality before the law.

2. **Constitutional Law:** STATUTE: VALIDITY. "An act which violates the true meaning and intent of the Constitution and is an evasion of its general express or plainly implied purpose is as clearly void as if in express terms prohibited." *State v. Bartley*, 41 Neb. 277.

3. ———: RESERVATION OF POWERS. Our Constitution (Art. I, sec. 26) declares that "all powers not herein delegated remain with the people." This is characteristic of a republican form of government and distinguishes such government from a monarchy or oligarchy.

4. ———: EQUALITY: RIGHTS OF VOTERS. Under our Constitution all government derives its "just powers from the consent of the governed" (Art. I, sec. 1), and the principle of "equality before the law" requires that every voter shall, as far as practicable, have an equal voice in the affairs of government.

5. **Counties:** POWERS: RIGHTS OF VOTERS. The power of local legislation and other governmental powers are delegated to the counties, and in the exercise of those powers all voters of the county must, as far as practicable, be given an equal voice.

6. **Elections:** DISTRICTS: APPORTIONMENT. It is not required that equality of representation shall be mathematically exact. But the apportionment of representatives of the people in any government body must be according to the population represented as near as may be.

7. **Constitutional Law:** ELECTION DISTRICTS. The legislature has no power to disregard the constitutional standard of apportionment because of the nature and character of the population and business interests. The constitution will not permit one class of voters to be given more power in governmental affairs than is given to another class.

8. ———: LEGISLATIVE MOTIVES: PROOF. The courts will not inquire into nor consider the motives that may have actuated the legislature, except as those motives appear in their public acts or journals. The validity of an act does not depend upon the motive for its passage; but, whenever and to the extent that the legislature transcends its powers, it is conclusively presumed that it intended to so transcend them, and parol evidence of good motives or other considerations are not allowed to obviate the effect of such unlawful intent.

9. ———: LEGISLATIVE ACTS: COMPLIANCE WITH CONSTITUTION: QUESTION FOR COURTS. There is no doubt that the legislature may exercise a reasonable discretion in selecting the method of securing practical equality. But the question whether constitutional requirements have been applied at all is a question for the courts.

10. ———: ELECTION DISTRICTS: APPORTIONMENT. Chapter 19, Laws 1915, which provides that counties of more than 125,000 inhabitants shall be divided into five districts, and that all territory outside of a metropolitan city and more than two miles from the limits of such city shall comprise one of those districts and have equal representation upon the county board with each of the other four districts, is unconstitutional, because the result is that in Douglas county, to which the act applies, the district so formed will contain less than one-third of the population of each of the

other districts and would have equal power in the government of the county.

Original proceeding in mandamus to compel respondent, as election commissioner, to place the name of relator on the primary ballot as candidate for county commissioner. *Writ allowed.*

Myron L. Learned, for relator.

George A. Magney and *Ray J. Abbott, contra.*

SEDGWICK, J.

By chapter 150, Laws 1913 (Rev. St. 1913, sec. 979), it was provided: "Counties having more than one hundred and twenty-five thousand inhabitants, shall be divided into five districts numbered respectively one, two, three, four and five, and shall consist of two or more voting precincts, comprising compact and contiguous territory and embracing, as near as may be possible, an equal division of the population of the county, and not subject to alteration oftener than once in four years."

In 1915 (Laws 1915, ch. 19) the legislature enacted a statute entitled "An act to amend section 979, Revised Statutes of Nebraska for 1913, relating to commissioner districts, and to repeal said original section." The act provides: "Counties having more than one hundred and twenty-five thousand inhabitants, shall be divided into five districts numbered respectively one, two, three, four and five, and shall within the incorporated limits of any city of the metropolitan class or city of the first class in such county and within the territory comprised within two miles of such incorporated limits consist of two or more voting precincts comprising compact and contiguous territory and embracing, as near as may be possible, an equal division of the population of such cities and adjacent territory as hereinbefore provided and not subject to alteration oftener than once in four years: Provided, that all of the territory in such county outside the limits of such

city of the metropolitan class and city of the first class and such adjacent territory as hereinbefore provided, shall comprise one commission district and the person representing such district shall be a resident therein and one commissioner shall be nominated by each of said districts, but shall be elected by the qualified electors of the entire county, as heretofore provided. The district lines shall be made to conform to the division herein made so that the commissioner to be elected at the next general election in 1916 shall be elected from the district outside of such metropolitan city and city of the first class and adjacent territory as hereinbefore provided for and after such division the district lines shall not be changed at any session of the board unless all of the commissioners are present at such session: Provided, in counties of one hundred and twenty-five thousand inhabitants or more, and in counties where a majority have voted for five commissioners it shall be the duty of the county board of such county, at their first meeting after the publication of the state or federal census, or after an election deciding to have five, to divide said county into five commissioner districts, as provided for."

Douglas county is the only county in the state having the specified number of inhabitants, and therefore is alone interested in this controversy. Under the former statute the county had been divided into commissioner districts, and relator resided within the two-mile limit of the city of Omaha and in the third commissioner district, which embraced also a part of the territory without the two-mile limit. The relator applied to this court for a writ of mandamus to require the respondent, who is election commissioner of Douglas county, to "receive and file the nomination papers of your relator, and place his name upon the official primary ballot for the primary election to be held April 18, 1916, as a candidate for the nomination of county commissioner in the third commissioner district in Douglas county, Nebraska, as defined July 9, 1906." The respondent appeared and answered the appli-

cation for the writ. In his brief it is conceded that "there is but one question at issue in this case: Is chapter 19, Laws of 1915, unconstitutional?" Later in the brief it is suggested that "the only persons who could complain would be those who are in some way injured by such a division of the county. The relator is not injured and has no right to complain." But this point is not seriously contested. The supreme court of Michigan remarked in a similar case: "This court, as appears from the authorities above cited, has taken care to prevent officious intermeddling by the use of this discretionary writ, and at the same time has swept away technicalities where public interests are involved and prompt action is necessary. We have quite uniformly overruled this objection in cases of the latter class." *Giddings v. Blacker,* 93 Mich. 1.

Is the act of 1915 unconstitutional? The result of that act as applied to Douglas county is that there are four districts comprising Omaha and the territory two miles in width around the city, which contains over 18,000 voters, and the remaining district is a narrow strip around the outside of the two-mile limit, and contains only about 1,700 voters. This district is in two parts not contiguous. The relator contends that the statute is unconstitutional because it violates section 4, art. IV of the federal Constitution, which guarantees to every state a republican form of government, and that it violates the first section of the fourteenth amendment, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and that it violates both express and implied provisions of the Constitution of Nebraska. It is contended that a statute which so divides a county into districts that an elector in one district has as much voice in the control of the affairs of the county as do three or four electors in another district is unconstitutional. "The fact that a statute is within the letter of the Constitution is not sufficient. * * * An act which violates the true meaning and intent of the Constitution and is an evasion of its

general express or plainly implied purpose is as clearly void as if in express terms prohibited." *State v. Bartley,* 41 Neb. 277. That this statement of the law is substantially correct has never been controverted in this state. In *State v. Seavey,* 22 Neb. 454, it was decided that the provision of an act of the legislature "making it the duty of the governor to appoint a board of fire and police commissioners for cities of the metropolitan class is not repugnant to the Constitution." In *State v. Moores,* 55 Neb. 480, a contrary view appears to have been taken, which was affirmed in *State v. Kennedy,* 60 Neb. 300. The discussion is at great length, occupying some 60 pages of the report. The opinion by Judge Norval, and concurred in by Judge Harrison, cites many authorities. The dissenting opinion prepared by Mr. Commissioner Ryan, and concurred in by Judge Sullivan and Commissioner Irvine, presents also a quite exhaustive discussion of the question with citation of many authorities. Afterwards, in *Redell v. Moores,* 63 Neb. 219, the personnel of the court having changed in the meantime, *State v. Moores, supra,* is expressly overruled, and the doctrine announced was: "The legislature may by statute confer upon the governor the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class." These decisions are referred to in *State v. Savage,* 64 Neb. 684.

In *Newport v. Horton,* 22 R. I. 196, 50 L. R. A. 330, it is said that all of the authorities except *State v. Moores, supra,* seem to be that a statute authorizing the governor to appoint a board of police commissioners for a city is not unconstitutional as interfering with the right of local self-government; "with the exception stated, not one has denied the general power of the legislature to assume the control of the local police." In an extensive note (50 L. R. A. 330) it is contended that the court was in error in its construction of the laws of Rhode Island. The opinion of the court, however, is instructive. It distinguishes between police officers and governmental officers of cities and other divisions of the state. The court said:

"Obviously this must depend upon the status of a police officer. In *Kelley v. Cook,* 21 R. I. 29, this court has recently decided that he is an officer appointed to perform a public service, and in appointing him the mayor and aldermen of a city merely exercised one of the functions of government in which the city had no special interest and from which it derived no special benefit or advantage in its corporate capacity. A city, therefore, in preserving the public peace or enforcing the laws within its borders, is not acting for itself or for its own inhabitants merely, but for the whole people; in other words, the state. * * * *People v. Common Council of Detroit,* 28 Mich. 228, involved the creation of a park commission, and again distinguishing the case from *People v. Mahaney,* 13 Mich. 481, the court held that the people of other parts of the state had no right to dictate to the city of Detroit what fountains it should build or what land it should buy for a park or boulevard, at its expense, for the recreation of its citizens. *People v. Mayor of Detroit,* 29 Mich. 343, was on the same subject. *Robertson v. Baxter,* 57 Mich. 127, related to the authority of a drain commissioner to act outside of his township. *Wilcox v. Paddock,* 65 Mich. 23, held that the legislature had no power to authorize a judge of probate of one county to assess benefits upon lands outside of his county for a local improvement. *Board of Metropolitan Police v. Board of Auditors,* 68 Mich. 576, held that the police commission of Detroit, paid for by the city, could not be assigned to duty in other townships. The Michigan cases therefore draw a clear line between local and state service."

The court makes this distinction plain by quoting the following from *Burch v. Hardwicke,* 30 Grat. (Va.) 24, 38 (32 Am. Rep. 640): "The distinction recognized in all of them is between officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature. When they are of the latter character they are state officers, whether the legislature itself makes the ap-

pointment or delegates its authority to the municipality. The state, as a political society, is interested in the suppression of crime and in the preservation of peace and good order, and in protecting the rights of persons and property. No duty is more general and all-pervading than this. It extends alike to towns and cities as to the country."

In the case at bar we are dealing, not with police officers of cities, but with counties and their government. County governments are local in their nature, and the Constitution protects them in their right of local self-government. "The legislature shall provide by law for the election of such county and township officers as may be necessary." Const., art. X, sec. 4.

The Constitution makers had something definite in mind when they provided that county officers should be elected. If a statute should provide that the voters of one township should elect the county officers, that would not be the election that the Constitution intends. If one block of the city with perhaps 20 or 30 votes was constituted a voting precinct and empowered to elect one of five members of the county board, and the remainder of the county divided equally into the four districts with power to elect the four remaining members, this, of course, would not be the election intended. Counties are by the Constitution and statutes given control of their own local matters. No one outside of the county is vitally interested in these matters, and every one in the county is interested equally with all others. To give them unequal power in the local government of the county violates the constitutional right of representation as plainly and in the same degree as unequal representation in the state legislature or in congress would violate the constitutional right of representation in public affairs. The first section of article I of our Constitution declares that "all persons are by nature free and independent," and have certain inherent and inalienable rights and that governments derive "their just powers from the consent of the governed." The last section of

the same article declares that "all powers not herein delegated remain with the people." These provisions are characteristic of a republican form of government. If all power rests in the first instance with the people, and they delegate certain powers to certain of their representatives and retain all other powers, this distinguishes such a government from a monarchy or oligarchy. When the present Constitution was adopted county government had been established and the counties had been given a right to legislate upon certain local matters. This condition was assumed in our present Constitution, and, pursuant thereto, has been continued in elaborate legislative provisions. The principal of our Constitution of absolute equality in governmental matters is recognized in the legislation which requires that the great seal of the state shall contain the words "Equality before the law." It must follow that the legislature has no absolute and unlimited power to so distribute the control of county affairs that the voters in one of five districts of the county can control the affairs of the county. There appears to be no necessity in this case for unequal representation. There can be such number of districts in the county and those districts can be so appointed as to meet every legislative purpose, and at the same time give practically equal representation to all of the people. It is conceded that, if this smaller district had been divided into two districts, giving each of these two districts the power to select a member of the county board, and the remainder of the county divided into three districts with power to select only three members of the county board, the statute would be unconstitutional.

The courts have hesitated to attempt an exact definition of a republican form of government, but what constitutes equality before the law has been frequently considered. The supreme court of Kentucky said: "He has studied our Constitution in vain who has not discovered that the keystone of that great instrument is equality—equality of men, equality of representation, equality of burden, and

equality of benefits. Section 1 of the Bill of Rights provides: 'All men are by nature free and equal.' * * * Section 3: 'All men, when they form a social compact are equal.' * * * Section 33 provides for equality of representation. Sections 171, 172, 173 and 174 provide for equality of taxation (uniformity). Section 39 provides for equality (general) of laws. Indeed, it could not be otherwise, for, when our forefathers emigrated from their European home, it was in the main to escape from the oppression of inequality. They brought with them a burning love for this great democratic principle, and imbedded it deep in the foundation of the empire they were destined to erect, and which they will preserve so long as the love of liberty is more than a name. When they threw off the supervising government of the mother country, it was because they were denied equality of representation; or, as they then expressed the evil, they had imposed upon them taxation without representation. Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer county shall have seven times as much influence in the government of the state as a man in Ohio, Butler, or Edmonson, is to say that six men out of every seven in those counties are not represented in the government at all." *Ragland v. Anderson,* 125 Ky. 141, 160 (128 Am. St. Rep. 242).

In the same opinion the court said: "It is not insisted that the equality of representation is to be made mathematically exact. This is manifestly impossible. All that the Constitution requires is that equality in the representation of the state which an ordinary knowledge of its population and a sense of common justice would suggest. We have not been referred to a more accurate or better description of the equality required by the Constitution

than that contained in the report of Daniel Webster, as chairman of a senatorial committee engaged in a duty similar to that involved in the act under discussion: 'The Constitution, therefore, must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring congress to make an apportionment of representatives among the several states, according to their respective numbers, as nearly as may be. That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made.' "

The supreme court of Michigan used similar language: "It was never contemplated that one elector should possess two or three times more influence, in the person of a representative or senator, than another elector in another district. Each, in so far as it is practicable, is, under the Constitution, possessed of equal power and influence. Equality in such matters lies at the basis of our free government." *Giddings v. Blacker,* 93 Mich. 1.

It was suggested, on the one part, that the object of this legislation was to give the farmers in the outlying districts adequate representation on the board, and, on the other part, it was suggested that the motive was to remove this relator from the board where he had been a member, and to prevent the selection of a farmer residing within two miles of the city limits. This court will not inquire into nor consider the motives that may have actuated the legislature.

"There is no difficulty in making an apportionment which shall satisfy the demand of the Constitution. It is not the purpose or province of this court to inquire into the motives of the legislature. Courts will not discuss the motives of legislative bodies, except as they appear in the public acts or journals of such bodies. The validity of an act does not depend upon the motive for its passage. The duty of a court begins with the inquiry into the constitu-

tionality of the law, and ends with the determination of that question." *Giddings v. Blacker, supra.*

"In so far as a legislature keeps within the limits of powers in enacting laws its motives cannot be inquired into, and its discretion is not a subject for review in the courts; but whenever and to the extent that it transcends its powers, it is conclusively presumed that it intended to so transcend them, and parol evidence of good motives or other considerations are not allowed to obviate the effect of such unlawful intent. * * * Nor is evidence admissible, in support of such apportionment, to show that one district, with a less population than another, was given the same representation because of the excessive assessed valuation of property therein, and the nature and character of its population and business interests. The legislature has no power to disregard the standard of apportionment as fixed by the Constitution." *State v. Cunningham,* 35 Am. St. Rep. 27 (83 Wis. 90).

All voters are equal before the law. The Constitution will not permit one class of voters to be given more power to determine the government than is given another class. If the purpose is to give adequate representation upon the board to the farming interests, no reason is perceived why it could not be done in this case without violating a fundamental principle of our form of government by giving one class of voters more power in the government than is given to another class. Since perfect equality is impracticable, there is no doubt that the legislature may exercise a reasonable discretion in selecting the method of securing practical equality.

The supreme court of Illinois discussed at large the limits of legislative discretion in such cases in *People v. Thompson,* 155 Ill. 451, 481, and it was there held that, while the question whether the constitutional requirements have been applied at all is a question for the courts, the question "whether or not the nearest practicable approximation to perfect compactness and equality has been attained is a question for the legislative discretion."

It was also said: "Only a reasonable approximation toward equality is essential, under the requirements of the Constitution that senatorial districts shall contain, as nearly as practicable, an equal number of inhabitants." The court said: "The apportionment as made by the act of 1893 does not make the districts vary as much in population as from a fifth below to a fifth above the ratio. Here is a wide latitude, in a populous state, for inequality, it must be admitted; and we do not mean to say that the legislature could have arbitrarily formed a district containing simply the constitutional minimum of four-fifths, and another district adjoining with one-fifth or more above the ratio, when, by taking a county from the larger and adding it to the smaller district, greater equality in population and compactness of territory could have been secured, for in such case it might perhaps be said that the principles of compactness of territory and approximate equality in population, above the minimum, had been disregarded and not applied at all by the legislature."

From this it appears that that court was not considering a case in which one district had less than one-third of the population of any other district, and clearly that court would have considered that in such an apportionment "equality in population, above the minimum, had been disregarded and not applied at all by the legislature." It is clear that in the statute we are considering the legislature has arbitrarily divided this county into districts without any regard whatever to equality in population of the district, and it must be considered that the controlling principle of equality before the law has not been applied at all. In this view of the case, the statute is unconstitutional and should be disregarded. The writ is

ALLOWED.

MORRISSEY, C. J., dissenting.

I dissent from the majority opinion because no provision of our Constitution has been pointed out to which the act does violence, and it is the duty of the court to sustain

every law which does not clearly violate the provisions of the Constitution. There is no provision in our Constitution directing that counties shall be divided into commissioner districts, or determining that such an office as county commissioner shall be created. The whole field as to what county officers shall be elected, and how they shall be elected, and from what territorial divisions, is left entirely to the legislature. We have long recognized the wisdom of dividing counties into districts, and in overthrowing this act the majority opinion repudiates the very policy it purports to support. While the act requires the commissioners to be chosen from districts, they are elected by the entire electorate of the county.

A few general principles of constitutional law should be kept in mind in considering this question.

A fundamental principle announced in *Hallenbeck v. Hahn*, 2 Neb. 377, is: "The Constitution of this state confers plenary legislative power upon the general assembly; and, if an act is within the legitimate exercise of that power, it is valid, unless some express restriction or limitation can be found in the Constitution itself."

In the same case it was said (p. 397): "This doctrine is elementary, is cardinal, and arises out of the very nature of our form of government. With us, sovereignty resides with the people. Were they acting as a whole for themselves, there can be no doubt but this, or any other law that should receive a majority sanction, would be conclusive. But, parceling out the exercise of their sovereign power to the three departments of government—the legislative, the executive, and the judicial—to the first has been committed, except what has been abandoned to the congress of the United States, the exercise of the whole sovereign law-making power as completely and absolutely as possessed by the people, subject only to such limitations as the people may have chosen to impose. These limitations are set out in the state Constitution."

The constitutional provision quoted in the majority opinion that "all powers not herein delegated are reserved

to the people," instead of being, as indicated by the opinion, a limitation upon the legislature, is a positive affirmation that, unless restrained by constitutional limitations, the people, acting through their legislature, are free to enact any law they deem desirable.

Where no limitation is expressed in the Constitution, "The framers of the Constitution relied for protection in this regard upon the wisdom and justice of the representative body and the accountability of its members to the people, rather than the restraining power of the courts of law. It is said that 'the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions, which, resting on theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.' Cooley, Constitutional Limitations, 129. *State v. McCann,* 21 Ohio St. 198, 210." *State v. Board of County Commissioners,* 4 Neb. 537.

It is also well settled that "A legislative act should not be declared unconstitutional, unless it is so clearly in conflict with some provision of the fundamental law that it cannot stand." *State v. Nolan,* 71 Neb. 136.

Has the act under consideration been shown to be "so clearly in conflict with some provision of the fundamental law that it cannot stand?" Relator contends that the act violates section 4, art. IV of the United States Constitution, which provides that congress shall guarantee to every state a republican form of government. The opinion discusses at some length the nature of a republican form of government. This is a political question, and is beyond the jurisdiction of the judiciary. *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U. S. 118. "There does not seem to be any case which is authority for the proposition that an act of the legislature of the state, with a republican form of government and so recognized by congress, can be held invalid under the provisions of article IV, sec. 4 of the Constitution." *Susman v. Board of Public Education,* 228 Fed. 217.

In discussing the nature of a county, in *Board of Commissioners v. Mighels,* 7 Ohio St. 109, 119, it was said: "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

In its control over the governmental agencies of the state, known as counties, wherein is the legislature limited by the Constitution? The Constitution provides: "The legislature shall provide by law for the election of such county and township officers as may be necessary." Const., art. X, sec. 4. Under this provision the legislature could not provide for the appointment of county officers. While the Constitution directs that the legislature shall provide by law for the election of county officers, it has seen fit not to restrain the legislative discretion as to the number of county officers, their duties, their terms of office, nor their qualifications. Wherein does an act providing for the election of county commissioners from districts into which the county is divided violate any constitutional provision? If the legislature has the power to provide that county commissioners shall be chosen from districts, has not the Constitution left the legislature free to exercise its own discretion in the matter? While not denying the authority of the legislature to create commissioner districts, the majority opinion holds that the legislature, in doing so, must not do violence to the principle of "equality of representation," and cites *People v. Thompson,* 155 Ill. 451, *State v. Cunningham,* 83 Wis. 90,

Giddings v. Blacker, 93 Mich. 1, and *Ragland v. Anderson,* 125 Ky. 141. In these cases acts of the legislature dividing the state into legislative districts of unequal population were held unconstitutional, but an examination of these cases shows that in each state the Constitution provided that the districts should be divided "according to population," or should contain, "as nearly as practicable, an equal number of inhabitants." No such constitutional provision has been shown to limit the legislature in this case.

The majority opinion quotes the discussion of the Kentucky court in *Raglan v. Anderson, supra,* upon the principles of "equality." The Kentucky Constitution expressly provided that the state should be divided into senatorial and representative districts "as nearly equal in population as may be." Since that decision the Kentucky court has held that, where a city council has authority to divide the city into wards and provide for the election of councilmen, "there being no constitutional or statutory provision requiring that such division be so made as to provide equal representation, the courts cannot interfere with the exercise of the legislative power so conferred by invalidating an ordinance so dividing the city into wards as to cause unequal representation." *Moore v. City of Georgetown,* 127 Ky. 409. In an opinion containing a full discussion of the question, the court, among other things, said:

"It is true that fair representation and equal apportionment is a valuable privilege, and one that should be adhered to; but, when the legislative department of the state that created these municipalities and provided an elaborate plan for their government failed to adopt either directly or by implication any scheme to regulate or control them in the selection of their legislative boards, we do not feel that the courts are warranted in interfering with the discretion lodged in the people of these cities and their representatives whose duty it is to divide the city into wards. So far as our examination extends, in every in-

stance in which the judiciary has undertaken to interfere with the legislative department of the state or its municipalities in the power of apportionment and representation authority direct or by implication has been found in the Constitution or the statutes. * * * Whilst the division of Georgetown into wards by the council and the allotment of representation is apparently unfair and unequal, we do not feel disposed to adjudge that it exceeded the power granted. Nor can we hold that it violates any fundamental principle of government."

In *Richardson v. McChesney,* 128 Ky. 363, the Kentucky court also held: "A legislative apportionment of the state into congressional districts cannot be judicially reviewed, in the absence of a constitutional provision controlling apportionment." In the opinion the court said: "Except when limited by the Constitution of the state, the general assembly, especially in administrative and political affairs, is beyond the reach of the judiciary of the state. We have no authority to pass judgment upon its acts. In no case that has come under our notice have the courts undertaken to attempt to restrain the legislative departments, unless it violated some provision of the organic law of the state. * * * But in the matter of congressional districts we find nothing in our state Constitution to guide us. There is nowhere any limitation upon the power of the legislature, and it would be assuming authority this court does not possess if we undertook to control a coordinate department of the government in the performance of a power vested exclusively in it. It is not for the judiciary to question the policy, expediency, or propriety of laws enacted by the general assembly, unless they conflict with the Constitution."

In Tennessee, where the Constitution provides for the election of justices of the peace in districts of the counties who shall constitute the county board, it was held that the court would not interfere with the action of the legislature in redistricting a county, "though the districts as laid off in the statute are disproportionate in area, wealth, and

population, and of shape inconvenient to their inhabitants." *Maxey v. Powers,* 117 Tenn. 381. In the opinion the court said (p. 392): "The general rule is that where one of the departments of the state is vested with a power, to be exercised when and in such manner as those charged with its exercise may consider expedient and proper in its discretion, the action of the department cannot be interfered with by any other department. This is especially so in matters of a political character. * * * (p. 398) The general assembly had the exclusive and absolute power to lay off Knox county into civil districts. How it should execute this power was for it to determine. It must be assumed that it had the proper data and information before it to do so intelligently, and that the districts created by it are of convenient size for their primary purpose, the efficient administration of the law in the county, and also in the interest and for the good of the people affected. The courts have no jurisdiction to inquire into these matters, and the civil districts must stand as laid off by the act, until it is repealed or amended by the legislature."

The Constitution of Michigan provides: "A board of supervisors, consisting of one from each organized township, shall be established in each county. * * * Cities shall have such representation in the board of supervisors of the counties in which they are situated as the legislature may direct." The legislature provided that the president of the village of Mackinac should be a member of the board of supervisors. This was claimed to violate the quoted provisions of the Constitution. It was argued that this act allowed a village to have the same representation on the board as a city, and, further, that the act provided for more than one supervisor from each township. The court held the act valid, and said: "The necessity for the enactment of the statute becomes most apparent in the case of this village, when we take into consideration its geographical position with reference to other portions of

the county in which it is located. It is situated on two islands about five miles from the other portions of the territory of the county, and for several months in the year access with the mainland becomes exceedingly difficult. Its business interests, to a great extent, are such as have but little connection with those of the other portions of the county; and its property depends largely for its value on considerations which do not affect the remainder of the county. It seems to be entirely proper that its interests should be specially represented on the board which apportions the taxes to be paid, on its property holders, and whose action continually, more or less, involves its local interests." *Attorney General v. Preston,* 56 Mich. 177.

In *Redell v. Moores,* 63 Neb. 219, the doctrine on which the majority opinion is based, previously announced by this court in *State v. Moores,* 55 Neb. 480, that an act might be unconstitutional as being in violation of the spirit of the Constitution, was definitely set aside. Speaking of the decision in *State v. Moores, supra,* it was said by Judge Sullivan, in *State v. Kennedy,* 60 Neb. 300, that, if the view that the spirit of the Constitution may be invoked to declare a law invalid "is to be acquiesced in and accepted as a rule of construction, the Constitution of the state is to be fully known only by studying the theories of the judges who are chosen to expound it; it will expand or contract with every fluctuation of the popular will which produces a change in the personnel of the court; and the limitations upon legislative power will be as unknown and unknowable as were the rules of equity in the days when the chancellor's conscience was the law of the land."

The wisdom of the act is not for the court to determine, although it clearly appears that there is good reason for its enactment. The policy of dividing the county into districts is based on the supposition that members of the board ought to be familiar with the local needs of their constituents; that they ought to be in close touch with

those they are elected to serve and whose business they administer. This act is designed to provide representation for the rural district, where the avocations of the people are different from those within the metropolitan city. While there are fewer voters in the rural district, they are scattered over a much wider territory, and their interests are more diversified. There are many miles of road within this district, and there are many bridges. These roads and bridges come within the jurisdiction of the board. Members of the board living within the metropolitan city, enjoying the advantages of paved streets, strangers to the vicissitudes of country life, may not be so ready to respond to the needs of this particular class as one who maintains his home among them. Then again, *per capita,* this district may represent a much greater proportion of the taxable property of the county than a district of greater population within the metropolitan city, where large numbers of voters possess no property and contribute nothing to the support of the county.

The majority opinion is an unwarranted invasion of the power vested exclusively in the legislature, and cannot be reconciled with the provisions of our Constitution.

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

JOSEPH M. KIMMEL V. STATE OF NEBRASKA.

FILED MARCH 18, 1916. No. 19375

1. **Forgery:** COPIES OF ORDERS. Making duplicates or copies of orders for the payment of money, imitating the signatures of the makers of the original orders, and thereafter selling them to a third person as, and for, the true, genuine and original orders, is, in law, a forgery.

2. ———: EVIDENCE. Evidence of indorsing and selling such orders, thereby obtaining their face value, with intent to defraud, will sustain a conviction for the crime of uttering and publishing such forged instruments.

3. **Criminal Law**: NEW TRIAL: SHOWING: NEWLY DISCOVERED EVIDENCE. Affidavits attached to the motion for a new trial, asked for on the grounds of newly discovered evidence, examined, and found to be immaterial in that they fail to support the ground set forth in the motion.

4. **Forgery**: DEFENSE: INSTRUCTIONS. Instructions given by the trial court examined, and *held* to have properly submitted defendant's theory of his defense to the jury.

5. ———: INSTRUCTIONS: INTENT. The principal instruction of which defendant complains is set forth in the opinion, and *held* to be without error.

ERROR to the district court for Burt county: WILLIS G. SEARS, JUDGE. *Affirmed.*

J. M. Priest and *B. C. Enyart*, for plaintiff in error.

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

BARNES, J.

The county attorney of Burt county filed an information in the district court charging Joseph M. Kimmel with the crime of forging three certain orders for sums of money, and with uttering and publishing the forged instruments with intent to defraud. A plea of not guilty was entered and a trial was had. Before the case was submitted to the jury, the court withdrew the charge contained in the first count of the information. The jury found the accused guilty on the second and third counts of the information. A motion for a new trial was overruled. The court suspended sentence and paroled the accused to one Joseph Force, a resident of Burt county. Later on the parole was revoked at the instance of the county attorney, and Kimmel was sentenced to the penitentiary for a term of not less than one year nor more

than eight years. From that judgment he has prosecuted error.

The first assignment of error is that the verdict is not according to the evidence. The second count in the information reads as follows: "The said Herbert Rhoades, county attorney of the county and state aforesaid, gives the court to understand and be informed that Joseph M. Kimmel, on or about the 25th day of September, A. D. 1914, in the county of Burt and state of Nebraska, aforesaid, then and there being, did then and there unlawfully, knowingly, wilfully, maliciously, feloniously, and falsely make, forge and counterfeit an order or request for the payment of money, to which he falsely, fraudulently, and with the intent to defraud, forged the name of Andrew S. Gilbert, which said order or request for the payment of money was in the following words and figures, to wit:

" 'July 23, 1914.

" 'To Farmers State Bank:

" 'Please pay to J. M. Kimmel, the bearer hereof, the sum of $105.15 on my account, for which amount I hereby acknowledge my indebtedness to you and agree to make payment thereof to you or order on October 1, 1914, together with interest at 8 per cent. from maturity. Andrew S. Gilbert.

" 'Received payment pursuant to the above order.

" 'Dated this ..... day of ..... 1914.

" '.....'

"Which said order or request for the payment of money was on or about said date indorsed by the said Joseph M. Kimmel, 'J. M. Kimmel,' all done with the intent of him, the said Joseph M. Kimmel, to defraud one Charles C. Taylor.

"The said Herbert Rhoades, county attorney, further alleges and gives the court to understand and to be informed that on or about the 25th day of September, 1914, the said Joseph M. Kimmel, in the county of Burt and state of Nebraska, then and there being, did utter and publish as true and genuine the above named and de-

scribed made, forged and counterfeited order or request for the payment of money, knowing the same to be false, with the intent of him, the said Joseph M. Kimmel, to defraud the said Charles C. Taylor, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Nebraska."

The third count was in all respects the same as the second count, with the exception that the order was purported to be signed by one W. W. Eckley.

The record discloses that the orders alleged to have been forged were introduced in evidence, and appeared to have been filled out in the handwriting of the defendant. The signatures, however, were very good imitations of the signatures of Andrew S. Gilbert and W. W. Eckley, who were supposed to have executed them.

Charles C. Taylor testified, in substance, that the defendant came to his restaurant at Tekamah, in Burt county, Nebraska, on or about the 24th day of September, 1914, and sold him the orders, which defendant then and there indorsed; that he paid him their face value, less a small board bill which defendant owed him; that he paid him the balance due on the orders in question in cash and certain checks on the First National Bank of Tekamah, on which defendant obtained payment from the bank. Taylor also testified that the defendant told him not to say anything about the transaction, because it might make him trouble with his insurance company. His evidence was corroborated by the testimony of his wife and one G. C. Deck, and certain other witnesses. Gilbert and Eckley both testified that they never signed the orders in question. The defendant claimed, however, that the orders were duplicate copies of original orders which he took from Gilbert and Eckley for life insurance premiums on policies in the Bankers Life Insurance Company of Lincoln, Nebraska; that he was the agent of the company, and in order to keep track of his business he made the duplicates, which were to be returned to Gilbert and Eckley on the payment of the originals, which defendant

claimed he had sent to the insurance company. By his evidence he admitted that he imitated the signatures of the drawers of the instruments, and that he did not mention that fact to Taylor when he sold him the orders. He also claimed that he did not sell Taylor the orders, but that Taylor took them from him by force and fraud, and was holding them to force the payment of a gambling debt which defendant owed Taylor. This was denied by the witnesses for the state. He also testified that he never got any money for the orders, but the cashier of the bank testified that the defendant presented to him, at the bank counter, at least one of the checks given by Taylor for $64, and that he paid defendant the cash for which the check was drawn. There was testimony which showed that defendant had played poker in the rooms upstairs over Taylor's restaurant, and there was some evidence which tended to show that Taylor had been conducting a game of chance, but that evidence did not excuse the defendant for his conduct in forging the instruments. In fact, the testimony of the defendant himself was so inconsistent and contradictory to his own statements that the jury were warranted in disregarding his evidence and returning a verdict of guilty against him.

Defendant contends that the court erred in overruling his motion for a new trial on the ground of newly discovered evidence. The record, on that question, contains a history of the prosecution of Charles C. Taylor on a charge of running a gambling house, and certain newspaper accounts of that prosecution. As we view the case, it was quite immaterial, and furnished no substantial reasons for granting the defendant a new trial.

Defendant also alleges error for the failure of the court to instruct the jury on the "authority to makes notes." In support of this assignment he cites 12 Cyc. 615*g*, and other authorities. The citation from Cyc. reads as follows: "An instruction which, while stating the charge or the evidence against the accused, omits to charge the jury as to the defense set up by him is error, unless the

defense is properly submitted to the jury in other parts of the charge."

An examination of the instructions given by the trial court shows that the defense was properly submitted to the jury, and defendant has no cause to complain in relation to that matter. It cannot be successfully contended that the authority to make duplicates of the orders in question included the right of the defendant to imitate the signatures of the makers, and then utter and publish the instruments as true and genuine orders for payment of money, and by so doing to obtain the amount of money which they called for.

It is finally contended that instruction No. 10, given by the court on his own motion, was erroneous and misleading. That instruction reads as follows: "It is a claim made by the defendant that he did not make the notes, checks, orders or requests for money he is herein charged with having forged, as forged instruments, but that he made them as copies of genuine notes for the purpose of keeping track of his business of life insurance transactions. Unless the state establishes beyond a reasonable doubt that this theory or claim is untrue, and that the said instruments were forged for the purpose of defrauding Charles C. Taylor, you should find the defendant not guilty." This instruction was clear and explicit, and was as favorable to defendant's contention as the court could well have given.

In conclusion, an examination of the record satisfies us that the defendant had a fair and impartial trial, that the evidence was sufficient to sustain his conviction, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

CHARLES E. GIBSON, APPELLEE, V. LEVI GUTRU ET AL., APPELLANTS.

FILED MARCH 18, 1916. No. 18246.

Bills and Notes: BONA FIDE PURCHASER: FAILURE OF CONSIDERATION. Under the facts stated in the opinion, *held*, that the plaintiff is not a holder in due course of the note sued upon, and that it is subject to any defense that might be made against it in the hands of the original owner. *Held*, further, that the defense of failure of consideration is established by the proofs.

APPEAL from the district court for Madison county: ANSON A. WELCH, JUDGE. *Reversed.*

Albert & Wagner and *H. Halderson*, for appellants.

M. B. Foster, James Nichols, W. A. Meserve and *Reese, Reese & Stout, contra.*

LETTON, J.

Action on promissory note, tried to the court without the intervention of a jury. Judgment for plaintiff, defendants appeal.

This is an appeal from a second trial of *Gibson v. Gutru*, 83 Neb. 718. The petition is in the ordinary form for an action by an indorsee against the maker of a promissory note. It pleads the execution and delivery of the note to the Globe Investment Company, the purchase of the note by the plaintiff on June 13, 1899, for a valuable consideration in the usual course of business, and the indorsement and delivery to plaintiff by the receiver of that corporation. The main defenses are a general denial and failure of consideration. The facts alleged are that defendant Gutru in November, 1894, purchased certain land in Box Butte county, Nebraska, from one Olson, who had theretofore executed a note for $275 secured by mortgage on the land to the Dakota Mortgage Loan Corporation, the name of which was afterwards changed to the Globe Investment

Company; that foreclosure proceedings were begun on this note and mortgage; that defendants, in order to renew the note given by Olson, executed the note sued upon herein and executed a mortgage on the same land to secure its payment, upon the agreement that, upon the delivery of the latter note and mortgage, the Globe Investment Company would release and surrender the Olson note and mortgage; that it failed to do this, and still retains the Olson note and mortgage, and therefore there was no consideration for the note sued upon.

The reply pleads the invalidity of the foreclosure proceedings in Box Butte county, and that defendants have sold and conveyed the land by warranty deed as if the decree were a nullity, and are therefore estopped to claim any right of defense. The court found generally for the plaintiff and rendered judgment accordingly. It is undisputed that the note was given to the Globe Investment Company in order to renew the Olson note.

Gutru bought the land subject to the mortgage and received a warranty deed dated November 12, 1894, after the *lis pendens* notice had been filed in the foreclosure suit. The application for the renewal was made in December, and Gutru paid the Globe Investment Company $80 back interest through one Miller, signed the new note and mortgage, and also a commission note and mortgage for $41.25, as a part of the same transaction. Afterwards Miller informed him that the company wanted him to pay $19 additional costs in the foreclosure suit, which he refused to do, and stated that, if they would not renew the note as they had agreed, they should return the money paid and the new note and mortgage. This was never done.

The testimony of the plaintiff is that he purchased the note in suit on October 21, 1896, with other loans from one Chaplin; that Chaplin held a prior mortgage given by Olson; that while the note in suit was in the hands of the Globe Investment Company it failed, and a receiver was appointed; that a dispute arose between the receiver and

plaintiff as to certain sums claimed to be due the company on account of the Chaplin loans, and that plaintiff came to terms with the receiver, who on June 13, 1899, indorsed the note and delivered it to him. Plaintiff testified: "I did not buy the Gutru note and coupons from the receiver of the Globe Investment Company. The said receiver never claimed to me that he owned said note and coupons, and never offered to sell me the same."

The question is whether Gibson was a purchaser in due course, for value, so that the defense of failure of consideration may not be made against him. The note was not payable to Chaplin, but was made payable to the Globe Investment Company. It was never delivered to Chaplin. Chaplin was the owner of the prior note and mortgage. The receiver testified that the record of the investment company showed that loan No. E-323, the Olson note and mortgage, had been assigned to George W. Chaplin in 1887, and that under the same filing number, E-323, and in the same filing envelope, there was found the application signed by Olson, and the application signed by Gutru. He also testifies that he delivered the note to Gibson for the reason that he had received a letter which was produced from the administratrix of the estate of George W. Chaplin, to the effect that her father had sold all his loans in the Globe Investment Company to Mr. Gibson, and because Gibson had settled the claims of the investment company "on account of the foreclosure costs, taxes and expenses in connection with the several loans which had been sold by said Chaplin and transferred to said Gibson."

The foreclosure of the prior loan was brought in the name of one of the officers of the Globe Investment Company, which was in possession of the note and mortgage as the agent of Chaplin, and was evidently acting for him. The petition was filed on August 1, 1894, a notice of *lis pendens* and a cross-petition of the Globe Investment Company were filed on the same day. A summons was issued, but was not served because the fees of the officer were not

paid in advance. An alias summons was issued on August 27, directed to the sheriff of Madison county. The return shows personal service on Olson in that county. On September 19 a special appearance was filed by Olson objecting to the jurisdiction of the court, and "that the copy of summons hereto attached" is the only copy served upon him and is not a certified copy. No copy is attached to the affidavit. On November 1, 1894, a defective summons was issued and served on Olson. Nothing further appears to have been done until April 2, 1895, when the record recites that the case came on to be heard; "The defendants, except the Globe Investment Company, not appearing. * * * The court finds that due and legal notice of the filing and pendency of this action was given each of the said defendants, and that they have failed to appear and plead in said cause in the time and manner provided for by law." A default was adjudged against Olson, and a decree of foreclosure rendered.

The finding that defendant Olson had been duly served with summons overruled the special appearance, which was unsupported by proof.

It would seem (but since others not parties to this suit are interested we do not so decide) that the court had jurisdiction to render the decree. The land afterwards was duly sold under the decree, the sale confirmed on August 30, 1895, and a deficiency judgment rendered against Olson.

The facts with reference to the foreclosure suit are really immaterial under the issues in the case, except in so far as they corroborate the other proof that there was an absolute lack of consideration for the note sued upon in this case. The fact that Gutru sold the land after the foreclosure is also immaterial under the issues.

Since the Globe Investment Company, acting for Chaplin, had taken the note from Gutru, when it was directed to return it, it was still the property of Gutru, and neither Chaplin nor that company had any interest in it. Gibson was not a holder in due course of business under the stat-

ute, and any defense that might be made against the note in the hands of Chaplin or the investment company is valid against Gibson. The judgment is therefore erroneous.

If the evidence in this case, as seems probable, is identical with that adduced in the first trial, the trial judge was warranted in directing a verdict for defendant at that time, and the commissioners and this court, as shown by the opinion in 83 Neb. 718, failed to apprehend its true purport.

The judgment of the district court is

REVERSED.

JOHN J. FLANNERY, APPELLEE, V. MICHAEL FLANNERY, APPELLANT.

FILED MARCH 18, 1916. No. 18640.

1. **Deeds: DELIVERY: INTENT: PROOF.** The intention to deliver a deed must be shown by acts or words, or by both combined.
2. ———: ———: ———: DETERMINATION. "Delivery of a written instrument like a deed is largely a question of intent to be determined by the facts and circumstances of the case." *Brown v. Westerfield*, 47 Neb. 399.

APPEAL from the district court for Holt county: R. R. DICKSON, JUDGE. *Reversed and dismissed.*

A. P. Lillis and *E. H. Whelan,* for appellant.

J. A. Donohoe, contra.

ROSE, J.

The action is ejectment for the northeast quarter of section 18, township 30, range 15 west, Holt county. The parties are brothers. Plaintiff relies on a deed executed by his father and mother August 17, 1909. Defendant

pleaded that the deed was never delivered; that his father, John J. Flannery, died intestate September 29, 1909; that his mother died intestate September 19, 1910; that defendant was appointed administrator of his father's estate June 1, 1912, and that he is in possession of the premises as heir and administrator. The reply, in substance, contains the plea that the father and mother, August 17, 1909, for the purpose of dividing their real estate, executed and delivered three deeds, one to plaintiff for the land in controversy, one to defendant for a different quarter and the other to Thomas Flannery, another son, for an 80-acre tract; that, September 21, 1910, at a meeting of the heirs, consisting of the three sons and three daughters, plaintiff, to equalize the division so made, paid defendant $2,000; that the latter retained the money thus paid with the understanding that the transaction should constitute a settlement binding on all of the heirs; that defendant is estopped from disputing plaintiff's title. The issues were tried without a jury. From a judgment in favor of plaintiff, defendant has appealed.

The first question presented is the delivery of the deed under which plaintiff claims title. The grantors, John J. Flannery and wife, occupied the premises as a homestead. They had three sons and four daughters. One of the daughters died November 7, 1908. Thereafter the father talked about giving the sons land and the girls money. August 17, 1909, he and his wife went to Stuart, where he consulted an attorney, who drew the three deeds described in the reply. All were executed and acknowledged by both grantors. In the evening, after they returned, while plaintiff and defendant were in the kitchen, their father took the deeds from a pocket in his coat, and laid them on the table, saying, according to plaintiff, "Here are those deeds," and, according to defendant, "Those are the deeds." Each picked up a deed, read the one in which he was named as grantee and replaced it on the table. The father told defendant to put the deeds in the former's tin box where he kept his papers. Defendant did as directed. Both

before and after the deeds were executed the box was kept in the bedroom occupied by the father. They remained there, unrecorded, until after his death. They were warranty deeds; no life estate for the father or the mother being reserved. The day following their execution, the father said he did not want them recorded until after his death. He expressed a purpose to change them. He had said he intended to retain and to control his real estate as long as he lived. The children all understood that. They also understood that their mother would have the same right, if she survived their father. After the alleged delivery upon which plaintiff relies, the father managed the land and received the proceeds thereof until his death. The mother survived, and defendant managed the farm for her. The son Thomas was in Canada August 17, 1909, the date of the delivery pleaded by plaintiff. The facts and conclusions thus narrated are established by uncontradicted evidence. Did plaintiff acquire title August 17, 1909, by a delivery of the deed in which he was named as grantee? Did his father by a valid delivery lose control of the warranty deed and thus divest himself of all interest in his homestead, according to the terms of his warranty, without reserving a means of livelihood?

Delivery is essential to the validity of a deed. The intention to deliver a deed must be shown by acts or words, or by both combined. *Brittain v. Work,* 13 Neb. 347. The rule in this state is: "Delivery of a written instrument like a deed is largely a question of intent to be determined by the facts and circumstances of the case." *Brown v. Westerfield,* 47 Neb. 399.

In the present case the intention essential to a delivery is not shown. The father retained possession of the deed. He said it should not be recorded until after his death. There was no change in possession, control, use, or benefits. The father continued to exercise rights at variance with a transfer of the fee. His acts and expressed purposes, both before and after the execution of the deed, are inconsistent with an intention to deliver it. There was

no manual delivery or an expressed intention to make one. The facts and circumstances proved do not warrant a finding that the father intended to deliver the deed to plaintiff when he laid it on the table. Proof of a subsequent delivery is not shown. On the contrary, the undisputed evidence shows conclusively that the deed was never delivered.

It is contended, further, that defendant is estopped to deny plaintiff's title and right of possession. This plea is based on an alleged settlement under which plaintiff paid and defendant retained $2,000. Since the deed on which plaintiff relies was never delivered, he has no legal title and cannot maintain ejectment. Each party's interest in the land is that of an heir, plaintiff being entitled to credit for the amount contributed by him to the improvement of his father's estate upon discharging and satisfying any apparent incumbrance created by him.

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

REVERSED AND DISMISSED.

FAWCETT, J., not sitting.

HENRIETTA OWENS, APPELLEE V. TRAVELERS INSURANCE COMPANY, APPELLANT.

FILED MARCH 18, 1916. No. 18767.

Insurance: PREMIUMS: PAYMENT: WAIVER. In an accident insurance policy, a provision requiring payment of the premium in advance may be waived by a course of dealings in which insured, through a series of renewals, paid each renewal premium long after it became due, having been thus induced to believe that payment in advance would not be required.

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

Gurley, Woodrough & Fitch, for appellant.

James C. Kinsler and *Dunham & Aye, contra.*

ROSE, J.

This is an action by plaintiff, as beneficiary, to recover $5,000 upon an accident insurance policy issued by defendant upon the life of her husband, John S. Owens. The policy was issued September 30, 1910, for a term of three months, in consideration of a premium of $6.25, and provided that "it may be renewed, subject to all the provisions of the policy from term to term thereafter by the payment of the premium in advance." Owens was accidentally killed October 24, 1912. The premium for the term commencing September 30, 1912, had not been paid, and defendant denied liability on the ground that the policy had lapsed. Plaintiff alleged that defendant had waived the provision of the policy requiring payment of the premium in advance. A verdict was rendered in plaintiff's favor for $5,586.92 and judgment entered thereon. Defendant has appealed.

The controlling question on appeal is whether defendant waived the provision of the policy requiring payment of the premium in advance. The evidence shows that defendant maintains a general branch office in Omaha. The cashier is appointed by, and acts under the direction of, the home office in Hartford. There is a general manager in Omaha who has charge of writing insurance. To procure applications a number of agents are employed. While they remain in the employ of defendant, they collect the premiums upon policies procured by them. After they leave the employ of defendant the cashier makes the collections. Collections are reported to the cashier, who enters payment on a card record and makes daily reports to the home office. Receipts for premiums, countersigned by the cashier, are delivered to the agents at the beginning of the term, with instructions to return them to the branch office within 60 days or to bring in the money. If receipts are not returned

within 60 days, the agents must pay the premiums. Policies were not canceled for nonpayment of the premium until 60 days after due. D. J. Sinclair, an agent of defendant, solicited Owens to make application for an accident policy. Owens was not ready to take a policy, but did so when the agent informed him that he need not pay the premium for 60 days. Though the policy was issued September 30, 1910, the premium was not paid until December 27, 1910. The insurance was renewed from time to time, but the premiums were not paid until the expiration of periods extending from 65 to 87 days after due. Sinclair testified that he generally called on Owens pay-day, leaving the receipt for the premium whether then paid or not, and making collection, if not paid, later. Plaintiff testified that pay-day was the sixth of the month, and also that she saw Sinclair deliver a receipt to her husband 30 days or more after the premium became due. Sinclair left the employ of defendant in August, 1912, but it does not appear that Owens was aware of that fact, nor of the rule that the cashier made the collections after the soliciting agent left. Demand for payment of the premium due September 30, 1912, was made by a letter dated September 17, 1912, signed by the cashier, and containing the following: "Renewal premium of $6.25 on Policy No. E-181,706 issued by the Travelers Insurance Company of Hartford, Connecticut, is due on the 30th day of September, 1912. Please forward remittance in season to reach my office on or before the date above named." The premium was overdue 24 days when Owens was killed. The morning after his death, the premium was received without knowledge of that fact, and defendant tendered it back.

The law applicable to this case has been stated in *Insurance Co. v. Wolff*, 95 U. S. 326, 330, as follows:

"The principle that no one shall be permitted to deny that he intended the natural consequences of his acts when he has induced others to rely upon them is as applicable to insurance companies as it is to individuals, and will serve to solve the difficulty mentioned. This principle is

one of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And if the acts creating such belief were done by the agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, the same consequences should follow."

For nearly two years defendant had accepted from Owens premiums 65 days or more after they had become due. These payments were entered by the cashier on the card record of the branch office and reported to the home office. Defendant knew the course of dealings with Owens. While there is testimony that the premium receipts were delivered to Owens and payment made later, there is also testimony from which the jury might infer that these receipts were not delivered in some instances until 30 days or more after the premium had become due. When Owens was killed the premium had been unpaid but 24 days. It had been the practice of defendant to send the agent to Owens to collect the premium. It is not shown that Owens knew that the agent had left the employ of the insurer, or that the custom to call for the premium would be abandoned, or that collection would thereafter be made by the cashier. The notice from the cashier that the premium was due September 30, 1912, and asking for a remittance on or before that date, in view of the course of dealings described, did not necessarily amount to notice that payment at a later date would be rejected and the former practice abandoned. Defendant was willing to, and did, receive payment of the premium. While this was not of

itself a waiver, since defendant did not then know of the death of the insured, it is proof tending to show that defendant had not changed its course of dealings and was willing to receive the premium after it had become due and after the date mentioned in the cashier's notice. Under the evidence it was at least a question for the jury whether "the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due would not be enforced if payment were made within a reasonable period afterwards." This view is in harmony with adjudicated cases: *Cornell v. Travelers Ins. Co.*, 104 N. Y. Supp. 999 (affirmed without opinion in 192 N. Y. 587); *Morgan v. Northwestern Nat. Life Ins. Co.*, 42 Wash. 10, 7 Ann. Cas. 382; *Boutin v. National Casualty Co.*, 86 Wash. 372.

The instructions of the court are in harmony with the views herein expressed. There is no error in the record, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. W. L. STICKEL LUMBER COMPANY, APPELLEE.

FILED MARCH 18, 1916. No. 18453.

1. **Carriers: FREIGHT CHARGES: LIABILITY.** The mere acceptance from a carrier and removal of a shipment of goods, by one who is not the consignee named in the bill of lading, does not of itself create a primary obligation on the part of the one receiving such goods to pay charges beyond the amount stated and claimed by the carrier at the time of such acceptance and removal.

2. ———: ———: ———. In such case, where the failure by the carrier to collect the full amount of the freight charges, as fixed by the tariffs on file in the office of the interstate commerce com-

mission, is the fault of the carrier, it must first look to the consignor with whom it contracted to make such shipment, and who was also the consignee named in the bill of lading, for any balance due thereon.

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

Edson Rich, B. W. Scandrett and *Thomas F. Hamer,* for appellant.

N. P. McDonald, contra.

FAWCETT, J.

This action was brought to recover a sum alleged to be due as a balance of the freight charges upon four shipments of lumber transported by plaintiff and connecting carriers from points in other states to points in Nebraska. Each of the four shipments is set out in the petition as a separate cause of action. The first cause of action, being barred by the statute of limitations, has been abandoned. The case was submitted to the district court upon an agreed statement of facts, and defendant recovered as to the other three causes of action. Plaintiff appeals.

The brief of plaintiff states that there is no substantial difference in the facts involved in the three causes under consideration, and that a statement of the facts in one will suffice for all. The second cause of action is therefore treated in the brief as the basis for the discussion of the whole case, and will be so treated by us. The motion for a new trial raised but one question, viz., whether the judgment of the court on the stipulated facts is correct, and that is the only question discussed here. It appears from the statement of facts that shortly prior to January 27, 1909, defendant purchased from the Falls City Lumber Company of Spokane, Washington, one car-load of white pine lumber, to be delivered by the Spokane company to defendant, at Elm Creek, Nebraska, at an agreed price; that at the time of the purchase the Spo-

kane company requested defendant to pay the amount charged by the railroad company for transportation of the lumber on its arrival at destination and deduct the charges so paid from the purchase price. On or about the date named, the Spokane company shipped the car from Troy, Idaho, *via* Silver Bow, Montana, to Elm Creek, but, instead of consigning it to defendant, it consigned it to itself, viz.: "Falls City Lumber Company, Elm Creek, Nebraska. Notify W. L. Stickel Lumber Company." The lumber was transported by plaintiff and the connecting carriers to Elm Creek, and on its arrival plaintiff presented to defendant a bill for the transportation charges, charging 46 cents per hundred pounds, for 50,500 pounds, amounting to $232.30, that amount and weight being the amount and weight shown and charged in the bill of lading and the freight bill presented by plaintiff to defendant. Thereupon defendant paid to plaintiff the sum named, being the full amount charged and claimed by plaintiff, and the lumber was then delivered to defendant. The weight of the lumber was correctly stated, but the tariffs, on file in the office of the interstate commerce commission, fixed the charge for the transportation of the car, by the route named, at the rate of 60 cents per hundred pounds, which would make the true amount, which plaintiff, under the federal law, would be compelled to charge for the shipment, $303. It is agreed that the tariffs and schedules fixing such rate had been published and filed with the interstate commerce commission, and were in full force and effect when the lumber was transported and delivered. Without knowledge that any larger freight rate than that charged in the freight bill and bill of lading was due to or claimed by plaintiff, defendant paid to the Spokane company, consignor, the full purchase price of the lumber, less the amount it had paid to plaintiff at the time of delivery. When, later on, plaintiff discovered the error which had been made in the rate charged, it demanded payment from defendant of the difference between 46 and 60 cents per

hundred. Upon payment being refused, this action was instituted.

The argument of plaintiff is that under the law, as it existed at the time, there was but one charge which a carrier in interstate commerce could lawfully collect, viz., the one fixed by the tariffs on file with the interstate commerce commission. This is conceded. That it is not only the right, but the duty, of plaintiff to collect the difference between the amount paid and the legal rate must also be conceded. The question here is: To whom must plaintiff first look for this balance? It is contended by plaintiff that, when the lumber was delivered to defendant, plaintiff parted with the lien which it had upon the lumber for its lawful charges, which raised an obligation in the form of an implied promise on the part of defendant to pay the freight charges in full; not the charge made by the freight bill, which was an unlawful charge, but the charge fixed by the tariffs. Cases are cited by plaintiff, and *Union P. R. Co. v. American Smelting & Refining Co.*, 202 Fed. 720, is liberally quoted from, to sustain its contention. The decision in that case was in the circuit court of appeals, eighth circuit. The opinion by Sanborn, J., is a strong and well-reasoned opinion, but the facts in that case and this are not the same. In that case the defendant was the consignee named in the bill of lading. The first paragraph of the syllabus shows that the bill of lading itself contained the stipulation, "The consignee or consignees paying freight." The holding of the court was that an implied contract by the consignee to pay the freight under a bill of lading containing such a stipulation, or any similar provision, arises from the acceptance by the consignee of the delivery of the goods under the bill, because the consignee knows that the carrier looks to him for the charges, and by delivery waives its lien therefor in the faith that the consignee will pay them. The difference between that case and the one at bar is this: In that case the goods were consigned to the defendant and contained the provision that the consignee

was to pay the freight; while in this case the lumber was not consigned to defendant, but was consigned by the Falls City Lumber Company to itself, and the bill of lading did not contain a stipulation that defendant was to pay the freight. Indeed, it made no reference to defendant as being in any manner liable for the payment thereof. The only reference to defendant contained in the bill of lading was, "Notify W. L. Stickel Lumber Company." There was nothing in this to indicate to plaintiff that defendant was the owner of the shipment, or in any manner interested in it except as agent for the consignee named in the bill of lading. We think, therefore, that the cited case is clearly distinguishable from the case at bar.

We have not overlooked *Texas & P. R. Co. v. Mugg,* 202 U. S. 242, and *Louisville & N. R. Co. v. Maxwell,* 237 U. S. 94. In the *Mugg* case the question involved was the right of the shipper of three car-loads of coal from Coal Hill, Arkansas, to Weatherford, Texas, at a rate previously quoted by the carrier, on which the shipper relied in contracting for the sale of the coal shipped, to compel delivery of the coal to the shipper at the point of destination upon payment of the quoted rate, which the carrier had, prior to the arrival of the coal at the point of destination, discovered was a lower rate than the interstate rate in effect at the time the shipment was made. The supreme court held that the shipper was not entitled to a delivery of the coal until payment of the interstate rate was made. The decision in that case was clearly right; but the case, it will be seen, deals only with the respective rights of the shipper and carrier. In the *Maxwell* case, Maxwell desired two round-trip passenger tickets from Nashville, Tennessee, to Salt Lake City, by one route, and a return by another. He purchased the tickets at the rate quoted, which proved to be $29.15 less, on each ticket, than the interstate rate, which it was conceded had been duly published and was in force at the time the tickets were purchased. Here, again, the case involved the rights of the original contracting parties, viz., the

passenger and the carrier. A reading of the syllabus, and of the opinion by Mr. Justice Hughes, shows that no other question was considered. The right of the carrier to collect the interstate rate, as duly fixed and published, was upheld. We are in entire harmony with the holding in these two cases; but they have no application to the case at bar. Here the right of the carrier to collect its full rate is not questioned. Nor would we question that right in a case brought by the carrier against either the consignor or consignee named in a bill of lading. In such a case both the consignor and consignee are parties to the contract of shipment, and, while the original contract may be between the carrier and the consignor, the bill of lading itself would advise the carrier that the consignee named in the bill of lading is the one who is entitled to the possession of the goods covered by the shipment; or, as stated in *Cornelius & Co. v. Central of Georgia R. Co.*, 69 So. (Ala.) 331, the railroad company would be "entitled to rely on the presumption that the consignee is the owner of the shipment." In the case at bar, defendant, as already shown, was neither the consignor nor consignee named in the bill of lading. There was nothing in the bill of lading to warrant the carrier in indulging a presumption that the title to the shipment had passed to defendant. So far as the record before us shows, the only presumption that plaintiff was entitled to indulge in this case was that the defendant would represent the consignor, who was also the consignee, when the shipment arrived at its destination. This would imply nothing more than that defendant in that respect would act as agent for the consignee in receiving the goods. We do not think that in such a case the agent would incur a primary liability for the payment of any freight beyond the amount that was demanded at the time it acted for its principal. It probably must be conceded that under the far-reaching scope of the act of congress the agent in such a case might be held to have incurred a secondary liability. Whether so or not, a question which we are not now

called upon to decide, the duty of the plaintiff in this case is to first exhaust its remedy against the consignor and consignee before it can proceed against defendant. This holding is in no manner in conflict with the act of congress, or the holding of the supreme court of the United States in construing such act; nor will it do any injustice to the plaintiff, as it can as well pursue its remedy, primarily, against the consignor, with whom it contracted, as to pursue a third party with whom it had no contractual relations, either actual or constructive. There is nothing in the agreed statement of facts showing that defendant was the owner of the lumber, or to the effect that the words, "Notify W. L. Stickel Lumber Company," would warrant plaintiff in presuming that the defendant was the owner or the actual consignee; and for us to so hold would be to extend the liability of defendant by construction, in order to furnish a basis for reversing the judgment. This an appellate court will not do. Upon the contrary, it will indulge the presumption that the parties have deliberately put into their agreed statement of facts everything necessary to support their respective contentions.

In the firm belief that we are acting in entire harmony with the views and the reported holdings of the supreme court of the United States, the judgment is

AFFIRMED.

HAMER, J., not sitting.

WILLIAM T. KUSEL V. STATE OF NEBRASKA.

FILED MARCH 18, 1916. No. 19012.

Assault: ASSISTANT PROSECUTOR: ARGUMENT: INSTRUCTIONS. Record examined and found free from prejudicial error.

ERROR to the district court for Dawes county: RALPH W. HOBART, JUDGE. *Affirmed.*

Dolezal & Johnson, for plaintiff in error.

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

FAWCETT, J.

Plaintiff in error, whom we will designate as defendant, was prosecuted in the district court for Dawes county, upon an information charging him with an assault upon one Ben Norman, with a "pistol," with intent to "wound and injure." He was found guilty of "assault" and sentenced to pay a fine of $50 and costs, from which he prosecutes error.

Defendant and Norman were driving loaded teams in opposite directions on the public highway. When they met an altercation arose in relation to "turning out." Defendant's wagon was loaded with baled hay, and the wagon of the other with coal. Defendant testified that Norman began throwing coal at him, and denied that he had any gun with him at the time. Other witnesses testified on the subject, but it is unnecessary to refer to their testimony, as there is no assignment of error on the ground of insufficiency of the evidence, and the brief concedes that defendant has not sufficient ground upon which to assail any of the rulings of the court in the admission or exclusion of evidence.

It is first urged that the information was defective by reason of the adding of the words "and injure" to the word "wound," in alleging the intent of the defendant in making the assault. We do not consider this objection serious enough to require extended discussion. It certainly was not prejudicial to defendant, as, if it had any effect at all, it was to minimize the intent of the defendant, as alleged in the information.

It is next urged that the court erred in permitting Mr. McDowell, a practicing attorney of the county, to assist in the prosecution. The appointment of Mr. McDowell was regularly made upon the motion of the county attorney. It was apparently satisfactory to defendant, as the

evidence preserved by a bill of exceptions settled on the hearing of the motion for a new trial shows without contradiction that, prior to the commencement of the trial, defendant requested the county attorney to take no part in the case himself, but to let Mr. McDowell conduct the entire prosecution. No objection was made to Mr. McDowell's acting in that capacity until after the jury had been impaneled and sworn. We think the assignment is without merit.

It is next urged that there was misconduct on the part of the county attorney in delaying the filing of the information until after the trial of two civil suits, in both of which defendant was a party and Norman figured as a witness. The bill of exceptions above referred to shows that the delay by the county attorney was at the request of defendant, who stated that the filing of the information and trial of the criminal case would prejudice him in the civil actions. He cannot complain of delay which he requested.

Misconduct on the part of Mr. McDowell in making his closing argument, in stating that certain witnesses, whose names appeared on the information, had been spirited away, is urged as error. The record of the trial does not show the making of any such statement by Mr. McDowell. It appears in the bill of exceptions above referred to. The charge is there made by affidavits filed by defendant and his counsel, which affidavits are met by a counter affidavit filed by the county attorney. In the affidavits filed by defendant and his attorney, they both state that, when Mr. McDowell made the statements complained of in his argument, defendant's counsel objected, and the trial court sustained his objection. The county attorney in his affidavit goes further, and states that the court not only sustained defendant's objection, but cautioned the jury that statements made by counsel were not evidence and should be disregarded by them. This contention must therefore fail.

It is next complained that the court erred in giving instruction No. 3. This instruction was the one in which the jury were advised as to the material allegations in the information. The complaint is that the court used the words "wound and injure" as they were used in the information. There was no prejudicial error in this.

It is next urged that the court erred in refusing to give instructions 5 and 7, requested by the defendant. Everything in these two instructions proper to be given to the jury was given in instructions 6, 12 and 13, given by the court on its own motion.

We are unable to find any prejudicial error in the record.

AFFIRMED.

SEDGWICK, J., not sitting.

ARTHUR B. BISHOP, APPELLEE, V. L. D. SPAULDING ET AL., APPELLANTS.

FILED MARCH 18, 1916. No. 18498.

1. **Forcible Entry and Detainer:** COMPLAINT: DESCRIPTION OF PREMISES. By section 8470, Rev. St. 1913, the complaint before a justice of the peace in forcible entry and detainer must "particularly describe the premises," and without such complaint the justice has no jursidiction to proceed in the action.

2. ———: ———: ———. If the description in the complaint identifies the premises so that an officer with the writ of restitution which contains the same description can ascertain from the writ the property intended, it is sufficient to give the justice jurisdiction.

3. ———: ———: ———: COLLATERAL ATTACK. A complaint in forcible entry and detainer which alleges that the defendant is in possession of the premises described as "S. W. corner Avenue H and 21st street, East Omaha, Douglas county, Nebraska," is not void for uncertainty. If the evidence shows the defendant to be the tenant of the plaintiff, and that he has no written lease, and that the premises "always went by" the description given in the

complaint, the proceedings before the justice will not, in a collateral attack, be held void for the alleged insufficiency of the description in the complaint.

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

Stout, Rose & Wells and *Daniel L. Johnson,* for appellants.

John O. Yeiser, contra.

SEDGWICK, J.

It appears that this plaintiff had occupied premises belonging to the defendant company, and in June, 1913, the company began an action in justice court in forcible entry and detainer to recover possession of the premises. Such proceedings were had before the justice that a writ of restitution was issued by the justice and placed in the hands of Hensel, a constable, who removed the plaintiff and his family from the premises. Afterwards the plaintiff began this action in the district court for Douglas county against the constable and the company, his former landlord, and Spaulding, the company's agent, and certain other defendants, alleging a conspiracy to wrongfully remove him from the premises and to do other wrongs. The case was tried by a jury, and the plaintiff recovered a verdict and judgment against the company and its agent, Spaulding, for damages. The defendants have appealed.

The court at the commencement of the trial announced that, if the proceeding before the justice "was legal and lawful, that ends this lawsuit." Although the plaintiff was allowed to put in a mass of evidence which had no bearing upon the legality of the proceeding before the justice, the court disposed of the case upon that issue, held the justice's proceedings void, and instructed the jury to find a verdict for the plaintiff, and submitted only the question of damages.

After the complaint in forcible entry and detainer before the justice was put in evidence, the court excluded

all other evidence of the proceedings, on the objection that the complaint was void because it did not particularly describe the premises. The complaint alleged that the defendant (plaintiff in this suit) entered upon the premises as tenant of the undersigned; "that the said defendant has ever since the 20th day of May, 1913, and does still, unlawfully and forcibly detain from the undersigned possession of the following premises, situated in the county of Douglas, and state of Nebraska, and described as follows, to wit: S. W. corner Avenue H and 21st St., East Omaha, Douglas county, Nebraska." The transcript shows that the defendant therein appeared before the justice, obtained a continuance, and at the trial objected that the "description was insufficient." This objection was overruled, and he excepted. He filed a bond for appeal from the judgment of restitution, and, one of his sureties having withdrawn from the bond, the bond was not approved. Instead of perfecting his appeal, he brought this action.

The cases that have considered the sufficiency of the description of the demanded premises in actions of this kind are almost innumerable. Very many are cited in the briefs. In several of the states the statute is identical with ours, which provides:

"The summons shall not issue until the plaintiff shall have filed his complaint in writing with the justice, which shall particularly describe the premises so entered upon or detained, and shall set forth either an unlawful and forcible entry and detention, or an unlawful and forcible detention after a peaceful or lawful entry of the described premises. The complaint shall be copied into and made a part of the record." Rev. St. 1913, sec. 8470.

The conclusion of the courts generally is that in such actions the description must be such as to so identify the property demanded that the officer with a writ of restitution can ascertain from the writ itself the property intended. The description is jurisdictional, and, unless the complaint sufficiently describes the property, the justice

will be without jurisdiction and his subsequent proceedings therein void. Does this complaint sufficiently describe the property within the above rule?

In *Grant v. Marshall,* 12 Neb. 488, the complaint described a lot in Lincoln. It appeared that the defendant was in possession only of "a small room in the basement" of the building on the lot described. The court held the description sufficient, no objection having been made before the trial court. If there had been no sufficient description to give the justice jurisdiction, there would, of course, be no jurisdiction upon appeal, and the judgment of the district court would have been reversed. This, then, was a holding that such complaint was sufficient so that the justice had jurisdiction.

In *Cummings v. Winters,* 19 Neb. 719, the description was: "The N. E. ¼ of section 28, T. 7, R. 7." The court said: "The description certainly is sufficiently definite to enable any person familiar with the mode of numbering the different subdivisions of land adopted by the government to identify the premises, and this is sufficient, independently of the further statement of occupation by the defendant."

This is also held in *Devine v. Burleson,* 35 Neb. 238, in which the court said: "The premises could be established and identified by a competent surveyor without difficulty."

Under a statute which required that a complaint be filed "specifying" the land, etc., the supreme court of New Jersey held that the following description was sufficient: "The messuage or storehouse and buildings of Lulu Crossman and Charles E. Crossman, and the lot of land whereon the same is located, being fifteen feet by thirty-two feet, situate in the township of Neptune, county of Monmouth, and state of New Jersey, on the south side and edge of the south branch of Great Pond, and a short distance westward of the west line of Central avenue, which runs from Asbury avenue in West Park to said Great Pond." The court said: "Great technical nicety

is not required in the complaint, or in other proceeding in suits for forcible entry and detainer." *O'Hagan v. Crossman,* 50 N. J. Law, 516.

The same court held that "The westerly portion of the building known as 'Newings Hotel,' situate on Broadway, Long Branch City, in the county of Monmouth," was a sufficient description. *Newing v. Stilwell,* 67 N. J. Law, 96.

A complaint in forcible entry and detainer described the land, "known as the Peninsula, 'Punta del Potrero,'" and the supreme court of California held: "Where a declaration describes land by a certain name, this is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by evidence. The fact that a Spanish name can be translated into English so as to mean nothing does not alter or affect its potency as a name descriptive of a place." *Castro v. Gill,* 5 Cal. 40.

That court has decided the precise point involved in this case. The description considered was a certain building "on the southwesterly line of California and Larkin streets," in San Francisco. The court said: "It is plain that the description of the premises is marred by a mere clerical error, and, if we substitute the word 'corner' for 'line,' we have a correct description of the premises involved. That the parties intended the word 'line' to be 'corner' is too plain to need argument; for the description, when read as a whole, shows the fact to be that the premises dealt with by the parties are situated on two streets, Larkin and California, and on the southwest corner thereof." *Olcovich v. Deremberg,* 27 Cal. App. 194.

If we substitute the word "corner" for "line" in that case, we have precisely the description we are now considering, which that court holds is "a correct description of the premises." The plaintiff himself testified that he had no written lease, and that "Twenty-first and Avenue H, that is the number it always went by." It seems clear that the premises in dispute might be identified from the allegation in the complaint, and that the justice of the

peace had jurisdiction to determine who was entitled to possession.

The plaintiff says in the brief: "The defendants were advised of their want of authority and were urged not to proceed, but chose to consider appellee and his family more as animals than as human beings; and, thinking laws were made only to be obeyed and respected by the poor and to be ignored by the opulent, they put them out of their home at any cost."

The action of forcible entry and detainer before a justice of the peace is the most simple and inexpensive form of action for such purpose that the law affords. It should not be used to harrass "the poor," nor to give any advantage to "the opulent." It clearly was not so intended by the legislature. If a still more simple and inexpensive method for adjusting the rights of those not desiring, nor prepared for, litigation can be devised, or if justice requires that the public shall assume the defense of those who for any reason are unable to defend themselves, the attention of the legislature should be drawn to the matter. The remedy of an independent action of this nature in the district court does not seem to be less complicated or less expensive than the action before the justice of the peace, even if an appeal from the decision of the justice is found to be necessary. At all events, the statute as it now is intends that, if the proceedings are sufficient to confer jurisdiction upon the justice of the peace, the decision of the justice is the final determination of the right of possession, unless those proceedings are removed to the district court for review. The theory of the law is that one suit must determine which party is entitled to possession. We cannot ignore in this collateral proceeding the judgment of the justice of the peace. It follows that the district court erred in excluding the record of that judgment.

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

REVERSED.

ROSE, J., not sitting.

MILDRED HAMILTON ET AL., APPELLEES, V. NORTH AMERICAN ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED MARCH 18, 1916. No. 18560.

1. **Appeal:** AFFIRMANCE: INSTRUCTED VERDICT. Upon a jury trial in district court, if each party asks an instructed verdict in his favor, the decision of the court for plaintiff will be sustained if a verdict could be sustained for plaintiff upon the evidence with proper instructions.
2. **Insurance:** POLICY: CONSTRUCTION. The word "dwelling" alone is not commonly used with exactly the same meaning as the words "dwelling house." As that word is used in the policy in suit, under the circumstances in which the insured was placed, it is capable of being understood to mean, "home or place of habitation." If the insured did so understand and the insurer had reason to suppose she so understood it, that meaning must prevail. Rev. St. 1913, sec. 7909.
3. **Appeal:** AFFIRMANCE. In this case it is not so clear that the trial court was wrong in so construing the evidence as to require a reversal.

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

H. E. Goodall, Edward St. Clair and *H. A. Dano*, for appellant.

Wilcox & Halligan, Flickinger & Powell and *L. A. De Voe, contra.*

SEDGWICK, J.

These plaintiffs, Mildred Hamilton and Clarence Hamilton, minors, by their guardian, I. N. Flickinger, recovered a judgment in the district court for Keith county against the defendant on an insurance policy, and the defendant has appealed.

The policy was issued to the mother of these minors, and provided: "Two thousand dollars for loss of life occurring within 30 days from date of the event causing the

fatal injury, provided the assured shall sustain exclusively by the means hereinafter stated, bodily injuries, effected solely by external, violent and accidental means, and which, independently of all other causes, shall be immediately, continuously and wholly disabling, and which shall be the sole and exclusive cause of the death of the assured within the time limit of this paragraph, as follows." Then follow twelve provisions purporting to limit the liability on the policy, the fourth being:

"By the burning of a dwelling, hotel, theater, clubhouse, lodge room, school building, office building, store or barn, in which the assured may be burned by fire or suffocated by smoke, but this shall not apply to or cover the assured while acting as a volunteer or paid fireman."

The insured was a widow, who was supporting and educating, largely by her own efforts, these two young children. The evidence is that she was attempting to extinguish fire which had burned some rubbish in the rear of her dwelling house in the village of Ogallala, and while attempting to stamp out the smouldering fire her clothing became ignited. She ran to a neighboring house, and there the burning of her clothing was extinguished, and she was carried to her own house, where within a few hours she died from the effects of the burns. One witness who, from a distance of "about a block," saw the clothing of the deceased take fire, was asked: "Q. Was this fire on her own lot? A. I should think it would be in the street, but I don't know." She was also asked: "Q. Where was that fire? A. Right north of the fence around her yard; between that and the road. * * * Q. State what she was doing. A. She had burned off the weeds and grass, and there was a little cinders that was burning, and she was walking on that and tramping it out with her feet, so that the blaze wouldn't blow over into her buildings." The defendant contends that this evidence shows that the accident happened in the street, and not on her premises. The parties each asked for an instructed verdict, and the court directed a verdict for

plaintiffs. Under the oft-announced rule, we must sustain the decision of the court if a verdict for the plaintiffs could be sustained upon the evidence with proper instructions. That is, all issues of fact will be considered as found in favor of the decision, and those findings upon conflicting evidence will not be disturbed unless clearly wrong. Within this rule it will, if necessary to support the judgment, be considered that the court found that the accident occurred upon the premises of the deceased, and such finding is not so unsupported that we can say that it is clearly wrong. It is conceded that the injury was "effected solely by external, violent and accidental means," and was within the terms of the policy, unless excluded by the limiting clause. The defendant contends that paragraph 4 of the limiting clause above quoted applies directly and precludes a recovery on the policy. The plaintiffs point out that if the 12 limiting articles are construed as defendant contends, the result is that the deceased, under the circumstances in which she was placed at the time of procuring the insurance, had practically no indemnity by the policy of which her children could avail themselves in the event of her accidental death, so that with such a construction of the policy she paid her premium practically without consideration. It is substantially alleged in the reply, which is without objection treated as alleging a substantial issue in the case, that the deceased understood when she bought the policy that her children were protected by the policy against any fatal accident that might happen to her while she was at her home; that the defendant company knew that she so understood the policy and purposely led her to rely upon the insurance with that meaning. The word "dwelling" alone is not commonly used with exactly the same meaning as the words "dwelling house." Webster's New International Dictionary defines "dwelling," as "habitation; place or house in which a person lives." The words "dwelling house" are given a much more restricted meaning. The trial court was asked to find that

this insurance company took the money of this woman and gave her a policy in which it agreed to pay her children "two thousand dollars for loss of life occurring within 30 days from date of the event causing the fatal injury," and then followed that agreement with a long list of provisions of such a nature as to practically deprive the children of any protection whatever. The trial court considered that the use of the word "dwelling" instead of the expression "dwelling house" might reasonably be understood by the insured to include her "habitation" or home place, that the insurer had reason to believe that she did so understand it, and that section 7909, Rev. St. 1913, applies: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

Under the peculiar circumstances of this case, we cannot say that the trial court was wrong, and the judgment is

AFFIRMED.

MITCHELL S. MCININCH, APPELLEE, V. AUBURN MUTUAL LIGHTING & POWER COMPANY, APPELLANT.

FILED MARCH 18, 1916. No. 18764.

Electricity: FRANCHISE: METER RENTALS. Where the city of Auburn, Nebraska, passed an ordinance permitting an electric lighting and power company to install and maintain a lighting plant in said city for the use of the same and the citizens thereof, and by the terms and conditions of said ordinance, which the company accepted, it was to furnish a meter for the use of each of the consumers to measure the electricity furnished by said company, and while the rate at which the light should be furnished was set forth in the ordinance, there was no provision in the ordinance to the effect that any rental should be charged for the use of said meter, it will be considered that the meter should be furnished by the company to the consumer free of charge and as a necessary part of the equipment of the company's plant.

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

Neal & Armstrong and *H. A. Lambert,* for appellant.

McInnich & Rankin, contra.

HAMER, J.

This is an appeal from a judgment of the district court for Nemaha county. It is alleged by the plaintiff, and appellee, that he brings this case in his own right and at the instance of numerous citizens of Auburn for the purpose of procuring a judicial construction of section 5, of Ordinance No. 189, of the Revised Ordinances of the city of Auburn, and to settle a controversy between the citizens of Auburn and the defendant company; that the plaintiff brought the action while he was city attorney for said city of Auburn. The plaintiff alleges that the defendant, the Auburn Mutual Lighting & Power Company, is a corporation organized for the purpose of furnishing electric light and power to the said city of Auburn and to the inhabitants thereof, and that it has its principal place of business in said city; that the city of Auburn is a municipal corporation organized under the laws of Nebraska as a city of the second class, and being in the county of Nemaha, and state of Nebraska; that the plaintiff is a resident and citizen of said city, and patron of the defendant company; that on the 12th day of July, 1901, said city passed and approved Ordinance No. 189, authorizing and empowering said defendant company to furnish electric light and power to said city and to the citizens thereof under the provisions and according to the terms of said ordinance, a copy of which is attached to the petition and made a part thereof; that on the 1st day of August, 1901, the said company filed with the city clerk of said city of Auburn its acceptance of the terms and provisions of said Ordinance No. 189; a copy of said acceptance is also attached to the plaintiff's petition; that at the request of the plaintiff said company caused to be

placed on the premises of the plaintiff's landlord, and for the use of plaintiff in measuring the amount of electricity consumed by him, a meter, which said meter ever since the placing of the same has been used by the plaintiff for measuring the electricity consumed by him for lighting purposes in his office at Auburn; that said meter was in use by the plaintiff in measuring the electricity so consumed by him for light during the months of October, November and December, 1913; that on the 2d day of January, 1914, said defendant company by its manager, E. E. Elliott, demanded of the plaintiff the sum of 25 cents a month for the use of said meter for said months of October, November and December, 1913, or the sum of 75 cents for said services in payment of rental for the use of said meter, which demand the plaintiff refused, and continues to refuse, to pay; that, because of such refusal, the said Elliott, acting on behalf of said company, threatens to, and is about to, take out and remove said meter, and will deprive the plaintiff of the use of the same or any means of measuring the electricity consumed, thus causing great and irreparable injury; that, unless said defendant is restrained from removing said meter, it will remove and take the same away from the plaintiff, and will deprive the plaintiff of light in his office, to his great and irreparable injury; that said action on the part of said defendant in collecting, and attempting to collect, rent for said meter is in violation of, and in conflict with, the terms and provisions of said ordinance. The plaintiff prays for a temporary order of injunction restraining the defendant from removing said meter until final hearing of this cause, and then that the injunction heretofore granted shall be made perpetual, and that the plaintiff may recover his costs.

The part of the ordinance relating to the subject under consideration reads: "Section 5. The rates charged to consumers of light or power shall be such as to enable said company to pay such part of costs of construction as may not be covered by sale of stock, its organizing expenses,

the cost of maintaining its light and power system, and an annual dividend to its stockholders of not more than 12 per cent., under the condition that the said electric light and power company shall charge subscribers for lights not to exceed 75 cents per month for all night service or 55 cents per month for midnight service, per sixteen candle power; or when sold on the meter basis, not to exceed 15 cents per thousand watts, and it shall be compulsory upon said electric light and power company to put in electric meters when required by patrons of said company. The city of Auburn shall not be charged a higher rate for either light or power than the rate charged private citizens."

Application was made to the county judge, who granted a restraining order enjoining the defendant from removing the meter described in the petition, upon the plaintiff executing an undertaking in the sum of $50. The record shows that the understanding was executed and approved, and subsequently that there was a motion made before the district court to dissolve the restraining order, and that the motion was overruled.

The defendant answered that the petition did not state facts sufficient to constitute a cause of action, and admitted the passage and approval of the ordinance; also admitted that at the request of the plaintiff it installed a meter for the plaintiff for the use of electricity for lighting purposes; and that it did on or about the 2d day of January, 1914, threaten to remove said meter because said plaintiff refused to pay a reasonable charge for meter rental, but denied that such charge was in conflict with or in violation of said ordinance. The answer further alleges that shortly after the passage of the ordinance, and about the time that the defendant entered upon the business of furnishing electricity for light and other purposes, it adopted and promulgated a rule wherein it required patrons who desired electricity furnished them by meter to deposit the sum of $12 to cover the cost of putting in and establishing an electric meter for said

purpose, or, where said deposit was not made, said rule required the patron taking electricity by meter measurement to pay the sum of 25 cents a month as meter rent; that said rule was just and reasonable, and that the meter rent charged was no more than sufficient to pay reasonable interest upon the money expended for purchasing and installing a meter and the cost of reading, inspecting and caring for the same; that the plaintiff for many years had been a patron of the defendant, and had knowledge of the said rule long previous to the time he requested the defendant to install the meter mentioned in the petition; that several years before said time the defendant had installed in the plaintiff's residence a meter, and at said time notified the plaintiff of the said rule, and the plaintiff at that time elected to, and did, make the deposit mentioned; that, after the meter mentioned in the petition was placed and installed for the plaintiff, the plaintiff for seven months paid said 25 cents a month as rental, and when he requested and had said meter put in he knew of said rule, and by said request agreed with this defendant to pay said rental; that at the time of the approval of said ordinance and the acceptance of the same by the defendant, there existed a usage throughout the state of Nebraska in cities of the class of Auburn having electric light plants that, in addition to the charge made for the electricity furnished, the lighting company did make a reasonable charge per month as rent for meters, and that this usage generally prevailed and was well known to the parties to said contract at the time the same was made; that it was contemplated at the time of making said contract that the defendant would have the right to make a reasonable charge as rent for meters or to require a deposit therefor; that this charge should be in addition to the sum charged for electricity furnished.

The plaintiff filed a reply. On the 28th of April, 1914, the court rendered its judgment finding for the plaintiff and against the defendant. The facts alleged by the plaintiff in his petition were found to be true, and the

court held that the effort of the defendant to collect rental for the use of the meter was in violation of the said Ordinance No. 189, and rendered a judgment in favor of the plaintiff. The court specifically found that the rule of the company requiring the deposit of a certain sum of money in place of the meter was a violation of the ordinance.

The plaintiff, McIninch, testified that he had no other means of measuring the electricity to be consumed for the purpose of lighting his office except this particular meter, which the defendant threatened to remove unless the plaintiff paid the rental demanded; that his office was his place of business, and that he had no other means of lighting his office except by electricity; that he was frequently required to be in his office at night and to use the lights, and without the lights he would be greatly damaged, and without the meter he would have no means of ascertaining how much electricity was consumed; that Mr. Elliott, representing the defendant company, called at his office and demanded that he pay the rental charge, and stated that, if he did not do so, he would take the meter away and deprive him of the use of it. Elliott also stated at the same time that he had taken out the meter of Mr. William B. Smith, a patron of the company at Auburn. McInirich also objected because, if the meter should be taken out, it would deprive him of the meter rate and would increase his electric light bill; that without the meter he could not have the benefit of the meter rate.

Evidence was introduced which tended to show that in some of the towns where there is electric light there is a custom to charge for the use of the meter. Whatever the custom may be in certain towns in the state, the ordinance only contemplates a charge for the electricity used. The ordinance fixes the maximum rate that the defendant can charge for the use of electricity at 15 cents per 1,000 watts. The provision concerning the putting in of meters reads: "And it shall be compulsory upon said

electric light and power company to put in electric meters when required by patrons of said company." So far as we can see, the defendant was obliged to put in the meters when requested to do so. It was a burden which the defendant assumed when the ordinance was passed and it accepted it. The plaintiff requested defendant to put in the meter.

In *Smith v. Birmingham Water Works Co.*, 104 Ala. 315, 325, there was an action to enjoin a private water company from cutting off the plaintiff's water supply and from removing a meter. The court, among other things, said: "In all cases where the defendant has the right to charge for water by measurement, and demand pay for water furnished, it is incumbent on the respondent to furnish meters." The court said the fact that the water company had the right to charge and collect by measurement fixed the matter of furnishing the meter, and the company had to do it.

When the article sold is sold by measurement, the only practicable way in which to ascertain the quantity sold is by the use of a meter. This would imply that the meter is part of the necessary equipment of the company.

In *Albert v. Davis,* 49 Neb. 579, it was held, in substance, that a grant of power to fix and collect charges for the use of water meters excludes by implication the power to compel consumers to furnish their own meter.

In *Spring Valley Water Works v. City and County of San Francisco,* 82 Cal. 286, 6 L. R. A. 756, 16 Am. St. Rep. 116, it was held that an ordinance requiring that the corporation furnishing water shall provide the means necessary for its measurement is not an unreasonable regulation. The court added that the expense of the meter could not be imposed on the consumer. The ordinance provided: "All persons owning or occupying houses used for any purpose shall have the right to determine whether they shall receive and pay for water supply under the meter rates, and on notification to the person, company or corporation so supplying water, to furnish and place a

meter within a period of thirty days to register the water supply, and thereafter shall charge only for the water so used;" etc.

The ordinance, together with the report of the California case cited above, including the opinion of its supreme court, may be found in Municipal Reports of San Francisco, 1888-1889, page 242, and on page 268 of said report, at paragraph 4, is the language of the court in construing the section of the ordinance quoted. There is cited in support thereof *Red Star Steamship Co. v. Jersey City,* 45 N. J. Law, 246.

An electric light plant in the position of the defendant in this case becomes a public service corporation whenever the ordinance is passed and its terms are accepted. There seems to be no provision in the ordinance that the company has any authority to collect for the use of meters or to demand a deposit in place of the meter. We cannot add to the conditions of the contract.

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

AFFIRMED.

SEDGWICK, J., not sitting.

ETTA GIFFIN, APPELLANT, V. GRAND LODGE, A. O. U. W., ET AL., APPELLEES.

FILED MARCH 18, 1916. No. 18656.

1. **Insurance:** BENEFICIARY: DIVORCEE. A wife named as beneficiary in a fraternal benefit certificate, who thereafter procures an absolute divorce, without accruing alimony, forfeits her rights to such benefits where the law of the state or the by-laws of the society restrict the payment of its benefits to the families, heirs, blood relations, affianced wife, or persons dependent upon the member.
2. **Interpleader:** ACTION ON BENEFIT CERTIFICATE. The act of a fraternal society in filing a bill of interpleader to determine conflicting claims is proper, and cannot prejudice the rights of claimants, when the same are fixed by law.

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

Thomas F. Hamer and *J. M. Easterling,* for appellant.

H. M. Sinclair and *W. D. Oldham, contra.*

MARTIN, C.

Thomas Coppinger was a member in good standing of the Grand Lodge of Ancient Order of United Workmen, a fraternal insurance society, organized under the laws of this state. On the 25th day of June, 1901, the society through its subordinate lodge at Gibbon, Nebraska, issued to him a certificate for $1,000, wherein the plaintiff, then his wife, was named as beneficiary. On August 25, 1912, the plaintiff obtained an absolute divorce from said Thomas Coppinger, and on the 4th day of March, 1913, said Coppinger died. No change of beneficiary was made in the benefit certificate after the plaintiff procured her divorce. She brought this action against the society to recover the amount of the benefit certificate. The defendant society paid the amount of this benefit certificate into court on an order of interpleader granted on its own showing and motion. The interpleaded defendants are the sisters and brother of said Thomas Coppinger, deceased. The interpleaded defendants had judgment for the amount of the benefit certificate less the sum of $130.40, which it was shown that plaintiff had paid as dues upon the said certificate. The plaintiff was allowed an equitable lien upon the benefit certificate fund for the amount expended by her in keeping the benefit certificate in force. From that decision the plaintiff is here on appeal.

Thus it appears that the controversy here is between the divorced wife and the heirs of the insured. The contract of the parties is made up of the benefit certificate, the by-laws and constitution of the society, and the laws of the state under which said society is organized. Authorities need not be cited to the point that all these are elements which constitute the contract as a whole. The insured and the insuring society are alike bound by

them. Nor need cases be presented to support the well-established proposition that in benefit societies the beneficiary at the time of the issuance of the certificate acquires no vested interest therein, but that the same is simply an expectancy.

Section 96 of the laws of said society is as follows: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance be one or more members of his family or some one related to him by blood, or his affianced wife."

This section was strictly complied with by the designation of the member's wife as his beneficiary. Under the doctrine laid down by some of the authorities that a designation of beneficiary valid in its inception remains so, we might be called upon to reverse this case, if it were not for the laws of said society and the statutory law of the state relating to such subject. Section 98 of the laws of said society provides that, if the beneficiary named in the certificate shall die during the lifetime of the member and the member shall have made no other direction, the benefit shall be paid to his widow, and, in case he leaves no widow surviving him, then said benefit shall be paid to his children or blood relatives, etc. It is argued that the only contingency provided for in this section is the death of the beneficiary during the life of the member, and that divorce is not death. This section fixes the order of payment, and it should be construed in a way to effectuate the intention of the society. When the law severs the bonds of matrimony, the relationship of husband and wife is broken as effectually as if death had removed one of the parties.

Section 3298, Rev. St. 1913, is as follows: "Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member."

Said sections of the society are clearly a limitation upon the insured, and require him to designate as his benefi-

ciary some one related to him as in the said sections provided, and to whom the beneficiary fund due at his death shall, and can, be paid. These provisions of the society's laws and the section of the state law referred to are a prohibition against the payment of any certificate by the society to any person who does not belong to those classes or bear such relationship to the insured at the time of his death. A former wife who secured an absolute divorce from the insured without accruing alimony does not come within such classes or bear such relationship, consequently she is not qualified or eligible to receive benefits from this society.

"A person who is not eligible as a beneficiary under the statute is not entitled to the fund even though named as beneficiary, and in such case the heirs of the deceased member are entitled to the fund." *Grand Lodge, A. O. U. W., v. Ehlman,* 246 Ill. 555.

It is evident from the laws of this order that its object is to provide benefits for the families or dependent ones of its members. To permit such benefits to be paid to persons who do not sustain the prescribed relationship to the insured at the time of his death would surely thwart the purpose of the organization. *Kirkpatrick v. Modern Woodman of America,* 103 Ill. App. 468; *Green v. Green,* 147 Ky. 608, 39 L. R. A. n. s. 370; *Green v. Knights & Ladies of Security,* 147 Ky. 614; *Knights of Columbus v. Rowe,* 70 Conn. 545; *Larkin v. Knights of Columbus,* 188 Mass. 22.

In the case of *Dunmore v. Modern Woodmen of America,* No. 18598 (decided by commission and findings of fact journalized but not published) we held that a "wife named as beneficiary in a fraternal benefit certificate, who thereafter procures an absolute divorce, forfeits her rights to such benefits where the by-laws of the society restrict the payment of its benefits to the wife, surviving child, heir, blood relative, or person dependent upon, or member of the family of the insured, at the time of his death." In the foregoing case the by-laws of the society

restricted payment to persons sustaining certain relationships to the insured, whereas in the instant case the statute makes such restriction.

Under the prohibition of the statute, the divorce obtained by the plaintiff from the insured operated to revoke the designation of her as a beneficiary in the certificate, and to substitute in her place those next specified under the by-laws of the order and the law of the state, which persons in this case are the interpleaded defendants.

The contention on the part of the plaintiff that objection to the ineligibility of the beneficiary named in the benefit certificate can be raised by the society alone is not in accord with the better reasoned cases, as we view them. The society simply pays the money into court on the order of the court, and asks to be relieved from litigating, as between two sets of claimants. The aid of the court is invoked to determine which of the claimants is entitled to the fund. This we understand to be a proper case for interpleader. The statute of this state prohibiting payment to anyone not belonging to the classes therein designated fixes the rights of the parties. This being true, claimants in good faith under the laws of the state and those of the society cannot be prejudiced by the act of the society in asking the court to determine their rights.

"The fact that the beneficiary named in a certificate is not eligible is not an objection such as the society alone can raise, as the rights of the parties are fixed by law and are not affected by the action of the society in filing a bill of interpleader to determine conflicting claims." *Grand Lodge, A. O. U. W., v. Ehlman,* 246 Ill. 555; *Supreme Council of Royal Arcanum v. McKnight,* 238 Ill. 349. It follows that the judgment should be affirmed.

BY THE COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

LUCY G. REESE ET AL., APPELLANTS, V. CITY OF LINCOLN, APPELLEE.

FILED APRIL 1, 1916. No. 18523.

Municipal Corporations: LIABILITY: ACTS OF OFFICERS. Where a property owner, or a person contemplating the purchase of property, within a city, visits the office of the city engineer, who is the custodian of the maps, plans and surveys of the city, for the purpose of ascertaining the cut to be made in grading the street in front of the property, but does not understand the technical language and method of making the records, and thereupon requests and receives the advice and assistance of the engineer in an interpretation thereof, the engineer in giving such assistance and interpretation, in the absence of ordinance or statute making it his duty to do so, acts outside the scope of his duties, and the city is not liable for damages sustained because of any erroneous information given by the engineer under such circumstances.

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

Wilmer B. Comstock, for appellants.

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

MORRISSEY, C. J.

This is an action to recover $2,500 for damages to plaintiffs' property at Twentieth and C streets, Lincoln, alleged to have been caused by the grading of C street. The petition, in substance, alleges that before purchasing the property plaintiffs went to the office of the city engineer and informed him of their intention to purchase the property, provided that the grades of the streets adjacent thereto were not lowered so as to materially injure the property; that the city engineer exhibited the maps, plans and sketches pertaining to C street, but was informed by plaintiffs that they could not determine therefrom to what extent C street would be lowered from the natural grade;

that thereupon the city engineer informed plaintiffs that C street would not be excavated to a greater depth than 18 inches in front of the property; that, relying upon such information, plaintiffs purchased the property and made improvements thereon of the value of $15,000; that prior to the injury complained of the property was worth $25,000; that subsequently and before signing the petition for paving C street, plaintiffs again inquired at the office of the city engineer for information as to the depth C street would be excavated; that they were shown the maps, sketches and plans; that they informed the city engineer that they could not determine therefrom the information they desired; that thereupon the city engineer informed plaintiffs that the finished surface of the pavement in front of their premises on C street would not be more than 14 inches lower than the natural surface of plaintiffs' lots; that to further explain the matter the city engineer caused stakes to be set on C street showing where the finished pavement would be; that, being unable to determine from such maps, plans and sketches to what extent the street would be excavated, plaintiffs relied upon the information furnished by the city engineer and signed the petition for paving; that "thereafter defendant negligently and unlawfully, and in fraud of plaintiffs' right, changed the grade of C street between Nineteenth and Twentieth streets, and in front of plaintiffs' lots, and, contrary to the representations aforesaid, defendant cut said C street in front of plaintiffs' lots to a depth of about * * * four feet below the natural surface of said lots;" that plaintiffs' property was thereby rendered unsightly and unattractive and difficult of access from C street, and its value was permanently lessened, to plaintiffs' damage in the sum of $2,500; that plaintiffs filed their claim for damages within the time required by law. Defendant demurred to the petition. From an order sustaining the demurrer and dismissing the action, plaintiffs have appealed.

The principal question presented is whether a city is liable in damages for an error of the city engineer in ex-

plaining to a lot owner the municipal plan and public profile for the grading and paving of an abutting street. The argument in support of municipal liability is that the making and improving of streets is a corporate function; that the city engineer has the duty of making plans and profiles of the established street grades, and has the custody of the same in his office, and that in improving the street he is acting for the city in its corporate capacity. The argument is not conclusive. It may be granted that in the performance of a corporate duty the doctrine of *respondeat superior* applies to municipal corporations, but to render the master liable for the negligence of the servant the latter must have been acting within the scope of his duties. Was the city engineer acting in the performance of his duties to the municipality, or was he performing an act outside of his duties, when he gave plaintiffs information regarding the established street grade in front of their property. The city charter prescribed the duties of the city engineer:

"The city engineer shall make record of minutes of his survey and of all work done in his department for the city, * * * and accurately make such plats, sections, profiles, maps, plans, details and specifications necessary in the prosecution of any public work, all of which shall be public records and shall belong to the city, and shall be turned over to his successors." Rev. St. 1913, sec. 4500.

"The city engineer shall * * * make all surveys, estimates and calculations necessary to be made for the establishment of grades, * * * and perform such other duties as the council may require. Before the council shall * * * enter into any contract for * * * any work or improvement to cost over two hundred dollars, he shall make and submit to the council an estimate of the total cost thereof, together with detailed plans and specifications, and, if approved by the council, such plans and specifications shall be returned to the city engineer and kept subject to public inspection." Rev. St. 1913, sec. 4501.

It will be presumed the legislature knew that engineers in making "plats, sections, profiles, maps, plans, details and specifications" perform their duties according to technical rules and methods of their profession, and that technical representations may not be understood by the public in general. The statute has imposed no duty upon the city or the city engineer to explain them to the public. While they become part of the public records of the city and are to be kept subject to public inspection, no duty is imposed upon the city or city engineer to give information as to their contents. In giving such information the city engineer acted outside the scope of his duties. He was acting for the plaintiffs, and not for the defendant.

In *Waller v. City of Dubuque,* 69 Ia. 541, it was held: "A city is not liable for the negligence or want of skill of its civil engineer in the performance of a duty the benefit of which is to accrue solely to an individual, and not to the city in its corporate capacity; and so the defendant city is not liable for the mistake of its engineer in incorrectly informing the plaintiff as to the established grade of the street adjacent to his lot, though an ordinance of the city made it his duty to give such information, for a named fee to be paid by the person desiring it." This rule is followed in *Sargent v. City of Tacoma,* 10 Wash. 212.

Plaintiffs rely upon *City of Youngstown v. Moore,* 30 Ohio St. 133. In that case evidence was held competent showing that the city engineer had misinformed plaintiff as to the established grade when plaintiff called at the office pursuant to a published notice "inviting all persons interested in property abutting on the streets to be improved to call and examine them, with a view to their filing claims for damages." The result of the engineer's act was that plaintiff failed to file a claim for damages within the designated time. The liability of the city for damages for grading the street already existed, and did not arise from any act of the city engineer in giving the information. It merely excused plaintiffs' delay in making claim for dam-

ages. The decision of the Ohio court is not controlling in this case.

The defendant is not liable for damages sustained because of erroneous information given by the city engineer. The judgment is therefore

AFFIRMED.

ROBERT PARMALEE V. STATE OF NEBRASKA.

FILED APRIL 1, 1916. No. 18986.

Rape: SUFFICIENCY OF EVIDENCE. Evidence examined, its substance set out in the opinion, and *held* sufficient to sustain the verdict of the jury.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Reese, Reese & Stout and *E. H. Evans,* for plaintiff in error.

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

MORRISSEY, C. J.

This is an error proceeding from the district court for Lincoln county, where defendant, Robert Parmalee, was convicted of the crime of rape on the person of Minnie Thiede, a female child under the age of 18 years, and over the age of 15 years, with her consent. The crime is alleged to have been committed April 10, 1914. A number of assignments of error are set out in the brief, but the principal complaint is that the evidence is insufficient to sustain the verdict.

The defendant was 26 years of age at the time of the acts complained of, and had been employed as foreman or manager of a ranch. Prosecutrix had been living at this ranch,

assisting with the housework and attending school. About the 1st of April, defendant left the Hansen ranch and went to another farm, or ranch, located a mile therefrom, where it would appear he was to engage in business for himself. April 10 defendant and prosecutrix were present at a party at a nearby farm. They were among the last to leave. According to defendant's theory, he did not regard himself as her escort and did not get her horse for her; but, when he had saddled his horse and made ready to leave the premises, he found her already mounted and ready to join him. He admits they rode together for some distance, until they reached a turn in the road which would take him to his home, but says that he there left her to proceed to the Hansen ranch alone.

She testifies that he accompanied her to the Hansen ranch; that on the way he suggested that they have sexual intercourse, and she refused; that on arriving at the ranch they went into the barn; he turned his horse loose, and she proceeded to unsaddle her horse; that he took hold of her and coaxed her to have sexual intercourse with him, and that she finally consented and the first act of intercourse between them took place; that he returned to the Hansen ranch from time to time thereafter until the 20th of the month, and that during this time she had intercourse with him once in the barn and three times in the house. She remained at the Hansen ranch until the 28th of April, when, after arriving at the schoolhouse, she became sick with an attack of vomiting. That she went from the schoolhouse to a neighbor's, and from there she was taken to a hospital in North Platte by her mother and sister; that the doctor made an examination of her and found her pregnant. The child was not born at the time of the trial, but her pregnancy seems to be admitted. She testifies that he was the only man with whom she had ever had intercourse.

It is not clear whether the Hansens were at home at the time of the alleged intercourse on April 10, or whether they had not yet returned from North Platte, where they had spent the evening. On the other occasions of which she

testifies, she says that he came to the place evenings, after she had returned from school, and when Mr. and Mrs. Hansen were away from home. The testimony shows that the Hansens kept an automobile, and were away from home a good deal during that period. Mr. Hansen was called as a witness for the defendant, and testified that he did not see defendant at the ranch on any of the occasions mentioned by the prosecutrix, but his testimony is of a merely negative character and does not show that her testimony in that regard is untrue.

In May following she called on defendant where he was cultivating corn and charged him with being responsible for her condition. Their version of the conversation differs somewhat. She says that he said: "He would never marry me. He said that if he had to marry me he would treat me like a rattlesnake. He said a man could treat a woman in such a miserable life that she will take her own life, and he said he did not want me to say anything to mamma about this business; and he said for me to come in and he was going to send me to Broken Bow, Nebraska, and have this child knocked, and he told me to be in at 9 o'clock in the evening on the south side of the bandstand in the courtyard."

He admits that she called on him and told him she was in trouble, and says that he asked her why she called on him, and she replied that she thought he might help her, and that he asked, " 'Why don't you go to Charlie Russell.' I says, 'Wasn't he caught in the room with you?' And she says, 'Well, yes; but he never did anything.' I says, 'Well, why don't you marry him?' She says, 'I don't want to.' " That she then asked him if he would help her, and he replied, "Well, I will consider this proposition over. * * * I told her then a certain length of time to meet me down here by the courthouse and I would tell her what I had considered. I wanted to counsel somebody whether it was right for me to help her or not. And that was the end of our conversation."

Subsequent to this a bastardy proceeding was instituted, and the prosecutrix, her mother and sister went to the county attorney's office, and the county attorney and defendant met, and the county attorney sent defendant to his office, with the suggestion that a settlement be effected. The three women testify that in that conversation defendant admitted that he was responsible for her condition, and offered to pay $200 in settlement if they would keep the matter out of court; that no settlement was made, and a few days thereafter defendant approached them on the streets of North Platte and again made an offer of settlement; that the girl's mother demanded that a marriage ceremony be performed; that defendant declined; that he held up his hands and said, "Fight it. * * * Pen for me." He admits making an effort to effect a settlement, but he says that this was done owing to the suggestion of the county attorney and his desire to protect his name and keep out of court.

At the hearing in the bastardy proceeding, the prosecutrix testified that the first act of intercourse was had in the afternoon of April 14 in the barn, and she made no mention whatever of what she now alleges occurred some days before on the return from the party heretofore mentioned. Counsel for defense lay much stress upon this feature of her testimony, which she admitted upon this trial to be untrue. It is, of course, a circumstance to be taken into consideration in weighing her testimony. But it must be remembered that she was a young girl, inexperienced in court procedure, in a delicate state of health, and probably testifying for the first time; and prompted somewhat by the natural disposition to shield herself from blame. She failed to tell of this occasion in which she now admits that she consented to the intercourse, but charged her trouble up to the act committed on the afternoon of the 14th, when she insists that she resisted his embraces. After reading in full the testimony which she gave before the jury and her testimony given at the bastardy proceeding, we still

believe the jury was warranted in finding the story told on this trial to be true.

It is rarely, if ever, possible to furnish direct corroboration of the principal fact; but, in this case, they were seen together late at night on the date she alleges the first act of intercourse occurred. That opportunity existed on the other dates she alleges is clearly evident from all the testimony. Before the expiration of a month her pregnancy was discovered by the doctor who examined her, and she is not shown to have been in company with any other man who might be the author of her trouble. Defendant admits that he had agreed to consider what he would do for her, and to meet her in North Platte. These facts, together with his own version of the conversations taking place in the office of the county attorney and on the streets of North Platte, are sufficient corroboration.

But defendant, in addition to denying that he ever had improper relations with the girl, argues that she was not previously unchaste, and that the verdict ought to be set aside for that, if for no other, reason. He testifies that on two separate occasions he saw her having intercourse with a man employed on the ranch, named Wesley Randall, and inferentially charges that another man, named Charlie Russell, employed on the ranch, had been found in her room, but states nothing definite as to Russell. The story he tells as to finding her and Randall together is entirely lacking in corroboration. He claims to have had this knowledge for nearly two years and never to have mentioned it to any person until he told it on the witness stand. He was not without the benefit of counsel, and must have known that, if true, this would be a defense. He made no effort to subpœna either Russell or Randall, but trusted to his own uncorroborated statement to blacken the reputation of the girl he was charged with having debauched.

In support of a motion for a new trial, defendant filed affidavits calculated to support his contention that prosecutrix was previously unchaste, but these affidavits are so vague and indefinite that if the statements therein con-

tained had been made to the jury it is not likely they would have been given any serious consideration.

Complaint is made because the court refused to give instructions No. 1 and No. 3 requested by defendant. But the substance of these instructions is covered by the instructions given by the court on its own motion, and these assignments are not well taken.

The verdict is fully sustained by the evidence. The record is free from error, and the judgment is

AFFIRMED.

SEDGWICK, J., dissents.

HAMER, J., concurring.

I have read all the evidence. The prosecutrix was a young girl at school. She was 9 or 10 years younger than the defendant. He was 26, and was in charge of the Hansen ranch. The girl was staying at Hansen's and was working for her board while she went to school. Mr. and Mrs. Hansen were away a part of the time in California. The girl was at Hansen's three years. The defendant had been there and in charge of the ranch for five or six years. The prosecutrix was unable to adequately defend herself against the defendant.

On the night of April 10, 1914, the prosecutrix went to a party at Calhoun's, about two miles south of Hansen's. She went there on horseback. There may be some doubt about the defendant going there with her, but after reading the evidence the writer thinks not. They rode back on horseback, and were among the last to leave Calhoun's. The defendant denies that he was in the barn with the prosecutrix after their return from Calhoun's. The defendant at that time claimed that he had moved over to Beach's place. He seems to have taken charge of the Beach ranch. The defendant claimed at that time to have left the Hansen ranch permanently. He claimed that prior to April 1, or about that time, he had moved his colts and machinery from the Hansen ranch down to Beach's place. According to the testimony of the prosecutrix, the defendant seems

to have frequently gone back to the Hansen ranch. Her testimony concerning the fact that he still kept his clothes at the Hansen ranch seems to corroborate her other testimony as to the relations between them. During the three years that she was at Hansen's there was only a short period when she was gone, and the defendant testified that he could not remember when that was. He admits going to the party at Calhoun's with Miss Thiede, the prosecutrix, but says that she came by the Beach place on her way home from school and asked him to go with her. And he testified: "I didn't say a word. I turned around and walked away. I went to the house." He saw her again that same day. He testified she came to the Beach place where he was; that she was riding a gray saddle horse, which she put in his barn, and then came up to the house and waited for him until after he dressed for the party; but he told her that she could go if she wanted to. He seems to have testified to that as an excuse for going with her. He says that they were the last to leave Calhoun's the night of the party. He says he met her just outside the door, and that she came along with him, and that they passed Arthur Qualley. He denied going home with her. He testified that she branched off at the schoolhouse and cut across the meadows and went home, while he came straight north up the Tryon road to his place; and he denied going to Hansen's place that night. She appears to have daily passed him when he was at work on the Beach ranch. She was on her way to and from school, and he said, "I never paid any attention to it."

After she found out that she was pregnant she visited him in the cornfield, and asked him if he could not help her. He said: "Well, I will consider this proposition over." He then arranged to meet her at the courthouse. Would he have done this if he had not regarded himself as the father of the unborn child? This testimony corroborates the evidence of the prosecutrix. The defendant offered to settle up the case. That is a further corroboration of the testimony of the prosecutrix. He met the prose-

cutrix and her mother and sister. He was ready to fix the matter up. What he said would probably not have been said by an innocent man. He was ready to pay $200. He had it fixed to get the money, so he testified. This would seem to be a corroboration of the testimony of the prosecutrix and sufficient to establish the defendant's guilt.

When asked if he had not said that he was sorry the affair had arisen, he admitted he had. He talked with the prosecutrix and her mother and sister. He testified: I told them that I was sorry that this trouble had come between us." Is a man likely to get very sorry if the woman is just lying on him? He gets angry if the woman lies on him without any cause, and he gets sorry when she tells the truth and there is a serious difficulty to meet. He was sorry because of the condition of affairs and because of the baby to be. He was sorry he had gotten into trouble by being guilty. That was the kind of sorrow that had hold of him. When she visited him in the cornfield to tell of her condition he was in a great hurry and had no time to listen to her, but he did listen. When she stood down before him he said he could not wait. He testified: "I had my work to do." It was not his work that was bothering him, it was the trouble of this girl and their prospective baby. "Q. What did she talk about? A. Why, she just sat there and never said a word. Q. Did you say anything to her? A. No." The thing he was called on to meet was trouble. He knew what was the matter. That was what kept him silent for half an hour. Then he began to manufacture his defense, and to threaten her with Charles Russell, and perhaps Wesley Randall. When a man does an indefensible thing and there is a woman who is going to suffer because of his wrong, then he begins to abuse the woman and to fabricate and spread dirty slanders about her. To defend himself he testified to what he says he saw between the prosecutrix and Russell, and also Randall. According to his story no attention was paid to him, although he was close to the guilty pair and called out in a loud voice. A child or a foolish person could have invented a better story

than he did. Its untruthful character is at once apparent. When he had an interview with the prosecutrix and her mother and sister, he invented the story concerning Randall to justify himself in not marrying the prosecutrix. He testified that he told them, "It makes no difference now whether I have did this crime or not, but, I says, you have got me now into it and I am willing to come to any terms to blot this off of my name; my name has been blotted." They said, "We want you to marry Minnie." He testified that he said, "No. I think we ought to come to some other kind of agreement." Then he starts out with Minnie's alleged improper conduct with Randall as an excuse for not marrying her. The Randall story is as intangible as the Russell story, and both are unreasonable in the extreme. Randall had not been seen for a long time, not since he was going away. Besides, defendant did not report her misconduct to any one, although he was in charge of the ranch. Neither did he discharge Randall. When asked why he did not discharge him, he said because "he was a pretty good man." Of course Randall left, and the defendant does not know where he is. He never tried to get him as a witness, and never knew where he was.

At the Calhoun party the prosecutrix waited for the defendant, so he says, and they started home together. "It was awful cloudy and very dark," so he testified. He further testified that it probably was a gentleman's duty to go home with her, and then he thought, "I have got my work to do. I will go on home. It is late." Was it natural to do that on a night that was so awful cloudy and very dark, or to ride with her and then stop at Hansen's barn to help her put the horse away? The girl says he went all the way to Hansen's with her, and then that he stopped at the barn. The girl's story as to what happened is natural and reasonable, and it rings like the truth. The girl was at the barn, too. She told all about what happened in the barn. He let his horse run loose. Then he was insistent and had matters his own way.

Several affidavits were filed touching the alleged bad character of the prosecutrix. They were filed after the defendant had been tried and convicted. The persons signing these affidavits do not set forth a sufficient reason for not testifying. Diligence in preparing the case for trial is not shown. If these persons who make the affidavits were ready to testify to the things set up in them, then they should have been looked for and found and subpœnaed and brought in as witnesses to attend the trial and testify. The story they tell does not seem to have favorably impressed the judge before whom the case was tried. He refused to grant the new trial applied for. No error is shown in his refusal. He was closer than we are to the persons who attempted to swear away the good character of this young girl. In these affidavits, of course, there was no opportunity for cross-examination. The affidavits do not favorably impress the writer with their truthfulness, and no sufficient excuse is given for the failure to find these proposed witnesses before the trial. This young girl was struggling to maintain herself by the labor of her hands while she obtained an education. She was entitled to the sympathy and help of all who knew her. The defendant, who was much her senior, should have guarded and protected her, instead of plunging her into shame and disgrace. If men mislead and deceive women, and especially young girls, and break faith with them and make them drink the bitter dregs of disappointment, disgrace and dishonor, then there should be no hesitation upon the part of the courts to enforce the law and to punish those who break it.

CHARLES R. MCAVOY, APPELLEE, V. MARION OSBORN, APPELLANT.

FILED APRIL 1, 1916. No. 18847.

1. **Replevin:** DAMAGES: REMITTITUR. In an action of replevin, where the jury has returned a verdict for the defendant, based on conflicting evidence, fixing an excessive value to the property in controversy, which excess the defendant offers to remit, it is ordinarily the duty of the court to order a remittitur and render a judgment on the verdict.
2. ———: JUDGMENT OF DISMISSAL. If, however, the court, after setting aside the verdict, makes a finding that there was fraud in the bill of sale under which the plaintiff claimed the right to the possession of the property, and that the parties should be left in the situation in which they were at the commencement of the action, it is error to dismiss the case, and thereby leave the plaintiff in possession of the property which he has obtained by means of the writ.

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

Hoagland & Hoagland and *L. A. De Voe,* for appellant.

H. A. Dano, G. E. Junge and *C. J. Campbell, contra.*

BARNES, J.

This was an action in which the plaintiff obtained possession of a certain merry-go-round by a writ of replevin. The petition was in the usual form, and the answer was a general denial. On the issue thus joined there was a trial to the jury, and the defendant had the verdict. A motion for a new trial was sustained, and thereupon the court entered a judgment as follows:

"This cause came on for hearing before the court on this 30th day of March, A. D. 1914, being one of the days

of the regular March, 1914, term of the district court of Keith county, Nebraska; Honorable H. M. Grimes, presiding. The cause is heard upon the motion of the plaintiff heretofore filed praying for a new trial in said cause. Upon consideration whereof, and the court being fully advised in the premises, the court finds that the contract between the plaintiff and defendant as to the property involved herein was fraudulent; that both the plaintiff and defendant participated in the fraud; that the verdict is excessive, and said verdict is set aside; that, because the plaintiff and defendant in the transfer of the property from the defendant to the plaintiff were each guilty of fraud, neither is entitled to any relief, and each are regularly to be left in the position that they placed themselves in by their fraud. It is therefore considered and adjudged by the court that this cause of action be and the same is hereby dismissed, and the costs of each party are to be paid by themselves; to each of which findings of fact and the judgment of the court both the plaintiff and the defendant except. It is further ordered that both the plaintiff and defendant be allowed 40 days from the rising of the court to prepare and present their bill of exceptions in this cause."

The defendant has appealed to this court, and contends, among other assignments of error, that the court erred in his findings, and in his judgment dismissing the action, because the plaintiff had obtained possession of the property in controversy by the writ of replevin, and by the judgment of dismissal the property was left in the plaintiff's possession; whereas, by the findings of the court neither party was entitled to any relief. The judgment complained of gave plaintiff the possession of the property which he had obtained by the writ of replevin.

It appears from the record that the question submitted to the jury was the *bona fides* of a certain alleged bill of sale made by the defendant to the plaintiff. On the one hand, it was claimed that the bill of sale was made in fraud

of the creditors of the defendant, while, on the other hand, it was contended that it was not fraudulent, but was made for a valuable consideration which plaintiff paid to the defendant. It also appears that defendant had peaceable possession of the property at the time it was taken from him under the writ of replevin and turned over by the officer to the plaintiff. The jury were properly instructed, and the verdict was based on conflicting evidence. It would therefore seem that the trial court erred in setting aside the verdict. The record shows that the value of the property as fixed by the verdict was excessive, but the defendant offered to remit such excess, and therefore the court should have ordered the remittitur and rendered a judgment on the verdict.

The court, by its findings, however, held that the bill of sale was fraudulent and void, and on that finding predicated his judgment of dismissal. It is apparent that the court overlooked the fact that by virtue of the writ of replevin the plaintiff had obtained possession of the property, and therefore the parties were not in the position in which the court found them, and, if the judgment should be affirmed, the plaintiff will be given possession of the property by means of the writ.

The findings of the court should have the same effect as the findings of the jury on which they based their verdict, viz., that plaintiff is not entitled to retain the possession of the property which he obtained under the writ. Therefore, the judgment should be reversed, and the cause should be remanded, with directions to either render a judgment on the verdict or order the return of the property to the defendant and dismiss the action.

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

REVERSED.

SEDGWICK, J., not sitting.

PERRY L. FULLER, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 1, 1916. No. 18184.

1. Carriers: DUTIES: SHIPMENT OF LIVE STOCK. It is the duty of a common carrier to furnish safe and suitable cars to be used in shipping animals, and for failure to do so the carrier is liable, if damages result by reason of such failure.

2. ———: LIABILITY OF INITIAL CARRIER. Where a defective car is furnished by an initial carrier for the transportation of animals to a point beyond its own line, and injuries are sustained by the animals by reason of such car being out of repair, the initial carrier is liable for such damages, in the absence of any proof of negligence by the connecting carrier.

REHEARING of case reported in 98 Neb. 727. *Former judgment of reversal set aside, and judgment of district court affirmed.*

LETTON, J.

Rehearing of case reported in 98 Neb. 727. In the former opinion it was held that the plaintiff could not recover for any injuries occurring to his horses on the line of the Union Pacific Railroad Company, for the reason that a judgment had been rendered in the action in favor of the Union Pacific Railroad Company and against him on the issues. In the motion for rehearing, and on the argument, our attention was called more particularly to the principle that an initial carrier is liable for all damages occurring due to a defective car furnished by it, although the injuries may have occurred upon the line of a connecting carrier.

The testimony on behalf of plaintiff is that some of the horses were injured by falling through a defective loading chute at Ewing. There is also testimony that the door of one of the cars in which the horses were loaded was broken

and loose; that there was no "bull-board" to keep the animals from the door after they were loaded; and that there was a board broken off at the corner of the car about 18 or 20 inches long. Plaintiff testifies that when the car arrived in Grand Island the horses' legs were skinned and swollen, and there was hair on the boards of the car showing where their legs had slipped through. For the defendant, the conductor admits there was a "bull-board" missing, and testifies that he procured some wire and wired the car in several places to protect the door. He and other witnesses for the defendant deny that the car was broken or defective in any way at the time the horses were loaded, or when it left Norfolk. We are satisfied that there is sufficient evidence to support a finding that the car was defective at the time it left Ewing.

Complaint is made of the giving of instruction No. 12, to the effect that, if the jury found "that the defendant company negligently failed to provide a safe and suitable car for the transportation of the horses, and that the car furnished was defective, then the defendant company would be liable for any damages to the stock resulting from the defective condition of the car, whether said damages occurred on its own line or on the line of the Union Pacific railroad." This was not erroneous. It is the duty of a common carrier to furnish suitable and proper cars to be used in shipping live stock. *Chicago, St. P., M. & O. R. Co. v. Deaver*, 45 Neb. 307; *Union P. R. Co. v. Langan*, 52 Neb. 105; *Allen v. Chicago, B. & Q. R. Co.*, 82 Neb. 726. If damages result for failure to do so, the carrier is liable. The principle of law applicable in this case is clearly stated in 2 Hutchinson, Carriers (3d ed.) sec. 499, as follows: "Where the vehicle is furnished by an initial carrier for the transportation of goods to a point beyond his own line, and he negligently violates his duty by furnishing a vehicle which is defective, he will be liable for any subsequent damage arising from the defective condition of the vehicle, although such damage develops on the line of a connecting carrier. And this rule will remain true even though the

initial carrier expressly confines his liability for damages to his own line." A number of cases announcing this principle are collected in the note to *Atlantic C. L. R. Co. v. Riverside Mills,* 31 L. R. A. n. s. 7, at page 81 (219 U. S. 186); 4 R. C. L. p. 879.

There is no proof of any injury occurring on the line of the Union Pacific railroad. The horses were injured, and their appearance, when unloaded, indicated the injuries had been suffered some time before; the blood having caked and dried upon their legs.

It is urged there was no competent evidence of damages to the horses on which a verdict could be based. Plaintiff testified, without objection, that there was a difference of $35 between the value of one of the animals before it was injured and afterwards, and gave like testimony as to the others. The claim inspector for the Union Pacific Railroad Company was sent to examine the horses, according to the custom of that company. He examined the stock, and testified, without objection, to the amount that each injured animal was damaged. Defendant requested an instruction to the effect that, if the jury believed three of the horses were injured at the loading chute, they might under the evidence find a verdict for plaintiff to the amount of $75. Having let the evidence in without objection as to its competency, and having requested an instruction based upon the theory that it was competent, defendant cannot now urge that the court erred in its reception. We find no prejudicial error in the record.

The former judgment of this court is set aside, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

BARNES and HAMER, JJ., dissent.

MARY J. MORIARTY, APPELLEE, V. ROME MILLER, APPELLANT.

FILED APRIL 1, 1916. No. 18633.

Master and Servant: INJURY TO SERVANT: ASSUMPTION OF RISK. In an action to recover for personal injuries sustained prior to the passage of the workmen's compensation act (Laws 1913, ch. 198), a woman employed to clean and scrub the floors of a café who was thoroughly familiar with the work, and had known for a long time that metal caps for beer bottles often fell and were found upon the café floor, assumed the risk of injury from kneeling upon one of such caps while in the performance of her work, and her employer is not liable for a personal injury caused thereby.

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

Edgar M. Morsman, Jr., for appellant.

Smyth, Smith & Schall, contra.

LETTON, J.

This is an action for personal injuries. Plaintiff recovered a verdict and judgment for $2,500. Defendant appeals.

The defendant is the owner of the Millard hotel in Omaha. The plaintiff is a scrub woman who was employed there. She had been employed in that capacity for about two years prior to the night of January 7, 1913. She usually began work at midnight. It was her duty to scrub three cafés and other rooms, which occupied her time until morning. She was supplied by the housekeeper with a pad or pillow stuffed with curled hair upon which she placed her knees while at work. A porter was employed, whose duty it was to sweep the rooms and pile the chairs upon the top of the tables out of her way just before she began to scrub. He worked from room to room, and she followed him. A bar was connected with the hotel, in which intoxicating liquors were sold. At night,

after the bar was closed, it was the custom for beer to be served to customers in the café. The bottles of beer were stored in a refrigerator in one of the rooms and were brought by a waitress from there to the café. A hook or device was attached to a shelf or post, wherein the metal caps could be inserted and jerked from the bottles. The beer was then poured into teapots and served to the customers. This plan was pursued in order to evade the 8 o'clock closing law of the state. A cigar box was placed underneath the device in order to catch the caps as they fell.

Plaintiff testified: "Q. Did you see it before you got hurt? A. No, sir. Q. In the work that you had done there in the dining room before this, had you ever before run across these beer tops laying on the floor as you did your scrubbing? A. I often run across one, but I always avoided it. I did not see it on this night. * * * Q. Had you seen any beer tops on the floor that night prior to the time you got hurt? A. No, sir. Q. Now, you say that you had seen these beer caps on the floor there many times; now you had not seen them there very many times, had you, Mrs. Moriarty? A. I saw them very often, and I did not pay attention because they did not bother me before this. Q. You mean to say that you saw them there on the floor many times before this night that you were hurt? A. Before I was hurt? Q. Before you were hurt? A. Yes. * * * Q. Before now, when the beer caps that you say you saw on the floor, you saw them—were they always in one place or scattered about the floor? A. I did not see them scattered about the floor. I would always see them on one spot. Q. That is the place where you were hurt that night? A. Just right when I was finishing that I got hurt. Q. It was right at that same place where you were hurt? A. Yes, sure."

Her testimony is that on the night of Saturday, January 7, she was just finishing one of the rooms; that she pulled the scrub pail toward her and it spattered suds upon the floor; that she took the rag to wipe it up; that

her right knee was upon the pad, but her left knee came upon one of the beer caps, lying with the corrugations upward, which cut through her skirt, underskirt and underclothing, and cut her knee; that she took the cap from her knee and laid it upon a shelf and proceeded with her work; that this happened about a half hour or an hour after she commenced work. She testifies that, after the porter had swept the floor in this room, the waitress passed through and opened a bottle of beer on the hook; that she worked until 7 A. M., when she found that a flannel pad upon her knee was all bloody, and she had to loosen it with water, and that the print of the cap was on the knee just below the pad. The knee became sore that day. She continued to work up to Thursday night, although her knee had become greatly swollen, but was unable to finish on account of pain, and went to bed on Friday morning. The house doctor was called, and the knee was placed in a plaster cast for five or six weeks. She was confined to her bed for weeks, and when she left the hotel in July she was still obliged to use a crutch. The knee appears to be permanently partially stiffened. The testimony of the house physician, who is a son-in-law of the defendant, is that he was called on January 16, and found plaintiff with a badly inflamed knee, and that after she left the hotel in July he saw her again, and the knee was still swollen, discolored and painful, with little motion. Another physician called by plaintiff testified that he examined the leg just before the trial and found it still stiff and painful upon motion; that he was present when another physician took an X-ray picture. After having made an examination, and with the aid of the X-rays, he testified that there was a new bone formation around the cartilage and the joint, which limited the motion of the knee. The X-ray photographs were introduced in evidence. The doctor who took the photographs testified that there was a small piece of foreign matter, apparently steel or iron, in the soft tissues of the knee, close to the patella, or just below it, about the size and breadth of a carpet tack without a

head, and that the inflammation induced by the presence of this substance "would produce a chronic inflammation, probably acute at first, or if the poison kept up it would become chronic, depending on the length of time it went." He also said that the bony growths were probably caused by inflammatory conditions. The house doctor testified that when he was first called the skin was not broken, there was no scar or opening, and there was no place where any pus exuded at any time while he treated the knee.

Plaintiff produced a metal cap which she says caused the injury. It bears the name of the Metz Brewery. The evidence for the defense tended to prove that no beer had been purchased from or delivered to the Millard hotel from the Metz brewery for a long time prior to the accident. But it was not conclusively shown that a bottle of Metz Brothers beer could not have been opened in the café that night.

A number of assignments of error are made. We think it unnecessary to discuss them in detail. Her own testimony shows that Mrs. Moriarty was fully aware of the fact that beer caps were often to be found on the floor at or near the place where she says she was injured. It was the duty of the porter and her to clean and scrub these rooms. She knew that the waitress had pulled a beer cap after the porter had swept and left the room, and that it was not improbable that the cap might fall at or near the place where she was working. The proper performance of her cleaning duty seems to require that a scrub woman should look at the floor she is cleaning and pick up any waste matter or articles which have dropped on it. It seems clear to us that in scrubbing floors it is a very ordinary and common danger that tacks, pins or other foreign substances, which if knelt upon will produce injury, may have dropped upon the floor, especially in a public room such as a café. This was an ordinary risk of the employment and one which plaintiff assumed. If she had kept her knee upon the pad provided for her, the accident

would not have happened, and it is not shown it was necessary to move from it. Furthermore, the X-ray photographs clearly show a foreign body in the knee, and the medical testimony indicates that in all probability the irritation set up by this piece of metal caused the injury. An inspection of the beer cap which is in evidence fails to disclose any sharp, broken or jagged edges; the doctor who was called within a few days found no evidence of a cut; and her own sister, who saw and describes the knee as it appeared on the day after the injury, does not mention any cut.

The plaintiff's injuries are, no doubt, permanent, and she deserves the sympathy that all right-minded people feel for such a misfortune to a hard-working woman. The accident occurred before the workmen's compensation act was in effect. Under the law as it then stood and as laid down in the instructions, the jury were not warranted in finding against the defendant. Nor is this court warranted in affirming the judgment, and thus taking $2,500 of the money of defendant or his insurer for the benefit of plaintiff. Much has been said of the illegality of the conduct of defendant in selling beer after the legal hours, and, no doubt, this unlawful act had some influence with the jury. We can neither condone nor approve of this open violation of law; but, as we view the case, whether the beer was sold legally or illegally is not material.

The judgment of the district court is

REVERSED.

S. A. FOSTER LUMBER COMPANY, APPELLANT, V. H. E. GLATFELTER ET AL., APPELLEES.

FILED APRIL 1, 1916. No. 18838.

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

James H. Woolley, for appellant.

Martin & Bockes, contra.

LETTON, J.

Plaintiff furnished material to defendant for the building of a house under an oral contract. Payment was made for most of the material as the work progressed, but, a dispute having arisen as to some of the items, defendant refused to pay the remainder due under the contract. A materialman's lien was filed by the plaintiff, to foreclose which this action is brought. The petition alleges the furnishing of material to the amount of $1,512.60, and that there is a balance due of $120.70, with interest.

The defense is that a certain grate included in the contract, of the value of $22.50, 60 feet of oak flooring, of the value of $6, and two door sidelights, of the value of $16, were not furnished as provided by the agreement; that the lumber was not furnished promptly, thereby delaying the completion of the building for a month, to the damage of defendant in the reasonable rental value, which was $25; and that defendant has been damaged by the loss of time of his employees in the sum of $150. He asks judgment for the balance due after crediting plaintiff with $120.70. The reply pleads that all the items were furnished, and denies any stipulation as to the time, and any damage by reason of delay.

From the testimony we are satisfied that, while plaintiff's agent may not have intended to furnish a grate, the defendant was justified in believing from the conversation that this was included in the estimate. As to the sidelights, the proof shows that when they arrived the glass in one of them was broken or cracked; that plaintiff offered to have this replaced, but defendant refused to receive the same because he wanted another style of light. We think he is justly chargeable with the cost of the sidelights, less $3, the amount which it is shown it would probably cost to have the glass replaced.

Plaintiff has not sustained the burden of proof as to the delivery of more than 900 feet of oak flooring. Defendant is therefore entitled to a credit of $6 on this item. It is shown that some delay was caused by defendant's desire to select fir finishing, instead of taking it as it came, and the consequent waiting for another car of fir to arrive, and we doubt whether the other delay was caused by plaintiff's fault. In any event, we are satisfied that the allowance of one month's rental value of the house covers all the damages defendant suffered from delay occasioned by the default of plaintiff. Defendant, therefore, should be credited with $25 for delay, $22.50 for grate, $3 repairs on sidelights, and $6 flooring shortage. After crediting the items mentioned on $120.70 which defendant's answer admits is due plaintiff, the balance due is $61.70, for which plaintiff is entitled to judgment as of April 23, 1914, the date of the original judgment in this case.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment in favor of plaintiff for $61.70, with interest from April 23, 1914, and costs of suit.

REVERSED.

SEDGWICK, J., not sitting.

LEWIS L. YOUNIE, APPELLANT, V. FRED SPECHT ET AL., APPELLEES.

FILED APRIL 1, 1916. No. 18850.

Appeal: RECORD: UNAUTHORIZED EXHIBITS. A judgment will not be reversed upon a stipulation of attorneys as to the evidence, not approved by the district judge and embodied in a bill of exceptions.

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

G. J. Hunt, for appellant.

Williams & Williams, contra.

LETTON, J.

Action to restrain the execution and delivery of a sheriff's deed in proceedings taken under a judgment alleged by plaintiff to be void. The petition alleges that the judgment is wholly void on account of jurisdictional defects in the constructive service, and that the deed, if executed, will cast a cloud upon the title of plaintiff. The court found that the allegations of the petition were not supported by the evidence and for the defendant generally. Plaintiff appeals.

A transcript of the judgment was filed in this court in due time. Attached to it are filed two papers, one purporting to be a copy of an affidavit for service by publication, the other a copy of an order for service by publication in the action on which the judgment was based. A stipulation is also attached, which states that the papers of which these are copies "were the only extraneous evidence of any kind offered or considered by the court," and "that attached to this stipulation are full, true and correct copies of said affidavit for service by publication and the order for service by publication hereinabove described, and by agreement they are to be considered by the supreme court in reviewing the ruling of the district court upon the pleadings in the case first entitled herein."

Such a stipulation cannot be considered unless brought up by a bill of exceptions. *State Ins. Co. v. Buckstaff,* 47 Neb. 1. It is there said: "A stipulation of the attorneys in a cause is no more part of the record than a deposition or any other evidence which may have been improperly included in the transcript. Matters which are not properly part of the record cannot be made so by being improperly inserted in the transcript. A stipulation of facts or mode of proof cannot take the place of a bill of exceptions. *Credit Foncier of America v. Rogers,* 8 Neb. 34; *State v. Knapp,* 8 Neb. 436; *Herbison v. Taylor,* 29 Neb. 217; *McCarn v. Cooley,* 30 Neb. 552. This stipulation could have been brought into the record by a bill of exceptions; but, that not having been done, it is not properly before the court, and hence it cannot be considered." *Keeler v. Manwarren,* 61 Neb. 663.

We must follow the settled policy of the court. It would be manifestly unfair to the district courts to review their proceedings upon evidence which has never been brought into the record, nor examined and certified as a part of it by the district judge.

The pleadings are sufficient to sustain the judgment, and it is therefore

AFFIRMED.

FAWCETT and SEDGWICK, JJ., not sitting.

EMMA KAUFMANN, APPELLANT, V. THOMAS E. PARMELE, APPELLEE.

FILED APRIL 1, 1916. No. 18839.

1. **Conversion: GIFTS: PROOF.** In an action for conversion, proof of facts showing that the owner of bonds deposited with defendant for safe-keeping delivered the receipt therefor to plaintiff with the intention of making a gift thereof may establish plaintiff's title thereto, though the receipt was transferred without indorsement or assignment.

2. ———: BONDS: VALUE: PRESUMPTION. In an action for the value of bonds converted by defendant, the presumption is that they were worth their face value, and the burden of proof is on defendant to show the contrary.

3. ———: ———: MEASURE OF DAMAGES. In an action by a pledgor against a stranger to the pledge for conversion of the pledged property, the measure of damages is the value of such property, less any sums paid by defendant to the pledgee.

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

D. O. Dwyer, for appellant.

C. A. Rawls and *W. A. Robertson, contra.*

ROSE, J.

In this action defendant is called to account for conversion of stock, in the sum of $5,000, and bonds, in the sum of $10,000, issued by the Long Distance Telephone Company of Norfolk, Nebraska. When William Volk was owner of the stock and bonds in controversy defendant obtained possession of them under the following instrument, described in the record as "Plaintiff's Exhibit 1":

"T. E. Parmele, President. G. H. Wood, Cashier.
"Bank of Commerce. Capital $10,000. Surplus $5,000.
"Louisville, Nebraska, February 1, 1910.

"Received of William Volk, for safe-keeping, $10,000 six per cent. gold coupon bonds; $5,000 six per cent. preferred stock, Long Distance Telephone Company of Norfolk, Nebraska. It is agreed between Thomas E. Parmele and William Volk that these bonds and stock are to be held at the Bank of Commerce, at Louisville, Nebraska, for five years, and the income to be paid over to William Volk as paid. Thomas E. Parmele."

Thomas E. Parmele, trustee for the purposes thus disclosed, is defendant. He was president of the Bank of Commerce, and was an officer and a stockholder of the Long Distance Telephone Company. In the petition plaintiff pleaded ownership of the stock and bonds by gift from

Volk, delivery to her of the receipt quoted, and conversion of the property by defendant. The latter, in his answer, denied the gift and the conversion, and pleaded that Volk withdrew the stock and bonds from the safe-keeping of defendant and pledged them to the Bank of Commerce as collateral security for money borrowed from it, and thus received more than the value of the property pledged. In a reply to the answer, the withdrawal of the stock and bonds from the safe-keeping of defendant and the indebtedness and the pledge of Volk were denied. The trial court found the issues in favor of defendant and dismissed the action. Plaintiff has appealed.

The first question presented is plaintiff's ownership of the stock and bonds. In attempting to justify the judgment below, defendant argues that plaintiff did not prove the gift pleaded by her. The position thus taken is untenable. Volk was the owner of the stock and bonds February 1, 1910, when he entrusted them to the safe-keeping of defendant. Volk was engaged to be married to plaintiff, and during the existence of that relation delivered to her the receipt for the stock and bonds January 7, 1911, saying that he gave them to her, that they were in the bank at Louisville, and that he had no relatives. She kept the receipt in her possession at all times after he delivered it to her. He died May 5, 1912. Their engagement had never been abrogated. These facts were proved by uncontradicted evidence admitted without objection. Defendant, nevertheless, insists that the transfer of the receipt, unindorsed, without actual delivery of the stock and bonds, is insufficient to establish a gift. No heir, executor or administrator claims the property. The unincumbered ownership of Volk and his right of possession February 1, 1910, are not disputed. According to the receipt, Volk then parted with possession. Thereafter the property was in the hands of defendant as trustee. Volk's ownership and title were not affected by the change in possession. He had a right to donate the stock and bonds to plaintiff. The receipt was a symbol of ownership. It was written

evidence of defendant's obligation to keep the property for Volk and to return it to him or to his assign. It was all Volk had in his possession to deliver when he made his donation. Under these circumstances delivery of the receipt to plaintiff with the intention of making her a gift amounted at least to an equitable transfer of the property to her. The transaction was valid between the parties to it. By it plaintiff acquired the rights of Volk, and with those rights defendant is not in a position to interfere. Plaintiff's ownership by gift is therefore established by uncontradicted evidence.

What became of the stock and bonds entrusted to defendant and subsequently donated to plaintiff? Volk had accepted them in part payment for a quarter section of land purchased from him by defendant. They had been issued by the Long Distance Telephone Company. Defendant was a stockholder and an officer of that corporation. Its bonds had been secured by a mortgage on its property. In a suit in the district court for Madison county, to foreclose the mortgage, the bonds donated to plaintiff were turned over to the clerk of that court. They had been taken from the Bank of Commerce. In thus taking and using the bonds defendant justifies himself in the language of his brief as follows:

"This he had a perfect right to do, as it is shown by the plaintiff's exhibit 1 that he was president of the bank, and his testimony is that the proceeds realized therefrom on the sale of foreclosure was less than the amount he had loaned to Volk."

Defendant bought the property of the Long Distance Telephone Company at foreclosure sale for $20,010, and sold it a few days later, July 1, 1912, for $50,000. Some of the bondholders shared with defendant in the proceeds of the resale, but there is no proof that plaintiff participated therein, or that any part of Volk's alleged indebtedness to the Bank of Commerce was ever paid.

The acts and conduct outlined amounted to a conversion, unless defendant pleaded and proved a justification. In

his answer he alleged in general terms that Volk withdrew his bonds from the safekeeping of defendant and pledged them to the Bank of Commerce as collateral security for money borrowed from it, and thus received more than the value of the property pledged. The testimony of defendant is that the bank's loans to Volk amounted to $4,689.20. The testimony of the cashier is of a similar nature. There is no proof of a specific loan, of the execution of a note, or of an unpaid debt. Amounts and dates of loans were not stated. There is no documentary evidence of any debt or loan. No book entry or other record of the bank was offered. No excuse for such a method of attempting to establish a defense was suggested. An indebtedness essential to the pledge on which defendant relies is not shown by competent evidence. A trustee, bailee, pledgee or meddler cannot be permitted to escape liability in that manner.

The defense fails for other reasons. Defendant did not prove his allegation that Volk owed the bank more than the value of the property pledged. According to incompetent testimony, the bank's loans to Volk only amounted to $4,689.20, if unpaid. Presumably the converted bonds were worth their face value. The burden of proof was on defendant to show that their actual value was less than their face value. *Powell v. Ong,* 92 Ill. App. 95; *Clark v. Cullen,* 44 S. W. (Tenn.) 204. There is no competent evidence sufficient to overcome the presumption that the actual value of the converted bonds was the same as their face value of $10,000. On this branch of the defense, therefore, there is no justification for the dismissal of plaintiff's suit.

It may be fairly inferred from the testimony, from the admissions of defendant and from his attitude toward plaintiff, that he took the bonds from the Bank of Commerce and left them with the clerk of the district court for Madison county, where a suit to foreclose the mortgage securing them was pending. Defendant was sued as an individual. The bonds were not pledged to him. There is no intimation that Volk was indebted to defendant.

The latter did not prove that he paid any part of Volk's alleged indebtedness to the Bank of Commerce. Title or right of possession is not traced from the pledgee to defendant. Defendant's right to the stock and bonds was neither pleaded nor proved. On the record presented defendant was a stranger to the pledge. The law is that, in an action by a pledgor against a stranger to the pledge for conversion of the pledged property, the measure of damages is the value of such property, less any sums paid by defendant to the pledgee. *Craig v. McHenry,* 35 Pa. St. 120; Jones, Collateral Securities (3d ed.) sec. 434.

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

REVERSED.

OLIVER C. DOVEY, APPELLEE, V. GEORGE E. DOVEY ET AL., APPELLANTS.

FILED APRIL 1, 1916. No. 19209.

1. **Judgment:** RES JUDICATA. *Dovey v. Dovey,* 95 Neb. 624, examined, and *held res judicata* as to the facts alleged in paragraphs 1 to 5, inclusive, of the answer of defendants.

2. **Defense:** SUBMISSION. The defense interposed by paragraph 6 of the answer of defendants, referred to in the opinion, *held* to have been properly submitted to the jury and the verdict returned thereon amply sustained by the evidence.

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

John L. Webster and *A. L. Tidd,* for appellants.

John J. Sullivan, Anan Raymond and *Francis A. Brogan, contra.*

FAWCETT, J.

From a judgment in favor of plaintiff in the district court for Cass county, upon the promissory notes which were involved in *Dovey v. Dovey,* 95 Neb. 624, defendants appeal. The cited case was a suit in equity in the district court for Douglas county, by the defendants in this action against the present plaintiff as defendant in that suit. For a statement of the facts relating to the execution and delivery of the notes, reference is made to the opinion in that case.

The petition is in the usual form. The first five paragraphs of the answer are devoted to allegations of facts which plaintiff contends were all within the issues tried and determined in *Dovey v. Dovey, supra.* The only new matter pleaded in those five paragraphs will be found in paragraph 2, where it is alleged that, subsequent to the trial of that case, Jane A. Dovey, widow of E. G. Dovey, deceased, and mother of the parties in that suit, died testate, and that her legatees are now seeking, in the probate court of Cass county, to recover a large sum claimed to represent an interest which she is alleged to have had in the firm of E. G. Dovey & Son, at the time the settlement was made between the parties in *Dovey v. Dovey, supra.* In this paragraph it is alleged that plaintiff represented to defendants that Jane A. Dovey had ratified and approved the settlement and would surrender to the business of the firm her interest therein, and that one-third thereof was included in the consideration for the notes. The trial court ruled that *Dovey v. Dovey, supra,* was *res judicata* as to all of the matters set up in the first five paragraphs of the answer, and declined to submit the same to the jury. In this we think the court did not err. The facts alleged in paragraphs 1, 3, 4 and 5 were all clearly within the issues and determined in that suit. We think the facts attempted to be relied upon in paragraph 2 were also fairly within those issues, except, of course, the facts alleged in reference to the execution of a will by Jane A. Dovey, and the action now being taken by her executors

and legatees. As to those facts, we think the answer fails to state a defense. Conceding that plaintiff made the alleged statements to the defendants in relation to the attitude of Jane A. Dovey toward the settlement then being made, there is nothing in the statement of the allegations of paragraph 2 of the answer, set out in defendants' brief, which shows that defendants relied upon the statements made by plaintiff, or that they were not as fully advised as to the interest of Jane A. Dovey in the firm and her attitude toward the settlement as plaintiff himself. Moreover, it clearly appears that, after the settlement in *Dovey v. Dovey,* and the retirement of plaintiff from the firm, the business continued under the management of defendants, and large sums of money were from time to time paid by them to Jane A. Dovey. In fact, the transactions subsequently had between defendants and their mother clearly indicate a full and complete understanding between them as to the rights or interest of the mother in the firm business.

The substance of paragraph 6 is that at the time the notes in suit were signed a mortgage securing the same was given upon an undivided two-thirds interest in 640 acres of land in Cass county, that plaintiff then agreed to look solely and entirely to the mortgage security for the payment of the notes, and is therefore without right to sue upon them at law. This defense was submitted to the jury and a verdict returned in favor of plaintiff. We deem it unnecessary to spend time upon this assignment. As we view the record, this issue was fairly submitted upon evidence amply sufficient to sustain the verdict.

Another contention is made in the brief of defendants that, at the time of the agreement in *Dovey v. Dovey,* there was an agreement among the three brothers, who composed the firm of E. G. Dovey & Son, that each should pay to his mother $400 a year for her support, and that plaintiff failed to keep and perform that agreement by failing to pay such sums or any part thereof. This contention has no place in this action. There is nothing in

the allegations of defendants' answer showing that by reason of plaintiff's failure to make such payments defendants suffered any loss, or were called upon to pay to Mrs. Dovey out of their private funds any sum whatever in excess of the $400 a year each, which, under their own allegations, they were required to pay. It is clear, therefore, that, if plaintiff made any such agreement and failed to keep it, the only person who could complain of such failure was Mrs. Dovey herself.

The judgment entered being the only one which could properly be entered on the record before us, the other points presented will not be discussed.

AFFIRMED.

LETTON and HAMER, JJ., not sitting.

JAMES A. ANDERSON, APPELLEE, V. ESTATE OF ROBERT M. AKINS, APPELLANT.

FILED APRIL 1, 1916. No. 18595.

1. **Witnesses:** COMPETENCY. A witness who has a direct legal interest in the result of the litigation is not incompetent under section 335 of the Code, if such interest is not adverse to the representative of the deceased.

2. ———: ———. One who is jointly interested with the plaintiff in a claim being prosecuted against the estate of a deceased person is disqualified as a witness for such claimant. But the fact that both claims are for services rendered to the deceased will not disqualify them as witnesses for each other where they are upon separate and distinct transactions.

3. **Contracts:** ACTION: PLEADING AND PROOF. The allegation that services were rendered by plaintiff at the request of the deceased, "who promised and agreed to pay plaintiff for the same," will admit evidence of either an express or implied promise to pay for the services.

4. ———: ———: ———. Such allegation is supported by proof that the deceased promised to convey or devise certain property in payment for services rendered, but refused or neglected to perform such agreement.

5. **Evidence:** ACTION FOR WORK AND LABOR: MEASURE OF RECOVERY. In such case, if there is no express contract as to the value of the services to be rendered, the measure of the recovery is the actual value of the services. A witness may testify to the value of a part of such services with which he is familiar.

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

J. S. McCarty, H. A. Lambert and *Hugh LaMaster,* for appellant.

S. P. Davidson and *Jay C. Moore, contra.*

SEDGWICK, J.

The plaintiff filed a claim in the county court of Johnson county against the estate of his uncle, Robert M. Akins, deceased. The estate appealed to the district court for that county, and upon trial by jury in that court the plaintiff secured a judgment against the estate, and the defendant has appealed.

The defendant contends that the evidence is not sufficient to support the verdict and judgment, and complains of the rulings of the court in admitting and excluding evidence, and in an instruction to the jury. The plaintiff, with his mother, resided with the deceased from the infancy of plaintiff. They were both supported as members of the family. When the plaintiff became of age he proposed to seek employment for himself. At the request of the deceased he remained and continued with the deceased for about 15 years. During that time he worked on the farm of the deceased and assisted in every way in the accumulation of the property which was held by the deceased at the time of his death.

The plaintiff's mother testified in his behalf, and the defendant objected that she was incompetent as a witness under section 7894, Rev. St. 1913. This witness, as one

of the heirs of the deceased, had a direct legal interest in the result of the litigation, but that interest was not adverse to the representatives of the deceased, and therefore did not disqualify her as a witness. *Hageman v. Estate of Powell,* 76 Neb. 514.

The defendant sought to disqualify this witness by cross-examination. She was asked whether she herself did not have a similar claim against the estate of the deceased for services rendered by her, and whether she had an understanding with this plaintiff that they should mutually assist each other in establishing their claims, and other similar questions, which were excluded by the court. The defendant now insists that this evidence would have established that the witness had a claim against the "estate arising out of the same facts and circumstances," and that this would disqualify. If the witness was jointly interested with the plaintiff in the claim that was being prosecuted, or if the two claims were so dependent upon the same facts as to amount to a joint interest in both, the objection to her testimony might be substantial, but the offer of testimony and the foundation laid therefor are far short of intimating such a condition, and we cannot say that the court erred in excluding these offers.

The petition, after alleging the services rendered by the plaintiff, contained the allegation that "said services were performed at the request of said Robert M. Akins, who promised and agreed to pay plaintiff for the same." There was no motion to make the petition more definite and certain in this respect, and the allegation was sufficient to admit evidence of either an express or an implied agreement to pay for the services. The objection that it was necessary under this allegation to prove an express contract fixing the price to be paid is without merit, and this is a complete answer to the objection to instruction No. 17. That instruction told the jury that, if the deceased agreed to leave his property to the plaintiff in consideration of the plaintiff's services, and that the plaintiff

performed the services accordingly, and the deceased neglected to convey or devise the property to the plaintiff, then the plaintiff could recover the value of the services. This instruction was justified by the evidence in the case.

Some of the witnesses testified that they saw the plaintiff working for the deceased, and that the class of work was of a certain value. The defendant objects that the witnesses did not show themselves competent, and that these witnesses did not testify that the services were of equal value during the whole time of their performance. It was, of course, competent to prove by different witnesses that certain services were rendered and the value of such services. We have not found any prejudicial error in these rulings of the trial court. The evidence in regard to the value of the services is not so conclusive as to remove all possible doubt, but, upon the whole, we cannot say that the verdict of the jury is so clearly unsupported as to require a reversal.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

OSCAR JOHNSON, APPELLEE, V. AMERICAN SMELTING & REFINING COMPANY; MONTANA CONSOLIDATED GOLD MINING COMPANY, INTERVENER, APPELLANT.

FILED APRIL 1, 1916. No. 18591.

Bankruptcy: SALE BY TRUSTEE: RIGHT OF PROPERTY. Where an employee of a mining company was engaged by the general manager of such company to perform certain necessary services as a watchman, and also other labor, and performed the same, whereby said company became indebted to such employee, and said general manager in payment of said indebtedness delivered to such employee certain copper plates formerly in use by such company, but at that time abandoned and no longer in use and not attached as a fixture to any part of the machinery of such company, said employee may properly be considered to be the owner of said plates, and, having sent the same to a smelting company to be smelted, will be entitled to

the proceeds thereof as against one who purchased the mining plant from the trustee in bankruptcy after the delivery of the plates to said employee; said plates not being in the inventory of said trustee at any time, or in his possession.

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

George W. Plummer and *Weaver & Giller,* for appellant.

Baldrige, Keller & Keller, contra.

HAMER, J.

The plaintiff, Oscar Johnson, performed services as a watchman, and also other labor, for the Kimberly Mining Company, which was the owner of a mining plant in Montana. The mining plant became indebted to Johnson a little less than $2,000. It was financially embarrassed, and the plaintiff, Johnson, demanded to be paid for his labor, and with the purpose of paying him in view the general manager of the mining company delivered certain copper plates to said Johnson, who shipped them to the American Smelting & Refining Company at Omaha, for the purpose of having them smelted. While the plates had been a part of the Kimberly company's plant, nevertheless at the time they were delivered to the plaintiff they were loose and were not attached as a fixture to the mining company's equipment. The plaintiff appears to have worked for the company from a year and a half to two years and until a trustee in bankruptcy took charge of the affairs of the company. There was a sale by the trustee in bankruptcy of the plant of the Kimberly Mining Company to the Montana Consolidated Gold Mining Company. At the time of this sale the plates were in the possession of the plaintiff, Johnson, and had been in his possession for some time prior thereto. An action was brought by the plaintiff against the American Smelting & Refining Company to recover the proceeds of the plates which had been smelted by that company. The Montana Consolidated Gold Mining Company intervened. It was agreed that the value of the copper

plates was $1,758.44. This amount of money was placed in the hands of the district court for Douglas county to await the disposition of the case as between the plaintiff and the intervener; the smelting company disclaiming any interest in the property. The plaintiff had the verdict and judgment against the intervener.

The intervener has appealed. It complains of certain instructions given by the court. The first instruction reads: "The question that is submitted to you is: Who was the owner of the plates that were shipped from the mines by Johnson, the plaintiff in this suit, to the smelting company at Omaha, before they were so shipped? The money in the hands of this court was derived from the smelting of the plates by the smelting company, and the smelting company disclaiming any interest in the matter in controversy, has turned the money into court, to await your conclusion of ownership in the matter. The smelting company is out of the case, and, Johnson and the intervening Montana Consolidated Gold Mining Company each claiming the ownership, the result is this trial. The contention of Johnson is that he performed certain services as watchman, and otherwise, for the Kimberly Mining Company, owner of the mining plant, until the time that the Kimberly company was judicially declared a bankrupt in the federal court of Montana; that during the time that he was such watchman, and performing such service, Ryan was the manager in control of the Kimberly property for the Kimberly company, and that Ryan, acting within his scope and powers of general manager, and with authority so to do, paid the plaintiff, Johnson, for his said services to the Kimberly company, by transferring to him title and possession of the plates in question, and that he (Johnson) became thereby the owner thereof, and as such owner made the shipment to the smelting company, and that he is therefore entitled to the money in the court's possession, the avails of the smelting of the plates. All of these contentions of Johnson are denied by the intervener, the Montana Consolidated Gold Mining Company. In its turn, the

intervener, the Montana Consolidated Gold Mining Company, alleges that it became the owner of the plates from the smelting of which the money in court was derived, by reason of having bought all of the property of the Kimberly company at the trustee's sale, and that by reason thereof, the plates being part of the property at such time so bought, it is entitled to the money that has been paid into court. The plaintiff, Johnson, denies that the plates in question were a part of the plant of the Kimberly company at the time of the trustee's sale, but claims that prior to the time of that sale the title thereo, that is, to the plates, had become vested in the plaintiff Johnson."

It is then said, in substance, that it being established that the plates in controversy were at one time a part of the Kimberly company's plant, and that but for Ryan's sale the plates would have become the property of the intervener, therefore it is incumbent upon the plaintiff to establish by a preponderance of the evidence that prior to the time of the decree in bankruptcy the plates were sold to the plaintiff, Johnson, by Ryan as the Kimberly company's manager, and were received by Johnson as a fair and reasonable compensation for his services. The jury were distinctly told that the burden of proof was upon the plaintiff to establish this fact by a preponderance of the evidence, and that if he failed to do so they should find for the intervener. We do not see any well-founded objection to this instruction.

By the third instruction given, the jury were told that the general manager had authority to keep watchmen and to pay them with the company's credit or money after a petition in bankruptcy had been filed against the company, if good, reasonable care should so require, and until the petition had been acted upon and a decree rendered adjudging the company to be a bankrupt. At the same time the court told the jury that there would be no right for the general manager to employ such watchman or to pay for his services with the fixtures of the plant such as were of general use and part of the plant's mechanism. He told the

jury that only such property as had been discarded from use could be used by agreement with the laborers in paying them their compensation. This instruction seems to be right.

In the fourth instruction the jury are told, among other things, that if they should find that during the interim between the filing of the petition and the court's decree the manager of the Kimberly company paid for the labor performed for that company with plates which were not the immediate fixtures of the plant, but which had been discarded and which had been delivered to the plaintiff, Johnson, then they should conclude that the title to the plates did not pass to the Montana Consolidated Gold Mining Company at the trustee's sale, but did pass to Johnson, who, being so paid, became the owner before the trustee's sale was held. This instruction seems to be without error.

The fifth instruction reads: "In considering whether or not Ryan, as manager of the Kimberly company, did in fact sell to Johnson the plates, as Johnson claims, you will consider all the evidence relating thereto, including the evidence bearing upon whether or not he performed the services, whether or not Johnson was paid in fact by Ryan, as he claims, by the sale to him of the plates, whether or not in good faith they were ever discarded as proper working plates for the plant, whether or not they were ever delivered to Johnson, and, from all the facts and circumstances shown in evidence, come to your best conclusion as to the matters submitted for your consideration." This instruction seems to be fair.

The first instruction given to the jury at the request of the appellee is, in substance, as follows: You are instructed that if you find from the evidence that in August, 1908, and prior to the bankruptcy of the Kimberly-Montana Gold Mining Company, said company was indebted to the plaintiff for services already rendered, and thereafter to be rendered, by him as watchman and custodian of its mining plant and properties at Jardine, Montana, and that H. M. Ryan was then the managing director of

that company and, as such, had charge of its properties and business at Jardine, Montana, and for the purpose of paying for such services turned over to the said plaintiff the said copper plates, the same not being a part of the then working plant, and from the proceeds of which the money now on deposit in this court was realized through the American Smelting & Refining Company, to whom said Johnson had shipped said plates to be smelted, then your verdict should be for the plaintiff in this case, and it is unnecessary as a matter of law, that the said Ryan should have made any formal bill of sale to said Johnson if he turned the plates over to the plaintiff.

The election of Mr. Ryan as managing director of the Kimberly company is shown by the record to have been unanimous.

J. C. McMynn testified that he was the consulting engineer of the Kimberly company; that Oscar Johnson, the plaintiff, was the watchman of the property. On cross-examination he testified that Johnson was his general utility man. The evidence shows that Mr. Ryan had been accustomed to buying and selling property for the Kimberly company. "Q. Did Mr. Walsh, as trustee, take charge of these plates at any time? A. No, sir. * * * Q. The first time? State whether or not he recognized your claim as the owner of those plates? A. That is the understanding." There appears to be no denial of this.

M. J. Walsh, the trustee in bankruptcy, testified that he sold the property of the Kimberly company to the Montana Consolidated Gold Mining Company; that the copper plates in controversy in this case were not included in the inventory because, before he was appointed receiver, he was told that the plates did not belong to the company, and, after he was appointed, he was again told that the plates did not belong to the company, but belonged to Mr. Johnson.

Walsh's testimony shows that he was the trustee in bankruptcy of the Kimberly company from the 9th day of August, 1909, to the 26th day of May, 1910. There was

introduced in evidence a letter written by Oscar Johnson, known as the "Dryfus letter." It is dated March 31, 1913, and states: "I have been employed here to look after the property since 1907. Some time during 1908 Mr. Ryan, as managing director, gave me authority to sell the copper plates, as they were no good for any further use. They were torn up and scrapped when the mill first shut down. I was put here with an understanding that I was to get $90 a month. All I ever received was $200."

In conclusion, it would seem that the evidence shows that the plaintiff was properly employed by the general manager of the company, and that the company became in debt to him, and that the plates were turned over in payment of the debt, and that the plaintiff is entitled to the avails of the plates which were shipped to the smelting company at Omaha. The plates do not appear in the inventory of the trustee in bankruptcy and were never in his possession, and there is a failure to show that the intervener, the Montana Consolidated Gold Mining Company, bought them from him.

The judgment of the district court is

AFFIRMED.

ROSE, J., dissents.

SEDGWICK, J., concurring.

The appellant states as the proposition of law relied upon for reversal that "all of the property owned by the bankrupt at the date of the filing of the petition passed to the trustee, and from the trustee to the purchaser at the sale." This is the only question discussed with any attempt at compliance with supreme court rule 12. The petition in bankruptcy was filed December 18, 1907. The adjudication of bankruptcy was June 18, 1909. If the date of the appointment of a receiver is stated in the briefs, it is lost in the mass of evidence stated, but not utilized by the parties under rule 12. April 20, 1910, the property of the bankrupt was ordered sold, and was ac-

cordingly sold by the trustee December 15, 1910. There is no doubt, under the many cases cited by appellant, that as between creditors, and as to the right to prefer creditors, and perhaps for other purposes, the filing of the petition in bankruptcy fixes "the date of cleavage." Even for a time before the petition is filed creditors are prevented from obtaining preferences. For 18 months after the petition in bankruptcy was filed the property remained in the hands and under the control of the alleged bankrupt before any further proceedings were had. It was cared for and protected by the alleged bankrupt; this plaintiff having been employed for that purpose. Neither the creditors nor the court objected to using the money or property for that purpose. There was no appointment of a receiver until after the services were rendered and paid for. It would seem, under the decisions of the federal courts, cited by the parties, that to employ and pay the plaintiff was the proper thing to do. However that may be, which is a question for the federal courts, the creditors and the court, by its receiver, are not now complaining. The appellant claims to have bought this property at the receiver's sale, but the property was not described or included in the inventories, and, with the consent of all parties interested, had been shipped to Omaha before appellant purchased at the sale, which seems to be a complete answer to this claim. The appellant could not buy this property at the receiver's sale under the circumstances. If one of the creditors had taken this property and sold it in Omaha, another creditor, or the receiver, might require an accounting for the property. If this plaintiff has made himself liable to the creditors or to the receiver for the proceeds of this property, that fact would not transfer the title and ownership of the property to a subsequent purchaser of the remaining property of the bankrupt. The appellant suggests in the brief that the plaintiff conspired with the manager of the bankrupt company to withdraw these plates from a machine of which they were really a part, and, for that reason, when appellant bought that machine it also

bought these plates, which were then in Omaha, and so is entitled to the proceeds of the sale of the plates. But there is no citation or discussion in the brief, in connection with this suggestion, of any evidence which would support such a charge, even if that would give appellant any right to the proceeds of the sale of the plates. In any view of the case, so far as appears from the discussion in the brief, the judgment of the court is the only one that could be supported, and I concur in affirming it.

OXYGENATOR COMPANY, APPELLANT, V. CASSIUS C. JOHNSON, APPELLEE.

FILED APRIL 1, 1916. No. 18642.

1. Sales: IMPLIED WARRANTY. Where a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, there is in such case an implied warranty that the article will be reasonably fit for the purpose to which it is to be applied.
2. ———: WARRANTY: BREACH: DAMAGES. In an action for damages for a breach of warranty as to the quality of personal property, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually is and what it would have been worth had it been as represented at the time the warranty was made.
3. ———: ACTION FOR PRICE: DEFENSE: EVIDENCE. The defendant having pleaded that the property in question was worthless, and having submitted proof tending to establish the fact alleged, the verdict of the jury so finding will be sustained.

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

Kretsinger & Kretsinger, for appellant.

Hazlett & Jack and *Walter Vasey, contra.*

HAMER, J.

This is an appeal by the plaintiff from the judgment of the district court for Gage county. It is alleged in the petition that between November 1, 1909, and February 4, 1910, the plaintiff sold and delivered to the defendant certain goods, wares and merchandise of the value of $1,499.60, on which amount the defendant paid the sum of $743.20, leaving still due to the plaintiff the sum of $756.40; that the said goods, wares and merchandise were sold under a written contract, a copy of which was set forth, and consisted of 292 oxygenators; that the plaintiff had performed all terms and conditions incumbent upon it to perform, and was entitled to recover against the said defendant.

The defendant answered, admitting that he ordered the oxygenators from the plaintiff, but he alleged that the machines were not perfect, as the plaintiff represented they would be; that they were not perfect because they were not hermetically sealed, and were, as a matter of fact, entirely worthless; that therefore the defendant was not indebted to the plaintiff. The defendant also set up a counterclaim containing three alleged causes of action against the plaintiff. In the first he alleged that he purchased 292 oxygenators from the plaintiff under the contract referred to; that they were to be perfect instruments, but in fact they were not hermetically sealed, and therefore were worthless; that he suffered damages by reason of said defective machines in the sum of $2,850. There was a second cause of action, which need not be discussed because it was withdrawn from the consideration of the jury.

In the defendant's third cause of action he alleged that the plaintiff purposely shipped him defective and worthless instruments in order to create an apparent indebtedness to the plaintiff for said machines, and, using said apparent indebtedness as a pretext, that the plaintiff wilfully and maliciously canceled said contract on the 21st

of February, 1910, and refused to furnish any more machines; that by said means the plaintiff purposely and intentionally destroyed the defendant's business, which was worth at least $3,000 a year, and that defendant was greatly damaged thereby.

To the defendant's answer and counterclaims the plaintiff filed a reply and an answer in the nature of a general denial. The cause was submitted to a jury, which returned a verdict on the 25th of October, 1913, for the sum of $1,719.05 for the defendant, Johnson. The jury also made special findings: (1) That there was nothing due plaintiff from the defendant; (2) that there was due defendant from plaintiff on the defendant's first cause of action in his counterclaim the sum of $1,219.05; (3) that there was due from plaintiff to defendant on defendant's third cause of action in his counterclaim the sum of $500.

There was a motion for a new trial, and the court was of the opinion that there was not sufficient evidence to sustain defendant's third cause of action for any amount, and granted plaintiff a new trial thereon. The court also required the defendant to remit from the special verdict of $1,219.05 the sum of $601.65. Finally, the court made an order requiring the defendant to remit the sum of $1,101.65 from the general verdict, or submit to a new trial, and, upon the remittitur being filed, overruled the motion for a new trial and rendered judgment for defendant in the sum of $617.40.

It is not disputed that the plaintiff was to furnish the defendant with perfect machines. The oxygenators seem to have been worthless. The defendant testified that of 292 of these machines there were a few more than 100 that were not hermetically sealed. He and his assistant, Ira R. Gould, tested them. Gould's testimony corroborated Johnson's testimony. Johnson testified that if the instruments had been in perfect condition each one would have been worth $35. He further testified that of these 292 instruments he sold about 50 for $6.50 each, and the remainder at prices ranging from $17.50 to $25 each. Johnson testi-

fied that the machines were worthless and without any value, and utterly failed to meet the conditions of the guaranty.

Charles N. McMichael testified that he was at present treasurer and bookkeeper of the Oxypathy Company, and that the company had formerly been called the Oxygenator Company, and that he had then been the treasurer and bookkeeper of that company; that he had had correspondence with the defendant, Cassius C. Johnson, and that his company had shipped Johnson some goods, and that he owed the company a balance of $756.40. He testified to various charges against Johnson, and credits, leaving the balance above stated. The contract between the defendant, Johnson, and the plaintiff shows the latter to be "the sole owner and proprietor and exclusive manufacturer of clinical instruments known as "Duplex Oxygenator" and "00 Duplex Oxygenator," and recites that said Cassius C. Johnson is desirous of having the exclusive right to vend and sell said machine in certain territories of the United States. The exclusive right is granted "to sell the Duplex Oxygenator and the 00 Duplex Oxygenator within the states of Washington, Oregon, California, Nevada, Arizona, Utah, Idaho, Montana, Wyoming, Colorado, New Mexico, South Dakota, Nebraska, Kansas, Iowa, Missouri, and the counties of El Paso, Reeves, Jeff Davis, Presidio, Brewster, Pecos, Ward, Loving, and Winkler, in the state of Texas." At least 584 machines were agreed to be purchased, for which the defendant was to pay $5 each for the 00 Duplex Oxygenator, and $4 for each Duplex Oxygenator not in the 00 class. It was also agreed that the plaintiff would furnish as many more machines in excess of 584 as could be supplied by the plaintiff, having due regard for "supplying other territories in which sales of said machine are made."

The evidence shows that a book is distributed along with each machine. Pictures of the machine are shown by the record, and also the picture of a winding path through a beautiful forest. The machine itself seems to be a cylinder

containing metals and chemicals said to be of mysterious and wonderful power. The oxygenator itself is declared to never require "recharging." "As you receive it from us, so you use it forever, the simple, silent doctor, does its duty and sends in no bills." It is so written in the book.

It is evident from Johnson's testimony that, if the instruments were not hermetically sealed, then they were perfectly useless.

Where a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, there is in such case an implied warranty that the article will be reasonably fit for the purpose to which it is to be applied. Newmark, Law of Sales, sec. 333; 1 Benjamin, Sales (6th ed.) sec. 657; *Omaha Coal, Coke & Lime Co. v. Fay,* 37 Neb. 68. In the latter case it is said in the syllabus: "Where one contracts to supply a commodity in which he deals, to be applied to a particular purpose of which he is aware, under such circumstances that the buyer necessarily trusts to the judgment of the vendor, there is an implied warranty that the commodity shall be reasonably fit for the purpose to which it is to be applied."

"In an action for damages for a breach of warranty or fraudulent representations as to the quality of personal property sold, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented at the time the representation or warranty was made." *Young v. Filley,* 19 Neb. 543. *McConnell v. Lewis,* 58 Neb. 188; *Sherrill v. Coad,* 92 Neb. 406.

In *Young v. Filley, supra,* it is said in the body of the opinion: "Where there is no allegation of a rescission of the contract, the measure of damages is the difference between the value of the corn as it really was at that time and what it would have been worth had it been as represented."

In *Sherrill v. Coad, supra,* it is said in the syllabus: "In an action by a vendee for damages for a breach of warranty or fraudulent representations by the vendor as to the

quality of personal property purchased, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented at the time the representation or warranty was made."

If the entire property is worthless, the entire value of such property as it was warranted is a measure of damages, and can be recovered. Burdick, Sales (3d ed.) sec. 352; 2 Mechem, Sales, sec. 1817.

If the property was worthless, the defendant was not obliged to return it. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5.

In the syllabus of the above case it is said: "Where the vendor, in pursuance of a contract of sale, delivers goods which do not conform to the warranty, which the vendee for that reason returns, or duly offers to return, and the vendor fails to furnish goods conforming to the warranty, the vendee has a right of action for breach of contract, and in such action is entitled to recover such damages as may be reasonably supposed to have been in contemplation of the parties, when the contract was made, as the probable consequences of such breach."

If the verdict rendered gave the defendant more than he was entitled to under the pleadings, this could be cured by the remittitur.

The defendant having pleaded and submitted proof that the property in question was worthless, it was proper that the jury might so find, and the court may take judicial notice that the property had no value. *Punteney-Mitchell Mfg. Co. v. Northwall Co.*, 66 Neb. 5.

The chemicals and material in the cylinder of the oxygenator being the thing which made the instrument valuable, if it was valuable, and these being worthless because not hermetically sealed, it was proper for the jury to take the defendant's view that the instruments had no value.

As the defendant was not in default, he did not owe the plaintiff anything, and the plaintiff had no right to break

the contract; but, if the court erred in its instruction to the jury concerning the third cause of action, it is to be kept in mind that the plaintiff also claims that, if the defendant was in default, then the contract terminated according to its own provisions. The remittitur was properly allowed. In view of the uncertain value of the property and the uncertainty of the profits in the sale of it, we are unable to say that the judgment of the district court as a whole is not right.

The judgment of the district court is

AFFIRMED.

LETTON, J., concurs in the conclusion.

FAWCETT and SEDGWICK, JJ., not sitting.

GRAND LODGE, DEGREE OF HONOR, ANCIENT ORDER OF UNITED WORKMEN, APPELLANT; JOHN H. LANGDON, INTERVENER, CROSS-APPELLANT, V. SARPY COUNTY, APPELLEE.

FILED APRIL 1, 1916. No. 19517.

1. **Taxation**: MORTGAGES OF REALTY: WHERE TAXED. Under the mortgage tax law (Laws 1911, ch. 105), being sections 6349-6353, Rev. St. 1913, real estate mortgages are to be taxed only in the county where the land mortgaged is situated.

2. ———: ———: INTEREST IN REAL ESTATE. Under the tax law above referred to, a mortgage on real estate in this state, when recorded, becomes an interest in real estate for the purposes of assessment and taxation.

3. ———: CLASSIFICATION OF PROPERTY: MORTGAGES. The act makes a new legislative classification of property and permits the separate taxation of the mortgage interest apart from the equity of redemption held by the owner of the real estate.

4. ———: EXEMPTIONS: CHARITABLE ASSOCIATION. A fraternal beneficiary association, the Degree of Honor, is not such a charitable association that its funds are exempt from taxation by the laws of the state of Nebraska.

5. ———: MUTUAL BENEFIT ASSOCIATION. The property of mutual benefit associations organized under the laws of this state is taxable the same as the property of individuals, corporations, and other domestic associations. *Royal Highlanders v. State*, 77 Neb. 18.

6. ———: ———: MORTGAGES. As the mortgage tax law has made mortgages an interest in real estate to be separately assessed and separately taxed when the mortgage is recorded, it is immaterial whether the money secured by the mortgage loan is from the mortuary fund or from the general fund.

7. ———: ———: ———. Where a beneficiary association, in this case the Degree of Honor, takes advantage of the recording act for the purpose of protecting its interest and procures its mortgage to be recorded, it ceases to be personal property to the extent that it is a part of a fund, and it becomes an interest in real estate taxable in the county where the real estate mortgaged is situate.

8. ———: EQUITY OF REDEMPTION. In such case the owner of real estate, being liable to pay the tax levied upon his equity, cannot complain so long as no greater burden is laid upon him than the payment of taxes on the excess of the value of the real estate above the mortgage interest.

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

Stewart & Stewart and *A. E. Langdon,* for appellants.

E. S. Nickerson, contra.

HAMER, J.

A real estate mortgage for $6,000 made by John H. Langdon and his wife to Grand Lodge, Degree of Honor, of Ancient Order of United Workmen of the state of Nebraska, was assessed by the taxing authorities of Sarpy county, Nebraska, as an interest in the real estate therein described, and under the provisions of the mortgage tax law enacted in 1911 (Laws 1911, ch. 105), and they also assessed the remaining equity in the land to John H. Langdon, the owner. The board of equalization refused to

strike the tax assessed against this mortgage from the record, and the matter was taken upon the petitions of the appellant and of the intervener, John H. Langdon, to the district court for Sarpy county. Demurrers were filed to said petitions by the said appellants, the said Degree of Honor and said John H. Langdon, upon the ground that the said petitions did not state a cause of action or entitle the petitioners to the relief prayed for. These demurrers were sustained, and the petitioners appealed from the order sustaining them.

The questions presented are: (1) Should the Degree of Honor be relieved from the payment of taxes on the mortgage? (2) If the court should find that the Degree of Honor was entitled to offset outstanding indebtedness upon beneficiary certificates against this mortgage, should Langdon pay taxes on the entire assessed value of the land, or only upon his equity?

Part of section 6350, Rev. St. 1913, reads: "A mortgage on real estate in this state is hereby declared to be an interest in real estate for the purposes of assessment and taxation. The amount and value of any mortgage upon real estate in this state shall be assessed and taxed to the mortgagee or his assigns, and the taxes levied thereon shall be a lien on the mortgage interest; and the excess in value of the real estate above the mortgage or mortgages thereon shall be assessed and taxed to the mortgagor or owner of the premises and be a lien on the owner's interest. The mortgagee or his assigns may pay the tax levied on the interest of the owner and have a lien thereon secured by the mortgage to the extent of the amount so paid with lawful interest thereon. The mortgagor or owner may pay the tax levied on the mortgage interest, and the amount so paid shall be claimed and held to be a payment on the indebtedness secured by the mortgage, and it may offset against any interest due thereon."

Sections 6349–6353, Rev. St. 1913, relate to the taxation of land and the taxation of the mortgage interest therein.

It is contended by the appellee that a mortgage on real estate in this state, when placed of record, is an interest in real estate for the purposes of assessment and taxation.

It is provided in section 6351 above referred to: "The assessor shall, at the time the property is assessed, assess the mortgage interest and the value of the real property above the mortgage interest separately." This is a new classification of property. It permits the separate taxation of the mortgage and the separate taxation of the equity of the owner of the real estate.

That part of section 6350, not heretofore quoted, reads: "In case of nonpayment of any tax levied upon the interest of the owner or mortgagee or assigns, the land upon which the tax is unpaid shall be sold at the time and in the manner provided by law for the sale of real estate for delinquent taxes; and the holder of either the interest of the mortgagor or mortgagee may redeem from such sale the interest sold; and the amount paid in redemption shall be treated and cause the same rights to accrue in favor of the party making the payment as if payment had been made before sale."

In *State v. Fleming*, 70 Neb. 523, 539, it is said: "All property in this state is, by the Constitution, required to be taxed by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchise. It must be conceded that property, whether belonging to the citizen or nonresident, must be equitably valued for taxation. When dealing with the taxation of property the legislature cannot discriminate in favor of the resident against a nonresident. Each is to be treated alike, and each is to pay a tax in proportion to the value of his property." In the same case (p. 523), it is said that the question to be decided is not whether particular provisions of chapter 73, Laws 1903, are valid, but whether the act considered as a whole is a constitutional expression of the legislative will.

In *Royal Highlanders v. State*, 77 Neb. 18, it was said: "It is further urged that it was the intention of the legis-

lature in passing the present law to completely exempt fraternal beneficiary associations from taxation. * * * It seems to us, however, that excepting such associations from those special provisions constitutes no evidence of an intention not to tax them, but, on the other hand, it shows an intention to tax them the same as all persons, corporations and other domestic associations. If the legislature had intended to exempt them from taxation, it certainly would have expressed such intention and thus put the question beyond all doubt. So we are of the opinion that the property of mutual benefit associations organized under the laws of this state is taxable the same as the property of individuals, corporations and other domestic associations."

In *Lancaster County v. McDonald*, 73 Neb. 453, 458, it is said: "The administration of the laws governing taxation has developed the difficulties, if not the impracticability, of permitting the subtraction of debts and liabilities of the owner of real estate and tangible personal property from its value for taxation. * * * The conclusion is that the legislature intended that moneys loaned or invested shall be taxed without deductions on account of indebtedness, and the 'credits' that are to be taxed are the true credits."

If a mortgage is to be assessed as an interest in real estate, it is impracticable to consider it a part of a mortuary fund or of any other fund where there is a right of setoff. If it is to be taxed as an interest in real estate, then its classification is changed. It is not real estate, but undoubtedly the legislature has the authority to so characterize it, and when it has done so it is no part of any fund, and its character is determined by the limitations of the statute. The interest in the real estate belonging to the owner thereof is taxable in the county in which the real estate is situate, and as soon as the mortgage becomes an interest in real estate by virtue of the statute it is taxed in the same county. Under section 6350, above quoted, the land upon which the tax is unpaid shall be sold at the time and in

the manner provided by law for the sale of real estate for delinquent taxes, and the holder of the interest of the mortgagor or mortgagee may redeem from such sale the interest sold. This is a change of the law as it existed prior to July 1, 1911, and section 6353, Rev. St. 1913, provides that all mortgages on real estate recorded prior to July 1, 1911, shall be taxable as provided by law under that provision of law relating thereto prior to July 1, 1911. It is clear from the language of the act that it was the intention of the legislature that a mortgage should be assessed as "an interest in real estate."

It does not appear to be material whether the Degree of Honor is indebted on beneficiary certificates beyond the amount of its fidelity fund. If it insists on putting its property out at interest so that it may earn money, it must comply with the provisions of the law concerning the assessment and payment of taxes. If it owns a mortgage it must pay tax upon the mortgage as any other owner would be expected to do.

In *Critchfield v. Nance County*, 77 Neb. 807, it was said that money loaned and invested discriminated that kind of property from "credit."

In *Lancaster County v. McDonald, supra,* it was said in the third paragraph of the syllabus: "The word 'credits' as used in section 28, art. I, ch. 77, Comp. St. 1903, means *net credits.*" In the fourth paragraph it was said: "The statute distinguishes between items of property to be scheduled for taxation. The other items named in the schedule are not to be considered as credits so as to allow indebtedness to be deducted therefrom. Notes and mortgages which represent moneys loaned or invested are not subject to such deduction." In that case it was held that section 28, art. I, ch. 77, Comp. St. 1903, concerning the specific listing of all moneys loaned and invested, must be complied with, although the taxpayer might be indebted beyond the amounts of such loans and investments. It is immaterial whether the Degree of Honor is indebted on beneficiary certificates beyond its fidelity fund, for it can offset one

against that class of property that truly may be termed included in credits. That is not property loaned out and earning money as an investment, and by the statute changing the classification is forbidden.

In the case of the *First Trust Co. v. Lancaster County*, 93 Neb. 792, this court upheld the act of 1911 providing that mortgages on real estate in this state should be considered as an interest in land for the purposes of taxation, and held that a mortgage is an interest in real estate and "such mortgages are assessed separately from the capital stock of the company, whether the tax is paid by the mortgagor or by the mortgagee."

The mortgage tax law of 1911 requires the assessor of the county where the land lies to assess the mortgage. "The assessor shall at the time the property (real estate) is assessed assess the mortgage interest and the value of the real property above the mortgage interest separately." Rev. St. 1913, sec. 6351.

The legislature had power under the Constitution to provide for taxing this class of property as it is done. Section 1, art. IX of the Constitution, says in part: "The legislature shall provide such revenue as may be needed by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises, the value to be ascertained in such manner as the legislature shall direct."

Section 6313, Rev. St. 1913, provides: "Personal property shall be listed in the manner following: Every person * * * shall list all his moneys, credits, bonds, or stocks, shares of joint stock or other companies, * * * moneys loaned or invested, annuities, franchises, royalties and all other personal property."

A mortgage on land may be held to partake of the character of realty. It is clearly within the authority of the legislature to provide that the mortgage shall be taxed in the county where the land lies and without regard to the residence of the mortgagee. This was clearly done by the passage of the act of 1911. The situs of the personal prop-

erty belonging to the Degree of Honor is in the county where the company has its head office; but, as the legislature is given authority to pass the act which it did, the law now provides that the "interest in real estate" held by the Degree of Honor is in Sarpy county where it is to be listed. The law provides that it is the recording of the evidence with the register of deeds or the county clerk that works the change in the nature of the mortgage from personal property to "an interest in real estate." The Degree of Honor recorded their mortgage. They did that which under the law must change the character of the mortgage from personal property to an interest in real estate. It will not do to have one sort of construction of this law for private individuals and corporations, and another contruction for the beneficial society.

It does not appear that cross-appellant Langdon has any right to complain of anything. He has not been hurt in any way. He owns the equity. He could hardly expect to avoid payment of taxes on his interest in the equity.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

RACHEL HUPP, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

FILED APRIL 1, 1916. No. 18550.

Bankruptcy: LIENS: ASSIGNMENT OF WAGES. Where a debtor assigns his future wages, no lien is created thereon until such wages are actually earned. If the debtor is adjudged a bankrupt prior to the earning of the wages, the debt, if listed in bankruptcy, is extinguished, and no lien attaches by reason of said assignment to wages earned thereafter.

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

Carl E. Herring, for appellant.

Edson Rich, B. W. Scandrett and *C. B. Matthai, contra.*

PARRIOTT, C.

June 12, 1907, one Henry F. Meyers assigned his salary, not yet earned, as an employee of the defendant, to the plaintiff in the sum of $68 to secure the payment of a promissory note. November 7, 1907, Meyers was declared a bankrupt. The indebtedness in question was listed in the bankrupt proceedings, and said Meyers was duly discharged in said bankrupt proceedings on the 24th day of February, 1908. On the 29th day of April, 1908, the plaintiff notified the defendant of said assignment, and on the 20th day of May, 1908, demanded payment thereof of the defendant. It is admitted by the defendant that, at the time of said demand, the defendant was indebted to the said Henry F. Meyers in the sum of $68. Before the commencement of this action, the said Henry F. Meyers obtained a judgment against the defendant for the amount that was alleged to have been assigned to the plaintiff, and in said action the defendant answered, alleging that the money in question was claimed under the assignment to Rachel Hupp. Said judgment and costs were paid by defendant. At the conclusion of the introduction of evidence, both parties asked for an instructed verdict, whereupon the court entered judgment for the defendant.

The principal question presented herein is whether or not the debt, alleged to be due plaintiff, by reason of the assignment from Meyers, was discharged in the bankrupt proceedings. The wages in question were earned after the adjudication in bankruptcy of said Meyers. The employee had a legal right to assign his future wages, and the assignment created a lien upon the wages earned up to the time of the bankrupt proceeding, but the plaintiff seeks to

enforce the lien against the wages earned after such proceeding.

Under the rule laid down by the weight of authority, the plaintiff's debt was discharged in bankruptcy. The assignment created no lien upon the wages of the employee until such wages were really earned, and, the debt having been discharged before the wages were earned, it follows that at the time of the commencement of this action the plaintiff had no right to recover against the defendant by reason of such assignment.

The above proposition is fully sustained by the decision in the following cases: *In re West,* 128 Fed. 205; *Leitch v. Northern P. R. Co.,* 95 Minn. 35; *In re Home Discount Co.,* 147 Fed. 538; *In re Lineberry,* 183 Fed. 338.

The judgment of the trial court should therefore be affirmed.

BY THE COURT. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

GEORGE MANGOLD ET AL., APPELLEES, V. AMERICAN INSURANCE COMPANY ET AL., APPELLEES; HOME INSURANCE COMPANY ET AL., APPELLANTS.

FILED APRIL 15, 1916. No. 18841.

Insurance: CONTRACT: CONSTRUCTION. In an action on a fire insurance policy, to which an "average clause" is attached, covering a lumber yard and its contents wherein there are a number of buildings and piles of stock, all within a common inclosure, and also covering the same class of property on a lot lying across a street and disconnected from the main yard, where no separate designation of the buildings or piles of stock in the main yard is made in the policy, the main yard with the property therein will be regarded

as one of the "premises" named in the "average clause," and the property disconnected therefrom will be regarded as a separate "premises" within the terms of the contract.

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

Stout, Rose & Wells and *William C. Ramsey,* for appellants.

Flansburg & Flansburg, John D. Wear and *J. J. O'Connor, contra.*

MORRISSEY, C. J.

Plaintiffs were engaged in the lumber business at Bennington, Nebraska. Their main yard and sheds were located on lots 6, 7, 8 and 9 of the railroad right of way, while across Stark street, 80 feet to the east, lay lot 18, block 10, which was used in connection with the yard as a place for piling stock and material.

March 1, 1911, plaintiffs took a policy of insurance for $3,000 in the Nebraska Lumbermen's Mutual Insurance Association, hereinafter called the "Nebraska company," covering their stock of lumber and building materials, and "their sheds, office, and warehouse buildings, and office furniture and fixtures." April 25, 1912, they took additional insurance in the sum of $3,000 in the Retail Lumbermen's Insurance Association of Minnesota, hereinafter called the "Retail company," covering the same property. September 15, 1912, they took a policy for $3,000 in the American Insurance Company of New Jersey, hereinafter called the "American company," on the same property, and on January 6, 1913, they took a policy for $5,000 in the Home Insurance Company of New York, hereinafter called the "Home company," covering the same property.

January 7, 1913, while each of said policies was in force, a fire occurred. The office building and some other property were destroyed, but none of the loss occurred on lot 18, block 10. Plaintiffs notified the insurance companies

and asked for an adjustment. The American company and the Home company sent a Mr. Garmire to represent them. The Retail company sent a Mr. Holmes. Mr. Garmire asked for authority to represent the Nebraska company. Peter Mangold, father of the plaintiffs, was a director in the Nebraska company and lived at Bennington. The record seems to show that he was requested to act for his company, and it is the contention of the appellants that he did so; but he testifies that he did not so act, and the Nebraska company denies that it was represented in the making of the adjustment that followed.

The adjusters and the insured agreed that the total loss was $4,807.51, which they undertook to apportion and charge against the respective companies as follows: Nebraska company, $1,601.83; American company, $1,601.83; Retail company, $601.44; and the Home company, $1,002.41. Proofs of loss were prepared and signed on behalf of the Mangolds, directed to the respective companies for the amounts stated. The Retail and the Home companies immediately sent drafts for the amounts charged to them, but the American and Nebraska companies, not being satisfied with the apportionment of loss, refused to pay the amounts assessed against them. Without cashing the drafts which they had received, plaintiffs instituted this suit on the four policies, and returned the drafts.

The amount of loss is admitted by all of the companies, but they differ as to the amount that ought to be paid by each. The cause was tried to the court without a jury. Judgment was entered against the American company for $1,051.24; the Nebraska company for $1,051.24; the Retail company for $1,014.39, and the Home company for $1,690.64. It may be said that this judgment sustains the theory of the American company and the Nebraska company. The Retail company and the Home company have appealed.

An average clause was attached to the Home policy, stating: "It is understood and agreed that the amount

insured by this policy shall attach in each of the above-named premises, in that proportion of the amount hereby insured that the value of property covered by this policy, contained in each of said places, shall bear to the value of such property contained in all of above-named premises." A reciprocal or favored policy clause was attached to the Retail policy, providing: "If any policy in any other company, covering the described property, shall contain any conditions of average or coinsurance, this policy shall be subject to the conditions of average or coinsurance in like manner."

Appellees contend that the main yard which constituted a single inclosure was one "premises" or risk and the property disconnected therefrom and lying across the street on lot 18, block 10, constituted another "premises" or risk. When the adjusters undertook their work they divided the property located on lots 6, 7, 8 and 9 into different "premises," and with this as a basis they reached the conclusions which have been heretofore set out. Appellees denied the correctness of this theory, and insist that this yard or inclosure cannot be arbitrarily divided after the loss has occurred. The court took the view contended for by appellees, and after a careful examination of the record we are constrained to believe that this yard or inclosure is not susceptible of the arbitrary division which the adjusters attempted to make. There are several buildings on the property. They are not placed with any regard for lot lines, nor separately named or described in the policy, but the whole scheme and arrangement indicates that the yard was intended to constitute a single "premises," and the lot across the street was intended to, and did, constitute a single or separate "premises." Taking this view of the record, the judgment entered by the court was the only one that could be entered under the admissions and the evidence, unless the other points raised by appellants are controlling.

It is claimed by appellants that appellees participated in the adjustment and are estopped from questioning the

correctness of the apportionment between the companies, but this claim is not sustained by the record. No one has changed his position because of the adjustment, and the doctrine of estoppel cannot be applied. It is true that plaintiffs signed up proofs of loss calling for the amount from each company which appellants say was the proper amount for each to pay, but it is very clear that in doing this they were simply making a formal statement at the request of the representatives of the companies. They agreed on the amount which they were to receive, and it mattered not to them how it was divided among the four companies carrying the insurance. They acted as other men similarly situated would act. They left the matter of division for the companies. They asked only for that which was coming to them, and signed the proofs of loss without question, but without intention of waiving their rights under the policies.

It is also contended that the American company and the Nebraska company were bound by the acts of the adjusters in fixing the amounts, but we think it may be seriously questioned whether the Nebraska company had a representative there. Even if Mr. Mangold was authorized to act for the company, he was without authority to increase its liability under the policy. The American company was represented by Mr. Garmire, but the terms of his employment did not authorize him to alter the liability of the company. So far as the adjustment went, it amounted to a mere settlement or determination of the amount of the loss, and neither increased or decreased the liability which any company owed under its policy.

The whole controversy appears to have arisen over the mistaken right of these adjusters to make an arbitrary division of the yard. We can find nothing in the record that warrants the making of such division as was attempted, and the judgment of the district court is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

IRA LEE, APPELLEE, V. PAUL T. BROWN ET AL., APPELLANTS.

FILED APRIL 15, 1916. No. 18749.

1. Attachment: WRONGFUL ATTACHMENT: LIABILITY. In the absence of proof of fraud or conspiracy, a justice of the peace is not liable to the owner of property taken and sold under his judgment in attachment proceedings as the property of another.

2. ———: ———: ———. The same rule obtains in favor of the attorney who commenced the proceedings in attachment, although the plaintiff himself may be liable.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed in part and reversed in part.*

Crites & Sons and *F. S. Baird,* for appellants.

Allen G. Fisher and *William P. Rooney, contra.*

BARNES, J.

This was an action brought by the plaintiff in the district court for Dawes county, in which he sought to recover the value of a team of horses, a set of harness and a wagon alleged to have been wrongfully taken by the defendants and sold under an order of attachment against one Lyman Lee in a suit wherein the defendant Gus Makres was plaintiff and Lyman Lee was the defendant.

The plaintiff in his petition alleged, in substance, that he was the owner of the property taken and sold as the property of Lyman Lee; that defendants had due notice of plaintiff's ownership of the property, and, with knowledge of that fact, Paul T. Brown, acting as a justice of the peace, wrongfully proceeded to issue the attachment process, enter judgment, and order the sale of said property; that defendant Makres, as plaintiff, and Frederick S. Baird, as his attorney, well knowing that Lyman Lee was not the owner of said property, proceeded to sell the same, and wrongfully applied the proceeds of the sale to

the plaintiff's claim and for certain alleged fees of the justice of the peace and the constable who conducted the sale, to plaintiff's damage in the sum of $300, for which plaintiff prayed judgment.

The defendants Makres and Baird joined in an answer in which they alleged that Lyman Lee was indebted to Makres in the sum of $65; that on the 27th day of March, 1913, they commenced an attachment suit before defendant Paul T. Brown, a justice of the peace for Dawes county, against the said Lyman Lee, and placed the papers in the hands of a special deputy constable for service; that the attachment was levied on the two horses, a set of double harness, and a spring wagon, as the property of the defendant Lyman Lee; that thereafter such proceedings were had that Makres obtained a judgment against the defendant, and the property was sold to satisfy such judgment. It was further alleged that Ira Lee filed a notice in writing with the justice of the peace claiming to own said attached property. It was also alleged that neither Lyman Lee nor Ira Lee had ever appealed from the judgment rendered in that case. It appears, however, that the plaintiff, Ira Lee, was not a party to the action, and the court never gave him a trial or a hearing of any kind on his claim of ownership.

The defendant Paul T. Brown, by his attorney, filed a separate answer; he having removed to Chicago. By his answer he alleged that he was the justice of the peace before whom the attachment suit of Gus Makres against Lyman Lee was commenced; that all of the proceedings were regular, and, so far as he was concerned, were conducted in good faith; that Ira Lee did not file an inventory asking that the attached property be set off to him; that no hearing on plaintiff's claim was ever had; that, as such justice, he acted in good faith and without malice and therefore prayed that he might go hence without day.

Plaintiff filed a general denial to each of said answers. The cause was tried to the jury, and a verdict was returned for the plaintiff for $175. A motion for a new trial was

overruled, and the court rendered judgment on the verdict for the sum last named, and costs of suit. The defendants have appealed.

The record shows, beyond question, that the plaintiff, Ira Lee, was the owner of the property which was attached in the suit commenced against Lyman Lee. It appears that the jury was properly instructed. Indeed, the instructions are not complained of.

As we read the record, there was no evidence of any misconduct on the part of the defendant Paul T. Brown, who was the justice before whom the action in favor of Makres against Lyman Lee in which the attachment was issued was pending, and in which the judgment against said Lee was rendered, and no evidence of any misconduct or wrongdoing on the part of the defendant Frederick S. Baird. Therefore the district court was not authorized in rendering any judgment against them or either of them. We are of opinion that the verdict and judgment against the defendant Makres were proper, and, the record containing no reversible error in his favor, should be affirmed.

The judgment of the district court as to defendant Makres is affirmed, and as to defendant Brown and attorney Baird is reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

CITY OF FALLS CITY, APPELLEE, V. RICHARDSON COUNTY, APPELLANT.

FILED APRIL 15, 1916. No. 19482.

Highways: ROAD FUND: CLAIMS AGAINST COUNTIES. The rule announced in *City of Albion v. Boone County*, 94 Neb. 494, and cases cited therein, *held* to control the questions presented by the defendant's appeal and sustain the judgment in this case.

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

Kelligar, Ferneau & Gagnon and *James E. Leyda,* for appellant.

C. F. Reavis and *John Wiltse, contra.*

BARNES, J.

Action in the district court for Richardson county brought by the city of Falls City to recover from the county one-half of the road taxes collected by the county treasurer from the taxpayers of the city, and not paid over to the city or its authorities. After the issues were settled, a trial was had to the court, without a jury, upon a stipulation of facts which is contained in the record. The trial resulted in a judgment for the plaintiff for the sum of $4,241.88. The defendant has appealed, but the plaintiff failed to perfect a cross-appeal.

The stipulated facts are, in substance, as follows: Plaintiff is a city of the second class under the laws of this state, and defendant is one of the organized counties of the state of Nebraska. In the year 1886 defendant adopted what is known as the township organization form of government, which has been in force from that date to the present time. Ever since the adoption of that form of government, plaintiff has been a city of more than 1,000 inhabitants and has constituted a supervisor's district, known as Road District No. 6, of the defendant county. The stipulation contained the amounts of the several levies of road taxes for the years 1880 to 1886, inclusive, all of which are stipulated to have been levied and collected on the property within the limits of the city. One-half thereof, as collected, has been fully paid to the plaintiff so there was no controversy as to those amounts. The stipulation next contained a statement of the road taxes levied and collected on the property within the city limits for the years 1889 to 1907, inclusive. It also contained a separate

statement of such taxes, designated as road and bridge fund taxes, levied and collected by the defendant on the property within the city limits for the years 1908 to 1912, inclusive. It contained a further statement of the several amounts which the county treasurer had paid to the plaintiff city from time to time up to, and including, the year 1913.

The court found in favor of the defendant on all claims for the years prior to 1907, to which finding the plaintiff excepted. There was a further finding for the plaintiff and against the defendant on all claims for the years 1908, 1909, 1910, 1911 and 1912, to which finding of the court the defendant excepted. The court also found that the defendant was entitled to a credit for the payment to plaintiff of the following amounts: $500 and $420.17 paid to the plaintiff in the year 1913, to which finding the plaintiff excepted. The court thereupon made a computation, and determined the amount due the plaintiff to be $4,241.88, for which the judgment was rendered.

Without making a specific statement of the contentions of the parties, or considering the several amendments to the road laws of 1879, it may be said that our holdings in *Libby v. State,* 59 Neb. 264, *City of Chadron v. Dawes County,* 82 Neb. 614, *City of Crawford v. Darrow,* 87 Neb. 494, and *City of Albion v. Boone County,* 94 Neb. 494, clearly show that plaintiff was entitled to recover a judgment in this case.

It further appears from the stipulation that since the amendment of 1907 the county has paid, or appropriated, certain amounts of the road fund tax to the benefit of the plaintiff, to wit: $500 on January 9, 1913, and in September, 1913, there was appropriated to the use of plaintiff $420.17. These amounts plaintiff has received, and therefore the county should be credited on the amount claimed by plaintiff the sum of $920.17 with interest thereon since the dates of those payments. This was the finding of the trial court.

We are of opinion that the questions involved in this litigation were correctly determined by the district court. Therefore, the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

MICHAEL JORDAN ET AL., APPELLANTS, V. ROBERT E. EVANS ET AL., APPELLEES.

FILED APRIL 15, 1916. No. 18584.

1. **Infants:** SUMMONS: SERVICE. Service of summons on an infant under the age of 14 years merely by leaving a copy at his usual place of residence, and without service upon mother, father, guardian, or the person having his care and custody, or with whom he lives if they can be found, is void and of no effect. Rev. St. 1913, sec. 7637.

2. **Attorney and Client:** APPEARANCE: PRESUMPTION. An attorney at law being an officer of the court, there is a strong presumption that his appearance in an action is authorized, and the burden of proof is upon one who asserts the contrary to establish the fact by clear, convincing and satisfactory evidence.

3. **Parties:** INDISPENSABLE PARTIES. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

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

R. C. Roper, for appellants.

R. E. Evans, J. J. McCarthy and *Fred S. Berry, contra.*

LETTON, J.

In 1889 Mary Jordan became the owner of 240 acres of land in Dakota county. She and her husband, John Jordan, lived upon and farmed the land. Debts were contracted which resulted in a number of judgments being rendered against both Mr. and Mrs. Jordan in favor of E. H. Monroe & Company and other creditors. On December 19, 1894, the Jordans, being old and incapacitated, made a disposition of their property among their children in such a manner as to secure for themselves a home for the remainder of their lives. They made and delivered to their sons, John Jordan, Jr., and Patrick Jordan, who had been farming the land as tenants, a warranty deed to the farm. In consideration for this conveyance a bond was executed by the sons in the sum of $2,000 which bound them to pay existing mortgages on the farm to the amount of $2,150 and interest, and also to pay $200 annually to their parents and the survivor, as well as to carry out other provisions for the old people. As a further consideration, separate notes, amounting in all to $3,300, were made by Patrick and John, each payable in six annual instalments to the seven other children, and secured by seven separate mortgages on the land. The notes to Michael are in evidence. There is testimony that the notes to the others were afterwards burned in a fire which destroyed the family residence. The deed and mortgages were placed on record on December 29, 1894. The grantees took possession at once. On November 18, 1895, a creditors' suit was begun in the district court for Dakota county by E. H. Monroe & Company against the grantees and mortgagees in these conveyances. The petition alleged the recovery of a judgment against Mr. and Mrs. Jordan, that the family settlement was in fraud of creditors, and prayed that the conveyances be set aside and the property sold to satisfy the judgment. At this time two of the children, Nellie Jordan and Michael Jordan, were minors under 14 years of age, and Winifred was a minor over 14 years old, all residing with their par-

ents. The record shows that an answer was filed by one Kamanski, an attorney at Bloomfield, where Thomas then lived, purporting to be signed, "Mary Jordan et al., by Thomas Jordan." Afterwards other creditors were permitted to intervene, the last petition being filed on February 11, 1897. A motion filed by Kamanski asking that the petitions in intervention be made more definite and certain was overruled on March 9, 1897. In May, 1897, Paul Pizey was appointed guardian *ad litem* for the minor defendants. Testimony was taken, the deed and mortgages were decreed to have been fraudulently made, and were set aside in favor of the attacking creditors. Several years afterwards a sale was had of 80 acres of land under this decree to one T. A. Berry, trustee, from whom by mesne conveyances defendant Lamp derives his title. The object of the present action is to set aside the decree in the creditors' suit as being secret, fraudulent and unauthorized, to declare the title to the land to be in Patrick and John Jordan, and to foreclose the mortgages described.

The service of summons upon Nellie and Michael was void, for the reason that no service was made upon the parents or guardian as the statute requires, and it may be conceded that the return was impeached as to service upon four of the other children who then resided in Knox county.

Plaintiffs' contention is that by reason of a conspiracy the decree was secretly rendered at a time when the case had been previously continued to a later term, and without notice to any of the plaintiffs; that at a later term the case was dismissed for want of prosecution, but the entry of this judgment on the trial docket was erroneously made in another case, and that Kamanski had no authority to appear for any other parties to the suit than Patrick Jordan and John Jordan, Jr. The record is voluminous and the facts are out of the ordinary. After a careful consideration of all the testimony (which must be analyzed and compared in all its parts in order to extract the truth, being

full of contradictions and improbabilities) and considering the admissions and inconsistencies appearing in the testimony of the Jordans, the usual course of human conduct, the presumption as to the appearance by an attorney, an officer of the court, and a number of incidents occurring subsequent to the rendition of the decree, we feel satisfied that Kamanski was at least tacitly authorized to act in behalf of the defendants who were then *sui juris*. The question is not free from doubt, and yet, giving due weight to the presumptions that attend the record of judicial tribunals, we feel that this is the proper conclusion. We hold, therefore, that the decree of May 24, 1897, was valid and effectual in favor of the creditors as against all defendants except the two minors under 14 years of age who were not served as the statute requires. This is the same conclusion arrived at by the district court.

The plaintiffs charge that R. E. Evans, judge of the district court for Dakota county at the time the Monroe decree was rendered, "acting in collusion and conspiracy with the other defendants herein and other coconspirators heretofore named," unlawfully and without authority permitted the decree to be fraudulently entered after the case had been continued. It is also charged that the conspirators allowed the plaintiffs Patrick and John Jordan to remain in possession of the premises until December 23, 1905, when Judge Evans "and Fred S. Berry, his coconspirator," procured an order of sale to be issued and a pretended sale was made to one Thomas A. Berry, who fraudulently pretended to be acting as trustee for the creditors. A number of other charges of fraud and collusion are made against these gentlemen. It is clearly shown by the testimony that at a subsequent time Evans (who had retired from the bench) and Berry, who were then acting for the creditors, Mr. Jay having died in the interim, offered, after the dismissal of the proceedings in the case of Jordan v. Hanson, to release all claim to the land if the Jordans would pay the amount of the judgments and costs, but this was never

done. We are satisfied from a careful inspection of the record that there is no evidence to support the allegations of fraud, collusion, or conspiracy, and that these charges are entirely unwarranted. We know of no rule of morals or ethics which debars a former judge, years after he has left the bench, from becoming the purchaser of real estate, the title to which had passed to a former holder of the title by virtue of a sale under a decree rendered by the court when he was acting as judge. Nor is the mere fact that an attorney in such proceedings afterwards buys from the purchaser at judicial sale a ground for criticism of his conduct.

It is urged that the Monroe decree is void for the want of service on the minor heirs under 14 years of age, since they were indispensable parties to the action. Indispensable parties are those who not only have an interest in the subject matter of the controversy, but (1) an interest of such a nature that a final decree cannot be made without affecting their interests, or (2) leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Chadbourne's Ex'r v. Coe,* 10 U. S. App. 78; and cases cited in 15 Ency. Pl. & Pr. 611, 614.

Tested by this definition, did these minor heirs (1) have an interest in the controversy of such a nature that a final decree could not be made without affecting their interests? We are unable to see how a decree setting aside the deed to Patrick and John and the mortgages to the other parties defendant in favor of creditors could anywise affect the interests of these minors. Not having been brought into court, the decree was an absolute nullity as to them, and, so far as they are concerned, the deed to Patrick and John and the mortgages given to these children are valid and effectual. They have had no day in court with respect to the issue of their validity. Furthermore, the purchaser at the sale under the decree became possessed by his purchase

of all the interest in the real estate of the other defendants who were served or appeared in the action.

Was the controversy in the Monroe-case (2) left in such a condition that its final determination was "wholly inconsistent with equity and good conscience?" It is apparent that the omission of these defendants was not wholly inconsistent with equity and good conscience so far as the plaintiffs were concerned, and the presence or absence from the suit of these minors could not and did not affect the justice of the decree or the interests of the other defendants. If it had been known that the entire interests of all the children were not subject to the decree, the purchaser at the sale might not have been willing to pay so high a price for the land, but this could not and did not affect the merits of the case. It was for the plaintiff in that case to decide whether it would proceed to decree under such circumstances, and the absence of these parties could affect adversely the plaintiff alone. It is not infrequent in cases of mortgage foreclosure that some party having an interest in the premises is not brought into the suit. This does not affect the validity of the foreclosure, but merely leaves an outstanding interest which the purchaser at the sale does not acquire. The decree was final and effectual as to those before the court. These minor heirs, therefore, were not indispensable parties to the action, and the failure to bring them in by proper service does not affect the validity of the decree as to the other defendants.

It is urged that, because the decree set aside the deed and all of the several mortgages upon the entire 240 acres, it was indivisible. It is true this is its purport, but the decree was only effectual to do this in behalf of creditors alone. When the sale of the 80 acres satisfied the creditors' claims, the decree had served its purpose, could operate no farther, and the deed and mortgages were as valid and effectual as if no such action had ever been maintained or decree rendered.

The district court found that the Monroe decree was valid as to all defendants except the minors under 14 years of age. It foreclosed the mortgages held by them, and provided the 160-acre tract be sold first, and, if the amount realized be insufficient, then the 80 acres should be sold. Since defendant Lamp appears to have purchased without knowledge of the infirmity of the title to the 80-acre tract, and defendant Hemstreet who purchased the mortgage executed by Lamp was equally innocent, this seems to be a just and equitable decree.

We have reached the same conclusion as did the district court. Its judgment is

AFFIRMED.

GREAT WESTERN COMMISSION COMPANY, APPELLEE, V. GOTTLIEB W. SCHMEECKLE, APPELLANT.

FILED APRIL 15, 1916. No. 18863.

Mortgages: FORECLOSURE: BURDEN OF PROOF. In an action to foreclose a real estate mortgage, when the allegations of the petition are denied, the burden is on plaintiff to make *prima facie* proof that no action at law has been instituted for the recovery of the debt. *Jones v. Burtis*, 57 Neb. 604.

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

J. L. White, for appellant.

J. A. Williams, contra.

LETTON, J.

This action was brought to foreclose a mortgage by Friedricke Schmeeckle and Gottlieb W. Schmeeckle on 160 acres of land. The mortgage was given to secure the payment of a promissory note for $2,700, signed by Friedricke

Schmeeckle and Gottlieb W. Schmeeckle, and payable to plaintiff. The petition is in the usual form. An answer was filed by Gottlieb W. Schmeeckle to the effect that he was not sufficiently informed as to the alleged facts, and therefore he denies each allegation in the petition contained and demands proof. No service was had on Friedricke Schmeeckle. At the trial the original mortgage was received in evidence. The plaintiff then offered the original note in evidence "for the purpose of a comparison of the signatures with the mortgage." Defendant objected on the ground that no foundation was laid. The objection was overruled. The clerk of the district court was then called, and testified that there was no other action pending in that court in which the defendants were being sued by the plaintiff. The attorney for defendant testified that Friedricke Schmeeckle was dead. He also testified that at a former hearing he had stated that defendant was ready to pay the interest, and that if plaintiff "would extend the time one year we would pay 8 per cent. interest and surrender possession without any trouble. * * * And I subsequently stated that we did not deny that we owed the debt."

This concluded the testimony. A decree of foreclosure was then rendered which contains the following finding: "The court further finds that Friedricke Schmeeckle is dead, and that before such death she conveyed all her interest in said land to her husband, Gottlieb Schmeeckle." Errors of law occurring at the trial and that the judgment is not sustained by sufficient evidence are assigned. That portion of the decree which finds that Mrs. Schmeeckle had conveyed her interest to her husband before she died is unsupported by the pleadings or the evidence. The mortgage was properly received in evidence, since, being acknowledged, it proved itself. Rev. St. 1913, sec. 6210. Construing the language of the offer of the note technically, it was offered only for the purpose of comparison of the handwriting. It is apparent, however, that counsel meant that,

the mortgage having been received, the signature of the note is to be established by a comparison with the handwriting on the mortgage. This matter is really immaterial since defendant's attorney admitted the debt in open court.

There was a failure of proof as to the fact that no other action had been brought for the recovery of the debt secured by the mortgage, except as to the court in which the action was pending. This allegation was denied in the answer. In this state of the pleadings, proof that no such action had been begun was essential. *Beebe v. Bahr,* 84 Neb. 191, and cases cited.

The heirs or representatives of Mrs. Schmeeckle were not parties to the suit. All interested parties should be brought in.

The judgment of the district court is

REVERSED.

JAMES MCCARTHY, APPELLEE, V. VILLAGE OF RAVENNA, APPELLANT.

FILED APRIL 15, 1916. No. 18565.

1. **Master and Servant:** INJURY TO SERVANT: GROSS NEGLIGENCE. The violation of the statute requiring the employer to guard shafting is gross negligence. Rev. St. 1913, sec. 3597.

2. **Negligence:** COMPARATIVE NEGLIGENCE: DIRECTION OF VERDICT. "Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison required by the statute rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of plaintiff. Ordinarily, wherever there is room for difference of opinion upon these questions, they must be submitted to the jury." *Disher v. Chicago, R. I. & P. R. Co.,* 93 Neb. 224. Rev. St. 1913, sec. 7892.

3. Appeal: INSTRUCTIONS: HARMLESS ERROR. A judgment will not be reversed on appeal for the giving of an instruction not prejudicial to appellant.

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

W. D. Oldham and *R. M. Thompson,* for appellant.

Wilmer B. Comstock and *N. P. McDonald, contra.*

ROSE, J.

Plaintiff brought this action against the village of Ravenna, his employer, to recover damages in the sum of $20,000 for personal injuries. While on a ladder, whitewashing a wall in the pumping station of the village waterworks, he was caught in the coupling of a revolving overhead shafting, whirled around it, stripped of clothing, thrown on a cement floor below, and permanently injured. Defendant is charged with negligence for failure to guard the shafting and to countersink or cover the set-screws or bolts in the coupling. In his petition plaintiff invoked the statute containing the following provisions:

"It shall be the duty of any person, company or corporation operating any factory, mill, workshop, mercantile or mechanical establishment, or other institution where machinery is used, to provide or construct such guards and protection as will protect all employees against injury from belting, shafting. * * * Every protruding set-screw in collars and couplings of shaftings or other revolving machinery shall be countersunk or covered with metal boxings." Rev. St. 1913, sec. 3597.

"For an injury to a person occasioned by any violation of this act, by the failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damage sustained thereby." Rev. St. 1913, sec. 3599.

Defendant denied negligence, and pleaded in detail the following defense as stated in the answer: "The injury the plaintiff received was occasioned solely by his own gross

negligence, while violating the positive orders given him by defendant's water commissioner, and by exposing himself to known dangers of which he had been fully warned." A trial of the issues resulted in a verdict in favor of plaintiff for $10,000. The recovery, however, was reduced by remittitur to $6,000. From a judgment for the latter sum, defendant has appealed.

It is first argued by defendant that the evidence is insufficient to sustain the judgment. There is proof tending to show the following facts: Plaintiff was employed by defendant to work in the pumping station, where a shafting 46 feet long, 18 inches from a wall, was suspended 10 feet above the floor. The water commissioner authorized plaintiff to do some whitewashing. Near the shafting his work could not be done properly from the floor with a long-handled brush. He was urged to hurry, though the machinery was in operation. To apply the whitewash by hand with the brush itself, a method approved by the water commissioner, it was necessary for plaintiff to ascend a ladder and to reach over the shafting. While performing his duty in the manner indicated, a revolving coupling caught his clothing, wound it on the shafting, whirling him around with it, denuded him, and threw him on the floor. The shaft itself was unprotected and unguarded. The set-screws or bolts in the coupling had not been countersunk or covered, but protruded three-fourths of an inch beyond the surface of the coupling. The position of plaintiff while applying the whitewash from the ladder was similar to that frequently assumed by him in oiling the shafting pursuant to directions of the water commissioner. That plaintiff was seriously injured is not now questioned. His employment by defendant is established. The jury obviously accepted as true plaintiff's account of his injury. While he is contradicted in several particulars, the evidence, in view of the statute cited, is sufficient to sustain a verdict in his favor.

The principal assignments of error challenge the instructions on the subject of negligence. Attention is thus directed to the proofs in support of the defense that plaintiff's injuries resulted from disobedience of orders. The water commissioner testified, in substance, that he had directed plaintiff to keep away from the machinery when in motion, to use a long-handled brush and to remain on the floor while applying whitewash. Referring to this feature of the defense, the trial court gave an instruction concluding as follows:

"If you further believe from the evidence that plaintiff in violation of said orders and warnings took a ladder and a short-handled brush and ascended on the ladder to a place in dangerous proximity to the shafting and gearing of defendant's machinery, while the same was in operation, and while so doing exposed himself to known dangers and in consequence was injured, and if you further believe from the evidence that such acts and conduct on the part of plaintiff made him guilty of more than slight negligence as compared to the negligence, if any, of the defendant, then plaintiff cannot recover, and your verdict must be for defendant."

It is argued that the jury should have been instructed to render a verdict in favor of defendant, if plaintiff was injured as a result of disobeying orders. The common law rule that the negligence of plaintiff, if contributing to the injury for which he seeks damages, defeats a recovery, has been changed by statute. The law now is:

"In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attribu-

table to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury." Rev. St. 1913, sec. 7892.

Construing a similar statute, it was recently held:

"Where the facts in evidence tend to show both negligence and contributory negligence, the duty to make the comparison rests with the jury, unless more than slight contributory negligence of the plaintiff, in comparison with that of defendant, is so clearly shown that it would be the duty of the trial court to set aside a verdict in favor of the plaintiff. Ordinarily, wherever there is room for a difference of opinion upon these questions, they must be submitted to the jury." *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224.

If plaintiff testified truthfully, the case made by him may be summarized thus: He was injured through the failure of defendant to comply with the statute requiring it to guard the shafting and to countersink or cover the set-screws or bolts in the coupling. A compliance with the statute would have prevented the injury. When injured, plaintiff, in performing the duties of his employment pursuant to the directions of his employer, was at work near the unprotected machinery. He did not disobey orders. His testimony, if believed, would justify the jury in finding that the injury of which he complains was caused by defendant's failure to comply with the statute. Such a violation of the statute is gross negligence. Could the jury properly find that plaintiff was not guilty of more than slight negligence in comparison? The answer depends on their view of the evidence. Plaintiff testified that he had repeatedly ascended the ladder to oil the revolving shaft; that the water commissioner had directed him to do so; and that his position on the ladder, while using the whitewash brush at the time of the injury, was practically the same as that often occupied by him, while oiling the shafting pursuant to the orders of the water commissioner. If the jury believed this testimony, they could consistently and reason-

ably find that plaintiff, comparatively, was guilty of only slight negligence, though they also believed that earlier in the employment of plaintiff he had been warned to use a long-handled brush and to keep away from the machinery while in motion. If plaintiff testified truthfully, he was not negligent in ascending the ladder to oil the shafting while in motion. If he afterward went to the same place under similar circumstances to apply whitewash, was he guilty of more than slight negligence in comparison with the gross negligence of defendant in violating the statute requiring guards which would have prevented the injury? Under the evidence, when considered with the statute on the subject of comparative negligence, defendant was not entitled to a more favorable instruction than the one given. In this respect there is no prejudicial error in the charge of the trial court.

Complaint is also made because the trial court used the word "negligence," instead of the statutory term "gross negligence," in permitting the jury to make their comparison. Other parts of the charge contained the literal language of the statute. It seems clear that the jury, when the instructions are all considered, were not misled to the prejudice of defendant by the omission of the word "gross." Prejudicial error in other respects has not been found.

The judgment is assailed as excessive, but a substantial reason for reducing it has not been given.

AFFIRMED.

FAWCETT, J., dissents on the merits.

SEDGWICK J., dissenting.

The majority opinion quotes the instruction given by the trial court submitting the question whether the negligence of plaintiff was slight. The instruction tells the jury that if plaintiff violated the orders and warnings of his employer, and in doing so "exposed himself to known dangers," and that the "consequences" of disobeying orders and warnings when he knew the danger of so doing was the

very injury he complains of, they might find that such conduct was slight negligence. It seems to me that such conduct as is stated in this instruction amounts to recklessly and wilfully injuring himself. By this instruction the jury were permitted to find for the plaintiff, although satisfied from the conflicting evidence that the plaintiff had knowingly caused his own injury. For this peculiar holding, *Disher v. Chicago, R. I. & P. R. Co.*, 93 Neb. 224, is cited and quoted from, a case which arose before the statute we are now construing was enacted, and did not involve the questions here presented.

The majority opinion is to my mind a very incomplete and unsatisfactory discussion of the important questions presented in this case under the new statute which we are now called upon to construe.

HAMER, J., dissenting.

As I understand it, section 3597 contemplates the construction of guards to "protect all employees against injury from belting, shafting, gearing, elevators, drums, saws," etc. Section 3599 provides: "The fact that any employee, servant or other person shall continue to work during the time such owner has failed to comply with the provisions of this article shall not be considered as an assumption of the risk of such employment by such employee, servant or other person." The purpose of the provision concerning the construction of guards for the shafting is the protection of employees. There seems to be a dispute as to whether the plaintiff was employed, and concerning the capacity in which he was employed if there was in fact any employment. It is uncontroverted that the shafting, which it is claimed ought to have been protected by a guard, was about 9 or 10 feet above the floor of the building in which the injury occurred. If the plaintiff was acting within the line of his employment, if he had actually been employed, then it is important whether the shafting had been protected by the guard. If the plaintiff had not been employed to do the whitewashing, which he undertook to do, and which

it appears was a voluntary act upon his part, and he went up in close proximity to the shafting and so was caught by a revolving shaft and injured, the defendant is not liable because it never agreed to the conditions and purpose of the employment. If plaintiff was employed to guard the machinery and in doing so should go up in the neighborhood of the shafting, about 10 feet above the floor, for the purpose of oiling the machinery, there might be a liability if he was injured, but in this case, as I understand it, he was voluntarily attempting to whitewash the inside of the structure, and he went up to the machinery which was not accessible from the floor, and while about 10 feet from the floor he sustained the injury complained of.

There appears to be evidence tending to show that the plaintiff was guilty of disobedience of orders, and that he violated the instructions given him, and that he exposed himself to dangers that were not required in his employment. If that is true, he should not be allowed to recover. There does not appear to have been given such instructions as the case demands covering the employment of the plaintiff and the liability of the defendant. He was told to keep away from the shafting, but, nevertheless, he went up there to engage in whitewashing the building, which was no part of his duty. If he was outside of his employment in what he did and violated the instructions which had been given him, he was guilty of gross negligence, and should not be allowed to recover anything. If the common law has been modified by the statute, nevertheless it is not intended to take away from the owner the control of his property and the direction of the servant or employee. It would be an alarming condition which would turn the property of the owner and its control over to the employee or to one who assumes to act as an employee. A reasonable construction should be given to these acts for the safety of servants and employees, and a radical view not contemplated by the law-making power should not be interpolated into these acts by the decisions of the courts.

The instruction given does not seem to be warranted by the facts, and it was a license to the jury to find for the plaintiff, whatever they may have thought the facts were.

GEORGE RUSHART, APPELLEE, V. HOMER CRIPPEN ET AL., APPELLANTS.

FILED APRIL 15, 1916. No. 18870.

1. **Statutes:** AMENDMENT. The legislature, by amending an existing section covering the entire subject to which it relates, may incidentally change or modify other statutes without violating the constitutional limitations in regard to amendments. Laws 1907, ch. 81; Const., art. III, sec. 11.

2. ———: CONSTITUTIONALITY: LOCAL AND SPECIAL LAWS. In a suit to test the constitutionality of a legislative act, the presumption that an exception to general provisions is justified by facts within the knowledge of the lawmakers can only be overthrown by pleading and proof to the contrary, unless an unreasonable or arbitrary classification appears on the face of the act or is disclosed by facts of which the court may take judicial notice.

APPEAL from the district court for Sarpy county: JAMES P. ENGLISH, JUDGE. *Affirmed.*

Smyth, Smith & Schall, for appellants.

W. P. Lynch, contra.

ROSE, J.

This is a suit to enjoin the village board of Fort Crook from issuing a saloon license to R. D. Wansel. The law relating to intoxicating liquors formerly authorized the issuance of such a license on statutory terms, but the legislation was changed in 1907 by an amendment containing, among other things, the following provisos: "Provided, that no license shall be granted by the authorities of any

village for the sale of any liquor within two and one-half miles of any United States military post; provided, this act shall not apply to military posts maintained exclusively as signal-corps posts." Laws 1907, ch. 81.

The village was within two and one-half miles of the Fort Crook military post, which is not maintained exclusively as a signal-corps post. The trial court overruled a demurrer to the petition, and, the defendants refusing to plead further, an injunction was granted. Defendants have appealed.

Without questioning the remedy by injunction, defendants argue that the provisos quoted violate the following constitutional provision: "No law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11.

According to the title, the sole purport of the act assailed is the amendment of section 25, ch. 50, Comp. St. 1905. The section cited was a part of the general statute on the subject of intoxicating liquors, and granted to cities and villages the power to license saloons and to regulate the sale of intoxicating liquors. It is insisted that the amendment goes beyond the statute to which it refers and amends that part of the village charter empowering the village board to license and regulate the sale of intoxicating liquors. Rev. St. 1913, sec. 5115. The amended section is general in its nature and covers the subject of legislation to which it relates. In amending such a provision the legislature may incidentally modify or change other statutes. The licensing power granted by the city charter to the village board is by the very terms of the grant subject to general laws. Rev. St. 1913, sec. 5115. Reasons for sustaining the amendment are stated in a former opinion. *Dinuzzo v. State,* 85 Neb. 351.

Defendants further contend that the amendatory act is class legislation, and that it violates that part of the constitution inhibiting the enactment of local and special

laws: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * In all other cases where a general law can be made applicable, no special law shall be enacted." Const., art. III, sec. 15.

It is argued that there is no basis for the classification prohibiting saloons within two and one-half miles of a military post and allowing them within the same distance of military posts maintained exclusively for signal corps. It will be presumed that the lawmakers based their exception on conditions of which they had knowledge. An unreasonable or arbitrary classification does not appear on the face of the act. Defendants did not offer any proof. The pleadings do not allege facts indicating that the amendment is local or special within the meaning of the Constitution. Facts of which the court will take notice do not warrant such a conclusion. In a suit to test the constitutionality of a legislative act, the presumption that an exception to general provisions is justified by facts within the knowledge of the lawmakers can only be overthrown by pleading and proof to the contrary, unless an unreasonable or arbitrary classification appears on the face of the act or is disclosed by facts of which the court may take judicial notice.

A substantial reason for holding the amendment invalid has not been given.

AFFIRMED.

HERWARD CROOK, APPELLEE, V. WILLIAM B. CHILVERS, APPELLANT.

FILED APRIL 15, 1916. No. 18287.

1. **Abstracts of Title: DEED RECORDS: EXAMINATION: DUTY OF ABSTRACTERS.** The provisions in section 5623, Rev. St. 1913, which require the register of deeds to keep general grantor and grantee

indexes of deeds and mortgages, and the provisions in section 5629, which make it the duty of the register of deeds, on receiving any conveyance or instrument affecting realty, to cause such conveyance or instrument to be entered upon a numerical index immediately after filing the same, are intended as checks, one upon the others, to insure accuracy in ascertaining the state of the records as to titles to real estate, and an abstracter is not justified in relying solely upon any one to the exclusion of the others.

2. ———: DUTY OF ABSTRACTER: LIABILITY. Ordinary care and diligence on the part of an abstracter, in performing the work for which he has been employed, require him to avail himself of every facility at hand in order to furnish his client an accurate and complete abstract of the records. For a failure so to do he will be liable personally and upon his bond.

3. ———: ———: ———. Any person engaged in the business of compiling abstracts of title to real estate in this state, who furnishes an abstract to one by whom he is employed for that purpose, is chargeable with knowledge of the use to which such abstract will in all probability be devoted, and he thereby becomes liable under section 6277, Rev. St. 1913, for all damages sustained by reason of any defect in such abstract, not only to the party who employed him to make it, but also to all persons who may deal with such party in reliance upon the abstract so furnished.

4. ———: ———: LIMITED EMPLOYMENT: CERTIFICATE. When an abstracter relies upon the numerical index alone to refer him to all entries upon the records affecting the title to the property which he is examining, he does so at his peril, unless the one employing him agrees that in the making of such abstract he may rely upon said index alone for such information; and in such case his certificate to the abstract must clearly and unequivocally show his limited employment and investigation by reciting that such was the method pursued by him in making the abstract.

APPEAL from the district court for Pierce County: ANSON A. WELCH, JUDGE. *Affirmed.*

O. J. Frost, and *M. H. Leamy,* for appellant.

Fred H. Free, contra.

FAWCETT, J.

About April 1, 1910, plaintiff entered into a contract for the exchange of certain real estate which he owned in Rock county, with one Van Norman, for 80 acres of land which

Van Norman owned in Pierce county. Each party was to furnish the other with an abstract of title to the land which he was to convey. When they met to complete the exchange, plaintiff presented to Van Norman a deed to the Rock county land, together with an abstract, to which was attached the certificate of an attorney certifying that it showed good title in plaintiff. Van Norman presented his deed to the Pierce county land, but, not having an abstract, he delivered the deed to plaintiff with the arrangement that plaintiff should hold all the papers until he (Van Norman) furnished his abstract. Van Norman testified: "I was to furnish a perfect abstract." Again he testified: "Well, we made the deal; and papers were to be left in the bank until I had the abstract completed and brought down to date, and I had an abstract completed from Mr. Chilvers (defendant), and the deeds to the Rock county land were held in the bank until I should produce the abstract for this land in Pierce county." This abstract was delivered by Van Norman, about a month later, to the bank at which the papers had been left. Plaintiff testified that he then examined the abstract, was satisfied with the title which it showed, and that he relied upon it in finally consummating the deal. It subsequently transpired that there was a prior mortgage for $400 upon the land, which the abstract did not show. The mortgagee subsequently foreclosed the mortgage, and after the foreclosure suit had proceeded to decree plaintiff, in order to protect his grantee to whom he had sold the property with full covenants of warranty, paid off the mortgage. He thereupon instituted the present action against defendant, who was the maker of the abstract, to recover the amount which he had been compelled to pay to satisfy the mortgage referred to. At the conclusion of the trial the court directed a verdict in favor of the plaintiff, upon which judgment was entered, and defendant appeals.

The fourth assignment alleges error in directing a verdict for plaintiff. The points argued in the brief may all be considered under this assignment.

A record of the county clerk, who, at the time the $400 mortgage was recorded, was the custodian of the records of deeds and mortgages, shows that when the mortgage had been recorded it was delivered to Mr. Chilvers, the defendant in this action, who receipted upon the record therefor. The execution of this receipt by defendant is admitted. It appears therefore that at the time the mortgage was recorded defendant had full knowledge of the fact, and he should not be permitted to subsequently deny such knowledge. The evidence shows that at the time the abstract was prepared by defendant the mortgage had been spread upon the records and had been duly entered in both the grantor and grantee general indexes, but it was not shown on the numerical index, and the important question which we are called upon to decide is: Is an abstracter liable for a failure to show in his abstract the existence of a mortgage in such a case, or, to state it another way, may he implicitly rely upon the numerical index and examine only such instruments as are shown thereon, or is he bound to furnish an accurate and complete abstract of the records? Section 5623, Rev. St. 1913, requires the register of deeds to keep a grantor and grantee index of deeds in his office, and gives the form of such indexes. Section 5624 provides that the entries in such index shall be doubled, one showing the names of the grantors arranged alphabetically, and the other those of the grantees in like order; and that, where there are two or more grantors having different surnames, there must be as many distinct entries among the grantors as there are names, and that they shall be alphabetically arranged in regard to each of such names, and that the same rule shall be applied in the case of several grantees. Section 5628 requires the register to keep a numerical index as nearly as practicable in the form set out. Section 5629 provides that it shall be the duty of the register of deeds, on receiving any conveyance or instrument affecting realty, including mechanics' liens, to cause

such conveyance, instrument or mechanics' lien to be entered upon the numerical index immediately after filing the same. The statute is just as imperative as to keeping the general indexes as it is in relation to the numerical index. We find nothing in the statute which would justify an abstracter in relying upon the latter any more than upon the former. The purpose of the statute unquestionably is to require the keeping of the general index and the numerical index in order to guard against such a blunder as was made in the case at bar. We think, therefore, it is clear that, even if an abstracter is not required to go through the record books themselves, for the purpose of determining the condition of the title to real estate, of which he is making an abstract (a point which we do not decide), he cannot shield himself from liability by relying upon one only of the indexes referred to. Ordinary care and diligence in performing the work for which he has been employed require him to avail himself of every facility at hand, in order to furnish his client that which he knows his client has employed him to furnish, viz., an accurate and complete abstract of the records. He certainly should not be permitted to escape liability when on the abstract he furnishes he certifies, as defendant did in this case, that the abstract "is a full and complete abstract of all instruments on record or on file in the office of the Register of Deeds of said county, that in any way affect the said lands; that the same are properly executed, and properly indexed; * * * and that I have compiled the within abstract from the records of said county, and not from the indexes." The abstract which defendant furnished was not such an abstract as this certificate certified it to be.

Section 6277, Rev. St. 1913, provides: "It shall be unlawful for any person * * * to engage in the business of compiling abstracts of title to real estate in the state of Nebraska, * * * without first filing in the office of the county judge, in the county in which any such business is conducted, a bond to the state of Ne-

braska in the penal sum of ten thousand dollars, executed by any surety company authorized to do business in this state as surety, or with not less than three sureties residents of the county to be approved by such county judge, conditioned for the payment by such abstracters of any and all damages that may accrue to any party or parties by reason of any error, deficiency or mistake in any abstract or certificate of title made and issued by such person."

Defendant had given the required bond, and at the time of making the abstract was engaged in his business as a bonded abstracter, under the provisions of the section quoted. The abstract which he furnished was incorrect in failing to show the mortgage above referred to. When he furnished Van Norman the abstract, he was bound to know the use to which the abstract would in all probability be applied. He thereby became liable for all damages which might be sustained by reason of any defect in his abstract, not only to the one who employed him to make it, but also to the parties who might deal with such party in reliance upon the abstract so furnished; and no custom on the part of defendant himself, or other abstracters, could be shown to relieve him from the obligations imposed upon him by the statute. We therefore hold that, when an abstracter relies upon the numerical index alone to refer him to all entries upon the records affecting the title to the property which he is examining, he does so at his peril, unless the one employing him agrees that in the making of such abstract he may rely upon said index alone for such information; and in such case his certificate to the abstract must clearly and unequivocally show that that was the method pursued by him in making the abstract, so as to advise all parties to whom it may be presented of his limited employment and investigation. He cannot in such a case certify that he compiled the abstract "from the records of said county, and not from the indexes," and then seek to destroy the

force of that certificate by testimony of a witness that that language means "that I have not simply taken the information on the numerical index and put that information into my abstract as my complete report, but that from the information there indexed I have gone to the records of the instruments and compiled my abstract from the record itself," as was attempted to be done in this case. The trial court did not err in refusing to receive such testimony. Such a construction by abstracters, if sustained, would render the keeping of general indexes by registers of deeds a mere waste of time and a needless expense.

It is argued that, inasmuch as the mortgage was not shown on the numerical index, it was not properly recorded; that, when plaintiff took his deed without actual knowledge of the existence of the mortgage, he took it as an innocent purchaser, and therefore had a perfect defense to the foreclosure suit; and, not having interposed that defense, he cannot now recover from the defendant. This means that, if a deed or mortgage is not entered on the numerical index, it is not properly recorded, and hence is void as against subsequent purchasers without notice, even though it be in fact spread upon the record and properly entered in the general indexes. This contention is clearly met in *Lincoln Building & Saving Ass'n v. Hass,* 10 Neb. 581, where we held: "A mistake of the county clerk in entering a discription of mortgaged premises on the numerical index, the mortgage being in all other particulars properly recorded and indexed, will not vitiate the record as to subsequent purchasers."

If the contention of defendant in this case is sound, then one who files a deed or a mortgage for record is bound at his peril to stand by and see that the deed is properly recorded and indexed. This contention is met in *Deming v. Miles,* 35 Neb. 739, as follows: "Where a party files a deed properly executed and acknowledged for record with the proper officer, he is not bound to see that the officer performs his duty by actually recording it, nor

is he responsible to other parties for the officer's neglect of his duty. The proper filing of such deed for record operates as constructive notice to all subsequent purchasers and mortgagees, although the officer may fail to comply with the requirements of the statute with respect to the recording of the instrument."

"A purchaser of real estate who takes his deed to the office of the register of deeds and deposits it with him for record, and pays the fees for recording and entering the same on the numerical index, discharges thereby his duty of notice to the public; and if, through the fault alone of the register, the deed is lost or mislaid, and not entered of record or entered on the index, such failure will not work to the prejudice of the title of such purchaser, even in favor of a subsequent purchaser without actual notice." *Perkins v. Strong,* 22 Neb. 725.

That the wording of the certificate is important is shown in *Thomas v. Carson,* 46 Neb. 765, which is cited by defendant to the point that the liability of an abstracter is contractual, and there was no privity of contract between plaintiff and defendant. We do not understand the opinion sustains the point under which it is cited. It is, however, a strong authority against defendant's contention upon the effect to be given to the wording of the certificate of the abstracter. The abstracter was held not liable in that case. Let us see why. In his certificate he certified: "I have carefully examined the records and files of the county clerk's office, office of the clerk of the district court, and treasurer's office, all of the county of Adams and state of Nebraska, and that the foregoing abstract is true in all respects." He further certified that there were no deeds, mortgages (and numerous other kinds of instruments named), or any liens of mechanics or for taxes upon the premises described in the heading of the abstract or any part thereof "upon or in the records of either of the said three offices, to wit, county clerk's office, office of the clerk of the district court, and treasurer's office, all of the county of Adams, except as herein-

before set out." On the back of his abstract there was printed a blank certificate in the usual form, in which it was recited that the abstract "is a full and complete abstract of all conveyances upon record affecting the property therein described." Carson, the abstracter, did not fill out and sign that blank, but prepared a special certificate as above shown. The court in the opinion (p. 769) say: "Carson, for reasons not disclosed by the record, instead of using the blank above mentioned, which included all conveyances affecting said property, executed and attached to the abstract a certificate in the following form (setting out the special certificate from which we have above quoted)." The opinion shows that for more than a year prior to the time the abstract was prepared the county clerk had ceased to be the custodian of the public records, that the office of register of deeds was at that time in existence in Adams county, and that the register of deeds had by law been made the custodian of all records of deeds, mortgages, etc. Had the certificate attached to the abstract in the case at bar, or one like that printed upon the back of the abstract in *Thomas v. Carson,* been used instead of the special certificate, it is very clear that the abstracter would not have been released from liability.

We have carefully examined every case from this court cited by defendant, and not one of them would have justified the trial court, under the undisputed evidence before us, in entering any different judgment than the one that was entered.

AFFIRMED.

ROSE, J., dissents.

AMY L. WILSON, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 15, 1916. No. 18588.

1. **Carriers: INJURY TO PASSENGER: NEGLIGENCE: SUFFICIENCY OF EVIDENCE.** The evidence examined, its substance set out in the opinion, and *held* sufficient to justify the submission to the jury of the charge of negligence on the part of the motorman in stopping the car in an unusually sudden and abrupt manner, and sufficient to sustain the verdict of the jury thereon.

2. **Instructions** 6 and 7 requested by defendant examined, and *held* properly refused.

3. **Trial: INSTRUCTIONS: STATEMENT OF ISSUES: HARMLESS ERROR.** In an action for personal injuries, where the trial court intends to submit but one of several acts of negligence charged, it is improper practice to include in the statement of the issues to the jury a recital of the other allegations of negligence pleaded; but, where such statement is followed by an instruction which clearly and explicitly eliminates from the case everything but the allegation of negligence to be submitted, and limits the jury to a consideration of that charge alone, the improper recital in the statement of the issues will, ordinarily, be held to be error without prejudice.

4. **Appeal: REVIEW.** Where the giving or refusing of an instruction is not excepted to at the time, nor called to the attention of the trial court in the motion for a new trial, it cannot be assigned as error on appeal.

5. **Damages: SUFFICIENCY OF EVIDENCE.** The evidence examined and set out in the opinion *held* sufficient to sustain the amount found by the jury as the measure of plaintiff's damages.

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

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

W. W. Bulman and *Sutton, McKenzie, Cox & Harris, contra.*

FAWCETT, J.

From a judgment of the district court for Douglas county, awarding plaintiff damages for personal injuries, defendant appeals.

The facts, briefly stated, are: Plaintiff was a passenger upon defendant's electric street car. She desired to leave the car at Sixteenth street and Capitol avenue. When the car came to a stop at that point a number of passengers alighted. Plaintiff had left her seat and was walking toward the exit a little in the rear of the other passengers who were alighting. When she was within some three or four feet of the exit door, the conductor, who was standing upon the back platform facing the rear and collecting fares from passengers who were boarding the car, signaled the motorman to go ahead. The car at once started forward, whereupon plaintiff said to the conductor: "Let me off, please." The conductor evidently heard her request, and, turning about, saw that she desired to "get off." He thereupon gave the signal of one bell to stop the car. Plaintiff alleges that "the motorman in charge of said car caused the same to be brought to an unusually sudden, violent, instant and abrupt stop; that so abruptly and suddenly was the movement of said car stopped that the plaintiff was thrown to the floor of said car with great force and violence, receiving and sustaining the injuries complained of." The petition also charged negligence on the part of the conductor in starting the car before plaintiff had time to alight, but the trial court withdrew that issue from the jury, and submitted only the allegation of negligence on the part of the motorman.

Defendant presents and discusses five assignments of error which we will consider in their order.

1. It is argued that, instead of giving instruction No. 3, the court should have directed the jury to return a verdict for defendant, for the reason that the evidence was insufficient to sustain the charge of negligence submitted by that instruction. Instruction No. 3 reads as follows:

"There is no evidence in this case sufficient to justify or authorize you to find that the conductor of the car on which plaintiff was riding, at or prior to the happening of the accident to her, was guilty of doing or failing to do any act or thing that would constitute negligence on his part. The only actionable negligence alleged in the petition of plaintiff which you are to consider is the allegation that 'the motorman in charge of said car caused the same to be brought to an unusually sudden, violent, instant and abrupt stop; that so abruptly and suddenly was the movement of said car stopped that the plaintiff was thrown to the floor of said car with great force and violence, receiving and sustaining the injuries complained of.' You are further instructed that you would not have the right in this case to declare or determine that the defendant was guilty of negligence in any other respect."

The testimony of the witnesses as to the manner in which the car stopped is conflicting. The motorman and conductor and two or three gentlemen who were standing upon the rear platform all testified that there was nothing unusual in the manner in which the car came to a stop. The testimony of plaintiff tends strongly to show that the stopping was unusually sudden. She testified that it caused a "violent rocking sensation;" that it rocked first toward the south and then toward the north; that the rocking was a "violent motion throwing me forward and backward;" that it first threw her south and then north; that when she went back the last time it threw her down violently and suddenly; that she did not have time to reach any of the handrails; that she had braced herself with her feet, but did not know the car was going to stop that way; that she was thrown about four feet back from where she was standing. The plaintiff is not corroborated by the testimony of any witness, but it is argued by her counsel that the doctrine of *res ipsa loquitur* applies; that the manner in which she was thrown to the floor furnishes corroboration of her testimony. When we consider, in addition to this, that the motorman and con-

ductor were men accustomed to the lurching of cars, and that the other witnesses were men who were standing upon the rear platform, leaning against the side of the rear vestibule, the jury may well have believed that they were not as competent to testify as to the actual manner of the stopping as plaintiff. However that may be, they have found this important issue, which was properly submitted to them by the trial court, in favor of the plaintiff, and we cannot say that her testimony, when compared with the testimony of the witnesses against her, is so unreasonable as to warrant us in setting aside the verdict on the ground that the evidence is insufficient to show negligence on the part of the defendant. Numerous authorities from other states, notably Massachusetts, are cited by defendant, which, if followed by us, would, under the facts shown, relieve the defendant from the charge of negligence in stopping the car as was done. Those cases go to the extent of holding that it is not enough to show that there was a sudden jerk of the car, but it must affirmatively appear that the jerk was extraordinary or attributable to a defect in the track, an imperfection in the car or apparatus, or to a dangerous rate of speed, or to unskilful handling. This court has never gone so far as that. On the contrary, as stated in *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672:

"It is settled by the decisions of this court that street railway companies are common carriers of passengers. (Citing cases). As such they are bound to exercise for the safety of their patrons more than ordinary care. They are required to exercise the utmost skill, diligence, and foresight consistent with the business in which they are engaged, and are liable for the slightest negligence. This is the liability imposed by the common law on all carriers of passengers for hire. (Citing cases). The law presumes that one injured while being transported by a common carrier was injured in consequence of the latter's negligence; and to escape liability it must show that it has discharged the full measure of its legal duty and was in nowise to blame for the accident."

The least that can be said is that, if the defendant's car stopped in the manner described by plaintiff, it would warrant the jury in finding that defendant was guilty of "unskilful handling" of the car. This, under some of the authorities cited by defendant, would be negligence. We therefore conclude that the evidence was sufficient to sustain the verdict, and justified the giving of instruction No. 3.

2. Error in refusing to give defendant's requests 6 and 7. To have given these instructions would have been tantamount to directing a verdict for the defendant. They were properly refused.

3. It is urged that the court erred in its statement of the issues, by reciting the averments in the petition with reference to negligence on the part of the conductor. It is argued that, as the court intended to withdraw this issue from the jury and submit only the negligence of the motorman, the allegations in relation to such issues should not have been embodied in the charge of the court to the jury. We agree with counsel in this contention; but we are unable to see how the action of the court could have prejudiced defendant. Instruction No. 1 is a brief statement of the substance of the allegations in the petition as to what was said and done by plaintiff when she entered the car, and as to the action of the conductor in starting the car before she had time to alight. It then properly states the allegations as to the negligence of the motorman. If the trial court had not, by the most explicit and unqualified language, eliminated from the case everything but the allegation of negligence on the part of the motorman, and limited the jury to a consideration of that charge of negligence alone, there would be good ground for the complaint made. But we are unable to see how the court could more clearly have told the jury that they were not at liberty to consider anything in the pleadings or in the evidence, except the allegation of negligence on the part of the motorman and the evidence pertaining thereto, than was done in instruction No. 3, above set out. We think this

instruction relieved the case of any error there may have been in reciting in the statement of the case the allegations of the petition as to other acts of negligence.

4. The fourth assignment is based upon instruction No. 4½, in which it is argued that the court erred in defining the effect of contributory negligence. This assignment cannot be considered, for the reason that the instruction now complained of was not excepted to by defendant at the time it was given, nor called to the attention of the trial court in the motion for a new trial.

5. By the fifth assignment it is urged that the verdict and judgment are excessive. At the time of the accident plaintiff was 38 years of age. The testimony shows that she had not yet reached the age of 40 years at the time of the trial. She had suffered from Pott's disease in her childhood, and there is some medical testimony to the effect that at the time of the trial she was still troubled with that disease. She also had quite a curvature of the spine. This curvature was such that she was commonly known as a "hunchback." She had been in this condition since she was ten months old. The evidence shows that for many years she had supported herself; that for some time prior to and at the time of receiving her injury she was earning "from $75 a month up," which would be from $900 to $1,000 a year. Her disease had apparently spent its force many years prior to the injury complained of, and no longer affected her general health or interfered with her performing the duties of the several avocations in which she had been engaged. She testified that for about five years she was in the millinery business; that for about three years she was cashier and bookkeeper for a mercantile company; that one year she was saleslady and had charge of the books in a grocery store; that at one time she carried on a cut-flower department in one of the leading stores; that she worked for an eastern firm, introducing a treatment that she understood; that at the time of the injury she was a representative of the Vimedia Company of Kansas City, introducing it in the city of Omaha. She was asked, and

answered, the following questions: "Q. From the time that you can remember up until the time that you met with the injury that you complain of, what has been your general health? A. Most always very good. Q. State whether or not you were at any time, on account of the condition of your back or your spine, prevented from doing the work that you had before you? A. I never remember any time at all in my life. Q. And any disability was always outside of that, as I understand it? A. Yes, sir. Q. Was it temporary or was it of a permanent, lasting character? A. Oh, just a day or so. Q. How did you feel generally? Were you active or otherwise? A. Very, very active on my feet. Q. How has your mind been? A. Very active." In the light of this testimony, we think the jury would be warranted in believing that she had a fair chance of at least living out her expectancy of life, which was 28 years. Considering that expectancy, and the amount of money she was earning in her business, and adding to that the pain and suffering which she had endured and was sure to endure in the future, we cannot say that the verdict of $10,500 was excessive.

Finding no prejudicial error in the record, the judgment is

AFFIRMED.

HARRY M. PAYNE, APPELLEE, V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, APPELLANT.

FILED APRIL 15, 1916. No. 18637.

Carriers: SHIPMENT OF LIVE STOCK. In the absence of a special contract, or special circumstances which take the case out of the general rule, a carrier of live stock is not bound to use extraordinary means to forward a shipment of stock. In such case the shipper will be held to have consented to the carriage of such stock by the regular trains of the carrier on its ordinary schedules.

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

Crofoot, Scott & Fraser, for appellant.

Earl R. Ferguson and *Harry W. Shackelford, contra.*

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for damages for alleged negligence of defendant in failing to transport, within a reasonable time, a shipment of live stock, defendant appeals.

The case was submitted to the court upon a stipulation of facts as follows:

"It is hereby stipulated by and between the parties hereto that the plaintiff in the above-entitled case delivered the shipment referred to in his petition, consisting of twenty-nine (29) head of cattle and three (3) head of calves, to the defendant company at Luther, Iowa, for transportation to South Omaha, Nebraska, between 5:30 and 6 o'clock P. M., on May 1, 1911, and that the defendant's train conveying the said shipment left Luther at about 6:15, and arrived at Madrid at 6:45 P. M. That the shipment arrived at Council Bluffs, Iowa, at 5:15 P. M., on May 2, 1911, and was delivered at the stock-yards chutes in South Omaha at 9:30 o'clock the same evening.

"That the distance from Luther to South Omaha by way of the lines of the defendant and connecting carriers is one hundred sixty-three and six-tenths (163.6) miles. That the time consumed by the defendant in transporting this shipment is about twenty-seven and one half (27½) hours.

"It is further stipulated that the station of Luther is on a branch line of the defendant railroad, about seven (7) miles distant from Madrid, which is the junction point connecting the said branch with the defendant's main line between Omaha and Chicago. That Perry is the first division station west of Madrid on the defendant's line and is one hundred thirty (130) miles from South Omaha. That the

defendant's printed time schedules show that the first regular freight train is due to leave Madrid at 2:10 o'clock A. M., and is due to arrive at Council Bluffs at 5:30 o'clock P. M. of the same day, and to arrive at Omaha at 8 o'clock P. M. on the same day. That the usual time required to deliver shipments from Omaha to the stock-yards chutes in South Omaha is about one and one-half (1½) hours. That the said schedules show that the regular freight trains leaving Omaha east-bound maintain an average speed of eighteen (18) miles per hour between Omaha and Madrid, including time consumed in stops at stations en route, and also between Madrid and Chicago, Illinois. That this shipment moved west from Madrid, Iowa, on the first train down in the said schedule after the time of its arrival at that point, the schedule time for the departure of the train from Madrid being 2:10 o'clock A. M., and the schedule time of arrival at Omaha, Nebraska, being 8 o'clock P. M.

"That no special contract was entered into or any agreement made respecting the particular train said stock should be transported on.

"That both the parties waive a jury and agree to try the said case to the court. That neither party shall be understood to waive objection to any of the foregoing facts, and that the competency, relevancy and materiality of any of the foregoing facts may be called in question by either party at the trial of the said case. That either party may at the trial of the said case offer further evidence bearing upon the question of the defendant's unreasonable delay in transportation of the said shipment, but it is agreed that if the court, after hearing all of the evidence, should find that the defendant failed to transport the said shipment to destination with due diligence and without unreasonable delay, the plaintiff shall have and recover judgment from the defendant in the sum of fifty-six dollars and fifty-nine cents ($56.59), with interest thereon at the rate of 7 per cent. per annum from May 2, 1911, to date, and his costs."

From this stipulation it appears that Luther, Iowa, was on a branch line of defendant road. The cattle were delivered to defendant between 5:30 and 6 o'clock in the evening. They were at once loaded, and left Luther about 6:15, arriving at Madrid (seven miles distant) on the main line at 6:45. The first regular west-bound train due to leave Madrid was at 2:10 A. M. the following morning. It was due to arrive at Council Bluffs at 5:30 P. M., at Omaha at 8, and at South Omaha about an hour and a half later, or at 9:30. The stock was shipped from Madrid on that train. It arrived at Council Bluffs at 5:15, which was 15 minutes ahead of schedule time, and delivered at the stock-yards chutes in South Omaha at 9:30. The distance from Luther to South Omaha is 163.6 miles. If the defendant is liable, it is not because it was guilty of negligence in not transporting the stock promptly under its published schedules, but because it was operating its trains under too slow a schedule.

In *Johnston v. Chicago, B. & Q. R. Co.*, 70 Neb. 364, we held: "In order to recover damages for an alleged delay in the shipment of live stock, it is necessary to introduce some competent evidence tending to show the length of time ordinarily required to transport the shipment from the place where received to the point of delivery, and that a longer time was actually consumed than was necessary for that purpose." This holding was later approved and followed in *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166. We think the evidence was insufficient to take this case out of the rule there announced.

In *Pine Bros. v. Chicago, B. & Q. R. Co.*, 153 Ia. 1, it is held: "A railway company is not required to attach a freight car carrying live stock to a passenger train to hasten its delivery; and where it transports the same by its usual freight trains on schedule time, and there is no evidence that there were faster freight trains by which the destination could have been sooner reached, it is not liable for the death of an animal, the result of sickness, while in transit." In the opinion it is said: "The defendant's

freight schedules upon which the road was then being operated were so arranged that a car sent out of Bushnell on the afternoon or evening of May 5, 1908, and making all the connections provided for in said schedules, would not arrive in Diagonal until about noon of May 8. There is no claim that plaintiffs did not fully understand the time required to make this trip, or that they asked for or received any assurance that the progress of their car could or would be accelerated beyond the rate indicated by the schedule."

In *Johnson v. New York, N. H. & H. R. Co.*, 111 Maine, 263, it is held: "(4) In the absence of a special contract, or of special circumstances which take the case out of the general rule, the carrier is not bound to use extraordinary means to forward even perishable freight." "(6) The shipper must be understood to contemplate carriage by the regular trains on the ordinary schedules. If he desires special service, he may contract for it."

In *Tiller & Smith v. Chicago, B. & Q. R. Co.*, 142 Ia. 309, it is held: "Unless the carrier contracts to deliver stock by a special train, it may make such reasonable train schedules as are proper to the ordinary and economical conduct of its business, having regard to the nature of the stock to be transported."

Four Texas cases and one from Oklahoma are cited, which seem to be in conflict with the foregoing authorities and to sustain plaintiff's contention. We have carefully examined those cases, but they have failed to satisfy us that the rule announced in our own cases and in the cases from Iowa and Maine, above cited, are unsound. When this shipment was made, plaintiff was charged with knowledge of the published schedules of defendant. That they were published is admitted in the stipulation, and no denial of knowledge thereof by plaintiff is claimed. He therefore knew that the stock which he delivered to defendant at Luther, Iowa, at 5:30 in the evening of May 1 could not possibly, under those published schedules, reach South Omaha in time for the next day's market, nor until late

in the evening of that day. Under the authorities upon which we prefer to rely, he made his shipment, knowing that it would be made in accordance with those schedules, and without asking for or receiving any agreement or intimation from the defendant that the progress of his shipment "could or would be accelerated beyond the rate indicated by the schedule."

Plaintiff having failed to sustain the allegations of his petition, and it being clear that all of the evidence which could be produced by him in support of his claim is contained in the stipulation, the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

SEDGWICK and HAMER, JJ., not sitting.

FIRST NATIONAL BANK OF SUTTON, APPELLEE, V. FRED SCHIERMEYER ET AL., APPELLANTS.

FILED APRIL 15, 1916. No. 18382.

1. **Trial:** DIRECTION OF VERDICT: SPECIAL FINDINGS. In an action at law the trial court is not required to make special findings when directing the verdict of the jury.
2. ———: ———. There being no evidence which would support a verdict for defendant, the trial court did not err in instructing the jury to find a verdict for the plaintiff.

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

Morning & Ledwith, C. L. Richards and *Weiss & Weiss*, for appellants.

W. E. Goodhue, M. L. Corey and *Mockett & Peterson, contra.*

SEDGWICK, J.

This action was upon a promissory note, and the defense was that the note was given for a hay baler, which was warranted, and was not as warranted. The court instructed the jury to find a verdict for the plaintiff, which was done, and judgment accordingly, and defendants have appealed.

The first objection is that the court erred in not stating the ground of the ruling. It is generally necessary in moving for an instructed verdict to state the ground of the motion for the information of the court. Under some circumstances it has been held that unless the ground of the motion is stated no error can be predicated upon refusal of the motion. When the motion is based upon the failure of evidence, it is generally held that the point relied upon must be specified. *Yeager v. South Dakota C. R. Co.*, 31 S. Dak. 304. The statute does not require special findings in an action of this kind.

The contract of warranty contained provisions for furnishing defective parts, and similar provisions, but there is no claim of evidence of failure of the company in these respects.

The contract provided: "The Luebben Baler Co. guarantees that when baler is run 150 revolutions per minute of its drive shaft, and the carrier is kept full of hay spread uniformly, it will bale three tons per hour, and the capacity will be increased with the increased speed of the baler." The defendants testified: "Q. You may state how the baler worked. A. Well, the hay in the stack, it was really damp, and it wouldn't go through the rollers at all, and it would clog up on the spindles and it would run up onto the belt so we couldn't do hardly anything with it, and they had put on a new spreader and it wouldn't work on there either, so finally we raised the spreader up, and stood there with forks and spread the hay with the forks on the feeder." Other similar testimony is quoted in the brief of defendant. No evidence is referred to in the brief which tends to

show that the baler was run as specified in the warranty, or that it was ever satisfactorily tried with hay suitable for the purpose. There is quite a volume of evidence, and we have not observed evidence tending to prove that the baler failed upon a fair trial as contemplated by the contract. As no substantial failure of the warranty appears, it is immaterial whether the plaintiff is a *bona fide* holder of the paper under the negotiable instruments law.

The judgment of the district court is

AFFIRMED.

LETTON J., not sitting.

L. D. POWELL, APPELLANT, V. NORMAN P. MAYHEW ET AL., APPELLEES.

FILED APRIL 15, 1916. No. 18514.

1. **Appeal in Equity: TRIAL DE NOVO: CONFLICTING EVIDENCE.** This court is required to try equity cases *de novo* without reference to the findings of the trial court; still when the important evidence in the case was taken before the trial court, and that court has construed the conflicting oral evidence of witnesses, and the record shows which witnesses must have been relied upon in determining doubtful facts from such conflicting evidence, this court will carefully consider the construction that the trial court must have given to such conflicting evidence.
2. **Evidence** found to support the findings and decree of the trial court.

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

A. M. Post and *Albert & Wagner,* for appellant.

J. J. Harrington and *Walcott & Walcott, contra.*

SEDGWICK, J.

In March, 1910, this plaintiff made a contract with defendants whereby he exchanged 960 acres of land in

Cherry county, in this state, for 280 acres in Montgomery county, Iowa. The greater part of the Iowa land was owned by the defendant Norman P. Mayhew, and a small piece was owned by his son, the defendant Max Mayhew. In the exchange the defendants agreed to pay plaintiff a difference of $7,800, and to secure this the defendants gave plaintiff five notes, one for $1,000 and four notes for the aggregate sum of $6,800, all secured by as many mortgages on different parts of the Nebraska land. Afterwards the plaintiff began five several actions in the district court for Cherry county to foreclose the mortgages. The defendants answered in each action alleging fraud on the part of plaintiff in securing the contract of exchange of lands. The five actions were consolidated and tried together. The court found that the contract was obtained by fraud and misrepresentation on the part of the plaintiff, and that the defendants were damaged more than the amount of the mortgages. A decree was entered canceling the mortgages and quieting the title of defendants in the Nebraska land. The plaintiff has appealed.

The plaintiff contends that the defendants have failed to prove: (1) That the alleged false representations were actually made; (2) that the alleged false representations were relied upon by the defendants; (3) that the alleged false representations were made under circumstances justifying the defendants to rely upon them; (4) the facts necessary as a basis for the computation of damages.

The record is very large. We cannot attempt an analysis of either the pleadings or the evidence. The case is a difficult one. We have with hesitation concluded that the judgment of the trial court must be affirmed. The several answers of the defendants are complicated and involved. Many of the representations alleged to be false were, if made, of such a nature as these defendants had ample opportunity to test them by personal investigation. It appears that the defendants are farmers and familiar with lands and land values. They went to the land for which they bargained for the purpose of independent examination

thereof. They made inquiries of the person occupying the land and were freely informed by him as to the condition of the land. They do not, so far as we have observed, contend that he misinformed them in any particular. Ordinarily these facts would defeat their claims. Some of the alleged false representations, however, were as to the quality of the land and what it had produced, and perhaps some other particulars which were within the knowledge of the plaintiff. When the defendants saw the land, it was in March and some snow was on the ground. While they were there a storm arose, accompanied with snow, and during the night following the ground was entirely covered with snow. They testify that they were practically driven away from the land by the storm, and were prevented from returning the following morning by the snow and cold, and so returned to their home in Iowa without opportunity to ascertain the facts in regard to the representations which had been made. The plaintiff also resided in Montgomery county, Iowa, and was somewhat of a speculator in lands. He was assisted by a shrewd land agent. The evidence of these witnesses was conflicting. To see them and hear them testify would be of great assistance. Indeed, we have frequently said that, while the statute requires us to try equity cases *de novo* upon appeal without reference to the findings of the trial court, still when the important evidence in the case was taken before the trial court, and that court has construed the conflicting oral evidence of witnesses, and the record shows which witnesses must have been relied upon in determining doubtful facts from such conflicting evidence, this court will carefully consider the construction that the trial court must have given to such conflicting evidence. In determining whether the plaintiff knew that the defendants were relying upon his representations in regard to the land, and whether the defendants were qualified to, and did, discover the facts, and, if they did not, whether it was owing to their negligence that they failed to do so, or was owing to the circumstances surrounding them, and a justifiable reliance upon the fairness

of the plaintiff, and other difficult questions involved, an opportunity to see and hear these witnesses while testifying and to observe their characteristics and their respective qualifications would be of the highest importance.

Under these circumstances the trial court found that many representations were made by plaintiff, some of which are of such a nature that the defendants might believe and rely upon them. The court, from the conflicting evidence before him, has found that the defendants did rely upon these representations. These are clearly shown by the evidence to be untrue. The finding that the Nebraska land is of less value than it would be if as represented is supported by the evidence. This difference, as found by the court, was more than the amount of the notes and mortgages. Construing the oral evidence as the trial court evidently did, we conclude that the findings are sustained by the evidence, and the judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., not sitting.

ROSE, J., dissents.

HAMER, J., concurs in the conclusion.

J. WARREN KEIFER, JR., APPELLEE, V. ARCHIBALD M. SHAMBAUGH, APPELLANT.

FILED APRIL 15, 1916. No. 18843.

1. **Waters: DIVERSION: ADJOINING LANDOWNERS.** A landowner may not rightfully collect and divert either waters of a watercourse or surface waters and discharge them onto the land of his neighbor to the latter's damage.

2. **———: ———: INJUNCTION.** It is the plaintiff's right to occupy and use his land for such lawful purposes as he sees fit, and unincumbered by an overflow of surface water or water in a watercourse, accumulated, arrested and discharged in a body, by the owner or occupant of adjoining land; and for the protection of such right injunction will lie.

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

L. H. Blackledge, for appellant.

Buck, Brubaker & Buck, contra.

HAMER, J.

The plaintiff and appellee, J. Warren Keifer, Jr., owns a farm in Nuckolls county adjoining a farm owned by the defendant and appellant, Archibald M. Shambaugh. Oak creek, a natural watercourse, runs across the defendant's farm. The defendant constructed a dam across Oak creek, and a dyke which extends therefrom obstructs this watercourse and discharges the waters thereof, together with surface waters collected thereby, in a body upon and across the adjacent farm of the plaintiff. The waters diverted cause continuing damage to the land of the plaintiff by destroying the crops which would otherwise be raised thereon. Because of this destruction, the plaintiff appears to be without a remedy at law. The defendant, from time to time, repairs and maintains said dam and said dyke, and for the sole purpose of obstructing and diverting the waters of said stream and causing them to be discharged upon the farm lands of the plaintiff, and against the plaintiff's repeated objections and protests, and without obtaining his consent in any way. The plaintiff claims that the evidence is sufficient to entitle him to a decree for an injunction. The defendant has pleaded an alleged oral agreement with the plaintiff under which he claims that he has a right to so divert said waters. This agreement is denied in the reply. It is claimed by the plaintiff that the agreement set out by the defendant is not proved to be the agreement made, and that said agreement, as alleged in said answer, is only a part of the agreement made, the other part of which the defendant repudiates and denies. It is claimed by the plaintiff that the agreement which is alleged by the defendant fails to give to the defendant the right to flood the plaintiff's land or to discharge said water thereon. Dis-

charging said water on the plaintiff's land is the real wrong of which the plaintiff complains. It is the wrong admitted to be remedied by the decree entered in the trial court.

There was an amendment made to the petition at the trial and by reason of the suggestion of the court. It was filed as complained of in the defendant's brief. The substance of the amendment was, and is: (a) That in the fall of 1903 T. M. Shambaugh, the father of the defendant, who was then the owner of the defendant's farm, to wit, the northwest quarter of section 27, township 1, range 8, agreed with plaintiff that, if plaintiff would furnish land at the west side of his farm for a drainage ditch, he (Shambaugh) would construct, maintain and keep up ditches and dykes sufficient to carry the combined waters of Oak creek and Dry creek through said ditch, and would thus prevent any of said waters from flowing across onto the plaintiff's lands to the east of said dyke so to be built on the east of said drainage ditch. (b) Said drainage ditch and dyke and dam were constructed pursuant to said agreement, and were not completed until May, 1904, and they were first used in July of said year. (c) Said agreement was oral and permissive only, and was expressly conditioned upon the defendant keeping up and repairing the said dykes. (d) The defendant refuses to repair the dykes on plaintiff's land, but maintains and repairs the dam and dyke on his own land, so as thereby to throw said waters across the farm lands of the plaintiff, to his irreparable injury, and in violation of the express condition upon which said dam and dykes were to be built and used.

The amendment does not appear to be necessary, because it did not change the issues, and does not make admissible in evidence that which was before inadmissible, nor did it state any new or different cause of action, nor did it vary the remedy originally sought. The wrongful and unlawful diversion from their natural course of the flowage of the waters in Oak creek, together with the surface waters, by means of said dam and dyke on defendant's land, there-

by causes such waters to be discharged on the plaintiff's adjacent lands, and this is the wrong of which the plaintiff complains. After the amendment it still remains the distinct wrong.

J. Warren Keifer, Jr., testified that the plaintiff owns the east half and the defendant the west half of section 27, township 1, range 8. Dry creek, a draw carrying water only in wet times, comes from Kansas northward through the bluffs on plaintiff's land about 250 or 300 yards west of section 27, whence it originally spread its waters northward across plaintiff's land. Oak creek comes northward through the bluffs on plaintiff's land about 250 or 300 yards west of the plaintiff's east line, and thence runs in a northerly direction in a well-defined channel from 4 to 10 feet deep, with natural timber along its course, passing between defendant's house and barn, and continuing clear across defendant's north eighty, and nowhere touching plaintiff's west line. The land along plaintiff's west line east of Oak creek is higher than the land west of Oak creek, and the overflowing waters from Oak creek originally flowed out west of the creek. Oak creek is larger than Dry creek, and drains a more extensive territory and carries more water.

In the fall of 1903, and the late spring of 1904, T. M. Shambaugh built a dyke or dam across Oak creek, and a ditch and dyke running eastward therefrom to a ditch which is built northward on the west part of plaintiff's land, and also a ditch and dyke from the south end of said north and south ditch in a southeasterly direction to the bluff at the east side of the mouth of Dry creek. Before the building of said dykes and ditches no part of the waters of Oak creek came upon plaintiff's land from the west, and said dykes and ditches diverted all of said waters toward plaintiff's land; and, because of defendant's failure to keep up the dykes on plaintiff's side of the ditch, said waters flowed over and now flow over and run across the plaintiff's said farm lands.

On cross-examination J. Warren Keifer, Jr., testified touching the agreement as follows: There was talk about between Shambaugh and plaintiff of making a joint ditch, but the arrangement was finally made that the ditch should be constructed on the plaintiff's side of the line by Mr. Shambaugh bearing all the expense and keeping it up. Shambaugh was to do all the work and keep up the ditch. Keifer testified that he was quite sure that it was a part of the bargain that Shambaugh was to keep up the ditch.

Arthur Stanley testified that it was stated at the time that the ditch was to run west to where Oak creek crossed the road to go north, and that Mr. Shambaugh suggested that the ditch should run south and west to catch the waters of Oak creek at the bluff, and that he (Shambaugh) would do the work if Mr. Keifer would furnish the land, and he would also keep up the ditch. Stanley was sure that Shambaugh so stated, and was also sure that the ditch was afterwards dug in the manner that was that day proposed.

Stanley Sutherland testified that he heard Shambaugh say that he had agreed to maintain the ditch and dyke. This was in the presence of J. P. Hostick. J. P. Hostick himself testified to the conversation with Shambaugh in the presence of Stanley Sutherland, and that Shambaugh said that he had agreed to maintain the ditch and dyke, or words to that effect.

On rebuttal, J. Warren Keifer, Jr., testified that the matter was talked over a good deal, and that the final agreement was that he (Keifer) was to furnish the land for the ditch, and that Shambaugh was to do all the work and was to maintain the ditch, and the two creeks were to be thrown together, as was afterwards done, and that the defendant failed and refused to maintain the ditch and dyke on the plaintiff's land.

The defendant on cross-examination testified that he did not have any intention of repairing the ditch and the dyke: "A. No, sir; not a bit. Q. And you don't have

yet? A. No, sir." But nevertheless the defendant was keeping up and raising the dam and dyke on his own land so as to dam up and divert Oak creek. He testified: "A. I have repaired it; I put approximately a day's work on that dyke I guess every year I have been there."

Oak creek, which is being diverted across plaintiff's land, has a well-defined channel. It is a natural drainage channel. The dam and dykes which divert Oak creek and part of the ditches were not constructed until the spring of 1904, less than 10 years before the commencement of this action. T. M. Shambaugh testified: "Well, the Keifer side was finished that fall. We didn't get all through with my side on Oak creek until the spring. We had to throw up a levee there; that is the reason that it washed out so bad there, because it was loose dirt." Arthur Stanley testified that the ditches were not all built until the spring of 1904.

The evidence clearly establishes a continuing and irreparable injury. The judgment of the court is within the issues of the case as made on the original pleadings. The petition alleges the wrongful diversion of the waters of a natural watercourse to and across the farm lands of the plaintiff, to the destruction of his crops and the injury of the soil. The answer denies generally the said allegations, and pleads as a matter of defense an agreement under which the defendant asserts a right to divert said waters into a ditch on plaintiff's land. And the reply to said new matter, being a general denial, puts in issue, not only the making of such an agreement, but the form and substance in the agreement. Under the issues the plaintiff was entitled to prove whether or not an agreement was made and the exact nature of the agreement. The answer having set up new matter, namely, an alleged agreement which was denied in the reply, the burden was on the defendant to prove the very agreement alleged. *Williams v. Evans,* 6 Neb. 216.

If the amendment was necessary to conform the pleadings to the facts proved, it must be presumed that the court allowed such amendment in the furtherance of justice, and that such action was without prejudice. We are unable to see that the defendant was prejudiced in any way by the amendment.

In *German Ins. Co. v. Frederick,* 57 Neb. 538, the plaintiff after the trial was permitted to amend the petition and reply so as to admit that the premises were vacant. It was held that there was no error in this. It was said: "The evidence had gone in on this issue without objection based on its irrelevancy, and the amendment was a proper one to conform the pleadings with the proof."

In *Whipple v. Fowler,* 41 Neb. 675, it was held, as stated in the syllabus: "Where, upon the trial of an action, testimony is admitted without objection, it is not error for the court to permit the pleadings to be amended to conform to the proof."

In *Blakeslee v. Van der Slice,* 94 Neb. 153, it was held, as stated in the syllabus: "It is usually a matter within the discretion of the district court to allow or refuse to allow a pleading to be amended to conform to the evidence; and, in order to predicate error in allowing the amendment, it must be shown that the trial court has abused its discretion."

The injury which is complained of is an injury to real estate. It is such an injury as to be the object of equitable cognizance and protection by injunction. *Jacobson v. Van Boening,* 48 Neb. 80.

In the above case it was stated in the syllabus: "Against a continuing injury to land caused by an unlawful discharge of surface waters by an adjoining proprietor, equity will afford relief by injunction."

In *Ayres v. Barnett,* 93 Neb. 350, it is said, among other things, in the syllabus: "An owner of real estate is not required to permit the devastation of his timber land by a trespasser and seek relief in an action at law for damages. He may prevent such trespass by injunction."

The injury is a continuing one, and therefore it presents a proper ground for injunction.

In *Sillasen v. Winterer,* 76 Neb. 52, it was held, as stated in the syllabus: "Concerning simple acts of trespass equity has, in most cases, no jurisdiction, but, if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted." The cases cited in *Lynch v. Egan,* 67 Neb. 541, *Pohlman v. Evangelical Lutheran Trinity Church,* 60 Neb. 364, and *Peterson v. Hopewell,* 55 Neb. 670, are along the same line.

As the injury went to the destruction of plaintiff's estate, it was an irreparable injury within the meaning of the law relating to injunctions. *Eidemiller Ice Co. v. Guthrie,* 42 Neb. 238.

Because of the frequent recurrence of the injury, the jeopardizing of the value of the inheritance, and the ripening of the period of prescription, and the necessity of a multiplicity of successive suits at law to recover the damages, even if they could be measured and determined, the plaintiff has no adequate remedy at law.

The diversion of a watercourse on plaintiff's farm lands is unlawful. *Nelson v. Wirthele,* 88 Neb. 595; *Kane v. Bowden,* 85 Neb. 347; *Roe v. Howard County,* 75 Neb. 448.

In *Nelson v. Wirthele, supra,* the syllabus reads: "A landowner is entitled to an injunction to restrain the erection and maintenance of a dam in an old established drainage channel, partly natural and partly artificial, and the digging of a ditch, where the effect would be to collect and divert waters flowing therein and cast them in a body on his lands, which they would not otherwise reach."

In *Kane v. Bowden, supra,* it was said in the syllabus: "Water flowing in a well-defined watercourse, whether swale or creek in its primitive condition, may not, except in the exercise of the power of eminent domain, lawfully be diverted and cast upon lands of an adjoin-

ing proprietor where it was not wont to run according to natural drainage.

"A person may not, except in the exercise of the power of eminent domain, lawfully concentrate surface waters and discharge them through an artificial ditch in unusual quantities upon lands of an adjacent owner to his damage."

In the body of that opinion it is said: "The instant case is within the principle announced in *Roe v. Howard County,* 75 Neb. 448, and *Gregory v. Bush,* 64 Mich. 37. That is to say, that water flowing in a well-defined watercourse cannot be lawfully diverted and cast upon the lands of an adjoining proprietor where it was not wont to run in the course of natural drainage, and that a person may not lawfully concentrate surface water and discharge it through an artificial ditch in unusual quantities upon lands of an adjacent owner to his damage."

In *Roe v. Howard County, supra,* it is said in the syllabus: "Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condition, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors, and what a private proprietor may not do neither can the public authorities, except in the exercise of the right of eminent domain."

The instant case is an ordinary case in equity instituted to restrain the defendant from repeating his acts of continuing injury and damage to the plaintiff's lands and crops. T. M. Shambaugh, who built the dam across Oak creek and the dykes and ditches, maintained them during the years he continued to occupy the farm. The son seems to have been unwilling to do what his father had done according to the agreement made. The defendant admitted that he had no intention of protecting the plaintiff by maintaining the dykes that his father had constructed on the plaintiff's land. The defendant *hav-*

ing abandoned the agreement which his father made as to maintaining the dyke on the east margin of the artificial ditch on the land of the plaintiff, while still repairing and keeping up the dam across Oak creek and the dykes leading therefrom to the plaintiff's land, disregarded the rule of law to the effect that a landowner cannot collect and divert either the waters of a watercourse or surface waters and discharge them onto the land of his neighbor, to the neighbor's damage.

"The owner of a natural pond or reservoir wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury." *Davis v. Londgreen,* 8 Neb. 43. In that case it is said in the body of the opinion: "Now, it is certain that the plaintiff has the absolute right to occupy and use his land for such lawful purpose as he sees fit, unincumbered by the periodical floodings complained of. And this is one of those substantial rights incident to the property itself, to protect which an injunction will always be granted. * * * A correct test for determining whether an injunction is the appropriate remedy was given, we think, by the supreme court of Wisconsin, in *Pettigrew v. Village of Evansville,* 25 Wis. 223, wherein the threatened nuisance was essentially the same as that committed by the defendant here."

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

AFFIRMED.

LETTON, J., concurs in the conclusion.

SEDGWICK, J., not sitting.

HARRY J. SMITH, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED APRIL 15, 1916. No. 18360.

1. **Appeal:** CONFLICTING EVIDENCE. "In a law action, where the evidence upon any disputed question of fact is sufficient to sustain a finding either way, the finding of the trial court thereon will be sustained on appeal." *Holmvig v. Dakota County*, 90 Neb. 576.

2. **Statutes:** CONSTRUCTION. "In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality." *State v. Standard Oil Co.*, 61 Neb. 28.

3. **Carriers:** REGULATION. "Section 4, art. XI of the Constitution, does not prohibit the legislature from increasing the common law liability of common carriers." *Cram v. Chicago B. & Q. R. Co.*, 84 Neb. 607.

4. ———: "SPEED STATUTE:" CONSTITUTIONALITY: ELECTION OF REMEDIES. Sections 6018, 6019, Rev. St. 1913, known as the "speed statute," do not limit the liability of railroads as common carriers. This statute affords the shipper of live stock a statutory remedy, in addition to the common law remedy, by which he may recover liquidated damages sustained by reason of the unreasonable delay defined by the act, in the transportation of live stock from the initial point of shipment to the place of feeding or destination. This statute is not repugnant to section 4, art. XI of the Constitution. The common law remedy is not abrogated by the "speed statute." The shipper has an election of remedies; he may still bring his action under the common law, and recover for the actual damages sustained.

5. ———: CLAIMS: ATTORNEY'S FEES: STATUTORY PROVISION: CONSTITUTIONALITY. The due process of law and the equal protection of the law, guaranteed by the fourteenth amendment to the Constitution of the United States, are not denied to common carriers by section 6063, Rev. St. 1913, which provides for the recovery of a reasonable attorney's fee to be fixed by the court, in actions on claims for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the state may be liable, not adjusted and paid within the time limited by statute, and when the amount recovered exceeds the amount tendered by the carrier. This statute only applies to claims for loss or damage to property received by the carrier for shipment as freight,

and for overcharge for freight. This statute being applicable to all persons and corporations engaged in the business of common carriers in the state, and applying only to a limited kind of claims admitting of special legislative treatment, is not repugnant to the due process and equal protection provisions of the fourteenth amendment.

6. ———: ———: ———. Reasonable attorney's fees are properly assessed under section 6063, Rev. St. 1913, when the plaintiff is represented by an attorney of record.

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

A. A. McLaughlin, Lyle Hubbard and *Wymer Dressler*, for appellant.

Earl R. Ferguson and *Harry W. Shackelford, contra.*

MCGIRR, C.

The plaintiff brought this action to recover damages in the sum of $78.77, which he alleged he sustained because of unreasonable delay occasioned by the defendant in the shipment of one car-load of cattle from Tyson, Nebraska, to South Omaha, Nebraska, on January 4, 1912, and to recover an attorney's fee in the sum of $50 in addition to such damages. The plaintiff alleged in his petition that the defendant is a railroad corporation, operating a railroad from Tyson, Nebraska, to South Omaha, Nebraska, and is a common carrier of freight over said railroad; that on the 3d day of January, 1912, at 12 o'clock P. M. of said day, the plaintiff delivered to the defendant, at said town of Tyson, for shipment to South Omaha, a consignment of 22 head of cattle, consisting of one car-load; that the distance over defendant's said line of railroad from Tyson to South Omaha is 35 miles, and the usual, customary and reasonable time required for conveying a shipment of live stock over defendant's said railroad from Tyson to South Omaha is not to exceed 3½ hours; that, had this shipment been conveyed to destination within a reasonable time, the same would have arrived in prime condition

and in ample time to have enabled the plaintiff to have sold his said cattle on the early morning market for the highest price of that day; that defendant unreasonably delayed said shipment in transit for a period of 7 hours longer than was reasonably necessary, and did not deliver said shipment at destination until 10:45 o'clock A. M. on January 4; that, by reason of said delay, the cattle shrunk in weight 30 pounds per head in addition to the usual shrinkage on such a shipment, to plaintiff's damage in the sum of $34.25; that, by reason of the exhausted condition and gaunt appearance of the cattle upon their arrival at the market, there was a further loss of 5 cents per hundredweight due to depreciation in grade and quality, amounting to $11.13; that when the cattle were delivered at destination the market price of such cattle had fallen 10 cents per hundredweight below the earlier market of that day, causing a further loss of $33.39, and that plaintiff's total damages aggregated $78.77. The plaintiff further alleged that he filed his claim for said damages with defendant, as provided by law, on January 16, 1912; that more than 90 days had elapsed since the filing of said claim; that the same had not been paid; and plaintiff prayed judgment for an attorney's fee in the sum of $50 in addition to his said damages.

The defendant by its answer admitted the shipment of said cattle; denied all other allegations in the petition; and alleged that its line of railroad from Tyson southward terminates at Omaha; that said shipment of cattle was transported by it from Tyson to Omaha with all due care and dispatch, and was there delivered to its connecting carrier, the Missouri Pacific Railway Company; that under the contract of shipment it was agreed that defendant should not be liable for any delay to said shipment not occurring on its own line; that the weather was extremely cold, which rendered it difficult for defendant to operate its trains within the time which they could

be operated in good weather. The plaintiff's reply was a general denial.

The jury found for the plaintiff and returned a verdict for $85.77, and for an attorney's fee of $50. The plaintiff thereafter filed a remittitur amounting to $12.13, being the item of damages for the gaunt appearance of the cattle, and the trial court rendered judgment for the plaintiff on the verdict of the jury for $73.67 damages and $50 attorney's fee. The trial court thereafter set said judgment aside and rendered judgment on the verdict of the jury in favor of the plaintiff for $85.77 damages, and for an attorney's fee of $50, being a total judgment for plaintiff in the sum of $135.77.

From this judgment the defendant appeals, and asks a reversal for alleged errors of the trial court, which, for the purpose of discussion and determination, may be resolved into three propositions, viz.: (1) That the verdict of the jury is not sustained by sufficient evidence. (2) That, if plaintiff was entitled to recover at all, he was only entitled to recover the liquidated damages provided for by sections 6018, 6019, Rev. St. 1913, commonly known as the "speed statute;" that said statute affords the exclusive measure of recovery in actions for damages resulting from delay in transit to car-load shipments of live stock, and supersedes the measure of recovery which was available at common law. (3) That the assessment of an attorney's fee as a part of the judgment against the defendant, under the provisions of section 6063, Rev. St. 1913, deprives the defendant of the due process of the law and of the equal protection of the law, guaranteed by the fourteenth amendment to the Constitution of the United States; and that, inasmuch as the case at bar was conducted in the courts by an attorney who was not employed by the plaintiff, but was furnished by an association or collection agency which had undertaken for profit to collect plaintiff's claim against the defendant, to assess a statutory at-

torney's fee in favor of such client, for the benefit of such association or such attorney so acting, is in violation of public policy.

It appears from the evidence that the plaintiff, pursuant to the orders of defendant's agent at Tyson, had his stock loaded in the car and ready for transportation at 12 o'clock, midnight, on the 3d day of January, 1912; that the defendant's train which conveyed said stock to South Omaha did not arrive at Tyson until 2:30 o'clock A. M. on January 4; that the train made several long stops at various stations between Tyson and South Omaha; that the crew in charge of the train appeared to be working with the hose connected with the air brakes, sometimes when the train was stopped, and at other times appeared to be doing nothing and making no effort to move the train. The train consisted of 2 engines and about 28 cars. By reason of defendant's unreasonable delay in starting plaintiff's shipment of cattle from Tyson, and the further unreasonable delay in transit, the plaintiff suffered material and substantial damages. The verdict and judgment for damages, except as to the amount for which plaintiff filed a remittitur, is amply sustained by the evidence. "In a law action, where the evidence upon any disputed question of fact is sufficient to sustain a finding either way, the finding of the trial court thereon will be sustained on appeal." *Holmvig v. Dakota County,* 90 Neb. 576. *Dorrington v. Sowles,* 90 Neb. 587.

As to the defendant's second proposition, the plaintiff contends that, if the shipper's common law right of action is held to be abrogated by the "speed statute," then that statute must be held to be unconstitutional, as being in violation of section 4, art. XI of the Constitution, which provides that "the liability of railroad corporations as common carriers shall never be limited." Sections 6018, 6019, Rev. St. 1913, known as the "speed statute," are as follows:

"6018. It is hereby declared and made the duty of each corporation, individual or association of individuals, operating any railroad as a public carrier of freight in the state of Nebraska, in transporting live stock from one point to another in the state in car-load lots, in consideration of the freight charges paid therefor, to run their train conveying the same at a rate of speed so that the time consumed in the journey from the initial point of receiving such stock to the point of feeding or destination, shall not exceed one hour for each eighteen miles traveled, including the time of stops at stations or other points: Provided, in cases where the initial point is not a division station, and on all branch lines not exceeding one hundred and twenty-five miles in length, the rate of speed shall be such that not more than one hour shall be consumed in traversing each fourteen miles of the distance, including the time of stops at stations or other points, from the initial point to first division station or over such branches. The time consumed in picking up and setting out, loading or unloading stock at stations shall not be included in the time required, as provided in this schedule: Provided, further, upon branch lines not exceeding one hundred and twenty-five miles in length, live stock of less than six cars in one consignment, each railroad company in this state may select and designate three days in each week as stock shipping days, and publish and make public the days so designated, and, after giving ten days' notice of the days so selected and designated, shall be required upon its branch lines to conform to the schedule in this section provided only upon the days so designated as stock shipping days.

"6019. Any individual, corporation or association of individuals violating any provisions of the next preceding section shall pay to the owner of such live stock the sum of ten dollars for each hour for each car it extends or prolongs the time of transportation beyond the

period herein limited as liquidated damages to be recovered as other debts are recovered."

In the case of *Cram v. Chicago, B. & Q. R. Co.*, 84 Neb. 607, in considering the constitutionality of the "speed statute," this court held as follows: "Section 4, art. XI of the Constitution, does not prohibit the legislature from increasing the common law liability of common carriers, and, in case the legislature expands such liability, the courts will not declare the statute void on the complaint of the carrier, because in some hypothetical case the law, if applied, might work to the disadvantage of a shipper."

In the *Cram* case, *supra,* this court regarded the "speed statute" as an increase of the common law liability of railroad corporations as common carriers, and therefore not in conflict with the provision of the Constitution which prohibits the limitation of such liability, and with that reasoning we are now in accord. The speed statute provides an additional remedy by which the shipper may recover liquidated damages in event that the common carrier fails to run its train conveying such shipper's live stock, from the initial point of receiving such live stock to the point of feeding or destination, at the average rate of speed provided by the statute. This statute affords a remedy by which the shipper may recover only for damages sustained by reason of delay in the transportation of the live stock from the point of shipment to the place of feeding or destination, after the train commenced to move on the journey. Damages so sustained are always difficult to prove, and are often not susceptible of proof. Yet there is always some damage due to such delay in transit, and the legislature, by the enactment of the "speed statute," without limiting the common law liability of railroads as common carriers, has provided a means by which such damages are liquidated, and may be recovered without other or further proof as to amount, except proof of the failure of the carrier to move the shipment at the

average rate of speed required by the statute. The "speed statute" does not provide for the recovery of damages sustained by reason of delay of the carrier in starting the shipment to move after it has been received by it; for loss of, or injury to, the live stock by reason of want of due care, or by violence on the journey. For damages sustained from such causes, and from all causes, including the unnecessary delay defined by the "speed statute," the shipper still has his common law remedy. If all of the damages sustained are caused by the unreasonable delay in transit defined by the "speed statute," the shipper may, at his election, bring his action either under the statute for the liquidated damages fixed by the "speed statute," or under the common law for the actual damages sustained. "In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality." *State v. Standard Oil Co.*, 61 Neb. 28. In the case at bar a part of the damages sustained by the plaintiff was due to the unreasonable delay of the defendant in starting the shipment to move on its journey after it had been received by the defendant. The plaintiff, in conformity with the order of defendant's agent, had his live stock loaded on the car at midnight, and the defendant's train did not arrive and start the shipment to move on its journey until 2:30 o'clock in the morning. The plaintiff elected to bring his action under the common law for all damages sustained by him, and he recovered only for the actual damages proved.

For its third proposition the defendant contends that the trial court erred in assessing an attorney's fee for plaintiff's attorney, under the provisions of section 6063, Rev. St. 1913, which is as follows:

"6063. Every claim for loss or damage to property in any manner, or overcharge for freight for which any common carrier in the state of Nebraska may be liable, shall be adjusted and paid by the common carrier delivering such freight at the place of destination within

sixty days, in cases of shipment or shipments wholly within the state, and within ninety days in cases of shipment or shipments between points without and points within the state, after such claim, stating the amount and nature thereof accompanied by the bill of lading or duplicate bill of lading or shipping receipt showing amount paid for or on account of said shipment, which shall be returned to the complainant when the claim is rejected or the time limit has expired, shall have been filed with the agent, or the common carrier at the point of destination of such shipment, or at the point where damages in any other manner may be caused by any common carrier. In the event such claim, which shall have been filed as above provided within ninety days from the date of the delivery of the freight in regard to which damages are claimed, is not adjusted and paid within the time herein limited, such common carrier shall be liable for interest thereon at seven per cent. per annum from the date of the filing of such claim, and shall also be liable for a reasonable attorney's fee to be fixed by the court, all to be recovered by the consignee or consignor, or real party in interest, in any court of competent jurisdiction: Provided, in bringing suit for the recovery of any claim for loss or damage as herein provided, if the consignee or consignor, or real party in interest, shall fail to recover a judgment in excess of the amount that may have been tendered in an offer of settlement of such claim by the common carrier liable hereunder, then such consignee or consignor, or real party in interest, shall not recover the interest penalty or attorney's fees herein provided."

The defendant contends that due process of law and the equal protection of the law guaranteed by the fourteenth amendment of the Constitution of the United States are both denied to the defendant by this statute. The constitutionality of similar statutes of other states has been passed on by the supreme court of the United States. In the case of *Gulf, C. & S. F. R. Co. v. Ellis,*

165 U. S. 150, a statute of the state of Texas providing that an attorney's fee of $10 should be recovered in actions on claims against railway companies for personal services rendered or labor done, or for damages, etc., was held to be invalid and in conflict with the due process and equal protection provisions of the Constitution of the United States, for the reason that the Texas statute singles railway companies out of all citizens and corporations, and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. In the case of *Missouri, K. & T. R. Co. v. Cade,* 233 U. S. 642, a later statute of Texas providing for the recovery of attorney's fees in actions on certain kinds of claims, against any person or corporation doing business in the state, was held to be valid, for the reason that the statute did not single out a particular class of debtors, and applied only to certain kinds of claims. In the case of *Yazoo & M. V. R. Co. v. Jackson Vinegar Co.,* 226 U. S. 217, a statute of Mississippi providing for the recovery of a penalty of $25 in addition to the amount of the claim in actions on claims against common carriers amounting to $200 or less, not settled by the carrier within the time limited by statute, was held to be valid, for the reason that it applied to all common carriers, whether persons or corporations, and because the statute was applicable only to a certain class of claims admitting of special legislative treatment. Section 6063, Rev. St. 1913, applies to all common carriers in the state of Nebraska, whether persons or corporations. It is not open to the objection that it singles out a certain class of debtors and imposes upon them burdens not imposed upon other debtors engaged in the same kind of business. This statute provides for the recovery of a reasonable attorney's fee, to be fixed by the court, in actions on a certain kind of claims, viz., claims for loss or damages to property in any manner, or overcharge for freight. It was not the intention of the legislature to

make this act applicable to claims for the loss or damage to all property, including property upon or adjacent to a railroad, but only to property received by the carrier as freight for transportation. This is made clear by the requirements of the act that all claims must be accompanied by the bill of lading or duplicate bill of lading or shipping receipt, when returned to the complainant by the carrier, upon the rejection of such claims. Individual claims against common carriers for loss or damage to shipments of freight and for overcharges for freight are in most cases so small that the consignor could not afford to litigate such claims if he were compelled to pay attorney's fees. To remedy this wrong which the shipper might otherwise be required to suffer without redress, it is within the power of the legislature to provide for the recovery by the shipper of a reasonable attorney's fee in a successful action, upon a claim within the class comprehended by the act referred to. This act being applicable to all persons and corporations engaged in the business of common carriers in the state, and applying only to a certain class or kind of claims admitting of special legislative treatment, is valid, and not repugnant to the due process of law and equal protection of the law provisions of the fourteenth amendment to the Constitution of the United States.

As to the defendant's contention that an attorney's fee should not have been assessed, for the further reason that the plaintiff placed his claim for collection in the hands of an association organized for profit, that the suit was brought through the attorney for the association, and that said association is therefore engaged in the unlawful practice of the law, and the allowance of an attorney's fee in such case is against public policy, we will agree with the defendant that cases might arise wherein it would be against public policy to permit the recovery of an attorney's fee by such an association. In the case at bar, however, it appears that the attorney for whose benefit the attorney's fee was assessed

was the attorney of record for the plaintiff, and conducted the case for him in the trial court. We think the attorney's fee was properly assessed for the benefit of plaintiff's attorney of record, in payment for legal services rendered by him. The judgment of the district court should be affirmed.

For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and the foregoing opinion is adopted by and made the opinion of the court.

AFFIRMED.

ALLIE L. PERRY, APPELLEE, V. OMAHA ELECTRIC LIGHT & POWER COMPANY, APPELLANT.

FILED APRIL 29, 1916. No. 18840.

1. **Release:** AVOIDANCE: FRAUD: BURDEN OF PROOF. When the plaintiff in a suit for personal injuries has executed a release in writing of all claims for damages from the defendant, and has received a consideration therefor, but seeks to avoid the release on the ground that it was obtained by fraud or deception practiced upon him by the defendant, and that at the time the release was executed his mental condition was such that he was incapable of understanding the nature and quality of the act performed, or of comprehending its consequences, the burden is upon him to prove these facts.

2. **Compromise and Settlement:** FRAUD: EVIDENCE. When the amount received in settlement is grossly inadequate to compensate for the injuries sustained, that fact may be considered, with other evidence, as tending to show unfair practice, that the party has been overreached, and that the minds of the parties never met in the consummation of a valid contract.

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

Crofoot, Scott & Fraser, for appellant.

Lambert, Shotwell & Shotwell, contra.

MORRISSEY, C. J.

This is an appeal from the district court for Douglas county in an action wherein the plaintiff recovered a judgment for $2,000 for personal injuries sustained while in defendant's employ. While in the discharge of his duties as an arc light inspector, owing to the defective construction of defendant's lines and its failure to keep its wires properly insulated, plaintiff received an electric shock which threw him from the pole where he was working to the pavement below. He sustained a fracture at the base of the skull and was otherwise injured.

The answer contained a general denial; alleged contributory negligence on the part of plaintiff; that he was familiar with the dangers incident to his employment, and had assumed the risks incident thereto; and further alleged that at a time subsequent to the injuries the plaintiff had made a full and complete settlement with the defendant covering all damages he had sustained, and that plaintiff had executed the following release in writing:

"Oct. 14, 1912.

"Received from Omaha Electric Light & Power Co. the sum of ninety seven dollars ($97.50) which I (being of lawful age) acknowledge to be in full accord, satisfaction and compromise of a disputed claim growing out of a bodily injury sustained by me on or about August 27, 1912, for which bodily injury I have claimed the said Omaha Electric Light & Power Co. to be legally liable, and in consideration of said sum so paid I hereby remise, release and forever discharge the said Omaha Electric Light & Power Co., its successors, administrators, and assigns from any and all actions, causes of actions, claims and demands, for, upon, or by reason of, any damage, loss, injury or suffering which heretofore has been, or which hereafter may be, sustained by me in consequence of such accident and injury.

"Witness my hand and seal the day and date first above written. A. L. Perry.

"Witness: Fred Dickinson."

Plaintiff in reply pleaded that this release was given simply as a receipt for wages due, but that no part of the sum received was in payment for, or in release of, damages sustained by reason of the injuries. He also pleaded that the release was obtained by fraud and deceit; that plaintiff never executed, or intended to execute, a release for the damages he had sustained; that when defendant paid plaintiff the sum set out in the release, and when plaintiff signed the release, defendant represented that it was only a receipt for wages. He also alleged that the release was executed at a time when he was sick and in an enfeebled condition of body and mind due to the shock and injuries he had received, and that he was then suffering from severe headaches and loss of memory and was unable to transact matters of business; that he was then so weak and distressed in mind that he was unable to properly care for himself; that he did not read the release, but relied upon the representations of the defendant; that he believed it was a receipt for wages and nothing more; and that these facts were well known to the defendant and its agents at the time the release was executed.

At the close of plaintiff's case defendant moved for a directed verdict, based solely on the ground that plaintiff could not recover owing to the execution of this release. At the close of defendant's case the same motion was renewed, and, although five assignments of error are made in the brief, appellant's main contention is based upon the proposition that the settlement and release were and are binding on plaintiff, and that he is not entitled to recover in the face of this release.

The first proposition of law advanced by appellant is: "A party who, having the capacity and opportunity to read a release of claims for damages for personal injuries signed by himself, and not being prevented by fraud practiced upon him from so reading it, failed to do so, and relied upon what the other party said about it, is estopped by his own negligence from claiming that the release is not legal and binding upon him according to its terms." It has been so

held in *Osborne v. Missouri P. R. Co.*, 71 Neb. 180. But in this case the jury were instructed that plaintiff could not recover unless they found from a preponderance of the evidence that the release was obtained through some fraud or deception practiced upon him by the defendant or its agents, or that at the time he executed the release his mental condition was such that he could not understand the meaning or purpose of the same. By their verdict they resolved these questions in favor of the plaintiff. As we view the record, the first question to determine is whether the evidence is sufficient to sustain this finding. There is a conflict in the evidence as to the understanding of the parties at the time the release was executed, and this evidence must be considered in the light of all the surrounding circumstances. Plaintiff was a young man of about 23 years of age, and is not shown to have had any business experience. He had suffered a severe shock, necessitating his confinement in a hospital, where he lay in an unconscious condition for a number of days, but had sufficiently recovered to be up and about, and ready to resume work. He testifies, however, that, following the injury, he was nervous, suffered with headaches and with dizziness. Defendant proved that while in the hospital plaintiff was discovered to be suffering from a venereal disease. The medical testimony shows that the troubles of which the plaintiff complained, and from which he claimed to be suffering at the time of the trial, might be due to this disease, and defendant seeks to shift responsibility for his condition on the theory that it was not brought about because of the injuries sustained in its employ, but because of this disease, which is said to be progressive in its nature.

Following the execution of the release, plaintiff resumed work for the company and remained in its employ for several months. He left Omaha in March 1913, but returned in December following, and again made application to defendant for work. The foreman to whom he applied promised him employment, but within a short time thereafter notified him that the company did not desire to secure

his services. Soon thereafter this suit was instituted. It quite clearly appears that plaintiff was incapacitated for work; his injuries were serious; and the amount of recovery is not excessive. It is well to consider the extent of his injuries in concluding whether he meant to make a settlement of his claims therefor when he signed the receipt which is offered in evidence. The fact that he was paid but $97.50 and that the verdict of the jury is for $2,000, and that no complaint of the amount is made, may be taken into account in determining the condition of his mind, his ability to transact business, and his ability to understand the meaning or purpose of the paper at the time of its execution. If he could not understand its meaning or purpose, or if his mental condition was such that he was unable to comprehend its effect, he cannot be held to be bound by this release. On the other hand, the fact that he remained in the employ of the company for a number of months, left the city, and, after an absence of several months, returned again and sought employment may be said to indicate that, in signing the release and accepting the amount paid at that time, he intended to release defendant.

In *Hauber v. Leibold,* 76 Neb. 706, it is held: "In order to make a valid contract the minds of the parties must meet; and if one mind is so weak, unsound or diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to make a valid contract, whether such state of his mind be the result of sickness, accident or voluntary intoxication."

If his mind was in such condition that he could not make a valid contract, it matters not, so far as the release is concerned, whether that condition of mind was brought about by reason of the shock from the fracture of his skull or from the disease with which he is shown to have been afflicted.

Where the amount received in settlement is grossly inadequate to the injuries suffered, that fact may be con-

sidered as tending to show unfair practice; that the party has been overreached, and that the minds of the parties never met in the consummation of a valid contract.

Defendant states in its main brief that in this appeal it "has devoted its attention solely to the defense of a settlement and release having been made." However, we find that complaint is made of instructions. The court instructed the jury that the release was binding on the plaintiff, unless he had established by a preponderance of the testimony that it was obtained through fraud or deception practiced upon him, or at the time of its execution plaintiff's mental condition was such that he could not understand its meaning or purpose. We find no error in this instruction.

The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

GEORGE E. DOVEY, ADMINISTRATOR, ET AL., APPELLANTS, V. FRANK E. SCHLATER, SPECIAL ADMINISTRATOR, ET AL., APPELLEES.

FILED APRIL 29, 1916. NO. 19475.

1. **Executors and Administrators:** VOID JUDGMENT: RELIEF IN EQUITY. One whose individual property and the partnership property in which he has an interest is seized under an execution issued on a void judgment against him in his capacity as the administrator of the estate of a deceased person may maintain a suit in equity to enjoin the sheriff, and those who obtained the judgment, from attempting to subject such property to the satisfaction of such void judgment.

2. ———: ———: ———: SUFFICIENCY OF PETITION. The substance of plaintiff's petition set out in the opinion, and *held* sufficient to entitle him to equitable relief.

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

John L. Webster and *D. O. Dwyer,* for appellants.

J. J. Sullivan, C. A. Rawls, A. L. Tidd and *F. A. Brogan, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Cass county sustaining a demurrer to plaintiffs' bill in equity, by which it was sought to establish the interest of defendants' decedent in certain property, and to enjoin the levy and collection of an alleged judgment of the county court of that county, and dismissing the action.

It was averred in the petition that plaintiff, George E. Dovey, was the administrator of the estate of his father, E. G. Dovey, who departed this life in the year 1881; that deceased left surviving him his widow, Jane A. Dovey, and his sons, Horatio N. Dovey, Oliver C. Dovey, and the plaintiff, George E. Dovey; that Jane A. Dovey departed this life in the year 1913, and that Frank E. Schlater was appointed special administrator of her estate; that, upon a petition to the county court by said Schlater, the plaintiff, George E. Dovey, was cited to appear and render his account as administrator of the estate of his father, E. G. Dovey; that he rendered a true and correct account of his administration of the estate of the deceased; that his account was wrongfully disallowed, and he was surcharged by the court with the amounts alleged by Schlater to be due the estate of Jane A. Dovey; that a judgment was rendered against the plaintiff, George E. Dovey, as administrator of his father's estate, for the sum of $54,297.64, and in favor of the estate of his mother, Jane A. Dovey; that such judgment was rendered without any order of distribution ever having been made; that the other heirs of the estate of E. G. Dovey were never cited to appear, and were not parties to the proceeding; that the alleged judgment was filed in the office of the clerk of the district court for

Cass county, and the execution in question in this case was issued by the clerk against the plaintiff, George E. Dovey, as upon a personal judgment for that amount; that the sheriff of Cass county had pretended to levy the execution on 371 shares of bank stock owned by the firm of E. G. Dovey & Son, which was deposited as collateral with the Omaha National Bank; that the sheriff pretended to levy the execution on certain shares of bank stock which were owned by the plaintiff, and proceeded to levy on the goods and merchandise contained in the general store of the partnership of E. G. Dovey & Son, and the store building in which the stock of merchandise was contained and in which the partnership business was being conducted; that said execution was being levied on said property as the personal and individual property of the plaintiff, George E. Dovey; that the sheriff was about to sell the property so levied upon, notwithstanding the fact that plaintiff, George E. Dovey, had appealed from said void judgment to the district court for Cass county. It was further alleged that the district court had wrongfully dismissed George E. Dovey's appeal, for the sole reason that he had been unable to furnish a bond for such appeal. The petition further set forth, in substance, the following facts: At the time of the death of E. G. Dovey, he and the plaintiff, George E. Dovey, were equal partners conducting a copartnership business in the town of Plattsmouth, in Cass county, Nebraska, which business consisted of a general merchandise business then being carried on by them under the firm name of E. G. Dovey & Son; that as a part of the co-partnership business they owned certain bank stock in the First National Bank of Plattsmouth, Nebraska, and other property, real and personal, constituting a part of the said partnership business; that at the time of the death of E. G. Dovey the partnership business was of the aggregate value of $52,092.42, and upon his death the value of the interest of the plaintiff, George E. Dovey, of Horatio N. Dovey, Oliver C. Dovey and Jane A. Dovey, became and was as

follows: The plaintiff, George E. Dovey, was the owner of an undivided one-half interest in the partnership of E. G. Dovey & Son, of the value of $26,046.21. Plaintiff, George E. Dovey, as the heir of E. G. Dovey, was entitled to a portion of the estate of his deceased father, amounting to $6,511.55; Horatio N. Dovey, as heir, was entitled to $6,511.55; Oliver C. Dovey, as heir, was entitled to $6,511.55; and Jane A. Dovey, the widow, was entitled to $6,511.55, making a total of $52,092.42. That, in addition to the foregoing partnership property, E. G. Dovey owned, in his own right, certain real estate in Cass county, Nebraska, and other choses of action; that after the death of E. G. Dovey the business theretofore carried on under the partnership name of E. G. Dovey & Son continued to be carried on in the same manner and under the same name, and the interest of the several parties as aforesaid in the said business remained invested therein; that afterwards, in 1895, it was claimed by Oliver C. Dovey and Horatio N. Dovey, defendants herein, that a mutual understanding or agreement was reached by which they became equal partners with the plaintiff, George E. Dovey, in the said business of E. G. Dovey & Son; that thereafter the business was carried on in the same manner, and that Horatio N. Dovey and Oliver C. Dovey each claimed to be entitled to an undivided one-third interest in the assets and profits of said business; nevertheless the business was continued and conducted under the name and style of E. G. Dovey & Son, and the three brothers contributed thereto in a greater or less degree, until September, 1909, when Oliver C. Dovey withdrew therefrom; that during all of the period from the time of the death of E. G. Dovey, in 1881, down to September 22, 1909, a period of 28 years, Jane A. Dovey, the widow and mother of the three boys, George, Oliver, and Horatio, permitted her interest in the said business of E. G. Dovey & Son to remain therein and to be used by the said brothers in the business of E. G. Dovey & Son to all intents and purposes as if the interest of Jane A. Dovey therein constituted a part of the assets of E. G. Dovey &

Son, and the business was conducted without any opposition on the part of Jane A. Dovey during all of said 28 years; that she knew that her interest in said business was so used as a part of the assets therein, and consented and acquiesced therein and thereto during the said 28 years, and from time to time drew therefrom such sums of money as she needed for her personal living and expenses, and that at no time during the said 28 years did the said Jane A. Dovey make any claim or assert any right to the withdrawal of her interest in the said business, or make any claim or assert any right that her interest was being in any manner converted or misappropriated by either of the three brothers, George, Horatio, or Oliver; that during the said period of 28 years rents collected and received from lands, the title to which had been in Edward G. Dovey, were placed in said business under the firm name of E. G. Dovey & Son, and when any part of said lands were sold the said Jane A. Dovey joined in the execution of the deeds or conveyances, and the proceeds of such sales were placed in the business of E. G. Dovey & Son as fully and effectually, and to all intents and purposes, as if the same belonged to the business of E. G. Dovey & Son, all of which was done with the full knowledge and acquiescence of the said Jane A. Dovey; that during all of said period of 28 years it was never claimed by Jane A. Dovey, or any other person in interest, that George E. Dovey had received said rents or choses in action or proceeds of sales of real estate in the capacity of administrator of the estate of E. G. Dovey, nor that he had received, handled, retained, or otherwise used any of the said rents, choses in action or proceeds of the sales of real estate as such administrator; but, to the contrary, all of said parties in interest, including the said Jane A. Dovey, recognized, consented to, and acquiesced in the receiving of said rents, choses in action and proceeds, and that the same became a part of the assets and business of E. G. Dovey & Son by the full consent and acquiescence of all the parties in interest, including the said Jane A. Dovey. It was further alleged that in September,

1909, the net value of the business of E. G. Dovey & Son, including the interest of Jane A. Dovey, was $142,796.56; that at that time Oliver C. Dovey withdrew from the business of E. G. Dovey & Son, and demanded of the plaintiff, George E. Dovey, and of Horatio N. Dovey, that they pay him, Oliver C. Dovey, for his undivided one-third interest of the business, the sum of $50,000; that in pursuance of his demand the plaintiff, George E. Dovey, and Horatio N. Dovey paid to Oliver C. Dovey the sum of $7,500 in money and gave him their promissory notes in the amount of $42,500, secured by mortgage upon certain real estate in which they separately had an interest as heirs of E. G. Dovey, deceased; that, thereupon, Oliver C. Dovey released, quit-claimed and surrendered to E. G. Dovey & Son all his right, title, claim or interest in the said business, and the said division of the assets of the business of E. G. Dovey & Son was submitted to Jane A. Dovey, the widow, for her consent, approval and acquiescence therein; that the proceeding was fully explained to Jane A. Dovey, and she then and there agreed and assented to and approved of the said settlement and division of the assets of E. G. Dovey & Son, and then and thereby released any and all interest of every kind and nature which she had in the moneys invested in the said business of E. G. Dovey & Son; that it was then agreed, among other things, that the said three brothers should thereafter contribute to the support of Jane A. Dovey the following sums of money, annually: George E. Dovey, $500; Oliver C. Dovey, $500; Horatio N. Dovey, $400; and that thereafter the said Jane A. Dovey should continue to reside at the home of Horatio N. Dovey. It was further stated that from and after September, 1909, up to the time of the death of Jane A. Dovey, in 1913, she continued to acquiesce in the division which had theretofore been made of the business of E. G. Dovey & Son, and by reason of the premises aforesaid the said Jane A. Dovey became, was, and is estopped, both in law and in equity, from asserting any right to any interest in the business of E. G. Dovey & Son, and from making any claim on her

part to any interest in the said business; that she thereby became barred during her lifetime from claiming or asserting any interest in said business, revenues, rents, choses in action or proceeds of the sales of any part of said estate by way of dower right or otherwise, and that the estoppel applies to Frank E. Schlater, special administrator, above referred to; that Jane A. Dovey died on November 20, 1913, leaving a will, theretofore executed, by which she bequeathed and devised all her property of every kind and nature, without describing the same, to Edward Grovenor Dovey and George Oliver Dovey, sons of Horatio N. Dovey; that said will was and still is being contested in the courts, and its validity has not yet been finally determined. It is further alleged that when Frank E. Schlater, special administrator of the estate of Jane A. Dovey, filed his petition praying that the plaintiff herein, George E. Dovey, should file his account as administrator of the estate of his father, E. G. Dovey, he well knew all of the facts hereinbefore referred to, and was induced to file said petition in the interest of Edward Grovenor Dovey and George Oliver Dovey, and not otherwise. The petition also contained the report of the plaintiff, George E. Dovey, specified and itemized in full and verified as provided by law. It was alleged that, when said report was filed, Frank E. Schlater, as special administrator, filed exceptions thereto; that, when said report came on for hearing in the county court, the county judge rendered his judgment and finding therein against the plaintiff, George E. Dovey, as administrator of the estate of E. G. Dovey, in the sum of $54,297.64 in favor of the estate of Jane A. Dovey. The petition further alleged that the application of Frank E. Schlater contained no prayer for a judgment against the plaintiff, George E. Dovey; that none of the other parties interested in the estate of E. G. Dovey were cited to appear; that no order of distribution was ever made and no account of the interests of the several heirs of the estate of E. G. Dovey was ever rendered, and that without any further order, notice or proceeding whatsoever the county court rendered the

judgment aforesaid against this plaintiff, George E. Dovey; that said judgment was filed at the request of Frank E. Schlater in the district court for Cass county, and the execution above referred to was issued and placed in the hands of the sheriff of that county, who proceeded in the manner above stated. The petition also contained the allegation that plaintiff, George E. Dovey, was without any adequate remedy at law, and concluded with a prayer for equitable relief.

The petition and proceedings cover some 75 pages of printed matter, but we have only stated the substance of some of the allegations in order to show the nature of the action.

The record discloses that Oliver C. Dovey demurred to the petition for the reason that the facts alleged therein do not constitute a cause of action against him or entitle the plaintiff, George E. Dovey, to any relief. Defendant Frank E. Schlater filed an extended answer to the petition. The defendant Horatio N. Dovey also answered to the merits, and prayed that the petition of plaintiff, George E. Dovey, be denied, and to these answers said plaintiff replied. When the petition was filed the court issued a restraining order. The cause came on for hearing, and the district court sustained the demurrer of Oliver C. Dovey, and without taking any evidence, and without any further trial or hearing, held that the facts stated in the petition did not entitle the plaintiff, George E. Dovey, to any relief, and the action was dismissed.

When the appeal was lodged in this court, plaintiff George E. Dovey made application for a restraining order, which was allowed. Thereafter the defendant Schlater moved to vacate the order, and the ruling on the motion was continued to the time of final hearing.

As we view the record, the petition stated facts sufficient to constitute a cause of action and entitle the appellant to a trial of the case on its merits. This is an action wherein all the parties are brought before the court for the determination of their rights, and is the

only one adequate to meet the situation. The county court had no jurisdiction to render the judgment appealed from.

If it should appear from the evidence that Jane A. Dovey retained her interest in the partnership property, and consented to the investment and use in the partnership business of her interest in the estate and property of E. G. Dovey, and drew money from the said business as an interested partner therein for many years, then her administrator would be estopped to deny those facts. The trial court should determine whether Jane A. Dovey in her lifetime made a settlement with the other parties interested in the business and transferred to them all of her interest in the business, as alleged in the petition. If it is found that no such agreement and transfer were made, then the trial court should determine the nature of the interest, if any, she had in the partnership and its value at the time of her decease, which should be decreed to her administrator for distribution under the order of the county court. If either of the partners in said business applies for that purpose, the partnership should be dissolved and the interest of each partner in the assets should be determined. The pleadings will be amended, if desired, and evidence taken.

We are of opinion that the judgment of the trial court should be reversed and the cause remanded for further proceedings, and that in the trial of the cause the litigation among all of the parties should be settled by giving to each his due, and making each of them respond to the full limits of their respective obligations.

The judgment of the district court is reversed and the cause is remanded for further proceedings, in accordance with the views above expressed.

REVERSED.

IN RE ESTATE OF EDWARD G. DOVEY.
GEORGE E. DOVEY, ADMINISTRATOR, APPELLANT, V. FRANK E. SCHLATER, SPECIAL ADMINISTRATOR, APPELLEE.

FILED APRIL 29, 1916. No. 19476.

Executors and Administrators: APPEAL: BOND. Where a judgment has been rendered by a county court against the administrator of the estate of a deceased person in his representative capacity, the administrator may appeal to the district court without an additional bond.

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

John L. Webster and *D. O. Dwyer,* for appellant.

C. A. Rawls and *W. A. Robertson, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Cass county dismissing the appeal of George E. Dovey from a judgment for $54,297.64 rendered against him as administrator of the estate of E. G. Dovey.

The district court dismissed the appeal of the administrator because he had failed to file an appeal bond. The record discloses that he was unable to furnish such a bond, and contended that, by reason of the fact that he had given a bond as such administrator, which had been duly approved by the court, he was not required to file an additional appeal bond, even if he had been able to furnish such bond. The record further discloses that E. G. Dovey departed this life in the year 1881; that he left surviving him, as his only heirs at law, George E. Dovey, Oliver C. Dovey and Horatio N. Dovey, together with his widow, Jane A. Dovey; that appellant, George E. Dovey, was appointed administrator of the estate of the decedent, gave his bond as such administrator and entered upon his duties; that Jane A. Dovey died on the 20th day

of November, 1913, and that Frank E. Schlater was appointed special administrator of her estate.

After Schlater qualified as special administrator, he filed an application in the county court of Cass county to require George E. Dovey to render an account of his doings as administrator of the estate of his father. In answer to the citation issued by the county court, George E. Dovey appeared and filed his answer under oath as provided by law. The report also contained matters which required consideration by the county court. On the filing of the report and inventory, a citation was issued and published notifying all parties interested in the estate of the time fixed for the consideration of the report. The special administrator filed an answer and exceptions, and without further process or proceedings, and without any appearance of the other heirs of the estate of E. G. Dovey, the court took the matter under advisement, and on the 9th day of June, 1915, rendered the following judgment: "Wherefore it is ordered adjudged and decreed that the estate of Jane A. Dovey, deceased, through the special administrator, Frank E. Schlater, have and recover from George E. Dovey, as administrator of the estate of Edward G. Dovey, deceased, the sum of $54,297.64, together with costs of suit, and that execution be, and the same is hereby, awarded for said amount and costs." From that judgment George E. Dovey prosecuted an appeal to the district court, alleging and showing by affidavit that he was unable to secure an appeal bond. It appears from the record that no pleadings were ever filed in the county court praying for or even suggesting that a judgment be rendered against George E. Dovey as an individual. No order of distribution was ever made. Neither were the amounts due each of the heirs ever determined, and nothing was done giving said heirs or the special administrator of the estate of Jane A. Dovey the right to recover their several shares from the said George E. Dovey. It is contended that the county court was without jurisdiction

to render such a judgment. Section 1427, Rev. St. 1913, provides: "Every executor or administrator who may have given bond in this state, with surety as provided by law, shall be authorized in all cases of appeal from one court to another, by him made, to prosecute the same without filing an appeal bond, such appeal to be prosecuted to the district court as appeals are now taken from courts of justices of the peace."

The effect of this statute was stated in *Kerr v. Lowenstein,* 65 Neb. 43. In that case a suit was brought upon an appeal bond, and the sureties defended upon the sole ground that under the terms of the statute the administrator was not required to give the appeal bond, and therefore the bond was a nullity and no action could be maintained thereon. The adverse party stated that, notwithstanding the administrator might sue out an appeal without giving an appeal bond, such an appeal would not supersede the judgment. The court held: "We are unable to agree to this contention. The effect of such construction would be to render meaningless that portion of the section quoted which gives the administrator the right 'to prosecute the same without filing an appeal bond.' * * * If the legislature, by the language used, intended to say no more than that an administrator or executor should also enjoy this right, the section would be entirely useless. It is elementary in the construction of statutes that such construction is favored which gives to the entire enactment force and effect, if possible, and, adopting this rule, we are required to say that the language quoted was inserted for the purpose of taking administrators and executors, duly qualified and acting as such, who have given bond agreeably to law, out of the general rule requiring litigants to give bond in order to supersede judgments rendered against them from which they desire to appeal."

In the case at bar the administrator properly represented, not only himself and his own interest, but also the interests of Oliver C. Dovey and Horatio N. Dovey,

together with the other heirs of the estate of E. G. Dovey. It should be observed that the judgment ran against George E. Dovey as administrator, and that he appealed in that capacity, and not from a judgment or order against him personally. The interests thus represented by George E. Dovey gave him the right to appeal without bond. *In re Williams,* 97 Neb. 726; *Thompson v. Pope,* 77 Neb. 338; *Rhea v. Brown,* 4 Neb. (Unof.) 461. We are therefore of opinion that the district court erred in dismissing the appeal.

The judgment of the district court is reversed and the cause is remanded to that court, with directions to set aside the judgment of the county court, and remand the cause to that court, with directions to recall the execution to make a final accounting, settlement and order of distribution of the assets of the estate of E. G. Dovey, deceased, among those interested therein, and for such further proceedings as may be necessary in the premises, not in conflict with this opinion.

REVERSED.

EMIL BAUER V. STATE OF NEBRASKA.

FILED APRIL 29, 1916. No. 19492.

1. **Criminal Law:** EMBEZZLEMENT BY AGENT: EVIDENCE OF DUTIES: ADMISSIBILITY. In a prosecution for embezzlement of the moneys of a corporation by its agent and general manager, the secretary may testify as to the specific duties of the manager, where the duties of such manager are not fully set forth in the charter and by-laws of the corporation.

2. ———: ———: BOOKS OF ACCOUNT: EXAMINATION: EVIDENCE AS TO RESULTS. Where, in such a prosecution, it appears that the business of the corporation amounted to more than $300,000 in a single year and consisted of many thousands of transactions with different individuals, an expert accountant who has examined the books of the corporation, as kept by the defendant, and which books were

in court subject to defendant's inspection, and has compiled a financial statement of their contents, may testify as to the result of his examination.

3. **Embezzlement:** VERDICT: SUFFICIENCY OF EVIDENCE. Evidence examined, its substance set forth in the opinion, and *held* sufficient to sustain the verdict.

4. ———: TRIAL: INSTRUCTIONS. In such case it was not reversible error for the court to instruct the jury that as to the count charging the embezzlement of $2,000 on or about March 9, 1915, it is not necessary for the state to prove the embezzlement of the whole of said amount, nor of any particular amount on any particular day, but "if you find from the evidence a continuous series of felonious conversions of money by the defendant at different times and in different amounts before that date and subsequent to January 1, 1914, and not included in any other count, you are entitled to consider the aggregate sum of such separate conversions of money by the defendant as the amount of embezzlement under this count; but not over the sum of $2,000, which is the amount charged."

5. **Criminal Law:** TRIAL: ADDITIONAL INSTRUCTIONS. While the jury were deliberating on their verdict, they came into court and requested further instructions, and the same were given. The defendant, being present with his counsel in court, made no objection. The giving of the instructions did not constitute reversible error.

6. ———: ———: ———. In answer to a request by the jury for further instructions, the court gave the following in writing: "In your finding as to the value, the word 'about' does not conform to the statute. You may renew your deliberations, and, in case your verdict is guilty, you should find some definite amount, such sum as you are able to say beyond a reasonable doubt is the amount and value embezzled." The defendant and his counsel made no objection to this instruction, and the giving of it did not constitute reversible error.

7. ———: EVIDENCE: ADMISSIBILITY: AVOIDANCE OF ARREST. Evidence that the defendant left his employment and went to other states and cities with the view of avoiding arrest may be received, not as a confession of his guilt, but simply as a circumstance to be considered by the jury with all of the other evidence in arriving at their verdict.

8. **Statutes:** REPEAL AND RE-ENACTMENT: EFFECT. The rule seems to be settled in this state that the simultaneous repeal and re-enactment of a statute in terms, or in substance, is a mere affirmance of the

original act, and not a repeal in the strict or constitutional sense of the term. *State v. Bemis*, 45 Neb. 724.

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

McCreary & Danley, Ambrose C. Epperson and *George W. Miller,* for plaintiff in error.

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

BARNES, J.

Emil Bauer was tried in the district court for Clay county on an information containing 13 counts charging him with the embezzlement of certain sums of money belonging to the Harvard Co-operative Grain & Live Stock Company, a corporation of which he had been the managing agent.

On the trial all of the counts of the information were eliminated except the first, second, fourth and thirteenth. The jury found Bauer not guilty as to the first, second and fourth counts, and guilty on the thirteenth count of said information, which charged him generally with the embezzlement of the sum of $2,000 of the funds of the corporation on or about March 9, 1915. His motion for a new trial was overruled, and he was given an indeterminate sentence of from one to five years in the state penitentiary. To reverse that judgment, he has brought the case to this court by a petition in error. In this opinion he will be designated as the defendant.

Much reliance seems to have been placed on the assignment that the court erred in receiving the testimony of witness Dieringer, who was the secretary of the corporation. It appears from the record that defendant's powers and duties were set forth in the articles of incorporation and by-laws in the most general way, but his specific duties were to buy and sell grain, collect the money due the company, deposit it in the bank and check

it out, keeping a record of his transactions in triplicate on slips provided for that purpose, and from which slips the books of the corporation were kept and posted. The record discloses that the secretary had personal knowledge of the facts to which he testified, and which were in addition to those stated in the by-laws. The evidence was competent, and the objection that it was not the best evidence is without merit. The statement of the same witness as to the duties of Miss Ketchum, who was the bookkeeper, was also competent and not subject to the objection that it was not the best evidence.

Defendant's next contention on which he seems to place reliance was that the court erred in receiving the testimony of the expert accountant who examined the books of the company and compiled a statement therefrom. The statement was used to refresh his recollection in connection with the books themselves which were in court subject to the defendant's inspection. The record shows that the business of the company totaled over $300,000 in a single year, and consisted of many thousand entries. Therefore it was practically impossible to trace each entry in the books and place the result thereof before the jury. In such a case an expert accountant may testify as to the results of his examination of the books and the accounts of the company. *Bartley v. State,* 53 Neb. 310; *Bode v. State,* 80 Neb. 74; *Mendel v. Boyd,* 71 Neb. 657. It is further contended that the witness had not complied with the provisions of section 5820-5825, Rev. St. 1913, and therefore his evidence was incompetent. The record shows that Mr. Thomas, who was the expert accountant, had served acceptably in that capacity for many years. He thoroughly qualified himself to testify and therefore this objection is without merit. We think what we have said as to the introduction of testimony is sufficient to dispose of all of such objections and assignments relied on by the defendant.

As to the question of the sufficiency of the evidence to sustain the verdict, the record shows beyond a reasonable

doubt that during the year 1914 and up to the 9th day of March, 1915, when defendant left his employment, he was short in his accounts with the company to the amount of $6,430. The several items included in that amount were taken and used by the defendant from time to time during the period above mentioned. He was a witness in his own behalf and attempted an explanation of certain items found in his accounts. His explanations covered the items with which he was charged in the first, second and fourth counts of the information, together with some other items, amounting in all to $1,043, or a total of $1,373. Giving him full credit for this amount, the testimony shows that more than $5,000 of the company's money was unaccounted for. It seems clear that at the date of the charge contained in the information on which he was convicted his shortage amounted to more than $5,000, and we are of opinion that the evidence sustains the verdict.

The court instructed the jury: "In count number 13 of the information the state charges an embezzlement by the defendant of about the sum of $2,000, on or about the 9th day of March, 1915. You are instructed as to this count that it is not necessary for the state to prove the embezzlement of the whole of said amount of $2,000, nor of any particular amount on any particular day, but if you find from the evidence a continuous series of felonious conversions of money by the defendant at different times and in different amounts before that date and subsequent to January 1, 1914, and not included in any other count, you are entitled to consider the aggregate sum of such separate conversions of money by the defendant as the amount of embezzlement under this count; but not over the sum of $2,000, which is the amount charged."

This instruction is assigned as error, and it seems to be the contention of the defendant that the several amounts of money taken and converted to his own use cannot be found and taken together for the purpose of

sustaining a conviction under the thirteenth count. We think that as to this assignment the defendant is mistaken. The rule announced in *Bolln v. State,* 51 Neb. 581, sustains such an instruction. In 9 R. C. L. p. 1299, it is said: "Proof that the money alleged to have been embezzled by an agent was received in several sums, at different times, and from different persons, during a course of continuous dealing between such agent and his principal, will support a verdict finding the aggregate sum as the amount of a single embezzlement." *State v. Moyer,* 58 W. Va. 146, 6 Am. & Eng. Ann. Cas. 344, is cited. We think this rule too well settled to be a subject for further discussion.

We have examined the other instructions given by the court and those requested by the defendant and refused, and find no reversible error.

The record further discloses that, while the jury were deliberating upon the verdict, they returned into court in charge of the officer and propounded the following question: "Did Miss Ketchum's white slips correspond with the bank slips?" The defendant was present with his counsel in court at that time, and the court, without any objection on his part, answered the interrogatory as follows: "I answer, 'My recollection of the evidence is that the white slips furnished her by Emil Bauer on the deposit slips of the bank correspond in amount or in case of mistake in figures were corrected and when corrected balanced $.....'" The bill of exceptions shows that Miss Ketchum so testified, and we are of opinion that it was not reversible error for the court to give the instruction to the jury of which defendant complains.

It also appears that the court instructed the jury during their deliberation as follows: "In your finding as to the value, the word 'about' does not conform to the statute. You may renew your deliberations, and, in case your verdict is guilty, you should find some definite amount, such sum as you are able to say beyond a reasonable doubt is the amount and value embezzled." This addi-

tional instruction was given in writing in open court in the presence of the defendant and his counsel without objection on his part. Under the rule announced in *Jameson v. State,* 25 Neb. 185, it was not reversible error for the court to so instruct the jury.

It appears from the record that on or about the 8th day of March, 1915, the defendant, fearing trouble by reason of the condition of the affairs of the company, left his employment and fled from Harvard; that in about a month thereafter he returned and was arrested by the sheriff of Clay county. The sheriff was allowed to testify to that fact, and to further testify as to defendant's admissions that while he was absent from Harvard he went from place to place throughout several southern cities and states in an attempt to avoid arrest. The admission of this testimony is assigned as error. It appears, however, that it was received, not as a confession of defendant's guilt, but simply as a circumstance to be considered by the jury together with all of the other evidence in the case in arriving at their verdict. The testimony was competent. 8 R. C. L., p. 192; 12 Cyc. 395; *George v. State,* 61 Neb. 669.

Finally, it is contended that the Revised Statutes 1913, relating to embezzlement, having been repealed by an act of the legislature of 1915 (Laws 1915, ch. 157) entitled "An act to amend section 8649 of the Revised Statutes of Nebraska for 1913, relating to embezzlement, and to repeal said original section," there could be no prosecution under that section or under the section as amended by the act of 1915, for the reason that the acts constituting the crime as it stood prior to the amendment had been wiped out by the repeal, and the new act of 1915 amounts to an *ex post facto* law to punish for acts committed prior to the criminal statute defining the crime of embezzlement. If this contention should be sustained the defendant could not be punished for the series of conversions of money under his scheme to cheat and defraud

the elevator company because of the failure of the legislature properly to protect pending prosecutions. The argument of defendant's counsel is based on the general rule that the repeal of the act defining a crime deprives the court of power to render a sentence upon a verdict finding defendant guilty. This contention disregards the situation in this case. There was no change whatever in the definition of the crime of embezzlement by the amendment of 1915. So far as this prosecution is concerned, the statute is the same, and the penalty imposed is absolutely unchanged. To quote the two statutes would render this opinion entirely too long. It is sufficient to say that the only change in the statute, so far as it affects the rights of the defendant, is that in the old statute the words "by virtue of such employment" are used, while in the statute as amended the following appears: "Which shall have come into his or her possession or care, in any manner whatsoever." The rule adopted in this state is that where a new act is in the very words of the statute which it repeals, and it is clear that the repeal and re-enactment were intended to continue in force the uninterrupted operation of the old statute, they will be so construed, and will apply to crimes committed before the new act took effect. *State v. Wish,* 15 Neb. 448; *State v. McColl,* 9 Neb. 203; *Wright v. Oakley,* 5 Met. (Mass.) 400; *Fullerton v. Spring,* 3 Wis. 677; *Hair v. State,* 16 Neb. 601; *State v. Bemis,* 45 Neb. 724; *Stenberg v. State,* 50 Neb. 127. The rule seems to be that the simultaneous repeal and re-enactment of the statute in terms, or in substance, is a mere affirmance of the original act, and not a repeal in the strict or constitutional sense of the term. We are therefore of opinion that this contention is without merit.

A careful examination of the record satisfies us that it contains no reversible error. The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

BESSIE JUCKETT ET AL., APPELLEES, V. SAM BRENNAMAN ET AL., APPELLANTS.

FILED APRIL 29, 1916. No. 18790.

1. **Venue:** ACTION AGAINST SURETIES. A surety upon a saloon-keeper's bond has such an interest in an action to recover civil damages brought against the saloon-keeper and his surety that an action may be brought against it in any county where it may be found. *Kramer v. Bankers Surety Co.*, 90 Neb. 301.

2. ———: ACTION AGAINST FOREIGN CORPORATIONS. A foreign corporation is "found," within the meaning of section 7619, Rev. St. 1913, in any county in which proper service can be had. *Council Bluffs Canning Co. v. Omaha Tinware Co.*, 49 Neb. 537.

3. **Process:** SUMMONS: SERVICE ON INSURANCE COMPANY. In an action against an incorporated insurance company in a county where there is an agency, the service may be upon the chief officer of such agency. Rev. St. 1913, sec. 7635.

4. **Intoxicating Liquors:** LIABILITY OF SELLER. "One selling intoxicating liquor is liable, not only for the actual results of the sale, but for all damages growing out of the disqualification resulting from or contributed to by such sale, without reference to the time through which such disqualification may continue." *Jessen v. Willhite*, 74 Neb. 608.

5. ———: LIABILITY OF SELLER AND SURETIES. A saloon-keeper and the sureties upon his bond are liable for the loss of support sustained by a widow and children of a decedent whose death was contributed to by intoxicating liquors bought from the saloon-keeper or drank by the deceased. *Schiek v. Sanders*, 53 Neb. 664.

6. ———: ———. Licensed liquor dealers in this state are liable in damages for all the legitimate and proximate consequences of their traffic, and, if they have induced drunkenness in a previously sober and industrious man who afterwards dies from exposure while in a condition of intoxication even after they have ceased to furnish him with liquors, they and their sureties may be liable to his widow and children for the damages they have suffered. *Stahnka v. Kreitle*, 66 Neb. 829.

7. **Evidence:** DECLARATIONS: ADMISSIBILITY. Spontaneous and unpremeditated declarations as to pain or suffering made when the circumstances show the absence of design or motive on the part of the person making them are competent evidence of physical condition.

8. **Evidence** examined, and *held* to support the verdict.

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

Willis E. Reed, M. A. Hall and *Cain & Mapes,* for appellants.

Kelsey & Rice, contra.

LETTON, J.

This is an action by the widow of Delbert B. Juckett against a number of saloon-keepers and the sureties on their respective bonds to recover damages under the Slocum act. Plaintiff had judgment for $17,000, and defendants appeal.

Ten of the defendants were licensed saloon-keepers in the city of Fremont during the license years of 1910, 1911 and 1912; another was in business at Cedar Bluffs during that time; while three of the defendants held licenses for the license year of 1913 in the towns of Royal, Brunswick, and Neligh, respectively, in Antelope county. The other defendants are sureties upon the bonds of these saloon-keepers.

It is alleged that in 1910 the deceased was a healthy, robust man; that the defendants, who were saloon-keepers in Fremont during part of 1910 and during the years of 1911, 1912, and part of 1913, sold liquors continuously and frequently to deceased, which he drank; that he was frequently drunk during this period in their saloons; that by such sales they caused him to form the habit of drinking to excess, and to become a drunkard, and by causing and contributing to his continual drunkenness they each caused him to become weakened and debauched in body and mind, his physical and vital force to become exhausted, and his ability to resist disease and exposure impaired and weakened, "and each of them thereby rendered the said Delbert B. Juckett an easy victim to dis ease, exposure and death." A like charge is made for the year 1913 against the other defendants, who were saloon-keepers in Antelope county.

It is next alleged that on December 26, 1913, deceased procured liquor from defendant Brennaman at Royal, Nebraska; that he started to go from Royal to his home in the country about ten miles away, about 6 o'clock in the evening, in an open wagon; that he had liquor with him which he had procured from Brennaman that day and which he drank on his way home; that he became intoxicated, lay down in his wagon, passed into a drunken slumber and paralyzed condition; that, the weather being cold, he was exposed to the cold in the wagon box for a number of hours, and died from the exposure, as a result of his intoxication and as a result of his weakened physical and mental condition.

Objections were filed by each of the saloon-keeper defendants to the jurisdiction of the court: "(1) Because he is not a resident of Madison county, Nebraska, nor was he served with a summons in the above entitled action in Madison county, Nebraska. (2) That the cause of action did not accrue in Madison county, Nebraska, nor was any one in said county upon whom legal service could be had or obtained when the petition was filed in said county." Each of these objections was overruled and separate answers were filed. The answers each admit that defendants were licensed saloon-keepers and sureties on their bonds as alleged, pleads they were not residents of Madison county and were not served with summons in that county, a misjoinder of causes of action, misjoinder of parties defendant, and a general denial.

The assignments of error are: "(1) The court had no jurisdiction of the persons of either of the defendants. (2) The verdict is contrary to law and is not supported by sufficient evidence. (3) Errors of law occurring at the trial. (4) The verdict is excessive and is the result of prejudice and passion."

1. A summons was issued to the sheriff of Madison county, which was returned showing personal service on the chief officer of the agency of the domestic surety com-

pany at its agency in Madison county, Nebraska. A like return was made as to service upon the chief officer of the agency of the foreign corporations. Section 7635, Rev. St. 1913, provides: "When the defendant is an incorporated insurance company, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency." Section 7619, Rev. St. 1913, provides also that an action against "a foreign corporation may be brought in any county in which there may be property of, or debts owing to said defendant, or where said defendant *may be found.*" Under these provisions service upon the "chief officer of such agency" in the county, of either a foreign or a domestic insurance corporation, is sufficient. The defendant is "found" in any county upon which proper service can be had upon its agent. *Council Bluffs Canning Co. v. Omaha Tinware Mfg. Co.*, 49 Neb. 537. The final proviso of section 7619, that if the "defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose," is not a limitation, but an extension of jurisdiction, so that a recovery may be had in counties other than where the defendant is situated or may be found. These questions have already been settled by decisions of this court. *Western Travelers Accident Ass'n v. Taylor*, 62 Neb. 783; *Kramer v. Bankers Surety Co.*, 90 Neb. 301; *Horst v. Lewis*, 71 Neb. 365. The court, therefore, had jurisdiction to render the judgment complained of.

2. The assignment, "Errors of law occurring at the trial," has repeatedly been held too indefinite to warrant review by this court, but we will consider it. It is complained that Mrs. Juckett was permitted to testify to statements made by Juckett regarding his health and physical condition. It is often difficult to prove the condition of a person's health unless his own declarations under certain conditions are admitted in evidence. Spontaneous declarations made when there is no thought of any litigation or controversy, and when the circumstances

tend to show the absence of any design or motive on the part of the declarant, are admissible. *Hewitt v. Eisenbart,* 36 Neb. 794. This is the general rule. 2 Jones, Commentaries on Evidence, sec. 349.

It is next argued that it was error to exclude an application made by Juckett for life insurance in May, 1913, and the written report made by the examining physician at that time. It was not proved that Juckett had read the statements written in the application by the doctor before he signed it. Moreover, the circumstances under which the statements were made were such as to induce in the appellant a desire to show a favorable state of health on his part. They were not made spontaneously and unpremeditatedly without any thought as to their possible effect upon the circumstances of the applicant. If a proper foundation had been laid, perhaps it would not have been erroneous to admit them, since such matters are largely in the discretion of the trial judge, but it was not erroneous to exclude them. So far as the report of the medical examiner is concerned, he was present at the trial and testified on behalf of defendants. This was the best evidence, and there was no error in excluding his written report.

It is next contended that instruction No. 2, requested by plaintiff, is erroneous. The substance of this instruction is that if the jury found at the time of his death that Juckett was of lessened or weakened physical and vital ability, and they further found that this condition was occasioned in any degree by his use of intoxicating liquors, "such finding is sufficient in law for you to further find that the death of said Delbert B. Juckett was caused or contributed to by his use of intoxicating liquor." The instruction is based upon the theory under which plaintiff seeks to recover, viz., that the excessive use of intoxicating liquors weakened Juckett physically to such an extent that he was unable to resist disease or exposure, and that as a result of such diseased and weakened condition he died from exposure. So far as the evidence

shows, the death of Juckett was caused by inability to resist cold, or from fatty degeneration of the heart. A man in ordinary health, dressed as Juckett was on the evening of his death, would have been exposed to no risk of injury to his health from the mere fact that he drove in an open wagon a comparatively short distance when the temperature was somewhere between 12 and 20 degrees above zero.

Defendants requested, and the court gave, instructions to the effect that, if the jury found that at the time Juckett was examined for life insurance, he was not exhausted and depleted in his physical and vital forces and was not suffering from heart trouble, but was in good physical and mental condition, they must find in favor of all the defendants from whom liquor was procured prior to that time; that if Juckett did not die from exhaustion and depletion of his vital forces caused or contributed to by his use of intoxicating liquors obtained from the defendants, but from some other independent cause, the saloon-keepers and their sureties are not liable, and their verdict should be for the defendants; that if they found the death was caused by heart trouble, brought on through lifting hogs, or through some other cause with which the drinking of liquors had nothing to do, then they should return a verdict in favor of defendants. When instruction No. 2 is considered in connection with the whole charge, which carefully protects the rights of defendants, and with the facts in evidence, we find it was not prejudicially erroneous.

It is contended that the verdict is not supported by sufficient evidence. It is undisputed that prior to 1910 Juckett, although he occasionally drank a glass of beer or stronger liquor, was not even what is termed a moderate drinker. His wife says he did not use liquor at all in 1907, and that in 1910 and thereafter he drank it to excess almost every time that he visited neighboring towns. As time passed on he became drunk more frequently. Up till 1913 the family lived on the farm of

Juckett's father in Saunders county. In that year he purchased an equity in a farm of 160 acres in Antelope county and removed there, where he continued to reside until his death. In that county he patronized the saloons of defendants who lived therein, and often carried whiskey home with him when he left the towns.

The evidence shows that after he began the excessive use of liquor he complained of trouble with his heart, that it did not beat at times. The last year he lived in Saunders county he procured aromatic spirits of ammonia as a stimulant. His extremities would become cold and he would have difficulty in getting warm. He was very much troubled with constipation and used medicine to overcome this condition. After they moved to Antelope county he had several sinking spells of like nature to those which he had in Saunders county. When in Antelope county he continued to drink to excess and would frequently come home very much under the influence of liquor. He usually brought liquor home with him on such occasions and sometimes failed to get home until the next day. After these debauches he was nervous and depressed, and usually ate little and slept a good deal until he became thoroughly sober. On December 23, 1913, he left home about 11 o'clock in the morning, went to Royal, and came home at midnight drunk. He had slipped or fallen forward and was upon his knees in the wagon. He had some groceries and a quart bottle of whiskey. He went to bed about 1 o'clock that night, got up the next afternoon, complained of headache and of being chilly and cold. The next day he did not work. On Christmas day he was ill and ate nothing but some chicken broth, and the next day he took a load of corn to Royal. He left home at about 11 o'clock A. M. About midnight his wife heard the team come home. She saw no one in the wagon box, but found Juckett in the front on his knees and lying or leaning over on his face. Part of his clothing was saturated with whiskey. She called the neighbors and tried to revive him, but without avail. No

inquest was held. Two doctors testify that in their opinion he came to his death from the fact that his physical condition and vitality had been so weakened and undermined by the excessive use of intoxicants that he was unable to resist the cold and exposure, and that his weakened condition was the proximate cause of his death. A number of physicians testified on the part of defendants that he might have died from apoplexy or from some heart trouble, but on cross-examination they stated that the continued use of intoxicating liquors might have a tendency to cause apoplexy. The general trend of their testimony, however, was that he might have died from some other cause. It is shown that when not upon one of these periodical sprees Juckett was above the average man in ability. He had been a superintendent of schools, had taught the use of musical instruments, was successful as a breeder of thoroughbred hogs and made a good income from his farm. He was stout and stocky in build and was able to do hard work upon the farm during the summer of 1913. The testimony of his wife is that he made $3,000 a year from the sale of his hogs and about $2,000 from the farm, but that there were about $2,500 expenses, so that his net income was about $2,500 per annum. It is shown, however, that the only property he owned was his interest in the Antelope county farm, upon which he still owed $6,600, and the personal property on the farm. There is proof as to each of the defendants, against whom a verdict was rendered, that he had procured liquor in their saloons with more or less frequency during the license years of 1911, 1912 and 1913. The proof as to some of the defendants was that he had purchased liquors from them only once, or perhaps twice; but it is clear that it was purchased during this period in which the habit of intoxication was being formed. Under the drastic provisions of the statute, the saloon-keeper who sells one glass of liquor which tends to produce such a condition is as much liable for the results thereof as he who sells in greater quantities.

The defendants contend that the evidence shows that Juckett was strong and able to do heavy work in 1913; that he was examined in the latter part of May for life insurance and passed; and that there could be no liability except on the part of Brennaman, who sold liquor to him thereafter. It was for the jury to determine from all the evidence whether the death of Juckett was caused by the use of intoxicating liquor, and, if so, whether it was the result of recent drinking or whether it was contributed to by sales made to him by all the defendants. There is evidence to support either view.

It is argued that the verdict of $17,000 is excessive. Juckett's expectancy was about 24 years. The evidence is not clear as to how much he devoted to the support of his family each year, but if he contributed $1,500 a year, which seems a fair conclusion from the evidence, the present worth would exceed the amount of the verdict. The recovery seems large, yet the loss to the family may far exceed the monetary return. For the reasons set forth, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

HENNING JOHNK ET AL., APPELLEES, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED APRIL 29, 1916. No. 18860.

Waters: STREAMS: FORMATION OF NEW CHANNELS: RIGHT OF RESTORATION. A riparian owner may restore to its former channel a stream which erosion has caused to flow in a new channel upon his land, providing he does so within a reasonable time after the new channel formed and before the interests of lower riparian proprietors along the course of the old channel would be injuriously affected by such action on his part, as, for instance, where they have con-

structed roadways across the former channel, have erected windmills and pumps in order to replace the water of which they were deprived by the diversion, and where the old channel has become shallow by the deposit of silt, the growth of vegetation, and other means.

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

Edson Rich, for appellant.

Cain & Mapes, contra.

LETTON, J.

This was an action in equity to restrain the defendants from restoring the waters of a natural watercourse, known as Shell creek, to their former channel. The flow had become diverted so as to abandon the natural channel, and by means of a ditch, known as the Bailey ditch, reached another ditch parallel to the line of the Union Pacific Railroad Company and close to its track. Shell creek rises in Boone county and flows in a southeasterly direction into the Platte river. For a distance of almost six or seven miles it flows almost parallel to the track of the railroad company. At one point in its course where it flowed though the land of the defendants Bailey its banks were low. When in flood the excess waters of the stream flowed southwardly through the Bailey ditch into the railroad ditch. This had been dug by the railroad company parallel and close to its right of way from where it received the water from the Bailey ditch to a point several miles to the east, where the accumulated waters passed under the railroad track through a bridge, and thence to the river. The railroad ditch being of greater depth at the point where the flood waters of Shell creek flowed into it and the soil being easily eroded, a scarp or fall was formed in the Bailey ditch, which in the course of years gradually worked backward to a point about 40 rods south of Shell creek. By the spring of 1908 this erosion had reached nearly to a bridge which had been erected over the Bailey ditch near the creek. Several witnesses testify

that by reason of heavy rains early in 1908 erosion proceeded much more rapidly, until at last there were only a few yards of clay or hardpan forming a barrier between the normal flow of Shell creek and the bottom of the Bailey ditch. In that year during times of high water in the creek the waters flowed both in the channel of the creek and through the ditch. Finally the barrier was worn through and washed away and the entire flow of the creek was diverted through the ditch. The former channel became partially filled with silt deposited from flood waters; weeds and bushes grew up in it and decayed; farmers along its course made earthen road crossings over it, and some of them were compelled to erect windmills and pumps to provide water for their live stock. The surface of the stream in the new bed at the point of diversion is now about six feet lower than the bed of the old channel. In 1912 or 1913 the railroad company, believing that the flow of the water in the ditch near their track was endangering their property, decided, with the consent of the owners of the land at the point of diversion, to build a dam at the head of the ditch and thus restore the waters to their former channel. The plaintiffs, who are owners of farms through which the former channel extends, insist that the stream changed its flow from natural causes; that the changed condition has existed many years; that the ancient channel below the head of the ditch is now insufficient to carry the waters of the creek; and that if the waters are diverted into the old channel they will overflow and inundate several hundred acres of their land and will injure and destroy their crops. They also assert that, by reason of the gradual change of the channel, the stream flowing through the ditch has become a natural watercourse; that they have changed their situation relying upon the present conditions; that defendants acquiesced in the new conditions, and now have no right to interfere with the present flow. Defendants contend that they have ten full years within which to restore the normal flow of Shell creek to its original channel. The dis-

trict court found for the plaintiff and granted a perpetual injunction. Defendants appeal.

The evidence is clear that, though the flood waters of Shell creek flowed down the Bailey ditch for many years, the ordinary flow did not enter into the ditch until in 1908. In April, 1909, a letter was written by one French, a farmer owning lands through which the railroad ditch passed, calling the attention of the railroad company, through its engineer, to the fact that all the water in Shell creek had been diverted through the Bailey ditch the previous year, had been flowing through the ditch all winter, that the creek was filling up, and suggesting the results liable to follow. A representative of the railroad company went with Mr. French to view the point of diversion. At that time some water was flowing in both channels, but soon afterwards it was only during times of excessive floods that water flowed in the old creek bed. The evidence seems to establish the fact that the change in the channel was quite gradual; first the flood waters only followed the new course, then as the clay barrier wore away the normal flow divided, part running in each channel, and finally a complete diversion took place. The ditch then became a natural watercourse, and so continued when the trial was had. *Pyle v. Richards,* 17 Neb. 180; *Town v. Missouri P. R. Co.,* 50 Neb. 768; *Gray v. Chicago, St. P., M. & O. R. Co.,* 90 Neb. 795; *Wholey v. Caldwell,* 108 Cal. 95, 30 L. R. A. 820.

If the defendants had erected a barrier to prevent the natural and normal flow of the stream from following the new channel, within a reasonable time, they would have had that right.

The crucial question is whether, after having stood by with knowledge of the conditions from the spring of 1909 until the latter part of July, 1912, when the conditions had materially changed, defendants may still put in a dam and return the waters to their former bed. In most of the cases involving the right to restore a stream to its former channel over the protest of the former riparian own-

ers, a much longer time had interposed than in this case. In a number the period was more than ten years, which was the statutory period of limitation. In such case the court held that the former proprietors had become entitled to hold their land free of being servient to the flow of the water in its natural channel. *Smith v. Musgrove,* 32 Mo. App. 241; *Kray v. Muggli,* 84 Minn. 90; 1 Wiel, Water Rights (3d ed.) sec. 60. In some cases, though 10 years had elapsed, the statute of limitations was not applicable, since in the state where the question arose the period of prescription was 15 years. In such cases the question was considered to be somewhat of the nature of one pertaining to the dedication of a highway, and it was held that if the conduct of the owner of the land where the stream now ran was such as to show an intention on his part that it should continue to run in the new course, and former riparian proprietors had accepted the new conditions, acted accordingly, and their interests would be injuriously affected by a change, the owner could not restore the stream to its former channel against their protest and without their consent.

In Vermont the statute of limitations is 15 years, but the court, in a case where a stream was suddenly changed by a flood so as to form a new channel and thus flowed for ten years, held that, on account of acquiescence in the running of the stream in the new channel and in the creation of new interests, the defendant would not be permitted to return the stream to the former channel. *Woodbury v. Short,* 17 Vt. 387. In *Ford v. Whitlock,* 27 Vt. 265, it is held that, if the diversion affects other proprietors unfavorably, it requires 15 years to give the right to keep the stream in the new channel. This is owing to the fact that their right of action does not lapse for that period, but, if it affects them favorably, the rule is the same as applies to a dedication of a road. "Any term is sufficient which satisfies the jury that the public was justified in treating it as a permanent dedication."

Washburn, Easements and Servitudes (4th ed.) *315, says: "In these and like cases, where one, who owns a watercourse in which another is interested, or by the use of which another is affected, does or suffers acts to be done affecting the rights of other proprietors, whereby a state of things is created which he cannot change without materially injuring another who has been led to act by what he himself had done or permitted, the courts often apply the doctrine of estoppel, and equity, and sometimes law, will interpose to prevent his causing such change to be made." See, also, 40 Cyc. 609, note 55.

Yazoo & M. V. R. Co. v. Brown, 99 Miss. 88, 33 L. R. A. n. s. 804, is not in conflict with this holding. In that case the water of the creek left the old channel in the spring of 1908 and flowed into the ditch of the railroad company. The same year the railroad company attempted to divert the water back into the old channel by building dams, which were washed away. In 1909, by driving piling, a dam was finally constructed which forced the water back. The action was brought by the owner of the land below the point of diversion to recover damages incurred by the construction of the latter dam and the return of the water to the ancient channel. The court held that plaintiff had no cause of action. This would have been the conclusion of this court under the same circumstances, since the defendant acted promptly and no rights had intervened.

The case of *Roe v. Howard County,* 75 Neb. 448, is in accordance with the doctrine of the Vermont court in holding that an easement by prescription against persons unfavorably affected can be acquired only by an adverse user for ten years. This does not aid defendants' contention. Had defendants taken steps to restore the stream to its former channel promptly, before the former channel had been obstructed by silt and vegetation, and before plaintiffs had incurred expense in supplying their want of water by artificial means, there is no doubt they would have had the right to do so, but we think their acquies-

cence and the changed conditions warrant the relief granted plaintiff by the district court.

AFFIRMED.

SEDGWICK, J., not sitting.

CHARLES DAVIS, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED APRIL 29, 1916. No. 18628.

Carriers: INJURY TO PASSENGER: DEFENSE. In a suit for damages for personal injuries, an act of God is no defense if defendant's negligence was a concurrent cause of plaintiff's injuries.

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

Edson Rich, A. G. Ellick and *B. W. Scandrett,* for appellant.

E. P. Clements, contra.

ROSE, J.

This is an action to recover damages in the sum of $2,610 for personal injuries sustained by plaintiff while a passenger on a train running on defendant's railroad track from North Loup to Ord. Plaintiff pleaded that the car in which he was riding was blown from the track by a storm and overturned about three miles from North Loup. He alleged further:

"That a stove placed in said car by the defendant was so carelessly and negligently secured and fastened to the floor of said car and the fastenings of said stove were so carelessly and negligently maintained by the defendant that when said car was overturned said stove broke said fastenings and was hurled against and upon the plaintiff,

and the plaintiff was thereby greatly injured; that the overturning of said car by said storm would not have caused said stove to break loose from the floor of said car if said stove had been properly secured and the fastenings thereof properly maintained; that the plaintiff was uninjured by the overturning of said car, and, had it not been for the negligence and carelessness of the defendant and its servants in securing said stove in said car and in permitting the fastenings of said stove to become out of order, the plaintiff would have escaped injury."

Defendant denied negligence, and pleaded that the storm which overturned the car was the act of God and the sole cause of plaintiff's injuries. The reply to the answer admitted that the storm was an act of God resulting in the overturning of the car, but pleaded:

"The plaintiff alleges that his injury and damages were not caused by, or the natural result of, the overturning of said car, but were wholly the result and consequence of the negligence of the defendant in failing to secure and properly maintain the fastenings of the stove placed in said car by the said defendant."

The jury rendered a verdict in favor of plaintiff for $170.81. Defendant moved for a judgment in its favor on the pleadings notwithstanding the verdict. Rev. St. 1913, sec. 8008. The motion was overruled. From a judgment on the verdict, defendant has appealed.

There is no bill of exceptions preserving the evidence, and the only question presented by the appeal is: Should the trial court have sustained the motion of defendant for judgment in its favor notwithstanding the verdict? The answer depends on the pleadings. For the purposes of this question the allegations of the petition and the reply must be regarded as established. Plaintiff alleged that his injuries were not caused by the overturning of the car. He pleaded that they resulted from negligence of defendant in failing to properly fasten the stove. The rule is that an act of God is no defense if defendant's neg-

ligence was a concurrent cause of the injury. *Amend v. Lincoln & N. W. R. Co.*, 91 Neb. 1. In 1 Shearman and Redfield, Negligence (6th ed.) sec. 39, it is said:

"It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the 'act of God' or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage, within the definition already given. * * * But if the superior force would have produced the same damage, whether the defendant had been negligent or not, his negligence is not deemed the cause of the injury."

It follows that the motion for judgment in favor of defendant notwithstanding the verdict was properly overruled.

AFFIRMED.

HAMER, J., dissenting.

There was no bill of exceptions brought to this court. The case was disposed of on the petition, the answer, and the reply, together with a motion for judgment notwithstanding the verdict. This requires a careful examination of the petition, the answer, the motion for judgment notwithstanding the verdict, and the reply. The petition alleges that the plaintiff purchased a ticket at North Loup April 25, 1912, which entitled him to ride from North Loup to Ord on the defendant's railroad, and that he then became a passenger on said railroad between said points; that while the train was running between said stations, and at a point about three miles northwest of North Loup, a violent storm blew the car in which the plaintiff was riding from the track, and that it went over upon its side; "that when said car was overturned said stove broke said fastenings and was hurled against and upon the plaintiff." It was the stove which was hurled. According to the answer, and also according to the reply, the thing which broke the stove loose and which hurled

it was the act of God. It was within the power of the act of God to use whatever force was necessary to break the stove loose. For this reason nothing within the ingenuity or power of man was sufficient to overcome the act of God.

The answer admits that the plaintiff was a passenger on the cars of the defendant, and that he was being transported from North Loup to Ord, and alleges that "a violent wind storm arose which blew said train from said track, and upon its side; but defendant alleges that the wind storm was of a tornado or cyclonic nature, of extraordinary force and violence, an act of God, and beyond all human power and agency to either resist or control, and of such force, violence and sudden approach that it could not be anticipated by human foresight, and was beyond the power of this defendant and all other human power to avoid or guard against." The allegations in the answer, to the effect that the storm was of extraordinary force, and that it was the act of God, and that the car was overturned thereby, are admitted by the reply. The reply admits "that said storm was of extraordinary force and violence and was an act of God, and that said car was overturned thereby." It was probably on this admission contained in the reply that no bill of exceptions was settled and brought to this court. The allegation in the reply that "said storm * * * was an act of God, and that said car was overturned thereby," was enough to show that all the power required to overturn the car was at hand. The act of God was of itself enough to make the storm irresistible. The plaintiff put in his reply an admission that of necessity must determine the case against him if any attention is paid to the thing which he pleaded. After he had conceded that the storm was an act of God, and that it overturned the car, he proceeded to allege that his injury and damages were not caused by the overturning of the car, but by the negligence of the defendant in failing to secure the fastenings of the stove in said car. He undertook to state something, but he does it by way of conclu-

sion, and no steps leading up to what he claims are set out. Of course, he could make no admission so bad that he might not say something so far as words are concerned. If the plaintiff's head had been cut off, it might be considered that there was nothing further to allege. The reply in this case undertakes to allege something further after making a reply which stipulates away the merits of his case. It is the contention in the majority opinion that there can be a sufficient reason given for *bringing about a certain result,* and yet something else may *contribute.* If the reason is given, that is enough. When the defendant moved for judgment notwithstanding the verdict, that was in the nature of a demurrer to whatever allegations of fact were well pleaded. The motion did not admit the truth of impossible things or inconsistent things. If the act of God was the *proximate cause of the injury,* then there could be *nothing else.* Could it reasonably have been foreseen that a storm would arise, that it would blow the train from the track, and cause the car in which the plaintiff was riding to be thrown off the track and thrown over upon its side?

Section 6052, Rev. St. 1913, provides: "Every railroad company shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of such road actually brought to his or her notice." To these exceptions there should be added, by operation of law when the injury occurs by the act of God.

As the storm which overturned the car was admitted in the reply to be the act of God, and the fastenings which held the stove "broke" while the car was being *overturned,* and the force of the storm overturned the car and broke the fastenings and "hurled" the stove against the plaintiff, it was the storm which caused the injury, and therefore there is no liability. Take out the storm and what is left? Take out the storm that caused the injury and nothing is left. Therefore it *was the storm.*

As the force which overturned the car and broke the fastenings was the act of God, no one can be heard to say that the power was insufficient to break the fastenings, however they may have been made. The act of God as against the strength of the creations of men and their ingenuity is irresistible. If it was strong enough to lift the car off the track, then it was strong enough to lift everything in that car and put it off the track along with the car. It lifted the stove with the car, and in the language of the petition "when said car was overturned said stove broke said fastenings and was hurled against and upon the plaintiff." Here is a statement from which it is fairly to be inferred that the act of God lifted the stove, and in lifting it broke the fastenings and then hurled the stove against the plaintiff. The plaintiff undertakes an impossible problem; that is, to *divide the force* and to say that it *stopped* with lifting the car and its contents off the track; and he undertakes to say "that the overturning of said car by said storm would not have caused said stove to break loose from the floor of said car if said stove had been properly secured and the fastenings thereof properly maintained." He undertakes to make the power of man superior to the power of God. When the act of God is without power to accomplish that which it seeks to do when arrayed against the power of man, then plaintiff may present such a problem. The statement that the fastenings of the stove were not "properly maintained" is not supported by any details of fact; only a conclusion is stated. We do not know the manner in which the stove was fastened, nor by what it was fastened; the only thing we are permitted to know under the statement is that the act of God first hit the car and then moved the stove until it was hurled against the plaintiff. The extraordinary force and violence of the storm are *specifically* admitted; that the storm was an act of God is also *specifically* admitted; that the car was overturned by said storm is also specifically admitted; and there is no denial of the fact alleged that the storm was "beyond all

human power and agency to either resist or control." The allegations of the *answer are not denied.*

No one may be able to tell the force of the storm which comes from the source of unlimited power, nor may any one prepare against it. The storm is admitted by the pleadings to be the act of God, both in the answer and in the reply, and it is shown by the statement contained in the reply to have been the force that overturned the car and broke the fastenings which secured the stove, and which said stove, as alleged in the petition, was "hurled" against the plaintiff. It will not therefore be deemed that the fastenings were weak or insecure or improperly made, but only that they were *overcome* by the force of the storm, which may be considered to have been irresistible *because* it was an act of God.

It is a fundamental proposition in the law of negligence that, to make an act of negligence actionable, there must exist three elements: (1) A duty or obligation which the defendant is under to protect the plaintiff from injury. (2) A violation of that duty; that is, a failure to perform the duty or obligation owed. (3) Injury resulting from the failure. In the present case the duty was to secure the stove with fastenings sufficient to hold it in a safe position while the car was subjected to its *ordinary uses.* It is manifestly impossible to anticipate that a certain car will be subjected to the stress and strain of a cyclone, and equally impossible to know how to secure a stove in a car in such a manner that, if the car is subjected to a wind of such fury as to establish that it is an act of God, the stove will remain secure. That is only another way of saying that man is stronger than the Supreme Power. The act of God is an act of Omnipotence, or power which human agency cannot prevent or stay. 4 R. C. L. p. 708.

It is not claimed that the stove was secured in a manner which made it unsafe when the car was in ordinary use. The car was thrown from the track by an act of God. The act of God therefore, as admitted in the reply, became the direct and *proximate* cause of breaking the fastenings

which secured the stove. They were broken by a force which could not have been guarded against.

Nearly every neighborhood has had at least one such storm. When a tiny whirlwind goes round and round down by the little creek in the lonesome woods, and then slowly and softly emerges and goes tiptoeing across the meadow, and the fields, and farms, and prairies, rapidly gathering strength and anger as it journeys upon its dangerous course, lifting the river out of its bed, and twisting the strong oaks and elms standing on its banks until only splintered stumps remain, picking up the settler's house, and barn, and granary, and the windmill standing at his well, and sweeping them into space, so that they come back no more, and never again are seen by the eyes of men—it is this that is the act of God and against which the ingenuity and strength of men are futile.

In *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44, a train was running three-quarters of an hour behind the usual, ordinary and advertised time. It was upset by a sudden gust of wind which crossed the track. It was contended that if the train had been running on time the wind would not have reached it. In an action for damages because the plaintiff was cut and bruised, it was held that there was no liability, that the injury complained of was not the natural result of the train being behind time, and that the damages sustained were too remote to entitle a recovery against the carrier.

In *Galveston, H. & S. A. R. Co. v. Crier*, 45 Tex. Civ. App. 434, the plaintiff alleged as negligence that the defendant ran its train at an excessive rate of speed directly into the path of the storm, which he could and should have avoided by coming to a stop. The court said that there was nothing to show that the defendant's engineer and conductor were guilty of negligence in failing to stop the train before encountering the whirlwind, had they known, or had reason to believe, it was impending; but they had no more reason to believe that it would strike the railroad

where it did than any place along its road where the train might have stopped.

The case of *Amend v. Lincoln & N. W. R. Co.*, 91 Neb. 1, cited in the majority opinion, does not seem to be in point. In that case part of a family, including the decedent, were lifted from a porch roof by a rescue party into a boat, and then the boat started for a place of safety, going over flood waters which surrounded the building. The boat came in contact with a telegraph or telephone pole and was accidentally overturned, and the plaintiff's daughter was drowned. The flood which made the trip in the boat necessary was claimed to have been occasioned by the construction of railroad tracks which prevented the water from escaping in natural channels. The liability of the railroad companies was alleged to be based upon the fact that the road had been so constructed as to impound the water and prevent it from being carried away. The flood case cited lacked the question of sudden and unexpected approach of the storm as that question is presented in the instant case, and it lacks the question of the act of God being irresistible; it also lacks the question of inferiority of the works and strength of man as compared with the act of God, and it lacks the attempted cutting off of the power projected, which is not in the instant case attempted to be stated by the defendant. The superiority of the act of God over the ingenuity and strength of man is not presented in the case cited.

The right of the defendant to build its railroad and run its cars without confiscation by an apparently unfriendly judicial proceeding is protected by the federal Constitution (Amend., art. XIV, sec. 1). The purpose sought in the instant case is to take the property of the railroad company without due process of law, and to deny to the railroad company the equal protection of the law. The defendant cannot properly be held to be liable to the plaintiff in an action for damages for injury based upon the alleged negligence of the defendant railroad company; there being no negligence in the defendant's failure to fore-

see the storm, or to successfully guard against its force. It is an arbitrary thing to punish the defendant for that which it could not anticipate and could not resist.

It is also in violation of section 3, art. I, Const. Neb., which reads: "No person shall be deprived of life, liberty, or property without due process of law."

LYDE S. MCCRACKEN, ADMINISTRATOR, APPELLEE, V. FREDERICK A. DELANO ET AL., RECEIVERS, APPELLANTS.

FILED APRIL 29, 1916. No. 18856.

1. **Railroads:** DEATH OF EMPLOYEE: LIABILITY: NEGLIGENCE. Where a railroad company's rules, of which a section-foreman has notice, require him on approaching a sharp curve through a deep cut on a handcar to send a man ahead to look for a train, the mere failure of trainmen to give warning of their approach, before the presence of section-men on the track is discoverable, is not negligence, in the absence of a statute or a rule requiring them to do so, since the trainmen may assume, until the contrary appears, that section-men will obey reasonable, known rules promulgated for the safety of themselves and others.
2. **Negligence:** RAILROADS: FAILURE TO BLOW WHISTLE. Failure of a train crew to blow the whistle on approaching a railroad bridge at an undergrade roadway is not negligence, as a matter of law, in absence of a statute or a rule imposing such a duty.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Reversed.*

John L. Webster and *James L. Minnis,* for appellants.

Earl R. Ferguson, C. R. Barnes and *Harry W. Shackleford, contra.*

ROSE, J.

This is an action in the district court for Douglas county against the receivers of the Wabash Railroad Company to

recover damages in the sum of $16,000 for causing the death of David W. Gilbert. From a judgment in plaintiff's favor for $5,250, defendants have appealed.

For the purposes of the appeal some of the pleadings, facts, contentions and proofs may be summarized as follows: Gilbert was a section-foreman in the employ of defendants. August 8, 1913, after a day's work, he and his section-crew started home on a handcar, going northward down grade toward Imogene, Iowa. A south-bound freight train consisting of a locomotive and 24 cars, on its way from Council Bluffs, Iowa, to Stanbury, Missouri, struck the handcar about a mile south of Imogene, and Gilbert was fatally injured. According to plaintiff's brief the following elements of negligence were charged: "Failure to give reasonable and proper warning of the approach of the train; failure to exercise reasonable care to discover the deceased in his situation of peril; and failure to use reasonable diligence and effort in slowing down or stopping the train after the presence of the handcar on the track was, or should have been, discovered." The collision occurred at the north end of a bridge about a mile south of Imogene. Immediately north of the bridge there is a sharp curve with the convex on the west, where the track runs through a cut having a high bank on the east. At the north end of the bridge the section-crew attempted to remove the handcar from the track. While one wheel was between the rails they all jumped except the foreman. The handcar was struck while Gilbert was still trying to remove it. There is testimony tending to show that a man on the bridge could have seen the approaching train 500 feet away, and that the fireman could have seen a man on the bridge at the same distance. The train was running up grade 18 miles an hour, and was 1 hour and 30 minutes late. The trainmen testified that the whistle was blown at Imogene, and that the automatic bell was kept ringing until the steam was shut off in the attempt to stop the train. A witness for plaintiff said that he was standing 125 feet east of the bridge, where he saw the collision, that

he heard no warning, and that the train did not slacken its speed until after it struck the handcar. On defendants' behalf there was testimony that the fireman, who occupied the east side of the cab, could not see a handcar on the bridge when more than 350 feet away; that he did see it at a distance of 300 or 350 feet; that he promptly warned the engineer; that the latter immediately shut off the steam and set the brakes; that the locomotive was stopped about 275 feet beyond the point of impact; that a rule of the company required section-foremen in approaching a curve or a cut on a handcar, when in danger of meeting a train, to keep a lookout and to send a man ahead, and that Gilbert knew of this rule.

One of the questions submitted to the jury was the alleged negligence on the part of the trainmen in failing to give warning as they approached the bridge through the cut. On this subject the trial court instructed:

"If you find that in approaching the said town of Imogene and in passing through the same the defendants' employees in charge of said locomotive did in fact sound such signals or alarms, but further find that the location of the bridge over which the deceased passed just prior to the accident and the curve around which the said train proceeded before reaching the said bridge were such as to require that, in the exercise of reasonable care, the employees of the defendants in charge of the said locomotive should have given signals other than or different from or in addition to the ones in fact given, or that signals should have been given at a point closer than the town of Imogene, and further find that the defendants' employees in charge of the said locomotive failed to give such signals as were required in the exercise of reasonable care upon their approach to said curve, or bridge, such failure to so give such signals would constitute negligence for which the defendants are liable."

This instruction is challenged as erroneous. Defendants argue that it was the duty of the foreman of the section-crew to keep a lookout and to send a man ahead to see

if a train was hidden from view in the curve behind the bank. In this connection it is further argued that negligence of the train crew cannot be based on their failure to give a warning, since they had a right to assume that the section-foreman would not disobey a reasonable, known rule. These propositions urged by defendants do not rest on contributory negligence. Plaintiff pleaded and proved an Iowa statute providing that contributory negligence is not a bar to a recovery for personal injuries. An act of congress contains a similar provision. In this respect, therefore, it is immaterial whether plaintiff relies on the statute of Iowa or the act of congress. In either situation contributory negligence on the part of the decedent does not bar a recovery by plaintiff. The question is: Should the jury have been permitted to find the trainmen guilty of actionable negligence, if the latter failed to blow the whistle or ring the bell while running through the cut toward the bridge? The duties of defendants in operating trains should be considered in connection with the duties imposed upon section-men. If the rules of the railroad company required Gilbert to keep a lookout and to send a man ahead to guard against the danger of approaching the curve on a handcar, defendants, in operating their trains, had a right to assume that those duties would be performed, there being nothing to indicate the contrary. Section-men are employed to keep the track in repair. They are under the direction of their superior. *Prima facie* their employer may rely upon them to perform their duties according to proper rules and regulations duly called to their attention. The law applicable to the present inquiry may be stated as follows:

Where a railroad company's rules, of which a section-foreman has notice, require him on approaching a sharp curve through a deep cut on a handcar to send a man ahead to look for a train, the mere failure of trainmen to give warning of their approach, before the presence of section-men on the track is discoverable, is not negligence, in the absence of a statute or a rule requiring them to do so, since

the trainmen may assume, until the contrary appears, that section-men will obey reasonable, known rules promulgated for the safety of themselves and others.

The instruction is at variance with the law, and in the form in which the issues were submitted to the jury under the evidence it is clear that the error was prejudicial to defendants.

It is contended by plaintiff that the train crew were guilty of negligence in failing to give warning of their approach, because there was a roadway under the bridge. There was no proof of a statute or a rule requiring them to do so. The common law imposed no such duty. *Houston & T. C. R. Co. v. Sgalinski*, 19 Tex. Civ. App. 107. The judgment, therefore, cannot be sustained on this ground.

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

REVERSED.

HAMER, J., not sitting.

STATE, EX REL. TOWN OF EWING, APPELLANT, V. TOWN OF GOLDEN ET AL., APPELLEES.

FILED APRIL 29, 1916. No. 19555.

Towns: POWER TO CREATE. In a county under township organization the board of supervisors may create new towns. Rev. St. 1913, secs. 995, 1054, 1068.

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

H. M. Uttley, for appellant.

J. J. Harrington, contra.

ROSE, J.

This is a proceeding in the nature of *quo warranto* to test the legal existence of the town of Golden, the town of Ewing being relator. Holt county adopted township government in 1887, the town of Ewing consisting of townships 26 and 27, in range 9, and the east half of the two adjoining townships on the west. The county board of supervisors made an order July 14, 1915, dividing the original town of Ewing, the south half retaining that name and the north half being organized as the town of Golden. Relator took the position that the order of the board of supervisors was void as having been made without authority of law. The district court dismissed the action, and relator has appealed.

The vital question upon appeal is: Had the board of supervisors authority to divide the old town and to create a new one? The answer depends upon the legislation on the subject of township government. The statute provides:

"When the board of supervisors shall have been organized as stated in the preceding sections they shall at once divide the county into townships by making such townships conform as nearly as practicable to townships according to government survey. * * * When any government township shall have too few inhabitants for a separate organization, then such township may also be added to an adjoining township or the same may be divided between two or more townships for the time being." Rev. St. 1913, sec. 995 (Laws 1895, ch. 28, sec. 9).

"In addition to the powers hereinbefore conferred upon all county boards, the board of supervisors shall have power * * * to change the boundaries of towns, and to create new towns as provided by law." Rev. St. 1913, sec. 1068 (Laws 1879, p. 372).

Relator contends that the latter section is unconstitutional. It was part of an act "Concerning counties and county officers," and was passed in 1879. Laws 1879, p. 353. The argument seems to be that the grant of power to the board of supervisors was invalid, because, at that time,

there was no law authorizing a county to adopt township organization, the act of 1877, providing for township organization, having been declared unconstitutional. *State v. Lancaster County,* 6 Neb. 474. While the provisions relating to the board of supervisors may have been without practical effect in absence of a law authorizing township organization, the act of 1879 was not for that reason unconstitutional. *Albert v. Twohig,* 35 Neb. 563. Later the legislature enacted a law providing for township organization. Laws 1883, ch. 36. It did not, however, purport to completely define the powers and duties of the county board of supervisors. The lawmakers obviously intended that the existing provisions of the act of 1879 on that subject should apply to all counties adopting township organization. The act of 1883 was subsequently repealed and a new law substituted. Laws 1895, ch. 28. No provision of the act of 1879, in relation to the county board of supervisors, was repealed. On the contrary, it was provided:

"In the absence of any special provision governing the board of supervisors as contemplated by this act, such board of supervisors shall be governed by and perform all the duties and have all the powers applicable to county boards as provided by the general laws of this state." Laws 1895, ch. 28, sec. 73 (Rev. St. 1913, sec. 1054).

The act of 1879 was one of the general laws to which reference was thus made. Relator has not shown that the act assailed is unconstitutional or that the board of supervisors of Holt county exceeded its powers in creating the town of Golden.

Technical questions not affecting the merits of the controversy have been presented, but will not be discussed.

AFFIRMED.

MORRISSEY, C. J., not sitting.

FIRST NATIONAL BANK OF AUBURN, APPELLANT, V. GEORGE C. PESHA ET AL., APPELLEES.

FILED APRIL 29, 1916. No. 18725.

Contracts: BUILDING CONTRACT: BOND: SURETY AND ASSIGNEE: PRIORITIES. A surety on the bond of a contractor, given to secure the payment of all claims for labor and materials furnished in constructing a public building, who, after default by the contractor, has paid any of such claims, has an interest in any final balance due the contractor on completion of the building superior to that of the contractor's assignee, notwithstanding the fact that the assignment may have been executed and filed prior to payment of such claims by the surety, and was given in consideration of money advanced to the contractor and used by him in the construction of the building.

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

Kelligar & Ferneau, for appellant.

Nolan & Woodland, contra.

FAWCETT, J.

Defendant Pesha entered into a contract with the school district of Auburn for the erection of a high school building for the contract price of $39,105, and, in compliance with the provisions of section 3840, Rev. St. 1913, gave bond for the payment of claims for labor and material, defendant Equitable Surety Company executing the bond as surety. A copy of the contract, bond and technical and general specifications are attached to and made a part of the petition. The contract bears date March 5, 1912, and the bond March 12, 1912. On January 8, 1913, Pesha borrowed from plaintiff $1,500, which sum was placed to his credit on open account. As security for this loan he gave plaintiff a written order or assignment, addressed to the board of education of the school district, directing them to

pay to plaintiff the sum named, and to "charge the same to my account as contractor with your district for the construction of the new high school building, now under course of construction, when the building is finished and accepted by you." Plaintiff filed this order with the school district. Pesha defaulted in the performance of his contract, and the school district completed the building. On completion of the building the sum of $2,906.85 remained in the hands of the district as the balance of the contract price. Prior to his default, and subsequent to the assignment to plaintiff, Pesha, for materials furnished and used in the building, executed two assignments, one to John Westover, Incorporated, for $2,342.27, and the other to Elmer Dovel for $2,100. The defendant surety company paid these claims and took assignments thereof. Plaintiff claims priority over the rights of the surety company to the balance of the fund in the hands of the school district, and from a judgment adverse to such claim it appeals.

A public school building cannot be subjected to a mechanic's lien. Section 3840, Rev. St. 1913, requiring the contractor to give a bond, was doubtless enacted for the purpose of protecting mechanics and materialmen. The bond, therefore, became an essential part of the contract entered into by and between Pesha and the school district. The contract provided for estimates by the architect and for payments from time to time, and provided that "the amount to be paid to the contractor shall be eighty-five per cent. (85%) of the amount of such estimate on the presentation of the progress certificate." It also provided: "The final estimate shall be made when the architect is satisfied that the work is entirely and satisfactorily completed, at which time the contractor shall be entitled to the fifteen per cent. (15%) retainer from the progress payments, as balance due him on the contract."

The question to be determined is: Is plaintiff, by virtue of its assignment as security for money advanced to the contractor, entitled to priority over the surety who has by the terms of its bond been required to pay for materials

furnished for the construction of the building? A similar question, involving a bond given in compliance with a federal statute relating to the construction of public buildings, was before the supreme court of the United States in *Hardaway v. National Surety Co.,* 211 U. S. 552, where it is held: "The right of the surety on a bond for performance of a contract given under the act of August 13, 1894, c. 280, 28 Stat. 278, to be subrogated to the contractor's claim for balances due from the Government, is superior to that of one advancing money to the contractor on assignment of such claim."

In that case the court followed *Prairie State Bank v. United States,* 164 U. S. 227, 230, wherein it is said: "Thus the respective contentions are as follows: The Prairie Bank asserts an equitable lien in its favor, which it claims originated in February, 1890, and is therefore paramount to Hitchcock's lien, which it is asserted arose only at the date of his advances. The claim of Hitchcock, on the other hand, is that his equity arose at the time he entered into the contract of suretyship, and therefore his right is prior in date and paramount to that of the bank. * * * That Hitchcock, as surety on the original contract, was entitled to assert the equitable doctrine of subrogation is elementary. * * * Under the principles thus governing subrogation, it is clear, whilst Hitchcock was entitled to subrogation, the bank was not. The former in making his payments discharged an obligation due by Sundberg for the performance of which he, Hitchcock, was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to Sundberg on the faith of a presumed agreement and of supposed rights acquired thereunder. The sole question, therefore, is whether the equitable lien, which the bank claims it has, without reference to the question of its subrogation, is paramount to the right of subrogation which unquestionably exists in favor of Hitchcock. In other words, the rights of the parties depend upon whether Hitchcock's subrogation must be considered as arising

from and relating back to the date of the original contract, or as taking its origin solely from the date of the advance by him. A great deal of confusion has arisen in the case by treating Hitchcock as subrogated merely 'in the rights of Sundberg & Co.' in the fund, which, in effect, was saying that he was subrogated to no rights whatever. Hitchcock's right of subrogation, when it became capable of enforcement, was a right to resort to the securities and remedies which the creditor, the United States, was capable of asserting against its debtor, Sundberg & Company, had the security not satisfied the obligation of the contractors, and one of such remedies was the right based upon the original contract to appropriate the ten per cent. retained in its hands. If the United States had been compelled to complete the work, its right to forfeit the ten per cent. and apply the accumulations in reduction of the damage sustained remained. The right of Hitchcock to subrogation, therefore, would clearly entitle him when, as surety, he fulfilled the obligation of Sundberg & Company, to the government, to be substituted to the rights which the United States might have asserted against the fund. It would hardly be claimed that if the sureties had failed to avail themselves of the privilege of completing the work, they would not be entitled to a credit of the ten per cent. reserved in reduction of the excess of cost to the government in completing the work beyond the sum actually paid to the contractor, irrespective of the source from which the contractor had obtained the material and labor which went into the building. That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created; and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties, is amply sustained by authority."

This is the general rule. *Labbe v. Bernard,* 196 Mass. 551, 14 L. R. A. n. s. 457, and note. In *Labbe v. Bernard,* it is said (p. 552): "While it is true that the rights of the sureties to the remedies of the principal do not become complete and are incapable of present enforcement until they shall have discharged their principal's obligation, yet their right becomes an inchoate one as soon as they have entered into the relation of suretyship; and their equitable assignment of their principal's rights and remedies, when completed by their performance of his obligation, relates back, as against each other and their principal, to that earlier time. (Citing cases). And all persons who have in the meantime received any securities or payments from either party to the principal contract, with notice of the facts and of the surety's responsibilities and consequent rights, must in equity hold them for his benefit."

It is insisted that, since the money loaned Pesha by plaintiff was used to pay expenses incurred in constructing the building, the surety company has received the benefit of such payments, liability on the bond being reduced to that extent. Plaintiff was under no obligation to advance the money, and, as shown by the above authorities, in doing so it acted voluntarily. It is not entitled to be subrogated, as against the defendant surety company, to the rights of Pesha's creditors to whom the money was paid.

AFFIRMED.

SEDGWICK, J., not sitting.

STATE, EX REL. LIZZIE SCHLEMME, APPELLEE, V. LEE WRIGHT, APPELLANT.

FILED APRIL 29, 1916. No. 18792.

1. **Appeal:** BASTARDY: SUFFICIENCY OF COMPLAINT. A bastardy proceeding, appealed to this court without a settled and certified bill of exceptions, presents simply the sufficiency of the complaint.
2. ———: ———: ———. The complaint examined, and *held* sufficient.

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

Harry B. Fleharty, for appellant.

Matthew Gering, F. P. Marconnit and *John G. Kuhn, contra.*

FAWCETT, J.

Defendant was complained against before a justice of the peace in Douglas county, on a charge of bastardy, and was bound over to the district court for that county. Trial was had to the court and a jury. The jury found the defendant guilty, and judgment was entered by the court charging defendant with the maintenance of plaintiff's child, in the sum of $1,500, to be paid to the plaintiff in instalments, which need not be set out. Defendant appeals.

The bill of exceptions found in the record has never been settled by the district judge. It is not in any manner certified by the clerk of the district court, nor does it appear to have ever been filed in his office. Nor does any attempt seem to have been made by defendant to prepare his brief in accordance with the rules of this court. We have examined the complaint upon which the action is based, and find it sufficient.

AFFIRMED.

SEDGWICK, J., not sitting.

EFFA HILL, APPELLEE, V. CHARLES NAYLOR, EXECUTOR, APPELLANT.

FILED APRIL 29, 1916. No. 18358.

1. **Deeds:** CONVEYANCE OF HOMESTEAD BY SURVIVING SPOUSE. An unmarried man is competent to convey title to real estate which he occupies, although it had been the homestead of himself and wife before her death.
2. ———: ESCROW: DELIVERY AFTER DEATH OF GRANTOR. A deed made pursuant to a contract that it shall be deposited as an escrow to be delivered to the grantee after the death of the grantor, and that the grantor may take possession of the deed, if the grantee fails to perform those things provided in the contract, and which constitute a valuable consideration for the deed on her part, becomes a valid conveyance upon the death of the grantor and performance of the contract on the part of the grantee.

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

Edwin D. Crites, for appellant.

Allen G. Fisher and *William P. Rooney, contra.*

SEDGWICK, J.

Johann Troutmann conveyed the real estate in question to this plaintiff by warranty deed. The deed was deposited in the First National Bank of Chadron, and something over a year afterwards Troutmann died, and left a will by which, in a residuary clause, he devised all of his real estate to persons other than the plaintiff. The defendant, Charles Naylor, as executor of the will, appears to have come into possession of the deed to this plaintiff, and, as a controversy had arisen as to the validity of the deed, he declined to deliver it to plaintiff. She began this action in the district court for Dawes county to determine her right to the deed. The court found in her favor, and ordered the deed delivered to her. The defendant has appealed.

The real estate was the homestead of Mr. Troutmann, but his wife was deceased before the execution of the deed, and he was therefore competent to convey the title which was held in his name. The defendant contends that the deed was not delivered and was not intended to take effect until after the death of Mr. Troutmann, and must be construed as an attempt to make a will, and as such is invalid, not having been executed with the formalities necessary to make a will. It is a general rule of law, that can be changed by the legislature only, that an instrument executed in the form of a deed which is to take effect after the death of the party executing the same, and has no effect in the present, is invalid as a conveyance. The question, then, is whether this deed conveyed a present interest in the real estate, or was not intended to have any operation or effect until after Mr. Troutmann's death. The intention and effect of the deed must, of course, be determined from the writings executed by the parties. If the meaning of the writings is doubtful, the circumstances surrounding the parties at the time of its execution and their subsequent conduct with reference thereto may be considered if they assist in ascertaining the true meaning of the contract. With this deed, a memorandum was signed by plaintiff and Mr. Troutmann, which recited "that the deed mentioned for the conveyance of the said property shall be delivered, for safe-keeping, and not to be delivered to the said Effa Hill during the lifetime of the said John Troutmann, and it is further stipulated and understood, by and between the said parties, that, in case the said Effa Hill shall refuse or neglect to comply with any of the covenants on her part agreed to be performed on her part, that it will be lawful for the said John Troutmann to take in his possession the said deed to which this agreement is attached." It is insisted that this language indicates that the deed remained in the possession and control of the grantor, and was not delivered to plaintiff for any purpose. But it must be noted that it is by the agreement of the grantee that the deed was deposited, and the memorandum

does not reserve to the grantor an absolute right to cancel the deed. It must first be determined that the grantee had forfeited her right by failure to perform on her part. The parties must have supposed that to "take in his possession the said deed" would operate as a reconveyance to him. The memorandum provided that the grantee "will give the said John Troutmann exclusive use of the bedroom now occupied by him in the said house, allowing him to keep his wood and coal in the same separate from her own fuel, and that she will at all times keep his said room clean, and in good order, and will do his washing, and furnish him with good board during his lifetime, also in case of his sickness that she will nurse and take proper care of him, the same as if she was paid for the said service. It is further stipulated and agreed by the said Effa Hill that she will pay the taxes on said property as they may accrue, and all necessary repairs on the said property." The evidence shows that he had the use of the room stipulated for. She cared for the room and generally performed her contract.

If the grantor reserved the absolute and unqualified right to withdraw the deed and cancel the same, the depositing of the deed for safe-keeping would not be a delivery to the grantee. This contract gave the grantor no absolute right to reclaim the deed. It was only in case the grantee "shall refuse or neglect to comply with any of the covenants on her part agreed to be performed on her part" that the grantor could take possession of the deed. The deed, then, was an escrow, and if this plaintiff performed her part of the contract she was entitled to the possession of the deed.

This seems to answer the questions raised by appellant. The judgment of the district court is

AFFIRMED.

WILLIAM H. WALKER, APPELLANT, V. A. THOMAS KLOPP, APPELLEE.

FILED APRIL 29, 1916. No. 18673.

1. **Negligence:** VIOLATION OF STATUTE: LIABILITY. The violation of a statute enacted for the protection of persons and their property constitutes negligence *per se*, and the violator may be required to respond in damages resultant, even though such statute be penal in its nature, and silent as to liability for damages resulting from its violation.

2. ———: MOTOR VEHICLES: OPERATION BY MINOR: LIABILITY OF OWNER. Section 3048, Rev. St. 1913, imposes upon owners, dealers in, and manufacturers of motor vehicles a public duty to refrain from permitting a person under 16 years of age, or an intoxicated person, to operate a motor vehicle; and when an owner of an automobile permits his minor child, under the age of 16 years, to operate his automobile, he is guilty of negligence, and is liable therefor, when the other elements of actionable negligence are present.

3. ———: ———: ———: PERMISSION OF OWNER: EVIDENCE. Evidence tending to prove that the defendant's minor son had frequently and for a long period of time previous to the accident, and after the accident, operated the defendant's automobile upon the streets of the city of Omaha, with the knowledge of and by permission of the defendant, is competent as proof that at the time of the accident the defendant's said minor son was operating such automobile by permission of the defendant.

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

McGilton, Gaines & Smith, for appellant.

Byron G. Burbank, contra.

MCGIRR, C.

The plaintiff brought this action to recover from the defendant the sum of $6,000, as damages to the automobile and person of the plaintiff, occasioned by the reckless driving of the defendant's automobile by his son, Lester Klopp, a minor under 16 years of age. In his petition the plaintiff

alleged, in substance, that on September 20, 1913, he was driving his car toward the east on Underwood avenue, west of the village of Dundee, and that on said date Lester Klopp, a minor under 16 years of age, was driving defendant's car, with defendant's permission and consent, and negligently and recklessly, while driving said car at a speed exceeding 40 miles an hour, ran into the plaintiff and destroyed his automobile and permanently injured his person; that the damage to plaintiff's automobile was in the sum of $1,000, and that he suffered permanent physical injuries and was thereby damaged in the further sum of $5,000. The defendant by his answer admitted the ownership of the car, and that Lester Klopp, his son, was a minor, and denied each and every other allegation in plaintiff's petition contained. At the close of plaintiff's evidence the court, on motion, directed a verdict for the defendant. On the verdict of the jury, the court rendered judgment in favor of the defendant, and from this judgment the plaintiff appeals and asks that the judgment be reversed, on the ground that the trial court erred in directing a verdict for defendant.

The only question presented to this court for determination is whether or not the evidence is sufficient to sustain a judgment for the plaintiff. There is evidence that the defendant was the owner of a seven-passenger Olds automobile of 50-horse power; that, for a considerable period of time previous to the accident which caused the damage to the plaintiff and his property, Lester Klopp, the defendant's minor son, who was under the age of 16 years, had been driving the defendant's said automobile about the streets of Omaha, and upon other public highways, with the general permission, knowledge and consent of the defendant; that the defendant's attention had been called to the fact that, by permitting his said infant son to drive his automobile on the public highways, he was violating the law, and that he stated that he proposed to let his son drive his automobile anyway. At the time of the accident the plaintiff was driving his car toward the east on Underwood av-

enue, and had reached a point on the intersection of Underwood avenue with the boulevard which crosses Underwood avenue, and was going at a speed of eight miles an hour. There is evidence that the defendant's son was driving the defendant's car toward the north on the boulevard at a speed of about 45 miles an hour, and collided with the plaintiff's car on the intersection; that the plaintiff's car was almost entirely destroyed, and the plaintiff and a man who was riding with him were thrown out of the car upon the ground. There is also evidence that the defendant's son had frequently, and for a long period of time previous to the accident, and after the accident, driven the defendant's automobile upon the streets of the city of Omaha, with the knowledge and permission of the defendant. This evidence was competent as proof that at the time of the accident the defendant's minor son was operating and driving defendant's automobile with the consent of and by the permission of the defendant. If the defendant, by reason of having permitted his son, who was at the time under 16 years of age, to operate and drive his automobile upon the streets and public highways, is liable to the plaintiff for the damages so sustained by him, the trial court erred in directing a verdict for the defendant. The answer to this question involves a construction of section 3048, Rev. St. 1913, which provides as follows:

"It shall be unlawful for any person under sixteen years of age, or for any intoxicated person, to operate a motor vehicle, and any owner, dealer, or manufacturer of motor vehicles who permits a person under sixteen years of age, or an intoxicated person, to operate a motor vehicle shall be deemed guilty of a misdemeanor and shall be punished as hereinafter provided for violation of the provisions of this article."

Counsel for defendant contends that it is a fundamental principle that acts penal in themselves, that is, acts creating a misdemeanor or a crime, and providing punishment therefor, shall be strictly construed, and shall not be extended beyond the strict letter and spirit thereof; that,

had the legislature contemplated anything further than punishment by a fine or imprisonment, it would have so declared in the act, by adding thereto language clearly stating that damages would follow in favor of the injured person. With this contention we cannot agree. It has been frequently and most universally held by the courts that the violation of a statute, although penal in its nature, that provides that something shall be done, or shall not be done, for the benefit of individuals, or for the benefit and protection of individuals and the public generally, is negligence *per se,* and subjects the violator of the law to liability for damages caused by a violation of such statute or ordinance.

"As a general rule it may be said that negligence may consist in the neglect of some duty imposed by statute as well as by the careless or negligent performance of some obligation imposed by law or contract. Liability for damages because of the violation of a statute or ordinance imposing some duty on a person is not affected by the fact that it is made a misdemeanor, and the fact that the statute imposes a penalty for its violation will not prevent an action for damages. In many decisions it is held that a violation of a statute or ordinance specifically imposed under the police power of the state is negligence *per se,* or as matter of law, if the other elements of actionable negligence exist." 29 Cyc. 436.

In the case of *Omaha Street R. Co. v. Duvall,* 40 Neb. 29, this court held that, as applied to the liability of street railway companies whose cars are propelled by means of electricity, the following instruction was proper: "The violation of any statutory or valid municipal regulation established for the purpose of protecting persons or property from injury is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Thus, the violation of the statutes or ordinance regulating the speed of vehicles, horses, or trains or street cars, is such a breach of duty as may be made the foundation of an action

by any person belonging to the class intended to be protected by such regulation, provided, he is specially injured thereby."

In the case of *Frontier Steam Laundry Co. v. Connolly,* 72 Neb. 767, in the opinion by Judge Letton it is said: "If the duty imposed by the ordinance is clearly intended for the protection and for the benefit of individuals or of their property, the violation of the rule prescribed tends to show negligence for which a recovery may be had; but, where the duty is plainly for the benefit of the public at large, then the individual acquires no new rights by virtue of its enactment, and a violation of the rule is of no evidential value upon the question of negligence. It is not always easy to draw the line between the two classes of enactments. In fact, in some cases their purpose is both for the welfare of the public at large and also for the protection of the personal and property rights of individuals. In such case the individual may adduce the failure to perform the duty enjoined as evidence of negligence. The rule which is applicable can only be ascertained from a consideration of the object and purpose of the enactment itself in each particular case." See, also, *Strahl v. Miller,* 97 Neb. 820.

In the case of *Hayes v. Michigan C. R. Co.,* 111 U. S. 228, the supreme court of the United States held: "If a railroad company, which has been duly required by a municipal corporation to erect a fence upon the line of its road within the corporate limits, for the purpose of protecting against injury to persons, fails to do so, and an individual is injured by the engine or cars of the company in consequence, he may maintain an action against the company and recover, if he establishes that the accident was reasonably connected with the want of precaution as a cause, and that he was not guilty of contributory negligence."

In the case of *Anderson v. Settergren,* 100 Minn. 294, the supreme court of Minnesota, in construing a statute of that state which made it unlawful for a minor under the age of 14, not accompanied by parent or guardian, to have

possession or control of firearms, and made it a misdemeanor to aid or knowingly permit a minor of such age, save in the excepted cases, to violate the same, held that a complaint, in an action to recover damages, which alleged that certain hardware merchants loaned a rifle and sold cartridges to a minor known to be only 13 years of age, and to be careless and negligent in the use of firearms, that the minor began to shoot with the gun and cartridges in every direction and damaged plaintiff, was not demurrable, and that the defendant's wrong was in law the proximate cause of the damage, despite the intervention of the minor.

The clear and unmistakable purpose of the legislature in enacting the Nebraska statute under consideration was to protect persons and property from the injury and damage that experience had shown were more likely to be occasioned by the driving of motor vehicles on the public highways by minors under 16 years of age than would be occasioned by the driving of motor vehicles by older persons of more mature judgment; and, when a person wilfully permits his minor child under the age of 16 years to drive his automobile upon the public highways in direct violation of this statute, such permission and such violation of the statute constitutes in him such negligence as is by the direct sequence of events the proximate cause of any damage that may be sustained by another to his person or property by the driving of such automobile by such minor, when the other elements of actionable negligence are established. The defendant cites a number of cases holding that the owner of a motor vehicle, or other carriage, is not liable for damages caused thereby, when such motor vehicle or carriage is driven by some one other than the owner, unless it be established that at the time the damage was occasioned the relation of either master and servant or of principal and agent existed between the owner and the driver, and that the driver was at the time engaged on the business of his master or principal. We readily agree that this is good law when the damage is caused by the negligence or carelessness of a servant or agent, and not primarily by

reason of the violation of a statute or ordinance by the master or principal. Neither the law of master and servant nor the law of principal and agent is applicable to the instant case. When there is competent evidence of the defendant's negligence by reason of his wilful violation of the statute, and that the other elements of actionable negligence are concurrent, and also that the plaintiff has suffered some injury or sustained some damage by reason of such negligence on the part of the defendant, the case should be submitted to the jury. It therefore follows that the judgment of the district court should be reversed and the cause remanded for further proceedings.

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

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. CALVIN H. DODD, APPELLANT.

FILED MAY 13, 1916. No. 18770.

PER CURIAM.

Contempt: REVIEW. A conviction under contempt proceedings can only be reviewed in the supreme court by the filing of a petition in error as in a criminal case. *Gandy v. State*, 13 Neb. 445; *Hanika v. State*, 87 Neb. 845.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Appeal dismissed.*

Albert W. Crites and *Earl McDowell*, for appellant.

Justin E. Porter and *Allen G. Fisher, contra.*

WILLIAM F. GIFT, APPELLEE, V. HENRY E. DRESS ET AL., APPELLANTS.

FILED MAY 13, 1916. No. 18862.

Deeds: DEEDS AS MORTGAGES: SUIT TO REDEEM: SUFFICIENCY OF PETITION. When, in an action to have two deeds, simultaneously executed by the plaintiff, running to two different grantees, who are made defendants, decreed to be mortgages, the petition contains allegations that the execution and delivery of the deeds were induced by the defendants working in concert, it will be held good against a demurrer alleging misjoinder of parties, and that several causes of action are improperly joined.

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

Frank E. Beeman and *Henry E. Dress,* for appellants.

W. E. Hill and *Beeler & Crosby, contra.*

MORRISSEY, C. J.

Plaintiff brought his suit in equity in the district court for Logan county to have two certain deeds which he had executed to the defendants decreed to be mortgages, and for permission to redeem from the liens of these mortgages. To this petition defendants filed separate demurrers, alleging misjoinder of parties defendant, that several causes of action were improperly joined, and that the petition does not state facts sufficient to constitute a cause of action.

The petition is very long and it would serve no useful purpose to set it out verbatim. It alleges that defendant Dress is a practicing attorney, and that plaintiff employed him to defend him against a certain criminal prosecution for a fee of $250; that to secure the payment of this money plaintiff executed and delivered to Dress a mortgage on a tract of land in Logan county, which plaintiff then owned; that thereafter Dress represented to plaintiff that certain

incriminating evidence would be given against him, and that it would be necessary to obtain a large sum of money to make a defense; that the defendant Carr would furnish the necessary money, provided plaintiff gave ample security therefor, and proposed to plaintiff that the mortgage which he had theretofore taken be released, and he executed a release; that in truth the county attorney had already determined to dismiss the felony charge which was pending against plaintiff herein because of lack of evidence to sustain the same, and, in compliance with an arrangement made between the county attorney and this plaintiff, plaintiff entered a plea of guilty to two misdemeanors, on which the fines and costs amounted to $225; that the defendant Carr advanced $250, out of which plaintiff paid said fines and costs; whereupon plaintiff, relying upon representations, which are set out in detail in the petition and alleged to be false and fraudulent, made by the defendant Dress with the knowledge and connivance of the defendant Carr, executed and delivered the deeds now asked to be decreed to be mortgages. It is alleged that the two defendants conspired together for the purpose of securing these deeds with the intention of defrauding the plaintiff of his land; that the land is worth much more than the indebtedness, and there is a prayer that the deeds be decreed to be mortgages and that the plaintiff be allowed to redeem therefrom.

It may be that the petition contains unnecessary allegations and sets out details of the transactions which are not required in a pleading of this kind, but this does not make it vulnerable to a demurrer. Defendants urge especially that there is a misjoinder of defendants, in taking title by two separate and distinct instruments of writing, but the petition expressly alleges that these two defendants conspired together to secure these two deeds and pleaded such facts as makes the act of one the act of the other. The parties are no differently situated from what they would be had they taken a joint deed to the whole property. Taking the allegations of the petition as true,

the defendants were acting in concert, and it was proper to join them in a single suit. No error is found in the ruling of the court, and the judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

WILLIAM NIKLAUS, TRUSTEE, APPELLEE, V. GEORGE F. LESSENHOP ET AL., APPELLANTS.

FILED MAY 13, 1916. No. 18892.

1. **Bankruptcy**: SALES IN BULK: CREDITORS' SUIT. A trustee in bankruptcy may maintain an action in the nature of a creditor's bill against the persons who have purchased and disposed of the entire assets of his bankrupt's estate in violation of the provisions of section 2651, Rev. St. 1913, commonly called the "Bulk Sales Law."
2. ———: ———: ———: MEASURE OF RECOVERY. In such case the liability of the defendants is not measured by the amount they received for the goods, but is measured by the agreed inventory value thereof.
3. **Sales.** The "Bulk Sales Law" was held valid and constitutional in *Appel Mercantile Co. v. Barker*, 92 Neb. 669, and we adhere to that decision.
4. **Evidence** examined, and *held* that the decree was not excessive.

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

T. J. *Doyle*, for appellants.

Mockett & Peterson and *Burkett, Wilson & Brown, contra.*

BARNES, J.

William Niklaus, as trustee of the bankrupt estate of the Lincoln Implement & Transfer Company, commenced this action in the nature of a creditor's bill in the district

court for Lancaster county against George F. Lessenhop, Isaac Deardorf, Charles W. Wingard, Joseph Miller and John M. Lindsey, to recover judgments for the conversion of assets of the bankrupt estate. The several defendants filed separate answers, to which replies were filed, and on the issues thus joined a trial was had to the court, which resulted in judgments in favor of the plaintiff and against the defendants as follows: Charles W. Wingard, $3,140, with interest from May 20, 1911, amounting to $643.53; against Joseph Miller for $2,500, with interest amounting to $512.36; against John M. Lindsey for $1,003, with interest amounting to $205.56; against Isaac Deardorf in the sum of $8,004.45, with interest from May 20, 1911. All of said judgments carried costs, and represented the amount of the assets converted by each of the said defendants. The court further found for the defendant George F. Lessenhop and dismissed the action as to him. From the several judgments, defendants, with the exception of Lessenhop and Lindsey, have appealed.

The record discloses that the Lincoln Implement & Transfer Company was duly adjudged a bankrupt, and the plaintiff in this action was appointed as trustee in bankruptcy; that before the implement company was adjudged a bankrupt, and on or about the 9th day of May, 1911, the defendant George F. Lessenhop executed a bill of sale of the entire stock of the bankrupt concern to the defendant Isaac Deardorf and transferred and assigned to him the entire amount of the capital stock of the implement company. The agreed inventory of stock amounted to $11,000. It appears that Lessenhop had, previous to that date, acquired all of the capital stock of the implement company, and was its president, and had full control of the affairs of the company; that at the time the bill of sale was executed and the stock of the implement company was assigned to Deardorf the company was insolvent and was indebted to a large number of creditors to the amount of $11,705.11. The testimony also shows that when the bill of sale and assignment of the capital stock was exe-

cuted Lessenhop claims Deardorf assumed the debts of the company. Within ten days after Deardorf received the bill of sale and assignment, he sold and delivered to Charles W. Wingard a part of said stock of implements of the value of $3,140; that he sold and delivered to Joseph Miller $2,500 worth of said stock; that he sold to John M. Lindsey $1,003 worth of said stock; that he sold other small amounts of the stock at retail, and within the time last above mentioned all of the assets of the company had been sold and been shipped out of Lincoln to different parts of the country; that no part of the stock itself had been found or accounted for. The testimony shows without dispute that the sale of the assets of the implement company was made to Deardorf in violation of section 2651, Rev. St. 1913, commonly known as the "Bulk Sales Law;" that no notice was given to the creditors of the bankrupt, and in the sales from Deardorf to Wingard, Miller and Lindsey the provisions of the "Bulk Sales Law" were wholly disregarded. In fact the testimony shows without dispute that Deardorf and the other judgment defendants converted the entire assets of the bankrupt to their own use in utter disregard of the provisions of the statutes.

Appellants contend that, because the Lincoln Implement & Transfer Company by its charter was authorized to do both a wholesale and retail business, the "Bulk Sales Law" has no application to this case, and that the assets of the company sold in violation of the provisions of the section above mentioned are not trust funds. There are some adjudications in other jurisdictions which seem to sustain this contention; but, in construing the section of the statute above mentioned, we held in *Appel Mercantile Co. v. Barker,* 92 Neb. 669, that: "One who obtains possession of a stock of merchandise pursuant to a purchase thereof in bulk, in violation of the statute, will be held to be a trustee for the benefit of the creditors of his vendor, and liable as garnishee." In *Kohn v. Fishbach,* 36 Wash. 69, it was held: "One who buys a stock of merchandise in bulk, without complying with the statute requiring him to demand

a list of the vendor's creditors and to see that the purchase price is applied to their payment, holds the property in trust for such creditors, and is liable to them in an action of garnishment, although he is not indebted to the vendor and has disposed of the goods." The same rule was applied in *Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, 131 Ga. 1. We think the rule is that the defendants are liable for the violation of the "Bulk Sales Law," and their liability is not measured by the amount they receive for the goods, but must be measured by the agreed value thereof. *Hargreaves Mercantile Co. v. Tennis*, 63 Neb. 356.

Appellants are liable for other reasons than the "Bulk Sales Law." Deardorf obtained the transfer of the goods without paying any money, and knew of the indebtedness of some $9,000 or $10,000, and in taking over the business, although he claims he did not assume any liability to the creditors, the record discloses that he gave no attention or consideration whatever to the liabilities of the Lincoln Implement & Transfer Company. Such being the case, he must be held to have entered into a transaction, the effect of which was to hinder, delay and defraud the creditors of that company. Miller obtained his share of the stock of goods without any concern as to the creditors. The same may be said of Wingard and Lindsey. Their purchases were in violation of the "Bulk Sales Law," and therefore they are each liable for the amount of the goods purchased and converted by them. They acted without regard to the rights of creditors, and therefore, to say the least, they participated in hindering and delaying the creditors of the Lincoln Implement & Transfer Company. The transaction must be held fraudulent as to all of the defendants. It is also contended that the "Bulk Sales Law" is unconstitutional. That question was before the court in *Lee v. Gillen & Boney*, 90 Neb. 730. The law was there assumed to be constitutional and valid. The question of the validity of the law was directly passed upon in *Appel*

Mercantile Co. v. Barker, supra, where it was held to be in all respects constitutional.

It is finally contended that the decree is grossly excessive and is not supported by the evidence. The record discloses, however, that when Deardorf purchased the assets of the implement company an inventory was taken and the value of the stock was agreed upon between the purchaser and the vendor. Deardorf conveyed certain property to Lessenhop in payment, the value of which he claimed was largely in excess of the amount of the inventory. When he sold the property to the other defendants, he obtained the inventory price of the same. The amount of the decree as to the several defendants is well within the inventory of the assets of the implement company. Therefore defendants' contention cannot be sustained.

As we view the record, the judgment of the district court was right, and is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

STATE, EX REL. WILLIS E. REED, ATTORNEY GENERAL, RELATOR, V. GARDEN COUNTY ET AL., RESPONDENTS.

FILED MAY 13, 1916. No. 19387.

Counties: BOUNDARIES: WRIT OF OUSTER: SUFFICIENCY OF ANSWER. Pleadings examined, the substance of the answer set out in the opinion, and *held* to be sufficient to resist a general demurrer.

Original application for writ of ouster. Demurrer to answer. *Demurrer overruled.*

Willis E. Reed, Attorney General, George W. Ayres, W. H. Thompson, A. D. Fetterman and *D. F. Osgood,* for relator.

H. J. Curtis, contra.

BARNES, J.

This is an original application in this court on the relation of the attorney general to obtain a writ of ouster against the county of Garden and its officers, commanding them to refrain from exercising jurisdiction and dominion over a strip of land alleged in the information to be and constitute a part of Grant county in this state.

The information, after setting forth the several acts of the legislature passed from time to time defining the boundaries of Garden, Grant and several other counties out of which Grant and Garden counties have been formed, alleged, in substance, that the twenty-fifth degree of longitude west from Washington constitutes the west boundary line of Grant county and the east boundary line of Garden county; that if the east boundary line of Garden county, as defined and described by the several acts of the legislature, set forth in the petition, overlaps the west boundary line of Grant county, then such acts are illegal and void; that the officers of Garden county are claiming and exercising jurisdiction over the said territory which overlaps the west boundary line of Grant county. The petition concludes with a prayer for a writ of ouster and such other and further relief as may be just and equitable.

To the petition for the writ the respondents have filed an answer denying the material allegations on which the relator relies. Further answering the respondents allege: "(6) That at the time of the formation of the county of Cheyenne the twenty-fifth degree of longitude west from Washington was unlocated and unmarked along or near said county except at one point at the northeast corner of the state of Colorado, and that said degree was never located and marked on the earth between the fifth and sixth standard parallels, which are respectively the southern and northern boundaries of the county of Grant, until the year 1912; that when the original government land survey was made in or about the year 18—of the lands in townships twenty-one (21), twenty-two (22) and twenty-three (23)

north, range forty-one (41) west of the sixth P. M., it was generally believed that the range line between said ranges 40 and 41 west of the sixth P. M. along said townships was on about the same line as the said twenty-fifth degree of longitude west from Washington; and the officers of the state of Nebraska and the county of Cheyenne and its officers recognized and claimed said range line between the fifth and sixth standard parallels as the east boundary line of the county of Cheyenne, and said range line was recognized and accepted as the eastern boundary of Cheyenne county by all persons residing in the vicinity of said boundary, and Cheyenne county at all times assumed and exercised jurisdiction and control of all matters pertaining to the territory immediately west of said range line; that from and after the organization of the county of Deuel the officers of the state of Nebraska and the officers of Deuel county and the persons residing in said locality recognized and claimed the said range line between ranges forty and forty-one between the fifth and sixth standard parallels as the east boundary line of Deuel county, and until the year 1910 the county of Deuel and its officers had authority and control of said strip of land and the personal property thereon for all judicial, legislative and revenue purposes, and that from and after the organization of the county of Garden said county and its officers have claimed and exercised authority and control in all matters in and pertaining to the above-mentioned strip of land immediately west of said range line, and the officers of the state of Nebraska have recognized said range line as the east boundary line of Garden county, and its predecessors, up to and until the year 1915, and the people residing in the immediate vicinity have recognized said range line as the east boundary line of Garden county and its predecessors.

"(7) That when the county of Grant was formed by legislative act, in the year 1887, and the western boundary described as extending south from a point on the eastern boundary of Sheridan county 'along the east boundary of

Cheyenne county to the south line of township twenty-one, range forty,' the said east boundary line of Cheyenne county was the range line between ranges forty and forty-one, and the legislature intended to make and did make the west boundary line of Grant county a straight line from a point on the east boundary line of Sheridan county, said east boundary line being the range line between ranges forty and forty-one, to the southwest corner of township twenty-one, range forty west of the sixth P. M.

"(8) That from the time of the organization of the county of Grant until about the year 1912 the officers and representatives of said county recognized the said range line between forty and forty-one as the western boundary of said county, and neither claimed nor exercised authority or control west of said range line until about the year 1912, since which time Grant county and its officers have interfered to some extent with the due and legal control and authority of Garden county and its officers over and pertaining to the citizens, lands and property in said strip of land immediately west of said range line between ranges forty and forty-one.

"(9) That the act of the legislature of 1895, quoted in the information, did not change the boundary line between Deuel and Grant counties, but gave legislative recognition to the boundary line theretofore established and marked on the ground on the range line between ranges forty and forty-one in the manner as hereinabove set forth, and recognized by the officers of the state of Nebraska, and the officers of all the said counties, and by the inhabitants of the said vicinity."

The answer concludes with a prayer that the information be dismissed; that respondents go hence without day and recover their costs therein expended.

To this answer relator has filed a general demurrer, and on the argument, and in his brief, contends that the facts stated in the answer constitute no defense to the facts alleged in relator's petition.

On the other hand, the respondents contended, both in their brief and on the oral argument, that the facts set forth in the answer are a defense to the information and are sufficient to require the taking of testimony to determine the true boundary line between the counties. In support of their contention respondents cite the cases of *Virginia v. Tennessee,* 148 U. S. 503, and *Edwards County v. White County,* 85 Ill. 390. In the case last cited it was said: "If the language of the statute were more ambiguous than we conceive it to be, it would still be competent, in solving the doubt, to consider the acts of the public authorities in recognition of the boundary line; and, upon principles of public policy, where, as here, courts, assessors and collectors of taxes, and other officers having duties, limited to the respective counties, to perform, have, for a long time, recognized and acted upon the assumption that a given line is the true boundary line between the counties, we shall not inquire whether, in the first instance, the line was the one intended or not. The quiet and good order of communities ought not to be disturbed by controversy in regard to such questions, after, at least, the expiration of the period fixed for the limitation of actions between individuals where title to real estate is controverted; and this, not because in such a controversy counties are necessarily within the contemplation of the statute of limitations, but because the public welfare forbids that the possibility of strife and controversy in regard to boundary lines between counties should continue indefinitely."

If the governing authorities, the landowners and the public in general have for more than ten years recognized a definitely located line as the boundary between their counties, so that county assessors and collectors of taxes, and other officers having duties limited to the respective counties to perform, have, for a long time recognized and acted upon the assumption that a given line is the true boundary line between counties, these facts are very important in this case. They should be more definitely

pleaded. The answer seems sufficient to resist a general demurrer.

The demurrer is therefore overruled, and the parties are allowed to amend their pleadings, if so advised.

DEMURRER OVERRULED.

HARRY R. WARD, APPELLANT, V. BANKERS LIFE COMPANY ET AL., APPELLEES.

FILED MAY 13, 1916. No. 18917.

1. **Judgment: VALIDITY: JURISDICTION.** In a suit on an insurance policy naming a trustee for insured's minor son as beneficiary, the guardian of the latter being plaintiff and the insurer and the trustee holding the insurance contract being defendants, a judgment ordering the trustee to deliver the policy to plaintiff and requiring insurer to pay the insurance to plaintiff upon surrendering the policy is void as to the trustee, if based alone on service outside of the state, though insurer offered to pay into court the fund in controversy.

2. **Insurance: ACTION ON POLICY: PARTIES.** A trustee for the minor son of insured, when thus designated in a life insurance policy as beneficiary, is the proper party to maintain an action for the unpaid insurance. Rev. St. 1913, secs. 7582, 7585.

3. ———: ———: **ATTORNEY'S FEES.** The statute allowing plaintiff a reasonable sum as an attorney's fee in an action to recover insurance is applicable to contracts executed before its enactment. Rev. St. 1913, sec. 3212.

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

Carl E. Herring, for appellant.

I. M. Earle, John H. Grossman and *I. N. Flickinger, contra.*

ROSE, J.

This is an action on a life insurance policy. The insured, Nevada O. Ward, died August 8, 1912, the amount due the beneficiaries being $2,030. When executed, the policy was payable to Mary E. Ward, the wife of insured, but it was changed July 19, 1911, for the benefit of their two sons, one-half of the insurance being payable to Lawrence Ward, and the remainder to plaintiff in trust for Elmer B. Ward, a minor. The insurer paid to Lawrence Ward the amount due him on the policy. The remainder of the insurance is the subject of litigation between the mother as guardian and the plaintiff as trustee. In the probate court of Pottawattamie county, Iowa, Mary E. Ward was appointed guardian of her minor son, Elmer B. Ward, and in the district court for that county instituted an action against the insurer and the plaintiff herein to collect the remainder of the insurance due, on the theory that the trust was passive and that the legal title to the insurance vested in the minor upon the death of the insured. In its answer the insurer offered to pay into court the amount due on the policy. A summons issued from the Iowa court was served on plaintiff in Omaha, Nebraska, but he made no appearance in that tribunal. A judgment therein directed plaintiff herein to surrender and deliver to Mary E. Ward the insurance certificate held by him, and allowed a recovery of $1,015 from the insurer upon surrender of the certificate. In the district court for Douglas county the present suit was brought by Harry R. Ward, as trustee, to recover from the insurer for the benefit of the minor the remainder due on the policy. In this action Mary E. Ward intervened and pleaded the Iowa judgment as a bar, alleging that plaintiff herein was trustee representing a mere passive trust, and that she was guardian of Elmer B. Ward, the beneficiary of the trust. From a judgment in favor of defendant and intervener, plaintiff has appealed.

Plaintiff contends that the Iowa court had no jurisdiction to enter the judgment rendered. Intervener argues

that, since the insurer, by its answer, offered to pay the money into the Iowa court, that tribunal had jurisdiction of the *res,* and that the constructive service was sufficient. The law seems to be that the action was not *in rem,* and that in the absence of a valid personal service or an appearance the Iowa court was without jurisdiction to render judgment against the trustee. *Cross v. Armstrong,* 44 Ohio St. 613; *Washington Life Ins. Co. v. Gooding,* 19 Tex. Civ. App. 490.

It is argued that the tender made by the insurer conferred upon the Iowa court the same jurisdiction it would have acquired had the fund been impounded by garnishment. *Mooney v. Union P. R. Co.,* 60 Ia. 346. In the case cited a debt owing by a railroad company to an employee in Nebraska had been garnished in Iowa. There was service by publication. It was held that the debt was property of the nonresident within the jurisdiction of the Iowa court and that constructive service could be based thereon. In the case which intervener brought in Iowa, plaintiff herein made no claim to any specific real or personal property in Iowa. There was no debt owing to him by a resident of that state, if intervener's contention upon the merits was well founded. It was not an action to impound a debt owing to a nonresident, but an action to obtain an adjudication that there was no debt owing to him. *Cross v. Armstrong,* 44 Ohio St. 613.

Is the trustee the proper plaintiff? The insurance was payable one-half to Lawrence Ward and the remainder to plaintiff in trust for Elmer B. Ward. It is insisted by intervener that there were no duties to be performed by the trustee; that the trust was passive; that the legal title to the fund vested at once in the beneficiary, and that as his guardian the intervener is entitled to the insurance. The statute of uses did not apply to a trust in personal property, and consequently the legal title thereto did not vest in the *cestui que trust. Denton v. Denton,* 17 Md. 403; *In re Hagerstown Trust Co.,* 119 Md. 224; *Ure v. Ure,* 185 Ill. 216; *Smith v. Smith,* 254 Ill. 488; *Rust v. Evenson,* 161

Wis. 627. While it has been held that the statute of uses was not adopted in this state, equity has power to compel the trustee of a passive trust to transfer the property to the *cestui que trust*. *Hill v. Hill*, 90 Neb. 43. That has not been done. Plaintiff was the proper party to maintain this action. While the statute requires every action to be brought in the name of the real party in interest, it also provides that the trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted. Rev. St. 1913, secs. 7582, 7585.

On the record presented the trustee was the proper plaintiff and was entitled to judgment. He made application to the district court for a reasonable sum as an attorney's fee. Rev. St. 1913, sec. 3212. The insurer has not been neutral in the litigation, but has resisted the claim of plaintiff. It has been shown that $100 would be a reasonable attorney's fee, and it should be allowed, though the statute authorizing it was enacted after the insurance policy was executed. *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 863.

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

REVERSED.

LETTON, J., not sitting.

SEDGWICK, J., not participating.

GIOVANNA BUTERA, APPELLEE, V. J. C. MARDIS COMPANY ET AL., APPELLANTS.

FILED MAY 13, 1916. No. 18557.

1. **Statutes:** CONSTITUTIONALITY: ACT FOR PROTECTION OF LABORERS. The act of 1911 (Laws 1911, ch. 65), "providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts and other structures," is not void as in violation of the constitution.

2. **Master and Servant:** ACT FOR PROTECTION OF LABORERS: VIOLATION: PERSONS LIABLE. The intention of the legislature was to make all those liable for damages caused by a violation of the statute through whom the negligent party derived the right to perform the service; that is, all those who made his employment possible. This would include the owner of the real estate who originated and authorized the improvement.

3. ———: ———: ———: GROSS NEGLIGENCE. A palpable violation of the statute by the employer is gross negligence.

4. ———: ———: ———: CONTRIBUTORY NEGLIGENCE. The defense of contributory negligence still exists in actions for damages caused by a violation of the statute, but employees are not required to anticipate that their employers will fail to perform the duty imposed upon them by the statute.

5. ———: ACTION FOR DEATH: FINDINGS: SUFFICIENCY OF EVIDENCE. The evidence justifies the finding of the jury that the defendant violated the statute, and that the deceased was not guilty of contributory negligence.

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

Brogan & Raymond and *John W. Parish*, for appellants.

Gurley, Woodrough & Fitch, contra.

William R. Patrick and *C. J. Southard, amici curiæ.*

SEDGWICK, J.

The defendant, the J. C. Mardis Company, contracted to erect a building called the "Flat Iron Building" on a lot of the defendant, Sterling Realty Company, in Omaha. The deceased was in the employ of the Mardis Company and was killed by the fall of a load of material suspended by means of a derrick or crane over the walk. His widow, Giovanna Butera, brought this action for damages, and recovered judgment in the district court for Douglas county against the J. C. Mardis Company and the Sterling Realty Company, jointly. The defendants have appealed separately.

The Sterling Realty Company contends that the statute, so far as it makes the owner of the lot on which the build-

ing was being erected liable, is unconstitutional. Sections 3602, 3612, Rev. St. 1913, provide as follows:

Section 3602. "All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances, erected or constructed by any person, firm or corporation in this state, for the use in the erection, repairing, alteration, removal or painting of any house, building, bridge, viaduct or other structure, shall be erected and constructed, in a safe, suitable and proper manner, and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such manner as to prevent the falling of any material that may be used or deposited thereon."

Section 3612. "For any injury to person or property, occasioned by any violation of this article, or failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in case of loss of life by reason of such violation or failure, as aforesaid, a right of action shall accrue to the widow of the person so killed for the benefit of herself and the children or adopted children of the person so killed. * * * In case the person or persons so killed shall leave a widow surviving, the action shall be brought in her name for the benefit of herself and children, if any surviving. * * * The fact that any employee, servant or other person shall continue to work during the time such owner, contractor or subcontractor has failed to comply with the provisions of this article shall not be considered as an assumption of the risk of such employment by such employee, servant or other person and shall not in any case bar recovery of damages for the failure of such owner, contractor or subcontractor to comply with the provisions of this article. In all actions brought to recover damages for injuries caused by a failure to comply with the terms and provisions of this article the owner, contract-

or or subcontractor, if any, shall in all cases be jointly and severally liable in damages for all injuries caused through a failure to comply with this article. The owner, contractor and subcontractor, if any, shall in all cases be jointly and severally liable in damages for all injuries caused through a failure to comply with this article. The owner, contractor and subcontractor, if any, shall in all cases be held liable for the failure or neglect of any superintendent, foreman or other agent, employed by them, or either of them, to comply with the provisions of this article: Provided, however, the provisions of the foregoing article shall not apply to any buildings which do not exceed 33 feet in height above the foundation."

It appears to be conceded that the Sterling Realty Company was the owner of the lot and contracted with the Mardis Company to erect the building thereon. It is contended that "there were no contractual relations between the Sterling Realty Company and John Butera. It is not claimed that the Sterling Company committed any act which contributed to the death of said Butera." The court instructed the jury that, if the contractor was liable, "the Sterling Realty Company, as owner, would be jointly and severally liable." This seems to be fully warranted by the language of the statute. "The owner, contractor and subcontractor, if any, shall in all cases be held liable for the failure or neglect of any superintendent, foreman or other agent, employed by them, or either of them, to comply with the provisions of this article." In contending that this provision of the statute is unconstitutional, this defendant relies upon *Camp v. Rogers,* 44 Conn. 291, and *Daugherty v. Thomas,* 174 Mich. 371.

The nature of the action is thus stated in *Camp v. Rogers, supra.* "The statute (Gen. Statutes, p. 234, sec. 21) provides that the driver of any vehicle, meeting another on the public highway, who shall neglect to turn to the right, and thereby drive against the vehicle so met and injure its owner, or any person in it, or the property of any person, shall pay to the party injured treble damages; and

that 'the owner of the vehicle so driven shall, if the driver is unable to do so, pay such damages, to be recovered by writ of *scire facias.*'" The court said: "If the construction for which the plaintiff contends should be given to the statute upon which her right to recover must depend, then there can be no case in which the owner of a vehicle would not be liable, not only for the actual damage caused by a violation of the statute on the part of any person driving it, but for the threefold and punitive damages given by the statute against the driver. If the owner of a vehicle should leave it, with his horse attached to it, at a post by the side of the street, and in his absence a thief or trespasser should take it, and by reckless driving damage a horse or carriage that he happened to meet, the owner would be liable. So if one lends his vehicle to a friend, and he again lends it to a stranger, the owner would be liable, not only for any damage done by the stranger in driving it, but even by the servant of the stranger. Indeed, we should have this strange anomaly—that my neighbor borrows my carriage and is riding in it with his servant and the latter wilfully neglects to turn to the right and injures a team that he meets, while my neighbor would not be liable as master, because the act of his servant was wilful, I should yet be liable as owner, and too with no right to indemnity from the master." The court "held that, by the word 'owner' in the last clause, the person in control of the vehicle, either mediately or immediately, was intended, and not necessarily the actual owner. Any other construction would make the owner of a vehicle liable for the acts of a person in possession of it, over whom he had no control and to whom he did not stand in the relation of master or principal." We have no criticism on this conclusion of that court. This reasoning will not so readily apply to our statute. When the owner of real estate makes a contract for building thereon, he can in that contract protect himself against any misconduct or neglect of the contractor and can require such guaranty as he deems necessary for his protection. If this statute affects the right of free contract, or if

the public benefit that comes from protecting laboring men against the dangers of their employment will not justify such legislation, such questions of public policy, if doubtful in their application, are for the legislature, and not for the courts. We conclude that this legislation does not violate our fundamental law.

It is suggested in the briefs that the word owner should be construed to apply to the contractor himself while he is in the exclusive possession and control of the building in process of construction, and not to the owner of the real estate until the completed building is delivered to him pursuant to the contract. The statute makes both the owner and contractor liable for the neglect of the subcontractor and "for the failure or neglect of any superintendent, foreman or other agent, employed by them, or either of them." It could not be intended that a subcontractor, for instance a plumber, who would contract to furnish the plumbing of the building should be considered the owner. The intention plainly was to make all those liable through whom the negligent party derived the right to perform the service; that is, all those who made his employment possible. This would include the owner of the real estate who originated and authorized the improvement.

The plaintiff could not maintain the action in her own name under sections 1428, 1429, Rev. St. 1913, which provide that such action must be brought in the name of the administrator. The defendants insist that the petition fails to state a cause of action under the act of 1911, Rev. St., secs. 3602, 3612. The petition alleges the negligence of the defendants as follows: "Plaintiff alleges that, while the said John Butera was so engaged in walking across said sidewalk and into the street adjacent, the said crane and mechanical contrivance was not so operated by said J. C. Mardis Company as to give proper and adequate protection to the life and limb of persons passing under or by the same, including said John Butera, but, on the contrary, was so operated and in such a manner as to cause the load and material and hook attached to the said crane to fall

and strike and swing upon and against the head and body of said John Butera with such force and violence that he was crushed to the ground and killed; that the particular respects in which the said crane was so operated as not to give proper and adequate protection to the life and limb of persons passing under or by the same, including the said John Butera, and to prevent the material and load attached to the said crane from falling upon such persons, are more fully set out as follows, to wit: Plaintiff alleges that in the operation of said crane the J. C. Mardis Company caused a heavy load of material, upwards of two thousand pounds or more, to be lifted by said crane from the roof of the building and suspended over the public street and sidewalk to the north of said building; that the said street and sidewalk were at the time wholly unguarded by said defendant, and were open to and in constant use by workmen engaged in and about said building; that the said crane and mechanical contrivance was not in a suitable or proper condition to handle such a load as was attached thereto, but by reason of frost upon the brakes and drum and tackle of said derrick, the load was very liable to slip and fall or drop upon the said public sidewalk and street; that the employees of the defendant, the J. C. Mardis Company, who were employed to operate said crane, to wit, one Robert B. Wartnaby and Harry Reuben, were not competent or skilled in the operation thereof; that said Robert B. Wartnaby was employed by defendant to run the said steam engine, derrick and mechanical contrivance, and said Harry Reuben was employed to attend to the guide ropes upon said crane; that said Harry Reuben was a carpenter, and was not experienced or qualified to attend to said crane; that said Robert B. Wartnaby was a superintendent or foreman of said building and a carpenter by trade, and was not experienced or qualified to manage or operate said engine, boiler, crane and mechanical contrivance. That after said heavy load had been attached to said crane, the defendant, the J. C. Mardis Company, acting through its said servants, caused and

permitted the said load to fall and slip and to descend with great rapidity in such manner as to be out of control of the persons operating the crane and engine, and to drop and fall upon said John Butera upon the sidewalk and street adjacent to said building, and without giving any warning to any of the persons upon said sidewalk or street, including said John Butera, concerning the said operation of said crane, and without making any provision whatever for the protection of persons passing upon said sidewalk and street, including said John Butera." This paragraph originally contained allegations of an ordinance of the city of Omaha, which upon motion of defendants were stricken from the petition.

Defendants also insist that the evidence shows conclusively that the deceased was guilty of contributory negligence which would prevent the recovery. The argument seems to be that the deceased might have taken a different route, and that it was not necessary that he should pass along the walk under the derrick as he did, and that the noise of the derrick and of the engine which was operating it was such as to notify the deceased that it was dangerous to pass under it. The question of contributory negligence on the part of the deceased appears to have been fairly submitted to the jury, and we cannot say that the verdict in that respect is so clearly contrary to the evidence as to require a reversal. The statute requires the contractor and persons in charge of the building operations to so construct and operate the same as to give proper and adequate protection to employees. The deceased was not required to anticipate that this duty would be neglected, and the evidence in regard to the operation of the derrick at the time is not of such a nature as to convict the deceased of wilful or gross negligence in passing by the ordinary way in the performance of his duty. A palpable violation of the statute by the employer is gross negligence. The jury might find from the evidence that the negligence of the employer was such a violation of the statute.

The supreme court of Wisconsin in *Koepp v. National Enameling & Stamping Co.*, 151 Wis. 302, in construing a similar statute borrowed from New York, quotes from a decision of the New York court (*Gombert v. McKay*, 201 N. Y. 27), in which it was said: "It (their statute), in terms, absolutely forbids those employers to furnish or operate, or cause to be furnished or operated, any apparatus therein mentioned of the character and quality described by it. It, in its effect, provides that any employer who, either personally or by another, furnishes for the performance of any named labor a forbidden article shall be responsible therefor. The duty of the employer created by it is personal, incapable of delegation, and unaffected by caution and discrimination in selecting employees for their prudence and competency." It also quoted from another New York case (*Smith v. Variety Iron & Steel Works Co.*, 147 App. Div. (N. Y.) 242): "The defendant is not held liable for injuries to its workmen occasioned without any fault upon its part. It was at fault in furnishing a scaffold which was not safe, as the statute required it to do. While the scaffold appeared to be safe it was, in fact, insecure. Under the law the employer became responsible for the safety of the scaffold when he directed the workmen to use the scaffold." The Wisconsin court adds: "So it must be held that the legislature intended to make employers, in the situations dealt with by the statute, absolute insurers of the safety of their employees, save in cases of efficient assumption of the risk or contributory negligence."

The statement that the law makes employers "absolute insurers of the safety of their employees" was criticised by some members of the court, and the author of the opinion explained this language in a later case: "That does not mean that the place of employment must be so safe that an employee cannot become injured. The statute makes the employer an insurer as to furnishing such a place as it requires, but not against injury to employees using the place which has been so furnished. * * * Unsafe or

improper conditions are the opposites of safe, suitable, and proper. Safe and proper in that there is no such danger as that which the statute was intended to obviate, within reasonable apprehension. Safety as regards all reasonable probabilities not all possibilities of personal injury. Safe, suitable, and proper, so far as human foresight devoted to the matter, not with ordinary attention merely, but with a purpose to accomplish just what the legislature intended, a place so safe as to render personal injury so remote as to be, at most, merely within the realm of possibility." *Kendzewski v. Wausau Sulphate Fibre Co.*, 156 Wis. 452. This explanation seems to have had the approval of all the court except one judge. The expression, "a place so safe as to render personal injury so remote as to be, at most, merely within the realm of possibility," does not seem to be quite accurate. Possibility is a broad expression. It would seem to require a place so safe that an employee might not be injured by his own gross or even reckless negligence. No doubt the intention of the statute is that the employer is to be an "insurer as to furnishing such a place as it requires." The employee may confidently rely upon the performance of this duty by his employer, and he cannot be held guilty of negligence in acting upon the supposition that the employer has fully complied with the statute. To this extent the statute affects the doctrine of contributory negligence. Our statute expressly provides: "The fact that any employee, servant or other person shall continue to work during the time such owner, contractor or subcontractor has failed to comply with the provisions of this article shall not be considered as an assumption of the risk of such employment by such employee, servant or other person and shall not in any case bar recovery of damages for the failure of such owner, contractor or subcontractor to comply with the provisions of this article."

The noise of the derrick just before the falling of the materials was perhaps unusual. It may be that an expert in the handling of such machinery would have known that there was danger. But the evidence does not show any

such warning to the deceased under the circumstances as would require the court to say as matter of law that he was guilty of such negligence as to preclude a recovery. The deceased had no knowledge as to the construction and use of the derrick. He was performing his duty under the instructions of his employer. He took the ordinary passageway, without any responsibility for the operation of the derrick. The derrick was so constructed, and it was operated in such a way, that the materials with which it was loaded fell upon the deceased. The facts will support the finding of the jury that the employer violated the statute.

The defendants have assisted us with an interesting and complete brief upon the general subject and scope and construction of the statute. In the view that we have taken of the purpose and meaning of the statute, and the public policy it indicates, we cannot say that there is any error in the record requiring a reversal.

AFFIRMED.

LETTON and HAMER, JJ., not sitting.

ROSE, J., dissents.

CHARLES F. DRYDEN, APPELLEE, V. PERU BOTTOM DRAINAGE DISTRICT, APPELLEE; JOHN MULHALL, INTERVENER, APPELLANT.

FILED MAY 13, 1916. No. 18616.

1. **Landlord and Tenant:** LEASE: CONSTRUCTION. A landlord whose contract with his tenant is that he shall be paid a specified number of bushels of corn as rent, and shall have a lien upon the crop to secure the payment of such rent, and shall be notified when the corn on the leased land is to be gathered, and have an opportunity to "sell, store or otherwise handle the same," has an interest in such crop as against the tenant.

2. **Intervention:** ACTION FOR INJURY TO CROPS: RIGHTS OF LESSOR. In an action by the tenant to recover damages to such crop the landlord should be allowed to intervene and recover his proportion of the damage.

3. **Appeal:** REVERSAL: DIRECTIONS. In this case the landlord was not allowed to intervene, and the tenant recovered the entire damage to the crop. The judgment against the intervener is reversed, and the trial court directed to ascertain the landlord's equitable proportion of the judgment so recovered.

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

Lambert & Armstrong, for appellant.

Kelligar & Ferneau, Livingston & Heinke and *R. F. Neal, contra.*

SEDGWICK, J.

The question in this case arose out of *Dryden v. Peru Bottom Drainage District,* p. 837, *post.* Mr. Mulhall filed a petition in intervention in that case in the district court for Otoe county, alleging that he was the owner of the land upon which the damage was done, and that he had leased it for that season to the plaintiff, Dryden, and under the terms of his lease was interested in the crop damaged, and asked to recover his damages of the defendant in that action. Upon motion of the defendant, the district court struck his petition in intervention from the files and refused him relief. From that order of the district court, the intervener appealed.

It appears from the record in the original case that the court allowed the plaintiff to recover all damages to the crops growing upon the land during the season for which that action was brought. The question whether the intervener was entitled to recover depends upon the construction of the lease. The lease provided that the tenant should give the landlord a mortgage upon the crops to secure the performance of the conditions of his lease, and it does not appear that any such mortgage had been given or that the lease had been filed as a lien upon the crops, but the defendant is not in a position to claim the protec-

tion of an innocent purchaser. The question is as to the rights and respective interests of the landlord and tenant in the crops damaged. The lease provided: "And the said second party, in consideration of the leasing of the premises, as above set forth, covenants and agrees with the first party to pay as rent for the same in the manner following, that is to say: 2,000 bushels of corn to be delivered at the elevator at Peru, Nebraska, on or before December 25, 1912." It is contended that this provision does not give the landlord any interest in the crop itself because the tenant might pay the rent in corn produced from any other place as well as from the land leased. The lease, however, contained another provision to the effect that the tenant should notify the landlord before husking the corn, and "that he will not in any event permit said work to be done before the first party is on the premises and prepared to sell, store, or otherwise handle the same." It also provided that not later than June 1 the tenant should secure the "performance of the terms and conditions of this contract and lease, and the payment of the rents reserved hereunder on his part, by calling at the first party's office, at Sioux City, at the office of John Mulhall, at Sioux City, Ia., not later than June 1 of each year, and executing to the first party a chattel mortgage on the crop grown or gathered on said premises." It also contained the provision that the landlord should have a lien upon the crops upon the premises for the payment of the rents. These provisions gave the landlord an interest in the crop as against the tenant, and the court should have apportioned the damages between the landlord and tenant in proportion to their respective interests.

The judgment of the district court is reversed and the cause remanded, with instructions to take further evidence, if necessary, and determine the equitable interest of the landlord in the judgment rendered against the defendant.

REVERSED.

LETTON, J., not sitting.

CHRIS WILKEN ET AL., APPELLANTS, V. CAPITAL FIRE INSURANCE COMPANY, APPELLEE.

FILED MAY 13, 1916. No. 18631.

1. **Principal and Agent:** ACTS OF SUBAGENT: WHEN BINDING ON PRINCIPAL. An agent appointed for a specific duty is not authorized to appoint subagents for the transaction of the business of his principal, but may delegate to a subagent the execution of merely mechanical, clerical, or ministerial acts involving no judgment or discretion, and such acts of the subagent so authorized are regarded as the acts of the agent who authorizes them, and are binding upon the principal.
2. **Insurance:** ACTS OF SUBAGENT: LIABILITY OF INSURER. A duly authorized agent of an insurance company sent an application for insurance in a specified amount upon specified property to a bank to be executed by the owners of the property. The owners of the property signed the application and left it with the bank to be returned to the agent. The bank through some oversight failed to return the application to the agent for more than ten days. In the meantime the property was destroyed by fire, and the insurance company refused to pay the loss solely because the application had not been received and approved and a policy issued before the fire occurred. *Held*, that the delay of the bank in forwarding the application must be considered as the act of the agent, for which the company is responsible, and that the question of the liability of the company for failure to duly act upon the application was for the jury.

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

Hazlett & Jack and *Walter Vasey*, for appellants.

G. E. Hager, contra.

SEDGWICK, J.

The plaintiffs bought of Nichols & Shepard Company, at its office in Lincoln, a threshing machine outfit. The machine was shipped to them at Adams, Nebraska, and received there about the 23d of June, 1913. The agreement was that the machine should be paid for by a note

signed by the plaintiffs. A note for their signature, with other papers, was sent to the Farmers State Bank of Adams by Miss Sherman, a bookkeeper in the office of Nichols & Shepard Company, at Lincoln. With these papers she sent them an application for insurance upon the property in the defendant company. The plaintiffs signed the application for insurance, and also executed a note for the premium, and left the papers at the bank to be forwarded. Afterwards the property was destroyed by fire, and the company refused to pay the loss, on the ground that the application had not been approved and no policy had been issued. The plaintiffs brought this action in the district court for Gage county, alleging that they were damaged by the negligence of the defendant company in not acting upon the application and issuing the policy. The trial court instructed the jury to find a verdict for the defendant, and the plaintiffs have appealed.

It appears that Miss Sherman, the bookkeeper of the Nichols & Shepard Company, was the authorized agent of the defendant insurance company to take applications for insurance upon threshing machines sold by the Nichols & Shepard Company, and to forward those applications to the defendant insurance company. The papers with the application for insurance were received at the bank about the 23d day of June, 1913, and very soon thereafter all of the plaintiffs, who were all of the purchasers of the threshing machine interested in the insurance, except two, signed the application. The evidence fairly shows that these two also signed the application as early as the 15th of July. The fire occurred on the 26th of July, and the bank, being notified of the destruction of the property by fire, immediately forwarded the application to Miss Sherman, the company's agent. She filled the blanks in the application correctly describing the property, and also filled other blanks, and forwarded the application to the defendant company. The company returned the application, denying any liability because the application had not been approved and no policy had been issued. It is not

contended that there was any defect in the application, or that the blanks had not been filled and the application completed by Miss Sherman, as contemplated by the parties. It is insisted on behalf of the defendant company that the bank was not its agent, and that no liability existed on the part of the company because of the negligence of the bank. It is undoubtedly true that the company's agent was not authorized to appoint a subagent for the company for the transaction of the company's business, but as is said in 31 Cyc. 1428: "Having exercised his discretion and determined upon the propriety of an act, an agent may delegate to a subagent the execution of merely mechanical, clerical, or ministerial acts involving no judgment or discretion; and the acts of such a subagent, to whom such power and authority have been delegated by the agent, are regarded as the acts of the agent himself, and are therefore as such binding on the principal." It is clear that the delay of the bank in returning the application after it had been duly executed must be considered as though the delay had been by Miss Sherman herself after she had received the application from the bank. The evidence shows that the plaintiffs were responsible men. Their note was good, and the risk was a desirable one for the company. The defendant company declined liability solely upon the ground that the application had not been approved and the policy issued, and there was no attempt to show that the risk was an undesirable one or would not have been accepted if the application had been duly received.

A similar case was recently decided by the supreme court of Iowa. That court in quite an exhaustive opinion held the insurance company liable under very similar conditions. In that case the agent of the insurance company told the applicant for insurance that the notes given for the insurance would be returned if the application was rejected. The applicant then called upon the company's physician and was examined, and was informed that he had passed a satisfactory examination. The company's agent had been in the habit of calling on the physician for the

application with the examination, and the physician accordingly left these papers on his desk for the agent; but the agent neglected to call for the papers until the physician learned that the applicant had been drowned, whereupon the physician mailed the application to the company. The court said: "The association was bound by the acts of its agents and chargeable with any consequences that resulted from the failure of Rogers (the agent) to promptly forward the application and physician's report. In other words, if the association was under a duty to promptly act on the application and notify Duffy (the applicant), as we think it was, it cannot shield itself from the responsibility by the fact that the application and medical report had not been received by it and therefore it could not act. See *Northwestern Mutual Life Ins. Co. v. Neafus,* 145 Ky. 563. The possession of these by its agent had the same effect as if they were in the possession of the association at its home office. Assuming, then, that the application and medical report had been promptly forwarded by the agent, and that the application was not accepted or rejected within the time intervening prior to his death, it seems manifest that whether this was an unreasonable delay was for the jury to determine, and we so hold." The court then considered the question whether it was negligence on the part of the applicant in not seeing that the application was duly returned, and said: "The applicant had done all he could or was required to do in the matter. He had the right to assume that the application would be forwarded immediately after the medical examination and was so assured. * * * Moreover, about all he could have done was to withdraw his application and apply to another insurer for a policy, and this, one who has applied to a company of his choice would quite naturally hesitate to do. Under the circumstances, it cannot be said, as a matter of law, that the deceased was at fault in not stirring defendant to action by inquiry as to the cause of delay or in not withdrawing his application. At the most, this also was an issue appropriate for the determination of the jury.

* * * We think the jury might have found that, in all reasonable probability, had the association passed upon the application, it would have been accepted. * * * The association was actively soliciting members, and it seems to us that the record leaves little, if any, doubt but that, had the association ever passed on the risk, it would have been accepted and the certificate issued." *Duffie v. Bankers Life Ass'n,* 160 Ia. 19. The court then quoted from *Continental Ins. Co. v. Haynes,* 10 Ky. Law Rep. 276, as follows: "It is to be assumed that the company will accept the risk if advantageous to it, which it must be, if fairly and honestly contracted for, because that is the business in which it is engaged, and that is the object for which its agent acted; and, therefore, to allow it, under the reservation of the right to approve, to reject simply because a loss has occurred, would destroy the mutuality of the contract and inflict upon the party the misfortune he had provided against." In *St. Paul Fire & Marine Ins. Co. v. Kelley,* 2 Neb. (Unof.) 720, the action was upon an alleged contract of insurance. The agent had accepted payment of premium at less than the regular rate and the application was returned for that reason. The loss occurred before the required premium was received by the company. It does not appear whether the applicant had made the additional payment of premium. There was no question of negligence or wilful delay of the company in acting upon the application. The case is not in point.

The trial court, as a reason for the decision, stated upon the record that "Mr. Abbott (officer of the bank) had all his dealings with Nichols & Shepard Company until after the fire; he didn't know anything about this woman (the agent) at all until after the fire, and, as far as I can see, this woman did not have anything to do with this thing until after the fire." This refers to the fact that the letter in which the application was sent to the bank by Miss Sherman included also the papers between plaintiffs and the Nichols & Shepard Company and purported to be written by the latter named company. This reason does not appear

to us to be controlling. It is not denied that Miss Sherman was the authorized agent of the defendant company. Indeed, it was so alleged in the defendant's answer. As such agent she inclosed the application in behalf of the defendant company. She entrusted to the bank a mere mechanical duty that any one could have performed for her, and the conduct of the bank in performing that duty must be considered as the act of Miss Sherman as the company's agent. The issues should have been submitted to the jury with proper instructions.

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

REVERSED.

LETTON, ROSE and FAWCETT, JJ., dissent.

SUPERIOR NATIONAL BANK, APPELLANT, V. NATIONAL BANK OF COMMERCE, APPELLEE.

FILED MAY 13, 1916. No. 18635.

1. **Banks and Banking:** CHECKS: ASSIGNMENT OF FUNDS. Section 188 of the negotiable instruments act (Laws 1905, ch. 83, Rev. St. 1913, sec. 5506) changes the law of this state as it was formerly construed. By that section a check upon a bank does not of itself operate as an assignment of the funds of the drawer. It is the acceptance or certification of the check by the bank on which it is drawn that operates as a transfer of the funds.

2. ———: ———: ACCEPTANCE. By section 188 of the act the bank upon which a check is drawn is not liable to the holder of the check "unless and until it accepts or certifies the check," and such acceptance or certification must be in writing.

3. ———: ———: LIABILITY OF DRAWEE. The bank upon which a check is drawn will not become liable in equity to the holder thereof by stating orally to such holder that the check is good and will be paid on presentation, in the absence of fraud or deception on its part.

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

Field, Ricketts & Ricketts, for appellant.

Hainer & Craft, contra.

SEDGWICK, J.

On the 8th day of January, 1914, the First National Bank of Superior, in the regular course of business, executed and delivered to the Superior National Bank its check on the National Bank of Commerce of Lincoln, in the following form:

"First National Bank. No. 5588.
76-137 Superior, Neb., Jan. 8, 1914.
Pay to the order of Sup. Nat. Bank $10,856.07 ten thousand eight hundred fifty-six and 07/100 dollars, payable if desired in Chicago or New York exchange at par.
To National Bank of Commerce, Lincoln, Neb. 43-3.
"Ila L. Adams, A. Cashier."

On that same evening the First National Bank of Superior closed its doors. On the next day the National Bank of Commerce of Lincoln refused payment of the check on presentation, and this action was brought by the Superior National Bank to recover the amount of the check and interest. After the parties introduced their evidence, the court instructed the jury to find a verdict for the defendant, and the plaintiff has appealed.

The briefs of the respective parties are comprehensive and interesting; but, so far as we can see, the result of this case depends upon the construction of certain sections of our negotiable instruments law. Laws 1905, ch. 83. In an attempt to make the law of negotiable instruments uniform throughout the United States, nearly all of the states have now enacted this statute. In furtherance of this attempt at uniformity, the courts, so far, have aimed at a uniform construction of its provisions. We think that certain sections of this act and the construction that has been put upon them by the courts of other states simplify

this case and make it unnecessary to discuss all of the various questions so interestingly presented.

As we have already said, when this check was presented to this defendant bank, the bank refused to accept or certify the same, and insists now that section 188 of the act controls, and that under this section the defendant is not liable upon this check. That section is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." It appears that soon after the check was received by the plaintiff bank an officer of the bank called the defendant bank by telephone and inquired whether the check was good. There is so much conflict in the evidence as to the exact language used by either party in this telephone communication that the plaintiff rightly insists that, if the liability of the defendant depends upon the construction to be given to this conflicting evidence, that question should have been submitted to the jury.

The question remains whether the liability of the defendant bank could be fixed by notification or conversation over the telephone. The plaintiff contends that there is an inherent difference between the acceptance and the certification of a check by the bank upon which it is drawn, and that, while the acceptance must be in writing, the certification may be oral. The plaintiff also insists that, even if the certification must be in writing, and although the statute expressly provides that the "check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank," still the delivery of this check to the plaintiff bank for full consideration and the oral statement by defendant that "the check is good," made to plaintiff while the plaintiff still had the option to return the check and to refuse to receive it from the drawer in settlement of their accounts, would operate as an equitable assignment of the funds then in the bank to the credit of the drawer of the check. In some respects there may be a

difference between an acceptance and the certification of a check, but is there any difference that affects the question presented in this case? Section 188 changes the law in this state as it was formerly construed, and that section has been considered and construed in *Hentz v. National City Bank*, 159 App. Div. (N. Y.) 743; *Rambo v. First State Bank*, 88 Kan. 257; *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753; *Van Buskirk v. State Bank*, 35 Colo. 142; *Tibby Bros. Glass Co. v. Farmers & Mechanics Bank*, 220 Pa. St. 1. "Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance." Laws 1905, ch. 83, sec. 186. "Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon." Section 187. The certification of the check at common law was by indorsement thereon in writing, and by the express provision of the statute itself is "equivalent to an acceptance." In the provision that the bank shall not be liable to the holder "unless and until it accepts or certifies the check," the common law method of certifying a check is clearly intended. The evidence on the part of the plaintiff is that in the conversation over the telephone the officer of the defendant bank said that "the draft was good and they knew their business, if I would send the item to him they would give us Chicago or New York exchange," while that officer himself testified: "I told him it was good now; * * * there was no reference to the payment of the draft at all." This discrepancy illustrates the necessity of a definite provision so that the liability upon negotiable paper can be fixed beyond the uncertainty of misunderstanding communications by telephone, or indeed any oral communications. The plain intention of the statute is that the bank upon which the check is drawn shall not be liable upon the check unless the evidence of the acceptance or certification of the check is reduced to writing.

If this communication by telephone could be construed with the other evidence as operating as an equitable assignment of the funds in the bank, the purpose of the stat-

ute would be thwarted. There is, of course, no doubt that as between the maker of the check and the drawee an oral agreement transferring the funds of the maker of the check in the bank would be binding upon the parties to that agreement. In the Kansas case above cited it was expressly held: "A bank is not liable on equitable grounds to the holder for the amount of an unaccepted check which it has refused to pay because the holder acquired the check on the oral representation of the bank that the drawer had funds on deposit to meet the check, that the check was good, and that the holder might safely take it in payment for goods sold the drawer."

As we understand the statute, the judgment of the district court is right, and is

AFFIRMED.

FAWCETT, J., not sitting.

CHARLES F. DRYDEN, APPELLEE, V. PERU BOTTOM DRAINAGE DISTRICT, APPELLANT.

FILED MAY 13, 1916. No. 18657.

1. **Trespass:** RIGHT OF ACTION. One in possession of real estate may maintain an action for trespass thereon. Casting water upon the lands of another is a trespass upon real estate.

2. **Venue:** ACTION FOR TRESPASS ON REALTY. Actions for damage for trespass upon real estate must be brought "in the county where such real estate or some part thereof is situated." Rev. St. 1913, sec. 7612.

3. **Waters:** SURFACE WATERS: DIVERSION: LIABILITY. A drainage district that is guilty of negligence in the construction of its ditch, and by reason of such negligence casts the surface water which it has collected upon the lands of another, is liable for damage which is caused by such negligence.

4. ———: ———: ———: ———. It is the duty of a drainage district to so construct its ditch that it will carry off the ordinary

surface water which is collected in such ditch, and if it negligently fails to do so, and allows the water so collected by it to be cast upon the lands of another, it will be liable for damages caused by such negligence.

5. ———: ———: ———: ———. In such case the fact that the drainage district employed a competent engineer, and constructed its ditch in accordance with the plans of such engineer, will not constitute a defense in an action for damages caused by the improper construction of the ditch.

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

Paul Jessen, Kelligar & Ferneau and *R. F. Neal*, for appellant.

Livingston & Heinke, contra.

SEDGWICK, J.

The plaintiff leased a farm in Otoe county from one Mulhall for the year 1912, and took possession and farmed the land for that season. He brought this action in the district court for Otoe county against the defendant drainage district to recover damages caused by the defendant's negligence, as he alleged, in the construction of their drainage ditch, whereby the water was negligently allowed to overflow the land and damage the plaintiff's corn and his interest in the land for that season under the lease. He recovered a judgment, and the defendant has appealed.

The defendant insists that the district court for Otoe county had no jurisdiction of the action because the defendant corporation was situated in Nemaha county with its office and principal place of business in Nemaha county, and no service was had upon the defendant, or could be had, in Otoe county, where the action was brought. Section 7612, Rev. St. 1913, provides: "All actions to recover damages for any trespass upon or any injury to real estate shall be brought only in the county where such real estate or some part thereof is situated." Casting water upon the lands of another is trespass. 1 R. C. L. p. 374, sec. 7. The gist of an action for trespass to real property is injury to

plaintiff's possession. One in possession of real estate may maintain an action for trespass thereon. 4 Sutherland, Damages (3d ed.) sec. 1009. This, then, was an action to recover damages for trespass upon real estate, and could only be brought in the county where the land is situated.

Upon the second proposition the defendant urges two reasons for reversal. It is first contended that the plaintiff failed to establish a case because he did not allege and prove "that there was still unexpended benefits out of which the alleged damage of the plaintiff could be paid." A drainage district under this statute is organized by and for the benefit of the parties owning the lands to be drained. It is presumed to benefit their lands sufficiently to pay for all investments necessary, including all expenses and liabilities. If it fails to do so and proves to be a losing undertaking, the loss falls upon the owners of the lands supposed to be benefited thereby. But this consideration will not justify them in negligently injuring their neighbors and others in the construction of their ditches. If they are not benefited to the full amount of their investment, and their own negligence causes damage, there seems to be no reason for requiring those who were damaged to suffer the loss, rather than all of those who are responsible for the negligence which caused the loss.

The second reason urged is that the court instructed the jury that it was the duty of the defendant drainage district "to employ a competent and skilled engineer to lay out and plan its system of drainage and reclamation, and to see that such engineer's skilled knowledge was used in the construction of the new channel for the waters of Camp creek, and to construct such channel or ditch of sufficient size and capacity to carry and accommodate the ordinary flood waters of Camp creek and its tributaries. And if you find from a preponderance of all of the evidence that the ditch so constructed was insufficient to accommodate the ordinary flood waters of Camp creek, then the failure of the defendant to construct said ditch of sufficient size for that purpose would constitute negligence." The court refused

the request of the defendant to instruct the jury that, "if you find from the evidence in this case that the defendant employed competent and skilled civil engineers to design and plan the channel to carry the waters of Camp creek, and that same was constructed according to such plans, then the defendant is not guilty of negligence in the construction of such new channel, and would not be liable in this action for negligent construction." It is said: "An engineer who exercises the care, skill, and ability usually exercised by the members of his profession is not liable in damages for an honest error in judgment." *County of Mille Lacs v. Kennedy,* 129 Minn. 210. That case seems to be relied upon by defendant, but it is not in point. The defendant constructed this ditch for the benefit of its incorporators and stockholders, and, in constructing it, it is bound to use reasonable and ordinary care to avoid injuring the property of others. According to the allegations of the petition it conducted the ordinary surface water into the vicinity of the defendant's land, and negligently failed to provide a sufficient ditch and embankments to carry away the waters so conducted, but allowed them to escape upon the plaintiff's land to his damage. By this means it collected the surface waters and cast them upon the lands of the plaintiff. No individual or corporation, public or private, could be guilty of such negligence without liability for the damage occasioned thereby.

The judgment of the district court is

AFFIRMED.

LUCIA DILLENBACH, APPELLEE, V. THOMAS KERR ET AL., APPELLANTS.

FILED MAY 13, 1916. No. 18872.

1. **Appeal:** QUESTIONS CONSIDERED. This court upon appeal will ordinarily consider only the questions presented in the briefs.

2. **Deeds:** INTEREST CONVEYED. One who joins with the owner of the fee in the execution of a deed cannot afterwards establish a lien on the land on the ground that the grantee in the deed did not pay the full value of the land and paid nothing except to the owner of the fee.

3. ———: ———. The grantee in a deed cannot, as against one in possession when the deed was executed, urge any greater right under his deed than the grantor had.

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

John Snider and *Charles E. Bruckman,* for appellants.

J. W. James, contra.

SEDGWICK, J.

The plaintiff began this action in the district court for Adams county to establish and quiet title in certain real estate in that county and to redeem from alleged liens. The defendant Thomas Kerr, by his guardian William M. Lowman, alleged title in himself, and denied that plaintiff has any right or interest in the real estate, and asked to have his title quieted.

It is conceded that Daniel Dillenbach, the owner of a certain tract of land in Adams county, conveyed it, his wife joining in the deed, to his son Daniel S. Dillenbach, subject to two mortgages. In the deed the grantee agreed to board and clothe the grantors during their respective lives, and agreed that they should have the use and control of the dwelling-house and other improvements on the land. Afterwards the land was sold upon foreclosure of the two mortgages, and was purchased by the mortgagees William Kerr and one Clark, the owner of one of the foreclosed mortgages. The sale upon foreclosure was not confirmed, and Daniel S. Dillenbach, the holder of the legal title, conveyed the land to the said William Kerr. The plaintiff claims the land under a subsequent deed from Daniel S. Dillenbach. William Kerr conveyed it to his son, the defendant Thomas Kerr. The trial court found "against the

plaintiff in favor of the defendant, so far as the plaintiff seeks to declare, or to be declared the owner and to be decreed as entitled to reclaim" the land. "That plaintiff is entitled to an accounting as to the value of the interest acquired by William Kerr, on September 17, 1898, and not then incumbered; * * * that as a condition precedent to defendant having his title quieted as against plaintiff, he should pay the value of said interest, which is found by the court to be $2,950." From this finding and decree thereon in plaintiff's favor, the defendant has appealed.

The plaintiff makes no contention in the brief that the decree is wrong as against her, and it is not necessary to inquire whether plaintiff has regularly appealed therefrom. The plaintiff contends that the finding and decree requiring defendant to pay plaintiff $2,950 as a condition to have his title quieted is supported by the pleadings and evidence. The contention seems to be that William Kerr by his deed took only the interest of Daniel S. Dillenbach, and that the interest of Daniel Dillenbach and his wife which was reserved in their deed to Daniel S. Dillenbach was never acquired by William Kerr, and was therefore not conveyed in his deed to the defendant Thomas Kerr. The plaintiff has asked leave to amend the petition in this court so as to allege that Daniel Dillenbach and his wife joined in the deed from Daniel S. Dillenbach to William Kerr, and concedes that the evidence shows that to be a fact. It is, however, argued that the land was then, more than 15 years ago, worth more than the amount William Kerr paid therefor, and that no consideration therefor was paid for the right and interest of Daniel Dillenbach and his wife. It is admitted that William Kerr took possession of the land upon receiving his deed, and that Daniel S. Dillenbach and his wife paid him rent therefor for several years, and "at the expiration of such time, they removed from the land, upon the demand of the Kerrs." As the pleadings did not allege that Daniel Dillenbach and wife joined in the deed to William Kerr, the trial court apparently did not consider that fact. There was not a failure of consid-

eration for the deed. William Kerr paid a consideration for his deed, and all grantors signed the deed without reservation. It would make no difference to which one of the grantors the consideration was paid, it would be a consideration for the deed as executed, so far as the grantee was concerned. The deed conveyed the whole interest of the grantors. The question whether the grantee took the deed as security only was determined against the plaintiff by the trial court and is not now presented.

The judgment of the district court is modified so as to quiet the title of defendant absolutely, and, as modified, is affirmed. Each party will pay his own costs in this court.

AFFIRMED AS MODIFIED.

LETTON, J., concurs in the conclusion.

ROSE and HAMER, JJ., not sitting.

ANNA M. BUNTING, APPELLEE, V. OAK CREEK DRAINAGE DISTRICT, APPELLANT.

FILED MAY 13, 1916. No. 18874.

1. **Corporations:** LIABILITY FOR NEGLIGENCE. Local corporations created by request or consent of the persons residing in the territory incorporated and principally for their benefit, although they are clothed with powers of a public nature, are liable for damages caused by their negligence.

2. **Drainage Districts:** LIABILITY FOR NEGLIGENCE. A drainage district organized and acting under article V, ch. 19, Rev. St. 1913, is liable for damages caused by its negligence in the construction of its works.

3. **Eminent Domain.** Condemnation by right of eminent domain is not allowed except so far as it is necessary for the proper construction and use of the improvement for which it is taken.

4. ———: DAMAGES. If the application for condemnation specifies the desired taking and use of certain real estate and shows that it is necessary for the improvement contemplated, all damages caused by such taking properly exercised will be included in the damages allowed in such proceedings, which will be a bar to any further claims for such damage.

5. ———: DAMAGES FROM NEGLIGENT CONSTRUCTION. In such case damages caused by the negligent construction of the improvement are not contemplated in the condemnation proceedings and are not barred thereby.

6. ———: ———: ACCRUAL OF RIGHT OF ACTION. Damages caused unnecessarily by negligence and improper construction of the improvement cannot be anticipated, and a right of action accrues therefor when the damage occurs.

7. **Appeal:** PLEADING: IRRELEVANT MATTER. If a petition states one cause of action for damages to real estate, and also contains allegations as to other damages to the same real estate of a similar nature which are not sufficient of themselves to justify a recovery thereon, overruling a motion to require the plaintiff to separately state and number his causes of action will not be sufficient ground of reversal, when no motion is made to strike out such allegations, and evidence of both injuries to the real estate is received without objection on that ground. A plaintiff cannot be compelled to state a cause of action which he has failed to plead.

8. ———: INSTRUCTION AS TO MEASURE OF DAMAGES: HARMLESS ERROR. An instruction upon the measure of damages which follows and properly reflects the evidence admitted without objection will not be held so prejudicially erroneous as to require a reversal.

9. ———: MISCONDUCT OF JURY: FAILURE TO OBJECT. Alleged misconduct of the jury must be called to the attention of the trial court at the earliest opportunity. A party who sees the matters supposed to be misconduct and makes no complaint until after the verdict is not entitled to a reversal because of such supposed misconduct. He cannot so speculate upon his chance of a favorable verdict.

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

T. F. A. Williams, for appellant.

B. F. Good, A. M. Bunting and *A. W. Richardson, contra.*

W. J. Courtright, amicus curiæ.

SEDGWICK, J.

The defendant drainage district constructed a channel across a part of the lands of the plaintiff to carry the water of Oak creek in a more direct line. The plaintiff began this action in the district court for Lancaster county to recover damages to her land caused, as she alleged, by the negligence of the defendant in the construction of the channel and in the construction of a bridge over the channel. The trial in the district court resulted in a verdict and judgment in favor of the plaintiff, and the defendant has appealed.

The first important, and perhaps controlling, contention of the defendant is that a drainage district is a public corporation, and is not liable to an action for negligence. Chapter 19, Rev. St. 1913, is devoted to drains and drainage. It contains seven different articles: "I. Drainage by county authorities. II. Drainage by incorporated companies. III. Drainage for agriculture or sanitary purposes by individual landowners. IV. Drainage districts organized by proceedings in district court. V. Drainage districts organized by vote of landowners. VI. Natural lakes. VII. Sanitary drainage districts in cities." The pleadings in this case do not plainly show under which of these several articles this district is organized. The case apparently was tried by all parties on the theory that it was immaterial under which one of the several classes of drainage districts the defendant belonged. At the close of the trial the jury were excused, and the defendant offered evidence tending to show that the defendant district was organized under the act of 1907, Laws 1907, ch. 153, as amended. This evidence was objected to by the plaintiff on the ground that it was immaterial, "waiving, however, the production of the county clerk to prove the original incorporation," but as the evidence is, we think, material and no other ground of objection was made, it may be considered that the defendant was organized under that act, which is article V, ch. 19, Rev. St. 1913—"Drainage dis-

tricts organized by vote of landowners." In 2 Farnham, Waters and Water Rights, sec. 256, it is said: "The same principle which applies to a county applies to a drainage district. Unless the statute gives a right of action against it, no suit can be brought against it." And this statement and similar statements of other authors are relied upon by the defendant as establishing the doctrine that under no circumstance can a drainage district be liable for negligence. In the same section of his work the author quoted from plainly shows that the question of liability for negligence depends upon the statute under which it is organized; that is, upon the nature and character of the organization. He says: "So, whenever it is seen that the municipality has committed a wrongful act in turning water or sewage onto abutting property, there is no hesitation in holding that it is liable for the injury. Municipal corporations are by statute generally made liable for their acts of negligence the same as private individuals. When the question arises, however, as to the liability of a county or drainage district, a different principle applies. * * * Therefore, in determining whether or not they are liable for their negligent acts, attention must be given to the provisions of the statute." The author devotes something over 300 pages to the discussion of drainage, and his discussion shows that in the statement quoted he is considering drainage districts formed as counties are, by legislative enactment for governmental purposes. The state is a sovereign and cannot be sued without its consent. Being a sovereign, it is presumed that it will do justice to its citizens without compulsion, and even the sovereign itself under our constitution cannot take or damage private property without compensation. It has frequently been decided in this court that counties in performing the duties that are imposed upon them by the law are not ordinarily liable for the negligence of their officers, unless the statute under which they are acting so provides. It is not necessary in this case to consider under what circumstances a county might be

liable when proceeding under article I, ch. 19, Rev. St. 1913.

One of the earlier cases holding that a county is not liable for damages caused by the negligence of its officers is *Wood v. Colfax County,* 10 Neb. 552, in which it was held: "A county is not liable in damages at common law, or under the Revised Statutes of 1866, for injuries caused by the breaking down of a public bridge, which was caused by the negligence of the county commissioners." In the opinion by Chief Justice Maxwell it was said: "If the negligence complained of in the petition and consequent injury to the plaintiff had been occasioned by a natural person or a municipal corporation proper, the right to recover would be unquestioned. But are counties municipal corporations? Municipal corporations may be defined to be bodies politic and corporate, created by law for the purpose, primarily, of regulating and administering the local and internal affairs of towns, cities and villages. 1 Dillon, Municipal Corporations (3d ed.) sec. 9. Such corporations are created principally for the benefit and convenience of the inhabitants composing the corporation, although they are important auxiliaries of the state in the administration of the law. The charters conferring powers, prescribing duties, and imposing burdens must in some way receive the assent of those to be governed by their provisions, and they thus accept the benefits and agree to perform the duties imposed upon them. * * * A county is a mere local subdivision of the state, created by it without the request or consent of the people residing therein."

Drainage districts organized by vote of landowners under article V are voluntary corporations principally for the benefit of the owners of the land lying in the district incorporated. In determining whether such districts shall be organized, any person may cast one vote "for each acre of land or fraction thereof and each platted lot which he may own or have easement in." Rev. St. 1913, sec. 1872. A majority of the votes is necessary for the formation of the district. The defendant cites *Heffner v. Cass and Mor-*

gan Counties, 193 Ill. 439, as holding that a drainage district is not liable for the negligence of its officers. In a more recent case, *Bradbury v. Vandalia Levee and Drainage District,* 236 Ill. 36, 47, 19 L. R. A. n. s. 991, that court referred to a still earlier case as holding that such districts "were to be regarded as mere public involuntary quasi-corporations, and therefore not liable to respond in damages to an individual injured by the negligent or wrongful act of their officers, agents, or servants." The court then referred to the *Heffner* case as holding the same doctrine, and said: "It is quite evident that it needs some revision or limitation. The ground of distinction between corporations which are liable for the negligent or wrongful act of their agents or servants and those which are not is that public involuntary quasi-corporations are mere political or civil divisions of the state created by general laws to aid in the general administration of the government and are not so liable, while those which are liable have privileges conferred upon them at their request, which are a consideration for the duties imposed upon them. *Kinnare v. Chicago,* 171 Ill. 332. Neither the state, nor any part of it, is divided by the legislature into drainage districts, nor do they have public duties thrust upon them without their consent. The organization of a drainage district is for the sole and exclusive benefit of the territory within the district (*Commissioners of Union Drainage District v. Highway Commissioners,* 220 Ill. 176), and the lands within the district are assessed to pay the whole cost on the theory that they alone are benefited. * * * The organization is not different, in principle, from the organization of cities, villages or towns under a general law, on a petition of a certain proportion of the legal voters within the territory. It is correct to say that a drainage district is a quasi-corporation if the act under which it is organized does not make it a corporation in fact; but it is not created for political purposes or for the administration of civil government."

The district chooses its own board of directors and its work is done under its direction and supervision. It is given certain additional powers and privileges because the formation of the district "will be for the public health, convenience and welfare." It is given the power of eminent domain as are railroads and ordinary municipal corporations. In the conduct of their affairs they must not negligently injure others. If they do, they are liable for such injuries as cities and villages are.

A brief has been filed by a "friend of the court" in which it is vigorously insisted that such damages as are here alleged could be recovered only in the original condemnation proceedings in which the drainage district obtained the right of way. The brief says: "This was not a question of negligence in construction, but a question of deliberate plan. The district therefore actually took for drainage purposes the right of way involved in the ditch and actually took the lake for the purpose of constituting a channel of the new creek and for the purpose of furnishing a spillway temporarily until the outlet drained the water away. This was a part of the plans." The position would be more intelligible if it was not also contended that a drainage district is not liable for negligence. We do not see why the same rule that is applied to other corporations which exercise the right of eminent domain is not applicable here. Condemnation is not allowed, except so far as it is necessary for the proper construction and use of the work. If the drainage district had attempted to condemn this lake as a "spillway," and had definitely disclosed that purpose, and the proposed manner of constructing and using the same, and, upon objection by the parties affected, had made it appear to be a necessary and proper construction of the improvement, the district would be charged in the condemnation proceedings with all damages caused by the proper construction of the work. Negligence would not be presumed and anticipated. Persons injured by a necessary and proper construction of the work must be paid their

damages before the work is done. Damages caused unnecessarily by negligence and improper construction of the improvement cannot be anticipated, and a right of action accrues therefor when the damage occurs.

It is alleged that the defendant "constructed a dam in the regular channel, and a ditch or artificial channel across said bend, designed to divert the flow of water from its natural channel in Oak creek into the artificial channel, as aforesaid. * * * That in the construction of said artificial channel the defendant was guilty of negligence in this, to wit, in excavating a channel only ten (10) feet in width at the bottom instead of twenty (20) feet in width, and which channel was insufficient in width and depth to retain and imprison in its banks the flood waters that ordinarily occur and which theretofore flowed in the natural channel of Oak creek. * * * The defendant drainage district was also guilty of negligence in constructing a pile bridge across the said artificial channel of Oak creek where it crosses the public road about 300 feet southeast of the lake bed, through which said channel runs. That, instead of constructing a single-span bridge with stone abutments on each side of said channel, the said district constructed a three-span bridge, with piles driven thereunder for support of said spans in such manner and so closely together that the said piling so obstructed the channel that trees and other debris which flowed in said channel during the flood of May, 1913, formed a barrier across the channel, thereby raising the height of water in the channel, backing it up to the opening in the dike at the lake bed, causing it to spread out upon plaintiff's land, and thereby augmenting and increasing the flooding thereof in the month of May, 1913, as aforesaid."

There is no attempt on the part of defendant to justify these acts as necessary in the proper construction of the work. The petition contains unnecessary, and perhaps improper, allegations; but, considering the manner of trying the case by both parties, the defendant is not in a position

to insist that damages alleged in the petition must be regarded as compensated in the condemnation proceeding.

The defendant filed a motion to require the plaintiff to separately state and number her causes of action, and to strike out certain allegations of the petition. The court sustained the motion to strike out parts of the petition, but overruled the motion to require plaintiff to separately state and number her causes of action. The defendant complains of this refusal of the court. The petition alleges somewhat in detail damages alleged to have been caused in the months of March and April, 1912, and then alleges "that, in consequence of the negligence of the defendant, as aforesaid, the plaintiff's land to the extent of twenty-five (25) acres was subjected to a second overflow in the month of May, 1912, and a third overflow in May, 1913, and a fourth flood in March, 1914, and there was deposited thereon a large additional amount of debris, together with a large quantity of water, which remained thereon for several days in consequence of defendant's negligence in permitting such flood waters to escape from such artificial channel." This latter allegation hardly amounts to an allegation of a separate cause of action. It alleges no damages. It would no doubt have been stricken out as irrelevant if motion had been made for that relief. This is also true of other similar allegations.

"Where by the negligent construction of a railway embankment and ditches, surface water is discharged upon the land of an adjoining proprietor and his crops thereby injured, such party's cause of action accrues at the date of the injury, and not at the date of the construction of the embankment and ditches. * * * The measure of damages for the destruction of a growing crop is the value thereof in the condition in which it exists at the time of its destruction." *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745. These principles apply equally to injuries to the land itself.

The court limited plaintiff's recovery to damages caused to the land by the several floodings thereof in different

years, and stated that the measure of plaintiff's damages was "the fair market value of plaintiff's land before it was flooded in March, 1912, and the fair market value after it was flooded in March, 1914."

When the evidence was offered by plaintiff, the witness was asked: "Now, give the fair and reasonable market value of this land before it was flooded in 1912, and after the last flood of March, 1914." The defendant objected "because it does not exclude from the witness' consideration all of the elements that entered into the award made by the jury of condemnation." No objection was made upon the ground now insisted upon. The witness answered the question, showing a difference in value of $9 or $10 an acre, and added: "There is a depreciation, I would say, from $7 to $8 (an acre) in the value of the land." If this depreciation was not caused by the negligence complained of, the defendant might show other cause, if any. After this evidence was admitted without objection, both parties considering at the time that this was the proper method of proving the injury to the land, and defendant objecting only upon the ground that the witness was not duly considering the award upon condemnation, the defendant ought not now to have a reversal because the question of damages was submitted to the jury as it was proved. There was no other basis in the evidence upon which the measure of damages could be submitted. The defendant ought not to defeat the case by such methods.

Complaint is made of the conduct of the jury in viewing the premises under the order of the court. The defendant's attorney accompanied the jury, and knew at the time of the matter of which he is now complaining, but made no objection until after the verdict. There is no evidence that the verdict was affected by the irregularity complained of, and for these reasons this objection must be overruled.

The judgment of the district court is

AFFIRMED.

FREDERICK SPIER, APPELLEE, V. HENRY SPIER ET AL., APPELLANTS.

FILED MAY 13, 1916. No. 18920.

1. **Wills**: EXECUTION: COMPETENCY OF WITNESS. It will not be held that a will was improperly executed simply because one of the witnesses to its execution was less than 14 years of age. If otherwise competent, such witness may testify concerning the execution of a will the same as to any other fact.

2. ———: VALIDITY: TESTAMENTARY CAPACITY. Where the testatrix, although she is aged, knows the amount and character of her property and who are naturally the objects of her bounty, and has a full understanding of the persons and purposes to whom she makes devises and bequests, she will be regarded as possessing testamentary capacity, and being competent to make a will.

3. ———: ———: UNDUE INFLUENCE: BURDEN OF PROOF. The burden is upon the contestants to establish undue influence exercised upon the testatrix, and in so doing it is not enough to show that the circumstances attending the execution of the will are consistent with the hypothesis that it may have been obtained by undue influence; it must be shown that such circumstances are inconsistent with a contrary hypothesis.

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

S. P. Davidson, for appellants.

Frank A. Barton and *J. C. Dort, contra.*

HAMER, J.

Application was made to the county court of Pawnee county for the probate of the will of Sophie Spier. The proponent, Frederick Spier, represented to the court that Sophie Spier died in Pawnee county on the 25th day of July, 1913, leaving a last will and testament in which Charles A. Schappel was named as the executor thereof. This will was filed on the 9th day of August, 1913, in the county court of said county, and relates to both real and

personal estate. Sophie Spier, immediately prior to her death, was a resident and inhabitant of Pawnee county, and was possessed of real estate and personal property therein; the real estate being of the estimated value of $9,000, and the personal property of the value of $275. The decedent left surviving her Carl Spier, her son, residing in Nebraska City, Henry Spier, William Spier, August Spier, Frederick Spier, and Louis Spier, all residing in Pawnee county, Nebraska, and Fredericka Frey of Mount Clare, Nebraska, her only daughter. It is alleged that the will was executed on the 19th day of July, 1910, and that at the time of its execution the said Sophie Spier was of lawful age, of sound mind and memory and not under any restraint, and was competent to devise and bequeath said real estate and personal property; that a decree was duly made in the said county court which admitted the said will to probate, and appointed Charles A. Schappel executor of the said will and fixed the executor's bond in the sum of $1,000; that on the same day said Schappel presented his bond as executor in the sum of $1,000, with Frederick Spier and Louis Spier as sureties, and said bond was approved by the county judge of said county, and letters testamentary were thereupon immediately issued to the said Schappel as executor of said last will and testament; that on the 30th of September, 1913, the said Henry Spier, August Spier and William Spier filed their appeal bond in said county court in the sum of $300 appealing from the aforesaid decree probating said will, and on the 9th day of October, 1913, there was filed in the district court for said Pawnee county a transcript of the proceedings in said estate in the county court thereof; that an appeal was prosecuted from the decree of the said county court probating the said will.

Henry Spier, August Spier and William Spier, contestants, filed an answer to the petition on appeal in said case in the district court. They admitted that the said Sophie Spier died at the time and place alleged in the petition, and that at the time of her death she was a resident and

inhabitant of the county of Pawnee, in the state of Nebraska, and admitted that the names and addresses of the heirs at law are properly given in the petition. Each and every other allegation in said petition contained was denied. Said case was heard on appeal in the district court for Pawnee county on the 15th day of April, 1914. There was a jury, which rendered a verdict for the proponent, Frederick Spier. An appeal was taken from the judgment of the district court for Pawnee county to this court.

It is contended: (1) That said alleged will was not executed and witnessed as the law requires. (2) That the deceased was not mentally competent to make a will at the time the alleged will was executed. (3) That the deceased was unduly controlled and influenced by the proponent, Frederick Spier, and his brother, Louis Spier.

The testatrix seems to have been something more than 80 years old when she made the will. It is claimed that she was feeble, and that the will was not executed as the law requires. It is true that Fredericka Spier was only 14 years old at the time she witnessed the will. It is contended that she was incompetent to act as an attesting witness. She was asked and expressed the opinion that she thought her grandmother was competent to do business. It may be considered that she was not very competent to testify about that fact, being of the age of only 14 years, but she had a right to testify to that fact as she could testify to any other fact within her knowledge; and, if she may not have known much about it, it would be for the jury to consider that fact. It is claimed by the contestants that she did not know the meaning of the words "mental capacity" or "capacity to do business." It is probable that not very much knowledge can be gained from reading her evidence. At the same time she was competent to testify. *Evers v. State,* 84 Neb. 708; *Davis v. State,* 31 Neb. 247. We do not care to say that Fredericka Spier was not able to testify. She was not required to have any other

qualifications than those of an ordinary witness. *Carlton v. Carlton,* 40 N. H. 14.

It appears that the testatrix, in the presence of R. R. Mahan and Mike Weber, on the 8th day of February, 1913, declared to Mr. Schappel in the German language that the instrument prepared was her last will and testament, and that it was signed by her, and she desired these gentlemen to sign the attestation clause. Mr. Schappel interpreted her words into English to Mr. Mahan, and Mr. Mahan and Weber signed the instrument in the presence of the testatrix. It appears that Weber could speak German, although he did not remember the conversation.

In *Holyoke v. Sipp,* 77 Neb. 394, it is held, as stated in the syllabus: "A presumption of the due execution of a will arises from the presence of an attestation clause which recites the facts necessary to the validity of the will, and, in the absence of evidence discrediting the statements, the will should be admitted to probate." It is said in the body of the opinion: "When the subscribing witnesses are present at the probate and admit the genuineness of their signatures, but deny or are unable to recollect some or all of the facts which were attendant upon the execution, so that one or both of them are unable or unwilling to testify with positiveness and of their own knowledge that all the requirements of the statute were complied with, a presumption of due and proper execution will arise from the recitals of a perfect attestation clause."

There was a second attestation clause. It recited: "We, the undersigned, have this 8th day of February, A. D. 1913, subscribed our names in the presence and by the request of the testatrix, Sophie Spier. R. R. Mahan, Pawnee City, Nebraska. Mike Weber, Steinauer, Nebraska." It is not necessary that the witnesses see the testator sign, if he acknowledges to them that he has signed the will and shows them his signature thereto. Dame, Probate and Administration (2d ed.) sec. 43.

Publication, as the term is used in the law of wills, is the act or acts of the party by which he manifests that it is his

intention to give effect to the paper as his last will and testament; and any communication, indicating to the witness that the testator intends to give effect to a paper as his will, by word, sign, or motion, or conduct, is sufficient in law to constitute a publication. *In re Estate of Ayers*, 84 Neb. 16. In the case last-above cited this court held: "Where the evidence shows that the witnesses to a will signed the same at the request of the testator, who thereupon directed the draftsman thereof to place the same in an envelope addressed to the county judge, in whose office it was afterwards found, such acts constitute a sufficient publication of the will."

Concerning the competency of the testatrix, Charles A. Schappel testified that he had been acquainted with the testatrix 20 years or more; that he had had business dealings with her; she being the administratrix of the estate of her deceased son, Herman Spier, who died in the year 1907, and from whom she inherited the 120 acres of land involved in this case. He testified that she frequently came to his office in Pawnee City and talked her business affairs over with him. He went to her house on the 19th of July, 1910, taking with him his partner, Frank Barton, and she directed the making of the will. She gave instructions in the German language, and Mr. Schappell interpreted the instructions to Mr. Barton.

Frank Barton testified that he had been acquainted with her about three years before the making of the will; that she frequently came to the office of Schappel & Barton and talked over her business matters; that he drew the proposed will under her direction and as dictated by her and interpreted to him by Mr. Schappel. He thought she was competent to transact ordinary business affairs on the 19th of July, 1910.

Herman Kruger, the preacher, testified that he had known her 24 years; that he was her pastor, and frequently visited at the house and talked with her about religious and other subjects. In his opinion she was

capable of transacting ordinary business on the 19th of July, 1910.

Dr. Prendergast testified to having had considerable experience with persons mentally deranged. He was called to visit the testatrix and to treat her for acute bronchitis. He had made four calls upon her in March, 1910, and had observed her mental condition. He also treated her in April, 1911, and he finally treated her at the time of her last illness in July, 1913. It was his opinion that her mental condition was normal.

Steinauer, the banker, testified that he had lived within two miles of the testatrix for 40 years. He was well acquainted with her. He had had business transactions with her in loaning and borrowing money. He had often visited her at her house. In his opinion she was competent to transact ordinary business on the 19th of July, 1910.

Numerous other witnesses testified along the same line.

There is no evidence that shows that she was mentally incapable of doing business. Apparently there was nothing to cast serious doubt upon her testamentary capacity.

The third contention is that she was subject to undue influence. It is testified to by John Spier, the old lady's grandson, that she had said that she would like to sell the place and divide it up equally among the boys and her daughter, but she said that Fred had said "no," and not until his boys were big enough. This testimony does not show that Fred had refused his permission. It fails to show that he attempted to control her. It is simply her statement that he had said no, and it is not corroborated by anything that he said in the presence of anybody.

Gottlieb Spier testified that he had heard her say that she would like to have it divided up equally, and each one have so much, but she said she didn't know if she could or not; she said the rest of the boys would all be against it. She did not know that she could do it or not. She would like to divide it up equal. But here again is the same thing; it is only her statement as to what the will of Fred

and Louis may have been. On that question she may have been timid, or she may have imagined that they entertained this view or that view. If there was evidence that they had directly spoken to her, there would then be something before the court; but there is a total failure of evidence of this kind.

We do not feel we are justified in reaching a conclusion different from that reached in the district court. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

INDEX.

Abstracts of Title.

1. Since secs. 5623, 5629, Rev St. 1913, require general and numerical indexes of deeds and mortgages, an abstracter is not justified in relying on one index to the exclusion of the other. *Crook v. Chilvers* 684
2. Ordinary care on the part of an abstracter requires him to avail himself of every facility to furnish an accurate and complete abstract of records, and for failure so to do he will be liable personally and on his bond. *Crook v. Chilvers* ... 684
3. An abstracter is chargeable with knowledge of use to which abstract will be devoted, and becomes liable under sec. 6277, Rev. St. 1913, for damages from defects, not only to his employer, but to all who deal with him in reliance thereon. *Crook v. Chilvers* 684
4. Where an abstracter relies on the numerical index alone, he does so at his peril, unless his employer agrees that he may do so and the certificate clearly shows limited employment. *Crook v. Chilvers* 684

Action. See ELECTION OF REMEDIES. INTOXICATING LIQUORS, 3.

Under sec. 7657, Rev. St. 1913, a cause of action for conversion of corporate assets may be joined with one for the statutory liability of stockholders on account of failure to publish notice of the amount of corporate indebtedness. *Malm v. Stock* 374

Adverse Possession.

Where a railroad company held possession of a vacant lot contiguous to its right of way, under a tax deed, for nearly 30 years, *held* that its title became absolute. *Ferber v. McQuillen* 280

Appeal and Error. See BASTARDY. CONTEMPT. CRIMINAL LAW. DIVORCE, 9. EXECUTORS AND ADMINISTRATORS, 3. PLEADING. TRIAL. WATERS, 1-3.

1. Questions not fairly presented below will not be considered on appeal. *Bailen v. Badger Import Co.* 24
2. To warrant reversal of a judgment, the record must affirmatively show prejudicial error. *Morfeld v. Weidner* 49

Appeal and Error—*Continued.*

3. A verdict will not be set aside because of passion and prejudice unless the record affirmatively shows that the verdict probably resulted therefrom. *Morfeld v. Weidner* 49
4. Under sec. 7713, Rev. St. 1913, an error which does not affect substantial rights will not require a reversal. *Huxoll v. Union P. R. Co* 170
5. Where a petition is attacked for the first time on appeal, it will, if possible, be sustained. *Irwin v. Gould & Sons* ... 283
6. Error is available for the review of a final order made by the county court in the exercise of probate jurisdiction. *In re Hilton* 387
7. A judgment will not be reversed for immaterial variance between the pleadings and proof. *Kuncl v. Kuncl* 390
8. Where a cross-petitioner obtains all the relief to which the pleadings entitle him, denial of a continuance is not prejudicial error. *Southwick v. Reynolds* 393
9. A judgment will not be reversed on a stipulation of attorneys as to evidence not approved by the district judge nor embodied in bill of exceptions. *Younie v. Specht* 621
10. In an action by tenant to recover damages from flooding of crops in which landlord has an interest under his lease, striking of landlord's petition of intervention *held* ground for reversal. *Dryden v. Peru Bottom Drainage District* 825
11. The supreme court will ordinarily consider only questions presented in the briefs. *Dillenbach v. Kerr* 840
12. Alleged misconduct of the jury must be challenged at the earliest opportunity. *Bunting v. Oak Creek Drainage District* 843
13. An assignment in the motion for new trial that "the judgment was erroneous because contrary to law" *held* sufficient to present the question of sufficiency of the evidence, where there is no substantial conflict in the evidence. *Bailen v. Badger Import Co.* 24
14. Under supreme court rule 12 (94 Neb. XI) statement in the briefs of the substance of the evidence will be considered as accurate, unless opponent's brief shall deny with particularity the accuracy thereof. *Chicago, B. & Q. R. Co. v. Box Butte County* 208
15. Where the evidence was conflicting as to whether an obstruction in a street was guarded, a verdict for plaintiff will not be set aside. *Britt v. Omaha Concrete Stone Co.* 300

Appeal and Error—*Concluded.*

16. On appeal in equity, the supreme court in considering conflicting parol evidence will take into account the fact that the trial court observed the witnesses and must have accepted one of two versions of the facts. *Shafer v. Beatrice State Bank* 317

17. On appeal in equity, the supreme court will carefully consider the construction given conflicting oral evidence by the trial court. *Powell v. Mayhew* 706

18. In a law action, where the evidence is conflicting, finding of trial court will be sustained. *Smith v. Chicago, St. P., M. & O. R. Co.* 719

19. Refusal of an instruction, in an action for assault, that the jury consider "with caution" statements by plaintiff as to how the injury occurred, *held* error. *Morfeld v. Weidner* .. 49

20. Refusal to submit certain grounds of negligence *held* not error, in view of instructions given. *Huxoll v. Union P. R. Co.* 170

21. The submission of special interrogatories is discretionary with the trial court. *Huxoll v. Union P. R. Co.* 170

22. If the charge as a whole properly submits the issues, a mere technical inaccuracy will not require a reversal. *Huxoll v. Union P. R. Co.* 170

23. In an action for damages from collision of an automobile with an obstruction in a street, *held*, that an instruction that failure to place a danger signal was not negligence if street lights showed the obstruction was not prejudicial to defendant. *Britt v. Omaha Concrete Stone Co.* 300

24. Where each party asks for an instructed verdict, a decision for plaintiff will be upheld if there is evidence to sustain it. *Hamilton v. North American Accident Ins. Co.* 579

25. A judgment will not be reversed for the giving of an instruction not prejudicial to appellant. *McCarthy v. Village of Ravenna* 674

26. Where an instruction is not excepted to at the time, nor challenged in motion for new trial, it cannot be assigned as error on appeal. *Wilson v. Omaha & C. B. Street R. Co.* 693

27. An instruction on measure of damages which reflected evidence admitted without objection *held* not prejudicial requiring a reversal. *Bunting v. Oak Creek Drainage District* 843

Assault and Battery. See DAMAGES, 1.

1. Evidence in an action for assault *held* to warrant submitting to the jury the question of permanent impairment of sexual power. *Morfeld v. Weidner* 49

2. The adding of the words "and injure" to the word "wound" in an information for assault *held* not prejudicial to accused. *Kusel v. State* 570

Assignments. See BANKRUPTCY, 2. BANKS AND BANKING, 2. CONTRACTS, 6.

Attachment. See ESTOPPEL, 1. PARTIES, 1.

1. Where a redelivery bond in attachment had effected its purpose, *held*, that the fact that it was not manually delivered nor formally approved did not invalidate it. *Commercial Nat. Bank v. Faser* 105

2. Where attached property has been surrendered under a redelivery bond, the burden is on the attachment debtor to account for its nonproduction. *Commercial Nat. Bank v. Faser* 105

3. In absence of fraud or conspiracy, justice of the peace is not liable to owner of property sold under his judgment in attachment as the property of another. *Lee v. Brown* 661

4. Attorney in attachment *held* not liable to owner of property taken as that of another. *Lee v. Brown* 661

Attorney and Client. See ATTACHMENT, 4. CARRIERS, 9, 10. INSURANCE, 6. WILLS, 3, 4.

There is a strong presumption that appearance of attorney in an action is authorized, and the burden is on one who asserts the contrary to clearly establish the fact. *Jordan v. Evans* 666

Bankruptcy.

1. Employee of bankrupt mining company, to whom copper plates were delivered by the general manager for services as watchman, *held* entitled to proceeds thereof as against purchaser from trustee in bankruptcy. *Johnson v. American Smelting & Refining Co.* 633

2. Where a debtor assigns future wages and is adjudged a bankrupt before the wages are earned, the debt, if listed in bankruptcy, is extinguished, and no lien attaches under the assignment to the wages. *Hupp v. Union P. R. Co.* 654

Bankruptcy—*Concluded.*

3. A trustee in bankruptcy may maintain a creditors' bill against those who have purchased and disposed of the entire assets in violation of the bulk sales law. *Niklaus v. Lessenhop* 803

4. The liability of those who have disposed of the entire assets of a bankrupt in violation of the bulk sales law is not the amount for which they sold the goods, but the agreed inventory value thereof. *Niklaus v. Lessenhop* 803

Banks and Banking.

1. The Nebraska banking act *held* to vest the banking board with discretionary power to refuse a charter for a savings bank to be conducted in a room adjacent to one occupied by a national bank, where the officers and directors of the two banks are substantially the same persons. *State v. Morehead* 146

2. Under sec. 188 of the negotiable instruments act, a check does not assign the drawer's funds. *Superior Nat. Bank v. National Bank of Commerce* 833

3. The bank on which a check is drawn is not liable to the holder unless and until it accepts or certifies the check in writing. *Superior Nat. Bank v. National Bank of Commerce* 833

4. The bank on which a check is drawn is not liable in equity to the holder because it informs him orally that the check is good and will be paid on presentation. *Superior Nat. Bank v. National Bank of Commerce* 833

Bastardy.

A bastardy proceeding appealed to the supreme court without a settled and certified bill of exceptions presents simply the sufficiency of the complaint. *State v. Wright* 790

Beneficial Associations. See TAXATION, 9, 15, 16.

1. Where a member of a fraternal benevolent association is expelled in accordance with the laws of the association, the courts will not interfere. *Wilber v. Lincoln Aerie, F. O. E.* 428

2. Where the constitution of a subordinate lodge of a benevolent association provided for appeal from an order of expulsion and no appeal was taken, the courts will not interfere. *Wilber v. Lincoln Aerie, F. O. E.* 428

Beneficial Associations—*Concluded.*

3. Where members of a benevolent association have agreed, as part of their scheme of organization, to submit their domestic grievances to internal tribunals, they cannot in the first instance, against the protest of the association, maintain a civil action thereon. *Wilber v. Lincoln Aerie, F. O. E.* 428

Bills and Notes.

1. Physical condition of notes and plaintiff's evidence and circumstances proved, *held* to overcome testimony of defendants that an indorsement of transfer of the notes, rendering them negotiable, was not on the notes when plaintiff purchased them. *Martindale v. Galladay* 200

2. Evidence, in a suit to cancel a note alleged to have been obtained by duress and under an agreement to compound a felony, *held* to sustain decree for defendant. *Shafer v. Beatrice State Bank* 317

3. The burden of showing that a note was fraudulently altered after its execution and delivery *held* on defendant. *Teske v. Baumgart* 479

4. Evidence *held* to show that plaintiff was not a holder in due course of the note sued on, and failure of consideration. *Gibson v. Gutru* 553

Bonds. See ATTACHMENT, 1, 2. PARTIES, 1.

Brokers. See CONSTITUTIONAL LAW, 5, 6. PRINCIPAL AND AGENT, 3.

Carriers. See RAILROADS. STREET RAILWAYS.

1. Where the shipper accompanies an interstate shipment of stock and participates in a violation of the federal statutes relative to unloading and feeding, he cannot recover damages caused by such violation. *Fluchiger v. Chicago & N. W. R. Co.* 6

2. The mere acceptance and removal of a shipment by one not the consignee does not obligate him to pay charges beyond the amount stated by the carrier at the time of such acceptance and removal. *Union P. R. Co. v. Stickel Lumber Co...* 564

3. Where a carrier fails to collect from one not the consignee freight charges as fixed by its tariffs on file with the interstate commerce commission, it must first look to the consignor, who was also the consignee, for the remainder due. *Union P. R. Co. v. Stickel Lumber Co.* 564

4. It is the duty of a carrier to furnish safe and suitable cars for shipping animals, and for failure to do so the carrier

Carriers—*Concluded.*

is liable for resulting damages. *Fuller v. Chicago & N. W. R. Co.* 611

5. Where a defective car is furnished by an initial carrier for transportation of animals and they are injured by reason thereof, the initial carrier is liable, in absence of proof of negligence by the connecting carrier. *Fuller v. Chicago & N. W. R. Co.* 611

6. In absence of special contract or special circumstances, a carrier of live stock is not bound to use extraordinary means to forward shipment, but the shipper will be held to have consented to the carrier's ordinary schedules. *Payne v. Chicago, M. & St. P. R. Co.* 699

7. Sec. 4, art. XI, Const., *held* not to prohibit the legislature from increasing the common law liability of carriers. *Smith v. Chicago, St. P., M. & O. R. Co.* 719

8. Secs. 6018, 6019, Rev. St. 1913, afford shippers of live stock a statutory remedy for recovery of liquidated damages for unreasonable delay, in addition to the common law remedy, and are not repugnant to sec. 4, art. XI, Const. *Smith v. Chicago, St. P., M. & O. R. Co.* 719

9. Sec. 6063, Rev. St. 1913, providing for recovery of reasonable attorney's fees in actions on claims for loss or damage to freight, or overcharge therefor by carrier, *held* constitutional. *Smith v. Chicago, St. P., M. & O. R. Co.* 719

10. Under sec. 6063, Rev. St. 1913, reasonable attorney's fees are properly assessed, when plaintiff is represented by an attorney of record. *Smith v. Chicago, St. P., M. & O. R. Co.* 719

11. It is not ordinarily the duty of a railroad company to furnish an escort to an intending passenger, unless it is chargeable with knowledge that he is so infirm as to require assistance. *Scott v. Union P. R. Co.* 97

12. Petition, in an action for injuries from being struck by an engine, *held* not to state a cause of action. *Scott v. Union P. R. Co.* 97

13. Evidence *held* to justify submission to jury of question of negligence of motorman in stopping a street car in a sudden manner, injuring a passenger. *Wilson v. Omaha & C. B. Street R. Co.* 693

14. In an action for personal injuries, an act of God is no defense if defendant's negligence was a concurrent cause of the injuries. *Davis v. Union P. R. Co.* 769

Compromise and Settlement.

In an action on a settlement of a liability created by a policy of fire insurance, where defendant alleged that the settlement was procured by fraud, evidence *held* to sustain verdict for plaintiff. *Peterson v. Hartford Fire Ins. Co.* 444

Constitutional Law. See CARRIERS, 7-9. MANDAMUS, 5. MASTER AND SERVANT, 29. STATUTES.

1. Ministerial officers will not be compelled by mandamus to obey an unconstitutional statute. *State v. Hall* 95
2. A statute will not be declared unconstitutional at the suit of one not injuriously affected thereby. *State v. Hall.* 95
3. Insurance companies which contribute to the fund *held* the only parties who can question the constitutionality of ch. 138, Laws 1909, creating a fund for maintenance of the office of state fire commissioner. *State v. Hall.* 95
4. Ch. 222, Laws 1915, defining the word "week," *held* not unconstitutional as an attempt to control judicial action. *In re Estate of Johnson* 275
5. Ch. 204, Laws 1915, *held* not unconstitutional as being a local or special law regulating interest on money, nor as denying equal protection of the laws. *Althaus v. State.* 465
6. Sec. 3, ch. 204, Laws 1915, conferring on the secretary of state, after a hearing, power to reject an application for a license to lend money, *held* not unconstitutional as conferring arbitrary power. *Althaus v. State.* 465
7. Ch. 182, Laws 1915, establishing a municipal court for cities of the metropolitan class, *held* not unconstitutional. *State v. Hunter* 520
8. Sec. 26, art. I, Const., providing that "all powers not herein delegated remain with the people," distinguishes a republican form of government from a monarchy or oligarchy. *State v. Moorhead* 527
9. Sec. 1, art. I, Const., providing that governments derive their "just powers from the consent of the governed," and the principle of "equality before the law" require that every voter shall, so far as practicable, have an equal voice in the affairs of government. *State v. Moorhead.* 527
10. The Constitution will not permit one class of voters to be given more power in governmental affairs than is given to another class. *State v. Moorhead* 527

Constitutional Law—*Concluded.*

11. The courts will not inquire into the motives actuating the legislature, except as those motives appear in their public acts or journals. *State v. Moorhead* 527

12. Whenever and to the extent that the legislature transcends its powers, it is conclusively presumed that it intended to so transcend them. *State v. Moorhead* 527

13. Parol evidence of legislative motives is inadmissible to obviate the effect of unlawful intent. *State v. Moorhead* 527

14. The legislature may exercise a reasonable discretion in selecting the method of securing practical equality. *State v. Moorhead* 527

15. Whether constitutional requirements have been applied in the enactment of a statute is a question for the courts. *State v. Moorhead* 527

16. A statute which violates the intent of the Constitution and evades its general express or plainly implied purpose is void. *State v. Moorhead* 527

17. Ch. 19, Laws 1915, *held* unconstitutional, because a commissioner district created in compliance therewith in Douglas county will contain less than one-third the population of each of the other districts and have equal power in the government of the county. *State v. Moorhead* 527

Contempt.

A conviction for contempt can only be reviewed by a petition in error. *State v. Dodd* 800

Contracts.

1. Where a contract does not fix a time for its performance, and no fact is in dispute, the question of a reasonable time is one of law. *Kiser v. Denney* 3

2. A certain contract, construed with bill of sale, *held* to constitute a divisible contract. *Wilcox v. Badger Motor Car Co.* 189

3. Payments exacted from the owner of property unlawfully withheld, in order to obtain possession thereof, where the detention is accompanied by hardship or irreparable injury, may be avoided. *Nelson v. Nelson* 456

4. Allegation that services were rendered at request of deceased, who promised to pay for same, will admit evidence of either express or implied promise. *Anderson v. Akins.* 630

Contracts—*Concluded.*

5. Allegation that decedent promised to pay for services is supported by proof that he promised to convey or devise property in payment therefor, but failed to do so. *Anderson v. Akins.* 630

6. Surety on bond of defaulting contractor, who has paid claims for materials, has an interest in money due the contractor superior to that of the contractor's assignee, though the assignment was filed before payment by surety. *First Nat. Bank v. Pesha.* 785

Conversion.

1. In an action for conversion, proof that the owner of bonds, deposited with defendant for safe-keeping, delivered the receipt without indorsement to plaintiff, with intent of making a gift, may establish plaintiff's title thereto. *Kaufmann v. Parmele* 622

2. In an action for the value of bonds converted, it is presumed that they were worth their face value, and the burden is on the defendant to show the contrary. *Kaufmann v. Parmele* 622

3. In an action by pledgor against a stranger for conversion of pledged property, the measure of damages is value of property, less sums paid by defendant to pledgee. *Kaufman v. Parmele* 622

Corporations. See ACTION. VENUE, 2.

1. After forfeiture of charter under ch. 25, Laws 1909, for nonpayment of the occupation fee, an action cannot be prosecuted in the corporate name. *Weekes Grain & Live Stock Co. v. Ware & Leland.* 123

2. A mistake in beginning an action in the corporate name after forfeiture of charter may be corrected by an amended petition showing that the managing officers or directors, as trustees, are plaintiffs. *Weekes Grain & Live Stock Co. v. Ware & Leland* 126

3. Property of an insolvent corporation in the hands of its officers, who have taken same in payment of debts due them, or its proceeds, is held in trust for all creditors *pro rata*, including themselves. *Malm v. Stock* 374

4. The president of a corporation, who is also a director and stockholder, is in many respects a trustee for the stockholders. *Jacquith v. Mason* 509

Corporations—*Concluded.*

5. The president of a corporation and one who joined with him in purchasing the stock of a stockholder and realizing profit thereon *held* liable to such stockholder for the profit. *Jacquith v. Mason* 509

6. Evidence, in an action against the president of a corporation and another for fraud, *held* to sustain verdict for plaintiff. *Jacquith v. Mason* 509

Counties and County Officers. See CONSTITUTIONAL LAW, 17. PAUPERS. STATES.

1. County treasurer *held* not liable on his bond for interest which he could not collect on the public funds. *Custer County v. Cavenee* 101

2. Under the facts, a depository bank *held* not liable for interest on public funds deposited by county treasurer. *Custer County v. Cavenee* 101

3. Petition in a suit by a county to recover from an adjoining county one-half the cost of repairing a bridge *held* not demurrable. *Keya Paha County v. Brown County* 305

4. Notice by a county to an adjoining county that it would be necessary to rebuild a part of a bridge *held* sufficient to include an approach and necessary grading and riprapping. *Keya Paha County v. Brown County* 305

5. In the exercise of powers delegated to a county, all voters must, as far as practicable, be given an equal voice. *State v. Moorhead.* 527

6. The answer to an application for a writ of ouster against a county and its officers commanding them to refrain from exercising jurisdiction over certain land *held* not demurrable. *State v. Garden County* 807

Courts. See BENEFICIAL ASSOCIATIONS. CONSTITUTIONAL LAW, 7, 11, 15. DIVORCE, 2. STATUTES, 11.

Covenants. See DEEDS, 6-8.

Creditors' Suit. See BANKRUPTCY, 3. DIVORCE, 1.

Criminal Law. See ASSAULT AND BATTERY, 2. BASTARDY. EMBEZZLEMENT. FALSE PRETENSES. FORGERY. RAPE.

Criminal Law—*Continued.*

1. Admission of evidence tending to show that accused, at another time and place, committed a crime similar to that charged *held* ground for reversal. *Phillips v. State.* 187
2. Admission of evidence to show ulterior motive of complainant *held* not ground for reversal, where the court charged that the evidence should be considered only as affecting his credibility. *Nathan v. State.* 197
3. Decision on former appeal *held* conclusive on admissibility of evidence, where it was substantially the same. *Shellenberger v. State* 370
4. Denial of motion for new trial *held* proper, where the newly discovered evidence was immaterial. *Kimmel v. State.* 547
5. An instruction that every one is presumed to be sane until the contrary appears, but, if there is evidence tending to show insanity, then the burden is on the state to prove beyond a reasonable doubt that accused was sane when he made a confession *held* proper. *Shellenberger v. State* ... 370
6. Instruction criticized as to form, but *held* to fairly present the law as to the defense of insanity as applied to the evidence. *Muzik v. State.* 496
7. Evidence *held* insufficient to sustain the imposition of the death penalty, and to justify its reduction to life imprisonment. *Muzik v. State.* 496
8. Evidence *held* to sustain conviction of murder in the first degree. *Muzik v. State* 496
9. Admission of evidence as to the bloody condition of deceased and the room where the crime was committed, and exhibition of the knife, *held* not prejudicial, where the crime was admitted, and the only questions were the insanity of accused and the degree of the crime. *Muzik v. State* 496
10. Accused could not object to private counsel to assist in the prosecution where he had requested that such counsel conduct the entire prosecution. *Kusel v. State* 570
11. Misconduct of counsel in argument *held* not to require a reversal, in view of the record. *Kusel v. State* 570
12. Accused cannot complain of delay which he requested. *Kusel v. State* 570
13. In a prosecution for embezzlement of money of corporation by its agent and general manager, the secretary may testify as to specific duties of the manager, where they are not

Criminal Law—*Concluded.*

fully set forth in the corporate charter and by-laws. *Bauer v. State* 747

14. In a prosecution for embezzlement of money of corporation, whose business amounted to more than $300,000 a year consisting of thousands of transactions, an expert accountant may testify to result of examination of corporate books. *Bauer v. State* 747

15. The giving of additional instructions, in presence of accused and counsel without objection, *held* not reversible error. *Bauer v. State* 747

16. Instruction, in response to request by jury, that in a finding as to value the word "about" does not conform to the statute, and the jury should find some definite amount, *held* not ground for reversal. *Bauer v. State* 747

17. Evidence that accused left employment and went to other states to avoid arrest may be received, not as a confession, but to be considered with other evidence in arriving at a verdict. *Bauer v. State* 747

Damages. See CONVERSION, 3. EMINENT DOMAIN, 3, 4. INTOXICATING LIQUORS. SALES, 2.

1. Evidence of loss of sexual power resulting from assault *held* admissible, though the petition did not specify such loss as an element of damages. *Morfeld v. Weidner* 49

2. In an action under the federal employers' liability act, where the court has instructed that contributory negligence has been shown, but the jury make no deduction therefor, the court may order a remittitur. *Hadley v. Union P. R. Co.* .. 349

3. A general verdict for plaintiff may be returned in an action under the federal employers' liability act without apportioning damages among the beneficiaries. *Hadley v. Union P. R. Co.* 349

4. A verdict for $10,000 for personal injury *held* excessive. *Malko v. Chicago, R. I. & P. R. Co.* 158

5. Award of $25,000 for death *held* excessive. *Hadley v. Union P. R. Co.* 349

6. Award of $10,500 for personal injuries *held* not excessive. *Wilson v. Omaha & C. B. Street R. Co.* 693

Deeds. See VENDOR AND PURCHASER.

1. Equity will require a return of the purchase money or a restoration of the *status quo*, before setting aside a deed ob-

Deeds—*Continued.*

tained by fraud or imposition practiced on a person of weak mentality. *Overton v. Sack* 64

2. Where mental weakness in the grantor exists, and misrepresentation of the grantee or his privies is shown, equity may set aside the deed. *Miller v. Wentz Co.* 286

3. Where a contract to convey an elevator site for the erection of an elevator provided that, in case the elevator is destroyed, the grantee will rebuild same within a reasonable time, or reconvey, the grantee's title cannot be forfeited for not rebuilding until lapse of a reasonable time after destruction of the elevator. *Nye-Schneider-Fowler Grain Co. v. Hopkins* 244

4. Where land is conveyed by a deed providing that, if the building thereon is destroyed and the grantee fails to rebuild within a reasonable time, he shall reconvey, the grantee does not lose title by forfeiture during time granted for rebuilding. *Nye-Schneider-Fowler Grain Co. v. Hopkins*.. 244

5. A corporate grantor's right to demand a reconveyance may be waived without the formalities requisite to execution of a deed. *Nye-Schneider-Fowler Grain Co. v. Hopkins.* 244

6. Where the owner subdivides land into lots and executes deeds to the lots with uniform restrictive covenants, pursuant to a general plan, purchasers may enforce such covenants against each other. *Wright v. Pfrimmer* 447

7. Purchasers of lots cannot enforce against each other restrictive convenants in a deed to their common grantor, where such covenants were not part of a general plan of improvement, but were imposed for the benefit of other land retained by the original owner. *Wright v. Pfrimmer* 447

8. In a suit by a prior grantee to enforce a restrictive covenant in a subsequent grantee's deed from the common grantor, the burden is on plaintiff to prove that such covenant was intended for the benefit of his land. *Wright v. Pfrimmer* 447

9. The intention to deliver a deed must be shown by acts or words, or by both. *Flannery v. Flannery* 557

10. Delivery of a deed is largely a question of intent, to be determined by the facts and circumstances of the case. *Flannery v. Flannery* 557

Deeds—*Concluded.*

11. An unmarried man is competent to convey real estate which had been the homestead of himself and wife before her death. *Hill v. Naylor* 791
12. A deed made pursuant to a contract to deposit it in escrow to be delivered after death of grantor, providing that grantor may take possession of deed if grantee fails to perform, becomes a valid conveyance on death of grantor and performance by grantee. *Hill v. Naylor* 791
13. Petition to have two deeds, running to two different grantees, decreed to be mortgages *held* not demurrable for misjoinder of parties and causes of action. *Gift v. Dress.* 801
14. One who joins with the owner of the fee in executing a deed cannot thereafter establish a lien on the land on the ground that the grantee did not pay full value, and paid nothing except to the owner of the fee. *Dillenbach v. Kerr.* 840
15. The grantee in a deed cannot, as against one in possession, urge any greater right under his deed than the grantor had. *Dillenbach v. Kerr* 840

Divorce. See WITNESSES, 1, 2.

1. Evidence, in a suit to subject land to payment of a decree for alimony, *held* to sustain decree for plaintiff. *McNamara v. McNamara* 9
2. In Arkansas, divorce and alimony are not subjects of equitable jurisdiction; and the courts have no other powers in such matters than those expressly conferred by statute. *Bodie v. Bates* 253
3. Sec. 2681, Kirby's Dig. Ark., authorizing such alimony as is reasonable, applies where a husband obtains the divorce while sec. 2684 applies where a decree is granted to the wife. *Bodie v. Bates* 253
4. Under sec. 2684, Kirby's Dig. Ark., *held* that the Arkansas court could not vest the wife in a divorce suit with an interest in Nebraska land of her husband. *Bodie v. Bates* 253
5. The Arkansas court cannot take Nebraska land into account in fixing alimony. *Bodie v. Bates* 253
6. Decree allowing alimony out of Nebraska land *held* not objectionable as not giving full faith and credit to an Arkansas decree. *Bodie v. Bates* 253
7. In a suit for alimony wherein an Arkansas decree was pleaded as an estoppel, evidence *held* to show that the

Divorce—*Concluded.*

Arkansas court did not take the husband's Nebraska land into account in fixing the amount of alimony. *Bodie v. Bates* 253

8. Decree of Arkansas court *held* to allow the wife as alimony the sum of $2,611 out of the husband's estate located in Arkansas. *Bodie v. Bates* 253

9. On appeal from a decree of divorce, the supreme court will examine the evidence and draw its own conclusions. *Edholm v. Edholm* 331

10. Award of $25,000 alimony and $50 a month for support and education of a minor daughter *held* to be reasonable. *Edholm v. Edholm* 331

11. Where the pleadings and evidence entitled plaintiff to a decree of divorce from bonds of matrimony or from bed and board, *held* that the court could grant divorce from bed and board with suitable maintenance. *Pick v. Pick* 433

Drains. See EMINENT DOMAIN, 1.

1. It is the duty of a drainage district to construct its ditch so that it will carry off normal surface water. *Dryden v. Peru Bottom Drainage District* 837

2. The fact that a drainage district employed a competent engineer and constructed its ditch in accordance with his plans is not a defense in an action for damages caused by improper construction. *Dryden v. Peru Bottom Drainage District* 837

3. Drainage district *held* liable for damage from flooding caused by negligent construction of ditch. *Dryden v. Peru Bottom Drainage District* 837

4. A drainage district organized under art. V, ch. 19, Rev. St. 1913, is liable for damages caused by negligence in construction of its works. *Bunting v. Oak Creek Drainage District* 843

Easements.

A way of necessity over a grantor's land is not generally implied in favor of a grantee who has a convenient outlet across his own adjoining land. *Eng. v. Olsen* 183

Election of Remedies.

1. A futile pursuit of a remedy to which a party is not entitled will not deprive him of a right to which he is entitled. *Commercial Nat. Bank v. Faser* 105

Election of Remedies—*Concluded.*

2. Pendency of an action to recover the value of attached property *held* not to bar an action on the redelivery bond. *Commercial Nat. Bank v. Faser* 105

Elections. See CONSTITUTIONAL LAW, 9, 10. COUNTIES AND COUNTY OFFICERS, 5. LIBEL.

While equality of representation in a county board need not be mathematically exact, the apportionment must, as near as practicable, be according to the population. *State v. Moorhead* 527

Electricity.

Where there was no provision in a franchise ordinance for any charge for the use of meters, *held* that the meters should be furnished to consumers free of charge. *McIninch v. Auburn Mutual Lighting & Power Co.* 582

Embezzlement. See CRIMINAL LAW, 13.

1. Evidence *held* to sustain conviction of embezzlement of corporate funds. *Bauer v. State* 747

2. Instruction that, as to count charging embezzlement of a specific sum, it was not necessary to prove embezzlement of whole amount on any particular day, but the jury could consider the aggregate of separate conversions as the amount embezzled, *held* not erroneous. *Bauer v. State* 747

Eminent Domain.

1. Where property not taken is increased in value by construction of a drainage ditch, such increase is a special benefit and not a general benefit, though the value of other property within the district is also enhanced. *Stocker v. Nemaha Valley Drainage District* 38

2. The right of action for negligence and improper construction of the improvement under condemnation accrues when damage occurs. *Bunting v. Oak Creek Drainage District* 843

3. If the application for condemnation specifies the use of realty necessary for the improvement, the damages allowed will be a bar to further claims for such damages. *Bunting v. Oak Creek Drainage District* 843

4. Damages caused by negligent construction of the improvement are not contemplated in condemnation proceedings, and are not barred thereby. *Bunting v. Oak Creek Drainage District* 843

Eminent Domain—*Concluded.*

5. Condemnation is not allowed except so far as necessary for proper construction and use of the improvement for which it is taken. *Bunting v. Oak Creek Drainage District* 843

Equity. See DEEDS, 1, 2. PARTIES, 3. TRUSTS.

Estoppel. See DEEDS, 14. DIVORCE, 7. JUDGMENT, 2, 3.

1. The principal in a bond for redelivery of attached property is estopped to assert in an action on the bond that he owns the property. *Commercial Nat. Bank v. Faser* 105

2. A party cannot successfully contend in one suit that the court has no jurisdiction of specified property, and in another litigation with the same party insist that the court had jurisdiction of that property, and thus defeat an adjudication thereof. *Bodie v. Bates.* 253

Evidence. See ATTACHMENT, 2. ATTORNEY AND CLIENT. BILLS AND NOTES. CONSTITUTIONAL LAW, 13. CONTRACTS, 4, 5. CONVERSION, 1, 2. FRAUDULENT CONVEYANCES, 2. JURY, 2. LIBEL, 6, 7. MORTGAGES, 6-8. RELEASE, 1. WILLS, 6. WITNESSES.

1. Physical facts which amount substantially to demonstration may overcome the testimony of several interested witnesses. *Martindale v. Galladay* 200

2. Physical facts will not destroy direct and positive evidence showing want of contributory negligence, unless such facts are so conclusive as to require direction of a verdict for defendant. *Britt v. Omaha Concrete Stone Co.* 300

3. Where witnesses of apparently equal credibility disagree, circumstances tending to indicate which version of the transaction is reliable will be considered. *Shafer v. Beatrice State Bank* 317

4. An itemized receipt *held* not binding on a party refusing to accept it. *Nelson v. Nelson* 456

5. In an action for services, a witness may testify to value of part of such services. *Anderson v. Akins* 630

6. Spontaneous and unpremediated declarations as to pain or suffering, made when circumstances show absence of design, are competent evidence of physical condition. *Juckett v. Brennaman* 755

Execution. See EXECUTORS AND ADMINISTRATORS, 1, 2.

Executors and Administrators. See CONTRACTS, 5.

1. Injunction will lie to prevent the collection of a void judgment against an administrator out of his individual property. *Dovey v. Schlater* 735
2. Petition for injunction to prevent collection of judgment against an administrator out of his individual property *held* to state a cause of action. *Dovey v. Schlater* 735
3. Where judgment is against an administrator in his representative capacity, he may appeal to district court without additional bond. *In re Estate of Dovey* 744

False Pretenses.

1. In a prosecution for false pretenses under sec. 8874, Rev. St. 1913, evidence *held* insufficient to prove any offense greater than a misdemeanor. *Mason v. State* 221
2. Evidence, in a prosecution for false pretenses, *held* insufficient to prove either a felony or a misdemeanor. *Mason v. State* 221

Forcible Entry and Detainer.

1. Under sec. 8470, Rev. St. 1913, a complaint in forcible entry and detainer must "particularly describe the premises," in order to confer jurisdiction. *Bishop v. Spaulding* 573
2. Where the description in the complaint in forcible entry and detainer is sufficient to identify the property intended, it is sufficient to confer jurisdiction. *Bishop v. Spaulding* 573
3. Description of the premises in a complaint in forcible entry and detainer *held* sufficient as against a collateral attack. *Bishop v. Spaulding* 573

Forfeitures. See DEEDS, 3, 4.

Forgery.

1. Making duplicates of orders for payment of money, imitating makers' signatures, and selling the duplicates for the original orders is a forgery. *Kimmel v. State* 547
2. Authority to make duplicates of orders for the payment of money does not include the right to imitate the signatures of the makers, and then utter the instruments as genuine orders. *Kimmel v. State* 547
3. Evidence of the indorsing and selling of duplicates of orders for their face value, with intent to defraud, will sustain a conviction for forgery. *Kimmel v. State* 547

Forgery—*Concluded.*

4. An instruction to acquit unless the state established beyond a reasonable doubt that defendant made copies of orders as forged instruments, and not to keep track of his business, *held* not erroneous. *Kimmel v. State* 547

Fraud. See CORPORATIONS, 5, 6. MORTGAGES, 8. RELEASE.

Fraudulent Conveyances. See BANKRUPTCY, 4.

1. The transfer of an entire stock to a creditor in payment of a pre-existing debt, or to a trustee for the benefit of certain creditors, is void, if not made in compliance with the bulk sales law. *Bailen v. Badger Import Co.* 24
2. Where a transfer of personalty from a son to his mother in payment of a past-due indebtedness is attacked by judgment creditors as fraudulent, the burden is on the transferee to show the *bona fides* of the transfer. *Farmers & Merchants Nat. Bank v. Worden* 119
3. Transfer of personalty from son to mother *held* not void as in fraud of creditors. *Farmers & Merchants Nat. Bank v. Worden* 119

Gaming. See PRINCIPAL AND AGENT, 3. SET-OFF.

Guardian and Ward.

An order discharging a guardian and approving a false, final account based on a signed statement procured from the ward by fraud may be vacated on petition for new trial. *In re Hilton* 387

Health. See MUNICIPAL CORPORATIONS, 5-8.

Highways.

Where a county has collected a road tax levied within limits of city, it holds one-half thereof in trust for the city. *City of Falls City v. Richardson County* 663

Husband and Wife. See DIVORCE, 11.

1. A husband living apart from, and paying temporary alimony awarded to, his wife is not liable for necessaries furnished her. *Wise Memorial Hospital Ass'n v. Peyton* 48
2. Where husband and wife are permanently separated, and the latter has grounds for divorce, a reasonable agreement in settlement of their property rights and providing for the wife's support will be enforced. *Amspoker v. Amspoker* 122

Husband and Wife—*Concluded.*

3. Where a wife is compelled by the misconduct of her husband to live apart from him, she is entitled to a decree for separate maintenance. *Pick v. Pick* 433

4. Evidence, in a suit for separate maintenance, *held* to sustain decree for sum awarded. *Pick v. Pick* 433

Homestead. See DEEDS, 11.

A 99-year lease purporting to grant a way across a homestead is void unless executed and acknowledged by both husband and wife. *Eng v. Olsen* 183

Infants.

Service of summons on an infant under 14 by leaving a copy at his usual place of residence is void. *Jordan v. Evans* 666

Injunction. See EXECUTORS AND ADMINISTRATORS, 1, 2. NUISANCE, 2. TAXATION, 1. WATERS, 5.

Insurance. See COMPROMISE AND SETTLEMENT. JUDGMENT, 5.

1. A provision requiring payment of premiums in advance *held* waived, where insured was allowed to pay each renewal premium long after it became due. *Owens v. Travelers Ins. Co.* 560

2. The word "dwelling," as used in the policy in suit, *held* to mean "home or place of habitation." *Hamilton v. North American Accident Ins. Co.* 579

3. A wife, named as beneficiary, who procured a divorce, *held* to forfeit her right as such beneficiary. *Giffin v. Grand Lodge, A. O. U. W.* 589

4. Under an "average clause" attached to policy covering a lumber yard and contents, buildings and stock within a common inclosure will be regarded as one of the premises named in the average clause, and a yard disconnected therefrom as another. *Mangold v. American Ins. Co.* 656

5. Trustee for minor, designated in policy as beneficiary, is proper party to maintain an action for the unpaid insurance. *Ward v. Bankers Life Co.* 812

6. Sec. 3212, Rev. St. 1913, allowing plaintiff a reasonable sum as an attorney's fee in an action to recover insurance, is applicable to contracts executed before its enactment. *Ward v. Bankers Life Co.* 812

Insurance—*Concluded.*

7. Where an insurance agent sent an application to a bank to be executed, and it was signed but not returned for more than ten days, and in the meantime the property was destroyed by fire, the delay of the bank is the act of the agent, for which the insurer is responsible, and the question of liability is for the jury. *Wilken v. Capital Fire Ins. Co.* 828

Interest. See COUNTIES AND COUNTY OFFICERS, 1, 2.

Interpleader.

The act of a fraternal society in filing a bill of interpleader to determine conflicting claims to insurance *held* proper, and not prejudicial to the rights of claimants. *Giffin v. Grand Lodge, A. O. U. W.* 589

Intoxicating Liquors. See STATUTES, 14. VENUE, 1.

1. In estimating damages for loss of support, the jury may consider the situation of deceased, his annual earnings, if any, his habits, health, and reasonable expectancy of life. *Whipple v. Rosenstock* 153

2. A judgment for loss of support cannot be for a greater sum than the value of the means of support. *Whipple v. Rosenstock* 153

3. The death of the husband and father does not cause an action for loss of his support to abate. *Whipple v. Rosenstock* 153

4. In an action for loss of support, it is no defense that defendant had a license. *Whipple v. Rosenstock* 153

5. The bondsmen of liquor dealers who have furnished intoxicating liquors to the husband and father may be joined with the liquor dealers as defendants in an action for loss of support. *Whipple v. Rosenstock* 153

6. A married woman and her minor children, consisting of one family, may sue for loss of support all who have furnished intoxicating liquors to the husband and father, which occasioned or contributed to the damages. *Whipple v. Rosenstock* 153

7. Persons other than a credible, resident freeholder of the county may file a complaint under sec. 3864, Rev. St. 1913. *Nathan v. State* 197

8. An action for loss of support from death of a person resulting from traffic in intoxicating liquors may be maintained by children of deceased. *Phair v. Dumond* 310

Intoxicating Liquors—*Continued.*

9. Where a wife who supported her minor children died from an assault committed by her husband while drunk, *held*, that a child born after the assault could, after death of mother, recover on liquor dealer's bond for loss of support. *Phair v. Dumond* 310

10. Where whiskey furnished by a saloon-keeper contributed to an intoxication, it was immaterial that the drinker drank other liquor. *Phair v. Dumond* 310

11. Evidence, in an action for death resulting from sale of intoxicating liquors, *held* to sustain verdict for plaintiff. *Moran v. Slattery* 360

12. Instruction as to measure of damages sustained. *Moran v. Slattery* 360

13. An instruction that the liquors furnished decedent need not be the sole, or even the principal, cause of death *held* proper. *Moran v. Slattery* 360

14. A licensed saloon-keeper is liable under sec. 3859, Rev. St. 1913, to one who is injured while intoxicated from drinking liquors furnished by the saloon-keeper. *Forrest v. Koehn*... 441

15. A licensed saloon-keeper *held* liable to the wife and children of the deceased, constituting one family, for all damages to their means of support from sale of liquor to deceased. *Bergmann v. Koehn* 525

16. On a verdict for $9,000 against a saloon-keeper and his surety, the court may render judgment against the principal for the amount of the verdict, and against the surety for $5,000, the amount of the bond. *Bergmann v. Koehn* 525

17. Licensed liquor dealers are liable for all proximate consequences of their traffic, and if they have induced drunkenness in a previously sober man who afterwards dies from exposure while intoxicated, even after they have ceased to furnish him liquors, they and their sureties are liable to his widow and children. *Juckett v. Brennaman* 755

18. One selling intoxicating liquor is liable, not only for actual results of sale, but for all damages from disqualification resulting therefrom, without reference to time through which disqualification may continue. *Juckett v. Brennaman* 755

19. A saloon-keeper and sureties on his bond are liable for loss of support sustained by the widow and children of one whose

Intoxicating Liquors—*Concluded.*

death was contributed to by the drinking of intoxicating liquors furnished by the saloon-keeper. *Juckett v. Brennaman* 755

20. In action for civil damages, evidence *held* to sustain verdict for plaintiff. *Juckett v. Brennaman* 755

21. Verdict for $10,000 for loss of support *held* excessive. *Whipple v. Rosenstock* 153

Judgment. See INTOXICATING LIQUORS, 16. MORTGAGES, 2-4.

1. In a suit to enjoin a judgment because of defective service, the petition must allege facts constituting a valid defense to the merits of the original suit. *Alden Mercantile Co. v. Randall* 44

2. A judgment is conclusive of a question raised in a subsequent action, where it appears from the face of the record or is shown by extrinsic evidence that the precise question was raised and determined in the former suit. *Bodie v. Bates*.. 253

3. That a judgment may operate as an estoppel, it must appear, not only that there be a substantial identity of issues, but that the issue as to which the estoppel is pleaded was actually determined in the former action. *Bodie v. Bates* 253

4. Decree in suit to cancel notes *held res judicata* as to the same facts pleaded as a defense to an action on the notes. *Dovey v. Dovey* 627

5. In a suit on a policy against a trustee as beneficiary and the insurer, a judgment for plaintiff *held* void as to trustee, where based on service outside the state, though insurer offered to pay the fund into court. *Ward v. Bankers Life Co.* 812

Jury. See NEW TRIAL, 1.

1. In counties of 30,000 or more inhabitants the regular jury panel must be drawn by lot from the regular jury list, and cannot be filled by the sheriff by calling bystanders. *Haight v. Omaha & C. B. Street R. Co.* 56

2. It will not be presumed, in absence of evidence, that the regular list of jurors was exhausted in the ordinary work of the court. *Haight v. Omaha & C. B. Street R. Co.* 56

3. The regular jury panel cannot be filled pursuant to sec. 8156, Rev. St. 1913, providing for the calling of talesmen. *Haight v. Omaha & C. B. Street R. Co.* 56

Jury—*Concluded.*

4. Parties to an action are not chargeable with knowledge that the regular jury panel has been exhausted in the trial of a prior case, and then unlawfully filled by calling bystanders. *Haight v. Omaha & C. B. Street R. Co.* 56
5. Where there is no order to call talesmen, and jurors are called in the ordinary manner, counsel in a pending case may presume that the jurors are called from the regular panel. *Haight v. Omaha & C. B. Street R. Co.* 56

Justice of the Peace. See ATTACHMENT, 3.

Landlord and Tenant.

1. Farm lease construed, and *held* to give landlord an interest in the crop as against the tenant. *Dryden v. Peru Bottom Drainage District* 825
2. The landlord may intervene in an action by the tenant to recover damages to crops, where the lease gives him an interest in the crops. *Dryden v. Peru Bottom Drainage District* 825
3. Evidence, in an action for rent, *held* not to show termination of lease. *Lenhart v. Wolfson* 482

Libel.

1. A public statement as to qualifications of a candidate for public office is a communication of qualified privilege. *Estelle v. Daily News Publishing Co.* 397
2. A citizen has the right to inform voters of any well-grounded belief as to a candidate's fitness for office. *Estelle v. Daily News Publishing Co.* 397
3. A citizen may in good faith state his belief as to a candidate's fitness for office without becoming liable in damages therefor. *Estelle v. Daily News Publishing Co.* 397
4. One who publishes a statement as to a candidate's qualifications for office is not liable in damages if the statement is true and made for justifiable ends, though it is libelous *per se*. *Estelle v. Daily News Publishing Co.* 397
5. A person is not liable for publishing privileged communications unless there was actual malice. *Estelle v. Daily News Publishing Co.* 397
6. Where published statements are false and libelous *per se*, malice is presumed, and the burden is on defendant to prove that he had evidence justifying him in making them, and

Libel—*Concluded.*

in believing them to be true. *Estelle v. Daily News Publishing Co.* 397

7. Where a statement regarding a candidate for public office is libelous *per se* and untrue, the burden is on the party making it to prove that he made it in good faith on evidence sufficient to justify a reasonable man in belief of its truth. *Estelle v. Daily News Publishing Co.* 397

8. An innuendo is to explain and apply the meaning of ambiguous expressions, and, where it gives a meaning that cannot be derived from the language used, it should be stricken on motion. *Estelle v. Daily News Publishing Co.* 397

9. Where a statement published is the statement of an opinion, and an innuendo assumes that it is a statement of fact, instructions which assume that it was a statement of fact are erroneous. *Estelle v. Daily News Publishing Co.* 397

Limitation of Actions. See EMINENT DOMAIN, 2.

A specific money bequest, resting as a lien on realty in the hands of a residuary devisee, is barred after ten years from accrual of right of action thereon. *Overton v. Sack* 64

Mandamus. See CONSTITUTIONAL LAW, 1.

1. The state treasurer may be compelled by mandamus to pay warrants drawn on the fund collected for maintenance of the office of state fire commissioner, without specific legislative appropriation therefor. *State v. Hall* 89

2. Under sec. 6941, Rev. St. 1913, where parents or guardians of 50 children above the fourth grade petition that German be taught, the school board may be compelled by mandamus to comply with such request. *State v. School District* 222

3. Where a county treasurer, on demand for payment of funds into the state treasury at times other than the two dates fixed by sec. 6507, Rev. St. 1913, admits the funds demanded, but refuses to pay over the same, the state treasurer may by mandamus compel performance, notwithstanding secs. 6515, 6516, relative to the duties of the auditor. *State v. Ure* 486

4. Mandamus will lie to compel the state treasurer to obtain and deliver to a county treasurer a receipt countersigned by the auditor for state funds paid by him into the state treasury. *State v. Ure* 486

5. An elector of the county may challenge the constitutionality of a statute which attempts to divide the county into com-

Mandamus—*Concluded.*

missioner districts and fix the basis of representation in the county board. *State v. Moorhead* 527

Master and Servant. See RAILROADS, 9. RELEASE.

1. Under the workmen's compensation act, after the amount of compensation has been fixed by agreement or by the court, the parties may agree for payment of a lump sum in lieu of periodical payments. *Bailey v. United States Fidelity & Guaranty Co.* 109

2. The employer cannot be compelled to pay, nor the workman or dependent to receive, a lump sum in lieu of periodical payments. *Bailey v. United States Fidelity & Guaranty Co.*..... 109

3. Where the employer and a dependent have agreed for payment of a lump sum, such agreement, if reasonable, will bind an insurance company which has assumed a risk under sec. 3688, Rev. St. 1913. *Bailey v. United States Fidelity & Guaranty Co.* 109

4. Commutation of payments to a lump sum under the workmen's compensation act is allowable only when it clearly appears that the condition of the beneficiaries warrants such departure. *Bailey v. United States Fidelity & Guaranty Co.*. 109

5. Sec. 3683, Rev. St. 1913, *held* not to require that six months must elapse before an agreement for a lump sum payment to residents may be made, or that consent of the district court be procured to such an agreement. *Bailey v. United States Fidelity & Guaranty Co.* 109

6. A lump sum settlement made under the workmen's compensation act by taking the present value of the periodical payments computed at 5 per cent. simple interest *held* not erroneous. *Bailey v. United States Fidelity & Guaranty Co.* 109

7. Liability under the employers' liability act does not arise unless the accident happened in the course of employment, and arose out of the employment. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 321

8. An accident resulting from a risk reasonably incident to the employment should be considered as arising out of the employment. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* .. 321

9. The master is not liable under the employers' liability act for an injury to a fellow workman. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 321

Master and Servant—*Continued.*

10. The right to commute compensation to one or more lump sum payments depends on agreement of the parties, except that their right to so agree in specified cases depends on consent of the district court. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 321

11. Where the district court finds on investigation that special circumstances exist making it necessary to commute compensation to a lump sum, the court may consent to an agreement therefor by the parties. *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* 321

12. Where an accident to an eye, which appeared not serious, resulted shortly after in a diseased condition which destroyed the sight, the "injury occurred," within the employers' liability act, when the diseased condition culminated. *Johansen v. Union Stock Yards Co.* 328

13. The district court cannot enter judgment for a lump sum under the employers' liability act without agreement of the parties. *Johansen v. Union Stock Yards Co.* 328

14. Under the federal employers' liability act, contributory negligence is not a complete defense. *Huxoll v. Union P. R. Co.* 170

15. Under the federal employers' liability act, assumption of risk is only eliminated as a defense where the carrier's violation of a statute enacted for the safety of employees contributed to the injury or death of the employee. *Huxoll v. Union P. R. Co.* 170

16. An employee assumes the ordinary risks of his employment, but not extraordinary risks caused by negligence of the employer. *Huxoll v. Union P. R. Co.* 170

17. A locomotive engineer, in walking to his engine in switching yards through smoke and steam, does not assume the risk that his employer will propel an engine backwards through the yards without warning or lookout. *Huxoll v. Union P. R. Co.* 170

18. The running of a high-tank road engine backwards in switching yards without a lookout *held* negligence. *Huxoll v. Union P. R. Co.* 170

19. Where the petition sets up facts from which the conclusion follows that plaintiff and defendant's servants charged with the negligence alleged were not fellow servants, such fact need not be specifically alleged. *Irwin v. Gould & Sons* 283

Master and Servant—*Concluded.*

20. Employment in the service of a common master will not alone constitute two men fellow servants within the rule exempting the master from liability resulting from negligence of a fellow servant. *Irwin v. Gould & Sons* 283
21. In an action for personal injuries, employee *held* to have assumed the risk. *Moriarty v. Miller* 614
22. The violation of sec. 3597, Rev. St. 1913, requiring employer to guard shafting, is gross negligence. *McCarthy v. Village of Ravenna* 674
23. A palpable violation of ch. 65, Laws 1911, by the employer is gross negligence. *Butera v. Mardis Co.* 815
24. Contributory negligence is a defense in actions for damages for violation of ch. 65, Laws 1911, requiring protection in construction work. *Butera v. Mardis Co.* 815
25. Employees need not anticipate that their employers will fail to comply with ch. 65, Laws 1911. *Butera v. Mardis Co.* ... 815
26. Evidence *held* to sustain finding that defendant violated ch. 65, Laws 1911. *Butera v. Mardis Co.* 815
27. Evidence *held* to sustain finding that deceased was not guilty of contributory negligence. *Butera v. Mardis Co.* 815
28. The owner of realty who authorized the improvement *held* liable for damages from violation of ch. 65, Laws 1911, relating to protection of persons in construction work. *Butera v. Mardis Co.* 815
29. Ch. 65, Laws 1911, relating to protection of persons in the construction of buildings, *held* constitutional. *Butera v. Mardis Co.* 815

Mortgages. See DEEDS, 13. TAXATION, 9-14.

1. An order of sale, sale and confirmation, made after death of a party to a foreclosure suit subsequent to the decree, cannot be attacked collaterally. *Omaha Nat. Bank v. Ferguson.* 131
2. A decree of foreclosure of a mortgage is not a judgment within sec. 8056, Rev. St. 1913, relating to dormant judgments. *Jenkins Land & Live Stock Co. v. Kimsey* 308
3. A decree of foreclosure may be enforced without an order of sale. *Jenkins Land & Live Stock Co. v. Kimsey* 308
4. The lien of a foreclosure decree is not lost by failure to procure issuance of order of sale within five years from date of decree. *Jenkins Land & Live Stock Co. v. Kimsey* 308

Mortgages—*Concluded.*

5. In a suit to foreclose an unrecorded mortgage, a cross-petitioner seeking to foreclose a subsequent mortgage as a first lien must allege the actual consideration and payment thereof, and facts showing that he took his mortgage without notice of plaintiff's interests. *Southwick v. Reynolds* .. 393

6. In a suit to foreclose an unrecorded mortgage, where a cross-petitioner seeks to foreclose a subsequent mortgage as a first lien, the presumption that the secured note was issued for a valuable consideration is insufficient to show the actual consideration paid. *Southwick v. Reynolds* 393

7. Where allegations of petition to foreclose a mortgage are denied, the burden is on plaintiff to make *prima facie* proof that no action at law has been instituted to recover the debt. *Great Western Commission Co. v. Schmeeckle* 672

8. In a suit to foreclose mortgages, evidence *held* to sustain finding of fraud, and that defendants were damaged in excess of amount of mortgages. *Powell v. Mayhew* 706

Municipal Corporations.

1. It is actionable negligence to deposit sand and stone on a paved street and allow it to remain over night without a danger signal. *Britt v. Omaha Concrete Stone Co.* 300

2. A published notice of a petition for street paving directed to owners of lots within an improvement district and to owners of lots abutting on or adjacent to a designated street *held* binding on the owner of a lot 49 feet from the street, but connected therewith by another street and an alley. *Hoopes v. City of Omaha* 460

3. The Omaha city charter making the finding of the city council that a petition for the creation of an improvement district is regular, legal and sufficient conclusive except on appeal, *held* valid. *Hoopes v. City of Omaha* 460

4. A municipal corporation possesses only such powers as are expressly conferred by statute, or are necessary to carry into effect enumerated powers. *State v. Temple* 505

5. A city board of health *held* to have no jurisdiction to make the maintenance of a slaughterhouse outside the city a crime. *State v. Temple* 505

6. Secs. 5015, 5017, Rev. St. 1913, *held* not to authorize a city board of health to adopt and enforce a "regulation" making it criminal to maintain a slaughterhouse outside the city. *State v. Temple* 505

Municipal Corporations—*Concluded.*

7. Sec. 5106, Rev. St. 1913, which confers certain powers on villages and cities of the second class, does not confer those powers on the city board of health. *State v. Temple* 505
8. A city ordinance *held* not to give validity to a "regulation" of the board of health which attempted to make the maintenance of a slaughterhouse outside the city a crime. *State v. Temple* 505
9. A city can tax only such property as is within the city. *State v. Nickerson* 517
10. Taxes cannot be levied on property for city purposes after it has been detached from the city by the judgment of a court. *State v. Nickerson* 517
11. City *held* not liable for damages resulting to property owner from erroneous information given by the city engineer as to technical language and records pertaining to street grades. *Reese v. City of Lincoln* 594
12. Local corporations created by request or consent of residents and principally for their benefit, though clothed with powers of a public nature, are liable for damages caused by negligence. *Bunting v. Oak Creek Drainage District* 843

Negligence. See APPEAL AND ERROR, 23. CARRIERS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1. RAILROADS. STREET RAILWAYS.

1. Where the evidence shows both negligence and contributory negligence, the duty to make the comparison required by sec. 7892, Rev. St. 1913, rests with the jury, unless the evidence as to negligence is legally insufficient, or contributory negligence is clearly shown. *McCarthy v. Village of Ravenna* 674
2. Violation of a statute for protection of persons and property constitutes negligence *per se*, rendering violator liable in damages, though the statute be penal in nature and silent as to liability for damages. *Walker v. Klopp* 794
3. Under sec. 3048, Rev. St. 1913, an owner of an automobile who permits a minor child under 16 years to operate it is guilty of negligence, and is liable therefor when other elements of actionable negligence are present. *Walker v. Klopp* 794
4. Evidence *held* competent as proof that at time of accident defendant's minor son was operating defendant's automobile by his permission. *Walker v. Klopp* 794

New Trial. See CRIMINAL LAW, 4.

1. Where the regular panel has been filled from bystanders and a jury called therefrom, without knowledge of the parties until after trial, objection then made in a motion for new trial should be sustained and a new trial granted. *Haight v. Omaha & C. B. Street R. Co.* 56
2. A new trial will be granted for newly discovered evidence, on a showing that evidence given by the prevailing party was untrue, that its falsity could not have been anticipated, and that the verdict on another trial will probably be different. *Coon v. Drainage District* 138

Novation.

1. There can be no novation of a debt in absence of an unqualified discharge of the original debtor by the creditor. *Indiana Bridge Co. v. Hollenbeck* 115
2. An accepted order assigning to a creditor money to become due from the state to a public building contractor *held* not a bar to an action against the contractor for a balance due on the order, where it was not agreed that the assignment should discharge the debtor's obligation. *Indiana Bridge Co. v. Hollenbeck* 115
3. An agreement between two parties that one shall pay a third person a sum for which they were separately liable in equal parts does not create a novation without the sanction of the third party. *Nelson v. Nelson* 456

Nuisance.

1. Sec. 8845, Rev. St. 1913, which makes the maintenance of a nuisance a crime applies to all common-law nuisances. *State v. Temple* 505
2. A suit to enjoin a nuisance may be maintained by a city of the second class or a village. *State v. Temple* 505

Parent and Child. See NEGLIGENCE, 3, 4.

Parties. See CONSTITUTIONAL LAW, 2, 3. INSURANCE, 5. INTOXICATING LIQUORS, 5-9.

1. One who purchases choses in action during pendency of suit thereon may sue in the name of the original plaintiff and obligee, on a bond for redelivery of property attached in the suit. *Commercial Nat. Bank v. Faser* 105
2. The defense that an executrix cannot maintain a suit to enforce a resulting trust against a person to whom legal title had been conveyed is waived unless interposed by demurrer or answer. *Kuncl v. Kuncl* 390

Parties—*Concluded.*

3. Indispensable parties are those whose interest is such that final decree cannot be made without affecting their interests, or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience. *Jordan v. Evans.* 666

Paupers.

County *held* not liable to a township for care of an indigent man who had a son able to care for him living in the county. *Newark Township v. Kearney County* 142

Physicians and Surgeons.

1. A physician or surgeon must exercise the care and skill usually exercised by physicians or surgeons in good standing, of the same school in the vicinity, having regard for the advanced state of science. *Van Boskirk v. Pinto* 164
2. A surgeon is not liable for a mistake in judgment made in diagnosing a physical injury, where he has used requisite care and skill. *Van Boskirk v. Pinto* 164
3. Evidence *held* not to show that defendant's failure to procure a Roentgen picture of plaintiff's foot and ankle constituted lack of reasonable care and skill. *Van Boskirk v. Pinto.* 164
4. Whether a physician and surgeon exercised reasonable care and skill *held* a question for the jury under the evidence. *Van Boskirk v. Pinto* 164

Pleading. See CORPORATIONS, 2. JUDGMENT, 1. LIBEL, 8, 9. MASTER AND SERVANT, 19. MORTGAGES, 5.

1. Where a party answers over after an adverse ruling on a demurrer and goes to trial on the merits, he waives the error, if any, in such ruling. *Genho v. Jackson* 1
2. A petition purporting to set out several causes of action is good as against a general demurrer, if one cause is well pleaded. *Genho v. Jackson* 1

Principal and Agent. See INSURANCE, 7. SET-OFF.

1. Where a principal accepts the benefits of a contract made for him by his agent, he is chargeable with the instrumentalities used by the agent in procuring it. *Nye-Schneider-Fowler Grain Co. v. Hopkins* 244
2. A principal cannot adopt the beneficial part of an unauthorized contract and reject the remainder. *Nye-Schneider-*

Principal and Agent—*Concluded.*

Fowler Grain Co. v. Hopkins 244

3. Brokers *held* liable to the principal for money taken from the agent and used in gambling speculation. *Hinds & Lint Grain Co. v. Farmers Elevator Co.* 502

4. Though an agent cannot appoint subagents to transact business of his principal, he may delegate execution of ministerial acts. *Wilken v. Capital Fire Ins. Co.* 828

Principal and Surety. See CONTRACTS, 6.

Process. See INFANTS.

In an action against an incorporated insurance company in a county where there is an agency, service may be upon the chief officer of such agency. *Juckett v. Brennaman*..... 755

Quo Warranto. See COUNTIES AND COUNTY OFFICERS, 6.

Railroads. See ADVERSE POSSESSION. CARRIERS. TAXATION, 2-5.

1. A person walking on a railroad track, where there is no public crossing, is a trespasser. *Hooker v. Wabash R. Co.* .. 13

2. A deaf trespasser on a railroad track must use extraordinary care and exercise his sense of sight to learn of the approach of trains. *Hooker v. Wabash R. Co.* 13

3. Where a deaf trespasser walking on a railroad track fails to use his sense of sight and is struck by a train, the company is not liable unless the engineer carelessly ran him down. *Hooker v. Wabash R. Co.* 13

4. Evidence *held* not to show that the engineer carelessly ran into a trespasser on the track. *Hooker v. Wabash R. Co.* .. 13

5. Evidence *held* not to show that a railroad company was liable for death of a trespasser under the doctrine of the last clear chance. *Hooker v. Wabash R. Co.* 13

6. Where a pedestrian was struck by a train approaching him from the rear; *held* that it was the duty of those in charge of the train, not only to ring the bell, but to sound the whistle. *Malko v. Chicago, R. I. & P. R. Co.* 158

7. An adult person who attempted to pass over the coupling between two cars standing on a street crossing *held* guilty of contributory negligence. *Pansik v. Missouri P. R. Co.* 234

8. Where a traveler goes on a railroad crossing without looking and listening or having a reasonable excuse for not doing so, he cannot recover for resulting injury. *Smith v. Chicago, M. & St. P. R. Co.* 378

Railroads—*Concluded.*

9. Where a railroad company's rules required section-foremen on approaching a curve through a cut on a handcar to send a man ahead, failure of trainmen to give warning of approach of train before presence of section-men is discoverable is not negligence, in absence of a statute or rule requiring them to do so. *McCracken v. Delano* 778

10. Failure of a train crew to blow whistle on approaching a railroad bridge over a roadway is not negligence, as a matter of law, in absence of a statute or rule imposing such a duty. *McCracken v. Delano* 778

Rape.

1. Evidence of opportunity and inclination *held* to sufficiently corroborate prosecutrix' direct and positive evidence that accused ravished her. *Whetstone v. State* 469

2. Evidence *held* to sustain conviction. *Parmalee v. State*.... 598

Release.

1. Plaintiff, in action for personal injuries, has burden of proving that a release was procured by fraud, or that at time release was executed he was incapable of understanding the nature and quality of the act. *Perry v. Omaha Electric Light & Power Co.* 730

2. When the amount received in settlement is grossly inadequate to compensate for injuries, that fact may be considered as tending to show unfair practice in procuring a release. *Perry v. Omaha Electric Light & Power Co.* .. 730

Replevin.

1. In replevin, where the jury has fixed an excessive value to the property, which excess the defendant offers to remit, it is ordinarily the duty of the court to order a remittitur and render judgment on the verdict. *McAvoy v. Osborn* 608

2. In replevin, where the court, after setting aside a verdict for defendant, finds fraud in the bill of sale under which plaintiff claims title, and that neither party is entitled to relief, it is error to dismiss the case, leaving plaintiff in possession which he obtained by the writ. *McAvoy v. Osborn* 608

Sales. See FRAUDULENT CONVEYANCES, 1.

1. Where a manufacturer or dealer contracts to supply an article, there is an implied warranty that the article will be reasonably fit for the purpose to which it is to be applied. *Oxygenator Co. v. Johnson* 641

Sales—*Concluded.*

2. In action for damages for breach of warranty of personalty, where there is no rescission of contract, the measure of damages is the difference between value of property as it is and what it would have been worth if as represented. *Oxygenator Co. v. Johnson* 641

3. In an action for price of goods, evidence *held* to sustain verdict for defendant. *Oxygenator Co. v. Johnson* 641

4. In an action on a note given for a hay baler, defense of breach of warranty *held* not proved. *First Nat. Bank v. Schiermeyer* 704

5. The bulk sales law *held* constitutional. *Niklaus v. Lessenhop* 803

Schools and School Districts. See MANDAMUS, 2.

1. A school levy should be made for no more than the difference between the amount on hand and the amount required for the ensuing school year. *Union P. R. Co. v. Troupe* 73

2. Where a school district votes a tax to create a building fund without complying with sec. 6743, Rev. St. 1913, any assessment or levy made thereunder is void. *Union P. R. Co. v. Troupe* 73

3. What shall be done in the common schools in an educational way is to be determined at school meetings held in each school district, and by school officers. *State v. School District* 338

Set-off.

A claim for money paid to plaintiff by defendant's agent for gambling speculation is in the nature of a claim for money had and received, and is a proper subject of set-off in an action on contract. *Hinds & Lint Grain Co. v. Farmers Elevator Co.* 502

States. See MANDAMUS, 3, 4. STATUTES, 1, 2.

The times when county treasurers are required by sec. 6507, Rev. St. 1913, to pay over state funds are the two dates therein fixed and such other reasonable dates as the state treasurer shall fix. *State v. Ure* 486

Statutes. See CONSTITUTIONAL LAW. INSURANCE, 6.

1 The fund created by ch. 23, Rev. St. 1913, and set apart by sec. 2511 for maintenance of the office of state fire commissioner may be paid out by the state treasurer on auditor's warrants without a specific appropriation. *State v. Hall* 89

Statutes—*Continued.*

2. Sec. 19, art. III, Const., relating to legislative appropriations, *held* not to apply to funds created for maintenance of the office of state fire commissioner. *State v. Hall* 89
3. The fundamental principle in statutory construction is ascertainment of the legislative intent. *State v. School District* 338
4. In construing a statute words should be given their usual meaning. *State v. School District* 338
5. Where a statute is unambiguous, courts will give the language used its plain and ordinary meaning. *State v. School District.* 338
6. Courts will not inquire into the motives for the enactment of laws, nor determine their wisdom. *State v. School District* 338
7. The policy of any enactment is for the legislature, and not for the courts. *State v. School District* 338
8. An act complete in itself is not violative of sec. 11, art III. of the Constitution. *State v. School District* 338
9. Where an act complete in itself is repugnant to a prior act to which it does not refer, the prior act is repealed by implication. *State v. School District* 338
10. Courts will not read into a statute exceptions not made by the legislature. *State v. School District* 338
11. In construing a federal statute, a state court will follow the construction placed upon it by the federal courts. *Hadley v. Union P. R. Co.* 349
12. In construing a statute, reasonable doubts must be resolved in favor of its constitutionality. *Smith v. Chicago, St. P., M. & O. R. Co.* 719
13. The presumption that an exception to general provisions of an act is justified by facts within the knowledge of the lawmakers can only be overthrown by pleading and proof, unless an unreasonable classification appears on the face of the act, by facts of which the court takes judicial notice. *Rushart v. Crippen* 682
14. Ch. 81, Laws 1907, amending sec. 25, ch. 50, Laws 1905, by prohibiting license to sell liquor near military post, though incidentally modifying other statutes, does not violate sec. 11, art. III, Const., relating to amendments. *Rushart v. Crippen* 682

Statutes—*Concluded.*

15. Simultaneous repeal and re-enactment of a statute in terms or in substance is mere affirmance of original act, and not a repeal thereof. *Bauer v. State* 747

Street Railways.

1. Where a person walked back of the street car from which he had alighted and started to cross a parallel track without looking or listening for an approaching car, *held*, that he was guilty of contributory negligence. *Critchfield v. Omaha & C. B. Street R. Co.* 240

2. In an action for death, instruction *held* not objectionable as authorizing jury to find defendant guilty of negligence wholly unsupported by the evidence. *Owens v. Omaha & C. B. Street R. Co.* 364

Taxation. See HIGHWAYS. MUNICIPAL CORPORATIONS, 9, 10. SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

1. Injunction will lie to restrain collection of a tax levied or assessed for an unauthorized or illegal purpose. *Union P. R. Co. v. Troupe* 73

2. For taxation purposes a railroad is an entity, including property held and used principally in operating the road. *Chicago, B. & Q. R. Co. v. Box Butte County* 208

3. In doubtful cases the determination of the state board of equalization as to whether particular property is part of a railroad should be considered by local assessors. *Chicago, B. & Q. R. Co. v. Box Butte County* 208

4. Steel rails not to be used within the state and fencing on leased land, not assessed by the state board, *held* assessable locally. *Chicago, B. & Q. R. Co. v. Box Butte County* 208

5. The words "right of way and depot grounds" in sec. 6375, Rev. St. 1913, *held* not to exclude from the jurisdiction of the state board in assessing railroads all property situated more than 100 feet from the center of the main track. *Chicago, B. & Q. R. Co. v. Box Butte County* 208

6. Under sec. 6314, Rev. St. 1913, personal property must ordinarily be listed where the owner resides, but property having local situs must be listed at the place of such situs. *Nye-Schneider-Fowler Co. v. Boone County* 383

7. Under sec. 6314, 6329, Rev. St. 1913, where a corporation operates stations for selling lumber in several counties, each station should be assessed separately, and net credits ascer-

Taxation—*Concluded.*

tained by deducting the indebtedness thereat from the gross credits. *Nye-Schneider-Fowler Co. v. Boone County* 383

8. Property is taxed when the tax is levied, and not when it is valued by the assessor. *State v. Nickerson* 517

9. The mortgage tax law having made recorded mortgages an interest in real estate to be separately assessed and taxed, it is immaterial whether money secured is from the mortuary fund or general fund of a beneficial association. *Grand Lodge v. Sarpy County* 647

10. Where a beneficial association records a real estate mortgage, it ceases to be personalty, and is taxable in county where land is situated. *Grand Lodge v. Sarpy County* 647

11. The owner of realty cannot complain of taxation of mortgage thereon so long as no greater burden is laid upon him than tax on excess of value above mortgage. *Grand Lodge v. Sarpy County* 647

12. Under mortgage tax law (Rev. St. 1913, secs. 6349-6353) real estate mortgages are taxable only in county where land is situated. *Grand Lodge v. Sarpy County* 647

13. Under mortgage tax law, mortgage on realty, when recorded, becomes an interest in real estate for purposes of assessment and taxation. *Grand Lodge v. Sarpy County* 647

14. Mortgage tax law permits separate taxation of mortgage interest apart from the equity of redemption. *Grand Lodge v. Sarpy County* 647

15. A fraternal beneficial association is not such a charitable association that its funds are exempt from taxation. *Grand Lodge v. Sarpy County* 647

16. Property of domestic mutual benefit associations is taxable as property of individuals, corporations, and other domestic associations. *Grand Lodge v. Sarpy County* 647

Towns.

The board of supervisors in a county under township organization may create new towns. *State v. Town of Golden* 782

Trade-Marks and Trade-Names.

1. It is an infringement of a trade-name to use, in the same locality and in the same line of business, a name of similar import. *Basket Stores v. Allen* 217

Trade-Marks and Trade-Names—*Concluded.*

2. To entitle the owner of a trade-mark to enjoin a competitor from injuring his property by false representations, both must be engaged in the sale of the same kind of goods. *Basket Stores v. Allen* 217

Trespass. See VENUE, 3.

1. One in possession of realty may maintain an action for trespass thereon. *Dryden v. Peru Bottom Drainage District* 837

2. Casting water on lands of another is trespass. *Dryden v. Peru Bottom Drainage District.* 837

Trial. See APPEAL AND ERROR. CRIMINAL LAW. DAMAGES, 2, 3. LANDLORD AND TENANT, 2. NEGLIGENCE, 1. REPLEVIN. STREET RAILWAYS, 2.

1. Where the court had properly instructed on contributory negligence, *held* that it was not error to refuse to give more specific instructions thereon. *Malko v. Chicago, R. I. & P. R. Co.* .. 158

2. A requested instruction was properly refused where the narration of facts therein did not correspond with the testimony of defendant's witnesses. *Owens v. Omaha & C. B. Street R. Co.* 364

3. Where the instructions considered together properly state the law, they are sufficient. *Forrest v. Koehn* 441

4. The practice of copying pleadings in stating the issues criticised, but *held* not to require a reversal. *Forrest v. Koehn*.. 441

5. In stating the issues in an action for injuries, where the evidence sustains only one act of negligence, recital of others is without prejudice, where such recital is followed by an instruction clearly eliminating everything but the act proved. *Wilson v. Omaha & C. B. Street R. Co.* 693

6. In an action at law, the trial court is not required to make special findings when directing verdict. *First Nat. Bank v. Schiermeyer* 704

7. If a petition states one cause of action and contains allegations as to another which are insufficient, overruling a motion to require plaintiff to separately state and number will not require reversal, in absence of motion to strike. *Bunting v. Oak Creek Drainage District* 843

Trover. See CONVERSION.

Trusts. See PARTIES, 2.

1. Where one buys realty and takes the title in the name of another, the grantee holds the property in trust for the purchaser. *Doll v. Doll* 82
2. Where one buys realty in the name of another, the trust created is a resulting trust, not affected by the statute of frauds. *Doll v. Doll* 82
3. The same presumptions and rules as to resulting trusts apply to transactions between uncle and nephew as between strangers. *Doll v. Doll* 82
4. Evidence *held* to require a finding that the title to the realty in controversy was held in trust. *Doll v. Doll* 82
5. Where the purchaser of realty takes the legal title in his brother's name to give him credit, equity may decree a resulting trust. *Kuncl v. Kuncl* 390

Vendor and Purchaser.

Evidence, in a suit to set aside deeds for fraud, *held* to show that the defendant holders of the legal title were not *bona fide* purchasers for value. *Miller v. Wentz Co.* 286

Venue.

1. An action for civil damages against a saloon-keeper and his surety may be brought in any county where the surety may be found. *Juckett v. Brennaman* 755
2. A foreign corporation is "found," within sec. 7619, Rev. St. 1913, authorizing service where defendant may be found, in any county in which service can be had upon its agent. *Juckett v. Brennaman* 755
3. Actions for trespass on realty must be brought in the county where the realty or part thereof is situated. *Dryden v. Peru Bottom Drainage District* 837

Waters.

1. Evidence, in a suit to enjoin an irrigation company from charging a discriminatory rate, *held* not to show a discrimination. *Burtless v. McCook Irrigation & Water Power Co.* .. 250
2. In an action for damages to crops from flooding caused by alleged negligent construction of railroad grades, a verdict for defendant will not be set aside if sustained by competent evidence. *Sawyer v. Chicago, B. & Q. R. Co.* 294
3. Where, in an action for damages due to construction of railroad grades, it was not alleged that the construction was not

Waters—*Concluded.*

necessary, failure of an instruction to contain the word "necessary" found in sec. 5944, Rev. St. 1913, *held* not error. *Sawyer v. Chicago, B. & Q. R. Co.* 294

4 A landowner may not rightfully divert waters of a watercourse or surface waters onto land of his neighbor to his damage. *Keifer v. Shambaugh* 709

5. Injunction will lie to protect a landowner from overflow of surface water or water in a watercourse accumulated and discharged in a body on his land. *Keifer v. Shambaugh* 709

6. A riparian owner may restore to its former channel a stream which erosion has caused to flow in a new channel, within a reasonable time and before interests of lower proprietors will be injuriously affected by such restoration. *Johnk v. Union P. R. Co.* 763

Wills. See LIMITATION OF ACTIONS.

1. Testator's intention, as ascertained from a comprehensive view of the whole will, must govern. *Worley v. Wimberly* .. 20

2. A will *held* to convey to testator's widow only a life estate. *Worley v. Wimberly* 20

3. Where counsel were employed by decedent's husband, who was not a legatee, and the will was successfully contested, *held*, that compensation for such services, costs and necessary expenses were proper charges against the estate. *In re Estate of Merica* 229

4. The amount of attorney fees for successfully contesting a will depends on the necessity of the employment, the services rendered, the size of the estate, and the benefits. *In re Estate of Merica* 229

5. Ch. 222, Laws, 1915, defining the word "week," *held* not to change the construction of sec. 1303, Rev. St. 1913, providing for publication of notices in weekly papers of times and places appointed for proving wills. *In re Estate of Johnson* 275

6. The burden is on contestants to establish undue influence, and it is not enough to show that circumstances are consistent with hypothesis of undue influence, but they must be inconsistent with a contrary hypothesis. *Spier v. Spier* 853

7. Will *held* not improperly executed because one witness was under 14 years of age. *Spier v. Spier* 853

8. Where testatrix, though aged, knows the amount and character of her property, natural objects of her bounty, and per-

Wills—*Concluded.*

sons and purposes to whom she makes devises and bequests, she is competent to make a will. *Spier v. Spier* 853

Witnesses.

1. Threatening letters from a husband to his wife while they are living apart in contemplation of a suit for divorce are not confidential communications. *McNamara v. McNamara.* 9
2. Statements by one contemplating marriage to his intended wife relative to his property *held* admissible in a proceeding to subject his property to payment of a decree for alimony. *McNamara v. McNamara* 9
3. A witness cannot be cross-examined as to collateral matters for the purpose of subsequently impeaching him. *Owens v. Omaha & C. B. Street R. Co.* 364
4. A party should not be permitted to cross-examine a witness as to matters outside the scope of his direct examination. *Owens v. Omaha & C. B. Street R. Co.* 364
5. A witness who has direct legal interest in the result of litigation not adverse to representative of deceased is not incompetent. *Anderson v. Akins* 630
6. One jointly interested with plaintiff in a claim against the estate of decedent is disqualified as witness for claimant, but the fact that two claims are for services to decedent will not disqualify claimants as witnesses for each other where the claims are on separate transactions. *Anderson v. Akins* 630

Work and Labor.

Where there is no express contract as to the value of services, the measure of recovery is their actual value. *Anderson v. Akins* 630