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FRANK J. KENNEY, APPELLEE, V. VILLAGE OF DORCHESTER ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19509.

Municipal Corporations: USE OF STREETS. The right of a private party to occupy part of a public street in front of his place of business must yield to public necessity or convenience, and ordinarily the question of public necessity or convenience is for the governing body of the municipality, but such body cannot act arbitrarily and deny to one citizen privileges which it grants to another under like conditions.

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

George H. Hastings, Roland F. Ireland and *Robert R. Hastings,* for appellants.

T. J. Doyle, contra.

MORRISSEY, C. J.

Plaintiff, the owner of two business lots located on the main street of the village of Dorchester, installed modern gasoline apparatus, consisting of a tank, buried beneath the surface of the ground, and a pump connected therewith, in the space between the sidewalk and the graded part of the street, in front of his place of business. Growing in the park space is a row of thrifty trees, and the pump was set in line with and between these trees. A section of hose extends from the pump, by which gasoline is delivered to automobile drivers who drive up to the curb, or, perhaps it were better to say, to the place where a curb ought to be. On the same street, but a block and a half distant from plaintiff's place of business, a competitor, with the sanction of the village board, installed and maintains similar apparatus in a like position. The village board adopted a resolution directing plaintiff to remove his tank and pump, whereupon he sued out a writ of injunction, which, after hearing, was made perpetual by the

district court, from which order the village prosecutes this appeal.

Five assignments of error are set out. One of which is: "That the decree of the court is contrary to law and the evidence." Appellants' brief says: "The errors relied upon are so closely and intimately connected and interwoven that we deem it best to consider them as a whole rather than to discuss each separately." We will do likewise, as the assignment quoted covers the whole matter. Copious excerpts from the statutes are set out in the brief to show that the village authorities have control and jurisdiction of the streets of the village, with the right to remove obstructions from the sidewalks, curbstones, gutters, and cross-walks, to require and regulate the placing and protection of trees, and in fact to maintain general supervision of the streets. Of course, there is no room for question as to these general provisions, but in the instant case the record discloses that Dorchester is a village of about 600 population; that the main street, where the pump and tank are situated, is 100 feet wide. There is no congestion of the street, or any necessity shown for the removal of the tank and pump. The sidewalk extends eight feet from the lot line, and the distance from the outer edge of the sidewalk to the graded part of the street, or the point where a gutter may be built, is four feet. The row of trees heretofore mentioned is growing in the intervening space. The pump complained of is between the trees, and the village is not using, has not used, and, so far as the record shows, has no intention of using this space. It is not disputed that the equipment is of the very latest and best pattern, and such as is in use in other cities in the state; that it serves the convenience of a great number of persons living within the village; and that it is not dangerous or unsightly. In *Chapman v. City of Lincoln,* 84 Neb. 534, it is held: "It is no defense to a party who is being proceeded against by a city for unlawfully obstructing a sidewalk that others are obstructing the walks in like manner." There the plaintiffs were occupy-

ing a sidewalk space in direct violation of an ordinance of the city forbidding such occupancy by any person. In the instant case there is no such ordinance, but, on the contrary, it appears that, with the sanction of the village board, plaintiff's competitor is making like use of street space. The village board having granted plaintiff's competitor permission to install and maintain similar apparatus under like conditions, it ought not to arbitrarily deny the same privilege to plaintiff.

"Although the granting or refusing of a license is in a large measure discretionary, the acting authorities are not vested with personal or arbitrary power, but are subject to the control of the courts, when it appears that they have acted arbitrarily in the premises, and have thus abused the public trust reposed in them." 3 McQuillin, Municipal Corporations, sec. 1005.

The judgment is affirmed, but it will not be so construed as to deny the village board control of the whole situation by the enactment of a suitable ordinance which will apply to all persons similarly situated.

AFFIRMED.

STATE, EX REL. NORRIS BROWN, ATTORNEY GENERAL, APPELLEE, V. WAYNE COUNTY AGRICULTURAL SOCIETY, APPELLEE; JAMES BRITTON ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19544.

Attorney and Client: FEES: SERVICES BENEFICIAL TO STOCKHOLDERS. Where by the services of attorneys, duly retained by trustees appointed by the court for the benefit of the creditors and stockholders of a corporation whose charter has lapsed, property is preserved, their fees should be paid from the fund in the hands of the court.

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

William L. Dowling, for appellants.

A. R. Davis, contra.

MORRISSEY, C. J.

Appeal from an order of the district court for Wayne county.

In 1885 there was organized, under the general incorporation laws of the state, the Wayne County Agricultural Society. Among other property acquired was a tract of land lying adjacent to the city of Wayne. From 1885 to 1901, inclusive, the society held fairs, but after the latter date ceased to do so. Stockholders' meetings were not regularly held. Many of the stockholders left the county, others transferred their stock to parties who failed to have the transfers noted on the books of the company, and the ownership of much of the stock was unknown. Thus matters ran until June, 1905, when certain resident stockholders filed, with the persons who had theretofore acted as president and secretary, a request in writing that a meeting of the stockholders be called "for the purpose of perpetuating said organization or dissolving and disbanding the same." Pursuant to this request, a meeting of the stockholders was held July 7, 1905, at which meeting a resolution was adopted by a stock vote of 148½ shares to 33 shares, appointing a committee of three, "with full power and authority to dissolve or perpetuate this organization, to collect all moneys belonging to said organization, to bring such suit or suits as may be necessary, either in law or equity, to make settlements in regard to such property, and to employ counsel, who may be one of their number, and agree upon his compensation, to have full authority necessary to settle up such organization, to wind it up or extend it as their judgment seems best."

Pursuant to this resolution, a committee was appointed, which determined that it was to the interest of the stockholders to dissolve the corporation, and that these appellants should be engaged as attorneys, to receive as compensation a sum equal to one-half the value of whatever

property the stockholders might receive as a result of the proceedings. The society was subsequently dissolved by regular proceedings, and three trustees were appointed to take charge of the property for the benefit of the creditors and stockholders. Subsequently an action was brought on behalf of the county against the trustees and other persons claiming under them to procure a decree which would vest the title to the property in the county of Wayne. This suit was successfully defended by the appellants, and by decree of this court the title to the property was vested in the trustees. Since the entry of said decree, in 1912, the property has been sold, the debts paid, and the trustees filed their final report. On the coming in of the report of the trustees, appellants filed their claim and asked for its allowance.

The claim is not based alone on the contract made with the committee of stockholders, whereby appellants were to receive one-half of any amount saved as a result of their services, but it seems to rest also on a contract made by the trustees, under date of May 20, 1907, whereby, in the name of the society, they contracted to pay appellants a reasonable compensation. The creditors of the association have been paid in full, and no objection is made to the allowance of the claim by any stockholder or other person having an interest in the fund, but the trial judge took the view that throughout the litigation, which ran more than ten years, the appellants were not in the employ of the society, but of the individual stockholders with whom they dealt, and that they must look to these stockholders, and not to the society, for their compensation.

Regardless of the character of the litigation or the form of the action that was prosecuted, the services rendered inured to the benefit of every share of stock. The litigation was successfully concluded and a large amount of property was saved to the society. Each share of stock has been enhanced by appellants' services. The failure of each and every stockholder to object to the allowance of the claim, or even suggest that it is too high, may be taken

as some evidence of its fairness and of a desire on the part of all parties interested that it be paid. On the record before us it appears that the district court erred in disallowing the claim for attorneys' fees.

There is a further item of $200, claimed by the appellant Britton for services as secretary to the society. This was also disallowed by the court, and we think properly so. As to this item, the judgment is affirmed, but as to the item of attorneys' fees, the judgment is reversed, with directions to the district court to enter a judgment in conformity with this opinion.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., not sitting.

WILLIAM D. JORDAN V. STATE OF NEBRASKA.

FILED JULY 3, 1917. No. 19655.

1. **Criminal Law**: JURY: SUMMONING BYSTANDERS: FAILURE TO OBJECT. When upon the trial of a felony case the jury panel is exhausted and the court directs the sheriff, or coroner, "to summon from any of the bystanders so many good and lawful men as necessary to complete the same," objection to such order and to a juror so drawn not having been made until after verdict, it will be held error without prejudice.

2. ———: EXCLUSION OF WITNESSES. When the sheriff is a witness for the state, it is not ordinarily error for the court to refuse to exclude him from the courtroom during the examination of other witnesses.

3. ———: WITNESSES: LEADING QUESTIONS. The manner in which a witness shall be examined is a matter over which the trial court has a large discretion, but leading questions, which suggest to the witness the answer desired, should not ordinarily be allowed. If, however, it appears that the questions and answers were not of such a nature as to prejudice the defendant, the error will not require a reversal.

4. **Instruction** set out in the opinion *held* free from error of which defendant may complain.

5. **Criminal Law**: ARGUMENT. A prosecuting attorney ought not to appeal to the prejudice of a jury, or ask that they return a ver-

dict in response to public sentiment, but, upon the record in the instant case, the address of the county attorney is not so prejudicial as to require a reversal of the judgment.

ERROR to the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Affirmed.*

L. W. Colby, for plaintiff in error.

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

MORRISSEY, C. J.

Defendant was convicted in the district court for Scott's Bluff county of murder in the first degree. A sentence of life imprisonment was imposed, and he brings the case here on error proceedings.

At the request of the county attorney, another member of the Scott's Bluff county bar was appointed to assist in conducting the prosecution. Counsel for defendant filed objections to this appointment. The objections were overruled, and are urged again here. These objections were based upon the allegations that this attorney had appeared for the heirs of the deceased, other than the widow, in the matter of the probate of the estate of the deceased, and was therefore disqualified under section 5601, Rev. St. 1913. The testimony taken on the hearing of these objections is preserved in the bill of exceptions. It shows that, during the lifetime of the deceased, the attorney had represented deceased on one or two occasions; and that immediately following the homicide he, together with other citizens, went to the scene of the tragedy and made such investigation as any public-spirited citizen might make under the circumstances. Soon thereafter, at the request of a sister of the deceased, he prepared a petition for her appointment as administratrix of the deceased's estate, and this was filed in the county court. Before a hearing was had on the petition, the county attorney requested him to assist in the prosecution. He thereupon filed a withdrawal of his appearance in the county court, and was not

thereafter interested in the estate proceedings. He testified that no agreement had been made with him by any of deceased's heirs as to attorney's fees in the estate matter; that he never was paid for preparing the petition, and expected no pay therefor. It is also shown that he had no private employment from any of the deceased's family; that his employment came solely through the county attorney; and that he was not interested in any litigation based upon the same state of facts upon which the prosecution was based. On this showing the district court did not err in overruling the objections.

Counsel for defendant also complain that they were denied an opportunity to interview witnesses who had been subpœnaed by the state. The court gave them a hearing upon that complaint, and made an order permitting them to interview the state's witnesses, leaving it optional, however, with the witnesses whether they should submit to such an interview. The order made by the court fully protected the defendant in any rights he had, and he is in no position to complain of the ruling of the court thereon.

Early in the trial defendant filed an objection to the sheriff acting in his official capacity, alleging that he was prejudiced against the defendant. Later, however, defendant undertook to withdraw his objection, but by the permission of the court the coroner proceeded to exercise the functions of the sheriff, and the clerk thereafter issued an alias venire for jurors, and the same was served on the coroner's deputy or agent without objection from the defendant. The examination of jurors proceeded until the state had exhausted or waived its peremptory challenges, and the defendant exercised his last peremptory challenge, and, the jury being still incomplete, the court ordered the coroner "to summon from any of the bystanders so many good and lawful men as necessary to complete the same," whereupon a bystander was called, examined, passed for cause, sworn as a juror, and sat upon the trial of the case. It is now urged that the order of the court to the coroner is absolutely void, and that the person so summoned was

incompetent and disqualified to serve upon the jury. This contention is based upon the language of section 8143, Rev. St. 1913, wherein it is provided that, under such circumstances as existed at the time, the court may order the sheriff or coroner "to summon without delay good and lawful men, having the qualifications of jurors." It is said that the order made was erroneous because it directed the coroner to summon jurors from "the bystanders." The statute does not forbid the selection of bystanders, nor does it say that they shall be selected from the body of the county, but merely provides that those selected shall have the qualifications of jurors. Defendant made no objection at the time, nor is any complaint made against the character or conduct of the juror so summoned. While perhaps the order ought to have been in the language of the statute, no objection was made at the time and no prejudice is shown. In the absence of such showing, it will be treated as error without prejudice.

Defendant requested that witnesses for the state be excluded from the courtroom during the trial. This request was granted, with the exception of the sheriff, who was a witness. As to him the court refused the request unless defendant file an affidavit of prejudice. This was not done, and the court, in the exercise of sound legal discretion, refused to exclude him; he being an officer of the court. This was not an abuse of discretion.

It is also urged that the county attorney, in his opening statement of the case to the jury, made remarks which were not sustained by the evidence introduced on the trial and were prejudicial to the defendant. A number of immaterial matters were mentioned on which evidence was not offered, or, if offered, was excluded, but we find no misstatements of a prejudicial nature. The excerpts quoted in defendant's brief do not contain any matter that would tend to unduly prejudice the jury against the defendant. For the most part the statement merely pointed out what the county attorney expected to dev op by the evidence, except that now and then he may have become argumentative.

This would have been more proper after the evidence had been introduced, but we find nothing that could have worked to defendant's serious disadvantage. As to that part which is most objectionable, no objection was made by defendant's counsel, nor was the court's attention called thereto.

Error is assigned because the court permitted counsel for the state to ask a number of leading questions. It is probably true that from time to time in making up this record of more than 1,000 pages there are some questions in such form as to suggest an affirmative answer. However, after a consideration of the questions to which our attention is directed by defendant's brief, we are of the opinion that the trial court was not guilty of an abuse of discretion in allowing the questions to be asked and answered. The manner in which the witnesses shall be examined is a matter over which the trial court has a very large discretion. *Edwards v. State,* 69 Neb. 386. But as to matters material to the issues, this method of examination ought to be carefully guarded against, and under some circumstances would be so prejudicial as to require a reversal.

It is also urged that witnesses were permitted to testify "to seeing footprints made by defendant on the soft, smooth ground the next morning, and to compare them with the tracks on the west side of the house supposed to have been made by the man who fired the fatal shot through the window, and to give the result of his opinion or comparison of such tracks to the jury." It is true that some of these questions, if singled out and taken alone, may be criticized, but, when the whole testimony is examined, and the description of defendant's shoes and the points on which the witnesses based their opinions are brought out fully, as they were before the jury, we can find no substantial error in the rulings of the court on the admissions of this testimony.

While defendant assigns as error the refusal of the court to give a number of requested instructions, he especially complains because his requested instruction No. 7

was not given. This instruction was given in substance by the court on its own motion, and therefore its refusal was not error.

While exceptions were taken to each of the instructions given by the court on its own motion, instruction No. 20 is the only one of which special criticism is made. It reads:

"Certain officers of the county of Scott's Bluff and other places have testified in this case on behalf of the state. You are instructed that under the law of this state, in weighing their testimony, greater care should be used, because of the natural and unavoidable tendency of such persons in procuring and stating evidence against the accused. But it does not follow that you are necessarily obliged to disregard their testimony."

Complaint is made of the concluding sentence. With the exception of this sentence, the instruction has heretofore been approved. *Preuit v. People,* 5 Neb. 377; *Kastner v. State,* 58 Neb. 767; *Shellenberger v. State,* 97 Neb. 498. In a discussion of the rule, in *Shellenberger v. State, supra,* it is said:

"Instructions of this nature are countenanced by the courts in behalf of a defendant, in order to call attention of the jury to the fact that the hunting instinct still exists, and that men whose duty it is to prosecute criminals sometimes allow their zeal, perhaps unconsciously, to color or bias their testimony in the endeavor to procure conviction. This is the only reason why such instructions are permitted." The clause of which complaint is made does not go too far in telling the jury that they are not necessarily bound to disregard the testimony of the county officers. Indeed, the instruction is too broad. It ought not to have been applied to the county officers generally.

The closing argument of the county attorney is criticized. There are statements therein relating to the expense of the trial which might better have been omitted. Perhaps also the conclusion he drew from some of the evidence, or his recollection of some of the evidence, was some-

what faulty. His reference to the public interest in the verdict and his suggestion of the verdict expected may well be criticized. A prosecuting officer ought not to appeal to the prejudice of a jury, or ask that they return a verdict in response to public sentiment, but, upon the record before us, we do not feel called upon to hold that his remarks were so prejudicial as to require a reversal of the judgment.

The assignments have been considered in the order followed in defendant's brief, and the sole question remaining is the insufficiency of the evidence to sustain the verdict.

Joseph E. Layton was a well-to-do farmer, who, about a year before his death, had married defendant's daughter. In April, 1915, defendant and his wife came from their home in California and took up their abode with Mr. and Mrs. Layton. On the night of June 11, the family, which consisted of Layton and his wife, and his wife's three-year old child by a former marriage, the defendant and his wife, and a servant girl, had supper about 8 o'clock in the evening. The women cleared the table while Layton remained seated, reading a newspaper, as was his custom. Defendant was in and about the house. The women, having finished their work, were seated on one side of the table, which was in a room used both as a dining room and kitchen, while Layton was on the other side, immediately in front of a window, with a lighted lamp on the table, when a shot was fired through the window. The bullet passed through Layton's head, killing him instantly. The theory of the state was that Jordan went outside of the house, and with a rifle shot and killed Layton, the motive being to obtain possession of his property, either for himself or for his daughter, Mrs. Layton. No evidence was offered in behalf of defendant. It would serve no useful purpose to discuss the evidence at length. It points conclusively to defendant's guilt, and the judgment is

AFFIRMED.

HAMER, J., not sitting.

JEANNETTE MCDIVITT, APPELLEE, V. MARIE E. BRONSON, APPELLANT.

FILED JULY 3, 1917. No. 19571.

Ejectment: RIGHT TO MAINTAIN. Where a building projects over and upon the land of an adjoining proprietor, the latter may maintain ejectment to recover possession of that portion of his property which is occupied by the encroaching structure.

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

Eldred, Cordeal & McCarl, for appellant.

J. L. Rice, contra.

LETTON, J.

Defendant was the owner of two lots in the city of McCook, upon one of which her dwelling stood. She sold the other to plaintiff, who was intending to build. Plaintiff procured plans for the erection of a dwelling on the lot she purchased and let the contract for the erection of the house. She had the lot surveyed before beginning excavation for the foundation. It was then ascertained that a bay of defendant's house projected over and into the lot plaintiff had purchased. The portion which encroached was about 12 or 14 feet long and a little over 2 feet wide, exclusive of the eaves which projected about 2½ feet further. Plaintiff desired to use the strip upon which the house encroached as a driveway. She proposed to defendant that she (plaintiff) reconvey the lot and have a return of the purchase money. Plaintiff also negotiated with other parties with reference to the purchase of another lot. She also offered to accept $250 and reconvey the five-foot strip. The testimony tends to prove that defendant said she could not return the money and take the lot back because she had sent the money away. She declined to pay $250 for the strip. Plaintiff then proceeded with the construc-

tion of her house. She attempted to purchase a five-foot strip on the other side of the lot for a driveway, but the owner asked $400 for it and she did not purchase. Defendant has retained the full amount of the purchase money, and has never tendered or offered to pay or return to plaintiff any money from the time of the purchase until the present time. Plaintiff brought this action in ejectment to recover possession of the five-foot strip. It was disclosed at the trial that plaintiff was in possession of all the strip except that occupied by the encroachment of the dwelling. The cause was tried without the intervention of a jury. The court found that the building and eaves projected 4 feet 5 inches into plaintiff's lot, and that the plaintiff had sustained nominal damages of one cent, and rendered judgment of ouster. Defendant appeals.

The petition was the ordinary form in ejectment. The answer set up that the plaintiff knew of the encroachment when she purchased the lot and agreed that it might remain there, but there is absolutely no proof to support these allegations. The only assignment of error is that the judgment of the district court is contrary to law. Under this assignment two propositions are advanced; First, that it is essential to the action that plaintiff show that she has been ousted by the defendant; second, that ejectment will not lie for a portion of a building if the building will be so destroyed as to lose its identity.

In *Dale v. Hunneman*, 12 Neb. 221, the question whether it was necessary to prove ouster before an action of ejectment could be maintained was considered, and it was held that while this was essential at common law it was unnecessary in a modern action under the Code, and that all that is necessary to entitle the plaintiff to the action is that he has a legal estate in the premises, is entitled to possession of the same, and that the defendant unlawfully keeps him out of possession. *Bridenbaugh v. Bryant*, 79 Neb. 329.

As to the second point, only a small portion of defendant's dwelling projects into plaintiff's lot, which can be

be cut off and the main building left. The rule is that, where one encroaches by a building upon the land of another, ejectment is the proper remedy. *Butler v. Frontier Telephone Co.*, 186 N. Y. 486; *Wachstein v. Christopher*, 128 Ga. 229; *Johnson v. Minnesota Tribune Co.*, 91 Minn. 476; *Cromwell v. Hughes*, 144 Mich. 3. If it were not so, the adverse possession of the wrongdoer would ripen into a perfect title as against the owner. The finding of the court upon the facts in such an action is entitled to the same weight as the verdict of a jury. Defendant contends that plaintiff has mistaken her remedy, which is in equity. Plaintiff offered to rescind if defendant would return the money, but this offer was refused. She also offered to reconvey the strip to defendant for $250, which seems fair and reasonable, when the evidence shows that a like strip on the other side of the lot would have cost her $400. It would seem, therefore, that plaintiff has offered to do equity. Defendant has not pleaded an equitable defense, but has set up a legal defense which there is absolutely no evidence to sustain, and plaintiff is therefore entitled to judgment. It is unfortunate that this condition exists, but defendant seems to have brought it largely upon herself by her refusal to return the purchase money. It is to be hoped that even now an equitable adjustment can be made between these neighbors.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF CATHERINE E. CRAIG. ALVARADO W. CRAIG, ADMINISTRATOR, APPELLANT, V. DORIS L. WRIGHT, APPELLEE.

FILED JULY 3, 1917. No. 19600.

1. **Executors and Administrators: RIGHT OF APPEAL.** An administrator as such cannot appeal from the final order of distribution unless he is pecuniarily affected in his representative capacity. Rev. St. 1913, sec. 1498.

2. ———: DISTRIBUTION. "An administrator who undertakes, without an adjudication of heirship, to distribute funds in his hands as the residue of an estate administered by him, assumes the responsibility of making distribution to the proper persons." *Boales v. Ferguson*, 55 Neb. 565.

3. ———: ———: APPEAL. An administrator who, without having procured an order naming the distributees, distributes the proceeds of a judgment recovered by him for the death of intestate, cannot in his representative capacity appeal from the final order directing distribution to other persons.

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

Sullivan, Rait & Thummel, for appellant.

Ellery H. Westerfield and *Raymond M. Crossman, contra.*

ROSE, J.

This is an appeal by Alvarado W. Craig, as administrator of the estate of Catherine E. Craig, deceased, from an order of the district court for Burt county dismissing his appeal from the final order of distribution entered by the county court. Catherine E. Craig was killed in a collision with a railroad train at a public crossing, and in an action for damages the administrator recovered a judgment for $10,000. The husband and three daughters of decedent survived her. She also left surviving her Doris L. Wright, a son by a former marriage. The county court found that Alvarado W. Craig, who had been appointed administrator, and his three daughters were the only heirs. Without an order of court the administrator distributed the proceeds of the judgment to himself and two of his daughters. At the time distribution was thus made, the petition of Wright for a vacation of the adjudication of heirship was pending in the county court. Wright also petitioned the county court for an order of distribution allowing the husband one-fourth and each of the four children of decedent three-sixteenths of the estate. On that basis the county court ordered distribution. The administrator as such ap-

pealed to the district court without bond, and he gave no appeal bond as an individual. Wright filed a motion in the district court to dismiss the appeal from the county court on the ground that the administrator had no right to appeal in his representative capacity and had failed to appeal as an individual. Rev. St. 1913, sec. 1427. The appeal was dismissed. From the district court's dismissal the administrator has appealed to this court.

In support of the contention that the appeal was properly dismissed, *Merrick v. Kennedy,* 46 Neb. 264, is cited. In that case it was held that, where an executor or administrator is not pecuniarily affected by the final order of distribution, he cannot appeal therefrom in his representative capacity, since he is not "aggrieved" by such order. Rev. St. 1913, sec. 1498. In the present case, however, the administrator contends that the order of distribution pecuniarily affects him, since he had already paid out the proceeds of the judgment, and that he is therefore "aggrieved" and entitled to prosecute an appeal. The appeal is taken in his representative capacity. An appeal bond was not given. Craig's right to appeal as an individual, or as a distributee, has not been exercised. The problem is therefore reduced to the following inquiries: Was Craig, the administrator, "aggrieved" in his representative capacity? Is he as administrator of the estate of Catherine E. Craig, deceased, pecuniarily affected by the final order of distribution? He concedes that the funds for distribution were received by him in his representative capacity, but he challenges the correctness of the order designating the distributees and adjudicating their respective shares. As already stated, the funds were the proceeds of a judgment for damages. When the administrator ignored decedent's son in making distribution, the record in the county court presented for adjudication undetermined questions relating to heirship and to the distributive shares of those entitled to the estate.

The rule is that payments to distributees by the administrator without an order of court are made at his peril.

Boales v. Ferguson, 55 Neb. 565. If the court subsequently directs payments to other claimants, the administrator may be pecuniarily affected by the order, but the loss, if any, falls upon him individually, and not upon the estate. Under the circumstances of the present case as applied to the right of appeal, the estate itself is not affected by the final order of distribution, which neither increases nor diminishes the assets. The law does not permit the person who represents the estate to use it for individual purposes. *In re Barker's Estate,* 26 Mont. 279; *Ansel v. Kyger,* 60 Ind. App. 259; *Moore v. Ferguson,* 163 Ind. 395; *Succession of Hartigan,* 51 La. Ann. 126; *In re Heldman's Estate,* 135 N. Y. Supp. 143. Craig is not entitled to prosecute the appeal in his representative capacity at the expense of the estate and without an appeal bond. He is not thus representing the estate, but is seeking to protect individual interests. If the court's distribution is erroneous and that of the administrator correct, the latter had an adequate remedy by means of an individual appeal perfected by an appeal bond. *In re Williams,* 97 Neb. 726.

It follows that the appeal from the county court to the district court was properly dismissed.

AFFIRMED.

EDWARD J. EPSTEN, APPELLEE, V. HANCOCK-EPSTEN COMPANY, APPELLANT.

FILED JULY 3, 1917. No. 20084.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: IMPAIRMENT OF EARNING POWER.** Under the workmen's compensation act compensation cannot be awarded for the loss of a toe unless the injury has impaired the earning power of the employee. Rev. St. 1913, sec. 3662.

2. **———: ———: AMOUNT OF COMPENSATION.** Under the workmen's compensation act, providing for compensation for partial disability at the rate of 50 per cent. of the "difference between the wages received at the time of the injury and the earning power of the employee thereafter," the fact that the employee earns higher

wages after than before the injury will not deprive him of compensation to which he is entitled, where he receives higher wages because he has by education and training fitted himself for more remunerative employment. Rev. St. 1913, sec. 3662.

3. ———: ———: MEDICAL EXPENSES. Under the workmen's compensation act, declaring that the employer shall be liable for "reasonable medical and hospital services" rendered "during the first twenty-one days after disability begins," an employer who has provided necessary medical attention during the three weeks subsequent to an injury sustained by an employee is not liable for medical expenses subsequently incurred by the latter after blood poisoning developed. Rev. St. 1913, sec. 3661.

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

Nolan & Woodland, for appellant.

Montgomery, Hall & Young, contra.

ROSE, J.

This is an action to recover compensation for an injury sustained by plaintiff April 29, 1915, while in the employ of defendant. In operating a press, plaintiff placed his left foot under the plunger, which crushed his great toe. Medical attention was promptly furnished by defendant. Plaintiff returned to his employment May 18, 1915, and worked until May 26, 1915, when blood poisoning developed. He then went to a hospital, where his injured toe was amputated at the second joint. In the fall of that year he attended a business college, returning to work in defendant's office May 20, 1916. At the time of his injury, April 29, 1915, his wages were $7 a week. When he returned nearly a year later, he received $10 a week. At the time of the trial he was receiving $15 a week. The district court awarded him $5 a week to May 20, 1916, and in addition held: "That plaintiff is also entitled, for the permanent injury to his foot, which injury has permanently lessened the use of such foot, to the sum of $1 a week for 245 weeks, being the sum of $245. Plaintiff's claim for medical and hospital expenses incurred after blood poisoning developed was disallowed. Defendant has appealed

from the award of $245, and plaintiff has filed a cross-appeal from the order disallowing his claim for medical and hospital expenses.

Defendant contends that, since plaintiff's earning capacity has not been reduced because of the injury, he is entitled only to compensation for the actual loss of earnings from the time of receiving the injury, April 29, 1915, to May 20, 1916, and that the award of compensation for the permanent injury to his foot is not authorized by the statute. The statute makes provision for compensation for total disability, for "disability resulting from permanent injury" on account of the loss of, or "permanent loss of the use of," an arm, hand, leg, foot, or eye, and, in other cases of partial disability, the compensation "shall be fifty per centum of the difference between the wages received at the time of the injury and the earning power of the employee thereafter." Rev. St. 1913, sec. 3662. The statute does not, as is the case in many of the states, make provision specifically for the loss of toes or fingers. Unless such injuries cause the "permanent loss of the use" of the foot or hand, the compensation seems to be determined by the "difference between the wages received at the time of the injury and the earning power of the employee thereafter." Rev. St. 1913, sec. 3662. The statute conclusively presumes that for the loss of, or the permanent loss of the use of, a hand, arm, foot, leg, or eye, the proper compensation is 50 per cent. of the wages for a specified number of weeks, respectively. For any other partial disability, compensation is to be determined by proof of impairment of earning power. If an employee after his injury receives the same or higher wages than before, ordinarily that would indicate that his earning power had not been impaired. Such evidence, however, would not necessarily be conclusive, since after the injury he might for various reasons receive higher wages, though his earning power had been impaired by the injury. A general advance in wages might enable the injured employee to secure the same wages after as before the injury, though partially disabled. In the

present case it is a reasonable inference from the evidence that plaintiff received higher wages because he had by education and training fitted himself for more remunerative employment. There is evidence tending to show that he is unable to perform the duties of his former employment. The evidence justifies a finding that his earning capacity has been impaired. He concedes, however, that the award of a lump sum was erroneous, and in that respect the judgment will be modified.

On cross-appeal plaintiff contends that the court erred in refusing to make an award for medical and hospital expenses incurred after blood poisoning developed, and cites *Johansen v. Union Stock Yards Co.*, 99 Neb. 328. It was there held that, where an accident which at first appeared to be trivial later resulted in a diseased condition destroying the sight of an eye, the "injury," within the meaning of the statute, occurred when the diseased condition culminated, there being no apparent "violence to the physical structure of the body" at the time the accident occurred. In the present case an injury was apparent at the time of the accident. Plaintiff was then disabled, and did not return to work for nearly three weeks. During that time his employer provided the necessary medical attention. The medical and hospital expenses for which plaintiff seeks compensation were not rendered "during the first twenty-one days after disability" began. Rev. St. 1913, sec. 3661. His claim therefor was properly disallowed.

The judgment of the district court, modified to require weekly payments instead of awarding a lump sum, is affirmed.

MODIFIED AND AFFIRMED.

LETTON and CORNISH, JJ., dissent.

EDWARD SODOMKA, APPELLEE, V. CUDAHY PACKING COMPANY ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19192.

1. **Negligence:** COMPARATIVE NEGLIGENCE. In an action for damages caused by the negligence of the defendant, the plaintiff may recover, although himself guilty of contributory negligence, if his negligence was slight as compared with the negligence of the defendant.
2. ———: ———: QUESTION FOR JURY. In such case questions of negligence and contributory negligence are for the jury, and it is for the jury to find whether the plaintiff's negligence, if any, was slight as compared with that of the defendant. But, as in other cases, the verdict must have evidence to support it.
3. ———: GROSS NEGLIGENCE. To open the door of an elevator shaft and then turn one's back thereto and so enter it without looking to see whether the elevator is there is such gross negligence that one so doing cannot recover damages caused by falling down the shaft.

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

James C. Kinsler, for appellants.

William R. Patrick and *C. J. Southard, contra.*

SEDGWICK, J.

The plaintiff, an employee of the defendant, fell into the elevator shaft and was injured, and brought this action against the defendant to recover damages. There was a verdict and judgment for the plaintiff for $10,000. The defendant appealed. It is the companion case with *Sodomka v. Cudahy Packing Co.,* p. 448, *post,* which arose out of the same transaction.

The plaintiff, in the performance of his duties, undertook to take a two-wheel truck by way of the elevator from the first floor to the third floor. He went to the elevator with his truck, and rang for the third floor. He opened the door of the elevator, and then turned his face to the truck, and when he heard the elevator come up he backed into the shaft, supposing that the elevator had stopped; but the

elevator had gone on up to the next floor, and so he fell and hurt himself. He relies upon a custom to call the elevator by a certain number of rings indicating the floor at which it is to stop. The evidence shows that the elevator went to the next floor above. The plaintiff says the custom was, when the elevator man was not intending to stop the elevator where it is called, that the elevator man should notify him that he was going up higher, and he relied upon this custom, and so did not look to see whether the elevator had stopped or not. There is some evidence of a custom, as the plaintiff contends, to enter the elevator shaft backward without looking to see whether the elevator was there. Whether this custom, if there was one, was confined to this young man alone is not very clear. He was about 17 years of age, had worked in this building about two years, and ought to know that such a custom was dangerous, and to follow and rely upon such a custom was gross negligence. If we admit that the elevator man was not a fellow servant, and admit that he was negligent in not notifying the plaintiff that he did not intend to stop at his floor, and that therefore the negligence of the defendant was a proximate cause of the injury, the question then comes as to the negligence of the plaintiff himself. If the negligence of the plaintiff was slight in comparison with the negligence of the defendant, he might still recover.

We think that to back into the elevator shaft without looking where he was going is negligence, and that it is such gross negligence that no jury should be allowed to find that it was slight in comparison with the negligence of the defendant. It is difficult to see how one could be guilty of more gross negligence than to back into an elevator shaft without looking to see where he was going. His relying upon a custom when nature had given him eyes is not excusable.

The judgment of the district court is

REVERSED.

MORRISSEY, C. J., dissents.

LETTON, J., not sitting.

FRANK SODOMKA, APPELLEE, V. CUDAHY PACKING COMPANY, APPELLANT.

FILED JULY 3, 1917. No. 19224.

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

James C. Kinsler, for appellant.

William R. Patrick and *C. J. Southard, contra.*

SEDGWICK, J.

This action is based upon the same facts involved in *Sodomka v. Cudahy Packing Co., ante,* p. 446. That was an action by the young man who was injured by the accident. This case is by his father to recover for loss of services of his son. There was a verdict and judgment for the plaintiff.

For the reasons there given, the judgment is reversed and the cause remanded.

REVERSED.

MORRISSEY, C. J., dissents.

LETTON, J., not sitting.

ARTHUR J. KOENIGSTEIN, EXECUTOR, APPELLANT, V. ALBERT FINKE, APPELLEE: HATTIE LINDSAY, INTERVENER, APPELLANT.

FILED JULY 3, 1917. No. 18716.

1. **Insurance: BENEFICIAL INSURANCE: DEPENDENT.** The statute should be liberally construed in determining whether the beneficiary named by the insured, in a fraternal beneficiary association, is a "dependent" within the meaning of the statute.
2. ———: ———: ———. When the beneficiary named performs continued and necessary personal services for the insured under an agreement that the insured will contribute to her support by making provision for her for that purpose in his will, she is to that extent dependent upon him, and should be so held in construing the statute. The insured would be morally, if not legally, bound by such agreement.
3. ———: ———: CHANGE OF BENEFICIARY. If the insured in pursuance of such agreement makes her the beneficiary in his will, and the company has notice of that fact, and of the reason for so doing, and does not object, but allows all parties to believe that such beneficiary will be recognized as such by the company, and afterwards, in an action upon the certificate by such beneficiary and the administrator of the estate of the insured, pays the money into court and makes no defense, this will be a sufficient change of beneficiaries in favor of the person so named by the insured.

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

William V. Allen, William Dowling and *Arthur J. Koenigstein,* for appellants.

Arthur C. Mayer, contra.

HAMER, J.

Arthur J. Koenigstein, as executor of the last will and testament of Friedrich Finke, deceased, brought this action as plaintiff in the district court for Madison county against the Grand Lodge of the Order of the Herman Sons of Nebraska and Albert Finke, defendants. Hattie Lindsay became intervener. The action is brought upon a beneficiary certificate for $500 issued by a fraternal insurance

company to Friedrich Finke. Albert Finke is the brother of Friedrich Finke. The intervener, Hattie Lindsay, filed an amended petition of intervention. After the filing of the petition the fraternal association paid the money into court, where it awaits the rendition of proper judgment. Albert Finke demurred to the plaintiff's petition and the petition in intervention as amended, as not stating "a cause of action in favor of the plaintiff and against the defendant, Grand Lodge of the Herman Sons, or against this demurring defendant," and judgment was entered in his favor, from which the administrator and the intervener appeal. The intervener assigns the following errors: (1) The district court erred in sustaining the demurrer of Albert Finke; (2) the association has paid the money into court, and therefore waives any right it may have in the premises and declines to become a litigant in the case. This leaves the sole question to be determined, whether Mrs. Lindsay's petition of intervention states a cause of action on her account against the fund in court.

She alleges the existence of the company at the time the benefit certificate was issued to Friedrich Finke and its existence now, also that he was eligible to insurance in the association, and was insured for $500 in the event of his death, and that he died in good standing in the Order May 4, 1912, having complied with all the requirements of said beneficiary certificate and with the by-laws of the defend ant, and that said certificate then became due and payable; that said Friedrich Finke had no friends or relatives living in the United States, and for a long time prior to his death was greatly afflicted with tuberculosis, and was thereby so incapacitated as to require the constant attendance of a nurse; that many months prior to his death said Friedrich Finke orally contracted with the petitioner, who was not related to him by blood or marriage, that in consideration that she would take him into her home and would nurse and would care for him, and furnish him with food, raiment, shelter, medicine and medical attendance, and such things as his condition required until his death,

he would assign and transfer to her said beneficiary certificate or policy of insurance, and would make her the beneficiary thereof, and would make and sign an instrument in writing, which he did April 11, 1912, purporting to be his last will and testament, and would thereby assign and transfer to her said beneficiary certificate, and make her the beneficiary thereof; that in pursuance thereof said Hattie Lindsay did all that she had agreed to do; that said Germania Lodge, well knowing of the performance on the part of the petitioner of her part of said contract, and upon the strength thereof relying upon the fact that she was to be considered and treated by the said Friedrich Finke as the beneficiary of said benefit certificate or policy of insurance, the said Germania Lodge No. 1 of Norfolk, Nebraska, which is a part of defendant's organization, by and through its officers, assented to said substitution of the petitioner as the beneficiary of said benefit certificate or policy of insurance, and that said defendant never protested against or warned the petitioner that her claim to said benefit certificate or policy of insurance would be contested or objected to on its part, whereby the intervening petitioner avers that the defendant waived any right it might have in the premises to protest against or object to the substitution of the petitioner as the beneficiary of said benefit certificate or policy of insurance, and is estopped to deny the petitioner's right to recover herein; that by reason of the issuance of said beneficiary certificate and the assigning thereof and the death of said Friedrich Finke said sum of $500 became due and owing to the intervener with 7 per cent. interest thereon from May 4, 1912.

The fund is in the custody of the law. It is a fund in the hands of the court. The contract made and the work which Mrs. Lindsay was doing for the testator were known to the Grand Lodge of the Order of the Herman Sons of the state of Nebraska, and it made no protest or opposition thereto. It seemingly acquiesced in all that was done.

By its silence it became estopped to deny the validity of the contract and its performance by the intervener.

Did Friedrich Finke exercise his right to substitute a new beneficiary? The beneficiary certificate contained the clause: "At the time of admission every brother has to state in his application the person or persons who are to be the beneficiary of the insurance money after his death. However, the brother may at any time withdraw these names and make any other person the beneficiary of the insurance money, providing, however, that the grand lodge receive a written notice thereof. To make such a transfer binding, he must hand in such a request to the grand secretary, which will be certified by the secretary of his lodge, with the lodge seal. The fee for this is fifty cents, which the brother has to pay. As receivers of the insurance sum, only the wife, children, or other blood relatives, also foster parents or other legally recognized representatives, may be designated."

It would seem that there was an earnest purpose on the part of the Order of the Herman Sons to pay the sum of $500 upon the decease of a brother in good standing to the person who might be the beneficiary.

The first section of article 1, relating to the objects of the order, contemplates that "widows and orphans and other survivors * * * may be supported properly and kept from want at the time when help is most needed, that is, when the support has been taken away from them." It will be seen that it need not be a widow or an orphan, it may be "other survivors." Should it apply to one situated as the intervener is here? Mrs. Lindsay was taking care of the insured, who was sick unto death, and was giving him food and medicine and shelter. She was acting as a nurse and in a menial capacity. This and other similar allegations are sufficient, in the absence of any motion to make the pleading more definite and certain, to admit proof that she needed the support which this policy would give her, and that she depended upon it for the comforts and necessaries of life. If he did not take care of her no one else

would. He had nothing with which to reward her except this insurance policy, but he had promised to use that, and that was as substantial as if he had money in his pocketbook, or other property in his possession, which he might have given this woman. When she had labored to the end and death had laid its cold hand upon the man who was to provide for her, had she nothing to expect from the Grand Lodge of Herman Sons? It was not objecting. It seems to have consented to it. The principal ground for supporting the trial court in sustaining the demurrer to the intervener's petition was that the statute provides that benefits shall not be paid except to certain relatives named or to dependents. It would seem that the provision of the statute relates to the contract to pay, and to its binding force upon the company. In any event it does not relate to the right to make voluntary settlements in accordance with the strongest kind of moral obligations. If, therefore, every person interested in any manner in this company had formally expressed his consent to pay this insurance to this woman, the statute would not be a bar to their doing so. Some courts have held that the local lodge cannot consent for the members, but we have uniformly held that notice to the local authorities, who should be the ones to consent to a transfer of beneficiary, is notice to all the persons interested in the company. But we do not need to put our decision upon that ground. First, was the contract of the deceased followed up by his will and the performance on the part of this woman a sufficient designation of the beneficiary under the circumstances, there being no objection on the part of the company? Second, was this woman a dependent under the allegations of these pleadings, within the meaning of the statute?

In 1 Bacon, Benefit Societies and Life Insurance (2d ed.) sec. 308, the supreme court of Texas is quoted as saying, in *Splawn v. Chew,* 60 Tex. 532: "The right to change the disposition of the money being established in the member, the next question is, how is it to be exercised? It is contended by appellees that it can be exercised only in the

manner pointed out in the third section of the third by-law, which reads as follows: 'Members may at any time, when in good standing, surrender their certificate, and have a new one issued, payable to such beneficiary or beneficiaries dependent upon them as they may direct, upon payment of a certificate fee of fifty cents.' This section is in further recognition of the right to make the alteration, and it seems to be admitted that the surrender of the old certificate and the issuance of a new one under this section would effect a change in the beneficiaries of the policy. But is this the only way in which such a change can be effected? The right to make the change is given by a different section of the by-laws, and exists in the insured so long as he remains a member of the order. A method by which he may accomplish it to the satisfaction of the order is pointed out in the section last cited, but we do not consider this as exclusive of all other ways of effecting the same object. The design of this section is to protect the interests of the corporation. The company is entitled to know who are the parties entitled to the benefit money, and this is an effectual and certain means of giving that information. But, like all such provisions in the by-laws of private corporations, it may be waived at the option of the corporation, being for its benefit alone. It has been so held in reference to such provisions when prescribed in mandatory terms. If they can be waived in such cases, much stronger would seem to be the reason why this can be done when the course to be pursued is directed, as in this instance, in permissive language alone. * * * As a by-law of the order this provision entered into the understanding between the company and the member effecting the insurance, and the rights of interested parties are not strengthened by the fact that the same provision is found in the certificate. It is still a condition for the benefit of the company, to be insisted upon or waived according to their election."

In *Goff v. Supreme Lodge, Royal Achates,* 90 Neb. 578, it was held: "Where a woman, who is without means, in

good faith leaves her own home and work and assumes and for years faithfully performs the duties of a housekeeper for a member of a fraternal beneficiary association, not related to her by consanguinity, under an agreement that in consideration for such services he will support her and at his death leave her his estate, and no evidence is offered showing any improper relations between them, held that she thereby becomes a dependent upon such member, and as such is eligible as a beneficiary in a certificate of membership issued to him by the association of which he is a member."

In *Keener v. Grand Lodge, A. O. U. W.*, 38 Mo. App. 543, it is said: "I would not restrict dependents to those whom one may be legally bound to support, nor yet to those to whom he may be morally bound, but the term should be restricted to those whom it is not unlawful for him to support."

We think if the insured is under an obligation to help a person in her manner of living she is a dependent, within the meaning of the statute, and we ought not to seek for a more technical definition of a dependent in order to defeat her claim. In fact this court has already so decided. In the *Goff* case, above cited, it was said: "No case has been cited, nor do we think one will ever be decided, holding that a woman, who, without means, in good faith leaves her own home and work and assumes and for years faithfully performs the duties of housekeeper for a man who agrees, in consideration therefor, to support her and at his death leave her his estate, does not thereby become a dependent upon him, and especially so where there is an entire absence of evidence to show any improper relations between them."

If this woman had means of her own so that she did not depend upon the promise to reimburse her, and so that she could abundantly afford to support him in his last day as an act of charity, that fact does not appear in the pleadings demurred to, and no such presumption ought to be indulged.

The sister of the deceased, one of the original beneficiaries made no claim to the money. It is said that the sister is dead, but of course this does not appear in the pleading, and it is not shown of course by the demurrer of the brother, Albert Finke.

It will be seen that under the case above cited the intervener might have a home and some money, and may have had the capacity to earn other money, and yet be a dependent within the meaning of the statute. We think that the demurrer of Albert Finke should be overruled. As it is agreed between the parties that a final disposition of the rights of the parties shall be made upon a consideration of the demurrer, it is ordered that the district court pay this money to the intervener.

Reversed and remanded for this order to be carried out.

REVERSED.

ALVA H. JACKSON, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JULY 3, 1917. No. 19289.

1. **Continuance:** DILIGENCE. Ordinarily a party who fails to have a subpœna issued for a necessary witness and relies upon the latter's promise to appear and testify has not exercised such diligence as requires a continuance in case the witness fails to keep his promise.

2. ———: ———. The nonattendance of witnesses subpœnaed by plaintiff when the trial commenced is not of itself sufficient ground for a continuance at the request of defendant who relied upon plaintiff's efforts to procure the attendance of such witnesses.

3. **New Trial:** NEWLY DISCOVERED EVIDENCE. "A new trial should not be granted a party on the ground of newly-discovered evidence, unless he makes it appear that the newly-discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and produced it at the trial." *Cunningham v. State*, 56 Neb. 691.

4. **Appeal:** CONFLICTING EVIDENCE. Where there is a conflict of testimony, and the jury might have reached a different conclusion from

that which they returned in their verdict, but the evidence sustains the verdict, and the case is not shown to have been properly tried, the verdict will not be set aside unless it is clearly wrong.

APPEAL from the district court for Douglas county: JAMES P. ENGLISH, JUDGE. *Affirmed.*

John L. Webster and *W. Ross King,* for appellant.

B. H. Dunham, Herman Aye, Herbert S. Daniel and *John A. Moore, contra.*

HAMER, J.

Plaintiff brought this action to recover damages in the sum of $25,000 for an injury which, according to the petition, occurred by reason of the negligence of defendant's employees in prematurely starting a street car which plaintiff was attempting to board in the city of Omaha, the injury requiring the amputation of plaintiff's left leg. The answer was a general denial. From a judgment on a verdict in plaintiff's favor for $12,000 defendant appeals.

The principal assignments of error relate to the overruling of defendant's motion for leave to withdraw a juror and for a continuance of the case on account of the nonappearance of two witnesses, and the overruling of defendant's motion for a new trial. A proper understanding of these questions necessitates a review of some of the evidence. According to plaintiff's testimony, about 6 o'clock on the afternoon of July 22, 1913, he was returning from work at Twenty-ninth and Dewey streets with two of his employees, Pat Moore and Nels Jensen. The three men rode east to a transfer point at Sixteenth and Farnam streets. While waiting for a north-bound car plaintiff walked north to a flower store on the east side of Sixteenth street, intending to purchase flowers. The store was closed, and plaintiff returned to the corner. In the meantime a north-bound car had stopped at the northeast corner of the intersection to discharge and receive passengers. A number of persons, including plaintiff's companions, boarded the car. When plaintiff arrived at the rear end of the car it had not yet started. He grasped the hand-hold

over the rear step and lifted his left foot, and as he was placing it on the lower step the car gave a jerk forward, causing his foot to slip as it touched the step, and causing plaintiff to fall with his knee upon the step, his right foot dragging on the ground. While plaintiff was in this position the car proceeded about 20 feet before he was able to lift himself upon the platform of the car. Moore and Jensen were standing behind the conductor on the rear platform. When he arrived at home he found blood on his underwear and a scratch on his knee. He placed peroxide and turpentine on it. Later blood poisoning developed, and plaintiff went to a hospital August 1, where his left leg was amputated December 18.

On defendant's behalf there was evidence tending to show that plaintiff had made a statement to defendant's claim agent August 11, 1913, while plaintiff was in the hospital, and that he stated that he slipped while attempting to board a moving street car. There was also testimony by the conductors and motormen operating cars on Sixteenth street that no such accident as that which plaintiff narrated had occurred.

Moore and Jensen, who, according to plaintiff's testimony, were with him when the accident happened, failed to appear at the trial though a subpœna had been served upon them. When the trial commenced, March 3, 1915, plaintiff caused a subpœna to issue for Moore and Jensen, which was served that afternoon. They did not appear at the trial. That evening and again the next morning plaintiff made inquiry at their lodgings, but was unable to locate them. At the close of plaintiff's testimony defendant requested a a continuance on account of the absence of these men and supported its request by affidavits signed by Moore and Jensen May 30, 1914. Moore's statement was that he was not in Omaha July 22, 1913, when plaintiff testified the accident occurred, but that he was working on a farm in South Dakota; that February, 1914, plaintiff asked him to be a witness in his case against the street railway company and to testify that he was on the rear platform when the acci-

dent occurred, and that affiant narrated such a story to plaintiff's attorney. Nels Jensen's statement was that he saw plaintiff injure himself in July, 1913, while running to catch a street car, and that plaintiff had offered affiant $25 if he would testify that he was on the street car July 22, 1913, and saw the accident which plaintiff claims was caused by defendant's negligence. Defendant contends that it had exercised reasonable diligence to procure the attendance of Moore and Jensen, and excuses its failure to subpœna these men on the ground that plaintiff testified that a subpœna had been issued; that the record showed that these men had been served; and that a week before the trial the men had promised defendant's counsel that they would appear at the trial. The trial court held that defendant had not made a showing of due diligence, and that it was not justified in expecting to prove its defense by witnesses which it expected plaintiff to produce.

In overruling the motion for a continuance, was there "an abuse of a sound legal discretion?" Rev. St. 1913, sec. 7789. *Johnson v. Mills,* 31 Neb. 524, is cited by defendant in support of its contention that it was not lacking in diligence in relying on the promise of Moore and Jensen to appear and testify on its behalf. In that case the absent witness was a defendant whose interest in the result of the action justified his codefendant in relying upon his promise to attend. Ordinarily a party who fails to have a subpœna issued for a necessary witness and relies upon the latter's promise to appear and testify has not exercised such diligence as requires a continuance in case the witness fails to keep his promise. *Life Insurance Clearing Co. v. Altschuler,* 55 Neb. 341; 9 Cyc. 114.

Under the circumstances of this case, reliance upon the fact that plaintiff had issued a subpœna summoning these men as witnesses in his behalf does not excuse defendant's lack of diligence. Some courts have held that a party who relies upon the fact that his opponent has caused a subpœna to be served upon a witness is not entitled to a continuance in case the witness fails to appear, since the party

seeking the continuance has not exercised diligence. *Hutts v. Shoaf,* 88 Ind. 395; *Moore v. Goelitz,* 27 Ill. 18; *Drake v. State,* 5 Tex. App. 649. Whether this rule should be applied in all cases need not be decided. Under the circumstances of this case, however, there was good reason for denying a continuance for lack of diligence. The trial court did not abuse its discretion in overruling the motion for a continuance.

In support of its motion for a new trial, defendant produced affidavits by Moore and Jensen in which it was stated that they left the state immediately after being served with the subpœna; that they were not induced to do so by any person, but did so in order to avoid exposing the false claim of plaintiff who was their friend, and that when they learned that the trial had ended they returned to Omaha. Defendant also filed affidavits made by five other men who state that they were approached by plaintiff to falsely testify that they saw the accident upon which he bases his claim for damages. While it is stated in the affidavits filed by defendant that it had no knowledge of these witnesses until after the trial had ended, there is not a sufficient showing of diligence. It is not shown why such testimony and these new witnesses could not have been discovered by exercising reasonable diligence before the trial commenced. The name of one of the five affiants, Sorensen, was disclosed to defendant in the affidavit made by Moore eight months before the trial. Defendant was not surprised by plaintiff's testimony. The trial court did not err in overruling defendant's motion for a new trial. *Butterfield v. City of Beaver City,* 84 Neb. 417; *Andrews v. Hastings,* 85 Neb. 548; *Dresher v. Becker,* 88 Neb. 619; *Van Horn v. Cooper & Cole Bros.,* 88 Neb. 687. The rule in this state is: "A new trial should not be granted a party on the ground of newly-discovered evidence, unless he makes it appear that the newly-discovered evidence is material for him, and that he could not by the exercise of reasonable diligence have discovered and

produced it at the trial." *Cunningham v. State,* 56 Neb. 691; *Butterfield v. City of Beaver City,* 84 Neb. 417.

According to the evidence contained in the record, the inception of the wound which caused the plaintiff to lose his leg was due to the negligence of the defendant company in starting its car while the plaintiff was trying to get on board and in dragging the plaintiff some distance before the car stopped. There is a conflict of testimony, and the jury might have reached a different conclusion from that which they returned in their verdict; but, as there is evidence which sustains the verdict and the case is not shown to have been improperly tried, we are unable to set aside the verdict on the ground that it is clearly wrong. " A verdict, supported by competent evidence, will not be set aside simply because it does not comport with the conclusion which this court, as triers of fact, might have reached." *German-American Bank v. Stickle,* 59 Neb. 321; *Beels v. Globe Land & Investment Co.,* 93 Neb. 733.

The judgment of the district court is therefore

AFFIRMED.

LLOYD CHENEY, V. STATE OF NEBRASKA.

FILED JULY 3, 1917. No. 19944.

1. **Larceny:** SUFFICIENCY OF EVIDENCE. Evidence examined, its substance stated in the opinion, and the same *held* insufficient to sustain a conviction of the crime of cattle stealing as charged in the information.
2. **Criminal Law:** EVIDENCE: CONFESSION. A statement of facts claimed by the prosecution to be equivalent to a confession of guilt will not be considered unless it is first shown to have been voluntarily made and without inducement. *Jones v. State,* 97 Neb. 151.
3. **Larceny:** PROOF. In order to convict the defendant of the crime of cattle stealing, the state must prove beyond a reasonable doubt that the defendant participated in a larcenous taking of the property with the intent to convert the same to his own use.

4. ———: INTENT. A felonious intent to convert the stolen property to the defendant's own use is a necessary element of larceny.

ERROR to the district court for Sioux county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

Earl McDowell, for plaintiff in error.

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

HAMER, J.

The plaintiff in error, Lloyd Cheney, was tried in the district court for Sioux county on the charge of stealing a steer, and was convicted and sentenced to the penitentiary for an indeterminate period of from one to ten years. He brings the case here for review, and alleges certain errors, the more important of which we will discuss.

The first assignment is that the evidence fails to sustain the verdict. It is shown by the testimony that one Chester H. Kramer, on whose premises the steer was kept at the time it was killed, was also informed against, but not prosecuted. The steer appears to have been running in the pasture with Kramer's cattle, and had been there since some time in July. It belonged to a man named Wolfe. Kramer owned the ranch, consisting of about 1,440 acres, and kept there from 40 to 150 head of cattle. He had about 90 there December 10, 1914. He was a man of family, kept house, and had men employed to assist on his ranch. He had lived many years at Bancroft, Nebraska, and moved from there up to Sioux county, and staid there about two years, when he moved back to the eastern part of the state and located at Pender, Nebraska, where he was living at the time of the trial of Lloyd Cheney. When Kramer moved up to Sioux county from Bancroft he took with him John E. Marshall, a witness in this case. Marshall was in the employ of Kramer on the ranch, and was 31 years old. He was a single man, and lived at Kramer's residence. He (Marshall) and Lloyd Cheney worked for Kramer, the latter only a small part of the

time. They had been building a shed for him. In this shed the steer was killed about noon on the 10th day of December, 1914. The defendant was a single man. He lived with his sister, Mrs. Chris Morgan, and her husband. He was accustomed to visit at Kramer's, presumably with Ed. Marshall. Kramer testified on behalf of the state that Cheney had staid at his house on the night of December 9, 1914. It is undisputed that when the steer was killed Kramer, the owner of the ranch, Ed. Marshall, who was his hired man, and the defendant, Lloyd Cheney, were all present and participated in the butchering. Kramer testified that Lloyd Cheney "was back and forth between the two places every day or so." He was then referring to his own residence and the Morgan residence; that the defendant had been at his house three or four times between Thanksgiving and the 10th of December, 1914, and stayed over night two or three nights, and after that that he was there nearly all winter. Prior to the 10th of December, 1914, he had resided most of the time at the Morgan residence, although the witness Kramer testified that the defendant was first at one house and then at the other. Kramer was informed against, but he was not prosecuted. He testified on behalf of the state and against the defendant. The older men, Kramer and Marshall, were not prosecuted, but the young man was prosecuted. Cheney does not seem to have received any of the meat. Kramer, being a man of family and having help employed, may have needed it.

The testimony of the main witness for the prosecution, Chester H. Kramer, seemed to be introduced to show that he (Kramer) was not to be blamed for butchering the steer. He said Cheney had been riding over his (Kramer's), place with him, and that they had talked about the ownership of the steer; that the conversation "naturally took place" on the ranch "some time or other when we were all together;" that, when riding over the place with the witness Kramer, Cheney had made mention that "we needed some meat;" that Cheney said: "This steer ought

to be butchered before somebody came and claimed it." Kramer's testimony makes Cheney apparently anxious that meat shall be speedily furnished for the Kramer family and also for the Morgan family, and Cheney is made to appear anxious for fear the supply of meat will be lost because somebody may come and claim the steer. For so young a man, 21 years old, Cheney is made to show a very active and persistent anxiety to cause meat to be furnished for other people's families. Kramer lays the whole blame of bringing the steer out of the pasture and up to the shed upon Cheney. He has Cheney rope the steer, and he says that no other person helped Cheney. But Marshall, Kramer's hired man, who was then working for Kramer testified that Cheney did not rope the steer until Kramer and Cheney had together driven the steer up to the shed. Marshall testified: "Well, sir, I don't know whether they drove him in (to the shed) or roped him and dragged him in;" but Marshall remembered that the day the steer was killed Kramer had gone over to Morgan's place in the morning, and further remembered that Kramer was with Lloyd Cheney when they got the steer and brought it in. He says that he (Kramer) "come in with him. Q. Was he walking or horseback? A. I think he was horseback." Mrs. Chris Morgan testified that the morning of the day when the steer was killed Kramer came over to her house and asked her brother in her presence "if he would go over and help him butcher," and that her brother "told him he would," and then that they sharpened their butcher knives on the grindstone before they went over to Kramer's, and that the night before that particular night her brother had stayed at Kramer's. Her statement as to where her brother stayed on the night of the 8th of December is corroborated by Marshall's testimony. Marshall testified that he (Marshall) was working for Kramer on the 10th of December, 1914, and that the steer was butchered that day about noon, that Cheney "was there helping off and on," and that Cheney did not stay at Kramer's the night before the steer was

killed. Marshall testified that he (Marshall) slept at Kramer's the night before the steer was killed, and testified as follows: "Q. You may tell the jury whether Lloyd Cheney staid in that house that night or not. A. Well, sir, I don't just remember; I don't think he did, though. Q. Who staid in the ranch house that night? A. Mr. Kramer and Mrs. Kramer, Mrs. Bonsel, and myself." On the morning of the day when the steer was killed Kramer left his home to go to Morgan's residence, presumably. Marshall so testified, and Mrs. Morgan saw Kramer there at her house and heard him ask her brother to come and help butcher, and Cheney himself so testified. At Morgan's place they sharpened their butcher knives, and then went over to the shed on Kramer's place, where they were going to kill the steer as soon as they got it out of the pasture and drove it up there. Cheney testified that Kramer came to Morgan's place that morning and asked him (Cheney) if he could go and help butcher, and, when he said that he could, asked him to get a couple of butcher knives, and then, when he got the knives, they went out to the grindstone, and Kramer turned the grindstone and Cheney held the knives on the stone so that they might be sharpened. As they went to Kramer's through Kramer's pasture they picked up the steer. The steer and other cattle were running in a pasture of 600 to 800 acres belonging to Kramer. They (Kramer and Cheney) were both on saddle horses. Cheney so testified, and he is corroborated by Marshall. When they got the steer up to the shed then Cheney roped it, and when they got the steer into the shed Marshall tried to kill it with an ax, but, as the steer would not stand still, Marshall failed in his efforts to kill it, and then he (Cheney) shot the steer with a revolver, and in that way killed it. Marshall had known Kramer at Bancroft, and came up from there with him to Sioux county, and worked for him and remained with him about 14 months and until after the steer was killed. Marshall testified that Kramer and Cheney came in with the steer together. He supposed that they came from the pas-

ture. He remembered that "they were both there with the steer. * * * Q. And how close to the shed were they? A. I don't know; they were right close to it, though. * * * Q. What is your best recollection as to whether Kramer was on horseback or on foot? A. I am satisfied he was on horseback that morning. Q. At this particular time. A. Yes; he had his horse down there then, when they was down there at the shed." When asked how Kramer came over to Morgan's place on the morning of the day when the steer was killed Mrs. Morgan answered: "He was on horseback." Marshall also testified that Kramer told Cheney "to go ahead and shoot it," meaning the steer. This was after Marshall failed to kill it with an ax.

There was some kind of an arrangement by which Kramer was not to be prosecuted. That Kramer should show anxiety to secure the conviction of Cheney was natural if it in any way affected the proceedings touching himself. That some sort of an understanding was arranged between the county attorney and Kramer is shown by the county attorney's testimony, which is very candid. The county attorney testified: "Q. Mr. Baker, tell the jury what arrangement you have made with Mr. Kramer as to immunity in the case of the state of Nebraska against Kramer, implicated in this case. * * * A. In the case of the state against Kramer, you mean? Q. Yes, sir. A. In that case the facts came to my knowledge that there had been a butchering down near Glen, and that both Cheney and Kramer were implicated in this butchering, and I believe that the sheriff first brought the information to me about that; * * * and he (the sheriff) brought Kramer to my office in the courthouse; and I believe that there Kramer related all about this butchering, and made an affidavit to what had happened down there, and I told Mr. Kramer that I could not guarantee him anything, but that I would say to the district judge that he had turned state's evidence, and that if he would do the square thing that I would give him a recommend to the judge." In any event Kramer would seem to have been quite active, and his ac-

tivity was directed against Cheney. He may have been trying to earn the recommend.

The youngest man in the company was selected seemingly as the person upon whom to inflict punishment. The jury were not satisfied, and did not wish to inflict the punishment upon young Cheney which their verdict called for, because they recommended his pardon. When a recommendation for a pardon comes from a jury in a cattle country and in a cattle-stealing case, it may be said that there is some substantial reason for it. In the verdict in this case the jury said: "But this jury strongly recommends that the defendant be pardoned."

The defendant testified that he staid at the home of his sister, Mrs. Morgan, on the night before the steer was killed, and that his sister's husband, Chris Morgan, was away from home at that time, and that his sister and her two little children were the only persons there except himself; also that he had never talked with Kramer or any one else concerning a desire to help in butchering the steer "which was afterwards butchered;" that Kramer came over to Morgan's place on the morning of the day when the steer was killed, and that he was riding a little buckskin pony; that it was then that Kramer asked for the butcher knives and asked the defendant to help him butcher, and that he (Cheney) agreed to do so, and that together they then sharpened the knives on the grindstone, and that he (Cheney) got his saddle horse and went home with Kramer, and that Kramer said that the steer that he was going to butcher was on the north quarter, and that they then took the one that was butchered and 12 or 14 others and drove the bunch up together; that Kramer said, "Let's kill him in the shed we are building," and that the shed would "be a windbrake;" that he (Cheney) then caught the steer (with a rope) and dragged it into the shed "out of the wind;" that Kramer said to "knock it in the head;" that they hit it a time or two with an ax and could not hit it right, and Kramer said, " 'Cheney, shoot him,' and I had a revolver on my saddle, and I shot it, and Mr. Kra-

mer cut its throat;" that at that time he (Cheney) had no knowledge as to who owned the steer, and thought it belonged to Kramer, and that Kramer said it did; that the witness saw Marshall come in; that the witness was sitting down scraping the neck of the steer, and he heard "something sizzling in the fire," and that he looked back and that there was a piece of hide in the fire; that the witness inquired what was being done, and that Kramer said, "That's none of your damn business;" that a piece of hide had been cut out, and it was that which was sizzling in the fire; that the witness was about ten feet from the fire; that the witness ate supper at Kramer's, and after that went home. The defendant explained that Kramer came over on the day when the steer was killed and asked him to come over and help butcher that day, and that he said, "Yes; I guess so." He had been at Kramer's the day before, and was then working on the shed, but that night he went home. He did not seem to have a guilty knowledge concerning the butchering of the steer for the purpose of appropriating it. His testimony was corroborated for the most part by all the witnesses who knew the facts except Kramer, who was peculiarly circumstanced. Kramer testified that at the time of butchering the steer Cheney threw the piece of hide in the fire which bore the brand that was on the steer. Kramer's testimony was disputed by the evidence of both Cheney and Marshall. They both testified that it was Kramer who threw the piece of hide in the fire, and they substantially agree as to the indignant inquiry which Cheney made of Kramer concerning what he was doing when he threw the piece of hide in the fire. Marshall testified as follows: "Q. Did you see any skin or hide in the fire burning? A. Yes, sir. Q. Did you hear anything said by the defendant to Mr. Kramer at that time? A. I heard them talking; I thought they was in fun, and I didn't pay much attention, Q. What was said by Lloyd (Cheney) to Kramer? A. Lloyd asked him what he was doing. Q. And what was the reply? A. I don't remember whether he said 'darn' or 'damn';

he said it was none of his business anyway. Q. What was Lloyd doing at that time? A. Well, sir, I don't just remember; he was up at the head end of the steer." This puts Cheney at work where he could not have been cutting out the brand and throwing it in the fire. Cheney's inquiry as to what Kramer was doing related to Kramer's act in cutting out the piece of hide bearing the brand and throwing it in the fire. Kramer resented Cheney's right to interrogate him. If Cheney had been an accomplice of Kramer he would not likely have made such an inquiry in such a way. He would not have been surprised and angry. The point of counsel for the defendant that the evidence is insufficient to sustain the verdict has much to support it. There is no evidence that supports the charge against the defendant except Kramer's testimony. Kramer also testified that he thought Cheney had told him, he was not sure. Kramer tried to lay all the blame for what was done in butchering the steer upon Cheney, except that he acknowledged that he and Cheney took the hide off. Kramer testified to the brand and called it a double "T." He remembered also that a fire was built inside of the shed so that they could warm their hands by it while butchering the steer, but he was sure that Cheney destroyed the brand by cutting it out and putting the piece of hide on which it appeared in the fire, and he tried to put Chris Morgan in the deal, athough Morgan was not at home and was not shown by any testimony to have had anything to do with the theft. The purpose of this was probably to create suspicion against Cheney because he lived with his sister and brother-in-law.

The defendant was born in Box Butte county, Nebraska. His father took him along with him to Alabama when he was about nine years old, and subsequently the son returned to Nebraska and to the old neighborhood where he was born, and when his sister got married he made his home with her and her husband, Chris Morgan. He got employment at such work as he could get.

The county attorney in his cross-examination of Cheney seemed to attempt to make a point of some sort against Cheney because, when Kramer and Cheney were on their way to Kramer's place from Chris Morgan's residence, they picked up a bunch of cattle on Kramer's land and drove them and the steer that was to be killed down to the shed. It is a matter of common knowledge that one steer by himself is hard to drive, but he is easy to drive if he is with ten or a dozen other steers and they are all driven together. It is almost impossible to drive one hog by himself, but a dozen hogs may be driven together readily. This is common farm knowledge. The thing that they were doing was driving that one steer down to the shed so that he might be butchered, but they took the other cattle along so that one steer would be easy to drive. It was done under the direction of Kramer. It was Kramer's adventure. We are unable to find other testimony than Kramer's to the effect that Cheney knew that the steer belonged to some other person than Kramer. As to Kramer, the killing of the steer was theft because he was killing the steer to appropriate it and to use the meat. As to Cheney, the steer was to be killed for a lawful purpose, and he helped in the killing and butchering because Kramer asked him to do so. There is a failure of proof to connect Cheney in a felonious way with the killing of the steer.

There seems to have been an effort on the part of the sheriff to get Cheney to plead guilty before the county judge at the preliminary hearing. With the view to securing such a plea, the sheriff refused to tell Cheney whether "Kramer had turned state's evidence," but told him that he (the sheriff) "knew all that Kramer and Marshall knew about it." If Kramer was giving a false account of the killing of the steer, which he seems to have been doing, and this false account was carried to Cheney by the sheriff, it would justly excite the apprehension of Cheney, and, entirely independent of his guilt or innocence. Cheney might fairly and reasonably conclude that Kramer, and

the sheriff himself, would give just such an account of the butchering of the steer as would result in his (Kramer's) acquittal and in Cheney's conviction. Under this sort of an account of the sheriff to Cheney the latter appears to have said, according to the sheriff: "Well, then, I will go to the pen as sure as hell." The sheriff further testified: "Q. Did the defendant at that time say anything further to you in regard to the killing of the steer? A. Why, he said they had killed a steer, but he thought it was Kramer's when he killed it." Marshall was never arrested or in any way charged with stealing the steer, but Sheriff Hill seems to have tried to leave the impression with Cheney that both Kramer and Marshall "had turned state's evidence," which of course Marshall could not have done without being charged with the commission of the crime. Hill testified: "Q. And you knew there was no warrant out for Marshall? A. Yes, sir. Q. And did he (Cheney) not tell you after you told him that Ed. Marshall and Kramer had turned state's evidence that if they turned state's evidence they have jobbed me, and I probably will have to do time? A. Yes, sir; he told me that."

While the sheriff, Hill, finally denied that he had told Cheney that Marshall had turned state's evidence, he (Hill) had talked to Cheney in such a way as to induce that belief upon Cheney's part. Hill denied that he told Cheney that on the train, but said he told him that "in the jail." This was deception. The county attorney either did not know that Kramer and Cheney together drove the steer up from Kramer's pasture, or he desired to use the evidence for the sole and exclusive purpose of convicting Cheney. In his questions the county attorney is not shown by the record to have asked whether Kramer helped to drive up the steer from the pasture, but he starts in with the narrow inquiry concerning what happened at the shed. At the shed Cheney, who had been asked by Kramer to help butcher, threw the rope around the steer's head and put the other end of the rope on the horn of his saddle and pulled the steer into the shed. When Marshall failed

to kill the steer with the ax, then Cheney shot it at Kramer's request. Examination of Kramer by the county attorney: "Q. And how did this steer come to be in the shed? A. It was taken there. Q. Taken there by whom? A. Mr. Cheney. Q. How did he take it there? A. He had a rope on him and took him in with a saddle horse." The witness, John E. Marshall, seems to have also been called Ed. Marshall. He tried to be fairly honest. Kramer at the preliminary testified that he did not ask Cheney to come over to his house and help him butcher, and that he was in the house with Mrs. Chris Morgan. He testified he was there while the knives were being sharpened, but afterward at the trial insisted that he was wrong in his former testimony, and that he was not with Mrs. Chris Morgan at the time the knives were sharpened, but that the knives were sharpened at his (Kramer's) place on his grindstone. He testified that he did not think that he had asked anybody to help him butcher the steer except Ed. Marshall, the man who worked for him. He did not think that there was a grindstone at Marshall's place. He so testified.

When Kramer was asked if he had sold part of "this carcass," he answered that he had not. When asked if he had sold some of the carcass to Scott Chalfaunt, he answered, "Yes, sir," but subsequently amended it by saying that he had sold some of the meat of the second animal butchered, and that Chalfaunt "took a full quarter." He did not know whether the meat of this first steer had lasted until February, 1915.

While this case may be tried again, it is perhaps well to consider some of the other alleged errors. Kramer testified in such a way as to cast suspicion upon the defendant by reason of what he (Kramer) said independently of his direct testimony. "Q. Who was the first man that suggested butchering this animal? A. Chris Morgan. Q. That is the brother-in-law of the defendant? A. Yes, sir." Counsel for the defendant moved to strike this out as hearsay and not binding on the defendant. The motion

was overruled, and the defendant excepted. Morgan was never arrested. Morgan was never charged in any way with being implicated in the theft, and this appears to have been done to give Cheney a rap. It was done upon the theory that the defendant would be guilty of any bad sentiment that Morgan might entertain.

In *Wallace v. State,* 91 Neb. 158, it was said: "In order to convict the defendant of the crime of larceny, as charged in the information, the state was required to prove, beyond a reasonable doubt, that defendant participated in the larcenous taking of the hogs in question from the complaining witness. We think the evidence was insufficient to establish that fact beyond a reasonable doubt."

If Kramer's testimony is to be taken as true, then, and then only, is there enough evidence against Cheney to create any suspicion of his guilt. If we follow the example laid down in the *Wallace* case, we will reverse the judgment of the district court. It should be remembered that Kramer boldly expressed the desire to appropriate the steer. Such testimony should not be permitted to determine the guilt of any person unless it is corroborated by other evidence worthy of belief. The defendant never had the steer in his possession. He did what Kramer requested him to do. He helped to kill and butcher the steer, but he found it in Kramer's possession on Kramer's ranch, and he left it in Kramer's possession at Kramer's shed. He did not remove the steer, and therefore there was no asportation, and consequently there could be no theft. Asportation, nonconsent of the owner, and a felonious intent to thereby convert the stolen property to the defendant's own use are necessary elements of larceny. *Ladeaux v. State,* 74 Neb. 19.

After Kramer butchered the steer Cheney visited with Marshall, who was Kramer's hired man.

The judgment of the district court is

REVERSED.

SEDGWICK, J., not sitting.

ROBERT MCQUILKIN, APPELLEE V. JOHN E. FORD ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19594.

1. **Mortgages**: FORECLOSURE: DISTRIBUTION OF PROCEEDS. One holding a deed of real estate, given to secure him in the payment of any advancements made by him, and who pays one of a series of notes secured by a mortgage on the real estate, is not entitled, in proceedings by the mortgagee to foreclose the mortgage, to share *pro rata* in the proceeds of the mortgaged property.

2. ———: INSURANCE. In the absence of any agreement therefor, the mortgagee is under no obligation to insure buildings on the mortgaged premises, nor to prosecute at his own expense a disputed claim for insurance on account of a prior policy which he had held, covering the building destroyed.

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

Lambe & Butler, for appellants.

G. E. Simon and *H. W. Keyes, contra.*

CORNISH, J.

In this action plaintiff seeks foreclosure of a mortgage securing notes given to him as part of the purchase price for land sold, making Ford, mortgagor, and Ballah, then holder of the legal title, defendants. Ford in his answer claims certain credits on the note and $1,500 credit on account of the plaintiff's failure to recover insurance on a building destroyed by a wind-storm. The defendant Ballah, by way of cross-petition, also asks foreclosure of a $2,100 note, being one of the notes secured by the mortgage. Plaintiff in his reply denies liability on account of the wind-storm destroying the building, and denies that the $2,100 note in Ballah's possession was assigned to him; alleges that it was paid, and that his lien for the remaining notes is superior thereto. The trial court found generally for the plaintiff; found that Ford should be credited with $80 interest on the notes; that no liability

existed on account of the destruction of the building; that there was due defendant Ballah from Ford $2,100 on account of the note set forth in the answer and cross-petition; and gave Ballah a lien upon the land inferior, however, to that of the plaintiff.

The defendant Ballah assigns as error the judgment of the court in making his lien inferior to that of the plaintiff.

When the $2,100 note became due the plaintiff took it to the bank where it was made payable, and asked for and received from the cashier of the bank the amount of money due. The cashier at the time wrote an assignment to himself, as cashier, on the back of the note, which plaintiff signed. No negotiations for a transfer of the note were had between them, and the plaintiff did not know that he was assigning the note. Afterwards the defendant Ballah paid to the bank the amount of the note; it was stamped "paid" by the bank and delivered to him.

It appears that prior to this time Ballah, who had been president of the bank, and was then vice-president, living at Norfolk, had spoken to the cashier about the note, saying, as testified to by the cashier, that when the note was presented the bank should "take it up and hold it for him;" that he wanted the bank to "carry him in the bank." In the original sale of the land all of the negotiations were with Ballah. Following the sale Ford gave a deed of the land to Ballah, who testified that it was intended to operate as a mortgage. All payments had been made by Ballah.

The bank never undertook to assign the note to Ballah or to purchase it for him. When it received the final payment from Ballah, it very properly stamped the note "paid." This should have been and we think was intended by the parties as a payment, so far as the plaintiff was concerned. The trial court did not find there was an assignment of the note to Ballah, but gave him a lien in the amount of the note inferior to that of plaintiff. This may have been proper relief in equity. No objection was

made to it. We are of opinion that the defendant Ballah was not entitled to a *pro rata* share of the proceeds of sale on foreclosure; nor to have his lien, if any, equal in priority to that of plaintiff.

At the time of the sale of the land the plaintiff held some unexpired insurance upon the buildings, including the one destroyed in the wind-storm, and attempted to sell the insurance to the purchaser. Ballah, who negotiated the purchase, declined to buy, as he wrote insurance himself. When the building was destroyed the plaintiff interviewed the insurance agent, who advised him that nothing could be recovered because the building had been too long unoccupied and because of the change of title. Whether this would have been a good defense or not, plaintiff, under the circumstances, owed no duty to either of the defendants touching the insurance.

On examination of the testimony, we are of opinion that the court did not err in the credit allowed on interest as found in the decree.

AFFIRMED.

HAMER, J., not sitting.

BRIDGET MCNEA ET AL., APPELLANTS, V. JOHN MORAN ET AL., APPELLEES.

FILED JULY 3, 1917. No. 19603.

1. **Witnesses: COMPETENCY.** In an action involving title to real estate the wife, whose husband claims ownership as purchaser under an oral agreement, is not an incompetent witness to a conversation had between her husband and the vendor, since deceased, in which she took no part.

2. **Specific Performance: PAROL CONTRACT: EVIDENCE.** "The law is well settled in this state that an oral agreement to convey real estate will be specifically enforced where the evidence of such agreement is clear and satisfactory, and the plaintiff has fully performed on his part." *Harrison v. Harrison*, 80 Neb. 103.

3. **Equity**: LACHES. One in possession of land may rest in security until his title or possession is attacked, and a failure to appeal to equity during that period will not prejudice his right either to quiet his title or to assert an equity against the holder of the legal title.

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

Lewis C. Paulson, C. F. Shaver, G. N. Shaver and *J. H. Robb,* for appellants.

J. L. McPheely, contra.

CORNISH, J.

On July 29, 1913, Patrick Moran died, leaving as heirs three brothers, three sisters, and three children of a deceased sister. He held title to 480 acres of land. This action is for partition. The controversy is over the ownership of 240 acres of the land, claimed by John Moran, one of the brothers, and a defendant in this action, under an alleged oral contract of purchase, made February 10, 1905, the consideration therefor being services rendered for 20 years prior thereto, work of John and children on the farm, board and care given Patrick, and payment by John of a $1,000 mortgage, then existing on the farm. John asks that title be quieted in him. The trial court found in favor of John and quieted title in him. Certain of the other heirs have appealed.

John sought to show on the trial that immediately after purchasing the land he took possession, improved it, and held open and adverse possession thereof for over nine years and up to the time of Patrick's death; that he paid the $1,000 mortgage and fully performed the contract on his part.

An extended discussion of the testimony is not necessary. Patrick was an old bachelor. He homesteaded in 1876. In 1885 John, with his wife and the two children then born, came west from Ohio, and they all lived together until Patrick's death. The other heirs lived in Ohio and Ireland.

While there may be some room for doubt, we are convinced that the agreement, which John alleges, was made and carried out, all save the making of the deed. John took the land, fenced it, kept the crops, paid the taxes, and was understood to own it. The testimony of the members of his family, showing the details of the transaction from numerous conversations; the payment of the $1,000; Patrick's statement to the assessor that John owned it; his statements to the church committee; to the banker who paid taxes for them; to the carpenter who built a house on Patrick's land; to Frank Stenson who wished to trade for part of the land; all to the same effect, do not leave much room for doubt as to Patrick's understanding. Such being the situation, title should be quieted in John.

Complaint is made that the trial court submitted questions of fact to the jury. Courts of equity can do this for the judge's enlightenment. On appeal the case is tried in this court *de novo*.

Error is assigned in permitting John's wife to testify to conversations had, not between the deceased and her, but between the deceased and John, which she overheard. Such evidence is admissible under the Code. *In re Estate of Powers,* 79 Neb. 680; *Holladay v. Rich,* 93 Neb. 491.

John had been in possession of the land with Patrick as tenant before the agreement of purchase. It is urged that there is not competent evidence to show John's possession, or improvements, or payments, made under the oral contract, to take it out of the statute of frauds, and cases are cited bearing upon that question. Where the evidence of such oral agreement is clear and satisfactory, and the purchaser has fully performed on his part, the contract is no longer within the statute of frauds, and cases, bearing only upon what possession, what improvement, or what part payment will be sufficient to take the case out of the statute, are not in point. *Harrison v. Harrison,* 80 Neb. 103.

It is urged that the oral agreement is not clearly and satisfactorily shown. As applied to the evidence of some of the witnesses, members of his family, this is true. It is

not true, however, of the evidence as a whole. In considering this question of fact, it is proper to take into consideration, not only the evidence of the agreement, but the acts performed under it, and the declarations of Patrick regarding the ownership of the land in controversy. *Harrison v. Harrison, supra.*

The plaintiff invokes the rule denying relief in equity because of unreasonable delay, citing *Bradley & Co. v. Union P. R. Co.*, 76 Neb. 172, and other cases. These are cases where the rule was applied to stale claims of parties, not in possession, seeking specific performance. The general rule and the one applicable here is that one in possession of land may rest in security until his title or possession is attacked, and a failure to appeal to equity during that period will not prejudice his right either to quiet his title or to assert an equity against the holder of the legal title. 16 Cyc. 174. When Patrick Moran learned that his brother John was treating the land in controversy as his own and claiming it, the duty was on him to make a timely assertion of his rights, if John's claim was unfounded.

For the reasons herein given, the judgment of the trial court is

AFFIRMED.

HAMER, J., not sitting.

FRANK MORRIS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL., APPELLANTS.

FILED JULY 3, 1917. No. 19144.

1. **Railroads: INJURY TO OCCUPANT OF AUTOMOBILE: CONTRIBUTORY NEGLIGENCE.** Under the circumstances in this case, one who by invitation rode in an automobile driven by another and remained in it, with knowledge that it was approaching a dangerous railroad crossing, without requesting the driver to stop or to take other necessary precautions to avoid danger, was guilty of contributory negligence, and cannot recover for personal injuries sustained from colliding with a passing train, even though no signal by the locomotive bell or whistle was given.

2. ———: CARE REQUIRED AT CROSSINGS. "It is the duty of a traveler upon a public highway when approaching a railroad crossing to exercise ordinary care, and if he fails to do so and is injured at the crossing by a collision with an engine, and his failure to exercise ordinary care contributed to such injury, he cannot recover therefor." *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627.

3. ———: ACCIDENT AT CROSSING: RECOVERY: PROOF. "To recover for an injury alleged to have been sustained at a railroad crossing by a collision with an engine on account of the neglect of the railroad company to cause a bell or whistle to be sounded as its engine approached such crossing, it is not enough for the injured person to show that he was injured at the crossing, and that no signal of a bell or whistle was given, and that such default of the railroad company was negligence; but, to recover, the injured person must further show that the default and negligence of the railroad company were the proximate cause of the injury sued for." *Omaha & R. V. R. Co. v. Talbot*, 48 Neb. 627.

4. ———: ———: ———: ———. The testimony examined, and *held* that plaintiff is not entitled under the law to recover for personal injuries sustained.

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

E. E. Whitted and *J. L. Rice*, for appellants.

J. G. Thompson and *John Everson, contra.*

DEAN, J.

This is a companion case to the personal injury action of *Askey, Adm'r, v. Chicago, B. & Q. R. Co.*, *ante*, p. 266. This case and the *Askey* case grew out of the same accident, but were tried to a jury separately. In the present case plaintiff recovered judgment for $5,000 for personal injuries he sustained. From this judgment an appeal has been prosecuted.

The facts that are discussed in the *Askey* case that may be necessary to consider in arriving at an understanding of the present case need not be here repeated. At the time of the accident plaintiff's party was riding in a Ford automobile owned and driven by Thomas Askey. He was seated beside the driver in the front seat on the right hand side, that being the direction from which the train came

with which the automobile collided. The train came from the west and the automobile was going south. It appears that plaintiff was 30 years of age and Mr. Askey was about 35, and that the hearing and the eyesight of both were good. He said he was acquainted with the vicinity where the accident occurred, and that he had once lived about 3½ miles from that point, and he also testified that he crossed the track there three times in an automobile on the day of and shortly before the collision, the last time being only 20 minutes before it happened, and on one or more of these occasions plaintiff himself drove the car.

Mr. Morris says that the automobile was running at the rate of about 12 or 15 miles an hour, and that when they approached the railroad crossing he looked along the track to the east, but that he could not see to the west, the direction from which the train came, on account of some trees that obstructed the view, and that when he first saw the train coming the car in which he and his party rode was about 20 or 30 feet from the railroad track, and immediately he started to jump out of the machine, and got as far as the running board or fender. From the rate of speed at which the automobile was traveling, as testified by plaintiff, it may be inferred from the testimony that, if plaintiff had been in a normal condition, he could have induced his companion either to slow down or stop the machine, or that he could have jumped from the car in any event in time to save himself. With respect to the time when plaintiff first saw the train he testified: "Q. What did Mr. Askey do, if anything, when you saw the train? A. He says, 'My God, there is a train.' Q. What did he do? A. Well, he started to—the last I seen of him he was stooped over."

One of the main questions to be determined in the present case is whether plaintiff is chargeable with or shared the negligence and carelessness imputed to the administrator's decedent in the *Askey* case. In this case, as in the *Askey* case, the testimony shows that considerable quantities of intoxicating liquor had been consumed by plain-

tiff and some of his companions on the afternoon in which the accident occurred and shortly prior thereto, but it is not deemed necessary to discuss here that feature of the case, for reasons already given.

That plaintiff's carelessness and negligence in the premises contributed to his injury is fairly deducible from the record. Even though he was not driving the machine, it was his duty to look and listen where looking and listening would have been effective and where he knew there was danger. In a case of like import it was said by Kirkpatrick, C., in *Hajsek v. Chicago, B. & Q. R. Co.*, 5 Neb. (Unof.) 67: "The opportunities for observation of plaintiff were equal, if not superior, to those of her husband, who was driving the team." In the present case plaintiff was not charged with the responsibility of driving the automobile. His opportunity to be on the lookout for impending danger at a place he must have known to be dangerous was therefore perhaps better than that of the driver. Knowing the vicinity and the railroad crossing as he says he did, it was plainly his duty to use every reasonable effort to induce the driver of the automobile to slow down or to stop the machine if the view of the track was obstructed. It is not shown in the record before us that he cautioned the driver about impending danger before they reached the track where the collision occurred, nor that he made any attempt to induce his companion to slacken the speed of the car or to stop.

Plaintiff cites *Craig v. Chicago, St. P., M. & O. R. Co.*, 97 Neb. 426, but it does not appear to support his contention. In that case it is shown, in an opinion by Letton, J., that plaintiff's decedent attempted to seize the arm or the reins of the driver, seemingly in the endeavor to prevent the team from crossing the track in front of the locomotive.

In *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, the court gives this rule: "One riding in an automobile by invitation of the owner and driver, with whom he sat on the

front seat, equally with such driver was required to exercise care for his own safety, and where without objection or protest he permitted the driver to negligently drive upon a railroad crossing immediately in front of an approaching train without stopping to look or listen, exercising no care on his own part to ascertain whether the crossing was safe, although the view of the track was obstructed until they reached a point only a few feet distant, he is chargeable with negligence contributing to his own injury by the striking of the car by the train, and cannot recover therefor from the railroad company."

Rebillard v. Minneapolis, St. P. & S. S. M. R. Co., 216 Fed. 503, is a late case, wherein the court say: "The rule that the negligence of the driver of a conveyance will not be imputed to a passenger, whether the conveyance is a public one or the passenger is the guest of the driver of a vehicle, does not apply where the passenger has full knowledge of the danger and voluntarily incurs the risk."

Omaha & R. V. R. Co., v. Talbot, 48 Neb. 627; *Bush v. Union P. R. Co.,* 62 Kan. 709; *Willfong v. Omaha & St. L. R. Co.,* 116 Ia. 548; *Dean v. Pennsylvania R. Co.,* 129 Pa. St. 514; *Warth v. Jackson County Court,* 71 W. Va. 184; *Brickell v. New York C. R. Co.,* 120 N. Y. 290. The foregoing cases substantially support the rule that is adhered to in this opinion.

In view of the record, we find that the verdict of the jury is not supported by the evidence, and the judgment of the trial court is therefore reversed and the cause remanded.

REVERSED.

MORRISSEY, C. J., and ROSE, J., dissenting.

LETTON, J., not sitting.

WILLIAM H. MCELWAIN, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED JULY 10, 1917. No. 19231.

1. **Carriers:** TRANSPORTATION OF LIVE STOCK: CLAIM FOR DAMAGES: NOTICE. Where the bill of lading provides that, as a condition precedent to the right to recover "damages for loss of or injury to" live stock, the shipper shall give notice in writing of his claim therefor, notice is not required where the claim is solely for damages sustained by the loss of a favorable market and for shrinkage in weight and expense of feeding at destination while awaiting the next market; such damages being caused by reason of delay in transportation.
2. ———: ———: DELAY: BURDEN OF PROOF. Where there is proof that an unreasonable time was consumed in transporting the shipment, the burden is on the carrier to prove that the delay was not caused by its negligence, though the owner of the live stock accompanied the shipment. *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166, distinguished.
3. **Evidence:** OPINION OF WITNESS: SHRINKAGE OF LIVE STOCK. Opinion testimony of qualified witnesses that cattle held at destination two days before selling will probably shrink in weight 3 per cent. may be admissible to prove a claim for shrinkage after arrival, where the weight of the cattle on arrival at destination and before watering and feeding and their selling weight tend to show that the cattle did not "fill" the usual amount. *Underwood v. Chicago & N. W. R. Co.*, 100 Neb. 275, distinguished.

APPEAL from the district court for Merrick county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Edson Rich, A. G. Ellick and *Martin & Bockes,* for appellant.

Elmer E. Ross and *Prince & Prince, contra.*

LETTON, J.

Plaintiff recovered judgment for damages caused by delay in the transportation of live stock, and defendant appeals.

Defendant contends that the instructions ignore the following provision of the bill of lading: "The said ship-

per further agrees that, as a condition precedent to his right to recover any damages for loss of, or injury to, any of said stock, he will give notice in writing of his claim therefor to some officer of said carriers, or to their nearest station agent, before said stock has been removed from said place of destination, and before such stock has been mingled with other stock, and present a formal statement of his claim duly verified to said carriers within 60 days thereafter."

Plaintiff concedes the validity of this provision, but contends that it is not applicable to claims for damages not accruing during transportation. In the petition it is alleged that, if there had been no delay in the transportation, the cattle would have arrived in Chicago in time for the market of Monday, December 2; that owing to the negligence of defendant they arrived there too late for the Monday market; that there was no satisfactory market Tuesday for the class of cattle which plaintiff had shipped, and the cattle were sold Wednesday for less than plaintiff would have received had they arrived Monday. He claims damages for the loss of the Monday market, for shrinkage in the cattle while in the stock-yards from Monday afternoon until Wednesday, and for feeding expense for the two days.

Provisions in a bill of lading, in cases where there is a reasonable doubt as to their meaning, are to be construed most strongly against the carrier. 10 C. J. 181, 194. Was plaintiff required by the provisions of the bill of lading to give notice of his claim? The following statement of the law is pertinent to this inquiry:

"If because of wrongful delay the shipment sustains physical injury, and in consequence a depreciation in value, a provision in the contract of shipment requiring notice of claim for damages for loss or injury to the shipment is applicable. * * * On the other hand, it is very generally held that a stipulation for notice of this character applies only to a loss of, or physical injury to, a shipment of dead freight, or to injury to a shipment of

live stock caused by delay and consequent depreciation in value. In other words, where the shipper suffers special damages because of wrongful delay, no compliance with the stipulation is necessary to entitle him to recover for special damages, and the reason is that the notice would be useless in determining the amount of such loss. In conformity with this principle, it has uniformly been held that a stipulation that notice of damages should be a condition precedent to recovery for any injury to the shipment during transportation has no application to damages caused by the loss of market, to loss resulting from a decline in the market value of the shipment, or to the expense of feeding stock, resulting from delay in transportation. And no notice is necessary to authorize the recovery of damages from shrinkage resulting from the holding of the cattle after transportation was completed, due to the loss of market. * * * Nevertheless, it has been held that, where the provision requiring notice is not confined to loss of, or injury to, live stock covered by the contract, but expressly includes damages for delay, it must be construed as including a loss sustained by a decline in the market, and that a provision in a bill of lading to the effect that claims for loss, damage, or delay must be made in order to render the carrier liable was not limited to claims for damages to the goods shipped." 10 C. J. 334.

Plaintiff's claim was not a claim for "damages for loss of, or injury to," the stock, and notice was not required by the bill of lading. *Gault v. Atchison, T. & S. F. R. Co.*, 92 Kan. 464; *Elliott v. Chicago, M. & St. P. R. Co.*, 38 S. Dak. 371.

It is also contended that instructions relating to the burden of proof are erroneous. After instructing that, in order to recover, plaintiff must prove by a perponderance of the evidence that "an unreasonable delay in the transportation of said cattle occurred on account of the negligence and carelessness of defendant or connecting carriers, and without fault of the plaintiff," the court also instructed that, "when the evidence discloses that an un-

reasonable length of time has been consumed in the transportation of live stock, and the carrier seeks to justify the same, then as to such justification the burden of proof devolves upon it to show by a preponderance of the evidence that said delay in transportation was not caused by its own carelessness or negligence." Defendant argues that, since the owner accompanied the shipment, the burden is on him to prove that the loss complained of was occasioned by the carrier's negligence. *Cleve v. Chicago, B. & Q. R. Co.*, 77 Neb. 166. In the case cited it was held that, "where by contract the shipper accompanies his live stock with tenders or caretakers, no presumption of negligence on the part of the carrier arises merely from the proof of the fact that loss or injury has attended the shipment, but the burden is on the shipper to show that the loss, if any, sustained was occasioned by the negligence of the carrier," and a judgment against the carrier was reversed, since there was no competent evidence tending to show that more time was consumed in transporting the shipment than was reasonably necessary. The instruction assailed does not conflict with the rule announced in the foregoing case. Where the evidence shows that an unreasonable time was consumed in transporting the shipment, the carrier will be liable for resulting damages, whether the shipper did or did not accompany the shipment, unless it is shown that the delay was within the exceptions qualifying the carrier's general liability, the cause of the delay being a matter peculiarly within the knowledge of the carrier.

It is contended that the court erred in admitting opinion evidence to prove alleged shrinkage in weight of the cattle while being held at the stock-yards in Chicago. The aggregate weight of the cattle when weighed on the railroad scales on their arrival at Chicago and before watering was 255,200 pounds. Their selling weight Wednesday morning was 256,410 pounds. Witnesses for plaintiff, experienced in the live stock business, testified that the cattle ought to "fill" 3 to 4 per cent. when watered and sold on their arrival. A witness, called by the defendant, who

had been engaged in the live stock business in Chicago for nearly thirty years, on cross-examination and without objection testified to the same effect. There was a conflict in the evidence as to whether cattle held over from Monday to Wednesday under circumstances such as were in evidence would shrink in weight, but the contention of plaintiff is supported by sufficient competent evidence that such cattle would shrink about 3 per cent. in weight. In other words, while the actual weight of the cattle on the cars at destination and their weight when sold two days later might be the same, if properly filled and taken care of, the cattle should weigh 3 per cent. more than when on the cars, the weight when sold in this case being 6,446 pounds less than it would have been if the cattle had filled 3 per cent. on arrival. There is no proof as to the amount of feed furnished during this delay, and it is not contended it was insufficient.

Defendant cites *Underwood v. Chicago & N. W. R. Co.*, 100 Neb. 275, in which it was stated in the syllabus: "The fact that there was a shrinkage of weight must be proved by competent evidence, and cannot be established by mere opinion evidence." This was correct as applied to the facts in that case, but is not correct as a general rule. In that case the weight of the cattle at the point of origin and destination was the same. The selling weight showed that the cattle had filled a little over 65 pounds a head on an average, which met the requirements indicated by the testimony on behalf of plaintiff. Under such evidence, opinion evidence that cattle when held over one day would shrink 30 pounds a head was insufficient to support a finding of such a shrinkage, since the other evidence conclusively showed that there had been no shrinkage. In the present case, since the cattle at destination did not "fill" to the usual amount, it was proper to show by stockmen that cattle being held for two days at destination would probably shrink 3 per cent.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

HAMER, J., dissenting.

I am unable to agree with the views expressed in the majority opinion. In the first paragraph of the syllabus it is held: "Where the bill of lading provides that as a condition precedent to the right to recover 'damages for loss of or injury to' live stock, the shipper shall give notice in writing of his claim therefor, notice is not required where the claim is solely for damages sustained by the loss of a favorable market and for shrinkage in weight and expense of feeding at destination while awaiting the next market, such damages being caused by reason of delay in transportation." The views of the court as expressed in the body of the opinion supports the syllabus. The provision in the bill of lading reads: "The said shipper further agrees that, as a condition precedent to his right to recover any damages for loss of, or injury to, any of said stock, he will give notice in writing of his claim therefor to some officer of said carriers, or to their nearest station agent, before said stock has been removed from said place of destination, and before such stock has been mingled with other stock, and present a formal statement of his claim duly verified to said carriers within 60 days thereafter." It might be all right to hold that notice is not required where the claim is solely for damages sustained by the loss of a favorable market and expense of feeding at the destination, provided the same are caused by an unnecessary delay in transportation. The weight of the cattle immediately upon their arrival at their destination and before eating, drinking and filling to their usual condition, as nearly as may be, would not be their proper weight. The opinion testimony concerning what the cattle would shrink in two days further complicates the matter. There is no proper starting point shown by the evidence in the case. The testimony of the witnesses as to what might be the shrinkage of the cattle in two days gets nowhere. It is a projected view having no relation to the case and no

connection with it. Undoubtedly there was shrinkage during the transportation of the cattle and it was that shrinkage to which the bill of lading refers, but the defendant company could not properly be held liable for that; and that is mixed with the estimated shrinkage of two days, as related by the opinion witnesses, and both kinds of shrinkage are together, that on the trip and that after the cattle arrived at the end of the trip, and therefore they are inseparable, and each by itself is unascertainable. This must have been prejudicial to the interests of the defendant at the time of the trial.

It is without doubt dangerous to the due administration of justice to make claims for damages because of other things than injury to the live stock shipped and then to consider the whole together. Besides no satisfactory reason is offered for not giving the notice. When the cattle arrived at their destination the shrinkage of the trip had occurred and it was then ready to be investigated. The notice should then have been given before the accumulation of further acts to obscure the view of the subject. The weight of the cattle immediately upon their arrival at Chicago and before being fed or watered was 255,200 pounds, and when sold on Wednesday morning afterwards they weighed 256,410 pounds. The opinion witnesses were brought in to show that the weight of the cattle when sold was 6,465 pounds less than it would have been if the cattle had been properly cared for and had been properly filled on arrival. The problem presented was incapable of exact demonstration, and no one may know that this testimony enabled the court to reach a correct result. It is conceded in the majority opinion that the case cited by the defendant railroad company, *Underwood v. Chicago & N. W. R. Co.*, 100 Neb. 275, was right in that case "but is not strictly correct as a general rule." I think it is preferable to look for a *general rule*. In that case the "fill" is claimed to have amounted on the average to 65 pounds to each steer, and in that case the weight of the cattle at the destination and "point of origin" was the

same, and when the court saw there had been no shrinkage the opinion evidence that the cattle when held over one day would shrink 30 pounds to the head was held insufficient to support a finding of shrinkage in the face of competent evidence that there had been no shrinkage.

FRANK POOS, APPELLEE, V. FRED KRUG BREWING COMPANY, APPELLANT.

FILED JULY 10, 1917. No. 18935.

1. **Master and Servant:** INJURY TO SERVANT: LIABILITY OF MASTER. It is the duty of the employer to furnish his employee with a reasonably safe place in which to work and reasonably safe tools, instrumentalities and appliances to work with. If the employer fails to do this and the employee is injured by reason of such failure, the employer is liable, unless the employee is himself negligent or knows the danger and voluntarily assumes the risk.
2. ———: ———: DUTY OF MASTER: SAFE PLACE TO WORK. If the place to work or the tools or instrumentalities with which the work is to be accomplished are unsafe, it is the duty of the employer to make them reasonably safe, and this is a continuing duty that he cannot avoid. He does not perform this duty by instructing some person or employee to make the place or the instrumentality safe. It is a duty so incumbent upon the employer that he cannot delegate it to some one else and so evade responsibility.
3. ———: ———: NEGLIGENCE OF FELLOW SERVANT. The liability of the employer is determined by the nature of the act in question; and if "the nature of the act in question" establishes that the accident was caused by the negligence of a fellow servant, and not by any defect in the place to work or in the tools or instrumentalities to be used, the employer is not liable.
4. ———: ———: DUTY OF MASTER: SAFE PLACE TO WORK. The employer performs his duty if he furnishes places and appliances that are safe when they are used in the usual and proper way. If such places and appliances are unsafe when safely and properly used, it is the employer's duty to see that they are made reasonably safe for usual and proper use. This is the duty that he cannot delegate so as to relieve himself from responsibility if it is not performed.

5. ———: ———: LIABILITY OF MASTER: ACTS OF FELLOW SERVANT. If the place to work and the tools and instrumentalities with which to work are reasonably safe, the employer is not liable for a misuse of such tools and instrumentalities by a fellow employee who is employed with reasonable care as to his fitness and carefulness.

6. ———: ———: ———. The employer is not liable for anything that he could not avoid by the exercise of foresight and care. He could not anticipate and avoid the negligence of a competent employee.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Former judgment* (no opinion) *vacated, and judgment of district court reversed.*

Nolan & Woodland, for appellant.

Arthur F. Mullen, James E. Rait and *George B. Thummel, contra.*

SEDGWICK, J.

The plaintiff was injured by the falling of a ladder on which he was standing while engaged in his duties as an employee of the defendant company. He brought this action in the district court for Douglas county to recover damages for the injury he sustained in the fall. The jury returned a verdict in his favor for $3,500. The trial court required a remittitur, and entered judgment for $2,500, and the defendant has appealed.

There is but very little, if any, controversy in regard to the facts. The plaintiff has filed three briefs in the case, and from them we learn the following: He was required to "perform certain work connected with alterations to the refrigerating plant. These alterations, as far as need be noted here, consisted of lifting a trap weighing several hundred pounds to its place a few feet below a ceiling 24 feet high. This was done by block and tackle, the chains of which came only within 10 feet from the ground. Ladders were provided for appellee and others doing this work to stand upon when lifting the trap by the block and tackle." One Louis Peitzel was called to hold the ladder for the plaintiff while he was working upon it. The plaintiff

further says: "The ladder was 12 or 15 feet long, with round wooden rungs, and was placed against a round iron post. The floor was of cement, and at that time was slippery because of oil and grease. Appellee's work necessitated his standing upon a rung about 10 feet from the ground, with his back to the post. He could not hold onto the post while working. It was Peitzel's duty to hold the ladder to keep it from slipping while appellee was working, and he did so until appellee was injured. Appellee had ascended the ladder, and was turning around when it turned and threw him to the ground, the ladder falling also. Peitzel was holding the ladder when appellee started to ascend, but released his hold of it before appellee reached the top. * * * The testimony of appellee clearly establishes the fact that he was hurt solely because of the negligence of the man holding the ladder. It was undisputed that it was Peitzel's sole duty to hold the ladder for appellee, and that the ladder could not fall if held, and that it was likely to fall if not held. * * * The fact that the ladder turned, throwing him to the ground, speaks for itself, for, as appellee and appellant's witnesses say, it could not slip if it was held. * * * If appellee's testimony is to be believed, * * * it was the negligence of Peitzel that caused his injuries."

The only proposition of law stated by the plaintiff in his original brief is: "Peitzel's failure to hold the ladder for appellee was a breach of appellant's duty to furnish appellee a reasonably safe place to work, for which appellant is liable." The brief also concedes that Peitzel was a fellow servant: "It is true that Peitzel was, as far as rank goes, a fellow servant of appellee's; but in this instance he was performing the duty of his master." And so the plaintiff himself presents this as a case where the negligence of a fellow servant causes an injury. The plaintiff's contention is that the employer did not furnish him a safe place to work. In the brief it is stated in these words: "Appellee's place was not safe until the ladder was held, and it remained safe only so long as it continued to be

held. Since the law imposes the duty to provide a reasonably safe place for workmen, that duty certainly continues so long as the men are there at work—so long as that place is needed, for their work."

It is the duty of the employer to furnish his employee with a reasonably safe place in which to work and reasonably safe tools, instrumentalities and appliances to work with. If the employer fails to do this and the employee is injured by reason of such failure, the employer is liable, unless the employee is himself negligent or knows the danger and voluntarily assumes the risk. It is equally well-settled law in this state that, if the place to work or the tools or instrumentalities with which the work is to be accomplished are unsafe, it is the duty of the employer to make them reasonably safe, and this is a continuing duty that he cannot avoid. He does not perform this duty by instructing some person or employee to make the place or the instrumentality safe. It is a duty so incumbent upon the employer that he cannot delegate it to some one else and so evade responsibility. He must see to it that the thing is done, and that the place and the instrumentality are made reasonably safe. But the plain question in this case is whether this accident happened because the place or the instrumentality was unsafe, or happened by the negligence of a fellow servant. The plaintiff correctly says in the brief that "the liability of the master is determined by the nature of the act in question." So that the question is, to state it again, whether this accident was caused by some defect in the place to work or in the instrumentality to be used, or was caused by the negligence of the fellow servant. It is said that the ladder might easily be held, and that if it had been held the place to work would be safe, but the employee negligently failed to hold the ladder, and that made the place to work unsafe; that the holding of the ladder was necessary in order to make a safe place to work, and that, as it is the duty of the employer to furnish a safe place to work, it became his duty to hold the ladder, and that he could not delegate that

duty, but must hold it himself, or if he did delegate it he would be responsible as though he were holding it himself.

This sort of reasoning is so emphasized and so much reiterated in the brief, and seems to be so earnestly relied upon, that it may not be useless to suggest some illustrations of such a rule. If two employees to construct a platform to stand upon place two supports under a plank or platform, if these supports are placed at each end of the plank or platform, it will furnish a safe place to work upon, but if one of the employees places a support too far from the end of the plank, his fellow workman may innocently stand upon the unsupported end of the platform and meet with an accident. A platform so unsupported is an unsafe place on which to work. The employer, therefore, by plaintiff's reasoning in this case, has not furnished a safe place on which to work, and his duty to do so cannot be delegated, and therefore he should himself have placed the support under the end of the plank or platform, and is responsible for the fact that a fellow employee misplaced it.

An employee may safely stand upon a wagon to perform services if the wagon is not moved. If horses are harnessed to the wagon and are liable to move it, it might be rendered an unsafe place to work. A fellow workman, as long as he holds the horses and keeps them quiet, therefore furnishes a safe place to work. The duty also would devolve upon the employer, as it is his duty to furnish a safe place to work, and he could not delegate the duty of holding the horses, but would be responsible if the fellow servant left the horses and they moved the wagon and so made the place unsafe to work.

Upon careful examination it will be found that this reasoning can be applied to almost every case where the negligence of a fellow servant has caused an accident.

The employer performs his duty if he furnishes places and appliances that are reasonably safe when they are used in the usual and proper way. If such places and appliances

are unsafe when safely and properly used, it is the employer's duty to see that they are made reasonably safe for usual and proper use. This is the duty that he cannot delegate so as to relieve himself from responsibility if it is not performed. If, however, the tool or instrumentality furnished is in itself safe, and one employee uses it negligently so as to injure his fellow, the employer cannot anticipate or guard against such negligence. The plaintiff concedes this in his brief when he says that the master is not liable "where the place is reasonably safe, but a misuse thereof is made." There can be no possible difference in this respect between the place and the instrumentality with which to work. The plaintiff's brief quotes from *Hermann v. Port Blakely Mill Co.*, 71 Fed. 853, 857, in which it was held that the employer was not liable because "it would create a liability which the master could not avoid by the exercise of any degree of foresight or care." And so in the case at bar the employer could not avoid the negligence of the fellow employee "by the exercise of any degree of foresight or care."

The plaintiff repeats in his brief the statement that because of the situation there was no other way possible to make the use of this ladder safe but by holding it in position, which the fellow employee could easily have done, but carelessly left his duty and allowed the ladder to fall. Surely the employer could not possibly have anticipated such negligence. If there is a defect in the appliance to be used, the employer by proper diligence can ordinarily discover such defect, but he cannot anticipate criminal negligence on the part of fellow employees.

The fellow-servant law has undoubtedly been abused and misapplied, but plaintiff's reasoning would do away with it entirely. It has been so long established and universally acted upon by the courts that, if it is to be abolished and a better rule established in its place, it must be done by the legislature, and not by the courts.

Our former judgment is vacated, and the judgment of the district court is reversed and the cause remanded.

REVERSED.

CORNISH, J., concurring.

Because the master must not negligently fail to furnish the servant with a reasonably safe place to work, and cannot escape liability for the negligence by delegating the duty to another, plaintiff says that when defendant, to keep the ladder from slipping, put a man at the foot of it, he became liable for that man's negligence in failing to hold the ladder. This is a *non sequitur*. Reasoning from a corollary we are liable to fall into error. We need to go back to first principles. Individuals are liable for tort because they have done wrong. In negligence cases the wrong consists in a failure to exercise care. Where the relation of master and servant exists, certain rules based upon human experience and justice define their duties and responsibilities as to each other. Among these is the rule that the master ought to furnish his servant a reasonably safe place to work *in*. This rule never meant that the master must furnish the servant with safe persons to work *with*. The duty is upon him to hire only reasonably careful and competent men. Having furnished such men and a safe place, he has done his duty. Any other rule would be unjust, unworkable, and make the master an insurer against the negligence of others. Having hired competent men, he is not bound to anticipate their negligence. The rule under discussion refers merely to the place or the tool or appliance used—an inanimate object.

As stated in *Mitchell v. Omaha Packing Co.*, 92 Neb. 496, a case cited by plaintiff, the master is liable for the negligence of his agent or servant only when the agent is negligent in the performance of a duty which properly belongs to the master. Applying the rule, it is apparent that the man at the foot of the ladder at the time of the accident was not engaged in constructing, repairing, or in any way creating a place to work in. If the master had told him to secure the foot of the ladder by heavy weights or some other structure, and he had negligently done this, and the plaintiff, not knowing the situation, had received

an injury, then the rule contended for would apply. In such case the master, if necessary, could make a test and know beforehand the real condition; and in such case the plaintiff in using the ladder would have a right to assume that the work had been done carefully. It is to be remembered that the rule does not require the master to change the place or structure or appliance to take the place of workmen where such change is not reasonably required. It is agreed in this case that the ladder with the man at the foot of it constituted a safe place. The plaintiff in his pleading does not allege an unsafe place to work as a ground of negligence, but relies upon the negligence of the fellow servant or man at the foot of the ladder. If the master had placed heavy weights at the foot of the ladder to secure it, and another servant had negligently kicked away one of the heavy weights, all agree that his negligence would not be imputed to the master, and yet the place would have been rendered unsafe. The case above cited by plaintiff illustrates the rule. There, two men were, in their ordinary work, admittedly fellow servants. The master deputed one of them to fix a runway for emptying cinders. He negligently used an old door to stand on in emptying a wheelbarrow. The other servant, not knowing the situation, was injured. The master was held liable. That clearly was a case of unsafe "place to work." This rule is old in the law, and the decisions have always been as above indicated. There appears to be no decision to the contrary.

The main case relied upon by plaintiff is *Czapinski v. Thomas Furnace Co.*, 158 Wis. 635. Consideration of this case only proves the rule. A man was engaged in piling slag iron. A grab attached to a crane would drop, pick up the iron and convey it to another place. The appliance was defective and the master knew it. It would not always empty the small pieces of iron. To avoid this danger the master ordered the servant operating the crane to see to it that the grab in its movements would not get over the man at work. The servant negligently failed to do so

and a piece of iron fell and injured the worker. The master was held liable, but why? The court based its decision solely upon the ground of the defective appliance used that rendered the place unsafe and not at all upon the negligence of the servant operating the crane. The court said that the negligence of the man operating the crane—a fellow servant—may have and did concur in the negligence of the master in using a defective appliance and that in such case of concurrence the master would be held liable on account of his own negligence.

If we were to hold that wherever men are working together on the same job and one from the nature of his work is charged with care to save his fellow workman from the incidental risks of injury and is negligent in that particular, the master is liable, we would then go contrary to the decisions and would virtually obliterate the fellow-servant rule.

Nearly every occupation has its peculiar risks of accident. Men voluntarily entering them must assume whatever risks are reasonably necessary. A casual view of the industrial field will show how frequently this is the case where men work together. Men engaged together loading or unloading heavy material, building scaffolding, building walls, handling explosives, driving a team, automobile, or locomotive, operating the engine or motor that controls connected machinery, holding the horse while it is hitched or shod, digging a well, cooking a meal, have more or less responsibility to keep the place safe for others.

Sometimes it happens that more men are needed to make the place safe. If the master employs the number reasonably required for that purpose he has done his duty and in such case, has never been held liable for their negligence.

Plaintiff's position would seem to be contrary to another rule as to liability, namely, if the risk of danger was as obvious and well known to him as to the master, he assumed it if he continued at the work without making complaint.

ROSE, J., dissenting.

In my judgment the law controlling the decision should be announced as follows: It is the nondelegable duty of the master to exercise reasonable care to provide a reasonably safe place to work and to furnish reasonably safe and suitable appliances, and if he undertakes to perform that duty through another he acts at his own risk, and this rule may be applied where the master delegates to an employee the duty of holding a ladder when that act is essential to the safety of another employee required to work thereon as a part of a permanent plan of operation.

The action is one to recover damages in the sum of $10,000 for personal injuries alleged to have been sustained by plaintiff while in the employ of defendant, December 21, 1913. Defendant at the time was installing an ice machine. Plaintiff and other employees, by means of blocks and chains, were raising pipes 20 feet above the floor in the engine room of defendant's plant. The chains could not be reached from the ground and were operated by plaintiff and others from ladders. Six feet or more above the floor, plaintiff, in performing his duties, stood on a 14-foot slanting ladder with the lower end on a slippery cement floor and the upper end against a cylindrical iron column. This was a safe place to work when the ladder was held in place, but otherwise it was unsafe. Plaintiff, who had been transferred from another department, had no part in selecting the ladder or in placing it in the position indicated. It was the duty of Louis Peitzel, another employee, to hold the ladder, and, solely through his negligence in failing to do so, it slipped, turned, and threw plaintiff on the concrete floor. These facts are pleaded in the petition. In the answer it is alleged that the injury to plaintiff was caused by his own negligence, that he had assumed the risk incident to the use of the ladder, and that Peitzel was a fellow servant. From the judgment on a verdict in favor of plaintiff for $2,500, defendant has appealed.

Defendant challenges as erroneous an instruction containing the following language:

"As before stated, it was the duty of the defendant to exercise ordinary care to furnish a reasonably safe working place for plaintiff in which to work, and reasonably safe instruments and appliances with which to do his work. * * * You are therefore instructed that, should you find from a preponderance of the evidence that in the exercise of ordinary care, in order to furnish a reasonably safe working place in this instance and reasonably safe instruments or appliances with which plaintiff was required to perform his work, it was necessary to have some one hold the ladder in question while plaintiff was mounted thereon, and should you further find from the evidence that Louis Peitzel was the person delegated to perform said duty of holding said ladder in position, * * * and should you further find from a preponderance of the evidence that said Louis Peitzel was negligent in the performance of said duty, * * * then you are instructed that such negligence of Louis Peitzel would be the negligence of the defendant herein."

In regard to this instruction plaintiff seems to take the position that his injury resulted from the failure of Peitzel to perform for his employer the nondelegable duty to provide a reasonably safe place to work, the only negligence in that respect being the failure to hold the ladder. On the other hand, it is argued that Peitzel was a fellow servant, for whose negligence defendant is in nowise answerable. On appeal it is conceded: "(1) That the defendant placed Peitzel at the foot of the ladder with instructions to hold it steady when the plaintiff was upon it. (2) That Peitzel's sole duty was to hold the ladder for the plaintiff while he was on it. (3) That the ladder could not fall while Peitzel held it. (4) That Peitzel was, as far as his rank goes, a fellow servant of the plaintiff."

The evidence supports a finding that Peitzel neglected to hold the ladder while plaintiff, free from negligence on his part, was on it in the performance of his duties. In that position no degree of care on the part of plaintiff

would have made the place safe without some one to hold the ladder. Plaintiff was not required by his employment to make the ladder secure for his own protection. Plaintiff, who had been transferred from another department, had no part in selecting the ladder or in placing it in the position indicated. Its use in the manner indicated was not a temporary makeshift. It was intended to be thus used throughout the operations connected with the raising of pipes in the engine room. The unperformed duty was the exercising of reasonable care to provide a reasonably safe place to work. This was the obligation of the master. The law requires him to perform that duty. If he undertakes to perform it through another he acts in that respect at his own risk. The duty cannot be shifted by the mere employment of animate means. In holding the ladder, a nondelegable duty under the facts of this case, Peitzel acted for his master, though in other respects he and plaintiff may have been fellow servants.

Defendant argues, however, that it had performed its legal duty when it provided a safe ladder and selected a competent servant to hold it, and contends: "Where a master instructs a servant to work upon a ladder, and instructs a fellow servant to hold that ladder, and that fellow servant is competent, and the ladder is safe and sound and sufficient for the purpose for which it is employed, and the servant is in a 'safe place' so long as the fellow servant at the foot of the ladder performs his duty, is the master responsible for the consequences of the negligence of such fellow servant in releasing his hold upon the ladder, permitting it to slip, and causing the plaintiff to fall, on the theory that the fellow servant at the foot of the ladder is performing a nondelegable duty inasmuch as he is maintaining a 'safe place?' "

The argument is formidable, but not conclusive. It was defendant's duty to exercise reasonable care to provide a reasonably safe place to work and to furnish reasonably safe and suitable appliances. *Parker v. Omaha Packing Co.*, 85 Neb. 515; *Johnson v. Model Steam Laundry Co.*, 88

Neb. 12; *O'Dell v. Stewart & Co.*, 96 Neb. 147; *Union P. R. Co. v. Broderick*, 30 Neb. 735. The duty was a continuing one. *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U. S. 249. The duty was nondelegable, and, if the fellow servant to whom it was delegated was negligent, defendant may be liable. *Mitchell v. Omaha Packing Co.*, 92 Neb. 496. It is not material whether the injury is considered as a result of a breach of the duty to provide reasonably safe appliances or of the duty to provide a reasonably safe place to work. 3 Labatt, Master and Servant (2d ed.) p. 2392; 4 Labatt, Master and Servant (2d ed.) p. 4465. Defendant's argument is based on the premise that the ladder was a suitable, safe and proper appliance for the purpose for which defendant had directed it to be used. The petition alleged, and the proof justifies a finding, that the ladder was not in itself a suitable, safe and proper appliance, and that it was unsafe for the purpose for which it was being used unless it was held by another employee—an unperformed duty of defendant. In holding the ladder for the purpose of providing a reasonably safe place to work Peitzel was performing a nondelegable duty of his employer. His negligence was therefore attributable to defendant. The rule is: A master using a defective appliance cannot escape liability for injury to a servant therefrom by instructing or making it the duty of another servant to use it in a manner which will prevent the defect from causing injury, since the duty to furnish reasonably safe appliances is nondelegable. *Czapinski v. Thomas Furnace Co.*, 158 Wis. 635.

This doctrine seems to be founded on reason and justice. It is in harmony with the trend of modern legislation and judicial thought. In the adoption of the view of the majority the mission of the law has failed.

NEILS JOHNSON ET AL., APPELLANTS, V. LEROY T. PETERSEN ET AL., APPELLEES.

FILED JULY 10, 1917. No. 18896.

1. **Evidence:** HEARSAY: EXCEPTIONS. Declarations derogatory to the title of an ancestor, made by him after he transferred title, are not admissible as an exception to the hearsay rule merely because the grantee acquired the property without a monetary consideration. *Johnson v. Petersen*, 100 Neb. 255, overruled.
2. ———: ———: DECLARATIONS. Declarations against the pecuniary interest of the declarant when made may be admissible after his death as an exception to the hearsay rule.
3. ———: ———: EXCEPTIONS. While the entire statement made in connection with a declaration against the interest of the declarant may be admissible as an exception to the hearsay rule, such parts as are not against his pecuniary interest may be entitled to little credit, where the evidence shows that in those respects he had strong motives for misrepresentation.
4. **Trusts:** CONSTRUCTIVE TRUSTS: PURCHASER IN GOOD FAITH. Trust property conveyed by a trustee *ex maleficio* to his prospective wife in consideration of marriage cannot be followed by the *cestui que trust*, where the grantee acquired title in good faith without knowledge or notice that the property was purchased by her grantor with trust funds.

Opinion on motion for rehearing of case reported in 100 Neb. 255. *Former judgment vacated, second paragraph of syllabus overruled, and judgment of district court affirmed.*

CORNISH, J.

This action was begun by the heirs of Lena Petersen, first wife of Soren T. Petersen, deceased, and who died in 1875 without issue, to enforce a trust in the property in controversy, because it was purchased with the proceeds of a converted draft, Lena Petersen's share in a legacy. The defendants are the children of the deceased and his second wife, Maren, now Mrs. Hansen. Defendants contend that the beneficiaries of the trust cannot follow the property, even though so purchased, because it had been

conveyed by Petersen to his second wife (their mother) in 1876 in consideration of marriage, and because in divorce proceedings in 1892 between their mother and Petersen the property was ordered conveyed to their children, the defendants. The trial court dismissed the action, and plaintiffs appealed. In this court the judgment was reversed and title to the property quieted in plaintiffs. *Johnson v. Petersen,* 100 Neb. 255.

Upon motion for rehearing the defendants contend that this court erred in its consideration of the declarations of Petersen, made after he had conveyed the property, and in the rule announced in the second paragraph of the syllabus as follows: "In a suit to declare a trust in lands, the declarations of the ancestor through whom the defendants acquired title, without the payment of a monetary consideration, may be received in evidence against the defendants who stand in the place of the ancestor."

The declaration referred to is evidenced by oral testimony and by a letter written by the declarant just before he died, as follows:

"Omaha, Nebr., June 6, 1912.

"Nels Johnson, Hombolt, Iowa:

"I thought best to write you a letter, as I don't tink my time is long for this world. If I know that time you was her I would had a talk with you. I anderstant you was here to investigat the mony which Lena got from her ant. As I haven't long to live I will tell you about it. I got the money to week after Lena was dead in 1875. I tout it was all right, so I bought lot 13—20 Nelson's addition on which I built 3 houses, No. 975, 979, 971 North 27 street, Omaha, Nebr. I got the money in a draft to which I had to sign Lena name. The Duth (Dutch) concil said it would be all right so long as she was dead she could not do it. I did not write you that time as I did not know your address. I did not want to part with it, but the law say I must. That dam bich of a woman beat me out of it so I had to sumit. The property is now in possession of four children, namely Leroy Petersen, Leona McCutchen, Lillian Deitrick and

one what goes by the name of Emilie. She don't be long to me. I will send this to my Brother to send to you after my death, so you will know when you get this I will be with Lena. Now I think I am square with the world and hope for rest.

"(Signed) S. T. Petersen."

Under our system of jurisprudence, hearsay testimony is not generally admissible in evidence. An exception to this rule, based upon the principle of experience, is that a statement asserting a fact distinctly against one's interest is unlikely to be deliberately false, or heedlessly incorrect, and, being thus sufficiently guaranteed, is admissible in evidence, though oath and cross-examination are wanting; the witness being unavailable because of death.

One of the applications of this exception to the general rule is that which permits declarations derogatory to his title of one who at the time holds the title. Or, as stated in negative form in *Consolidated Tank Line Co. v. Pien*, 44 Neb. 887: "The declarations of a former owner of land are not admissible as against those claiming under him when made after he has conveyed the land." The owner of real estate is not likely to make untrue statements in derogation of his title. Declarations derogatory to title, made after parting with title, have not that guaranty of their truth which the law requires; nor does the law recognize that the declaration is more likely to be true if the title has been parted with without consideration, than if the conveyance was for valuable consideration paid. In either case the declaration is ordinarily inadmissible.

The declarations of an ancestor, from whom those claiming title derived their title as heirs, are within the exception to the hearsay rule and are admissible in evidence. The second paragraph of our syllabus, above quoted, is inaccurate in two respects: First, it appears to make the rule depend upon whether the defendants acquired title without payment of a monetary consideration, when, in fact, the character of the consideration does not affect the rule as a rule of evidence. Second, the rule announced is

not applicable to the case in hand. Here, the children did not acquire title as heirs through an ancestor, but through deeds made long before Petersen's death, and the declarations were made after parting with title. Considered merely as declarations derogatory to title, they are inadmissible. The rule announced in the second paragraph of the syllabus, in so far as it is contrary to the law as herein stated, should be overruled.

We are of opinion, however, that the particular declaration under consideration was admissible by virtue of another application of the general exception to the hearsay rule above stated. A declaration, which when made is directly contrary to the pecuniary interest of the person making it, is admissible in evidence. An admission that one has converted to his own use the money of another is within this class. It follows that the declarations of Petersen, stating that he converted the money of his first wife, which, if true, would constitute him a trustee *ex maleficio* of a constructive trust and render his estate liable therefor, are admissible in evidence for what they are worth. For a discussion of the rules of evidence applicable, see 2 Wigmore, Evidence, secs. 1082-1086, and 1457-1461; also, 4 Chamberlain, Modern Law of Evidence, secs. 2769-2774.

Upon further consideration, we are of opinion that the judgment of the trial court must be affirmed for other reasons of law and of fact. Defendants contend that the second wife was a purchaser for value without notice of the trust, and that therefore plaintiffs are not entitled to follow the trust property into defendants' hands. Petersen married his second wife, mother of defendants, September 29, 1876. He executed the deed which conveyed to her the property in controversy September 25, 1876. She testifies that it was conveyed to her in consideration of the intended marriage; that she did not know how Petersen acquired the property. On behalf of plaintiffs, besides Petersen's letter, there was testimony by his third wife that she heard Petersen say that the property was conveyed to

the second wife to protect it from possible creditors of Petersen, and that the second wife knew how he had acquired the property. Nowhere does she testify distinctly as to statements made either by Petersen or his second wife, showing when the wife first knew how Petersen had acquired the property; nor does Petersen in either his letter to Johnson or in the one to his third wife state that his second wife knew of the conversion of the money at the time she accepted the deed. A belief that she did know would rest mainly upon inference and be directly contrary to her sworn testimony. Petersen's declarations, when admitted in evidence, are not of much value for determining the real point in controversy. While his statement as to what he did with the money is probably admissible, as part of his entire statement, yet, considered by itself, that part of it telling what he did with the money is not a statement against interest, but the contrary. Petersen was in the money-lending business, and the evidence would indicate that he was at all times a man of some means. It would be to his interest to have the property, which he had parted with and which finally went to the children, appropriated for what he owed his wife's heirs, instead of being taken out of his own estate. The record, not his statements, shows that the property in dispute was not purchased until nearly a year after he received the money. It is hard to be sure that this particular money went into the particular property in dispute. In his love letter, written to his third wife at about the time he was divorced from his second wife, he speaks of the children (the defendants) as bastards. Afterwards, he seems to have been on friendly terms with one of the boys, but in his last letter, written just before his death, he speaks of Emilie as not his child. His malice and the malice of his third wife toward his second wife and the children are apparent from the testimony. His declarations, in the light of all the testimony, while against pecuniary interest, as above stated, shows generally an unfriendly feeling toward his second wife and family. We are of opinion that they are not suffi-

cient to overcome the testimony of the second wife that she was the *bona fide* purchaser of the property in dispute without knowledge or notice of any fraud upon her husband's part.

It is suggested as something extraordinary for Petersen to deed the property to his second wife just before marriage. We do not think so. It is entirely within the proprieties for a man about to marry a woman to give, and for her to take, in consideration of marriage, the property which is to be their home. If fairly offered in the right spirit, most women would be glad to take it as a proof of affection. Besides, this was Petersen's manner of wooing. In his letter to his third wife, he tells her that, if she will come and live with him, he will give her the old piano, or, if she wishes, buy her a new one. This last letter, written at about the time he was divorced from his second wife, indicates that previous thereto there had existed an impropor, if not illicit, relation between his third wife and himself. She did come to live with him, and they sustained illicit relations with each other for several years before their marriage. She afterwards commenced divorce proceedings against him. Neither her testimony nor his statements are entitled to the highest credit. His conscience draws too fine a line. Any friend could have told him that to his wife's people, whose property he had converted, there would be nothing sacred in the particular property in controversy, unless it would be its value. How easy it would have been for him to have taken the other property, which the evidence shows he owned and was worth more than this, converted it into cash, or given it to his wife's heirs. They would have been entirely happy and his conscience quieted. Instead of that, his conscience drives him to go elsewhere for property to pay his wife's relatives what he owes them, even though it forces him to violate the solemn decree of the court in a suit where he was a party, and two solemn deeds of conveyance executed by him.

When Petersen's second wife obtained a divorce from him, the parties agreed to the terms of alimony. The decree awarded to the wife $5,000 and provided that the property now in dispute should be conveyed to the children; the wife to have the custody of the children and the use of the property until the youngest child should become of age, provided that she supported them. One of the grounds alleged by her for a divorce was that he insisted on appropriating the rents received from the property in dispute, although he was worth $40,000. Both of the parties, in conformance with the decree, joined in the deed to the defendants. It is contended by defendants that, the property being awarded in lieu of payments in money, they are in the same position as if they had been awarded money and with the money had purchased the property.

If, at the time the property was deeded to the second wife, she took it in consideration of marriage, and we find that she did, then she would be a *bona fide* holder for value, unless she took it with notice that it was trust property. We find that she did not then know it was trust property. We are of opinion, also, that the deed made by the husband and wife, pursuant to the decree of the court in the divorce suit, constituted the children innocent purchasers for value of the property in dispute. For decided cases bearing upon these questions, see *Leininger Lumber Co. v. Dewey,* 86 Neb. 659; *National Exchange Bank v. Watson,* 13 R. I. 91; *Bowman & Cockrell v. Baker,* 147 Ky. 437; *Sloan v. Coburn,* 26 Neb. 607; *McClatchey v. Anderson,* 84 Neb. 783; *Pottenger v. Bailey,* 8 Ohio Dec. (Reprint) 106; *Ryder v. Ryder,* 244 Ill. 297; *Scheps v. Bowery Savings Bank,* 97 App. Div. 434, 90 N. Y. Supp. 26.

For the reasons given herein, the statement of law announced in the second paragraph of the syllabus of our previous opinion is overruled, and the judgment of the trial court is

AFFIRMED.

MORRISSEY, C. J., and HAMER and DEAN, JJ., dissent.

EMMA L. WATSON, APPELLEE, V. WILBERFORCE W. RILEY ET AL., APPELLANTS.

FILED JULY 10, 1917. No. 19307.

1. **Wills**: CONSTRUCTION: OPTION. An option to purchase property of the estate, whether it be at an appraised value or at a price named or agreed upon, may be created by will.

2. ———: ———: ———: ACCEPTANCE. A will, bequeathing to one of the four children one-fourth of the estate for life, with remainder over to her children, and to each of the other children one-fourth of the estate, concluded with a provision as follows: "It is my will that the said Emma L. Watson (one of the children) shall have the right to take the following described land (here follows description) for the sum of $50 per acre, the said Emma L. Riley (Watson) shall be allowed on the said purchase price of said land the sum of $12.50 per acre or if her bequest shall amount to more than the sum of $12.50 per acre then she shall be allowed upon the said sum of $50 per acre the sum of her entire inheritance to be deducted from said sum of $50 per acre." A codicil contained the following words: "I give and bequeath to my daughter, Emma Watson, the strip (describing a narrow strip) in addition to and as a part of the farm bequeathed to her in the said will, and on the same terms and conditions." Emma accepted the devise and offers to pay to the other heirs the $50 per acre as provided in the will. This offer is declined by the other heirs. Emma brings suit to quiet title. *Held*, that by the acceptance and offer the title to the land vested in Emma, subject to the amount then due from her to the estate.

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

Kelsey & Rice, O. S. Spillman and *Dowling & Warner*, for appellants.

M. H. Leamy, contra.

CORNISH, J.

Margaret Riley, by her will made February 20, 1906, bequeathed to Mary, one of her four children, "one fourth of all the property, both real and personal, of which I may die possessed;" to Wilberforce, the same; to Alice, the

same for life, with remainder over to her children; to Emma, the same. Then followed the words: "It is my will that the said Emma L. Watson (the child above mentioned) shall have the right to take the following described land (here follows description, 160 acres) for the sum of $50 per acre, the said Emma L. Riley (Watson) shall be allowed on the said purchase price of said land the sum of $12.50 per acre or if her bequest shall amount to more than the sum of $12.50 per acre then she shall be allowed upon the said sum of $50 per acre the sum of her entire inheritance to be deducted from said sum of $50 per acre." Subsequently she made a codicil to her will, as follows: "I give and bequeath to my daughter, Emma Watson, the strip (describing a narrow strip) in addition to and as a part of the farm bequeathed to her in the said will, and on the same terms and conditions."

Although, at the time the will was made, $50 per acre may not have been far from the value of the land, it is now worth about $150 per acre. The controversy, an action to quiet title, is over Emma's claim of right to the land at $50 per acre, under the will. The other heirs, defendants, contend that the will shows the primary intent of the testator to be an equal division of her property; that, if she had intended to limit the price of the land, she would have devised it to plaintiff and provided that she pay a certain amount to each of the other children; that, if Emma's claim is right, then each is not getting one-fourth of the property, in fact, according to the terms of the will, but one-fourth of a fictitious or arbitrary estate; that the figures given in the last paragraph are illustrative of or a formula for distribution only, and were not intended to cut down or limit the estate which she was giving to the other three children; that the will had two main purposes, one, an equal division, and the other, to give Emma an opportunity to take the home farm; and that the last clause of the will, above quoted, is ambiguous.

We are of opinion that this contention is erroneous. In the first place, it is impossible to say that the primary ob-

ject of the will was an equal division of the property amongst the children. Why did she limit Alice's share to an estate for life? People make wills to avoid equal division. The law does that without a will. The main object of a will is likely to be a purpose that, to strangers, may seem unfair. Mrs. Riley's moving purpose may have been to secure the homestead for Emma, at $50 per acre. Quite likely it was. That is the last clause in her will. Again, the argument proves too much. It renders nugatory this last clause, for, if the property is to be divided according to its value, that can only be determined by its highest selling value, and Emma has no preference over anybody else.

The argument that, if the testator wished to prefer Emma, she would have devised the land to her, charged with the portions going to the others, is unsound in this: Such was not her will. In such case, Emma *must* take or the will fails. She wished rather to give Emma the option to take, and expressed her wish in language clear enough. Of course, she had the right to prefer Emma if she wished. The defendants argue that at the time she wrote the will she considered $50 per acre a fair estimate of the land's value. Let us suppose that is true. Then her will is consistent throughout. But, it may be said, she was mistaken, or did not anticipate a subsequent raise in price. Perhaps so. Prices might have gone down.

Is it still insisted that, if she had known, she would have had it otherwise, in order to accomplish an equal division? Well, if so, we will give you the short answer, advised by Chancellor Kent in such cases: *Voluit sed non dixit.* (She wished but said nothing.) Margaret Riley's case may have been, probably was, a very common one. She regarded her children equally, and would so divide her property; but yet she was attached to the old homestead, which bore the family name, did not wish it divided, or to go into the hands of strangers, and for some reason wished Emma to preserve it for family uses. So she gave Emma that privilege, honestly valued the land at $50 per acre, and in

that way made an equal division. Such cases are numerous.

The courts unanimously and without disagreement have held according to the rule stated in 40 Cyc. 2000: "An option to purchase property of the estate, whether it be at an appraised value or at a price named or agreed upon, may be created by will." The rule is recognized in *Fauber v. Keim,* 85 Neb. 217. Deny the testator that power, and he could not make his real will. He may have the best of reasons. One piece of property—a store or a farm—may be adapted to the use of a particular child. He wishes to hold it intact and to avoid controversy over its value; and, more important still, he may desire to make a preference. His valuation must go in the distribution, and, if on his valuation the distribution is equal, then it is so in law, and there is no fictitious estate or repugnancy in the will. The writer knows of one will where no doubt the testator, dividing his property equally, thought his valuation on the homestead, bequeathed to one, might be from $5,000 to $10,000 too low. It turned out to be $5,000 too high. Testators know that conditions and their valuations will change, but that is their business. It generally happens. We know of no case, however, where the courts have permitted changed valuations to affect the will. The reason is that the intent must be drawn from the clear language of the will. Results, full of mischief, will follow when courts, not testators, make the will.

Johnson v. Johnson, 81½ Pa. St. 257, was a case very like the one in hand. There the testator, as here, divided his real property equally among his 12 children. He valued it at $6,000, and gave three sons the privilege of taking it at that price. The real estate became worth from $50,000 to $70,000. The court, without dissent, sustained the provisions of the will.

In the case in hand, the codicil to the will should remove any doubt about its proper construction. There Mrs. Riley herself interprets the will as if it bequeathed the land to Emma upon certain terms and conditions. The real cause

of the controversy in this case grows out of the increased value of the land since the time when the will was made. If the land value had remained at $50 per acre, or gone below that amount, there would have been no dispute. Once we fully and fairly recognize the right of the testator to fix the valuation of his property, bequeathed for distribution, then the will presents no difficulty of construction. Strictly speaking, the present value of the land is a matter with which the court has absolutely nothing to do, any more than it has to do with evidence bearing upon the testator's affection for the several children. When the language is clear, the will speaks for itself. There is no ambiguity in the will.

The judgment of the trial court should be affirmed. Emma having elected to purchase the land at $50 per acre, title should be quieted in her, subject to the amounts due the other children, in accordance with the provisions of the will.

AFFIRMED.

DEAN, J., concurring separately.

An option to buy real or personal property at a given price is everywhere recognized as a property right. It is so recognized in the law that pertains to the interpretation of wills. Mrs. Riley in express and coldly specific terms devised to her daughter Emma an option to purchase the home place at the price of $50 an acre. Her will also provides that Emma's distributive share in the land, $12.50 an acre, "shall be allowed on the said purchase price of said land." The language of the codicil, as pointed out in the main opinion, seems to emphasize the specific intent of Mrs. Riley with respect to the disposition that she wanted to make of her home place. The testatrix might have provided that Emma's option to purchase should be based on an agreement as to price, or upon an appraised value of the land at the time the will became effective. But it is sufficient answer that she did not do so. She named the price. The will does not appear to be ambiguous, and

we should not declare it to be so upon slight pretext. As said by Chief Justice Cooley in *Kinney v. Kinney,* 34 Mich. 250:

"Where there is no ambiguity on the face of a will, it is not admissible by extrinsic evidence to seek to raise an ambiguity, and thereupon on the strength thereof to limit or qualify the construction of the language actually used, so as to give effect to some conjectured probable purpose of the testator which he has failed to express. This would be not putting a construction upon the will made by him, but making a new one of quite a different purport. * * * Judicial tribunals cannot inquire into a testator's hopes and expectations as to what his fortune may turn out to be when his will shall take effect, any further than he has seen fit to express them; where he has clearly expressed a wish consistent with the rules of law, they must give it effect; they are not at liberty to surmise that his real wishes were something different."

Nothing can be more clear than the language of Judge Cooley on this point. The rule in the *Kinney* case must be adhered to, if men and women are to be left free to make their own wills. It is elementary that, where there is an apparent conflict in the language of a will having to do with both general and specific devises, the general devise yields to the specific. The rule is the same where a will, or even a contract, has to do with a general intent and a particular or specific intent. In such case the specific intent controls. In the present case it is argued by defendants that, if it is held that the will discloses two conflicting intents, namely, an intent to divide all of the property equally among the four children and an intent to give to Emma an option to buy the home place at $50 an acre, the intent for an equal division controls. The question, then, is squarely presented as to which is the controlling intent or paramount purpose that is disclosed by the language of the will. Clearly, if there is such conflict, the intent of the testatrix to give to Emma the option to purchase controls, because the language of the will pertaining thereto

is specific as to person, as to property, and as to price. In this respect all is distinct, all is clearly pointed out. It seems to be the uppermost, the controlling, thought of Mrs. Riley, and appears perhaps to be the main reason why the will was at all written. The clause of the will devising to Emma the option to purchase the farm, and the codicil which gave to Emma the strip of land that formed an essential part of the farm, "in addition to and as a part of the farm bequeathed to her in the said will, and on the same terms and conditions," are the sole and only portions of the will that point out and specify and distinguish any portion of the estate from the general mass of the estate. This seems to answer the contention that the will of Mrs. Riley gives expression to conflicting intentions with respect to the disposal of her property. The will does not seem to present intentions that are in substantial conflict, when viewed in the light of generally accepted rules of construction.

The specific devise is favored by our statute for certain purposes. Section 1318, Rev. St. 1913, provides: "The estate real or personal, given by will to any devisees or legatees, shall be held liable to the payment of the debts, expenses of administration, and family expenses, in proportion to the amount of the several devises or legacies, except that specific devises and legacies, and the persons to whom they shall be made, may be exempted, if it shall appear to the court necessary in order to carry into effect the intention of the testator, if there shall be other sufficient estate."

Ogilvie v. Ogilvie, 21 Quebec Sup. Ct. 130, holds: "The fact that the estate is much larger at the date of the testator's death than it was when the will was made is an extraneous circumstance which cannot be taken into account by the court in the interpretation of a will, so as to change its meaning from that fairly deducible from the contents of the entire instrument itself."

Will any one deny the validity of a clause in a will that places a valuation upon property for purposes of distribu-

tion? Will it be denied that an option to purchase property on terms and at a price specified in a will is not the subject of lawful testamentary disposition? The main opinion seems fairly to have gathered from the will of Mrs. Riley her intent with respect to the disposition that she wanted to make of her property. With this done, the duty of the court is accomplished. Where the language of the will is plain, it is not within the province of the court to go outside of the will to discover intent. Death will have an added terror when the judge begins to substitute his will for the will of the testator.

SEDGWICK, J., dissenting.

The office of the court in such case is to determine the meaning of the will; that is, the true intent of the testatrix. The case of *Fauber v. Keim*, 85 Neb. 217, cited in the majority opinion, also depended upon the intention of the testator, and it was said: "The decision on this point must be controlled by the intention of testator as disclosed by his entire will." This is the only respect in which that case is similar to the one at bar, and I must suppose, that it was cited for that purpose, as this is the only suggestion in the majority opinion that we should ascertain the controlling desire and intention of the testatrix from the consideration of the entire will. In considering the will for that purpose, we must also consider the conditions under which it was executed and the surrounding circumstances. "Every will should be interpreted, as far as possible, from the standpoint apparently occupied by the testator; and attendant circumstances, such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration, as part of the *res gestæ*, where the language is not plain nor the meaning obvious." 1 Schouler, Wills (5th ed.) sec. 466. The case of *Johnson v. Johnson*, 81½ Pa. St. 257, is also cited; but it appears to be fundamentally different from the case at bar. In that case the testator estimated the value of his real estate and specifically bequeathed that much money to his children, "to share

like and like (naming the children) each $500;" that is, he willed to each of his children $500 in money, and the will did not purport to give the land to any one except those particularly specified, to whom the court gave the land. The majority opinion says: "Strictly speaking, the present value of the land is a matter with which the court has absolutely nothing to do, any more than it has to do with evidence bearing upon the testator's affection for the several children." This seems to be an unusual statement, since all of the authorities agree, as above suggested, that in determining the meaning of a doubtful will the court must take into consideration the "evidence bearing upon the testator's affection for the several children." It may well be conceded that in like manner the court should take into consideration the present value of the land. The land, and its condition, and its value were circumstances to be considered, not only its supposed salable value at that time, but its potential value, and evidence that it increased in value very rapidly is evidence of its potential value at the time of the making of the will, a matter which the testator was at liberty to take into consideration, or a substantive fact that the testator might at the time have overlooked And so the present value of the land becomes an important circumstance.

Of course, where there is no ambiguity on the face of the will, extrinsic evidence is not proper to raise an ambiguity. The question in this case is whether there is an ambiguity on the face of the will; if not an ambiguity, an inconsistency. That depends upon the language of the will and the facts relating to the property which was the subject of the will. If the existing facts relating to the property which was the subject of the will show an ambiguity or inconsistency in the will, it seems to be proper to consider those facts and determine whether or not there is such an ambiguity or inconsistency that both of the supposed wishes of the testator cannot be enforced. If there is, then we must enforce the predominant and controlling one. The fact that the land has increased in value since

the will was made cannot change the meaning of the will from that "fairly deducible from the contents as a whole;" but "the meaning fairly deducible from the contents of the whole instrument" is the very question we are discussing. If the will was perfectly plain in those respects, and stated that Emma should take the property at the value of $8,000, then the fact that the property was altogether worth $24,000, instead of $8,000, would make no difference. Shall Emma have seven times as much as any of the others? Was that the intention of this will taken altogether? This land was the substance of the property willed. The personal property was of so little value that its consideration will not affect the result. There is no doubt but the desire and intention of the testatrix was to give each one of these four children one-fourth of all of her property of which she might die possessed. This she has expressly and explicitly done in the will. After having done this, she expresses a wish that her daughter Emma shall be allowed the right to take the farm at $50 an acre, which she evidently supposed was its value at the time. If the will had then become effective, it would have accomplished the desire of the testatrix, and would have contained no inconsistency; but it did not become effective until several years later, and then that each of these children should have one-fourth of the property of which she died possessed, and that Emma should have the farm at $50 an acre, was impossible. Feeling confident, as she did, that $50 an acre was at that time the real value of the land, the expression of her wish that Emma should have it at $50 an acre was equivalent to saying that she should have it at its real value, so far as the effect upon the devisees in general was concerned. There is, of course, no doubt that the testatrix might create by will "an option to purchase property of the estate, whether it be at an appraised value or at a price named or agreed upon." It was wholly unnecessary to cite authorities and discuss this proposition at length. It will also be conceded that the testatrix in this case used language which amounts to an attempt to so create an option which would without

hesitation be enforced, if that could be done without doing violence to the principal purposes of the will.

Whether the two provisions of the will under consideration are inconsistent and incapable of enforcement as literally stated in the will is not much discussed in the majority opinion. The second paragraph of the syllabus recites some of the facts quite at length, and determines arbitrarily upon the recited facts that Emma must have the bulk of this property; but that paragraph of the syllabus does not clearly disclose any proposition of law upon which it is so determined, and I do not clearly understand what the view of the majority is upon the vital proposition of law in this case. The thought that there is an inconsistency in the will was evidently in the mind of the writer of the opinion when he used this language: "She regarded her children equally, and would so divide her property; but yet she was attached to the old homestead, which bore the family name, did not wish it divided, or to go into the hands of strangers, and for some reason wished Emma to preserve it for family uses." Here it is assumed that she would have divided the property equally if she could, and at the same time have the property preserved for family uses; whereas, by the express language of the will, she did divide the property equally, and did give each of the four children one-fourth thereof as it might be at the time of her decease, and only expresses a wish that Emma might take the land at what she supposed at the time of making the will was its real value. The opinion assumes that the wish to preserve the land for family uses was the principal purpose of making the will, and says: "People make wills to avoid equal division. The law does that without a will." But there is a legal presumption, when there are no circumstances to indicate the contrary, that the testator desired an equal distribution of his property, and "in case of doubt a construction of the will, as to property, which conforms most clearly to the general statutes of descent and distribution should prevail." 1 Schouler, Wills (5th ed.) sec. 479. The opinion asks the question, "Why did

she limit Alice's share to an estate for life?" This may have been a leading reason for making the will, but it does not make the division of the property unequal. She divided the property into four equal shares, and gives a share to each of her children *per stirpes*. The fact that she desires that Alice's share shall be preserved for Alice's children throws no light upon the question here considered.

It is said in the opinion that "the codicil to the will should remove any doubt about its proper construction." This is because "Mrs. Riley herself interprets the will as if it bequeathed the land to Emma upon certain terms and conditions." The codicil provides that the easement of a passageway to the land shall go with the land upon *"the same terms and conditions."* The sole purpose of this codicil was to attach the passageway to the land as a part thereof, and the fact that the testatrix took this (probably unnecessary) precaution can be of no assistance in construing the will. This codicil amounts to no more than to say that, if the conditions are such that she gets the land, she shall have the right of way to the land upon the same terms. There is no evidence in the record indicating any motive or reason for any unequal division of the property. By the majority opinion Emma gets about seven times as much property of the testatrix as does any other of the four children. I cannot see how this will can be construed to express such an intention of the testatrix.

MORRISSEY, C. J., concurs in this dissent.

HAMER, J., dissenting.

The testatrix was the owner of a certain small amount of personal property at the date of making the will, February 20, 1906, and she also owned a quarter section of land, and a strip of land two rods wide, used as a private road and running to the farm. There were 160 acres in the quarter section, and two acres in the strip, making a total of 162 acres. She had four children, Mary Millett, Wilberforce W. Riley, Alice Dean, and Emma L. Riley

(Watson). At the time of her decease the personal property, after the payment of a few small debts, amounted in value to only about $1,000. The real estate was then worth $150 an acre, according to the evidence, and amounted to $24,300. As there is no controversy about the $1,000 of personal property, that need not be considered in this discussion. The testatrix was apparently desirous at the time of making the will of dividing all her property evenly between her children, giving one-fourth to each, but at the same time she desired that in the division Emma L. Riley (Watson) should be allowed, at her election, to take the farm, instead of her one-fourth in money. Emma L. Riley (Watson) elected to take the farm, and so notified the other children in writing. The evidence that the testatrix desired to evenly divide the property between her children is shown by the devising and granting clause contained in each of the second, third, fourth, and fifth paragraphs of the will. The first reads as follows: "I give and bequeath to my daughter, Mary Millett, one-fourth of all the property, both real and personal, of which I may die possessed." The second devising and granting clause in the third paragraph of the will reads: "I give and bequeath to my son, Wilberforce W. Riley, one-fourth of all the property, both real and personal, of which I may die possessed." The third devising and granting clause contained in the fourth paragraph reads: "I give and bequeath to my daughter, Alice Dean, one-fourth of all the property, both real and personal, of which I may die possessed, to have and to hold for her use and benefit for her natural life and upon her death to be divided among the children of the said Alice Dean share and share alike." This gives to Alice Dean a life estate in the one-fourth of all the property, with remainder over to her heirs. The fourth devising and granting clause contained in the fifth paragraph reads: "I give and bequeath to my daughter, Emma L. Watson, one-fourth of all the property, both real and personal, of which I may die possessed."

After this part of this last clause comes in this fifth paragraph some peculiar provisions that do not seem to be quite consistent with other parts of the will and (if properly a part of the will) are perhaps not quite consistent with each other. They are not a part of the devising and granting clause. They come afterwards. They are that Emma L. Riley (Watson) may purchase the land if she so elects, and it is said: "The said Emma L. Riley (Watson) shall be allowed on the said purchase price of said land the sum of $12.50 per acre (which would be one-fourth of the price of each acre valued at $50 per acre) or if her bequest shall amount to more than the sum of $12.50 per acre then she shall be allowed upon the said sum of $50 per acre the sum of her entire inheritance to be deducted from said sum of $50 per acre."

The first clause of the language quoted might seem to show that Emma L. Riley (Watson) was not expected to pay anything on the one-fourth of each acre that she would inherit under the law; that the land was to be treated under the will as if she had inherited one-fourth of each acre, and was to receive one-fourth of each acre without paying anything for it; and the second clause shows that it was in the mind of the testatrix that it was uncertain what would be the amount of the bequest coming to Emma L. Riley (Watson). The words, "Or if her bequest shall amount to more than the sum of $12.50 per acre," clearly implied the uncertainty in the mind of the testatrix as to what might be the amount of the bequest. There could be no uncertainty concerning this matter if the price of the land was to be regarded as fixed at $50 per acre for the entire tract. It would be 50 times 162 or $8,100. The uncertainty was certainly there, or the writer of the will would not have given expression to it. Of course, the writer of the will must be presumed to have expressed the purpose of the testatrix, unless the contrary appears from the language of the will, the number of the devisees, the property devised, and its entire value. Could this have been the intent, first, that Emma L. Riley (Watson)

should not be obliged to pay for the one-fourth of the real estate which she would inherit under the law or take in any event under the will, if she took the land, or its value if she did not take it? Her bequest as to dollars and cents would be much greater if the land should be sold and she got one-fourth of the purchase price. This indicates that the testatrix expected the land to be sold and to get more than $12.50 per acre for her one-fourth. If the majority opinion is finally sustained, it renders absolutely nugatory the whole disjunctive clause which we have quoted. In that event, that clause in the will is without a purpose. It puts in a sentence which has no meaning, and, notwithstanding the four separate devising and granting clauses by which there is bequeathed and devised to each one of the heirs "one-fourth of all the property, both real and personal," of which the testatrix "may die possessed," yet the last child named, Emma L. Riley (Watson), is to be given 162 acres, worth $150 per acre, as set forth by the evidence, and for the price of $50 per acre only, provided the statement as made in the will is held to be equivalent to a devise. The majority opinion in that event would confer a license upon the testatrix to say one thing in the will and to mean another, and enable Mrs. Watson to enforce that which the testatrix did not say and did not intend to say.

It will be noticed that the peculiar clause in the will is not contained in the devising or granting clause. There is nothing in this clause which proposes to give the land to Emma L. Riley (Watson). She merely says in the instrument: "It is my will (my preference) that the said Emma L. Watson shall have the right to take the following described land." All that she says is that she prefers that Emma L. Watson shall have the right to take the land. But she does not devise the land to Mrs. Watson. The most that she does is to express a willingness to allow her to take the land; but, of course, at the time she executed the will she did not know whether she would take the land or not, and this part of the will is the expression

of a preference that she shall be allowed to take the land. It is merely the statement of a wish. If Mrs. Watson should prefer to take her share of the money instead of the land, there is nothing whatever in the will to prevent her from doing so. Nor should the will have greater force than the testatrix intended it to have. She did not unqualifiedly say that in any event Mrs. Watson shall have the land; but she said in effect that she might purchase it, and in that connection she said that if she did purchase it she "shall be allowed on the said purchase price of said land the sum of $12.50 per acre." Here is undoubtedly the statement indicated that the land might be sold for its reasonable market value, and, if it did sell for that, then that Mrs. Watson's interest in the land should be considered paid for up to the amount of $12.50 per acre. The fair implication is that, if the land is sold, Mrs. Watson should only have credit upon the purchase price at the rate of $12.50 per acre. The purpose was to protect Mrs. Watson and to give her the share of the land which she did inherit under the law. She did, of course, inherit one-fourth of it. But there was no purpose to say that the land should not be purchased at its fair market value. One-fourth of the land was hers under the law. It was not contemplated that this would be changed. It is difficult to understand how the land could be "purchased," unless a price was agreed upon between her and the other heirs. If I purchase a thing I agree upon the price with those who have the article to sell. That is what Mrs. Watson was expected to do. There is no meaning otherwise in the provision that she should purchase the land. There could be no "purchase price of said land," unless Mrs. Watson agreed with the other heirs concerning what the price should be. Nor is there seemingly any reason in the provision, "or if her bequest shall amount to more than the sum of $12.50 per acre then she shall be allowed upon the said sum of $50 per acre the sum of her entire inheritance to be deducted from said sum of $50 per acre." The testatrix was saying to herself: "The bequest cannot exceed

$12.50 per acre, because that is one-fourth of the value of the land now at the time of the execution of the instrument; but, if it brings more at the sale after my death, then my bequest should amount to more than the sum of $12.50 per acre." Of course, it would amount to more than $12.50 per acre if at the time of the sale it is worth $150 per acre. The scrivener did not fully express the thoughts in the mind of the testatrix. It is unreasonable to suppose that she would three times say that she intended to give each of these heirs "one-fourth of all the property, both real and personal, of which I may die possessed," unless she meant it. She intended an agreement as to the value of the property on the sale of the property. She intended to be fair with her children. The property has increased $100 an acre in value. The majority opinion would give Mrs. Watson $100 an acre on 162 acres of land. The proposition is to give her this increase in value without consideration, $16,200. To do this is to disregard the apparent intention of the testatrix as expressed in the four devising and granting clauses of the will, and is also to disregard the disjunctive clause quoted.

That part of the will contained in the fifth paragraph below the devising and granting clause is the mere expression of a wish. It is "precatory." I will say by way of illustration that it is not every condition in a will that is to be carried out; "and if such condition prove illegal or incapable of performance, whether as against good morals, or as impossible under any circumstances, or as rendered impossible in the particular case and under the existing circumstances, the gift, whether of real or personal property, relieved of the condition, becomes absolute in effect." 1 Schouler, Wills (5th ed.) sec. 599. See *Conrad v. Long*, 33 Mich. 78; *Parker v. Parker*, 123 Mass. 584; *Shepard v. Shepard*, 57 Conn. 24; *In re Greenwood*, 1 L. R. Ch. Div. 1903 (Eng.) 749. In the same section (sec. 599, *supra*) it is said: "A court of equity may, and frequently does, relieve the donee from embarrassing conditions which turn out harsh, impossible, and unconscionable."

In *Conrad v. Long, supra,* there was a devise to Frederick S. Conrad upon condition that the sister, Elizabeth Long, continued to live with her husband, Henry Long, as his wife. In case she ceased to live with her husband as his wife, then the will gave her one-half of the property devised. In an action of ejectment it was held that the condition in the will was contrary to public policy and void, and that Elizabeth Long took her share of the property clear of any conditions. In *Parker v. Parker, supra,* it was made a condition of the will that the devisee, Loring Parker, should exercise guardianship over the son of the testator, George Parker, who was an idiot. George Parker died two days before the death of the testator. He was unmarried and without issue. The testator left no widow. It was held that the devisee, Loring Parker, was relieved from the performance of the condition in the will, and that he held the land by an absolute title.

To say, "It is my will that the said Emma L. Watson shall have the right to take the following described land (describing it) for the sum of $50 per acre," she to be "allowed on the said purchase price of said land the sum of $12.50 per acre," is to use language described in the books as "precatory." It was not imperative. It was the mere expression of a wish, a preference. She would like to have it done, but did not make it a part of the devise. Where a testator wrote a codicil to his will which concluded, "I give my wife the option of adding this codicil to my will or not, as she may think proper or necessary," the court held that the option was not illegal; but, the wife having dissented, probate of the will was refused. 1 Schouler, Wills (5th ed.) sec. 293. It was said in a note to the section: "The least a court can do in such a case is to promptly decree probate of the will after the testator's death, without waiting for any later contingency to be determined, and leave its further operation to a court of construction." The testatrix did not attempt to make it imperative that Mrs. Watson take the land. In the instant case the taking effect of the codicil should be made to depend upon whether

the option to take the land by Mrs. Watson was (1) contained in a devising or granting clause, and therefore was a devise or grant, and (2) was exercised by her. It was not a devise or grant because not in such a clause; nor could it be known before the construction of the will that the heir named would elect to take the land. (3) A fair construction of the intent of the testatrix would require that the devisee named should purchase the land at its fair market value. In *Coffman v. Coffman,* 85 Va. 459, 17 Am. St. Rep. 69, 2 L. R. A. 848, it was held that, where a man made a will, so called, which purported to exclude a certain son from participating in his estate at his death, yet made no disposition of the property, there was no will, and the deceased had died intestate, and that the son was entitled to his share.

"The cardinal rule of testamentary construction, * * * is that the plain intent of the testator as evinced by the language of his will must prevail, if that intent may be carried into effect without violating some deeper principle of public policy or of statute prohibition." 1 Schouler, Wills (5th ed.) sec. 466.

"Every will should be interpreted, as far as possible, from the standpoint apparently occupied by the testator and attendant circumstances, such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration, as part of the *res gestæ,* where the language is not plain nor the meaning obvious." 1 Schouler, Wills (5th ed.) sec. 466. *Smith v. Bell,* 6 Pet. (U. S.) *68; *Blake v. Hawkins,* 8 Otto (U. S.) 315; *Brown v. Bartlett,* 58 N. H. 511; *Eidt v. Eidt,* 127 N. Y. Supp. 680 (will dictated to an unskilled scrivener just before testator underwent a serious surgical operation); *Cornet v. Cornet,* 248 Mo. 184; *Moore's Estate,* 241 Pa. St. 253; *Will of Ehlers,* 155 Wis. 46.

"The moulding or altering must be in furtherance of the purpose expressed or indicated in the context." 1 Schouler, Wills (5th ed.) sec. 477. *Acton v. Lloyd,* 37 N. J. Eq. 5; *Merrill v. Webster,* 187 Mass. 652.

Of course, this is saying that such changes may be made.

"If any word or expression has no intelligible meaning, or is absurd, or repugnant to the clear intent shown in the rest of the will, it may be rejected." 1 Schouler, Wills (5th ed.) sec. 478. *Bartlet v. King,* 12 Mass. 537; 1 Jarman, Wills (6th ed.) 480; *Needham v. Ide,* 5 Pick. (Mass.) 510; *Holmes v. Cradock,* 3 Ves. Jr. (Eng.) *317; *Davis v. Boggs,* 20 Ohio St. 550.

"Nor is a clear gift or devise in one part of the will to be cut down or out by indefinite, doubtful, or ambiguous expressions in another part, or upon any conjectures." 1 Schouler, Wills (5th ed.) sec. 478. 1 Jarman, Wills (6th ed.) 479; *Price v. Coles' Ex'r,* 83 Va. 343; *Meyer v. Cahen,* 111 N. Y. 270; *Hochstedler v. Hochstedler,* 108 Ind. 506; *Bruce v. Bissell,* 119 Ind. 525; *Robinson v. Finch,* 116 Mich. 180; *Pitts v. Campbell* 173 Ala. 604; *In re Randall's Will,* 137 N. Y. Supp. 319; *In re Boulevard,* 230 Pa. St. 491.

"Against the fundamental maxim that the intention of the testator shall prevail comes in conflict another primary one, namely, that the heir at law shall not be disinherited by conjecture, but only by express words or necessary implication. * * * Hence, in case of doubt a construction of the will, as to property, which conforms most clearly to the general statutes of descent and distribution should prevail." 1 Schouler, Wills (5th ed.) sec. 479. *Pendleton v. Larrabee,* 62 Conn. 393; *Geery v. Skelding,* 62 Conn. 499. The above language clearly suggests an even division of the property.

"Among one's legitimate and legitimized offspring, American policy favors the presumption that no one shall be favored above the rest, but all shall share equally in the parent's bounty, unless, of course, the will in question clearly shows a different intention." 1 Schouler, Wills (5th ed.) sec. 481. "So, too, a clause will be read so as to be consistent, if possible, with the testator's evident in-

tent and avoid uncertainty." 1 Schouler, Wills (5th ed.) sec. 488.

Because of all the reasons which we have given, it would seem that Mrs. Watson, the plaintiff, should not be allowed to recover. The will was executed in February, 1906. Mrs. Watson brought her action to quiet title in February, 1914. The testatrix died July 9, 1913. It is alleged that the will was admitted to probate on the 6th day of December, 1913. In the time that elapsed between the execution of the will and the decease of the testatrix conditions were much changed. The value of the land was at least three times as great as at the time of the execution of the will. It is not equitable to give this land to Mrs. Watson at the expense of the other heirs.

In Thompson, Wills, sec. 339, it is said: "Where a testator desires his devisee or legatee to benefit some third person out of the estate given, he frequently expresses his desire by words of entreaty, expectation, request, recommendation, hope, wish, desire, and the like, rather than by words of command. Such expressions in wills are termed 'precatory words.'" *Burnes v. Burnes,* 137 Fed. 781; *Kauffman v. Gries,* 141 Cal. 295; *Seymour v. Sanford,* 86 Conn. 516; *Bryan v. Milby,* 6 Del. Ch. 208, 13 L. R. A. 563; *Hartman v. Armstrong,* 59 Kan. 696; *Murphy v. Carlin,* 113 Mo. 112, 35 Am. St. Rep. 699; *Hunt v. Hunt,* 11 Nev. 442. While in the text trusts are referred to, the language used is "precatory," and means the same thing in its application to wills. In the same section of Thompson, Wills, it is said: "Where a clear discretion and choice to act, or not, is given, equity will not construe a trust from the language employed." *McDuffie v. Montgomery,* 128 Fed. 105; *Giles v. Anslow,* 128 Ill. 187; *Fullenwider v. Watson,* 113 Ind. 18; *Bills v. Bills,* 80 Ia. 269, 8 L. R. A. 696, 20 Am. St. Rep. 418; *Bowen v. Dean,* 110 Mass. 438; *Clay v. Wood,* 153 N. Y. 134. Of devises and bequests it is said in the same section: "Words of desire, request, recommendation, or confidence in a will, addressed by a testator to a legatee whom he has the power to command, create no

trust in favor of the parties recommended, unless (1) the intention of the testator to make the desire, request, recommendation, or confidence imperative upon the legatee, so that he shall have no option to comply or to refuse to comply with it, clearly appears from the whole will and the relation and circumstances of the testator when it was made, (2) unless the subject-matter of the wish or recommendation is certain, and (3) unless the beneficiaries are clearly designated. When these three conditions exist, a precatory trust may be raised." *Burnes v. Burnes,* 137 Fed. 781; *Colton v. Colton,* 127 U. S. 300; *Lines v. Darden,* 5 Fla. 51; *Hunter v. Stembridge,* 12 Ga. 192; *Peake v. Jamison,* 6 Mo. App. 590. In the same section it is said: "It is well settled that the words used must be essentially imperative in their character to create a trust." *Bristol v. Austin,* 40 Conn. 438; *Hayes v. Hayes,* 242 Mo. 155; *Sturgis v. Paine,* 146 Mass. 354.

In conclusion, I desire to say that, if the purpose of the testator is to be interpreted from what she said in the four separate paragraphs of the will containing devising and granting clauses, then the action of the plaintiff should fail. If the law of descent and distribution of property is to prevail in the construction of the will, then the plaintiff should not be allowed to recover. I know of no legal or equitable reason which permits the plaintiff to obtain a judgment quieting title to the premises.

PHILLIP H. GAMMEL V. STATE OF NEBRASKA.

FILED JULY 10, 1917. No. 20054.

1. **Criminal Law: INSTRUCTIONS: UNCHASTITY.** The defendant was convicted of committing rape upon the person of Hazel Gammel, alleged to be under the age of 15 years and not previously unchaste. The testimony with respect to her age was conflicting, that of the state tending to show that she was then about two months under the age of 15, while that of the defendant tended to show that she

was then between 16 and 17. There was also testimony on the part of defendant which renders it doubtful that she was chaste at the time when the alleged offense was charged to have been committed. *Held*, that it was error to refuse to give instruction numbered 6, requested by defendant, that is set out and discussed in the opinion.

2. ———: PRELIMINARY EXAMINATION: PLEA IN ABATEMENT. Where the transcript of the record in justice court shows that a person who is accused of felony has had or waived a preliminary examination, and it is contended that in fact no such examination ever took place, the absence of such examination should be raised by a plea in abatement.
3. **Rape**: CORROBORATIVE EVIDENCE. "The testimony of the prosecuting witness alone will not support a conviction of the crime of rape. Her testimony must be corroborated by other evidence." *Fitzgerald v. State*, 78 Neb. 1.
4. ———: ———. "The unsupported testimony of a prosecutrix that the crime with which a defendant is charged was repeated subsequent to the alleged commission of the principal offense is not corroborative of the testimony of the prosecutrix as to the commission of the offense charged." *Boling v. State*, 91 Neb. 599.

ERROR to the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Reversed.*

Joseph E. Daly, for plaintiff in error.

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

DEAN, J.

Phillip H. Gammel, aged about 65 years, was convicted in the district court for Dodge county of the crime of rape upon the person of Hazel Gammel, charged in the complaint as being under the age of 15 years and not previously unchaste. The trial proceeded to verdict and judgment of conviction, and, defendant being unable to procure a supersedeas bond, he was lodged in the penitentiary, there to serve a sentence of 12 years. He has brought the case here alleging that he did not have a fair and impartial trial, and that there are other errors in the record entitling him to a new trial.

Defendant's plea of "not guilty" was withdrawn, and he filed a motion to quash the information, for the alleged

reason that he neither had nor waived a preliminary examination. The motion alleged that the error complained of appeared on the face of the record, and that the case therefore came within the provisions of section 9084, Rev. St. 1913: "A motion to quash may be made in all cases, when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged."

The transcript of the proceedings before the justice of the peace on this feature of the case contains the following recital: "Now on this 13th day of October * * * said defendant was arraigned in open court and entered a plea of guilty to the first, second, third, fourth, fifth, and sixth counts of said complaint and to said complaint as a whole. It was therefore considered and adjudged by me that said defendant be held for trial to the district court of Dodge county, Nebraska, at the present term thereof."

This court has held that, where an accused person is brought before an examining magistrate and voluntarily pleads that he is guilty of the crime charged against him, he thereby waives his right to preliminary examination. *Latimer v. State*, 55 Neb. 609.

At the trial the justice testified, in substance, that when the complaint was read to defendant in his court he answered, "I plead guilty, but I am an innocent man," and that the county attorney then said to him: "That doesn't go. I have got to have from you, Mr. Gammel, a plea of guilty or not guilty; which is it?" To which defendant responded: "I plead guilty, but it is all wrong." The deputy sheriff testified on cross-examination that he understood from the defendant's statements that he protested that he was innocent, but that he would "plead guilty to end it all."

The chief of police of Fremont testified on cross-examination: "Q. Do you know the exact words Mr. Gammel used in the matter of his making response when asked to plead to this complaint? A. Yes, sir; I think so. While he pleaded guilty to the complaint * * * as a whole, he

intimated he was innocent, and he wanted to get done with it all and have it over. Q. I don't want the intimation or your understanding of what took place there, I want the exact words, Mr. Peterson. A. I think he said he was innocent, but he plead guilty. Q. And while he pleaded guilty he said he was innocent, did he not? A. Yes. Q. And he said that he pleaded guilty in order that it might be ended? A. Yes, that in substance."

The sheriff testified that when the complaint was read to the defendant he "inferred that he was not guilty." While he denies making any attempt to have the defendant plead guilty to the complaint, he testified on cross-examination: "Q. Well, Mr. Condit, that is a custom of your office, is it not, for you to try and get men that are charged with crime to plead guilty whether they are guilty or not? A. In some cases. Q. Isn't that the custom in all cases to get men to plead guilty when you catch them and they are charged with a crime? A. In some cases it is."

Elsewhere in the record it is shown that in a period of time that is not given, 36 out of 49 persons convicted of a felony in Dodge county pleaded guilty through the efforts of the sheriff.

From the foregoing it does not appear that defendant voluntarily pleaded guilty, and there is no pretense that he waived, nor that he was given, an examination. His answers to the questions propounded to him in the justice court cannot properly be held to be a waiver, nor can they be held to be a voluntary confession. Under the circumstances attending this case, we suggest, but not in the way of criticism, that it would perhaps have been better practice for the examining magistrate to have given to defendant the examination for which the law provides. The preliminary examination is a valuable right given by the law to the accused, and he cannot properly be deprived of that right except by his own voluntary act. It will not be contended by any person that, even though the accused stands charged with one of the most heinous offenses

known to the calendar of crime, he is not nevertheless entitled to a fair and impartial examination and trial.

In the justice court the county attorney, the sheriff, his deputy, and the chief of police were all properly present. The accused does not appear to be learned in the law, and it appears he was not represented by counsel. He seems there to have been confused, whether from fright, or from the enormity of the crime with which he was charged, or because of the alleged abrupt conduct of the officers in whose charge he was, or from some other cause which does not clearly appear. At all events, his plea in the justice court was not apparently the voluntary expression of a normal mind.

There are other substantial errors complained of for which the case must be reversed. In the present state of the record, we do not base the reversal on the ground of a lack or waiver of examination. Defendant should have raised his objections by a plea in abatement as the statute plainly provides.

There is substantial conflict in the testimony with respect to the age of the accusing witness, the state maintaining that, at the time of the commission of the alleged offense, she was about two months under 15 years, while there is testimony of two or more witnesses on the part of defendant that she was then between 16 and 17 years of age. The defendant testified that when he and his wife, who were itinerant evangelists, received her into their family from an orphanage, in December, 1901, that they were informed by the management of the institution that she was then a year and a half old.

There is also testimony in the record which renders it doubtful that the prosecuting witness was chaste at the time of the alleged commission of the offense. On this point defendant requested the following instruction, numbered 6 in the record, which was refused by the court: "The jury is instructed that, where the prosecutrix is over 15 years of age at the time of the alleged commission of the crime, in order to establish the defendant's guilt as

charged, it is necessary for the state of Nebraska to prove beyond a reasonable doubt that the prosecutrix was not previously unchaste."

In view of the conflicting testimony with respect to the age of the prosecuting witness and with respect to previous chastity, the jury should have been instructed upon the points embodied in the requested instruction. If she was over the age of 15 at the time of the alleged crime with which defendant is charged, the burden was on the state to prove beyond a reasonable doubt that the prosecutrix was previously chaste. *Burk v. State,* 79 Neb. 241. The prosecuting witness was interrogated on this point in her direct examination: "Q. Hazel, did you ever have sexual intercourse with a boy or man prior to the time you had this sexual intercourse here? A. No, sir; not here in Fremont. Q. So you will understand me, Hazel, before he had sexual intercourse with you, had you ever had sexual intercourse with any man or boy? A. No, sir; not here in Fremont." She also testified that defendant had no improper relations with her until May, 1916. From the record it appears that several women, who resided in the community where she lived, took a friendly interest in her welfare, and that to all of them she said that no man had ever sought to have improper relations with her. But to a man named Murphy, whom the record shows to have been a furnace tender and chore man about a hotel at Fremont, and who had at one time given to Hazel a bracelet, she confided her story of alleged abuses by defendant. The record shows that for two or three weeks after the death of defendant's wife in May, 1916, he was away from home, and that during this period he left Hazel in the home of a resident of Fremont. She testified that she went to the Gammel home from where she was staying twice each day, accompanied by the lady with whom she was staying, or by her daughter, and that "Mr. Murphy was there several times, and I went there when there was no one there." The prosecutrix, on cross-examination, was asked if she and Murphy were at the Gammel house in the

absence of defendant. To this question an objection of the state was sustained. In view of the surrounding circumstances, the witness should have been permitted to answer. This man Murphy was subpœnaed to appear as a witness, but the sheriff testified that he could not be found. It seems to us almost incredible that a chaste and truthful girl would have first sought out Mr. Murphy for a confidant, rather than some of the many good women who befriended her. A review of the record discloses that the verdict does not seem to be supported by the testimony of any witness except that of the prosecutrix. In this state this is held to be insufficient. *Fitzgerald v. State,* 78 Neb. 1.

Many other errors are complained of, but it is impractical to discuss all of them in the space that should be allotted to this opinion. The errors pointed out were prejudicial to the defendant, and he must therefore have a new trial.

The judgment of the district court is reversed and the cause remanded for further proceedings in conformity with law.

REVERSED.

ROSE, J., dissents.

HAMER, J., not sitting.

The following opinion on motion for rehearing was filed December 1, 1917. *Rehearing denied.*

1. **Criminal Law:** INSTRUCTIONS: REASONABLE DOUBT. In a criminal trial it is prejudicially erroneous to instruct the jury that, if "from a careful consideration of all the evidence and facts and circumstances in proof in the case, or the want of evidence," they "can say that they having an abiding conviction of the truth of the charge made in the information, then they are satisfied beyond a reasonable doubt."
2. **Rape:** CORROBORATIVE EVIDENCE. The facts and circumstances necessary to corroborate the testimony of the prosecuting witness must be proved by other witnesses. The testimony of a prosecuting wit-

ness as to other matters in a criminal trial cannot be held to be corroborative of such witness' own testimony as to the principal fact. *Fitzgerald v. State*, 78 Neb. 1.

DEAN, J.

Upon motion for rehearing and re-examination of the record, we find that the court of its own motion instructed the jury that, if they found from the testimony that the prosecutrix was over 15 years of age when the alleged crime was committed, it would be their duty to acquit defendant. It was therefore not error for the court to refuse to give defendant's instruction No. 6 that is referred to in our former opinion, and the first paragraph of the syllabus is therefore withdrawn as being inapplicable to the facts.

There are other instructions given by the court of its own motion that appear to us erroneous. These doubtless should have been discussed in our former opinion. Instruction No. 11, as given by the court, follows: "The court instructs the jury that 'a reasonable doubt,' as used in these instructions, is such a doubt, in the mind of a thoughtful man, as causes him to stop and hesitate and say, 'I am not satisfied,' when acting with reference to the graver and more important affairs of life. It is not a mere possibility of the innocence of the defendant; but if the jury, from a careful consideration of all the evidence and facts and circumstances in proof in the case or the want of evidence, can say that they have an abiding conviction of the truth of the charge made in the information, then they are satisfied beyond a reasonable doubt and should find the defendant guilty."

In this instruction the jury are informed, among other things and in effect that, if for "the want of evidence" they "can say that they have an abiding conviction of the truth of the charge made in the information, then they are satisfied beyond a reasonable doubt and should find the defendant guilty." It is obvious that the defendant could not be properly convicted for "the want of evidence" that the state failed to produce or that the de-

fendant failed to produce. This instruction, as given by the court, in effect places the burden of proof upon the defendant to establish that he is innocent of the crime with which he is charged, and is therefore erroneous.

In another instruction the court informed the jury that the evidence of the prosecuting witness must be corroborated as to "the principal fact of sexual intercourse," and added: "But the testimony of the complainant as to the commission of the crime by the defendant may be corroborated by evidence of facts and circumstances showing a disposition on his part to commit the crime, and an opportunity to do so." The prosecuting witness testified to various acts of intercourse with the defendant both before and after the act specified in the count of the information upon which the defendant was tried. The defendant requested an instruction that the testimony of the prosecutrix as to the commission of acts of intercourse subsequent to the time when the principal offense was alleged to have been committed would not be corroborative of the testimony of the prosecutrix as to the commission of the offense charged. This request the court refused. It seems clear that in connection with the above instruction given by the court there should have been given one of the nature of the requested instruction. If the jury regarded her testimony of other illicit acts as tending to prove "a disposition on his part to commit the crime" charged, they might erroneously find her testimony as to the principal fact corroborated by these other circumstances testified to by her. The jury should have been instructed that the testimony of the prosecutrix alone should not be considered as corroborative testimony. *Fitzgerald v. State,* 78 Neb.. 1.

For the errors pointed out herein, the application for rehearing must be

DENIED.

ROSE, J., dissenting.

Defendant was convicted of committing a rape upon a female child. I am convinced that the jury based their

verdict alone on proper and sufficient evidence of guilt, and that the instruction technically condemned by the majority did not mislead them or affect their deliberations to the prejudice of defendant.

There is no law in Nebraska requiring corroboration of a prosecutrix to sustain a conviction for rape. The supreme court never had any power to make such a law. Laws binding upon the supreme court in dealing with felonies and the rules of evidence in establishing them may come from three sources of power: (1) Constitutional provisions adopted by the people. (2) Direct enactments of the legislature. (3) The common law of England adopted by legislative enactment. The doctrine invoked by the majority to set aside the conviction of a man accused of committing a rape upon a female child did not come from any legitimate source of power. It is not in the Constitution. It is not in the statutes of Nebraska. It is not in the common law. Obviously its first announcement by this court was an error. Blind adherence thereto should be terminated by a correction of the error. In speaking of the rule followed by the majority, the supreme court of Oklahoma said:

"It is true that there are some decisions based upon special statutes which hold that corroboration of the prosecutrix is necessary, but, in the absence of such a statute in this state, we could not agree to establish a rule so repugnant to justice, constituting such a shame upon our civilization; so insulting to decency and so pregnant with danger to weakness and virtue." *Reeves v. Territory,* 2 Okla. Cr. Rep. 351, 360.

In *Brenton v. Territory,* 15 Okla. 6, 11, the same court said:

"The rule of requiring the prosecutrix to be corroborated in rape cases is followed, it is believed, in but one state and one territory, except where adopted by statute, viz., Nebraska and New Mexico. With criminal procedure acts like ours, the states of California, Florida, North Dakota, and Montana have held that such corroboration is not required, and the same is held by the courts of

highest resort in Alabama, Arkansas, Arizona, Georgia, Illinois, Kentucky, Michigan, Minnesota, Missouri, Mississippi, Oregon, Pennsylvania, Texas, Utah, Virginia and Wyoming."

If the reward of acquittal is to be forced on a villain who can hide from his victim all evidence that he committed a rape, except her own testimony, it should emanate from the legislature, and not from the court.

In the present case, however, the corroboration is ample.

EMALINE C. PARSON, APPELLANT, V. JOSEPH F. MURPHY ET AL., APPELLEES.

FILED JULY 10, 1917. No. 20055.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: DEPENDENT. In the meaning of the employers' liability act (Rev. St. 1913, secs. 3642-3696), dependency is not based solely upon a present legal obligation to support.
2. ———: ———: ———. Evidence examined, discussed in the opinion, and *held* that plaintiff is a dependent within the meaning of the act.
3. ———: ———: ———. Under the employers' liability act, the question of dependency is not determined by the fact that a decedent had or had not actually contributed to the support of a parent before the date of the accident.

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

Henry J. Beal, for appellant.

Mahoney & Kennedy and *Guy C. Kiddoo, contra.*

DEAN, J.

On January 29, 1917, Emaline C. Parson, plaintiff and appellant, began this action in the district court for Douglas county against defendants, in pursuance of the provisions of the workmen's compensation act, alleging generally that on March 23, 1916, her son Nels Parson, now deceased, while in the employ of Edward Carr, one of the

defendants, was kicked by a vicious mule that he was driving, and that was owned by Mr. Carr, and that as a result of the injuries so received her son died two days thereafter. Plaintiff alleged that her son was her only support, and that she is the only surviving relative who sustained to Nels Parson the relation of dependent. She prays for judgment for the amount of one-half of her son's wages for 350 weeks, together with $100 expenses and $90 hospital and physician's expenses, and for costs.

For answer defendants admit the employment of plaintiff's son, but allege it was only casual, and that the dependents of Nels Parson, if any, are therefore not entitled to the benefits of the workmen's compensation law, deny that Nels Parson's death was caused by or contributed to by any personal injury by accident arising in the course of his employment by the defendants, and that his death was due to other causes separate from any injury sustained while in defendants' employ, and that the injuries were due to wilful negligence and to intoxication, and that plaintiff's son never contributed to her support so as to entitle her to claim benefits as a dependent under the workmen's compensation act.

The trial court found generally in favor of defendants, and rendered a judgment against plaintiff for costs. Mrs. Parson has brought the case here for review.

The employers' liability act, in section 3665, Rev. St. 1913, among other things, provides: "Dependents. The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee. (a) A wife upon a husband with whom she is living at the time of his death; (b) husband upon a wife with whom he is living at the time of her death; (c) child or children under the age of sixteen years (or over said age, if physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of death of such parent, there being no surviving parent. * * * (e) In all other cases, questions of dependency, in whole or in part, shall be determined in accord-

ance with the fact, as the fact may be at the time of the injury. * * * (f) No person shall be considered a dependent, unless he or she be a member of the family of the deceased employee, or bears to him the relation of widow or widower, or lineal descendant, or ancestor, or brother, or sister. (g) Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee, and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto, or their legal guardians or trustees."

Defendants insist that the injury sustained by Nels Parson was due to his wilful negligence and to intoxication. The act expressly provides that the burden of proof to establish wilful negligence on the part of an injured employee is on the defendant. In the present case defendants introduced no testimony, and there is no proof of such negligence before us. Some testimony was brought out on cross-examination showing that plaintiff's son was intoxicated to some extent when he was injured, but it is nowhere shown that his intoxication in any way contributed to his injury, and without proof we will not assume that it did.

Mrs. Parson is a widow about 77 years of age, and unable to work on account of illness and extreme old age. For her sole support she has $300 or $400 deposited in a bank, which draws 4 per cent. interest. When this sum is expended she will be reduced to penury and will become a public charge. Her son was a single man when injured, about 40 years of age, without any other person dependent upon him. She testified that in November, 1915, about five months before the injury, she received a letter from him in which he promised to come and live with her and to support her, but that soon thereafter he became ill and could not do so.

Defendants argue in their brief: "The question of the right of the plaintiff to compensation must be determined by whether or not the deceased was actually contributing to her support. If he was not, she incurred no pecuniary

loss by reason of his death, and consequently is entitled to no compensation. * * * The plaintiff has not lost one iota of the support upon which she was dependent prior to Nels Parson's death." Elsewhere in their brief defendants concede that, "if in the case at bar Mrs. Parson had been living with her deceased son, and had been supported by him, there would be no question as to her right to compensation."

Defendants' argument on this point cannot be sustained. We believe the statute is susceptible of an interpretation that more nearly accords with the main purpose of its enactment. The act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. Among its objects are these: That the cost of the injury may be charged to the industry in which it occurs; the prevention of tedious and costly litigation; a speedy settlement between employer and employee; and to prevent dependent persons from becoming a public burden. To adopt defendants argument would require us to announce a rule that is not warranted by the act, nor by common experience. It is not shown that the widow's son made any contributions to her support. But in any event this feature is not important, in view of our holding that the question of contribution, as it is contended for by defendants, is not controlling. To illustrate: For its daily bread a family is ordinarily dependent upon the daily labor of the head of the household. The bread winner, a day laborer with little means is stricken. There remain surviving a widow, who by reason of age is unable to support herself, and a wage-earning son who is without dependents, and who has not recently lived with his parents, nor has he ever contributed to the support of either. In such case would it be seriously contended that the mother was not a dependent of her son in the ordinary and everyday meaning of the word, even though when her husband died she may have been provided with a small store of food and raiment to supply her every present need, sufficient for a few weeks or months at most?

Will it be argued that a supply of food that would sustain life for a day or a week would take plaintiff out of the dependent class? We cannot hold that the legislature contemplated a construction at once so literal, so restricted, and so unreasonable.

That plaintiff's son was capable of earning the wages usual to his employment affirmatively appears, and is not challenged in the record. But for the accident he would now, in human probability, be a wage-earner, and thus be in position to support plaintiff in pursuance of his promise. It is always presumed, until overcome by proof, that a man will do his duty. It cannot be known, and it will not be presumed, that Nels Parson, if living, would be unmindful of his filial duty, with or without promise, to support his aged and dependent parent. The question of legal liability to support does not of itself determine the question at issue, nor in the present case will the fact that Nels Parson was only occasionally employed by defendants defeat plaintiff's action, as argued by them.

The statute nowhere undertakes to define dependency. Its language is that "dependency shall be determined as of the date of the accident to the employee." If, then, plaintiff was not a dependent of her son Nels, upon whom was she dependent? Surely, in view of the facts, she could look to him for support. So far as the record and plaintiff's argument shows, her son fulfilled every statutory requirement, unless such requirment makes it imperative that at "the date of the accident" he should have been living with and at the time actually supporting his mother. This we think is too technical, and we cannot adopt defendants' reasoning on this point. Dependency under the statute may perhaps be held to mean for such food, clothing and shelter as may be necessary for the living of a person in his class and station, as distinguished from provision for the bare wants of existence. It is substantially the same principle that is involved in determining in a proper case what would be necessaries for a minor. In view of the record and of the law, we decline to hold that because a por-

tion of plaintiff's meager store remains unused, and because she neither lived with nor was supported by her son, she was not therefore his dependent at the time of the injury.

Defendants cite *Pinel v. Rapid Railway System,* 184 Mich. 169, but it does not seem to be applicable to the case at bar, for the reason, among others, that the claimant had a life lease on a farm of 87 acres in Macomb county and another son resided with her.

Crockett v. International R. Co., 162 N. Y. Supp. 357, is a case where the employee married within six days after sustaining the injury from which he subsequently died. Suit was commenced by his widow, and it was held that she was his dependent at the date of the accident, notwithstanding the statute provided that "all questions of dependency shall be determined as of the time of the accident." In that case the rule was relaxed, and the decision based on the ground that plaintiff was the "surviving wife," and as such was entitled to compensation under the statute because at the time of her husband's death she came within a class that the statute conclusively fixed as dependent.

Sweet v. Sherwood Ice Co., 100 Atl. (R. I.) 316, reviews some of the cases on the question of dependency, and says: "They do not baldly hold that the legal obligation determines the question of dependency, but that such legal obligation must be coupled with a reasonable probability that such obligation will be fulfilled." See *Purdy v. Watts,* 99 Atl. (Conn.) 496; 1 Bradbury, Workmen's Compensation (2d ed.) 575 *et seq*; 6 B. W. C. C. 348; 1 B. W. C. C. 85.

The word "dependent" should not be given its narrowest nor its most literal meaning, when considered in connection with the act in question, its aims and objects. 6 Bradbury, Workmen's Compensation, 571, gives this definition: "The expression 'dependent' means dependent for the ordinary necessaries of life for a person of that class and position in life, taking into account the financial and social position of the recipient."

In *Powers v. Hotel Bond Co.*, 89 Conn. 143, in which is involved a like act, it is aptly said: "The act, by eliminating the proof of negligence, by minimizing the delay in the award and by making it reasonably certain, seeks to avoid the great waste of the tort action, and to promote better feeling between workmen and employer, and accepts, as an inevitable condition of industry, the happening of accident, and charges its cost to the industry."

Kennerson v. Thames Towboat Co., 89 Conn. 367, L. R. A. 1916A, 436: "George Marsdale left surviving him two brothers, a sister, and a mother, claimant herein. He had, during the illness of his father, sent his mother from July until his father's death, November 10, 1913, $10 a week of his weekly wages of $15. After her husband's death the mother went to live with her son Charles temporarily, and on December 9, 1913, the decedent engaged in said employment with the respondent for $30 a month and his board, worth 50 cents a day. Out of his earnings the decedent gave his mother from $20 to $25 a month, which sums were to pay the funeral expenses of her husband. These were just paid prior to George's death. The mother and decedent had arranged that, as soon as the funeral expenses were paid, her residence with her son Charles should cease, and they should then live together and the decedent should support his mother. Except as stated, none of the children contributed to the support of their mother." In that case it was held: "That Mrs. Marsdale, the mother of George Marsdale, was a total dependent of her son George." It will be noted that George Marsdale did not contribute anything toward the support of his mother after his father's death, but that the money that he sent to her after that event was all devoted to the payment of the funeral expenses attendant upon the death of his parent, an item that was perhaps not chargeable to his mother in any event, though the record is silent on this point.

1 B. W. C. C. 332, cites *Medler v. Medler*, which holds: "A wife who had been turned out of her home by her husband and had not been living with or supported by him for

11 years before his death, but who had made endeavors to obtain support, was held to be in part dependent upon her husband's earnings at the time of his death within the meaning of schedule I (1) (*a*) (ii) of the Act of 1906."

Speaking generally, it may be borne in mind that a dependent who avails himself of the act is deprived of having a jury pass upon any of the questions that pertain to the injury or the cause of death of the person upon whom he may be dependent for support, and for this reason, among others, the statute, which is remedial in its nature, should be liberally construed. If our statute means that, unless the son is actually contributing to the support of his mother at the time of the accident, she is not a dependent within its meaning, and if this doctrine is established as a general rule, it would lead to strange conclusions. If such construction is proper, it is a very unfortunate statute, because, prior to its enactment, the mother could plainly recover damages for the death of a son who sustained to her the same relation as a dependent that Nels Parson sustained to plaintiff. That we have decided many times, and to now hold otherwise is to hold that the statute has done away with the plainest dictate of humanity. Under the law the mother could compel her son to contribute to her support, and yet because he does not do so, and because she can live a month or so without his doing so, we construe the statute to mean that he need not support her, and that it was no advantage to her to have him in a position to do so. Under such circumstances, the facts existed at the time of the accident which would make her dependent upon her son, although he failed to perform his duty and failed to contribute anything toward her support. One may be at the present time dependent upon his growing crop of wheat for his daily bread, and yet a drouth may destroy the crop and deprive him entirely of that support. Can it be said that at the time that the wheat was in the process of maturing he was not dependent upon that crop? And so one may give any number of illustrations, all showing that the fact exists at the present time that we

depend upon something for our support, although that particular thing may not be actually supporting us at the present time.

Boyd v. Pratt, 72 Wash. 306, construes a statute containing this language: "If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive $20 a month for each month after his death until the time at which he would have arrived at the age of twenty-one years." Laws Wash. 1911, ch. 74, sec. 5, subd. 3. It was there held that a parent, who is also a dependent, is entitled to the monthly payment during the continuance of dependency, and not merely to the time of majority.

Pittsburgh, C., C. & St. L. R. Co. v. Collard's Adm'r, 170 Ky. 239, is a recent case which construes the federal employers' liability act of April 22, 1908 (35 U. S. St. at Large, ch. 149, p. 65). It is there held: "It is not necessary to prove that a decedent has made actual contributions to the support of his parents in order to establish a reasonable expectancy of pecuniary benefit from the continuance of his life." The same case holds that declarations made by decedent that he intended to support his father were sufficient to sustain a verdict in behalf of the father. To the same effect is the following: *Tobin v. Bruce,* 162 N. W. (S. Dak.) 933. See, also, *Garrett v. Louisville & N. R. Co.,* 197 Fed. 715; *Michigan C. R. Co. v. Vreeland,* 227 U. S. 59.

The employers' liability act is new to our state. The questions involved in its construction are not without difficulty. Adjudicated cases are not numerous, and there is some conflict among them, due in part to slight differences in the wording of the statutes of the different states. On the points in dispute we have adopted the rule that appears to us to harmonize with the true intent of the legislature.

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

REVERSED.

JOHN J. BOUCHER, APPELLEE, v. CASUALTY COMPANY OF AMERICA, APPELLANT.

JOHN J. BOUCHER, APPELLANT, v. CASUALTY COMPANY OF AMERICA, APPELLEE.

FILED JULY 14, 1917. Nos. 19529, 19660.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *No. 19529 reversed, and No. 19660 affirmed.*

McLaughlin & Neely, for plaintiff.

James C. Kinsler, contra.

PER CURIAM:

In the trial of these cases the judgment in No. 19176, *Shick v. Johnson,* was relied upon as the foundation of both actions. That judgment having been reversed by this court (*Shick v. Johnson, ante,* p. 328), the judgment in *Boucher v. Casualty Company of America,* No. 19529, is reversed and the cause remanded, and the judgment in *Boucher v. Casualty Company of America,* No. 19660, is affirmed.

JUDGMENTS ACCORDINGLY.

STATE OF NEBRASKA, APPELLANT, V. LOUIS KELLER, APPELLEE.

FILED JULY 14, 1917. No. 19469.

Courts: JURISDICTION: HEIRSHIP. The county court has jurisdiction, in the final settlement of the estate of deceased persons, to determine the persons who are the heirs of the deceased, and its judgment in this respect, if the jurisdictional prerequisites have been complied with, is final and conclusive. *Fischer v. Sklenar*, p. 553, *post*.

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

Willis E. Reed, Attorney General, and *W. T. Thompson,* for appellant.

J. E. Willits and *J. W. James, contra.*

LETTON, J.

This was an action brought by the state of Nebraska to quiet the title to 80 acres of land in Adams county, the title to which the petition alleges became vested in the state of Nebraska by escheat, upon the death of Henry Keller, the owner of the same, without widow or heirs. The petition also alleged that a claim of title made to the same by the defendant Louis Keller was unfounded and invalid, and cast a cloud upon the plaintiff's title, which it prayed to have removed. Louis Keller answered that Henry Keller died seised of the real estate and without widow and heirs, except himself, who was the brother and sole and only heir at law. He further pleaded an adjudication on appeal from the county court of Adams county in administration proceedings, in which he had been adjudged to be the only brother and sole heir at law of Henry Keller, deceased. The district court found generally for the defendant and dismissed plaintiff's petition. Plaintiff appeals.

The state introduced evidence to show that, so far as any one in the locality where Keller had lived for about 15

years knew, he had no living relative. After the state rested, defendant proved that Keller had spoken to some of his neighbors of a brother in New York City, and an aunt. The only other material evidence for defendant is a transcript of certain proceedings in the county court, and on appeal to the district court, on a petition of Louis Keller in the administration proceedings to be decreed the sole heir of Henry Keller.

The question is whether this decree is *res judicata* that Louis Keller is the sole and only heir of Henry Keller, deceased. The state insists that it was error for the trial court to admit the record, for the reason that the county court had no jurisdiction to determine the title to real estate. The defendant insists that the decree establishes the status of the heirs to the estate of the deceased, and unless avoided in some mode prescribed by law it binds and concludes the whole world. The question was exhaustively argued in the case of *Fischer v. Sklenar*, p. 553, *post*. After protracted deliberation and consideration, it was held in that case that the county court in the settlement of the estates of deceased persons has jurisdiction to find and determine who are the heirs of the deceased. The contention of the state must therefore fail in this respect.

It must be said also that in our opinion the state failed to produce sufficient evidence to make a *prima facie* case, since there was no proof of inquiries having been made as to the relatives of Keller at the place where he had formerly resided.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

JOHN M. FISCHER, APPELLEE, V. VYT SKLENAR ET AL., APPELLANTS; WALLACE P. DIXON ET AL., APPELLEES.

FILED JULY 14, 1917. No. 19999.

1. **Descent and Distribution:** ADJUDICATION OF HEIRSHIP. A finding in a decree for final distribution of the estate of a deceased per-

son that a certain person is the sole heir of the deceased, and an order assigning the estate of the deceased to the person so found to be the heir, complies with the provisions of sections 1494, 1495, Rev. St. 1913, and is a sufficient adjudication of heirship.

2. **Judgment: COLLATERAL ATTACK: PROBATE COURT.** Upon its probate side a county court is a court of general jurisdiction, and its judgment upon matters of probate and of settlement and distribution of the estates of deceased persons made upon due and proper notice is final and cannot be collaterally attacked.

3. **Courts: JURISDICTION: HEIRSHIP: TITLE TO REALTY.** The probate court in the settlement of an estate has jurisdiction to find and determine who are the heirs of the decedent. In so doing the court does not determine the title to real estate. The statute of descent passes the title upon the fact so found. The final determination of such fact by the probate court is binding upon all parties interested in the estate, unless it is set aside upon appeal.

4. **Aliens: LANDS: TIME FOR DISPOSITION: QUESTION FOR COURT.** Under art. II of the treaty of 1848 with Austria-Hungary (9 U. S. St. at Large, p. 945) alien heirs are allowed a term of two years in which to sell lands which they acquire, "which term may be reasonably prolonged, according to circumstances." The question as to the reasonableness of the prolongation is a matter for the courts to determine. *Pierson v. Lawler*, 100 Neb. 783.

5. **Treaties: CONSTRUCTION.** Treaties should be construed liberally in order that justice may be done to citizens or subjects of the contracting parties.

6. **Aliens: DISPOSITION OF LAND: EXTENSION OF TIME.** Where the circumstances make it reasonable that such aliens should have further time than the two years prescribed in which to sell their interest in the real estate, such further time as may be reasonable under all the circumstances of the case should be allowed.

7. ———: ———: ———. Under the circumstances set forth in the opinion, a period of between eight and nine months after the expiration of two years from the death of the person from whom the estate passed is held to be a reasonable prolongation.

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

Frank L. McCoy and *E. H. Westerfield,* for appellants.

E. C. Page, B. E. Hendricks, B. C. Enyart and *F. S. Howell, contra.*

Fawcett & Mockett and *H. M. Uttley, amici curiæ.*

LETTON, J.

Action to quiet the title to certain lands in Burt county. Both parties claim title by inheritance from Augustine Sklenar, deceased, who died intestate in that county on the 27th day of December, 1909.

The plaintiff claims by mesne conveyances from Marie Anna Hamernik, a resident and citizen of Bohemia. The facts upon which plaintiff bases his claim of title are as follows: In the settlement of the estate of Augustine Sklenar, deceased, in the county court of Burt county, upon the application of the administrator for final settlement of the estate, a petition was filed in behalf of Mrs. Hamernik alleging that deceased died unmarried and without father or mother, that she was the illegitimate child of the deceased, that he had acknowledged himself in writing to be her father, and that she was his only child and sole heir, and praying that she be so adjudged and declared. She was so found and adjudged by the county court on August 27, 1912, and the real estate was duly assigned to her by said court.

The defendants are brothers and sisters of Augustine Sklenar, deceased, and parties claiming title under them. They admit that the deceased died intestate and unmarried, but deny that he had any children or issue either illegitimate or legitimate, and deny that he ever acknowledged himself to be the father of Mrs. Hamernik. They admit the administration proceedings, upon due notice, and the entry of the decree finding Mrs. Hamernik to be the sole heir and assigning the real estate to her, but deny that the same was made with jurisdiction or power in the court to enter such decree. They also allege that the deeds and conveyances from Mrs. Hamernik to the grantees therein under whom the plaintiff claims title are null and void as to these defendants and their grantees because they are in violation of the common law, of the Nebraska nonresident alien land statute, sections 6273, 6276, Rev. St. 1913, of the treaty of 1848 between the United States and Austria, of the Fourteenth Amendment to the Constitution of the

United States and the Constitution of the state of Nebraska; as an attempt to take the property of the defendants without due process of law; and as contrary to the meaning of the treaty of 1848. The remaining pleadings amount in substance to general denials of the material facts pleaded in the answer. A motion for judgment upon the pleadings was made by plaintiff and the other parties interested in like relief. In substance the court found that the county court of Burt county had full jurisdiction to make the findings, orders, and decrees of August 27, 1912, and that the same were and are binding and conclusive; that Marie Anna Hamernik is the sole heir of Augustine Sklenar, deceased, and it quieted the title in the plaintiff. Defendants appeal.

Three points are presented for review: (1) Was the decree of the county court a final and competent adjudication of heirship in Mrs. Hamernik? (2) Was this made with jurisdiction of the subject-matter and of the parties, and was it conclusive and *res judicata* as against the defendants and all persons claiming through or under them? (3) Granting that said finding was a conclusive adjudication that Marie Anna Hamernik was the daughter and sole heir of the deceased, did the failure on her part to sell and dispose of the real estate within two years from the death of the intestate under the terms of the treaty deprive her of any interest which she may have had in the land and operate to carry the title to the brothers and sisters of the intestate?

1. The appellants insist that no formal and valid decree of heirship and distribution of the land to Mrs. Hamernik was ever made; that it contains no language constituting a judgment, and hence is no adjudication. After making the customary recitals, the decree recites that the administrator *de bonis non* of the estate and the attorney in fact for Mrs. Hamernik appeared in person, and that each was sworn as a witness and testified in the matter. After finding that due notice of the hearing had been given, and the finding of facts as to the death of Sklenar,

his ownership and possession of the real estate, that due notice had been given of the time limited for the filing of claims against the estate, that an order had been made barring claims, that all claims allowed have been paid, and that more than two years have elapsed since administration was begun, the decree proceeds: "The court further finds that Augustine Sklenar, deceased, left no widow surviving him; that he left surviving him as his sole and only heir at law Marie Anna Hamernik, of Trebon, Bohemia, Europe, and that said Marie Anna Hamernik is now of full legal age." A number of other findings were made. The court then allows and confirms the reports of the administrator and orders the balance in his hands paid to the attorney of Mrs. Hamernik. The decree then proceeds: "It is further adjudged and decreed by the court that the real estate belonging to said estate, as hereinabove described and fully set out, be, and the same hereby is, assigned to Marie Anna Hamernik, of Trebon, Bohemia, Europe." The land had been fully described in a foregoing part of the decree.

The statute, sections 1494, 1495, Rev. St. 1913, provides: "1494. After the payment of the debts, * * * the county court shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are by law entitled to the same." "1495. In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled." The decree found that Mrs. Hamernik was "the sole and only heir at law" of the deceased, and it assigned the real estate, which was described in the decree, to her by name. It may be conceded that it would have been better for the court to have made a more specific and formal entry adjudging that Marie Anna Hamernik was the child of Augustine Sklenar, was duly acknowledged to be such by him, and is his sole heir. Proceedings to administer estates of deceased persons in probate courts are statutory. When the record shows that the statutory findings and orders have been made, it is sufficient, even though not in the ordinary form. A

finding that a person is the sole heir of another, and a judgment and order assigning the estate of the deceased to the person so found, naming the person and the proportion to which he is entitled, and assigning the estate to the person who is by law entitled to the same, complies with the statute. The authorties cited by the appellant applying to ordinary courts, justices of the peace, and courts of record, are not applicable. In *Boales v. Ferguson,* 55 Neb. 565, cited by appellant, the heirs were not named, nor the amounts due them, respectively, determined, and the administrator having assumed the responsibility of distributing the estate before this was done was held to answer to those who had suffered by his error.

2. It is conceded by defendants that as a general rule probate courts in the exercise of their original jurisdiction in the settlement of estates are vested with power and jurisdiction, at the time a final decree of distribution is made, to ascertain and determine the persons who constitute the heirs at law of the deceased, and that if such adjudication is made upon proper notice as required by the statutes of the several states, either personal or constructive, it is final and conclusive against all parties interested, whether present or absent, whether having received actual notice, or not, and against the whole world. But defendants maintain that this general rule is not applicable in the state of Nebraska. It is their contention that, in view of the history of the constitutional and statutory provisions concerning the jurisdiction of the probate and county courts of Nebraska in territorial times, and since the territory became a state, the makers of the Constitutions of 1866 and 1875 intended to and did take away all jurisdiction of the probate and county court with reference to real estate, and that no act, judgment or decree of such courts can in any manner affect the title to lands. They concede that a judgment of heirship is valid and effectual as to the personal property of the deceased and is sufficient to authorize the administrator or executor to distribute the property in accordance with the decree.

Their argument, much abridged, is about as follows: That in the organizing act of 1854 (1 Complete Session Laws, p. 4) section 9, creating the territory of Nebraska, it was provided: "That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. * * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be as limited by law: Provided, that justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute." That in the Constitution of 1866, art. IV, sec. 4, it was provided: "The jurisdiction of the several courts herein provided for both appellate and original shall be as fixed by law: Provided, that probate courts, justices of the peace, or any inferior court, that may be established by the legislature shall not have jurisdiction in any matter wherein the title or boundaries of land may be in dispute. Nor shall either of the courts mentioned in this proviso have the power to order or decree the sale or partition of real estate." The Constitution of 1875, article VI, sec. 16, provided: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts; in all matters relating to apprentices; and such other jurisdiction as may be given by general law. But they shall not have jurisdiction * * * in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate."

Under the statutes of 1855, 1856, and 1866, the probate courts were given power to decree sales of real estate to pay debts, and to make partitions of real estate. In 1867, however (General Laws 1867, p. 123), the decedent law was amended by substituting the word "district" for "probate" in a number of sections, so that the power to sell or partition real estate was thereby taken from the probate

court and vested in the district court. In *Stewart v. Daggy,* 13 Neb. 290, it is said: "The gross abuse of the power in some of the counties led to the insertion of a provision in the Constitution of 1867 depriving the probate courts of the authority to grant license, and conferred the same on the district courts. * * * The sole object of the change, so far as we can determine, was to place the matter in the hands of judges who would be free from local influence, and also, from their greater knowledge of the law, would be presumed to exercise greater care and circumspection in authorizing a sale."

The statutory provisions involved under which the county court acted are sections 1494, 1495, Rev. St. 1913, hereinbefore in part set forth.

Defendants insist that on account of the prohibitions in the Constitution the county court obtained jurisdiction only of the personalty of the estate by administration proceedings; that a finding as to heirship made in such proceedings can only have the force to protect the administrator in the distribution of the personal estate, and therefore the decree of the court is of no force, validity or effect as evidence of heirship in a controversy over the title to land. It is said that to hold otherwise would require an adjudication of heirship by a county court as a prerequisite to the passing of the title to real estate of deceased persons, and would imply that no title passing through an intestate is good which does not show upon the records or upon the abstract such a decree of heirship. This conclusion does not follow. We have held that heirship may be proved in many ways. *Jetter v. Lyon,* 70 Neb. 429. The heir may maintain ejectment while probate proceedings are pending, unless the administrator takes possession under the statute. *Lewon v. Heath,* 53 Neb. 707; 2 Woerner, American Law of Administration (2d ed.) sec. 337. We have held that the proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem.* Every one interested is a party in the probate court, whether he is named or not, and this is particularly true

as to the question of distribution of the estate. As to probate matters the county court is a court of general jurisdiction. Its judgment upon matters within its jurisdiction cannot be collaterally attacked. *Lydick v. Chaney,* 64 Neb. 288; *Miller v. Estate of Miller,* 69 Neb. 441; *In re Estate of Creighton,* 91 Neb. 654. The grounds upon which courts generally have arrived at such conclusions are that a proceeding to settle and distribute the estate of a deceased person is of the nature of a proceeding *in rem;* that, upon the presentation of a petition for letters of administration and the appointment of an administrator, the court takes control of the *res,* and thereafter, when proper notice has been given of the time and place of the hearing, the *res* itself is within the jurisdiction of the court, and, the interested parties being either actually or constructively present in accordance with the notice, the court has jurisdiction of both the parties and the subject-matter, and its judgment is final and conclusive unless appealed from.

The question is whether proceedings in the county court by which that court ascertains who are the heirs of the decedent to whom the administrator must yield possession of the estate are "actions in which title to real estate is sought to be recovered or may be drawn in question," of which class of actions that court has no jurisdiction under the Constitution.

Under the statute, on the death of an owner of land, the same descends *eo instanti* to his heirs, whomsoever they may be, unless, however, he has disposed of the same by will. *Prima facie* no will exists, and, until the existence of the writing has been shown and the instrument probated and established as having been executed in accordance with the statute, there is no cloud upon the title of the heirs to the real estate. *Brown v. Webster,* 87 Neb. 788. If, however, a will is produced, which by its terms grants and devises lands of the testator to others than his natural heirs, a decree of the court establishing the fact that the instrument is the last will of the testator

affects the title to real estate as much as would a finding and decree of heirship made by the same court in the settlement of the estate of an intestate. The decree establishing the will would in no sense settle the identity of the persons named therein, nor would it settle other questions which might arise affecting the title to the real estate devised, such, for instance, as the validity of prior contracts to convey the same, which courts of equity frequently enforce; or which of the devisees take under conflicting provisons of the will. The sole fact that it establishes is that the testator executed the document in conformity with the statute. The title passes, not by the decree, but by the operation of the statute of wills. In a case where the county court in proceedings under proper notice ascertains who are the children or next of kin of the deceased, that fact, so adjudged, which it has jurisdiction to establish, does not affect the title to real estate any more than does an adjudication that an instrument is the last will of the deceased.

The object of a decree of distribution is to determine to whom the estate of the deceased should be delivered. Neither adverse claims, nor title to the property can be litigated in the proceeding. The title itself may not be drawn in question. No title passes by the decree to the persons named as heirs. It passes by the statute of descent, and not by the decree, which merely determines which persons are within the class to which the statute of descent applies. 11 R. C. L. 183. The county court has no power to determine the title of any one of them to any particular tract of land, since the power to partition real estate has been taken away from it by the Constitution and is now vested in the district court. "Since the functions of probate courts are limited, in respect of executors and administrators, to the control of the devolution of property upon the death of its owner, it is not their province to adjudicate upon collateral questions. The right or title of the decedent to property claimed by the executor or administrator against third persons, or by third per-

sons against him, as well as claims of third persons against creditors, heirs, legatees, devisees, or distributees, must, if an adjudication become necessary, be tried in courts of general jurisdiction, unless such jurisdiction be expressly conferred on probate courts." 1 Woerner, American Law of Administration (2d ed.) sec. 151.

The decree of the county court which ascertains the persons who are the heirs of a deceased person finds a fact and adjudges a status. It is a common thing that courts which have no jurisdiction to act upon certain matters may have jurisdiction to determine certain basic facts upon which the decision of the other matters may eventually depend. For instance, the courts of this state have no right to grant or refuse a license to sell intoxicating liquors in a given locality. The matter rests solely within the jurisdiction of the respective local administrative bodies, but the courts have the right to determine whether the jurisdictional facts exist which authorize the administrative officers to act. While the ultimate result may be to stop the issuance of a license, and the court has no power to grant or refuse it, yet the determination of the question is within its jurisdiction.

Field v. Clark, 143 U. S. 649, 12 Sup. Ct. Rep. 495, was a case in which the reciprocity act, which authorized the president to suspend the provisions of the act relating to the free introduction of sugar and other articles of commerce as to any countries "which he 'may deem to be reciprocally unequal and unjust,'" was attacked as unconstitutional because it gave the president both legislative and treaty-making powers. The court said (quoting from *Locke's Appeal,* 72 Pa. St. 491): "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." It was also considered, reviewing the precedents, that congress had many times made the suspension of certain provisions and the going into effect of other provisions of acts of congress depend upon the as-

certainment by the president of certain facts to be made known by his proclamation. It was said: "As the suspension was absolutely required when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws."

The proviso in section 16, art. VI, Const., is that county courts shall not have jurisdiction "in actions" in which the title to real estate is sought to be recovered or may be drawn in question. The word "actions" is not usually considered to include such proceedings as the settlement of estates, the probate of wills, or the distribution of property, though proceedings ancillary thereto may partake of the nature of actions, and issues may be raised as to title. In any such proceeding before the county court, if "title to real estate is sought to be recovered, or may be drawn in question," that court cannot make a final determination of such title. The history of legislation in this state seems to demonstrate that the intention was not to curb and limit the jurisdiction of county courts in purely probate matters, but in the civil and criminal jurisdiction which might be conferred upon them by the legislature. The proper construction of section 16, art. VI of the 1875 Constitution, is (though perhaps not in accordance with the punctuation) that the limitation therein contained only applies to and limits the last clause of the preceding sentence. After giving county courts original and unlimited jurisdiction in probate matters and in the settlement of estates of deceased persons, it is provided that such courts shall have such other jurisdiction as may be given by general law. "But they shall not have jurisdiction in criminal cases in which the punishment may exceed six months' imprisonment, or a fine of over five hundred dollars; nor in actions in which title to real estate is sought to be recovered, or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate; nor in civil actions where the debt or sum claimed

shall exceed one thousand dollars." None of these restrictions seem applicable to such courts in the exercise of purely probate jurisdiction. Probate, orphan, or surrogate courts do not have criminal jurisdiction, nor power to try title to land, nor to foreclose mortgages, nor ordinary civil jurisdiction. *Brogan v. Brogan,* 63 Ark. 405, 58 Am. St. Rep. 124; *Buckley v. Superior Court,* 102 Cal. 6, 41 Am. St. Rep. 135. Then, why should such a limitation be announced, if it did not apply to the extra or additional jurisdiction which might be conferred by act of the legislature? A consideration of the whole history of courts of probate in this country supports this construction. 1 Woerner, American Law of Administration (2d ed.) secs. 11, 141; Smith, Probate Law (5th ed.) ch. 1; Gary, Probate Law (2d ed.) ch. 2. Again, if a decree of distribution and ascertainment of heirship is an "action," then a claim against the estate of a decedent for a sum of money may with equal propriety be termed a "civil action," and the result of this construction would inevitably be that county courts in the settlement of the estate of deceased persons would have no jurisdiction where the claims exceeded $1,000. In this view of the case, we must conclude that the word "actions" in the one clause and "civil actions" in the other do neither refer to matters concerned with the settlement of estates.

Heretofore it has been assumed that the county court had power to determine the persons who were the heirs of a deceased intestate, and also to decide whether a person claiming to be the widow of an intestate and entitled to share in the distribution did in fact sustain such relationship. *Security Investment Co. v. Lottridge,* 2 Neb. (Unof.) 489; *Sorensen v. Sorensen,* 56 Neb. 729, 68 Neb. 483, 490. In the former case we find the following, after citing the statute as to the decree of distribution set forth hereinbefore: "The effect of these provisions seems to be to give the executor or administrator the possession pending settlement of the estate, and to require an order for delivery of the real estate in bulk to its owners when this is

done, and leave them then to apply to the district court for partition, if they can not divide it themselves." In the latter case (68 Neb. 490) we find: "The principal relief sought in a proceeding *in rem* is usually an adjudication upon the status of some person or thing, and the judgment, *ipso facto,* renders the status of such person or thing what it declares it to be. *Woodruff v. Taylor,* 20 Vt. 65. From the very nature and purpose of such judgment, it is essential that it be conclusive and binding on all persons. * * * We think the true rule is that a judgment *in rem* is binding and conclusive upon all persons as to every matter necessarily involved in the adjudication upon the status of the person or thing which is the subject-matter of the proceeding, but as to matters involved in collateral litigation therein, between particular parties, and not necessarily involved in a judgment of that character, it is binding only upon those who actually litigated such matters and their privies."

The statute, section 1366, Rev. St. 1913, gives the administrator the right to the possession of the real estate of the deceased, other than the homestead, and to its rents and profits "until the estate shall have been settled, or until delivered over, by order of the county court, to the heirs or devisees." And he may maintain ejectment to recover possession. *Dundas v. Carson,* 27 Neb. 634; *Tillson v. Holloway,* 90 Neb. 481. In order to relieve the personal representative of liability for rent and profits, the real estate must be delivered by him to the parties entitled thereto, and the ascertainment of the proper persons is strictly within the jurisdiction of the county court. *Boales v. Ferguson,* 55 Neb. 565; *Fauber v. Kein,* 88 Neb. 379.

As to what has been said by the appellants with reference to the contemporaneous construction of this statute, if construction by the legislature itself has any weight, that body has assumed that the power to determine who are the heirs of a deceased person resides in the county court by enactment of sections 1356-1360, Rev. St. 1913, passed in 1905, whereby proceedings for the ascertain-

ment of heirship without administration have been provided for. Furthermore, it has been well-nigh the universal custom for very many years, of which fact we may take judicial knowledge, that examiners of title have required exemplifications of the records of the county court showing the administration of the estate of a deceased landholder, and a final decree settling the estate and ascertaining and adjudging who are the heirs, before title derived by descent would be approved. In the absence of such a decree, in very many instances competent and satisfactory proof of heirship would almost be impossible to obtain. In answer to the argument that valuable rights may be lost by such decrees based upon constructive service of which other heirs may have no notice, the plaintiff urges that, under sections 8207-8215, Rev. St. 1913, ample provision is made for the vacation of judgments after the term; that by section 8215, Rev. St. 1913, these provisions are made applicable to county courts as well as to the district courts. They also provide for the contingency that one or more persons affected may be minors, and a period is allowed to minors after arrival at their majority in which their rights may be asserted. Whether these provisions are applicable to such decrees is not decided. The evil that may result, as pointed out by the defendants, from deciding that such decrees are conclusive as to matters of heirship may equally occur with respect to holding any judgment conclusive rendered upon proper constructive service if it affect the title to real estate; but there is no question that such judgments are final. In *Youngson v. Bond,* 69 Neb. 356, and other cases cited by defendants, which are all cases involving wills and their construction, it is held that such adjudications by county courts are made only for the purpose of advising and directing the executor in the discharge of his duties, and cannot bind the devisees as to their rights in the estate. The conclusion of the court in the cases was correct, but some of the language used in these opinions is susceptible of too broad a meaning. Properly considered, these cases are not in con-

flict with the views expressed herein. *Youngson v. Bond, supra,* holds that a suit brought by an administrator with the will annexed on the theory that a construction of the will was necessary in order to enable him to settle the estate is maintainable in the county court, and is within the exclusive original jurisdiction of that court; but that suit by trustees under the will, after settlement of an estate, to obtain a construction of the provisions of the will relating to their trust can only be brought in the district court. It is said by Commissioner Pound: "It is urged that section 16, art. VI of the Constitution, precludes a county court from construing a devise of lands. We do not think the provision in that section that the county court shall have no jurisdiction 'in actions in which title to real estate is sought to be recovered, or may be drawn in question,' affects the conclusion already reached in any way. The evident meaning is that the county court shall have no jurisdiction of actions to recover real property or wherein the present title to real property is directly or substantially involved. But the provision does not mean that the county court is to be without jurisdiction where a question of title arises incidentally or collaterally or where the present title is not involved. Many actions which are not in form brought to recover the title to real property, nevertheless, have the effect of settling and adjudicating the present title."

It may be true that the county courts of this state have not fully realized heretofore the exceeding importance and gravity of the proceedings in such courts ascertaining the persons who are the heirs or next of kin of a decedent whose estate is being administered. No such finding should be made without competent sworn testimony. The record should show the names of the witnesses examined and the fact of such examination, and, if the court is not fully satisfied with the proof, it should investigate on its own motion. It has been said that the title to all the property of the state passes through the probate court periodically in a comparatively short interval of time. This is

largely true, and hence the necessity for care and deliberation in the proceedings and for the making of a proper record.

The following cases, mainly from states whose probate laws are based on that of Massachusetts, in which no such limiting clause is found in the Constitution, but in some of which county or probate courts have no other than probate jurisdiction, are in line with the views herein expressed. Space forbids quotation or exegesis of the holdings therein. *Christianson v. King County,* 239 U. S. 356; *Jones v. Roberts,* 84 Wis. 465; *State v. Probate Court of Ramsey County,* 25 Minn. 22; *Greenwood v. Murray,* 26 Minn. 259; *McNamara v. Casserly,* 61 Minn. 335; *Ladd v. Weiskopf,* 62 Minn. 29; *Case of Broderick's Will,* 88 U. S. 503; *Fitzpatrick v. Simonson Bros. Mfg. Co.,* 86 Minn. 140; *Morse v. Morse,* 42 Ind. 365. An interesting case is *Keahi v. Bishop,* 3 Hawaii, 546.

We conclude that the decree of the county court finding that Mrs. Hamernik is the sole heir of Augustine Sklenar, deceased, is a valid and binding adjudication of that fact, and cannot be assailed in this proceeding.

3. Appellants also claim that, since Mrs. Hamernik has always been a nonresident alien, she could not in any event inherit the fee to the land; that she could at most take only a limited right in or power of sale in the same; that, since the intestate died on December 27, 1909, under the treaty of 1848 with Austria-Hungary she had no interest or power over the land after December 28, 1911, two years from the time of the death, and that the county court, for the same reason, had no power thereafter to assign, distribute, or confirm in her the title to the land. The intestate died on December 27, 1909. The final decree was rendered August 27, 1912. Mrs. Hamernik, by an attorney in fact, sold and conveyed the land on September 9, 1912. The property was farm land and had always been so used by the intestate. No extension or prolongation of Mrs. Hamernik's right to sell had ever been made by any court or tribunal. Articles I and II of the treaty (9 U. S. St. at Large, p. 945) are as follows:

"Article I. The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country, where the said property lies, shall be liable to pay in like cases.

"Article II. Where, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same; which term may be reasonably prolonged, according to circumstances; and to withdraw the proceeds thereof, without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which such proceeds may be withdrawn."

Section 6273, Rev. St. 1913, is as follows: "Nonresident aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have prior to March 16, 1889, acquired lands in this state under the laws thereof, may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time herein limited, such lands, so acquired, have not been sold to a *bona fide* purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the state of Nebraska; and it shall be the duty

of the county attorney in the counties where such lands are situated to enforce forfeitures of all such lands as provided by this article."

Section 6276, Rev. St. 1913, allows nonresident aliens who have acquired liens upon real estate in this state to take a valid title to the real estate, provided that such land shall be sold within ten years. It is also provided that the provisions of the article shall not apply to real estate lying within the corporate limits of cities and towns. It is held in *Pierson v. Lawler,* 100 Neb. 783, that, under a treaty providing that the term in which to sell real estate inherited by a nonresident alien shall "be reasonably prolonged if circumstances render it necessary," it is a question for the judiciary whether the circumstances were such as to prolong the prescribed period. The language of the treaty under consideration is that the term of two years "may be reasonably prolonged according to the circumstances." Whether the circumstances in this case justify the prolongation can only be determined by the courts. It is clear that the term of two years provided in the treaty merely prevents the state from limiting the term below that period. If the state chooses to extend the term by statute, there is nothing in the treaty which in any wise controls or interferes with its discretion. Its power is supreme unless in such matters controlled and governed by the treaty, which by the federal Constitution is a law of the United States. Considering the liberal policy on the part of this state with reference to allowing a reasonable time for disposing of land, and, if sold, reserving to the alien heirs the value of the land, these treaties and statutory provisions should not be construed with undue harshness. Rev. St. 1913, secs. 6272-6276. That treaties are to be construed in a liberal method so as to protect citizens and subjects of both countries is held in *Doehrel v. Hillmer,* 102 Ia. 169; *Geofroy v. Riggs,* 133 U. S. 258. A case much like this arose in Illinois (*Scharpf v. Schmidt,* 172 Ill. 255), in which it was held that the provision that the "term may be reasonably prolonged," used in a like treaty,

means that the courts in passing on their rights may allow the alien heirs such time, in addition to the two years limitation, as is reasonable under the circumstances, to enable them to sell. Other cases are cited in the opinion in that case, and the topic is considered in *Ehrlich v. Weber*, 114 Tenn. 711; *Kull v. Kull*, 37 Hun (N. Y.) 476; 1 R. C. L. 806; and in a note to *Ahrens v. Ahrens*, 144 Ia. 486, in Am. Ann. Cas. 1912A, 1098.

Under our statute the administrator is entitled to possession of real estate pending administration. Not until eight months after the two year period had expired was the decree rendered which found that Mrs. Hamernik was the sole heir of the deceased. Within 15 days thereafter she disposed of the property to a *bona fide* purchaser, and through him the plaintiff and other appellees derive their interest in the property. Having in mind the peculiar facts as to illegitimacy and other circumstances in the case, following the rule of liberal construction, and considering the policy of the state as shown by the statute, we are of opinion that the prolongation of the term from December 24, 1911, to September 10, 1912, was not unreasonable, and that Mrs. Hamernik had the right to sell and dispose of the property at the latter date.

We find no error in the judgment of the district court on the facts set forth in the pleading, and it is therefore

AFFIRMED.

HAMER, J., concurring.

I concur in the conclusion of the majority opinion as I understand it. In the 47 years which I have spent endeavoring to follow and understand the decisions of this court, perhaps no more important question has been considered than that disposed of in this case. I believe that the district court has jurisdiction in the first instance to try title to land, and that the jurisdiction of the county court is confined in land cases to such subjects as may be properly considered in the adjudication of probate matters. I do not believe that title to land should pass under the de-

cree alone of the county court adjudicating heirship. A controversy between heirs or devisees concerning title to real estate should always be first determined by the district court, which alone has original jurisdiction to try title to land.

Much of the business of the county court is of a probate character, and the proceedings are often nearly or quite *ex parte*. They may be without actual notice to the real parties in interest. I believe that the exclusive jurisdiction of the county court is confined, where the title to land is sought to be brought in question, to the disposition of matters of probate, and that such jurisdiction should not be extended so as to oust the jurisdiction of the district court concerning the matters in which the title to land is in dispute. I so construe the decision which we have rendered.

I write this to avoid ambiguity and to make my position manifest and clear.

EDWARD A. VANDERLIP, APPELLANT, V. DURASTUS T. BARNES ET AL., APPELLEES.

FILED JULY 14, 1917. No. 19932.

1. **Set-Off.** It is universally held by all courts, at least by all courts in countries where the English language is used, that claims for damages for torts cannot be offset against promissory notes. The statute specifically provides what claims of a defendant against the plaintiff may be made the subject of set-off or counterclaim, and also makes plain what cross-demands shall compensate each other. A judgment may be set off against another judgment or against a claim upon contract.

2. **Assignments: CHOSE IN ACTION: RIGHTS TRANSFERRED.** The owner of an ordinary chose in action cannot sell and transfer a greater right therein than he himself has, but he can sell whatever interest he has therein, and, in the absence of fraud, the purchaser will take whatever right the seller had at the time of the sale, and the seller may afterwards formally transfer the right pursuant to his agreement.

3. **Fraudulent Conveyances:** TRANSFERS: CONSIDERATION. When there is "no mutual fraudulent intent," any person, solvent or insolvent, may dispose of his property for a valuable consideration as he desires, and the consideration for the transfer may be future services which have been agreed upon between the parties.

4. **Attorney and Client:** JUDGMENT: LIEN. The lien of an attorney upon a judgment obtained by him is allowed and regulated by statute. In this case the attorneys did not comply with the statute, and have no attorneys' lien on the judgment. Under the evidence they are the owners of the judgment.

APPEAL from the district court for Lancaster county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

T. J. Doyle, for appellant.

Reese, Reese & Stout, contra.

SEDGWICK, J.

The defendant Barnes obtained a judgment in the district court for Lancaster county against the plaintiff Vanderlip upon a promissory note given for money loaned. While that action was pending the plaintiff Vanderlip brought an action against the defendant Barnes in the district court for Lancaster county to recover damages for the alleged alienation of the affections of the wife of the plaintiff Vanderlip. In that action the plaintiff Vanderlip recovered a judgment for $5,000 damages, which was afterwards reduced to $3,000 and affirmed by this court. The plaintiff then began this action against the defendant Barnes and his attorneys, Strode & Beghtol, who claimed to be the owners of the judgment in favor of the defendant Barnes, and the sheriff of Lancaster county, Nebraska, to offset the one judgment against the other, and to restrain in the meantime the enforcement of the judgment in favor of Barnes; execution for that purpose then being in the hands of the sheriff. The trial resulted in a judgment for the defendants, from which the plaintiff Vanderlip has appealed. In the case at bar the defendants answered that, before the commencement of any of these proceedings, the note upon which Barnes recovered his judgment against Vanderlip was past due and unpaid.

The plaintiff contends that under the evidence in the case the court should have entered judgment for the plaintiff. He quotes in his brief what he alleges was the oral evidence in the case, as follows: Mr. Strode testified: "In a conversation with Barnes before being employed as attorney, Barnes stated that they (Vanderlips) were threatening to sue him for alienation of the affections of Vanderlip's wife. He had loaned Vanderlip some money; taken Vanderlip's promissory note. The note was due, and he knew that, if he started to collect the money, they would try to offset it, or pay it by this loss of affection, and he wanted advice as to what he should do, and particularly about the note. He stated that this note was about all he had to pay for our services in this litigation, not only in the matter of collecting the note, in his suit to collect it, but in the other litigation that was threatening at that time to break out in various spots, and he wanted to know if we would take that note or proceeds of the note for our compensation, as far as it would go, and, if our services were not worth the amount of the note, why, of course, we would account to him for the difference. Nobody knew just what scope or how far it would go at that time. We made that sort of an agreement with him, and brought suit on the note. Soon after the suit was brought on the note, Vanderlip sued Barnes for the loss of his wife's affection for $25,000. That case required a good deal of attention. Vanderlip got a judgment against Barnes for $5,000 in the case in district court. That was afterwards reduced to $3,000 in the supreme court." And from Mr. Beghtol's testimony he quotes as follows: "When he first talked with Barnes about the matter, Barnes did not have the note with him. He said the note was in the Bank of Hickman, and that the cashier of the bank had notified him that he must take the note up on his indorsement because Mr. Vanderlip refused to pay. And it was that thing, I think, which brought him up to us at the time which he came." A few days after the judgment was obtained by the plaintiff against Barnes, Strode & Beghtol

filed in the case what they styled "Notice of Attorneys' Lien," as follows: "Notice is hereby given that E. C. Strode and M. V. Beghtol have and claim a lien on the judgment recovered in this action and on the proceeds thereof in the amount of all the said judgment for attorneys' fees for the services of said parties by reason of an agreement between said E. C. Strode and M. V. Beghtol and D. T. Barnes." And soon afterwards they filed in the case an assignment by Barnes of the judgment which he obtained against Vanderlip, wherein he recited that for "services rendered" and services to be rendered by E. C. Strode and M. V. Beghtol he assigned to them "all of his right, title, and interest in and to" the judgment which he had obtained against Vanderlip, describing it.

We are required to determine whether this evidence will support the judgment entered. The paper denominated "Notice of Attorneys' Lien" was filed after the judgments were rendered. And the written assignment of the judgment was filed still later. From these facts plaintiff's brief derives the following: "(a) The right of set-off was complete at least eleven days before any notice of lien. (b) The attorney only has a lien for services rendered in the case in which lien is claimed. No lien was ever asserted for the value of those services alone. (c) The assignee has no greater right than the assignor. It follows as an inevitable sequence the right of set-off is not affected by the assignment."

The paper denominated "Notice of Attorneys' Lien" is not in fact a notice of lien under the statute, Rev. St. 1913, sec. 272, but is in reality a notice that the attorneys claim to own the judgment, not for services rendered in the case in which the judgment is obtained, but "by reason of an agreement." These defendants cannot claim the proceeds of this judgment by virtue of the statute which gives them a lien thereon. Their claim is based upon a purchase of the note upon which the judgment is obtained, so that the question really is whether they could make such purchase and obtain title in the face of the attempts that this plain-

tiff was making to offset his claim for tort against the note. It is universally held by all courts, at least by all courts in countries where the English language is used, that claims for damages for torts cannot be offset against promissory notes. It may be, and probably is, true that in some cases injustice follows from this universal rule, and it may be possible that some legislation is required to enable the courts to do justice in special cases. In our state, and in the other code states, the statute specifically provides what claims of a defendant against the plaintiff may be made the subject of set-off or counterclaim. "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." Rev. St. 1913, sec. 7676. "The counterclaim mentioned in the next preceding section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." Rev. St. 1913, sec. 7673. The statute also makes plain what cross-demands shall compensate each other, and limits it entirely to cases in which, "if one had brought an action against the other a counterclaim or set-off could have been set up." Rev. St. 1913, sec. 7678. Therefore, without further legislation, a defendant cannot set off damages in tort against a claim on contract, nor can he cause one of such claims to compensate the other. After his claim was reduced to judgment it might by the express provision of the statute be set off in satisfaction of the judgment against him, so far as the other judgment was at that time the property of the owner of the judgment against himself. It seems to follow that the question in this case is whether the judgment in favor of this defendant Barnes and against this plaintiff Vanderlip was the property of Barnes when this action was begun to offset the one judgment against the other.

The plaintiff correctly says "that the assignee of a claim has no greater rights therein than the assignor;" that is, the owner of an ordinary chose in action cannot sell and transfer a greater right therein than he himself has, but he can sell whatever interest he has therein, and, in the absence of fraud, the purchaser will take whatever right the seller had at the time of the sale, and the seller may afterwards formally transfer the right pursuant to his agreement. This court has decided that, when there is "no mutual fraudulent intent," any person, solvent or insolvent, may dispose of his property for a valuable consideration as he desires, and that the consideration for the transfer may be future services which have been agreed upon between the parties. *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130.

In addition to the uncontradicted testimony which we have already quoted, there was undisputed evidence that the value of the services rendered by the assignees of this judgment under their contract with their assignor was about equal to the amount of the judgment. These services in pursuance to their contract were rendered before this action to make the one judgment compensate the other was begun. The decision therefore in *Farmers & Merchants Nat. Bank v. Mosher, supra,* is applicable and decisive of this case.

The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., and LETTON and ROSE, JJ., not participating.

P. CHARLES TANKERSLEY, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JULY 14, 1917. No. 19432.

1. **Accord and Satisfaction:** JOINT TORT-FEASORS: SETTLEMENT: SUPPLEMENTAL PETITION. In a suit against two joint tort-feasors for

personal injuries, one of them may settle with the plaintiff, and, in case the settlement is not in full satisfaction for the injury, the suit may proceed against the other; but the plaintiff should not be permitted to plead the settlement and the amount paid by a supplemental petition. Such supplemental petition should be stricken from the files on defendant's motion.

2. **Appeal:** PREJUDICIAL ERROR: STATEMENTS OF COUNSEL. It is prejudicial error to allow counsel for the plaintiff to state to the jury the fact of such settlement, its terms, and the amount paid by the settling defendant, as such statement tends to show an admission of negligence as against the nonsettling defendant.

3. **Evidence:** ADMISSIBILITY: PHOTOGRAPHS. Photographs of the place and surroundings where the accident occurred, which are taken some two years afterwards, and long after such place and surroundings have been materially changed, are not ordinarily admissible in evidence.

4. **Trial:** INSTRUCTIONS: PHOTOGRAPHS. But if it becomes necessary to use such photographs in evidence, it is the duty of the court to give the jury such instructions regarding them as will insure the defendant a fair trial.

5. **Negligence:** EVIDENCE: REPAIRS. "Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence." *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657.

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

Field, Ricketts & Ricketts and *G. L. De Lacy,* for appellant.

Berge & McCarty, contra.

HAMER, J.

This is an appeal from a judgment in favor of one P. Charles Tankersley for personal injuries alleged to have been sustained by him for negligence on the part of the Lincoln Traction Company. The facts briefly stated are as follows: The Lincoln, Capital Beach & Milford Railway Company, a corporation entirely distinct from the Lincoln Traction Company, was incorporated prior to September, 1906, for the purpose of constructing and operating an electric railway west from the city of Lincoln to Capital Beach and other points further west. On

the 15th day of September, 1906, The Lincoln, Capital Beach & Milford Railway Company, entered into a contract with the Burlington Railroad Company, pursuant to which the Burlington installed and thereafter maintained a signal system at the intersection of the highway known as P street with the Burlington right of way. The expense of the installation and maintenance was and is paid by the Capital Beach Company. This signal system consisted of semaphores about 2,000 feet from the crossing in either direction and near the Burlington track. These semaphores were operated by two wires attached to the base of a vertical post by means of an arm or gate about 16 feet long attached to the same post. This gate was about six feet above the level of the ground and stood in a horizontal position. When the gate was turned across the Burlington track, the wires were made taut so as to raise the semaphores to a horizontal position and thereby warn an approaching train that the crossing was occupied. There are two of these wires. The vertical post is on the Burlington right of way about six feet east of the east rail of the track and about the same distance from the north line of the highway. At the foot of the vertical post was a box about three feet square. At the time of the injury the wires emerged from this box, and for a space of about three feet before they entered a duct, which carried them under the public crossing, were exposed. It was at the point of this exposure that the plaintiff was injured. When the gate was in its normal position it stood at right angles across the Beach Company's track. It was only changed from this position when a car on the Beach Company's track was crossing the tracks of the Burlington. About the center of the arm or gate was a box in which a red light was maintained at night as a warning of danger. Immediately adjacent to this gate the Burlington maintained a public crossing over its tracks, planked, level with the top of its rails, with good approaches, for a width of 29 feet. Several feet above the horizontal gate or arm was

a short arm some 4 or 5 feet in length which pointed in the same direction as the gate or arm, and had painted upon it in large letters the word "Stop." Within a few feet of the vertical post to which the arm or gate was attached, and by means of which the wires were made to operate the semaphores, was another post. On this post five electric lights were installed and maintained in a vertical row. These lights were kept lighted in the nighttime.

On the 14th day of May, 1907, the Lincoln Traction Company, entered into an operating contract with the Beach Company. By the terms of this contract the Traction Company agreed to furnish and operate cars, as agent of the Beach Company, over its tracks constructed to Capital Beach west of the city. The Traction Company was to receive 2½ cents per kilowatt hour for current, and actual expense for labor and material necessary in the operation of the cars. It was to collect all fares, deduct therefrom the cost of current and operating expense, and render a monthly statement to the Beach Company. It was not to be liable for injuries or damages in operating cars over the Beach Company's line. Profits were first to be applied to damages recovered, if any, and extraordinary repairs. Employees were to be discharged on written request of the Beach Company. The net balance arising from fares after deducting the above was equally divided between the Traction Company and the Beach Company. The contract contained other details not material to the instant case. At the time of the alleged injury the Traction Company was operating cars under this contract on the Beach line. It sustained no other relation to that company, the Burlington Company, or the signal system than that which can be inferred from its compliance with this operating contract. It had no authority, nor was any delegated to it, to modify or meddle with the signal system, or the wires which caused plaintiff's injury. The signal system, including the wires, was installed and maintained by the

Burlington on its right of way. The Beach Company paid the expense of the installation and the maintenance. After the Traction Company entered into the operating contract with the Beach Company the bills for maintenance were sent to the Beach Company, but actually paid by the Traction Company out of the Beach Company's earnings under the operating contract, and charged to the Beach Company in the monthly statements rendered that company.

At the time of the plaintiff's injury, and for more than a month prior thereto, cars on the Beach Company's track were operated only as far west as the Burlington track, which was then its western terminal. There was on the rail of the Beach Company's track, 50 feet east of the Burlington's east rail, a derailing frog, so that the Traction Company's car could not approach closer than a point 50 feet east of the east rail of the Burlington track without being derailed. By reason of this fact the rear platform of an approaching car would stop about 75 feet east of the offending wires. The plaintiff, when he arrived, safely alighted, and says he walked rapidly straight west, passed under the warning gate, and was tripped by the wires which operate the semaphores. It is claimed that a path had been created, which the plaintiff was following. The alleged path, however, was not well defined, and was rough and obstructed, and no effort had been made to make a safe walk at the point in question. The path, if any, was created subsequent to the time the wires and the signal system had been installed by the Burlington at the point in question, and persons who created it, such as it was, had to walk or step over these wires. It appears that plaintiff was tripped by and fell over these wires and was injured. Immediately adjacent to the wires and gate was a good crossing maintained by the Burlington, pursuant to statute, for the accommodation of the public. After the injury the Burlington boxed the wires at the point where they were exposed, and this fact was used by plaintiff in

the trial of the case as an admission that it was negligence to leave the wires exposed.

After the jury had been placed in the box and the *voir dire* examination made, the plaintiff settled with the Burlington for $3,200. Before any evidence was offered the plaintiff filed a supplemental petition setting up this settlement and the amount agreed to be paid by the Burlington on account of its negligence. The Traction Company moved to strike this supplemental petition from the files, for the reason that the matter therein set forth did not come within the province of a supplemental petition. The motion was overruled. It was thus disclosed that the Burlington settled and confessed judgment in behalf of the plaintiff for the sum of $3,200.

The same question was canvassed by the court in instruction No. 18, and the jury were there told the amount that the Burlington had paid in satisfaction of its admitted liability to the plaintiff. This instruction was excepted to. The jury returned a verdict in favor of the plaintiff and against the Traction Company for $6,400, and then recited that they deducted $3,200, the amount for which the Burlington had confessed judgment, leaving the verdict against the Traction Company $3,200. A motion for a new trial was filed and overruled, and judgment entered against the Traction Company. This appeal is prosecuted for the purpose of reversing that judgment.

The appellant's first two assignments of error are: The court erred in refusing to strike the plaintiff's supplemental petition from the files; and the court erred in permitting it to be disclosed to the jury that plaintiff had settled with the Burlington Railroad Company, and the amount of the settlement. These assignments of error will be considered together.

1. It is well settled by a decision of this court that, when two joint tort-feasors are sued, the plaintiff may settle with one of them and the action may proceed against the other. *Fitzgerald v. Union Stock Yards Co.,*

89 Neb. 393; *Bloss v. Plymale,* 3 W. Va. 393, 100 Am. Dec. 752. Where such a course is pursued, it is the duty of the court to establish a rule of procedure that will insure a fair and impartial trial to the nonsettling party. To permit the plaintiff in such a case to plead the settlement, the terms thereof, and the amount paid by the settling party would have the effect of a confession by the joint tort-feasor of the negligence complained of by the plaintiff, and the jury would at once assume that the nonsettling defendant was liable for the same amount of damages. It would seem from our examination of the record that such was the effect produced on the jury in this case.

There is another reason why the supplemental petition should have been stricken from the files. Section 7717, Rev. St. 1913, provides, in substance, that negotiations looking to a settlement between litigants cannot be disclosed to the jury on the trial of the merits. This expression of the legislature would seem to apply with full force in this case. The consideration of such a settlement and its effects is for the court, and not for the jury.

2. Appellant contends that it was error to offer evidence that the Burlington Company boxed their wires immediately after the accident occurred and to permit plaintiff's counsel to make the statement which follows in the opening address to the jury: "I will say to you, also, the evidence will show since that time those wires have been boxed up and the ground filled up, so the danger has been removed after Mr. Tankersley was injured." We think this contention is well founded. *Pribbeno v. Chicago, B. & Q. R. Co.,* 81 Neb. 657.

In that case it is said in the syllabus: "Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence." In the body of the opinion it is said: "Over defendants' objection, plaintiff was permitted to prove that subsequent to the flood de-

fendants 'lengthened the bridge and took out the ground so the water could go through.' Defendants not only objected to the testimony, but moved to strike it out of the record, so the court was well advised that defendants insisted the evidence was incompetent." Judge Root, who prepared the opinion of this court, said: "The testimony would naturally impel the jurors to believe the railway company had ascertained its fault and was endeavoring to repair its dereliction; hence without question it had admitted its negligence." He further said: "We believe logic, reason and sound public policy direct that we follow the rule adopted by the majority of the state courts." He cites many authorities, from some of which we may briefly quote. We will only refer to a part of the authorities which he cites. 1 Elliott, Evidence, sec. 228; *Standard Oil Co. v. Tierney,* 92 Ky. 367, 36 Am. St. Rep. 595; *Nalley v. Hartford Carpet Co.,* 51 Conn. 524; *Sappenfield v. Main Street & A. P. Co.,* 91 Cal. 48; *Corcoran v. Village of Peekskill,* 108 N. Y. 151; *Hodges v. Percival,* 132 Ill. 53; *Shinners v. Proprietors of Locks & Canals,* 154 Mass. 168; *Anson v. Evans,* 19 Colo. 274; *Sievers v. Peters Box & Lumber Co.,* 151 Ind. 642; *Sylvester v. Town of Casey,* 110 Ia. 256; *Terre Haute & I. R. Co. v. Clem,* 123 Ind. 15; *Getty v. Town of Hamlin,* 127 N. Y. 636; *Morse v. Minneapolis & St. L. R. Co.,* 30 Minn. 465; *Missouri P. R. Co. v. Hennessey,* 75 Tex. 155; *Georgia S. R. Co. v. Cartledge,* 116 Ga. 164; *Columbia & P. S. R. Co. v. Hawthorne,* 144 U. S. 202.

In *Standard Oil Co. v. Tierney, supra,* it was held that evidence that the defendant had taken certain precautions calculated to prevent a repetition of the injuries was not admissible.

In *Nalley v. Hartford Carpet Co., supra,* it was held that evidence of safeguards placed after the accident was not admissible for the purpose of showing prior negligence.

In *Sappenfield v. Main Street & A. P. Co., supra,* it was held that evidence of the substitution of a safer appliance after the accident was not competent.

In *Corcoran v. Village of Peekskill, supra,* it was held that the reception of evidence on the part of the plaintiff that after the accident the owner of the premises built a fence around the area to prevent persons from falling into it was incompetent.

In *Hodges v. Percival, supra,* it was held: "New measures or devices adopted after the accident do not necessarily imply that all previous ones were insufficient."

In *Shinners v. Proprietors of Locks & Canals, supra,* it was held: "If an accident happens through the alleged negligence of an employer, his subsequent acts in taking additional precautions to prevent other accidents are not admissible in evidence, in an action against him for the injuries occasioned."

In *Anson v. Evans, supra,* it was held that the subsequent conduct of the defendant could not be shown for the purpose of establishing antecedent negligence.

In *Sievers v. Peters Box & Lumber Co., supra,* it was held that evidence of repairs made after the injury had been sustained was not admissible to show antecedent negligence.

In *Sylvester v. Town of Casey, supra,* it was held that evidence of subsequent repairs of the sidewalk was inadmissible to show the negligence of the city.

3. It is contended that the court erred in admitting the photographs, exhibits 1 to 6, in evidence over the objections of the defendant. It clearly appears, and is in fact conceded, that these photographs were taken more than a year after the accident occurred, and after the changes in the *locus in quo* were made. Whatever may be the rule in other states, this court has decided in *Pribbeno v. Chicago, B. & Q. R. Co.,* 81 Neb. 657, that such photographs are not ordinarily admissible. The majority of the courts of other states so hold. In a note to *Alcott v. Public Service Corporation,* 32 L. R. A. n. s. 1084, 1127 (78 N. J. Law, 482), the authorities are collated which clearly show that the photographs were inadmissible to show changes or repairs made after the ac-

cident. It appears, however, that the purpose of introducing the photographs was not to show that changes or repairs had been made, but for the purpose of showing the platform, the pathway, the location of the crossing arm, etc. If proper instructions had been given confining the consideration of the pictures to such purposes, probably no error would have occurred, but no such instructions were given in the case.

The record clearly shows that defendant did not have a fair trial, and for this reason the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

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

CHARLES GUIGNON V. STATE OF NEBRASKA.

FILED JULY 14, 1917. No. 20006.

1. **Information: CONVICTION: EVIDENCE.** Under our statute (Rev. St. 1913, sec. 8579) the procuring, aiding, and abetting the commission of a felony is a distinct offense, and, upon an information charging that offense, a conviction of the principal offense cannot be sustained; but there may be a conviction of the crime charged, if sufficiently proved, although the evidence may also prove the defendant guilty of the principal offense.

2. ———: **VENUE: OBJECTION.** If the information alleges facts showing that the crime charged was committed in the county of the trial, it will not, after conviction, be held insufficient for not formally stating the venue, when no objection and no protest was made before the trial.

ERROR to the district court for Hall county: JAMES N. PAUL, JUDGE. *Affirmed.*

C. J. Southard and *J. L. Cleary,* for plaintiff in error.

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

HAMER, J.

This is a proceeding in error by Charles Guignon from the judgment of the district court for Hall county, by which judgment he, the said Guignon, was on the 7th day of December, 1916, sentenced to imprisonment for an indeterminate period of not less than 3 years nor more than 15, and to pay the cost of prosecution. There was a charge against him and John Reed in said court, made by the county attorney of Hall county, Benjamin J. Cunningham, and under which he, said Guignon, was adjudged to be guilty and to suffer said imprisonment. The charge was: "That John Doe, whose real name is unknown, late of the county aforesaid (Hall) on the 16th day of October, A. D. 1916, in the county of Hall and the state of Nebraska aforesaid, in and upon one John Hicks, then and there being unlawfully, feloniously, and forcibly and by violence, did make an assault, and him, the said John Hicks, did put in bodily fear, and from the person and against the will of him, the said John Hicks then and there, forcibly and by violence, and feloniously did steal, take, and carry away one pocketbook of the value of one dollar ($1.00), one United States five-dollar bill ($5.00), and silver coins to the amount of three dollars ($3.00), all of the value of eight dollars and fifty cents ($8.50) of the property, goods, and chattels of the said John Hicks; and before said robbery and felony were committed by the said John Doe, whose real name is unknown, to wit, on the 16th day of October, 1916, Charles Guignon and John Reed unlawfully, purposely, and feloniously did procure, incite, abet, and aid the said John Doe, whose real name is unknown, in the perpetrating of said robbery in the aforesaid manner and form."

The record shows that the county attorney of Hall county, Benjamin J. Cunningham, and William Suhr appeared in court on behalf of the state, and that the defendant, Charles Guignon, appeared in person, accompanied by his counsel, J. L. Cleary and C. J. Southard, and making no objection to the charge, "thereupon the

said defendant waived arraignment and the reading of the information filed therein, and to the charges of said information entered a plea of 'not guilty,' and states that he is ready for trial."

The evidence taken at the trial shows, as stated in the brief of plaintiff in error, that John Hicks, the witness who complains of being robbed, came to Grand Island Saturday night with the defendant, Jack Reed; that on the day following (Sunday evening), October 16, 1916, he went out in a taxi with Jack Reed and three other fellows, in the car of plaintiff in error, and which was driven by him; that, coming back to town, the witness rode in the back seat with Jack Reed and one other fellow, and Guignon was driving, and the same party rode with him in the front seat; that Guignon drove south off the main road, and then claimed he had a flat tire and stopped, and then all got out, and the fellow that was riding in the front seat with Guignon told witness to pull out his money, the fellow that had the gun, the fellow in the front seat with Guignon, said: "Pull out your money." Witness gave him his billbook and $2 and Jack Reed said: "Where is your pouch?" Witness stated that he was sure Guignon was standing there out of the car. John Reed, a witness for the state, testified that he and Hicks went to Harmony Hall in Guignon's car the night of the robbery; coming back, the witness, Hicks, and Smith were in the back seat, and Guignon and the short fellow in the front seat, Guignon driving; the car turned off the road about a half mile, and the short fellow "stuck us up;" that Guignon got out of the car and stayed right beside witness and Hicks.

The evidence which we have quoted is conclusive to the effect that plaintiff in error was driving the car and turned off of the road to town; that he stopped the car, claiming he had a flat tire, and got out with the others; that the robbery immediately took place in the actual presence of the plaintiff in error. None of this testimony is disputed. John Reed testified that he was one of the

parties that was held up, and that he lost "80 cents, somewhere about 80 cents." Reed asked Guignon what the fare was to Harmony Hall, and Guignon said it was paid. The witness did not know whether they split the money or not. He was asked: "Q. Doe is the fellow that sat in the back seat with you that night? A. Yes, sir." The county attorney, Benjamin J. Cunningham, testified that he talked with Guignon, who denied that there had been any shooting about the car that night. The county attorney testified that he asked Guignon why the shooting took place, and Guignon said: "Just to see him run." The county attorney testified that the affair happened in Hall county, Nebraska; that it was about a quarter of a mile west and a quarter of a mile south of Harmony Hall. William Pierce testified that Guignon had told him that he had a couple of "chumps," and he wanted Pierce to go with him; that he had told Guignon he did not want to go; Guignon said he was going to Harmony Hall. He also testified that Guignon had a gun in his coat pocket, and that he was going to get "these fellows out there." The witness testified that he had been asked by Guignon to go and see Jack Smith, and see if there was any way out of it. He wanted to know if the witness could get Jack Smith out of the road. No testimony was offered for the defense.

The verdict rendered, omitting the title and the term of the court, is as follows: "We the jury in this case, being duly impaneled and sworn, do find and say that the defendant, Charles Guignon, is guilty of the crime as charged in the information, and do find the value of the property taken to be $8.50. (Signed) L. P. Mullen, Foreman."

Guignon, by his counsel, C. J. Southard and J. L. Cleary, filed a motion for a new trial, which was overruled.

The defendant was tried and convicted on the statutory charge of procuring, aiding, and abetting another in the commission of a felony. Because, under the evi-

dence, he was present at the time of the commission of the crime, which would render him guilty as principal, it is argued that he was illegally convicted. While it is true that this court has held that procuring, aiding, and abetting a crime and the commission of it are distinct offenses, instead of being different degrees of the same offense, and that one cannot be charged with one offense and convicted of the other, it has never held that where one is charged with aiding and abetting a felony, or, as at common law, with being an accessory before the fact, and from the evidence he is found guilty as charged, the mere fact that the evidence not only shows him an aider and abettor, but goes further and shows him present when the offense was committed, and therefore guilty as principal, would operate to make the charge bad or the conviction void. In other words, the fact that a defendant is guilty of two offenses ought not to release him from the charge of being guilty of either. In *Casey v. State,* 49 Neb. 403, the defendant was charged as accessory before the fact and convicted. The case was reversed, not because the defendant was present and may have been guilty as principal, but because, as stated by Judge Post in his opinion, there was no evidence whatever of any act on the part of the defendant as aider or abettor of the crime charged. In other words, it was held that defendant could not be charged as accessory and convicted as principal. James Casey was charged with inciting, procuring, aiding, and abetting John Casey to commit the robbery charged. The only evidence against James Casey tended to show him guilty as a principal. There was therefore no evidence to sustain his conviction. The case consequently is not in point.

Section 8579, Rev. St. 1913, provides: "Whoever shall aid, abet, or procure any other person to commit any felony, shall, upon conviction thereof, be imprisoned in the penitentiary for any time between the respective periods for which the principal offenders could be imprisoned for the principal offense; or, if such principal offender would, on conviction, be punishable with death,

or be imprisoned for life, then such aider, abettor, or procurer shall be punished with death or be imprisoned for life, the same as the principal offender would be."

In *Brinegar v. State,* 82 Neb. 558, it is said: "An aider or abettor may be one who so far participates in the commission of a crime as to be present for the purpose of assisting therein, if necessary. In such a case he will also be liable as principal." Guignon was liable as an aider and an abettor, and also as a principal. He is shown by the evidence to have been the originator of the plan of the robbery, and he was an active participant in its execution. He appears to have been guilty as an aider and abettor, and also as a principal.

In *Lamb v. State,* 69 Neb. 212, 218, Lamb was charged with aiding, abetting, and procuring one Harry Hill and Verne Stewart to steal 10 head of steers belonging to Rooney & Company. The evidence showed that Lamb procured Hill and Stewart to take the steers. Hill and Stewart put the stolen steers in the shipping yard. Lamb took these steers along with his own cattle and shipped them to Omaha. He was held guilty of feloniously and purposely aiding and abetting and procuring the thieves to commit the crime. At the same time he is shown by the evidence to have participated in the theft by removing the cattle to Omaha. Judge Sullivan, in delivering the opinion of this court in *Lamb v. State,* said: "Besides the evidence was quite sufficient to establish *prima facie* the existence of a common purpose and design to steal and sell the Rooney cattle. The sale had not yet been made. The conspiracy was still pending, and consequently the acts and declarations of each of the conspirators in the prosecution of the unlawful enterprise, or with reference to it, were the acts and declarations of all."

Dixon v. State, 46 Neb. 298, is not in point. In that case an abortion was committed. It was claimed that the defendant was present and participated in the commission of the criminal act. He was therefore liable as a principal, and section 1 of the Criminal Code relating

to aiding, abetting, and procuring another to commit a felony did not apply because the defendant was himself a principal, and was not alleged to be an aider and abettor.

In *Oerter v. State,* 57 Neb. 135, the court, by Ragan, Commissioner, said: "The prisoner was indicted for one crime. He could not be lawfully convicted of another and different crime for which he was not indicted." In that case there was no charge of aiding and abetting or procuring, and therefore it was improper to instruct the jury that they could find the defendant guilty of aiding, abetting, or procuring.

In *Noland v. State,* 19 Ohio St. 131, it was held: "By the thirty-sixth section of the act providing for the punishment of crimes, aiding, abetting, or procuring a crime to be committed is made a substantive independent offense, and it is not necessary the principal should be convicted before the accessory is tried." The question here presented, as to whether the defendant might be found guilty of either offense, was not considered in the Ohio case. Alleged violators of the law in this state are to be tried under the statutes defining the offenses charged against them. Section 8579 should be given an interpretation consistent with the position of our state in regard to the conditions of the common law. We should not seek to extend the common law where our statutes and our Constitution never intended it should go. Section 3697, Rev. St. 1913, provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be the law within the state of Nebraska." The law of the state always should control. It is so provided in this section. Section 8567, Rev. St. 1913, provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. Its provisions and all proceedings under it shall be liberally construed, with a view to promote its

object and assist the parties in obtaining justice." Just as plainly as the legislature could say it, it is said that the will of the people, as expressed by their representatives in the legislature, shall be the law of the state, and that the common law shall not be allowed to encroach upon it.

Objection is made by the defendant Guignon that the information fails to state the venue. It alleges that an assault was made in Hall county by John Doe upon John Hicks, and the taking from Hicks of his pocketbook and money by the said John Doe in Hall county. The assault and the taking of the pocketbook and the money are all alleged to have been on the 16th day of October, 1916. It is also alleged that "Charles Guignon and John Reed unlawfully, purposely, and feloniously did procure, incite, abet, and aid the said John Doe, whose real name is unknown, in the perpetration of said robbery in the aforesaid manner and form." What Guignon and Reed did was, in the absence of any statement to the contrary, presumably done in Hall county. In any event, if the defendant made no objection to the form of the information and pleaded not guilty, he cannot wait until he sees whether he is acquitted before he makes the objection which he here seeks to make. Because he failed to object he waived the objection which he might perhaps have made at the proper time. While the information does not affirmatively show that the robbery was committed in Hall county, no objection was made until after the trial. It comes too late at this time. *Emery v. State,* 78 Neb. 547; *Johnson v. State,* 53 Neb. 103; *Korth v. State,* 46 Neb. 631; *Bailen v. Badger Import Co.,* 99 Neb. 24; *Davis v. State,* 31 Neb. 247.

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

AFFIRMED.

ROSE, J., not sitting.

SEDGWICK, J., concurring.

The defendant was tried and convicted on the statutory charge of procuring, aiding, and abetting another in

the commission of a felony. Because, under the evidence, he was present at the time of the commission of the crime, which would render him guilty as principal, it is argued that he was illegally convicted. This court has held that procuring, aiding, and abetting a felony and the commission of it are distinct offenses, instead of being different degrees of the same offense, and that one cannot be charged with one offense and convicted of the other; but it has never held that where one is charged with aiding and abetting a felony, or, as at common law, with being an accessory before the fact, and from the evidence he is found guilty as charged, the mere fact that the evidence not only shows him an aider and abettor, but goes farther and shows him guilty as principal also, would operate to make the charge bad or the conviction void. In other words, the fact that a defendant is guilty of two offenses ought not to release him from the charge of being guilty of either. Common-law precedents have sometimes gone to extremes to protect the rights of persons charged with crime. In *Casey v. State,* 49 Neb. 403, the case cited, the defendant was charged as accessory before the fact and convicted. The case was reversed, not because the defendant was guilty as principal, but because, as stated by Judge Post in his opinion, there was no evidence whatever of any act on the part of the defendant as aider or abettor of the crime charged. In other words, it was held that defendant could not be charged as accessory and convicted as principal. It is also claimed that the information failed to show venue. The information does show that the robbery was committed in Hall county. No complaint of the information was made until after trial. It comes too late at this time.

The propositions of the law which have been adopted by the court in the syllabus are all that is involved in the case.

For the reasons stated above, I concur in the conclusion.

LETTON, J., concurs in separate opinion of SEDGWICK, J.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1917.

JAMES M. WEBB, APPELLEE, V. OMAHA & SOUTHERN INTERURBAN RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 2, 1917. No. 19359.

1. **Carriers:** "RAILROAD COMPANY." A corporation organized under the general railroad statutes and having the power of eminent domain, whose articles of incorporation authorize it to construct and operate a railway from one city to another for the purpose of carrying passengers and freight and to perform all the duties of a common carrier, is a "railroad company," within the meaning of the statute regulating the liability of such companies for injuries to passengers. Rev. St. 1913, sec. 6052.
2. **Appeal:** INSTRUCTIONS. The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law.
3. **Damages:** PERSONAL INJURIES. In an action to recover damages for personal injuries which are permanent and have impaired the earning capacity of the plaintiff, damages awarded for pecuniary loss by reason of his decreased earning power should be based on the probable expectancy of plaintiff's life immediately before the injury, but damages awarded for future mental and physical suffering should be considered in connection with the probable expectancy of plaintiff's life in his injured condition at the time of the trial.
4. **Trial:** INSTRUCTIONS. Though an instruction may not be so specific as it should be, if it is not misleading, it is not cause for reversal, where the complaining party made no request for a more specific instruction.

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

John L. Webster and *Emmet Tinley,* for appellant.

Montgomery, Hall & Young, contra.

MORRISSEY, C. J.

Plaintiff recovered a judgment for $5,000 for injuries alleged to have been sustained while a passenger on the railway operated by defendant from South Omaha to Fort Crook, and defendant appeals.

On plaintiff's behalf there was evidence tending to show that at midnight, July 4, 1911, he boarded a car at Twenty-fourth and N streets in South Omaha to go to Fort Crook; when he got on the car there were no vacant seats; passengers were standing on the rear platform and in the aisles; some one at the rear of the car called for the passengers to move forward, and plaintiff went forward to the front platform, on which several passengers were standing; two men were sitting on the front platform in the doorway on the right side of the car; plaintiff stood between them holding to the handholds; at Twenty-fourth and W streets the track made a 46-degree curve at the foot of a sharp decline which the car approached at 25 miles an hour; when nearing this point plaintiff felt some one tap his arm and ask for his fare, and he reached into his pocket for his ticket, and as he did so the car gave a sudden jerk throwing him out of the car as it was rounding the curve. Plaintiff's head was injured, and he has been unable to work, and is now subject to epileptic fits. His story of the accident is corroborated in part by several other passengers. On defendant's behalf there was testimony tending to show that the accident occurred near Albright station, a considerable distance south of the curve at which plaintiff fixed the scene of the accident; that plaintiff, who was in the middle of the car, pushed forward, saying, "Let me off;" that when he reached the front platform he stood on the lower step between the two passengers seated in the doorway, and said, "I am going to get off here," and jumped off the car, which was moving at the rate of 8 or 10 miles an hour, and fell on his back.

Defendant contends that the court erred in instructing the jury, and that the preponderance of the evidence supports defendant's theory of the case so strongly that, if properly instructed, the jury would have returned a verdict in its favor. In the petition it was alleged that defendant permitted its car to become overcrowded, and that plaintiff was pushed out upon the front platform, and that defendant caused the car to go around a curve at a dangerous, high and negligent rate of speed, and by so doing caused plaintiff to be thrown from the car. In its answer defendant denied that plaintiff was injured at the place and in the manner alleged in his petition, and charged that plaintiff, "without giving any warning of his intention, suddenly walked through the car to the front platform and recklessly and negligently jumped therefrom." After instructing the jury that it was incumbent on plaintiff to prove the allegations of his petition by a preponderance of the evidence, the trial court instructed the jury that, as to defendant's allegation that plaintiff negligently jumped from a moving car, "the burden of proof is on defendant to prove such negligence by a preponderance of the testimony," and that "if, as to such allegation of negligence, the evidence preponderates in favor of plaintiff, or is evenly balanced, then your finding as to such negligence should be for plaintiff." It is contended that this instruction is erroneous, since it requires defendant to disprove plaintiff's allegation of defendant's negligence. Whether the instruction is erroneous need not be decided, since it was not prejudicial to the rights of defendant.

The statute 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." Rev. St. 1913, sec. 6052.

It has been held that this statute is not applicable to a street railroad company using the streets of a city

without excluding the public use thereof, and which transports "passengers from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at street crossings or other places irregularly, as the convenience of its patrons may require, for the receipt and discharge of its passengers." *Lincoln Street R. Co. v. McClellan,* 54 Neb. 672. While the defendant company in some respects partakes of the nature of a street railroad company, it appears to be a "railroad company," within the meaning of the statute. It is a corporation organized under the general railroad laws of this state and has the power of eminent domain. Rev. St. 1913, sec. 5940. It operates a railway from South Omaha to Fort Crook. Its articles of incorporation provide that it "may carry upon its line of railroad, passengers, baggage, freight, express and mail matter, with authority to perform all the duties of a common carrier," and may be operated by electric or by any other motive power. Within the meaning of the statute cited, the defendant company is a railroad company. *Diebold v. Kentucky Traction Co.,* 117 Ky. 146, 63 L. R. A. 637; *Anhalt v. Waterloo, C. F. & N. R. Co.,* 166 Ia. 479; *City of Aurora v. Elgin, A. & S. T. Co.,* 227 Ill. 485; *Knopf v. Lake Street E. R. Co.,* 197 Ill. 212; *Harvey v. Aurora & G. R. Co.,* 174 Ill. 295; *Metropolitan W. S. E. R. Co. v. City of Chicago,* 261 Ill. 624.

Defendant also complains of another instruction, and contends that it permits the jury to find that defendant was negligent in operating the car at a high rate of speed, and assumes that defendant was negligent because its car was crowded. For reasons already given, there was no prejudicial error in this instruction.

It is also contended that it was error to admit in evidence tables of expectancy showing plaintiff's probable expectancy of life at the time of the accident, and it is argued that future damages should be based upon plaintiff's physical condition at the time of the trial. In this connection defendant also complains of the instruction stating the measure of damages. The court instructed the

jury that, if they found that plaintiff's injuries were permanent, and that his ability to work at his usual occupations had been diminished thereby, "you may take that fact into consideration in connection with the probable duration of plaintiff's life, or such portion thereof as he would have been capable of doing such work but for his injuries, and the amount of money he was capable of earning, and, if it appear with reasonable certainty, that plaintiff will suffer pain in the future on account of such injuries, you may also consider that fact." Defendant cites *Hughes v. Chicago, R. I. & P. R. Co.*, 150 Ia. 232, and *Howell v. Lansing City E. R. Co.*, 136 Mich. 432, in which it was held that damages awarded for future mental and physical suffering must be based on the probable expectancy of plaintiff in his injured condition at the time of the trial, and not on his probable expectancy of life prior to the injury. The tables of expectancy were properly admitted to aid the jury in determining the pecuniary loss which plaintiff would sustain by reason of permanent injuries decreasing his earning power. If his earning power was lessened because his probable length of life was shortened by his injuries, he was entitled to damages therefor. On the question of recovery for future mental and physical suffering, the instruction, though not so specific as defendant contends it should be, is not misleading or inaccurate, and defendant made no request for a more specific instruction on this feature of the case.

Prejudicial error has not been shown and the judgment is therefore

AFFIRMED.

SEDGWICK, J., dissenting.

The majority opinion shows that the court instructed the jury that "the burden of proof is on defendant to prove (a certain allegation in the pleadings) by a preponderance of the testimony." The opinion says: "Whether the instruction is erroneous need not be decided, since it was not prejudicial to the rights of defendant." It then discusses the statute, and concludes that the defendant is a railroad

company, within the meaning of the statute, instead of a traction company, and for that reason the opinion concludes that the court might instruct the jury that the burden of proof upon any issue of negligence is upon the defendant.

The defendant answered by pleading the facts in regard to the manner in which it claims the accident occurred, which facts would constitute a special denial of the plaintiff's allegation in his petition, and would also constitute an allegation of contributory negligence.

It is true that in the case of railroads with the right of eminent domain, etc., the presumption as to negligence and as to contributory negligence is different from the presumption in the case of street car traction companies, under our statute and decisions, but there is no difference as to the burden of proof. The burden is in either case upon the plaintiff to prove the defendant's negligence, and is upon the defendant to prove contributory negligence of the plaintiff.

So fas as this answer and the proof thereunder constitutes a denial of negligence on the part of defendant, the burden of proof would be upon the plaintiff; that is, in establishing negligence of the defendant, the plaintiff has the burden of proof, and this is true when the denial of such negligence is a special denial. This answer alleged that the accident happened at a different place and in a manner altogether inconsistent with defendant's negligence as the cause of the accident. This, of course, is a special denial of negligence of defendant, and did not shift the burden of proof.

It seems to me to be a mistake to say that, because the defendant is a railroad company instead of a street car company, "whether the instruction is erroneous need not be decided, since it was not prejudicial to the rights of defendant."

HAMER, J., dissenting.

This is an action by a passenger to recover damages for alleged negligence upon the part of the defendant railway

company claimed to have resulted in personal injuries to the plaintiff.

As I understand the facts in this case, the plaintiff boarded one of the defendant's cars at Twenty-fourth and N streets in South Omaha, at 12 o'clock at night. He was on the way to Fort Crook. He went through the car and found two men sitting on the platform of the car with their feet out on the steps. He described these men as Fred Jenkins and Grostephan. They were soldiers. The plaintiff was himself a soldier. The plaintiff testified that he had a coupon book in his hand, and that while he was there at the front end of the car he felt a jerk and a lurch of the car. Immediately, according to his own story, he was thrown from the car or fell off. There is strong testimony which tends to show that the plaintiff got ready to get off the car, and then that he did get off. Grostephan appears to have so testified. Ross Collins, who was not a soldier, as Grostephan was, but was merely a passenger on the car testified that Webb said "Let me off here," and that then Webb jumped off. Grostephan described Webb as standing with one foot on the step of the car apparently just ready to get off. Immediately after that he got off. Webb does not deny that he first stood behind Jenkins and Grostephan, and that he then crowded in between them. Mrs. Beckstead testified that the car was moving when the plaintiff got off, and that she saw this man (the plaintiff) rolling in the street. Her testimony was corroborated by the testimony of Wilber Kast, who testified that he saw a man dressed in a soldier's uniform roll toward the pavement. Gus Bachmann also saw the man when he was rolling in the street. These witnesses were passengers, and their evidence tends to show that the plaintiff got off the car voluntarily, or that he carelessly stood at the front end of the car with one foot on the car step and another foot on the platform, and so may have fallen to the ground.

He was a young man and a soldier and his muscles should have been strong and hard. It is difficult to see how he was thrown from the car unless he was himself careless and negligent and refused to support himself by

taking hold of the guard-rail or the corner-post or the handholds. The defendant railway company denies that the plaintiff was thrown from the car at a certain street intersection, and produces testimony tending to show that the plaintiff continued to ride, and that he went a further distance of about 4,000 feet beyond where it is claimed by the plaintiff that he left the car; that the plaintiff then voluntarily stepped off or jumped off while the car was moving. Under the evidence produced on behalf of the defendant, the plaintiff may have accidentally fallen from the car by reason of the fact that it was moving rapidly, and because the plaintiff did not support himself as well as he might have done by holding on to certain supports in the front end of the car. The plaintiff is described as standing with one foot upon the car step and with another on the platform of the car. He does not dispute that he stood in this way. Of course, it is for the jury to determine under proper instructions how the plaintiff left the car. Fred E. Jenkins was a witness on behalf of the plaintiff. He was examined, and in his testimony said that he would not make the statement that Webb did not say he was going to get off "down here a little way." He described the plaintiff as going through the car and as stepping down on the lower step; that Webb left the car with his back in the direction that the car was going. He knew that Webb had one foot on the platform, but was uncertain whether the other foot "was on the upper or lower step."

The fourth instruction given by the court reads: "The defendant alleges that the injuries, if any, to plaintiff were caused by plaintiff's own negligence, and that plaintiff was negligent in that he jumped from a moving car. As to this allegation of negligence, the burden of proof is on defendant to prove such negligence by a preponderance of the testimony. If defendant has so proved, then your verdict should be for the defendant."

It will be seen that in the foregoing instruction the burden of proof is put upon the defendant. This permits the plaintiff to recover without establishing his case. The last sentence in this instruction permits the defendant to

recover only upon condition that the defendant proves the negligence of the plaintiff by a preponderance of the evidence. Under this instruction the jury might be in very much doubt as to whether the plaintiff had done anything to establish the fact that he had exercised the prudence and care of an ordinary person.

That the burden is still upon the defendant is again reiterated in the last clause of instruction No. 5, which reads: "As to defendant's allegation of plaintiff's negligence, if, as to such allegation of negligence, the evidence preponderates in favor of plaintiff, or is evenly balanced, then your finding as to such negligence should be for plaintiff." This in effect tells the jury that they may be uncertain when the evidence is all in as to whether the evidence is on the side of the plaintiff or on the side of the defendant, and that it may be evenly balanced, and that it is the duty of the jury to find for the plaintiff, notwithstanding the fact that the plaintiff has failed to establish his case, and has only succeeded in establishing an even balance.

I contend for the following: (1) An instruction which permits the plaintiff to recover without establishing his case by a preponderance of the evidence is clearly erroneous and so prejudicial that where an instruction of that kind is given the judgment should be set aside. (2) Where the evidence leaves it uncertain as to whether the plaintiff lost his balance and fell from the car when it was moving or voluntarily stepped off the car when it was so moving, the instructions of the court should so define the issues that the jury may understand that they are to find from the evidence whether the plaintiff voluntarily left the car or was thrown from it because of his negligence in standing in an unsafe place. (3) It is improper for the court, where the evidence shows that the plaintiff was probably thrown from the car because of his negligence in standing on the platform and steps when the car was in motion or voluntarily stepped from it, to instruct the jury that the burden of proof was upon the defendant to establish its defense. It is for the court to tell the jury that the burden

of proof remains upon the plaintiff to establish his case by a preponderance of the evidence, and that if he fails to do so he cannot recover. It is misleading to assume in the instructions to the jury that the defendant must prove something which the evidence leaves in doubt. It is the duty of the plaintiff to show over and above all the facts shown by the evidence that he is entitled to recover. (4) If the plaintiff stood out there on the platform at the front end of the car without holding onto such supports as were within his reach, and if one foot was on the car steps while the other was upon the platform, he may have been thrown from the car by reason of his own negligence, or, if there was negligence on the part of the conductor running the car, then the accident was due to contributory negligence; but if the plaintiff voluntarily stepped from the car he exercised his own will, and then the cause of his injury was his own independent act. (5) The district court appears to have erred because he misconceived the distinction between contributory negligence and the plaintiff's independent act of negligence in jumping from the car, and in which act, if it occurred, the defendant did not participate. (6) The district court appears to have treated the act of the plaintiff as contributory negligence if the plaintiff stepped off the car or jumped off it, and this way of treating the plaintiff's act as contributory negligence implied to the jury that the defendant had done something which contributed to the injury which he received, and for which they could render a verdict against the defendant. As there cannot be contributory negligence unless the plaintiff and the defendant each furnished a share of the same, it was clearly error upon the part of the court to tell the jury or to suggest to the jury that the defendant was liable. (7) The court should have instructed the jury that contributory negligence does not exist except in a case where there is evidence which tends to establish the negligence of the defendant, and also evidence which tends to establish co-operation on the part of the plaintiff with the negligent acts of the defendant. If the plaintiff jumped off the car, then such act was a volun-

tary act of negligence upon his part, for which the defendant could not in any way be held responsible. It was not contributory negligence, but plaintiff's voluntary act. The court should have so told the jury. (8) The prejudicial error in this case is that the court neglected and refused to submit to the jury the theory of the defendant's case. The jury should have been told that, if the defendant voluntarily got off the car when it was running and so got hurt, then he could not recover; or that, if he stepped off and did so in a negligent manner when the car was running, then he could not recover. (9) The court erred because he failed to tell the jury in any way that, if the plaintiff's injuries were the result of his own independent act, then the defendant was not liable, and that the plaintiff was responsible for the injuries which he brought upon himself. (10) There is a difference between contributory negligence and a case where the injury is the result of the plaintiff's own act, pure and simple. There can be no illustration plainer than this case itself. If the plaintiff stepped off the car when it was in motion or jumped off it, then his injury is due to the fact that he did so.

If the plaintiff by his own independent voluntary action jumped off the car or stepped from the car when it was in motion, that is the end of his case, although it does not follow that there was any contributory negligence upon the part of the defendant, but the defendant is not liable for the injury which the plaintiff brought upon himself. The district court made a distinction between the voluntary act of the plaintiff in leaving the car while it was in motion and the act of sitting or standing at the front end of the car with one foot on the platform and the other foot on one of the steps of the car. The trial court seems to have overlooked the wide difference that there is between contributory negligence and that of voluntary action upon the part of the plaintiff, which does not need any contributory negligence upon the part of the defendant to bring about an injury. The idea of the trial court as it has found expression in the instructions is that in any event the defendant is guilty of something: Perhaps, first,

that it permitted the car to be filled up; perhaps, second, that it ran the car too rapidly; perhaps, third, that there were rough places in the track. In any event no one may read these instructions without coming to the conclusion that the trial judge was unfortunate in the language used and could not have used such language without prejudicing the defendant.

If the rule contended for by the trial court is adopted by this court, and it seems to have been adopted in the majority opinion, then it will be seen that no statement concerning the facts of the accident may be given by a defendant in a personal injury case hereafter to be tried, and that in each case the only safe thing to do upon the part of the defense is to file a general denial. The rule of law which places the burden of proof upon the defendant to prove contributory negligence is distinguished from an act of independent negligence upon the part of the plaintiff by which the injury is brought upon himself. *Cincinnati Traction Co. v. Forrest,* 73 Ohio St. 1; *Cincinnati Traction Co. v. Stephens, Adm'r,* 75 Ohio St. 171.

In *McCarthy & Baldwin v. Louisville & N. R. Co.,* 102 Ala. 193, 48 Am. St. Rep. 29, it is said: "Contributory negligence exists only when the negligence of both parties has combined and concurred in producing the injury."

In *Cooper v. Georgia, C. & N. R. Co.,* 56 S. Car. 91, the court defined contributory negligence, following 7 Am. & Eng. Ency. of Law (2d ed.) p. 371: " 'Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.' It is thus seen that contributory negligence by a plaintiff can never exist except when the injury has resulted from the negligence of defendant as a concurring proximate cause."

In *Louisville & N. R. Co. v. Sights,* 121 Ky. 203, the court defined contributory negligence as follows: "Contributory negligence on the part of the plaintiff necessarily assumes negligence upon the part of the defendant."

In *Birsch v. Citizens Electric Co.*, 36 Mont. 574, the court said: "Contributory negligence on the part of plaintiff presupposes negligence on the part of the defendant. Beach, Contributory Negligence (2d ed.) sec. 64; *Wastl v. Montana Union R. Co.*, 24 Mont. 159; * * * *Moakler v. Willamette Valley R. Co.*, 18 Or. 189, 6 L. R. A. 656, 17 Am. St. Rep. 717; *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372. In *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190, it is said: 'Properly speaking, contributory negligence, as the very words import, arises when the plaintiff as well as the defendant has done some act negligently, or has omitted through negligence to do some act, which it was their respective duty to do, and the combined negligence of the two parties has directly produced the injury.' It goes without saying, then, that an answer which denies any negligence on the part of the defendant, and alleges that the injury resulted wholly from plaintiff's negligence, does not plead contributory negligence."

The foregoing decisions sustain the proposition that it was error for the trial court to instruct the jury that the burden of proof was on the defendant to establish by a preponderance of the evidence that the plaintiff jumped from a moving car. Also, it was erroneous to instruct the jury that, if the evidence was evenly balanced on that point, then the verdict should be for the plaintiff.

LEWIS F. FAIRCHILD, APPELLANT, V. JOHN H. WILSON, APPELLEE.

FILED OCTOBER 2, 1917. No. 19615.

1. **Appeal:** MOTION FOR NEW TRIAL. If the motion for a new trial does not challenge the attention of the trial court to the inadequacy of the verdict, the point will not be considered on appeal.

2. ———: INSTRUCTIONS. "Instructions relating to the right to recover, and having no bearing on the *quantum* of damages, cannot be complained of by the plaintiff when the verdict was in his favor, and unsatisfactory only in its amount." *Hankins v. Majors*, 56 Neb. 299.

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

Wilcox & Halligan, for appellant.

W. E. Shuman, contra.

MORRISSEY, C. J.

This was an action for damages growing out of an assault with a deadly weapon. The jury returned a verdict in favor of plaintiff. Plaintiff filed a motion for a new trial, alleging numerous errors on the part of the trial court, but not complaining of the amount of the recovery. The motion for a new trial was overruled and judgment entered on the verdict, and plaintiff has appealed.

In the brief a number of the instructions are attacked, but no complaint is made of the instruction defining the measure of damages. It is not necessary to discuss seriatim the errors alleged. Every disputed question was, by the verdict, resolved in favor of plaintiff. The sole matter of which the plaintiff might complain was the amount awarded. This was not called to the attention of the trial court by the motion for a new trial, nor is it assigned, as required by the rules of the court, in the brief. It follows that the inadequacy of the verdict cannot be considered on appeal.

The objections to the instruction given fall within the rule announced in *Hankins v. Majors,* 56 Neb. 299: "Instructions relating to the right to recover, and having no bearing on the *quantum* of damages, cannot be complained of by the plaintiff when the verdict was in his favor, and unsatisfactory only in its amount."

The judgment is

AFFIRMED.

LEE S. ESTELLE, APPELLEE, V. DAILY NEWS PUBLISHING COMPANY ET AL., APPELLANTS.

FILED OCTOBER 2, 1917. No. 20044.

1. **Appeal:** INSTRUCTIONS: REVIEW. Where instructions have been given by the district court upon the request of one of the parties to the suit, he will not afterwards be heard to complain in this court on appeal that the instructions were erroneous.
2. **Libel:** QUALIFIED PRIVILEGE. The law with regard to qualified privilege, and the necessary elements which must be shown in order to uphold a verdict for libel in such a case, laid down in the former opinion, is adhered to.
3. **Instructions** examined, and *held* to be in accordance with the law of the case.
4. **Libel:** DAMAGES: EVIDENCE. The condition and situation in life of one injured by a libel may be shown in evidence, and may be considered by the jury upon the question of the amount of damages.

APPEAL from the district court for Dodge county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Brown, Baxter & Van Dusen, Courtright, Sidner & Lee, Gurley & Fitch, Elmer E. Thomas and *Arthur G. Wray,* for appellants.

Mahoney & Kennedy, Frank Dolezal and *Stout, Rose & Wells, contra.*

LETTON, J.

It is unnecessary to set forth the facts in this case, since they are fully stated in the opinions upon a former appeal, reported in 99 Neb. 397. At that time a judgment in favor of the plaintiff was reversed and the cause remanded for trial. In the majority and concurring opinions the issues to be submitted to the jury upon another trial were fully stated. Many questions discussed in the briefs on this appeal were argued by counsel and disposed of by the opinion and judgment. It is unnecessary, therefore, to restate or reconsider the propositions of law thus settled.

On a second trial the plaintiff recovered a judgment for the sum of $10,000 against each of the defendants, and this appeal results. A large number of assignments of error have been made, but only a few propositions have been argued in the briefs or by counsel orally, and, in accordance with the settled rule of this court, those only will be noticed.

It is argued that the petition does not state a cause of action, that the publication on its face was an innocent campaign appeal, and is not susceptible of a libelous interpretation. This point was determined upon the former appeal, and it was the view of all the judges that the petition stated a cause of action.

It is next said: "Occasion determines the question of privilege. If the occasion exists, actual malice must be shown before the plaintiff can recover"—and in this connection that the cause "was submitted to the jury under instructions which left the jury as much at sea with reference to the rules of law in arriving at a verdict as if no instructions had been given." An examination of the instructions shows that the district court followed the decision of this court with reference to the questions to be submitted to the jury. Not only were such propositions submitted in the abstract, but by making reference to the facts the court directly called attention to the specific questions to be determined, in accordance with the law laid down by this court; and, furthermore, most of the instructions requested by the defendants were given either verbatim or in substance. The material facts on which the liability of the defendants depended were clearly stated.

The complaint is made that the instructions told the jury that the only inquiry for them to make was to determine whether the publication was made maliciously, and whether the readers would understand it to charge plaintiff with corruption or improper motives in his office, and practically informed the jury that they were concerned neither with the truth nor falsity of the article. It is also said that nowhere did the trial judge instruct the jury that it was necessary that they should find actual malice

on the part of the defendant before they could return a verdict for the plaintiff, and that the jury were given to understand that, if the publication charged improper motives and was malicious, yet plaintiff should recover even though the charge was true. The charge, as a whole, is not vulnerable to these criticisms. By instruction No. 17, given by the court upon its own motion, the jury were told that if they believed that the matter published was true, and that it was published for good motives and justifiable ends, the plaintiff could not recover. This statement was repeated in instruction No. 4, requested by the defendant Fellman, and included by the court in its instructions to the jury, and in instruction No. 7, requested by both defendants, and included by the court in its charge to the jury. In other instructions, included by the court in its charge and given at the request of the Daily News Publishing Company, the jury were told, in substance, that the fitness and qualifications of plaintiff "for the office which he sought and his record as judge were subjects for the freest scrutiny and investigation and comment, either by the publisher of a newspaper or by a voter or other person having an interest in the matter, and that much latitude must be allowed in the publication, for the information of the voters, of charges affecting his fitness for the office, so long as it is done in good faith and without actual malice nor will such publication be ground for damages without proof of actual malice on the part of him who published it, although it may be harsh, unjust and unnecessarily severe, provided said publication does not charge the plaintiff with a crime or with personal or official corruption." And again, in instruction No. 10, given at the request of the same defendant, it is said: "In determining whether or not defendant, the Daily News Publishing Company, was moved by actual malice in making the publication complained of, the jury should examine," etc. These instructions embody the principles of law contended for by the defendants and were given at their request. Whether strictly accurate or not, they are in no position to complain now. Upon a comparison of the charge given by the

court with the instructions requested by each of the defendants and refused, we find that every instruction requested which states a correct proposition of law was given either verbatim or in substance by the court, so that they have no room for complaint on this score. Much of the argument as to the instructions is in reality an attack upon the soundness of the law laid down in the former opinion. The questions raised were then considered and were determined adversely to appellants.

It is contended that the plaintiff's physical illness was not the direct result of the Fellman letter and was too remote to be considered by the jury in assessing damages. This contention is based upon the fact that the publication was made on the 14th of August, 1913, and no physician was called until about the 8th or 10th of September. It is shown by undisputed testimony that the first knowledge plaintiff had of the publication was by hearing his name mentioned by newsboys on the streets on the afternoon of August 14th; that he bought a paper and read it on his way home; that he suffered a severe nervous shock from the perusal of the letter; that this disturbed and interfered with his sleep, affected his appetite, and lessened his ability to work; and that these conditions progressively increased until early in September, when he was compelled to call a physician. The testimony in this respect was sufficient to justify the submission of this question to the jury.

The court gave the following instruction, on its own motion, with respect to the measure of damages: "If you find for the plaintiff you will take into account plaintiff's position in life, and who and what the third ward crowd was, as generally understood by the public, as shown by the evidence, and, in the light of these circumstances, and all the other circumstances proved at the trial, consider such damages or injury to his reputation as was caused by the publication, the mental anguish, grief, shame, humiliation or disgrace, and mental suffering, if any, caused by it, and you will allow him for said injuries, if any, such sum as would fairly compensate him for the

injury and damage sustained. You will allow no damage by way of punishment of the defendants."

The defendant Daily News Publishing Company requested the following instruction, which was given by the court as No. 13: "In determining whether or not the publication complained of caused the plaintiff to become ill, you have a right to consider the length of time lapsing between the publication and the illness, and all other facts and circumstances in evidence touching the publication, its character and scope, the business and occupation of the plaintiff during that time, and, before you can assess any damages sustained by the plaintiff for being ill, you must be convinced that said illness was caused by the publication complained of, and by no other thing."

The latter instruction was excepted to by the Daily News Publishing Company, after the charge was given, and the giving of this instruction is now assigned as error. The rule is that one who procures the giving of an instruction will not afterwards be heard to say it was erroneous. The argument of defendant upon this point is as follows:

"The reason for excepting to the instruction which the defendant had requested was that, the court having refused to strike out plaintiff's testimony in regard to his illness, the defendant supposed, of course, that he intended to submit the question of plaintiff's physical illness as one of the elements of damage; but, much to defendant's astonishment and surprise when the court gave his own instructions, he entirely excluded from the consideration of the jury the physical illness of the plaintiff as one of the elements of damage. * * * Had the defendant been apprised of the theory upon which the court was going to submit the case to the jury, so far as the measure of damages was concerned, it would not have offered instruction No. 13; and, as soon as the theory upon which the court proposed to submit the case to the jury was disclosed by the court's instructions, the defendant promptly excepted to the giving of the instruction which it had very naturally requested in view of the ruling of the court upon the admissibility of the testimony with reference to plaintiff's

physical illness. That defendant should not be bound by this instruction under the circumstances seems too clear for argument. But even under such an instruction the court must be satisfied that the verdict of the jury was in the face of the evidence, so far as it took into consideration the illness of the plaintiff as the direct, immediate and proximate effect of the publication."

The argument is ingenious, but not convincing. No doubt the court would, if requested, have informed counsel of the instruction it was about to give relating to the elements of damages. Besides, considering the charge as a whole, we are satisfied that the evidence sustains the finding that physical illness was the proximate result of the publication.

Defendant Fellman has filed a brief devoted in the main to the contention that the decisions of this court are in conflict as to the so-called "narrow" or "liberal" view of the law of libel, as applying to publications with reference to candidates for public office, and he asks that we follow the "liberal" rule announced in *Atkinson v. Detroit Free Press Co.*, 46 Mich. 341, and *Coleman v. MacLennan*, 78 Kan. 711, 20 L. R. A. n. s. 361.

Instructions No. 15, given on the court's own motion, and defendant's No. 3, heretofore alluded to on the question of malice, when considered together, allow discussion and criticism of the official record of the plaintiff as a candidate for judge of the district court, or of his fitness for the office to which he sought to be elected, and when considered with other instructions only allow recovery where false statements have been made maliciously, and not with good motives, or for justifiable ends. What more liberal rule than this could the defendants in reason ask for? In fact, they did not ask in the tendered instructions for any greater latitude. The rule laid down in the former opinion in this case is in consonance with that of most courts following the so-called liberal rule. In fact in the *MacLennan* case an instruction that, if the jury found "that said article was published with a malicious intent to wilfully wrong and injure plaintiff, then the fact that the

article is a privileged one would constitute no defense to this action," was given. We are not inclined to adopt a rule which practically takes away all responsibility for the malicious publication of that which is knowingly false, libelous and defamatory. The views of the court on this question have been clearly set forth in the opinion of Judge Sedgwick on the former appeal and will not be restated.

It is insisted that the verdict is grossly excessive, and a number of instances where verdicts of lesser amounts have been set aside or remittiturs ordered have been cited. The plaintiff in this case was nearly 65 years of age. He had lived in Nebraska since 1872. In 1884 he was elected district attorney for the judicial district in which he lived. He was appointed by the governor to fill a vacancy as judge of the district court. Afterwards, he was elected to the same position, and has held that position constantly since January, 1900. He has been department commander of the Grand Army of the Republic for the district of Nebraska. He was inspector general of the national organization. Between terms in his court work he has served engagements as a lecturer upon the Chautauqua platform. Having occupied these public positions, Judge Estelle has been more or less in the public eye in the state of Nebraska and elsewhere for many years. At the time the libel was printed he was occupying judicial office and was a candidate for reelection. The publication charged him with being associated with "the third ward crowd," which the proof shows was largely composed of thieves, gamblers, pimps, and ballot-box stuffers. The evidence shows with respect to the "Erdman case" mentioned in the publication that instead of assisting in a "frame-up" to send Erdman to the penitentiary, which is a fair implication from the published statement, Judge Estelle refused to accept a plea of guilty from Erdman when qualified by the statement that he was not able to fight the county. He appointed counsel for the defense and allowed compulsory process for witnesses. In a number of other material matters the evidence disproves the imputations and statements of the publication. The condition and station in life of one injured by a libel may

be such as greatly to aggravate the injury, and a jury is entitled to take this into account in fixing the amount of recovery. 25 Cyc. 508, and cases cited in note. The case has been twice tried and the former verdict was larger than at this trial. Under all the circumstances we are of opinion that the verdict is not excessive. *Sweeney v. Baker,* 13 W. Va. 158; *Duke v. Morning Journal Ass'n,* 120 Fed. 860; *Minter v. Bradstreet Co.,* 174 Mo. 444; *Crane v. Bennett,* 79 N. Y. Supp. 66; *Young v. Fox,* 49 N. Y. Supp. 634; *Cook v. Globe Printing Co.,* 227 Mo. 471.

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

AFFIRMED.

ROSE, J., not sitting.

IN RE ESTATE OF JOHN O'CONNOR. JOHN T. CULAVIN, APPELLANT, V. JAMES B. O'CONNOR ET AL., APPELLEES.

FILED OCTOBER 2, 1917. No. 19422.

1. **Wills: CONTEST: EXPERT EVIDENCE: QUESTIONS FOR JURY.** In the contest of a will on the ground of forgery, the value of expert testimony on handwriting depends in a great measure on the reasons for the opinion expressed; and the weight of such testimony and the credibility of the witnesses are questions for the jury, where there is a substantial conflict in the evidence on the contested issue.

2. ———: ———: **FORGERY: SUFFICIENCY OF EVIDENCE.** In a proceeding to probate a will, contested on the ground of forgery, a finding by the jury in favor of contestants on that issue *held* to be supported by sufficient evidence, as outlined in the opinion.

3. **Evidence: IDENTIFICATION OF SIGNATURE.** In the contest of a will on the ground of forgery, the failure of the trial court to permit a witness to identify a disputed signature of a deceased person was not abuse of discretion amounting to error, where the foundation for the rejected testimony was a statement by the witness that 20 years before he had seen a genuine signature of such person, without any showing that the witness had formed an idea of the character of the genuine handwriting.

4. ———: ———. In the contest of a will on the ground of forgery, the opinion of a nonexpert witness on the genuineness of a disputed signature may be rejected, if based alone on a comparison of the disputed and genuine documents in evidence, the jury in that respect being as competent as the witness.

5. ———: EVIDENCE AT FORMER TRIAL: ADMISSIBILITY. "Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause between the same parties is admissible if otherwise unobjectionable." *Jerich v. Union P. R. Co.*, 97 Neb. 767.

6. ———: ———: ———. Where the circumstances justify the reading of the testimony of an absent witness, all of his testimony on a former trial may be read, if otherwise admissible, though his cross-examination might have been waived had he been present at the second trial.

7. WILLS: CONTEST: PROOF OF SIGNATURES: REBUTTAL EVIDENCE. In a proceeding to probate a will, contested on the ground of forgery, where the subscribing witnesses are dead, proof of the signatures of the subscribing witnesses and of testator is necessary, and proponent should introduce his evidence as to the genuineness of such signatures, and the trial court in its discretion may refuse to permit him, on rebuttal, to offer additional affirmative evidence on that issue.

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

Duncan M. Vinsonhaler, for appellant.

F. P. Olmstead, James E. Addie and *McCreary & Danly, contra.*

Willis E. Reed, Attorney General, Dexter T. Barrett and *Sutton, McKenzie, Cox & Harris, amici curiæ.*

ROSE, J.

This is a proceeding commenced in the county court of Adams county May 12, 1914, to probate an instrument described as the last will of John O'Connor, who died in Hastings, August 17, 1913. John T. Culavin is proponent and in the document offered by him for probate he is named as sole beneficiary. Contestants claim to be heirs of O'Connor and assail the purported will as a forgery. The county court sustained the instrument as genuine, but on

appeal to the district court a jury rejected it. From a judgment on the verdict in favor of contestants, proponent has appealed.

The principal question for review is the sufficiency of the evidence to sustain the verdict, which contains in effect a finding that the instrument offered for probate is a forgery. Throughout the record the purported will is described as "Exhibit A." J. H. Culavin and J. K. Scott, who appear on the face of the disputed writing as subscribing witnesses, are dead. Their signatures were identified at the trial by witnesses who testified to having seen them write their names, but on the issue as to handwriting proponent's witnesses were contradicted by witnesses for contestants. Proponent testified in substance: Exhibit A was executed in the office of the Northwestern Hotel in Hawarden, Iowa, February 25, 1887. It was written by O'Connor himself, who used a modified copy prepared by proponent under O'Connor's direction, the modified copy having been prepared from a draft made the previous day by J. A. Ashley, a real estate agent, who was consulted by O'Connor. Exhibit A was delivered to proponent by O'Connor April 1, 1887, and was afterward kept in the former's possession. This is the testimony of proponent, and he explains the delay in offering the instrument for probate by saying that after O'Connor's death he could not find the will until April, 1914, but then found it folded in a paid-up insurance policy. There is testimony tending to corroborate proponent's story of the execution of the will and of his possession thereof during O'Connor's lifetime. Other testimony of proponent tended to prove that he was a nephew of O'Connor; that the latter moved to Hastings in 1876; that he died there August 17, 1913; and that he had visited Hawarden February 25, 1887. On behalf of contestants there is testimony tending to prove that the O'Connor who died in Hastings, August 17, 1913, was not in Hawarden February 25, 1887, and in other respects casting suspicion on testimony of proponent.

The sufficiency of the evidence to sustain the verdict, however, does not depend alone on proofs of the character

indicated. Other proofs in the form of documents and expert testimony are more satisfactory. The disputed writing was introduced in evidence and speaks for itself in comparison with checks and letters covering a period of years beginning prior to the date of the purported will. These checks and letters are conceded to be genuine. For purposes of comparison exhibit A, the disputed instrument offered for probate, exhibit DD, a genuine letter written by O'Connor to proponent ten months before the purported will is alleged to have been executed, and exhibit CC, a genuine letter written by O'Connor nine years after the alleged execution of the disputed instrument, are reproduced herein.

EXHIBIT A.

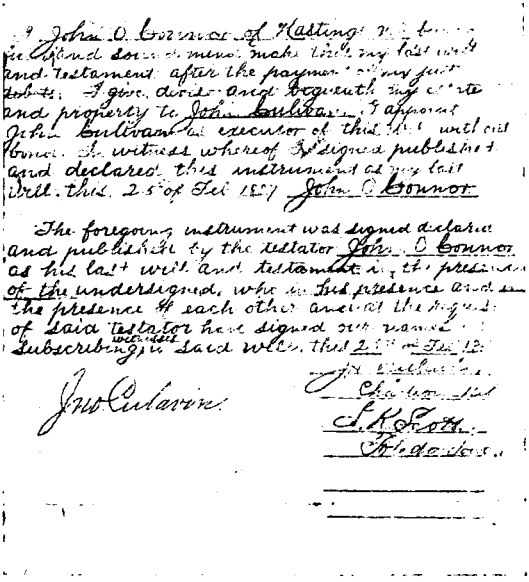


EXHIBIT DD.

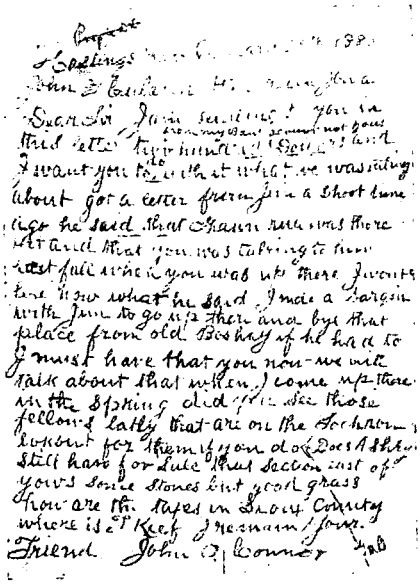
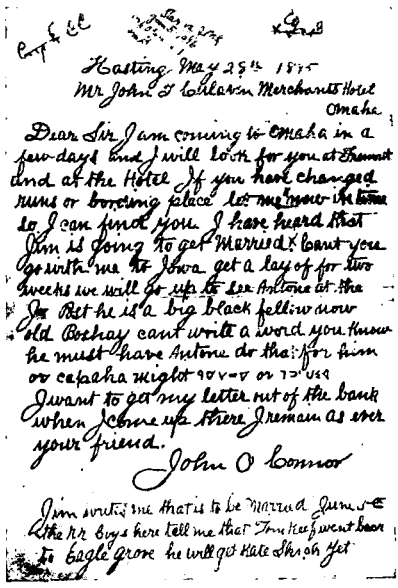


EXHIBIT CC.



Identifying characteristics and habits revealed by the letters reproduced are traceable in many other genuine documents introduced in evidence. Witnesses for contestants agree with proponent that whoever subscribed the name "John O'Connor" to Exhibit A, wrote the instrument itself, including the attestation clause. On the face of the disputed and the genuine writings, differences in the handwriting are obvious. Many of the earmarks which characterize O'Connor's handwriting as disclosed by the genuine documents cannot be found in the alleged will. The genuine writings disclose a uniformity of style at variance with the instrument offered for probate. If O'Connor wrote that instrument, in penning it he overcame habits which previously and subsequently controlled him in writing checks and letters, and he also concealed earmarks which are obvious in his other writings. Habits formed by O'Connor in using a pen or pencil are revealed in all of the genuine instruments, but they do not appear to have influenced the writer of the disputed will.

Two expert witnesses called by contestants expressed the opinion that O'Connor did not write the disputed instrument, and they gave reasons for their conclusion. Some of the reasons for the opinion that the offered will is a forgery follow: In handwriting there is a difference in the general appearance of the disputed and the genuine writings. There is also a variance in the slant of the letters and in the spacing. In the capital letter "I" the lower loop is below the base line in the genuine and above it in the disputed writings. In the genuine, the small letter "a," when not the first letter in a word, is not joined to the preceding letter, while it is otherwise in the disputed writing. In the genuine, the cross-mark of the "t" generally appears to the right of the stem, while it generally crosses the stem in the purported will. The two parts of the letter "k" are generally separated in the genuine documents and connected in the disputed will. In the genuine, the apostrophe in the name "O'Connor" is generally made with an upward movement, and with a downward movement in the disputed will. The difference in the letter "x" is marked. There are also other indications of forgery.

The qualifications of the expert witnesses called by contestants are challenged, but they both show candor and scientific knowledge. The experts did not confine themselves to mere opinion, but supported their conclusion by reasons which appeal to the judgment. Such testimony on the subject of handwriting, when considered with genuine and disputed writings, may amount almost to a demonstration. *Venuto v. Lizzo,* 132 N. Y. Supp. 1066. The testimony in the present case recalls the following observations:

"Handwriting is an art, concerning which correctness of opinion is susceptible of demonstration, and I am fully convinced that the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness. That demonstration will naturally consist in the indication of similar characteristics, or lack of similar characteristics, between the disputed writing and the standards, and the value of the expert's conclusion will largely depend upon the number of those characteristics which appear or are wanting. The appearance or lack of one characteristic may be accounted to coincidence or accident, but, as the number increases, the probability of coincidence or accident will disappear, until conviction will become irresistible." *Gordon's Case,* 50 N. J. Eq. 397, 422.

To refute the proofs and inferences of forgery, proponent points to the apparent age of the purported will—a fact conceded by a witness who testified as an expert on behalf of contestants. In this connection it is argued that there was no motive for forging a will February 25, 1887. The argument is not convincing. There is testimony tending to prove that O'Connor had recently abandoned a life of adventure among Indians; that as a cobbler he settled among strangers at Hastings and there led a quiet life for a quarter of a century; that at some time by some means he had accumulated considerable property. His life may have been in peril. With its secrets proponent was familiar. Under the circumstances the jury were not required to find that the apparent age of the document and the lack of motive disproved forgery.

In the argument counsel attached importance to the fact that "Culavin," the name of proponent, is misspelled in the alleged will. He argues that proponent would have spelled his own name correctly in forging a will for his own benefit. The argument is not conclusive. Open minds of jurors should reason from all of the sources of legitimate inference in connection with the misspelled name. Motives prompting a forgery may also suggest a means of avoiding suspicion. O'Connor knew how to spell proponent's name. He wrote it correctly in the genuine letter marked "Exhibit DD." This was ten months before the date of the purported will. He had not forgotten how to spell "Culavin" nine years later when the genuine letter marked "Exhibit CC" was written. According to proponent's testimony, O'Connor in drawing the will followed a copy prepared by proponent himself. In examining the will offered for probate, it will be observed that proponent's name is twice misspelled therein, but that halting and erasing attended its misspelling the second time. On an envelope postmarked two months after O'Connor's death, the name "Culavin" is written "Culivan," but in committing this error the writer evidently wrote the last syllable correctly and afterward changed the "i" to "a"—what seems to have been done in the writing of the purported will offered for probate. In an instrument dated August 1, 1913, and purporting to be O'Connor's will, "Culavin," beneficiary, is also misspelled. It is likewise misspelled in a letter of the same date, denounced by experts as a forgery, the letter containing the statement that O'Connor had made a will naming Culavin as beneficiary. The erasure in the misspelling of the name and the misspelling itself may have had a sinister import when considered by the jury. There is a reasonable aspect, therefore, in which the misspelling does not strengthen proponent's case.

The credibility of the witnesses whose testimony is conflicting in regard to the genuineness of the will offered for probate and the weight to be given to the testimony of those called as experts in handwriting were questions

for the jury. *Davis v. Lambert,* 69 Neb. 242; *Hayden v. Frederickson,* 59 Neb. 141.

The conclusion is that the evidence is sufficient to sustain the finding of the jury that the instrument offered for probate is not the last will of the John O'Connor who died in Hastings, August 17, 1913.

A ruling of the trial court in refusing to permit a witness for proponent to testify to the genuineness of the signature of Scott is challenged as erroneous. Though the witness testified to having seen the signature of Scott, the ruling assailed must be sustained for the following reasons: The witness had seen Scott's signature only twice, and this was 20 years or more before the trial. He did not testify that he had formed an idea of the character of Scott's handwriting. There was, therefore, no abuse of discretion on the part of the trial court—an essential element of error. 1 Wigmore, Evidence, sec. 694.

Another assignment of a similar nature is directed to the rejection of offered proof by another witness who was not permitted to testify to Scott's signature. This witness did not qualify as an expert in handwriting, but he was asked to express an opinion on the genuineness of Scott's signature, basing his answer on a comparison with two signatures which he had seen Scott write. These signatures were in evidence. In making the comparison the witness, not being an expert on handwriting, was no better qualified than the jury to express an opinion based on comparison of signatures. The law has been stated thus: "Where specimens are brought into court, there is no need of any opinion based on them except from persons skilled in handwriting; for the jury can judge as well as any other laymen." 3 Wigmore, Evidence, sec. 1997.

Another point argued is based on the reading of the testimony of a witness who, as an expert in handwriting, had testified in the county court. During the trial in the district court the expert was in Chicago, engaged in a hearing requiring his attendance for two weeks. In permitting the reading of this testimony under the circumstances, the trial court did not err. *Jerich v. Union P. R. Co.,* 97 Neb. 767; 2 Wigmore, Evidence, sec. 1404. It is

argued, however, that error was committed in allowing the cross-examination and the redirect examination of the expert to be read in evidence over the objection of proponent, since, had the witness been on the stand, cross-examination could have been waived. The argument is technical and the rule invoked by proponent might conceal facts essential to a just decision. The purpose of a trial is to discover the truth and administer justice. Where competent testimony on a former trial came legally from proper sources of information, it should not be rejected on a second trial of the same case merely because one party rather than the other made the inquiry which developed the truth. *Ulrich v. McConaughey,* 63 Neb. 10. The cross-examination to which objection is made consisted principally of questions and answers relating to the competency of the expert and to the reasons for his opinion that the will offered for probate was not genuine. Documents revealing the characteristics or habits from which the expert reasoned in his cross-examination were properly before the jury. Information of this nature might have been brought out on direct examination had the expert been available during the trial in the district court. The rule is: "On direct examination, the witness may, and, if required, must point out his grounds for belief in the identity of the handwriting, on the principle already considered (*ante,* sec. 655). Without such a re-enforcement of testimony the opinions of experts would usually involve little more than a counting of the numbers on either side." 3 Wigmore, Evidence, sec. 2014.

Complaint is also made of the refusal of the trial court to permit three witnesses, who had seen O'Connor write, to testify to the genuineness of his signature as it appears on the will offered for probate. These witnesses were called on rebuttal. In a proceeding to probate a will, contested on the ground of forgery, where the subscribing witnesses are dead, proof of the signatures of the subscribing witnesses and of testator is necessary, and proponent should introduce his evidence as to the genuineness of such signatures, and the trial court in its discretion

may refuse to permit him, on rebuttal, to offer additional affirmative evidence on that issue.

Error in the proceedings has not been shown. The judgment is therefore

AFFIRMED.

HAMER, J., concurring.

The verdict of the jury finds the alleged will to be a forgery. The name John O'Connor appears three times in the instrument. It is written in the body of the instrument, and then it is signed to it. And it is also shown in the attestation clause. An examination of the words "John O'Connor," shows that the same person who wrote the body of the will and the attestation clause also signed the will itself. On the left-hand side of the paper and below the attestation clause I find the words "Jno. Culavin." These words, "Jno. Culavin," are, as I understand it, admitted to be in the writing of John Culavin, whose name appears twice in the body of the will. The "Jno. Culavin" is apparently aimed to be in a different handwriting from the John Culavin contained in the body of the will. I can readily understand that if the John Culavin mentioned in the will wrote the will, and it was a forgery, how he might like to interject some evidence which would clearly corroborate his story that O'Connor himself wrote the will. A comparison of the "J" in the "Jno. Culavin" with the "J" in John Culavin in the body of the instrument, shows that the lower part of the "J" is much lighter and shorter than the same part of the letter in the John Culavin twice written in the body of the will. The upper part of the "J" is larger, perhaps almost twice the length of the upper part of the letter as it appears in the instrument, but there is a sort of similarity in the "J" wherever it is written. The pen comes up as it completes the lower part of the "J" and crosses over the stem of the letter and connects with the other letters to be written afterwards. The "Jno. Culavin" is written together and without taking the pen from the paper until it finishes the letter "l." In the name John Culavin as it appears in the body of the in-

strument, the word "John" is written, then the pen is removed from the paper and a capital C is written "C," but in the "Jno. Culavin" written below the attestation clause the "C" is of the same form as a little letter "c" in the alphabet, and is only very little enlarged. In the instrument the word "Culavin" is written without lifting the pen from the paper, but in the name "Jno. Culavin" written below the attestation clause, the pen is lifted from the paper at the termination of "l" and being in about the middle of the word "Culavin." The remainder of the word, consisting of "avin," is written together and without lifting the pen from the paper. In the word "Culavin," as it appears written three times, the "v" and the "a" or the "i" (as it is spelled van, and also vin) are joined together in much the same way. In the three times the words are written there is the same sort of slope between the "v" and the "i," or, as it is spelled in the body of the instrument, the "v" and the "a." Under the tail of the letter "n" as it is first written in the body of the instrument, there is a little dot. This same little dot is put under the tail of the letter "n" in the same way in each case. Most persons would put the period after the end of the letter, and not under it.

Another peculiarity is that the word "Culavin" is not spelled the same way each time. A man ought to know how to spell his own name. If the proponent wrote it, he probably did know. In the "Jno. Culavin" it is spelled "Cul*a*vin." Where it is first written in the body of the instrument it is written "Cul*i*van." Where it is written the second time in the body of the instrument it appears to have been written "Culavin," and then to have been written over the first writing so as to make it "van." Why he should have had so much trouble in writing the name the second time, if he did write it, does not very clearly appear, except that if the proponent himself wrote it, he was evidently trying to mislead somebody and to lead the reader who examined the will to form a conclusion favorable to the genuine character of the instrument. The effort

made, suggests that the writer knew or believed that some question might be raised as to the good faith of the execution of the instrument, and therefore in the body of the instrument he spelled the name "Culavin" first one way, and then another way, and then corrected it, and subsequently put the word "Culavin" where it could be seen by all who looked at the instrument, and shown to be unlike the word as it appeared to be twice written in the body of the reputed will. The several specimens of the name seem to represent different styles of acting, the latter of which is purposely made to be different from the other two.

The letter "n" is twice written in "Jno. Culavin." It is much the same both times as it appears in the body of the will and also in the attestation clause.

I submit what I have written here as worthy of possible consideration in addition to what seems to me to be a conclusive argument in the body of the majority opinion touching the spurious character of the alleged will. The finding of the jury that a forgery was offered for probate seems to be fully sustained by the great weight of evidence.

DEAN, J., dissenting.

The learned trial court denied the offer of proponent to submit to the jury the testimony of the county treasurer and of the deputy county treasurer of Adams county and the cashier of a Hastings bank to establish that the offered signature and handwriting of John O'Connor were genuine. These men were long time residents of the vicinity and acquaintances of the decedent. They were not permitted to testify solely because proponent did not call them as witnesses in chief, as shown in the main opinion. The ruling is without the doubtful merit of being even technically correct. To exclude material testimony on a point so vital for the reasons advanced for excluding it appears to be an abuse of judicial discretion. *Seebrock v. Fedawa,* 30 Neb. 424, 431; *Kerr v. Lunsford,* 31 W. Va. 659.

The expert testimony on handwriting is not satisfactory. The expert conclusion is based on a comparison of the will with letters and bank checks admittedly genuine.

When the testimony is analyzed, the comparison does not seem to be altogether fair upon examination of the exhibits used for comparison. Ordinarily a bank check is hastily drawn for a temporary purpose, perhaps while standing at a bank counter, and with an indifferent pen, or maybe a pencil. To some extent the same is true of a letter. But vastly different is the laborious penning of a will by the hand of a testator. For a man who had lived the life of John O'Connor up to the time the will was written, for one of his temperament and lineage, the making of a will would be a matter of great and dignified import, an event extraordinary, one that would attain almost to the solemnity of a religious rite. It would hardly be expected that he would write a bank check for a nominal or for any amount, or an ordinary letter, with the same care and precision that he would with his own hand write his will from a copy that was prepared by his direction and that lay before him as he wrote. As between an authentic will so written and a collection of bank checks and a few letters as those instruments are ordinarily written, one would expect to find a variance in the slant of some of the letters and in some of the spacing. One would expect to find the cross-mark of almost every "t" crossing the stem in any will that John O'Connor ever wrote, and the lower loop of the capital letter "I" would be planted squarely on the base line. The expert testimony seems to prove too much. In a forgery so much fault is not ordinarily found either with slant or spacing, nor as to the other discrepancies pointed out by the expert testimony.

It would be a different situation if the discrepancies were found in separate collections of checks, or of letters, one collection being admittedly genuine and the other in dispute, and each collection compared with the other. But that is not the case before us. The discrepancies are of the sort that one would expect to find in a comparison between a will that was carefully and solemnly prepared, written and signed by a testator, and checks and letters that were written by him to serve the passing purpose of

a day. Circumstance of time and place and purpose and condition all have to do with the appearance of the handwriting. For the reasons pointed out, and for others equally apparent from a careful reading of the main opinion, the writer submits that the probative value of the expert testimony on handwriting in the present case is reduced to the vanishing point.

It is a splendid sentiment to which the main opinion gives expression and to which all will agree, viz.: "The purpose of a trial is to discover the truth and administer justice." But it is a far cry from a purpose so laudable to the order of proof of the trial court that, for a trivial reason that was scarcely if at all even technically correct, excluded the offer of material testimony that was intended to aid the jury to discover the truth with respect to a vital point, namely: Did John O'Connor, the Hastings recluse, with his own hand, write and sign the will in question? Every case should be made to hinge, not upon technical rules invoked by the skilled tactician, but rather upon the eternal principles of truth and justice so aptly alluded to in the majority opinion.

HENRY M. THORNTON, APPELLANT, V. VERNON KINGREY ET AL., APPELLEES.

FILED OCTOBER 2, 1917. No. 18914.

Rehearing of case reported in 100 Neb. 525. *Former judgment adhered to.*

SEDGWICK, J.

More than ten years before this action was begun, a lateral was constructed from the irrigation ditch of the Gering irrigation district, about 2½ miles to the village of Gering, and thence through the principal streets of the village. A few years thereafter the plaintiff purchased a quarter section of land within the limits of the village.

When this lateral was constructed, the plaintiff's grantor, who was then the owner of this land, began irrigating the land from the lateral, and the plaintiff has continued so using the water until the village authorities undertook to prevent him from taking water from the lateral for that purpose. The plaintiff began this action in the district court for Scott's Bluff county to restrain the village authorities from interfering with his use of the water. No restraining order or alternative writ was granted, and upon the trial the court found the issues in favor of the defendants and dismissed the plaintiff's case. The plaintiff has appealed.

By our former decision (100 Neb. 525), the order of the district court was so changed "as to require the village, before ceasing to supply the plaintiff with water through the lateral in dispute, to take such steps as may be necessary so that the plaintiff may be able to receive upon his land as much water through another lateral as he formerly obtained from the lateral in dispute, and without additional expense for construction of the same." Upon the defendants' motion for rehearing, arguments were heard and the case was again submitted. Various questions are raised and discussed as to the jurisdiction and power of the village authorities in the premises. The statute provides that a village may enact ordinances, "to establish, alter and change the channel of watercourses, and to wall them and to cover them over; to establish, make and regulate wells, cisterns, windmills, aqueducts and reservoirs of water, and to provide for filling the same." Rev. St. 1913, sec. 5119. Furnishing water for the public purposes of the village and for the use of the inhabitants in arid and semi-arid districts is of so much importance that there can be no doubt of the authority of the village under this statute to provide and care for and control laterals for that purpose. It does not appear from the record what contracts, if any, the village authorities have with the irrigation district for the supply of the water, nor what formal proceedings, if any, were taken by

the village authorities in regard to the construction, management and control of the laterals in the village. The defendants have assumed control over the lateral, and are now exercising control of the same. They employed an agent, the defendant Barkdoll, to control the division of water therein to the different pieces of land under said lateral.

It was stipulated by the parties that the defendants employed the said Barkdoll to superintend the delivery of the water from the lateral, and paid him by warrant on the village treasurer. The evidence shows that the village owned a one-half interest in one of the laterals in the village by contract, and that the village constructed the lateral in question. There is no evidence of any ordinance of the village providing for supplying the inhabitants of the village with water in such manner, and there is no definite evidence as to when or in what manner the village undertook the construction or purchase or control of this plan or system for furnishing water. As the village has control and is managing it, we must assume that they have taken legal action and have protected the rights of the village and its inhabitants by suitable ordinances and contracts with the irrigation district. So that the question seems to be whether in the management of its system of water supply the village can be allowed under the law to discriminate in this manner between citizens. Before the commencement of this action an ordinance was adopted in which, after a preamble reciting some of the existing conditions, it was resolved: "That hereafter no water for the irrigation of farm lands shall be carried through any of the laterals in the village of Gering, except through said joint lateral owned by said Ray Carling and others and the village of Gering." The plaintiff alleged in his petition that the village was discriminating between him and the owners of other "farm lands" within the village, in that they allowed other lands to be irrigated from this lateral, but refused him the same privilege. The evidence will not justify the conclusion that

the village authorities were attempting such a discrimination, and this action must be regarded as an attempt to restrain the enforcement of the said ordinance.

It appears from the evidence that O street, through which this lateral runs from the point where it enters the village, descends rapidly at from 3 to 5 feet to the 100 feet, and that it has frequently happened that on account of this fall in the course of the lateral the water has escaped in large quantities and has overflowed parts of the village and has injured the foundations of some of the business buildings. An attempt has been made to remedy this by putting in what they call "drops" of 3 or 4 feet at various intervals, but these so far have not fully remedied the trouble. There is evidence, which does not seem to be contradicted, that a lateral 18 inches deep and 18 inches wide would carry the necessary volume of water without causing this overflow. There is no doubt that in the control and care of the streets the village authorities have a legal discretion to determine existing conditions, and the best method of serving all the interests of the public.

If the plan and system which has been adopted is found to be impracticable, the remedy must be with the village authorities. If it should be found necessary to transfer this lateral to another street of the village, no doubt it would be within the reasonable discretion of the authorities to do so. These lands which it is now attempted to deprive of water are within the village and have been improved and cultivated with reference to these water rights, which their owners have used for many years, and the evidence shows that to now deprive these parties of the use of this water would greatly damage them financially and probably in other ways. If the village continues to take this water supply from the irrigation district for the benefit of the inhabitants of the village, it must be for the benefit of all of the inhabitants alike and without discrimination.

We think, therefore, our former decision is right, and it is adhered to.

FORMER JUDGMENT ADHERED TO.

FARMERS STATE BANK, APPELLEE, v. HARRY BUTLER ET AL., APPELLANTS.

FILED OCTOBER 2, 1917. No. 19582.

1. **Contracts:** MARRIED WOMEN: FOREIGN CONTRACTS. Our statute, so far as it limits the right of a married woman to contract except in reference to her separate property, has no application to a note executed in and governed by the laws of another state, where she "may make any contract, which she could make if unmarried, and shall be bound thereby."

2. **Pleading:** ACTION ON NOTE. If the plaintiff, in addition to the necessary allegations in a petition upon a promissory note, alleges that he is an innocent purchaser thereof for a valuable consideration before maturity, such allegation does not constitute his cause of action. It is a plea in avoidance of anticipated defenses, and is usually reserved for the reply.

3. ———: ———. In such case, if the defendant answers special defenses against the note, the plaintiff in reply may allege facts in avoidance of such defenses.

4. **Evidence:** EXPERT EVIDENCE: QUESTIONS OF LAW. The question whether an offered title is marketable may be a question of mixed law and fact, but is generally a question of fact. When questions of law are involved, expert testimony is peculiarly applicable.

5. **Appeal:** LAW ACTION: FINDINGS BY COURT. When, in a jury trial, the trial court with the consent of all parties tries a particular question of fact involved, his finding thereon will be entitled to the same force as a finding of the jury, and will not be disturbed upon substantially conflicting evidence unless clearly wrong.

6. **Trial:** DIRECTION OF VERDICT. When there is no substantial conflict in the evidence upon matters to be submitted to the jury, so that a verdict for the defendant upon those matters could not be sustained, it is the duty of the court to instruct for the plaintiff upon those issues.

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

Matt Miller, for appellants.

Hastings & Coufal and *Sasse & French, contra.*

SEDGWICK, J.

This action was brought in the district court for Butler county upon a promissory note executed by these defendants, in which the Morden Land & Loan Company of Minneapolis was named as payee. The plaintiff in the petition set out the promissory note, and alleged that the payee named therein indorsed, transferred and delivered the note to the Drake & Ballard Investment Company, and that that company thereafter indorsed and delivered the note to the plaintiff. The petition then alleged: "That the plaintiff so purchased said note, before maturity, in the usual course of trade, for a valuable consideration, in ignorance of facts, if any existed, which would affect its force as between the original parties to it, and is an innocent, *bona fide* purchaser thereof."

The defendant Viola Butler answered that she was a married woman, and that she did not receive any consideration for the note, and did not execute the same with reference to her separate estate. To this answer the plaintiff replied that the note was a Minnesota contract, and under the laws of Minnesota a married woman "may make any contract, which she could make if unmarried, and shall be bound thereby," except conveyances and contracts for the sale of real estate, which are specially provided for. This allegation does not seem to be seriously controverted, and this special defense under the laws of Minnesota does not seem to be available.

The defendant Harry Butler answered setting up a failure of consideration for the note and other substantive defenses, and to this answer the plaintiff replied repeating the allegation that it was an innocent purchaser of the note, and alleging other matters in the way of avoidance of the special defenses pleaded. The defendant then moved to strike out these allegations of the reply on the alleged ground that they were "departure from the original cause of action." The defendant states in the brief: "The cause of action alleged in the petition is that the plaintiff is the owner of the note in question, having purchased the same

before maturity for a valuable consideration, in the usual course of trade, in ignorance of facts, if any existed, that would affect its force between the original parties to it, and is an innocent, *bona fide* purchaser thereof, * * * and cannot recover, except as the owner of the note, an innocent purchaser thereof for a valuable consideration, and, if he fails in this, then he cannot recover upon any other grounds, nor upon any matters alleged in the reply."

We cannot agree with this proposition. The cause of action alleged in the petition was the promissory note, and when the defendant pleaded special facts that he claimed rendered the note invalid for any reason, the plaintiff might in reply avoid these facts. "The office of a reply is to deny the facts alleged in the answer as a defense, or to allege matters in avoidance of such defense not inconsistent with the cause of action set out in the petition." *Plummer, Perry & Co. v. Rohman*, 61 Neb. 61. The motion to strike these matters out of the reply and the demurrer to the reply upon these grounds were properly overruled.

The note was given as part of the purchase price of a farm in Dodge county, Minnesota. The contract between the parties, in pursuance of which the note was given, provided that the payee in the note should furnish an abstract showing a merchantable title in the land; and the defendant alleges, and there is evidence tending to prove, that the note was delivered to an officer of the payee company upon the express agreement that it should not become the property of the payee until an abstract was furnished showing a marketable title. The evidence shows without contradiction that the note was indorsed and delivered to this plaintiff, and that the plaintiff paid full consideration therefor, and is therefore the owner of the note. So that the defendant correctly says in the brief: "What is a marketable title? That is the only question for the court to answer; that is the only question that the court can answer." If the abstract showed a marketable title, then the delivery of the note was properly made, and the terms of the contract in that respect have been com-

plied with. The defendant quotes from 26 Cyc. 819, a definition of a marketable title, in which it is said that it is "a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing and ought to accept." The defendant's objections to the abstract are principally predicated upon questions of jurisdiction of the probate court to probate the will of one John W. Allen, through whose estate the title came, which was admitted to probate in 1874. Defendant says that the abstract "is silent as to all jurisdictional facts, no petition for the probate of the foreign will being attached to the abstract," and he then recites that it does not appear that the proceedings were in the proper county; it does not appear that it was offered for probate by the right person; it does not appear that the claims against the estate nor the legacies were paid; it does not appear that the executors of a subsequent estate through which the title passed "were qualified and acting at the time they purported to deed this property."

The case was tried to a jury, and the court instructed the jury to find a verdict for the plaintiff. The plaintiff requested at the trial that the question whether or not the title shown by the abstract was a marketable title should be tried by the court. The defendant conceded this, and the question was so tried and the court found that issue for the plaintiff. The question whether an offered title is marketable is sometimes difficult to determine. It may be a question of mixed law and fact, but is generally a question of fact.

The plaintiff produced several witnesses who testified fully and clearly that these matters and other similar matters suggested by the defendant did not discredit the title or render it unmarketable. Among these witnesses was a former chief justice of the supreme court of Minnesota, and other fully qualified witnesses. It may be said that there was some conflicting evidence. The defendant produced a

witness who testified as an expert that he did not consider the title marketable, but he failed to show any unusual familiarity with such matters; and at all events it must be found that the evidence was at least substantially conflicting in favor of the finding of the trial court, and, being an ordinary action at law, that finding must be upheld unless clearly wrong. We conclude that the finding that the offered title was marketable is sufficiently supported.

When there is no substantial conflict in the evidence upon matters to be submitted to the jury, so that a verdict for the defendant upon those matters could not be sustained, it is the duty of the court to instruct for the plaintiff upon those issues. This renders it unnecessary to inquire whether this plaintiff was an innocent purchaser of the note, as the defense relied upon failed even as against the original payee.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

OTTO F. WALTER, TRUSTEE, APPELLEE, V. NATIONAL FIRE INSURANCE COMPANY ET AL.: GRONEWEG & SCHOENTGEN COMPANY, APPELLANT.

FILED OCTOBER 2, 1917. No. 19607.

Bankruptcy: PREFERENCES: NOTICE. If a debtor who is insolvent pays or secures one of his creditors, such creditor is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's insolvency which were brought home to him, might fairly be expected to disclose. It is not necessary, under the bankrupt act, to find that the creditor actually knew or believed that the debtor was insolvent.

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

Lambert, Shotwell & Shotwell and *D. H. Sheehan,* for appellant.

Otto F. Walter, contra.

SEDGWICK, J.

Charles Caldwell was adjudged a bankrupt. Among others he was indebted to the defendant Groneweg & Schoentgen Company, and assigned to that company an interest in an insurance policy in settlement of the claim. Afterwards, in an action upon the insurance policy, the company admitted its liability, and the question presented to the court was as to the validity of the assignment to the Groneweg & Schoentgen Company. The trial court decided that Caldwell was insolvent at the time of the assignment, and that the assignment was an unlawful preference, and was therefore void. The defendant Groneweg & Schoentgen Company appealed.

The questions presented are essentially questions of fact. Was Caldwell insolvent at the time of the assignment to this defendant? Did this defendant have such notice of the insolvency as to render the assignment void under the bankruptcy act as an unlawful preference?

It is conceded that the assignment was made within the four months prior to the adjudication of insolvency, and the evidence that Caldwell was insolvent at the time of the assignment is so clear that it requires no discussion. Indeed, it is not much discussed in the defendant's brief. So that the controverted question in this case is as to the knowledge or notice that this defendant had of such insolvency at the time it took the assignment.

One Russell acted as the agent of this defendant in adjusting its claim and procuring the assignment from the defendant. He was a witness upon the trial and testified in behalf of the defendant. Russell knew that Caldwell had been conducting a bakery, and that his stock of goods was entirely destroyed by the fire, that his insurance on the stock and fixtures was $2,600, and that the fixtures not destroyed by fire were of considerable value, so that he knew that Caldwell could not recover the full amount of his insurance upon his policies. In his inquiries he learned that Caldwell had no real estate. He made inquiries

among the business men of the town as to Caldwell's financial condition, and was told that it was "only a question of whether he gets all of his insurance money," and, as Russell knew that he would not collect the total policy, this was notice that he would not be able to pay his liabilities. He testified that he interviewed the bank of the town, and said: "Well, they said if he gets his insurance he will pay out, but they didn't know whether he was going to get it all or not, but they didn't think he would get all of his insurance." This was a statement by the officers of the bank upon Russell's inquiry that in their opinion Caldwell would not be able to pay his liabilities.

"It is not necessary that the creditor knows or even actually believes that a preference is being given, provided he has reasonable cause to be put upon inquiry as to whether a preference is actually given or not. Constructive notice is sufficient, upon the ground that, when a party is about to perform an act by which he has reason to believe that the rights of a third party may be affected, an inquiry as to the facts is a moral duty and diligence and an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice where the means of knowledge are at hand, and, if the party under such circumstances omits to inquire and proceeds to receive the transfer or conveyance, he does so at his peril, as he is chargeable of knowledge and of all the facts, which by a proper inquiry he might have ascertained." 1 Loveland, Bankruptcy (4th ed.) sec. 508.

"In determining this question, it is not necessary to find that the creditor actually knew or believed that the debtor was insolvent. He is chargeable with notice of such facts as a reasonable inquiry, in view of the circumstances with respect to the debtor's condition which were brought home to him, might fairly be expected to disclose." *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624. *Farmers & Mechanics Bank v. Wilson*, 4 Neb. (Unof.) 606, is not inconsistent with this view.

The court tried this case without a jury, and the findings have the same weight as would the findings of a jury. It

seems clear that under this evidence this court cannot say that the findings of the trial court are so wholly unsupported as to require a reversal.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

C. G. BOWEN, APPELLANT, V. HOLT COUNTY ET AL., APPELLEES.

FILED OCTOBER 2, 1917. No. 20013.

1. **Taxation:** MORTGAGED PROPERTY. The total taxable value of any mortgaged tract of land cannot exceed the sum of the interest of the mortgagor and mortgagee. Rev. St. 1913, sec. 6351.

2. ———: INJUNCTION. If more than such value shall be made the basis of assessment and taxation, the collection of the tax upon such excess may be enjoined upon the application of the party injured.

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

W. J. Hammond, for appellant.

Hugh J. Boyle and *J. A. Donohoe, contra.*

HAMER, J.

The plaintiff, C. G. Bowen, began this action to declare void parts of certain tax liens on land in Holt county. The case was determined on general demurrers to the petition. These demurrers were filed by Holt county, the county levying the taxes, and by the purchaser at tax sale, A. Baker. They were sustained.

The facts as they appear from the petition are that in August, 1911, a mortgage for $400 was given on the land, which was a first mortgage. Subsequently a second mortgage was given. This second mortgage was for $300, and it was afterwards acquired by the plaintiff. December 3,

1912, the then holder of the legal title to the land executed to one Mallory a mortgage on the land for $7,000. In 1912 the assessed value of the land was fixed at $380. In 1913, though no improvements had been placed on the land, the county clerk and county assessor caused the interest of the Mallory mortgage to be assessed against the land at $7,000, and caused taxes to be levied against the premises on the valuation for the purpose of taxation at one-fifth of the $300 mortgage, and one-fifth of the $7,000. These mortgages contained the provision that the mortgagor should pay taxes on the mortgages. The levy made on this valuation shows $87.60 taxes, whereas the levy on the value of land as fixed in 1912, and without reference to the $7,000 mortgage, shows only $16.56 as the tax to be collected. The defendant Baker purchased the land for delinquent taxes of 1912, and paid in 1914 the taxes assessed against the land in 1913, and he threatens to foreclose his lien and claim for the taxes paid.

The petition alleges that Mallory became the holder of the legal title, and in 1916 the plaintiff purchased the title from Mallory, paid off the first mortgage and released the second. It also alleges a tender of the amount legally due for taxes and costs of sale, a refusal by defendant to accept it, and payment of the amount into court, and an offer to pay any sum found by the court to be due. The prayer is that defendant Baker be required to accept the amount tendered in full of all claims against the real estate, and that Holt county be required to pay Baker any amount due him by reason of his payment of the taxes for 1913, and that Baker be enjoined from enforcing his claims. It is claimed on the part of the county that no cause of action is stated against it because the interest which it had in the taxes passed from its hands before the bringing of the action.

The real question in the controversy is between the plaintiff and Baker as to whether the value for the purpose of taxation in 1913 can be made on the basis of the mortgages against the land or must be determined by the

assessment of 1912 and without reference to the giving of the $7,000 mortgage. This question involves the consideration of sections 6349-6353, Rev. St. 1913, and especially of sections 6350, 6351. Section 6350 provides that a mortgage is an interest in real estate for the purpose of assessment and taxation. A part of section 6351 reads: "The county assessor in any county where the law provides that such officer shall compile the assessment book, and the county clerk in any county where the law provides that such officer shall compile the assessment books, shall each year prior to the first day of April examine the records of mortgages filed, and make a record in the assessment book against the land covered thereby, of any mortgages and the amount of such mortgage and the name of the mortgagee or assignee. 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. The assessment as to the mortgage interest, and the value in excess thereof, shall be revised annually as the facts may require to affect an assessment of the real property in accordance with the provisions of this article; provided, the total assessed value of any real property, including the interests of the mortgagor and mortgagee, shall not be changed excepting when all the real property of the county is assessed, unless the value of the property is changed by reason of a change in the improvements thereon." These provisions must be read with the statutes providing for the assessment of real property generally, Rev. St. 1913, secs. 6420–6435, which provide for the assessment of real property quadrennially, beginning with the year 1904. We think the manifest purpose of sections 6350, 6351, above quoted, is to secure the assessment and taxation of the mortgagor's and mortgagee's interests separately. Each interest is an interest in the land. The sum of these interests is the value of the land itself. If the amount of the mortgage exceeds the value of the land, yet the value of the mortgage or any "interest in real estate" cannot exceed the value of the real estate in which it is an interest, and

ought not to be assessed at more than the value of the real estate. That this was the thought of the legislature is made entirely plain by the provision in section 6351: "The total assessed value of any real property, including the interests of the mortgagor and mortgagee, shall not be changed excepting when all the real property of the county is assessed, unless the value of the property is changed by reason of a change in the improvements thereon." By this proviso uniformity in the assessment of real property mortgaged is secured. It is manifest that the total assessed value of any real estate cannot exceed the interest of mortgagor and mortgagee. There was no authority under the facts pleaded to change the assessment, and so much of the tax as resulted from the levy upon such increased valuation is void.

The judgment of the district court as to the defendant Baker is reversed and the cause remanded for further proceedings. The action is dismissed as to Holt county because it is without interest in the case.

REVERSED.

SEDGWICK, J., not sitting.

CHARLES ZENG, APPELLEE, V. IDA JACOBS ET AL., APPELLANTS.

FILED OCTOBER 2, 1917. No. 19471.

1. **Homestead:** OCCUPANCY: ABANDONMENT. While the occupancy of premises (the separate property of the wife) as a home is evidence of its homestead character, it is not conclusive, and, where such occupancy was temporary in character and has been long abandoned, and the evidence shows that the wife has never consented to its selection as a family homestead, the husband acquires no homestead right in it.

2. ———: ABANDONMENT. The temporary absence from the home for purposes of pleasure, health or business, intending to return to it when the reasons for removing no longer exist, does not amount to an abandonment of the homestead right therein.

3. ———: ———. But where, as in the instant case, the absence from the home (the wife's separate property) was for over 14 years, the family in the meantime occupying various other houses in the same town, and the husband for five years afterwards made no claim of homestead right to the occupant of the premises holding it under deed made by the wife before her death, and who was in the meantime putting valuable improvements upon it, no adequate reason being shown for such continued absence from the home and for failure to make claim of the homestead right, *held*, that such facts show an abandonment of the homestead by both husband and wife.

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

F. D. Hunker and *A. M. Emley,* for appellants.

J. H. Lindale and *F. Dolezal, contra.*

CORNISH, J.

Action to establish right of homestead in lot 8, block 21, West Point, Nebraska, as the surviving husband of Caroline Zeng. The defendants, holders and occupants of the property under a deed from Caroline Zeng, deny that plaintiff ever acquired a homestead right in the property, and allege that if he did it was abandoned. The trial court found for plaintiff.

It appears that plaintiff and Caroline Zeng were married at West Point on September 19, 1891; that she was then the owner of the property, which has never exceeded in value the sum of $2,000; that on June 3, 1892, she conveyed the property to plaintiff for a consideration stated of $1,135, secured by mortgage; that on March 18, 1893, plaintiff reconveyed the property to her for a consideration stated of $1,135; that on July 25, 1893, she and plaintiff gave a deed of the property to John Forrer; that on February 6, 1894, the property was reconveyed to her; that on April 13, 1907, she conveyed the premises by warranty deed to Fred Budwig and others, her children. This deed was not signed or acknowledged by her husband. Afterwards her grantees conveyed to Fred Jacobs, husband of defendant Ida Jacobs. It further appears that the plain-

tiff and his wife lived on the premises for at least one year after they were married; plaintiff contending five or six years. It is probable that the occupation was for not more than two or three years at most. Afterwards, except during one year, when the husband was necessarily away from West Point, they occupied various houses in that town, finally a house known as the Hartwig house, until the fall of 1906, at which time plaintiff left his wife and lived at a separate place. She was then in her last sickness. On request of her daughter, then renting the property in controversy, she went to reside with her, where, soon after, she died. At the time of the marriage the wife had several children. None was born to this marriage. After the wife's death defendant Jacobs occupied the property as owner for over five years and put $700 or $800 of improvements upon it. No attempt was made upon the part of plaintiff to assert a homestead right or give Jacobs notice that he claimed such a right. The plaintiff's explanation of his failure to occupy the premises as a home from about 1893 to 1912 is that his wife's children were always making trouble; that he wished to get away from them; and that he and his wife left the premises, intending some day to go back. The explanation given by the other side is that plaintiff, when drinking and violent, would damage the property without paying the damages, and the wife wished to move for that and other reasons. The plaintiff's testimony would show that her children stayed at their home, without objection from him, about the same after moving as before. It appears that the plaintiff never at any time got along agreeably either with his wife or her children. Three times she began divorce suits against him; the last one pending at the time of her death. The evidence would indicate that after the reconveyance of the property to her by Forrer she never in any way consented to her husband's having a homestead right in the premises in dispute. She treated it exclusively as her own, collected the rents, and finally conveyed it by deed.

We are of opinion that the rule that the temporary quitting of the home for purposes of pleasure, health or business, intending to return to it, does not amount to an abandonment, will not apply in this case. The abandonment was more than temporary, and during the years that the wife and her children were away from the premises there was no intention of returning to it as their family home. The fact that upon her death plaintiff made no claim of homestead right at a time when defendant Jacobs was improving the property cannot be overcome by his evidence of his private intention to claim it, especially so in the absence of any adequate reason shown why there was no return to the home.

By section 3077, Rev. St. 1913, the husband's homestead right in the wife's separate property is made dependent upon her giving consent thereto. The evidence does not show that she ever gave such consent. The fact that they made this property their home for a time would be strong but not conclusive evidence of its homestead character during that period. We are of opinion that the evidence shows that the wife never did consent nor ever would have consented to the selection of this her separate property as a homestead, and in law it did not become such. *Klamp v. Klamp*, 58 Neb. 748.

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

REVERSED.

WILLIAM A. FORD, APPELLANT, V. LOUISA E. FORD, APPELLEE.

FILED OCTOBER 2, 1917. No. 19609.

Divorce: ALIMONY: RECEIVERSHIP. Preliminary to making the order for the appointment of a receiver of the husband's property, provided for in section 1589, Rev. St. 1913, there must be an order, also provided for in said section, requiring the husband to give security for payments of alimony, according to the terms of the decree, and a failure or refusal upon his part to give such security.

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

Arthur C. Pancoast and *A. J. Kinnersley,* for appellant.

D. L. Johnston and *George Turkington, contra.*

CORNISH, J.

In April, 1915, the defendant, Louisa E. Ford, obtained a decree of divorce *a mensa et thoro* from the plaintiff, and was awarded $30 a month alimony, together with the use and occupation of the home, which was a considerable portion of plaintiff's real property. Afterwards, on November 29 of that year, the plaintiff being in default of payment of alimony, defendant filed her petition in the original suit, making application for the appointment of a receiver for plaintiff's real and personal estate, in accordance with the provisions contained in sections 1589, 1590, Rev. St. 1913. A demurrer to the petition was overruled, and plaintiff in his answer alleged, among other things, that the defendant's action was prematurely brought, in that no order had been entered by the court, and no request made therefor, requiring plaintiff to furnish security for any payments due or to become due defendant under the terms of the original decree. The trial court ordered the appointment of a receiver to take charge of all of plaintiff's property, including real estate in another county.

It is one of the contentions of plaintiff that, in proceedings commenced under section 1589, Rev. St. 1913, preliminary to an order appointing a receiver, there must be an order requiring sufficient security to be given by the husband for the payment of alimony according to the terms of the decree. This was not done in this case. We are of opinion that the contention of plaintiff is right. It is argued that the plaintiff had refused to secure the payment of future instalments of alimony, and that, such being the case, the order that security be given would have been useless. Plaintiff, on the trial of the issues made in the application for a receiver, had a right to resist, for reasons that might appear good to him, either the order that se-

curity be given or that a receiver be appointed. It does not follow, because that was his attitude upon the trial, that he would not give the security if the court ordered it. The presumption is that he would. The order requiring security to be given and the one appointing a receiver are both somewhat extraordinary and drastic remedies. Such orders cannot be made except in strict compliance with the statute. *Nygren v. Nygren,* 42 Neb. 408. The order requiring security should be made only as it appears to the court that such an order is necessary to make sure the payment of the alimony decreed. If such an order is made and not complied with, then the court, in appointing a receiver, should put into the hands of the receiver only so much of the husband's property as appears necessary to be held to make sure the payments due and to become due.

Under the statutes, a decree for the payment of alimony is in the nature of a general judgment. What the rights of the wife as judgment creditor may be for the appointment of a receiver, in case the husband is fraudulently disposing of his property for the purpose of avoiding payment of the judgment, is not involved in this case, this being a proceeding brought under sections 1589, 1590, Rev. St. 1913. *Fall v. Fall,* 75 Neb. 120, 139.

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

REVERSED.

MACARIO PERES ROMERO V. STATE OF NEBRASKA.

FILED OCTOBER 2, 1917. No. 20169.

1. **Homicide:** COMMON DESIGN. When two or more, in furtherance of a common design, enter upon the perpetration of a burglary, armed and prepared to kill if opposed, and while so engaged are discovered, and in the effort to escape one of the burglars shoots and kills one who is trying to arrest him, all are equally guilty of the homicide, although one of them, who was not armed with a deadly weapon, escaped before the shooting, and such killing was not part of the prearranged plan.

2. Instruction set out in the opinion, while not approved of, *held* not to have been prejudicially erroneous.

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

Richard S. Horton, for plaintiff in error.

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

CORNISH, J.

At 2 o'clock in the morning of January 21, 1917, Cornelius E. Cross, watchman of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, was shot and killed when he was attempting to arrest three men whom he then discovered in the act of robbing a car which they had broken and entered. The defendant (plaintiff in error) was one of the three men. In his brief it is stated: "The theory of the defense, supported by evidence, was that defendant was present unwillingly; that he had no gun; that he was anxious to go home; and that he ran away as long as five minutes before Cross was shot." It is uncertain who fired the fatal shot. The burglars had at least one gun, and defendant knew it. In defendant's confession, admitted in evidence over his objection, he stated that he fired the shot; but, according to his testimony on the witness-stand, he was coerced to join in the burglary by one of his companions, and ran away before the homicide. It is argued that if he was guilty at all it was as a coconspirator, and that whether the act of Lopez, who, defendant says, did fire the shot, was within their common purpose when the three went to the railroad yards, was a question for the jury, which, it is contended, the court, by refusing to give instruction No. 2 requested by defendant, excluded from the jury. Instruction No. 2 is as follows:

"You are instructed that even if you find that the defendant Macario Peres Romero and the other parties named in the information (naming them), on the occasion of the homicide, entered upon the premises with the common purpose of burglary, and the violence of the prisoner's com-

panion was merely the result of the situation in which he found himself, and that he proceeded from the impulse of the moment without any concert, then the prisoner would be entitled to an acquittal and discharge."

It will be noted that the instruction requested hardly bears upon the defendant's theory of the defense. It assumes a common purpose of burglary, and merely raises the question whether there must be concerted action in the shooting.

If one participating in a burglary would shoot and kill an enemy, whom he saw across the street, out of malice, and not in furtherance of the common design, then one would say his companions would not share the guilt of the killing; but if, on the other hand, the one killed was an officer attempting to arrest the lawbreakers, then one would say that his companions would share the responsibility and guilt of the killing, even though the killing had not been planned or expected by them. Both in morals and in law, if a man means one wrong and does another, he is punishable. This is true as to the individual, even though the killing may be unintentional or even accidental. Where one shares with others in the burglarious intent and act, and killing results from it as one of its natural, ordinary and probable consequences, he will not be heard to say that he did not intend or share in it. In the instant case, the plaintiff by his own testimony knew that his companion had a gun. He was bound to know that his companion might use it in resistance of an officer who might attempt to arrest him. The attempt to arrest is an interference with their plans. It is common experience that persons engaged in committing a felony may kill those who interfere. Such appears to be the general, though possibly not the universal, holding of the courts. *Conrad v. State,* 75 Ohio St. 52; *People v. Vasquez,* 49 Cal. 560; *Moody v. State,* 6 Cold. (Tenn.) 299; *McMahon v. People,* 189 Ill. 222; *State v. Nash & Redout,* 7 Ia. 347; *Miller v. State,* 25 Wis. 384; *Commonwealth v. Major,* 198 Pa. St. 290.

The instruction requested is bad for another reason. It has the court assume that Cross was killed as the result of

the violence of the defendant's companion. The jury might very well from the evidence have found that it was the defendant who did the killing.

The court's instruction No. 13, the last sentence of which is complained of as prejudicial error, is as follows: "You are instructed that under the law of this state, in weighing the testimony of police officers and detectives, greater care should be used because of the natural and unavoidable tendency of such persons to procure and remember with partiality such testimony as would be against the defendant. This instruction is not intended to either impeach or discredit the testimony of police officers either severally or collectively, but only as a reasonable caution for you to have in mind."

It is said: "Why should police officers be singled out and made the subject of an instruction if not to cast some discredit upon their testimony?" While we hardly approve of the last sentence of the instruction, yet we are of opinion that the purpose of such instruction is not to either impeach or discredit any particular testimony. It is a cautionary instruction to the jury, advising them of the care they should use in considering the particular testimony. The fact that a witness is interested in the event of the lawsuit calls on us to exercise extra caution in considering his testimony, but can hardly be said to impeach or discredit it.

The judgment of the district court is

AFFIRMED.

HAMER, J., concurring in the conclusion, but criticizing certain of the instructions used by the district court.

I concur in the conclusion reached by the majority opinion, but I am not fully in accord with all that is said, and I think that the district court was unfortunate as to certain of the instructions given. I deem it my duty to protest against some of the views expressed in the instructions, and I realize that such instructions may properly be criticized, although perhaps not sufficiently prejudicial to the plaintiff in error in this case to warrant a reversal of the judg-

ment. No law-abiding citizen sympathizes much with a burglar who goes out with a clearly defined purpose to break in and steal other peoples property, although the same is being carried in cars, and who gets into a bad predicament because of his wicked and lawless purposes, and the conduct of his vicious and lawless associates. Nevertheless it is the duty of each of the members of this court to examine the record carefully and to ascertain, if possible, whether the defendant had a fair trial in the district court, and, if he did not, then there should be a new trial, unless the errors complained of were without prejudice to the defendant. The defendant claims that he was acting under duress. He says that he was compelled to do that which he did. The defendant by his counsel, the public defender, requested the giving of the following instruction: "If you find that the part taken by the defendant in the commission of the crime was under duress and was not voluntary, then there would be no such intent as the law requires to constitute the crime charged."

The defendant received all he asked as to the giving of this instruction, and it may not have been necessary to refer to it in the majority opinion as the most such reference might accomplish would be in the direction of showing that the district court tried to be fair. It is claimed by the defendant that the trial court refused to submit to the jury the defendant's theory of the case. The giving of this instruction shows that he did submit that part of the defendant's theory relating to the alleged duress, but I am not fully satisfied that he submitted the other parts belonging to such theory as they ought to have been submitted, and yet perhaps there was no error.

As I understand counsel for the defendant, the defendant, with two others, succeeded in breaking into a box car standing in the yards of the Chicago, St. Paul, Minneapolis & Omaha Railway Company at Omaha, Nebraska, and they took merchandise out of the car. They were discovered, and the man who was killed knocked one of the two men down with his revolver. The defendant made his escape

and ran away. A few minutes after he ran away, the watchman was shot and killed by one of the burglars, who appears to have been in the car. The difficult part of the case is touching the question concerning whether a man should be held liable for an offense which he never intended to commit and in which he did not participate. Where burglars contemplate breaking into a dwelling house, and do so, and are attempting to remove goods in the house, and meet with resistance, and one of their number kills an occupant of the house, all are guilty if a killing occurs, and without reference to which one did the shooting. It must be held that if they went to commit a felony that they must have contemplated that there would be resistance when those living in the house were disturbed, and that it was contemplated that they would defend themselves, and that one or more might shoot if he deemed it necessary. The same principle should apply to the breaking into a car containing goods being transported for the benefit of the owner. But if the men who undertake to break into a car and to steal from it had no reason to suppose that it was guarded, and had no knowledge or reason to expect that the possession of the goods would be defended, then a different question is presented. Those who go to a dwelling house have reason to suppose that it is occupied by persons, unless they know to the contrary, and it will be presumed that they intended to do what they did; but when a thief goes to a box car standing on a railroad track, can it be presumed that he ought to know that the car was guarded and that the watchman or watchmen guarding the car would be likely to interfere with him? The point in favor of the defendant is that he might have gone to break into a box car and steal from it without the expectation of meeting any one, and without intending to shoot anyone, and without contemplating that his associates or either of them would shoot any one. In such case he might say that there was no objection on his part to breaking into the car and taking the merchandise out of it, but at the same time he did not want to shoot any one. It is a serious thing to be tried for murder in the first

degree and found guilty and sentenced to the penitentiary for life.

As I understand certain of the instructions given by the court to the jury, the jury were told, in effect, that if the defendant participated in the burglary it was immaterial whether he was present at the time of the shooting, and, although he had gone away and may never have contemplated the shooting, he would be guilty anyway if he had participated in the burglary.

The fourth instruction given by the court upon its own motion reads: "You are instructed that the statute of the state of Nebraska, defining the crime of murder, in so far as the same is charged against this defendant, provides as follows: 'Whoever shall * * * in the perpetration of or attempt to perpetrate * * * any burglary * * * kill another, * * * every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury.' In this connection you are instructed that it makes no difference at what stage of the attempted burglary, if you find from the evidence, beyond a reasonable doubt, one was attempted, the shooting took place, as long as such design and attempted burglary had progressed to some extent, in the manner and form charged."

The first part of the instruction confines the killing to the fact that it is in the perpetration or attempt to perpetrate the burglary. Now, can it be said that it is in the perpetration or attempt to perpetrate the burglary, when it is after the breaking and after the defendant has run away that the shooting occurs by another one of the burglars? It is easy to understand that the minds of the burglars met when they concluded to perpetrate the burglary, but one of them has run away and has been gone perhaps several minutes, and a new condition presents itself to the burglar who remains and who shoots; how can the other burglar know anything about it? Is this not punishing the man who has run away for the evil design and murder-

ous intent of the man who remained and who, whether justifiable or not, was confronted with a condition that had not existed up to the time that the man ran away? Conditions were apparently threatening for the man who remained. The man who was killed had knocked down one burglar, and he appears to have been lying quiet and the other burglar, who was in the car, might readily conclude that there were hostilities so far as he was concerned. Then he shoots. His case is not before us. We are not called upon to say whether his shooting was justifiable or not. But the condition that presented itself to him never presented itself to this defendant, because he had run away and was not in the immediate neighborhood. When the court said in the above instruction that "it makes no difference at what stage of the attempted burglary the shooting took place," as long as such burglary had progressed to some extent, he was telling the jury that, although the defendant had run away and was not there, yet if the car had been opened and there had been an attempt to rob it then he is to be found guilty of the shooting, although he may never have contemplated it.

The men who are willing to acquire property unlawfully, even to the extent of stealing it, are many perhaps, while only a comparative few would be willing to commit murder for the purpose of adding to their possessions. The purpose of the trial judge, as it appears in the above instruction, is further corroborated by the seventh and ninth instructions given by the court on its own motion. In the seventh instruction the court said: "The state is neither required to charge in the information, nor to prove at the trial, that the act of killing alleged was done purposely or of deliberate and premeditated malice." This was repeating in a way all that had been said in the former instruction, and it was telling the jury that, however sudden and unpremeditated the shooting had been by the man who remained behind, yet the defendant was liable for all of it. It is still further emphasized by the statement of the court in the eighth instruction "that where two or

more persons associate themselves together with intent to commit a burglary * * * all such persons are equally guilty, though one or more of them had not previously consented to the killing, and took no active part in actually producing the death."

That the purpose was to tell the jury that the defendant was equally guilty, whether he contemplated the killing or not, and whether he was there or not, is shown by the refusal of the court to give the second instruction requested by the defendant. The request was, in substance, that if the defendant's companions and the defendant entered upon the premises "with the common purpose of burglary, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and that he proceeded from the impulse of the moment without any concert," then the prisoner should be acquitted. Perhaps all the foregoing was not prejudicial, if the record contained evidence of a character tending to show that the defendant actually was on the ground, and that he participated in the conflict. I am not at all certain that the record discloses that fact; it is probably very doubtful; but the trial court and the jury were there, and they had the opportunity to hear the testimony and to determine its credibility.

Where the unlawful act agreed to be done is not of a dangerous or homicidal character and its accomplishment does not necessarily or probably require the use of force or violence which may result in the taking of life unlawfully, no such criminal liability will attach merely from the fact of having been a party to such an agreement. 1 Bishop, Criminal Law (7th ed.) sec. 641; 2 Hawkins P. C. (Eng.) ch. 29, secs. 19-21; *Regina v. Franz,* 2 F. & F. (Eng.) 580; Roscoe, Criminal Evidence (13th ed.) 673-675; *Lamb v. People,* 96 Ill. 73; *People v. Knapp,* 26 Mich. 112; *McLeroy v. State,* 120 Ala. 274.

But there is still a further instruction which deserves to be considered. Upon its own motion the court gave the following: "You are instructed that under the law of this

state, in weighing the testimony of police officers and detectives, greater care should be used because of the natural and unavoidable tendency of such persons to procure and remember with partiality such testimony as would be against the defendant. This instruction is not intended to either impeach or discredit the testimony of police officers, either severally or collectively, but only as a reasonable caution for you to have in mind."

There is some objection to the first sentence of the instruction; but, after having given it, it might be argued with considerable effect, and I doubt if any one may show to the contrary, that the purpose was to say to the jury that, although these men by reason of their occupation have an unavoidable tendency to procure and remember with partiality such testimony as is against the defendant, yet you will believe all that they have said anyway. *Preuit v. People,* 5 Neb. 377; *Kastner v. State,* 58 Neb. 767; *Sandage v. State,* 61 Neb. 240. To use an English expression, the district judge came very near "misdirecting himself." It is always a dangerous thing to suggest to a jury how it may avoid an established principle and go around it. The most skilful use of language is hardly adequate to the task.

The language used in *Preuit v. People,* 5 Neb. 377, is not the same as that used in this case and is much more vigorous. It gives the true reason for the greater care to "be used by the jury in relation to the testimony of persons who are interested in, or employed to find, evidence against the accused * * * because of the natural and unavoidable tendency and bias of the mind of such persons to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinions of the matter in which they are engaged." In the instant case it is said in the instruction that greater care should be used in weighing the testimony of police officers and detectives than other witnesses, but in the *Preuit* case one reason is given, and in the case at bar another reason is given. In the *Preuit*

case it is bias of the mind to construe everything as evidence against the accused and to disregard everything which does not tend to support their preconceived opinions. In that case the jury are told that police officers are partisans and against the accused because of their bias and interest in the case, and so there should be caution in weighing their testimony. But in the instant case the instruction given says nothing about bias of the mind to construe anything as evidence against the accused. The only thing charged is remembrance with partiality of such testimony as might be against the defendant. In the second sentence, even the very tame statement that the testimony of police officers should be weighed with care is modified by the second sentence which, however well intended, is likely to take away from the jury any caution with respect to such testimony. Notwithstanding all that I have said, I am not quite clear that the instructions given were so prejudicial as to demand and require a reversal of the judgment.

LIZETTA K. TANNER, APPELLEE, V. F. L. FRINK ET AL., APPELLANTS.

FILED OCTOBER 2, 1917. No. 19608.

Fraudulent Conveyances: CONVEYANCES BETWEEN RELATIVES. A transaction involving a conveyance of land between near relatives will, in a proper case, be closely scrutinized to discover if such conveyance was made fraudulently, or for the purpose of hindering, delaying or defrauding creditors or those to whom the vendor may subsequently become indebted.

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

M. D. Tyler and *M. B. Foster,* for appellants.

H. C. Vail and *H. Halderson, contra.*

DEAN, J.

On June 11, 1914, Lizetta K. Tanner, plaintiff and appellee, commenced this action in the district court for Madison county to subject 320 acres of land in that county to the payment of a judgment for $9,312.15 that she recovered in 1913 against Dr. F. L. Frink, alleging ownership of the land in him. Ida V. Frink, who maintains that she is the owner of the land in question, is the wife of F. L. Frink, and she is therefore made a party defendant with her husband. Plaintiff obtained a judgment subjecting the land to the payment of her debt, and the defendants appealed.

On October 1, 1910, Dr. F. L. Frink bought a tract of Texas land from Ben I. Tanner, to whom he gave certain promissory notes aggregating $7,253.55 as part payment. On December 16, 1913, Lizetta K. Tanner, plaintiff and appellee, who became the owner of the notes given for the Texas land, brought suit thereon and recovered the judgment on which this suit is based.

Appellants in their brief, argue that "two questions are presented by the record: (1) Was the conveyance to Ida V. Frink fraudulent and void as to the subsequent creditors of F. L. Frink? (2) Was said conveyance made in trust for F. L. Frink?"

Plaintiff in her brief concedes that not only are the foregoing issues involved, but also one other, namely: "That F. L. Frink was engaged in a hazardous business and was a land speculator, and that he contemplated incurring debts and liabilities by reason of being engaged in such business."

F. L. Frink became the owner of the land that is involved in this action in December, 1899. On January 4, 1904, he and his wife conveyed it to F. A. Long, who in turn on December 8, 1906, with his wife, conveyed the tract to P. E. McKillip, and on July 6, 1907, P. E. McKillip and his wife executed and delivered a deed of conveyance to Ida V. Frink, in pursuance of her purchase of the land from her husband. Aside from the deed of conveyance

there was no written contract between the Frinks, nor were any notes executed evidencing the debt of Mrs. Frink to her husband. Defendants concede that F. L. Frink was the owner of the land during all of the time that the record title stood in the names of F. A. Long and P. E. McKillip, respectively. It is contended by plaintiff that the Long and McKillip conveyances were made for the purpose of hindering and delaying creditors of F. L. Frink, who was defendant in three suits in district court that were pending against him in 1904, 1906, and 1907, respectively, and wherein it was sought to obtain judgments against him for considerable sums of money. All of the suits were dismissed by the respective plaintiffs, one on May 14, 1904, one on December 11, 1906, and one on January 8, 1907. One of the dismissals was without prejudice, as shown by plaintiff, and the last dismissal was filed about six months before the execution of the deed to Mrs. Frink. It was while these suits or some of them were pending that the transfers of the land were made to Long and McKillip, and without consideration, as Dr. Frink frankly testified, but on advice of counsel.

Defendants testified that the agreement of Mrs. Frink to purchase the land in controversy from her husband was made and the deed executed and delivered in July, 1907, in consideration of the sum of $10,000 that Mrs. Frink agreed to pay to her husband out of anticipated proceeds of the estate of her father, who was then living, but who was then insane and under guardianship. He died on October 20, 1908. In this agreement and by the terms of the deed of conveyance she also assumed and agreed to pay a $5,000 mortgage lien then existing against the land as a part of the purchase price. It was in pursuance of this agreement and purchase that the McKillip deed to Mrs. Frink was executed. On December 23, 1908, it is shown that she paid to her husband $6,937.50 as part payment for the land, and that on January 5, 1910, she paid to him $2,084.66, both payments on the land, being all of the money that she received from the estate of her deceased father.

There then remained unpaid about $1,000 of the agreed purchase price, which was afterwards paid to her husband out of rentals derived from the land. It is clear that the amount of the mortgage that Mrs. Frink assumed and the money that she paid to her husband in consideration of the deed of conveyance fairly represented the value of the land at the time it was purchased by her.

Bank records, bank books, deposit slips, and the testimony of bank officers corroborated the testimony of the defendants with respect to the payments that she made to her husband for the land and that was deposited by him in the regular course of business. The deed of conveyance and its delivery to Mrs. Frink and its record by her direction appear to be regular in all respects. On the date of the conveyance of the land to Mrs. Frink, and at the time of the payments made by her to her husband, and at the time of his purchase of the Texas land from Ben I. Tanner, Dr. Frink was not indebted to any person except perhaps in a few trifling amounts pertaining to his household expenses in his home town. Aside from his indebtedness to the Tanners, which was incurred more than two years after Mrs. Frink bought the land from her husband, the record does not disclose that F. L. Frink was indebted to any person. Both of the defendants testified, and there is no proof to the contrary, that they never knew nor heard of the Tanners until a few days before December 23, 1908, when the Texas land was bought. Dr. Frink testified that he did not contemplate the purchase of any property when Mrs. Frink bought the land from him. In any event the record clearly discloses that neither of the defendants at the time of the conveyance to Mrs. Frink contemplated becoming indebted to Ben I. Tanner or to the plaintiff, nor does it appear that the Texas land was sold to Dr. Frink by the Tanners in the belief that he was the owner of the land in controversy and that was held in possession by Mrs. Frink at the time by the occupancy of her tenant.

Plaintiff argues, as a circumstance showing bad faith on the part of defendants, that for a part of the time after the

conveyance of the land to his wife, F. L. Frink took a lease from one of the tenants in his own name and collected the rent. This is explained in part by testimony showing that Mrs. Frink was not present when the lease was drawn, and besides she testified that her husband acted as her agent to collect rents and to make repairs and the like. It also appears that it was agreed between the defendants that the final payment of $1,000 on the purchase price of the land should be collected by F. L. Frink from the land rentals after the interest on the farm loan, the taxes and repairs were all paid. So that from any view point this feature of the case is not important. Bank books were produced and other testimony offered to show that for many years after Mrs. Frink acquired title to the land the rentals were deposited in the bank to her credit and used as her own individual funds. It is also shown that at times the Frinks had a common bank account against which they both checked as occasion required.

Testimony was offered by plaintiff to show that Dr. Frink purchased an 80-acre tract of land that he caused to be conveyed to his daughter Amy, in March, 1909, without any money consideration, and that in 1912 he purchased an automobile which he presented to his wife. But neither the tract of land so conveyed nor the automobile are involved in the present case which has to do solely with an effort to subject a certain 320-acre tract of land to the payment of plaintiff's judgment. Other transactions of a like nature are set out in the record, but they do not seem to be in any way involved in the transaction between the parties to this suit.

The rule of law is that a transfer of property between members of the same family will be closely scrutinized in a proper case, for the purpose of discovering whether such transfer was made for the purpose of hindering, delaying or defrauding present or future creditors. *Lininger v. Herron,* 18 Neb. 450; *Farrington v. Stone,* 35 Neb. 456; *Dunn v. Bozarth,* 59 Neb. 244; *Jayne v. Hymer,* 66 Neb. 785; *Lavigne v. Tobin,* 52 Neb. 686; *Ayers v. Wolcott,* 66

Neb. 712. In the present case we are unable to find evidence of bad faith on the part of the defendants. Mrs. Frink in the purchase of the land in controversy, besides assuming the payment of a $5,000 mortgage thereon, parted with a little more than $9,000, her entire patrimony, and approximately $1,000 derived from the rentals of the land, all in payment of the purchase price. At the time of the purchase by her and at the time of the payment of practically all of the purchase money, the outstanding obligations of her husband were negligible in amount. The record fails to show that the conveyance to Mrs. Frink was fraudulent or that it was made for the purpose of defrauding future creditors of F. L. Frink. And even if the conveyance was made by F. L. Frink with a fraudulent intent on his part, Mrs. Frink, under the circumstances of this case, would not be chargeable with the fraud of her husband unless she had guilty knowledge of the intended fraud. No such proof appears in the record, nor do facts appear from which it could be inferred.

It may be noted that the original contract for the purchase of the Texas land from the Ben I. Tanner Land Company was made by Dr. Frink in the name of Mrs. Frink as purchaser on December 23, 1908. On October 1, 1910, Ben I. Tanner and Dr. F. L. Frink entered into a contract for the same tract of Texas land, wherein Dr. Frink appears as sole purchaser and obligated himself to pay the debt on which this action is founded. On the same date and appended to the F. L. Frink contract is an agreement by Ida V. Frink releasing "the Ben I. Tanner Land Company, Ben I. Tanner, or A. G. Bauder, collectively or individually, for any damage by reason of the existence of such contract (Mrs. Frink's contract of December 23, 1908) and by reason of the further fact that said parties will agree to sell said land to said F. L. Frink." Both of the contracts were offered in evidence by plaintiff, and it is not shown that Mrs. Frink, or any other person with her knowledge, in any fraudulent manner or by the use of deception procured her release from the contract of December 23, 1908. From the recital with respect to

her agreement to save the Tanner people harmless from damage by reason of the change in the identity of the purchaser, it would seem that the thought of procuring her release and substituting F. L. Frink as purchaser perhaps originated in the mind of the Tanner company or its agents. About two months after Dr. Frink assumed the Texas land obligation, namely, on December 9, 1910, he paid $2,100 or more to the vendor to apply on the agreed purchase price. From this it would appear, as argued by the defendants, that if he ever formed an intention to defraud the Tanners, such intention must have been formed after the payment of $2,100 was made.

Defendants argue that the Tanners relied for their security for the unpaid remainder of the purchase price of the Texas land on the vendor's lien that they retained thereon, leaving it to be inferred perhaps that an afterthought prompted the attempt to subject the land in suit to the payment of the debt that plaintiff held against F. L. Frink. The record discloses that the land in question was purchased by Mrs. Frink for an adequate consideration paid by her. The transaction on her part was apparently made in entire good faith. She is not shown to be a holder of the land in trust for her husband, nor is it shown to be liable for the debt sued on. Mrs. Frink does not appear to have had knowledge, actual or constructive, of fraudulent intent on the part of her husband to defraud future creditors, even though such intent may have existed. Aside from a fairly lucrative practice as a physician and his interest in the Texas land that he bought from the Ben I. Tanner Land Company, Dr. Frink appears to have been insolvent when this action was commenced. This feature is not controlling and is only mentioned to show that it was not overlooked.

From a review of the record and the law applicable thereto, we conclude that the testimony does not support the decree of the learned trial court, and the judgment is therefore

REVERSED.

SEDGWICK, J., not sitting.

LOUIS REINHARDT V. STATE OF NEBRASKA.

FILED OCTOBER 2, 1917. No. 20124.

1. **Adultery:** PROOF. Adultery, like any other fact, may be established by circumstantial evidence.
2. ———: EVIDENCE. The evidence examined, discussed in the opinion, and *held* that the testimony of the complaining witness is corroborated by competent testimony with respect to the commission of the offense charged against defendant.
3. **Criminal Law:** VERDICT: REVIEW. "It is the province of the jury to determine disputed matters of fact in criminal as well as in civil cases. The verdict will not be set aside in this court upon proceedings in error for want of evidence to support it, unless it is clearly wrong." *Henry v. State*, 72 Neb. 252.
4. ———: ADULTERY: INSTRUCTION. In a prosecution for adultery, the court of its own motion gave an instruction to the jury that is set out and discussed in the opinion. *Held*, that the instruction so given was, under the circumstances of this case, without prejudice to the defendant.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

R. J. Millard, for plaintiff in error.

Willis E. Reed, Attorney General, and *Alfred C. Munger, contra.*

DEAN, J.

The defendant, who is a married man, was convicted in the district court for Cedar county of committing adultery with Minnie Lee, an unmarried woman, aged eighteen, and sentenced to a term of three months in the county jail. He has brought the case here for review.

The defendant is a farmer residing on a farm with his wife and two children. The woman with whom the defendant is charged with having had adulterous relations is his wife's sister. Miss Lee came to the Reinhardt home on August 1, 1915, and with a few interruptions this seems to

have been her home for most of the time from that date until June 13, 1916, when she returned to the home of her step-father living in the same county. Two days thereafter she was there delivered of a babe, fully developed. She maintains that defendant is the father of her child. He stoutly denies its paternity. While she was at the Reinhardt home she assisted in the housework, did chores, helped defendant with the milking, and apparently helped generally in the work about the premises.

Prosecutrix testified that defendant had sexual intercourse with her, the first time, on September 4, 1915, and two or three times thereafter in the same month, the last time being on the 26th, and that all of the illicit acts complained of were committed in defendant's home and while his wife was away getting family supplies at their trading town or visiting among the neighbors. She says that he accomplished his purpose by overpersuasion and always against her will. In October, 1915, she began to suspect pregnancy, and upon telling defendant about her probable condition she testified that he told her "not to worry, he would get rid of it for me." She testified that about two days before her child was born she talked with defendant about her unfortunate condition when they were alone in his home, and that he then told her the name and address of a maternity hospital in Omaha, telling her that it was the place for her to go, and that when she told him she could not remember the name nor the address of the institution, he wrote it on a slip of paper and gave it to her. This paper in defendant's handwriting containing the address of the hospital is in evidence. On the same day and at the same time she said that he gave to her $12 to pay the expenses of the trip. She said she had a small sum of money in a bank in his name at the time, but this was not mentioned, and she understood that the money he gave her was his own. It is in evidence that Miss Lee concealed her condition from her mother until very shortly before the birth of her babe. Her mother testified that when her daughter told her that she expected to become a mother, she also

told her that a Coleridge man was the father of the child, and that she afterwards said that the defendant "told her to tell that, and not tell on him because it was a penitentiary act." It seems that she talked with no one except defendant about her condition until within a few days of the birth of the child. The complainant's stepfather testified that she and the defendant, for a period of about 10 days in the early part of September, 1915, while he was at the Reinhardt home, were frequently alone together, and that no other man was there during his stay in that month. The prosecutrix testified that she never had sexual relations with any other man than the defendant, and that she kept company with no other man during September.

The defendant denied ever having had sexual intercourse with the complaining witness, and also practically all of the material testimony offered by her. The question whether Miss Lee was at the Reinhardt home during the month of September, as she testified, is material in view of other facts in the case. On this point defendant and his wife both testified that in September she was at Coleridge for a few days, and at Hartington about fair time for perhaps a week, and that once or twice she was away from home over night at the home of some of the neighbors, one of whom the defendant named. This testimony is important if true, and if true it seems that it would have been corroborated by the testimony of disinterested witnesses who saw her when she was away from defendant's home. With the exception of one man who testified to seeing her at the fair in his automobile and seated by the side of his own daughter, no corroboration appears, and we conclude the jury must have disbelieved the testimony of both the defendant and his wife on this point. Besides, Miss Lee not only testified that she was at the Reinhardt home continuously in September, but she testified that she did not know the owner of the automobile, and denied the automobile incident altogether. Mrs. Reinhardt alone testified that there were one or more hired men who worked on the place in September, and that one of them, a 19-year old

boy, was there for a part of the time overnight. But no significance can attach to this circumstance, because it is not even attempted to be shown that the prosecuting witness even spoke to these men, much less that she was on terms of criminal intimacy with them. Apparently the jury believed from the testimony that defendant was the only man on the Reinhardt premises with whom Miss Lee was familiarly intimate during September, 1915; so that if the babe that was born to her on June 15, 1916, was begotten in September, 1915, the jury were justified in concluding that defendant was its parent, and to this extent the date of its birth is corroborative of her testimony that she had sexual intercourse with defendant in that month.

It is obvious that testimony as to the date of birth of the child might be admissible as corroboration in proof of adultery under some circumstances, and that such testimony would not perhaps be admissible under others. On this point we believe that an inflexible rule cannot be established that is equally applicable in all cases. The testimony appears to have been fairly presented, and the jury as triers of disputed questions of fact having determined the controversy, we are not disposed to disturb their verdict. It is disclosed that the testimony of the prosecuting witness was sufficiently corroborated, and we find no sufficient reason for setting aside the verdict of the jury.

Defendant complains of instruction No. 5, given by the court of its own motion. The instruction follows: "The question as to who is the father of the child born to Minnie Lee on June 15th, 1916, is immaterial except as the date of the birth corroborates the witness as to day of carnal knowledge charged in the information. And the fact, if it be a fact, that the father of said child is some other person than the defendant, would not relieve the defendant of the charge alleged in the information, if the jury believes beyond a reasonable doubt that defendant is guilty of adultery as charged in the information beyond a reasonable doubt as explained in these instructions."

In oral argument counsel for defendant admitted that "the instruction is correct as an abstract proposition of law," but he argues in his brief that the instruction as given has "a tendency to inject a false issue into the case. The question at issue was not as to who is the father of a particular child. It is not a bastardy case. The instruction would seem to indicate that we were trying to establish the parentage of the child as a defense. This was misleading and prejudicial." In oral argument, also, he cited *Commonwealth v. O'Connor,* 107 Mass. 219, a case where the defendant was charged with committing adultery with an unmarried woman. It was there held that evidence is inadmissible that the complainant "was delivered of a child which might have been begotten about the time of the offense charged." But in the *O'Connor* case only a few of the attendant facts are discussed, so that we are unable to say that the rule there announced should be accepted as an expression of substantive law that is properly applicable to the case before us. *Clark v. State,* 170 Ala. 101, holds to a rule directly contrary, where the same question was involved. We cannot adopt defendant's theory with respect to the instruction complained of. Its language is not susceptible of strained construction, and we do not see how it could have misled the jury. Under the circumstances presented by the record before us, we are unable to say that it was prejudicial to the defendant.

Discovering no reversible error in the record, the judgment of the trial court is

AFFIRMED.

EDWARD PRUSS, SR., APPELLANT, V. FRANK SCHULTZ ET AL., APPELLEES.

FILED OCTOBER 13, 1917. No. 19466.

Appeal: TECHNICAL ERRORS. A judgment will not be reversed merely on account of a technical error which does not affect the substantial rights of the appellant.

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

John M. Macfarland and *Thomas J. Keenan,* for appellant.

Jefferis & Tunison, A. H. Murdock and *A. C. Pancoast, contra.*

LETTON, J.

This is an action in replevin brought by Edward Pruss, Sr., against Frank Schultz and C. F. Huntzinger. A trial was had and verdict rendered, which was set aside and a new trial ordered. Afterwards Frank P. Lewis intervened.

The petition alleged, in substance, that on January 14, 1910, the plaintiff was the owner of and entitled to immediate possession of certificate of membership No. 126 in the South Omaha Live Stock Traders Exchange, issued in 1908 to Edward Pruss, Jr., the son of plaintiff; that the certificate had been assigned and indorsed by the latter to plaintiff; that it was placed in the name of Pruss, Jr., so that the latter could buy and sell cattle upon the exchange. Huntzinger answered denying any interest in the certificate, and stating that it was in his hands as secretary of the exchange. Schultz answered that he purchased the certificate in December, 1909, from Frank P. Lewis, without any knowledge of any claim on the part of Edward Pruss, Sr., or Edward Pruss, Jr. He asked that he be adjudged the owner of the same. In the

petition in intervention Lewis alleged that Pruss, Sr., and Pruss, Jr., pledged and delivered the certificate to him as security for moneys to be advanced to them for trading in live stock; that he advanced at various times money to the amount of $820.83; that in 1909 he sold the certificate to Schultz; that after this suit was commenced he refunded the purchase price to Schultz and took back the certificate, and that he now claims a lien thereon and a special ownership therein for the sum of $820.83, with interest at 7 per cent. from January 13, 1909, for money advanced to Pruss, Jr. He asked judgment for the possession of the certificate until the amount due him has been paid. The jury found that Lewis was entitled to possession of the property and that the value of the possession was $410. Judgment was rendered accordingly.

The brief of appellant is not prepared in accordance with rule 12 (94 Neb. XI) of the court, which is designed to aid the court by clearly specifying the points in dispute, clarifying the issues, and thus securing a better understanding of the contentions of the complaining party, but several complaints seem to be made.

It is urged that, since Lewis had sold the certificate to Schultz, the verdict finding that the right of possession was in Lewis at the time the action was commenced is erroneous. In a certain sense this is true, but under the circumstances of this case it is not prejudicial to plaintiff. It is undisputed that the real owner of the certificate was the plaintiff Edward Pruss, Sr. He purchased it with his own money and procured it to be transferred and issued in the name of his son so that the son might buy and sell stock as a member of the exchange. The actual dispute is with reference to whether the certificate was ever pledged as security for money furnished Pruss, Jr. Lewis, who was in the business of furnishing office facilities, bookkeepers and credit to traders upon the exchange for a commission on each head of cattle sold, testified that both the senior and junior Pruss were

present in his office at the time when the certificate was indorsed in blank by Pruss, Jr., and that the certificate was delivered to him by the senior Pruss; that afterwards he advanced money to Pruss, Jr., on the strength of the pledge, until December, 1908; that the senior Pruss several times examined the account kept in the name of the junior. Afterwards Pruss, Jr., was expelled from the exchange, and Pruss, Sr., with the assistance of Lewis disposed of the cattle he had on hand. Pruss, Jr., was afterwards reinstated as a member of the exchange. Lewis then contracted to sell the certificate to Schultz, and, according to the rule of the exchange, Schultz made an application for the transfer of the certificate on the books of the association from the name of Pruss, Jr., to himself. Pruss, Sr., then filed a protest with the secretary of the exchange against the exchange, which was delayed on this account, and the certificate was taken from the secretary by the writ issued in this case. Some time after the suit was begun it was agreed between Lewis and Schultz that the sale might be rescinded on account of the inability of Lewis to deliver the certificate. Lewis therefore succeeded to the interest of Schultz during the pendency of the action.

Under section 7832, Rev. St. 1913, the action might have proceeded in the name of Schultz. A verdict in his favor would have inured to the benefit of Lewis.

There is a direct conflict in the evidence as to whether the certificate was pledged to Lewis or merely left with other papers in a desk in his office. The preponderance is with the intervener upon this issue.

The verdict of the jury is amply supported by the evidence. We find no prejudicial error, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

SIDNEY T. FRUM, APPELLANT, V. GEORGE W. LEAMER, APPELLEE.

FILED OCTOBER 13, 1917. No. 20108.

Elections: CONTEST: EVIDENCE. In a proceeding under the Nebraska statutes to contest an election on the statutory ground that sufficient votes to change the result were illegally counted for contestee, contestant may introduce in evidence properly preserved ballots themselves without first making proof of the charges in his complaint, facts stating such statutory ground being alleged in specific terms. Rev. St. 1913, secs. 2095, 2124.

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

R. E. Evans and *Sidney T. Frum,* for appellant.

Fred H. Free and *J. J. McCarthy, contra.*

ROSE, J.

This is a controversy between two rival candidates for the office of county attorney of Dakota county to contest the election held November 7, 1916. According to the county canvassing board, contestee had a plurality of 13 votes, and he was declared elected. Contestant complained that sufficient votes to change the result of the election were illegally counted for contestee. The contest was commenced in the county court. There the ballots cast in the voting precints were rejected as evidence on the ground that no preliminary proof of error or mistake in the counting of the votes had first been adduced. A dismissal of the contest followed. Contestant appealed to the district court, with the same result for the same reason. This is an appeal from the judgment of the district court to review the ruling that the ballots are not available as evidence in advance of proof of contestant's charges.

The judicial opinions on the question presented are not harmonious. Some courts in construing legislation have

held that, while the ballots themselves are the best evidence of the result of the election, contestant, to make them available, should first offer proof tending to show that his charges are true; there being no reason to question or to examine the official returns or the ballots in advance of such proof. *Quigley v. Phelps*, 74 Wash. 73, Ann. Cas. 1915A, 679; *In re Tarr*, 93 Ohio St. 199. There is reason for this doctrine, where the legislature has left the courts free to prevent an examination of ballots and to terminate expensive or irritating litigation, unless there has first been proof of fraud or mistake affecting the result of the election. On the other hand, it has been held that, without any preliminary proof of fraud or mistake, the ballot boxes may be opened and the contents examined to sustain the charges of contestant. *People v. McClellan*, 191 N. Y. 341. In the cases cited, however, the statutes construed are not exactly like those under which contestant proceeded in the present case. It is therefore necessary to examine the Nebraska statutes and the issues presented by the pleadings.

An election contest may be instituted by the filing of a complaint "verified by the affidavit of the contestant that the causes set forth are true as he verily believes." Rev. St. 1913, sec. 2113. Contestant is required to file a bond "to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail." Rev. St. 1913, sec. 2113. The trial court has power to make any necessary "order concerning immediate costs." Rev. St. 1913, sec. 2118. "The election of any person to any public office" may be contested, says the statute, "when illegal votes have been received or legal votes rejected at the polls sufficient to change the result," and "for any error in any board of canvassers in counting the votes, or in declaring the result of the election if the error would change the result." Rev. St. 1913, sec. 2095. Some of the statutory provisions follow:

"The proceedings shall be assimilated to those in an action, so far as practicable, but shall be under the con-

trol and direction of the court, which shall have all the powers necessary to the right hearing and determination of the matter. * * * It shall be governed by the rules of law and evidence applicable to the case." Rev. St. 1913, sec. 2118.

"If an inspection of the ballots or poll books of any election district in this state shall become necessary for the determination of any election contest before any court, the presiding judge thereof may by order, naming the district or districts, require the proper officer to procure the same from the county clerk, or other person in whose possession or custody the same may be, and such clerk or person shall deliver the same to said officer, who shall deliver them unopened to such presiding judge." Rev. St. 1913, sec. 2124.

"The presiding judge shall open and inspect the same in open court, in the presence of the parties or their attorneys, and immediately after such inspection shall again seal them in an envelope and return them by mail or otherwise to the office of the county clerk in which they were at first required to be filed." Rev. St. 1913, sec. 2125.

The statute enumerates a number of grounds of contest, among them being ineligibility, conviction of a felony, and offer to bribe an elector. In a contest on these grounds alone an inspection of the ballots is unnecessary. The complaint is based on other grounds. It is alleged that there are eight precincts in Dakota county, and that in each votes sufficient to change the result of the election were illegally counted for contestee; the allegations in regard to Omadi precinct being as follows:

"That in said Omadi precinct the return of the election board of said precinct, and the official canvass thereof, shows that, out of 280 votes cast in said precinct for the office of county attorney, this contestant received 156 votes and the contestee received 124 votes. This contestant alleges and states that in said Omadi precinct contestant received 190 votes and contestee received not

to exceed 90 votes, and that the said votes in said precinct were irregularly, incorrectly and wrongfully counted and returned by the election board of said precinct, and were wrongfully canvassed by said canvassing board, and had the votes in said precinct been correctly counted, this contestant would have received, and did receive, not less than 190 votes for the office of county attorney in said precinct.

"That in said Omadi precinct in said county, at said general election, 14 ballots were cast by persons whose names are to this contestant unknown, on which said ballots no person was voted for, for the office of county attorney of said county, which ballots were illegally counted by said election board of said precinct for contestee, canvassed for the contestee by the said canvassing board of said county; that at least 34 ballots and votes cast for the contestant for the office of county attorney were illegally and incorrectly counted for the said contestee, George W. Leamer, and were canvassed for him by the said canvassing board of said county, and said 34 ballots so cast and voted for this contestant, or any of them, were not counted for this contestant by the said election board, and were not canvassed for said contestant by the said canvassing board, but said ballots were counted and canvassed for said incumbent."

The truth of these allegations was put in issue by the answer. After it was shown that the ballots cast in Omadi precinct had been preserved by the proper officers in the condition in which they were received by the election officers from the voters, and after the county clerk had produced in court the ballots from this precinct, they were offered in evidence and rejected. Was the ruling erroneous?

It will be observed that specific facts constituting a ground for a contest under the statute are confined to a specified election district. A correct count of the ballots would determine the issue without other proof. The statute seems to contemplate the taking of such a course.

Without requiring a contestant to conform to the Code of Civil Procedure, he is authorized to begin a contest by filing a complaint verified by an affidavit that the causes set forth are true as he verily believes. To prevent captious or meddlesome contests and to protect contestee and the public, contestant is required to file a cost bond. In addition, the court is authorized to make any necessary "order concerning immediate costs." The proceedings are under the control and direction of the court. As already stated, some of the statutory grounds do not require an inspection of the ballots, but if, in the language of the statute, an inspection of the ballots of an "election district" becomes "necessary for the determination" of the contest, the presiding judge may demand their production, and, when produced, he is required to open and inspect them in the presence of the parties and their attorneys. The legislature did not require preliminary proof of error or mistake as a condition of scrutinizing the ballots. An implied restriction that properly preserved ballots themselves cannot be examined, in the first instance, to prove a mistake does not seem to be consistent with the statutory procedure outlined. The public is interested in the election, in a correct count, and in the result. The force of the arguments on the sacredness of the ballot, on the integrity of the official returns, on the correct rules of evidence, and on the invoking of the power of the court to discover evidence is fully recognized, but the aim and import of the statute, as shown by the language of the lawmakers, are controlling considerations. The better construction permits the inspection of properly preserved ballots to support a charge of fraud or mistake in a specified election district, changing the result of the election, where that issue is raised by specific allegations stating a ground of contest, though preliminary proof in support of the complaint has not been first adduced.

For error in excluding the ballots, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

I. L. VAN SANT, APPELLEE, V. MATTHEW J. BEUDER, APPELLANT.

FILED OCTOBER 13, 1917. No. 20184.

1. **Landlord and Tenant:** LEASE: CONSTRUCTION. A farm lease, "for the term of one year with the privilege of three years subject to sale," construed to authorize lessor, by means of sale and notice, to terminate the tenancy at the end of any rental year during the three-year period.

2. **Forcible Entry and Detainer:** RIGHT OF POSSESSION. In an action of forcible detainer, the contest is limited to the naked right of possession.

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

Baker & Ready and *W. R. Patrick,* for appellant.

Ringer & Bednar, contra.

ROSE, J.

This is an action of forcible detainer for 54 acres of land in Sarpy county. From a judgment in favor of plaintiff, defendant appealed.

When Lelia B. Van Sant was owner of the property she leased it to Matthew J. Beuder, defendant, October 10, 1914, for the term of one year with the privilege of three years subject to sale, the first year to begin March 1, 1915, and to end March 1, 1916. Exercising the privilege thus granted, the land not having been sold during the first year of tenancy, defendant remained in possession of the premises. I. L. Van Sant, plaintiff, purchased the land from the lessor February 19, 1917. The next day plaintiff and his grantor joined in a notice to defendant that the demised premises had been sold and to vacate on or before March 1, 1917, the end of his second rental year. Defendant claimed the right to remain in possession until the end of the three-year period and refused to vacate. This action was instituted March 14,

1917. Following the language of the contract, which is in writing, the premises were leased to defendant:

"For the term of one year with the privilege of three years subject to sale on the 1st day of March, 1915, to end on the 1st day of March, 1916, at the rental of four hundred twenty-five dollars a year to be paid as follows, to wit: One hundred dollars cash, for which receipt is acknowledged, on the 10th day of October, 1914; one hundred twenty-five dollars, payable on the 1st day of March, 1915, and the balance, two hundred dollars, payable as follows: One hundred dollars the first day of September, 1915; one hundred dollars on the first day of January, 1916."

Another provision of the lease follows: "And the said renter, M. J. Beuder, hereby agrees to pay as the rent of said premises, for said term, the sum of four hundred twenty-five dollars."

A further stipulation reads: "At the expiration, or on the termination, of this lease from any cause, said lessee will, without further notice of any kind to quit, surrender up the peaceable possession of said premises to the said lessor."

The question presented by the appeal is the meaning of the expression, "For the term of one year with the privilege of three years subject to sale," as it appears in the lease considered as a whole. Defendant takes the position that the lessor had no right to disturb the tenancy by a sale after expiration of the first-year period, since no sale had been made during that time, and since defendant had exercised his privilege to retain the premises for two years more. The point is stated by defendant in another form:

"It therefore seems evident that the term 'subject to sale,' if it has any meaning at all, can be construed only as a limitation upon the right of the lessee to make his election for the extension of the term from one year to three years."

The lease itself seems to have a different import. The words, "subject to sale," limit the demise or the lease-

hold and apply to both periods of time. The lease is partly printed and partly written, the words italicized in the following paragraph being written in blanks with a pen:

"For the term of *one year with the privilege of three years subject to sale* on the *1st* day of *March,* 1915, to end on the *1st* day of *March,* 1916, at the rental *of four hundred twenty-five dollars a year.*"

The dates apply to the printed words, "the term," and do not limit the time for exercising the right of sale. Except for the expression "subject to sale," the tenancy, without regard to the length of the term, could not be disturbed by sale. The parties evidently meant to subject the tenancy itself to the right of sale, and the exercise of that right is not limited by the lease to any particular period. The lease as a whole, however, including the provisions for paying the rental, indicates that the parties had no purpose to interfere with lessee's possession, except at the end of a rental year. This seems to be the natural and reasonable construction of the language used by the parties and is consistent with the purposes of a farm lease, where the premises are for sale. Thus construed, the terms would appear satisfactory to both parties when making and executing the contract. Lessor's wish to sell her real estate would be protected. Lessee would realize the uncertainty of his tenure and would be warned to manage his leasehold accordingly. A resort to extraneous evidence, for the purposes of interpretation, is unnecessary.

It is argued, however, that this construction would sanction a forfeiture of improvements and crops. A lessee cannot prolong his stipulated tenure merely by making improvements or by planting grain in autumn, where his contract does not so provide. Compensation for improvements and crops, where the tenancy may be terminated by a sale of the demised premises, is a proper subject of negotiation and contract. Though leases of that nature generally contain provisions for such compensation and are enforceable, no reference to that subject is found in

the lease in controversy here. Defendant's lease and tenure were "subject to sale." Under a fair interpretation of the lease, the lessor, by sale, had a right to terminate the tenancy at the end of any rental year. The land was sold during the second rental year and defendant was not notified to vacate before the end thereof. Compensation for improvements and crops was not a condition of restitution, but defendant had agreed to surrender possession upon termination of the lease from any cause. Within the meaning of the lease, the tenancy, by sale and notice, was terminated at the end of the second rental year, and the right to restitution did not depend on compensation for improvements and crops.

In an action of forcible detainer, "the contest is limited to the naked right of possession of the premises." *Dawson v. Dawson*, 17 Neb. 671. This rule was recently approved. *Knapp v. Reed*, 88 Neb. 754.

The judgment of the district court is in harmony with these views of the case.

AFFIRMED.

SCHOOL DISTRICT, APPELLEE, V. A. K. WILSON, APPELLANT.

FILED OCTOBER 13, 1917. No. 19093.

1. **Schools and School Districts:** HIGH SCHOOLS: POLICY OF STATE. It is the established policy of the people of this state through their legislature to furnish free high school education to all the youth of the state without distinction or discrimination.

2. ———: ———: ———. The law requires each county of the state to establish a high school, if necessary, so that all the youth of the county can have free high school privileges. And there is no statute requiring that the parents of children qualified for and entitled to high school privileges shall be required to pay for such privileges for their children.

3. ———: ———: TUITION. If a resident of a school district having no free high school applies under the statute to the county superintendent "for free high school education" in an adjoining district having such high school, and the superintendent upon investigation makes the necessary certificates for that pur-

pose, and the children of school age having such certificates attend such high school without objection or question on the part of the school officials, the law will not imply an agreement on the part of their parents to pay for such privileges. The law will not imply that which the evidence clearly shows did not exist.

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

J. L. Rice and *John Stevens,* for appellant.

Lambe & Butler, contra.

SEDGWICK, J.

This defendant, while residing in school district, No. 105, in Furnas county, which district had no high school and no facilities for high school education, sent his children of school age to the high school in the adjoining district, No. 15. After they had attended that high school for some time, this action was brought by school district No. 15 to recover $3 a month, which it was alleged "the defendant impliedly and by operation of law agreed to pay the plaintiff for the said school privileges." The plaintiff recovered a judgment in the district court, and the defendant has appealed.

The plaintiff contends that under the provisions of the act of 1907 (Laws 1907, ch. 121) as amended by the act of 1909 (Laws 1909, ch. 122) there is an implied contract on the part of the parents of these children to pay the specified sum of $3 a month for tuition in the plaintiff's high school.

It has continually been the policy of this country to furnish free educational privileges to all children of school age by general taxation without regard to whether the parents or guardians of the children are situated so as to pay any part of such taxes. It is the established policy of the people of this state through their legislature to furnish free high school education to all the youth of the state without distinction or discrimination.

In 1907 the legislature provided for free public high school education. Laws 1907, ch. 121. The title of the act

was: "An act to provide four years of free public high school education for all the youth of this state whose parents or guardians live in public school districts which maintain less than a four-year high school course of study, and to repeal all acts and parts of acts in conflict herewith." And the first section began with these words: "Provision is hereby made for four years of free public high school education for all the youth of this state whose parents or guardians live in public school districts which maintain less than a four-year high school course of study, on the following conditions, to wit." The conditions that follow are quite elaborately set forth and apply generally to all children of the state without regard to location or residence. At the same session of the legislature there was an act (Laws 1907, ch. 122) the object of which, according to the title, was: "To provide for free high school education, to establish and locate county high schools, * * * to levy a tax for the support and maintenance of such county high schools; to provide for a county high school fund and the allowance of claims against such fund." Under this act any county in the state "may establish a county high school on the conditions and in the manner" therein prescribed for the purpose of affording "all grades above the eighth grade." The act provided for submitting the question to the electors of the county as to whether such high school should be established.

In 1913 an act was passed (Laws 1913, ch. 252) entitled: "An act to provide for the organization of county high schools in counties not having a twelfth grade high school." The act provided: "The county board of any county in this state that does not have organized within the borders of such county a twelfth grade high school accredited to the state university, shall be deemed authorized and it shall become their duty" to take steps necessary to provide a board of regents for such high school.

In 1915 an act was passed (Laws 1915, ch. 120) repealing the provisions of the former act in regard to sub-

mitting the question to the voters, and providing: "A county high school shall be established by every county in which there is not now located a twelfth grade high school accredited to the state university in the manner hereinafter prescribed for the purpose of affording better educational facilities for pupils who have advanced beyond the eighth grade."

The title of the act of 1907 declares the purpose of the act, and all other legislation upon this subject keeps that purpose distinctly in view.

The Constitution provides that the subject of legislation must be clearly expressed in the title of the act. The object of this provision is to prevent surreptitious legislation. The people of the state would not expect legislation under this title that would deprive the children of indigent parents of the privilege of free high school education, and the provisions of the act of 1907 were in harmony with the promise held out in the title of the act. If an attempted amendment to this act should so far depart from the subject expressed in the title as to amount to surreptitious legislation, such amendment would be invalid under the constitutional provision. It is seriously contended by the defendant in this case that the amendment of 1909 is unconstitutional and void. This court is so reluctant to declare an act of the legislature unconstitutional that we have concluded that this case can be decided without determining that question.

In *High School District v. Lancaster County*, 60 Neb. 147, the question was raised "whether the fact that under this act the taxpayers of such districts are compelled to pay the whole of the expense of educating pupils resident in such district, and in addition thereto the proportion of the expense of educating nonresident pupils, affects the question of the constitutionality of the act," but it was not found necessary in that case to determine that question. That objection has been obviated in sub-

sequent legislation authorizing and requiring each county of the state to establish a high school, if necessary, so that all the youth of the county can have free high school privileges. An act passed in 1907 (Laws 1907, ch. 122) was entitled an act "to provide for free high school education, to establish and locate county high schools," and provided for a special election at which the voters of the county could determine whether such free high school should be established. In 1913 (Laws 1913, ch. 252) it was enacted that it should be the duty of the county board of any county in this state that does not have organized within the borders of such county a twelfth grade high school, to provide for a board of regents for a county high school, and it also provided that "the county high school herein provided for by law shall be located at the county seat of such county." From these and similar acts it is manifest that the people of the state intended that each county should furnish high school privileges to all the youth of the county where such privileges were not otherwise provided for. Indeed the act so provided in express terms. Rev. St. 1913, sec. 6831. There is no statute that expressly provides that the parents of children qualified for and entitled to high school privileges shall be required to pay for such privileges for their children. Every expression of the legislature upon that subject seems to contemplate that high school privileges shall be free to all the youth of the state. It cannot be said then that there is in this state any law fixing such liability upon the parents.

The question remains for consideration whether, under the conditions shown to exist in this case and the provisions of our statutes, an agreement on the part of this defendant to pay this tuition should be implied. The statute provides: "Every pupil, to be entitled under the provisions of this article to *free public high school education* in the ninth grade of any public school district maintaining such grade, must have a certificate signed by the

county superintendent of the proper county that he has completed the course of study prescribed by the state superintendent for work below the ninth grade as set forth in the first condition of this section and that he is unable to secure ninth grade work in the public school district of his residence." Rev. St. 1913, sec. 6813, subd. 2. And there is the same provision in regard to each grade above the common school grades. The same section (subdivision 6) provides: "Every nonresident pupil attending any public school under the provisions of this article shall have the same rights and shall be subject to the same rules and restrictions which govern resident pupils attending such public school. Any public school district unable to furnish accommodations to nonresident pupils, without constructing or renting additional buildings, hiring extra teachers, or other reasonable cause, may refuse admission to any or all such nonresident pupils." The general provision for nonresident pupils in the common schools provides that the school board "may determine the rates of tuition of the pupils and collect the same in advance, but no tuition shall be charged such children as are or may be by law allowed to attend the school without charge." Rev. St. 1913, sec. 6784. It is admitted in this case that the defendant applied to the county superintendent under the statutes "for free high school education" of his children in the plaintiff district, which was adjoining the district in which the defendant resided, stating in his application "the number of pupils for whom free high school was desired;" and that during the time that these children attended the plaintiff high school they "each had a certificate duly signed by the county superintendent" required by the statute. Section 6831, above cited, after providing that "tuition shall be free to all pupils residing in the county where the school is located," provides for the admission of pupils from without the county "upon the payment of such tuition as the board of regents may prescribe." When these schol-

ars entered the plaintiff high school with the certificates of the county superintendent, which the statute requires, in their possession, it seems that the plaintiff district did not raise the question whether they were entitled to free tuition, and did not prescribe any terms of tuition, as contemplated by section 6831, in case of students that were not entitled to free tuition. They did not pursue the course pointed out in the statute in case of the common schools in general as indicated in section 6784. Under that section it is required that the board determine the rates of tuition and collect the same in advance, and ordinarily, if that was not done, it might be because of the further provision of that section that "no tuition shall be charged such children as are or may be by law allowed to attend the school without charge."

The law in many cases implies a contract to pay for services received, but not in cases where, as in this case, it is doubtful whether the party claiming compensation is entitled thereto from the party with whom he deals, and where the existing conditions and the conduct of the parties are entirely inconsistent with the existence of such a contract. The defendant claimed that he was entitled to free high school privileges for his children. That was what he expressly applied for, and the school district took no such action as the statute contemplates in case the party applying was not entitled to such free tuition; and so, instead of an implication of an agreement to pay, it clearly appears that no such payment was contemplated by the defendant, as the school officials and all parties knew. The law will not imply that which the evidence clearly shows did not exist. We do not think that the defendant is liable for the payment of tuition. The case was submitted to the trial court upon a stipulation. There is no disputed fact.

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

REVERSED AND DISMISSED.

LETTON and ROSE, JJ., not sitting.

CLOW F. ADAMS, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED OCTOBER 13, 1917. No. 19995.

1. **Municipal Corporations: FIREMEN: COMPENSATION.** The statutes reserve to the state the right to fix the compensation of firemen in cities of the metropolitan class.
2. ———: ———: ———. Section 4210, Rev. St. 1913, as amended by chapter 77, Laws 1915, fixes the compensation of firemen in metropolitan cities, and the city authorities have no power to provide different compensation.

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

John A. Rine, W. C. Lambert and *L. J. Te Poel,* for appellant.

Rosewater, Cotner & Peasinger, contra.

SEDGWICK, J.

The question in this case is whether a city of the metropolitan class has the power to regulate the compensation of firemen, or the state has reserved to itself that power and has fixed their compensation. The Banning Act gave all cities of the state having a population of 5,000 or more general powers of self-government. Section 11 of the Banning Act (Laws 1911, ch. 24) provides that the city council shall have "all executive or legislative or judicial powers and duties hitherto held, possessed or exercised under the then existing laws governing any such city, by the mayor or mayor and city council," etc., with a proviso in regard to the water board of metropolitan cities and other matters which do not affect this question. When this Banning Act was enacted there was in force in this state a statute fixing the salaries of police officers and members of the fire department in cities of the metropolitan class (Rev. St. 1913, sec. 4210), so that when this act was enacted the

city authorities had no power to fix such salaries, and therefore it would seem that the power to fix the salaries was not included in section 11. Of course, there can be no doubt that the state, because of the interest that the state at large has in enforcing the laws and in protecting property from fire, has jurisdiction over the police and the fire department. Again, section 19 of the Banning Act provided: "All general state laws governing the several classes of cities described in this act shall, according to the class within which it is embraced, apply to and govern any city adopting this act." As above suggested, it would seem that the interests of the state in the police and fire protection would bring it within the jurisdiction of the state to regulate those matters, and that the statute above quoted was a general statute of the state governing cities of the metropolitan class.

It will further be observed that afterwards the legislature has assumed to regulate those matters by amending section 4210, Rev. St. 1913. In 1915 (Laws 1915, ch. 77) the salaries of policemen and firemen are specifically fixed by the legislature in an act amending section 4210, and repealing that section. That section seems to fix the salaries of these officers at $100 a month. The district court so held, and its judgment is therefore

AFFIRMED.

ROSE, J., not sitting.

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

FILED OCTOBER 13, 1917. No. 20196.

1. **Pledges: SALE: LIABILITY FOR SURPLUS.** If a creditor who holds collateral security for his claim sells the securities and realizes more therefor than the amount of his claim, and refuses to pay the owner of the securities the remainder of the money received therefor after satisfying his claim, he is liable in an action for conversion of such surplus.

2. ———: ———: ———. The facts in this case, stated in the opinion, required the defendant to account to the owner of the collateral for the amount received and applied thereon by defendant.

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

D. O. Dwyer, for appellant.

Jesse L. Root and *C. A. Rawls, contra.*

SEDGWICK, J.

In the early part of 1910 the defendant sold to William Volk for $15,000 gold coupon bonds of $10,000 face value and preferred stock of $5,000 face value in the Norfolk Long Distance Telephone Company of Norfolk, Nebraska. Volk left this stock with Parmele for safe-keeping, and took Mr. Parmele's receipt reciting that fact, in which it is also agreed that the stock should remain in the Bank of Commerce of Louisville, Nebraska, in which the defendant was interested, for the term of five years, "and the income to be paid over to William Volk as paid." After Mr. Volk's death this plaintiff began this action against the defendant to recover the value of the stock, alleging that Mr. Volk in his lifetime, "being engaged to be married to plaintiff, gave said bonds and stock to plaintiff, and at the time delivered the same to plaintiff by delivering to her said written instrument of the defendant." She appears to have had the defendant's receipt for the stock in her possession. The defendant alleged that he had no notice of such gift by William Volk to the plaintiff, and that Mr. Volk had in his lifetime deposited the stock with this defendant as collateral security for such loans of money as the defendant and the banks in which the defendant was interested might make to Mr. Volk, and that he and the banks had pursuant to that agreement loaned to Mr. Volk money at different times amounting in the aggregate to a large sum, and that all of the property of the Norfolk Company (of

which the bonds in question were part) had been sold, upon an action in foreclosure of the bonds, and that the amount realized was not sufficient to pay the bonds, and the *pro rata* share applicable upon the $10,000 bonds of Mr. Volk was not sufficient to pay the indebtedness of Mr. Volk so incurred to the defendant and the said banks. The jury found a verdict for the defendant, and, judgment being entered thereon, the plaintiff has appealed.

It is not claimed that the defendant by this transaction with Volk became the owner of the bonds and stock. If the money advanced thereon to Volk was repaid the defendant had no right in the surplus value of the bonds and stock. It appears to have been held upon the former appeal in this case (*Kaufmann v. Parmele,* 99 Neb. 622) that the evidence was not disputed that the plaintiff was the owner of the bonds and stock, subject to such interest as the defendant might have in the same as collateral security. At the foreclosure sale all of the property of the Norfolk Long Distance Telephone Company was purchased in the name of this plaintiff for $20,000, and as that was two-thirds of the appraised value the same was confirmed by the court. The defendant insists that that fixed the value of the property and therefore the amount that could be applied upon the bonds, and established that the stock was worthless as the property was insufficient to pay the bonds which was the first lien upon all the property of the company.

The amended petition of the plaintiff sues as for a conversion, and much of the discussion in the briefs is upon the question whether this sale regularly made in the interest of all parties could amount to a conversion on the part of the defendant. We cannot see that this discussion is important. It appears that the defendant immediately transferred all of the property of the company to the Nebraska Telephone Company and received $50,000 for it. This money was paid to the Norfolk Long Distance Telephone Company and was distributed to the

bondholders in proportion to the amount of their bonds. In this distribution this defendant received that part of the $50,000 which was apportioned to the $10,000 of bonds in question. If he held these bonds as collateral security, as he says, this money, the proceeds of the bonds, was also collateral security, and, while he might properly apply so much of it as was necessary to extinguish the indebtedness for which the bonds were held as security, the remainder of the money, if any, would belong to Volk or his assignees, and to refuse to pay it over would be a conversion. There is no doubt under this evidence that this $50,000 must be considered as the proceeds of the sale of the property of the company. The evidence of the president of the company, who was called as a witness by the defendant, established that fact. He testified that before the foreclosure there were negotiations between the officers of the Norfolk company and the officers of the Nebraska Telephone Company in which it was understood that the Nebraska Telephone Company would pay $50,000 for the property to the Norfolk company if a clear title to all the property could be transferred. He says that to carry out this arrangement the foreclosure was decided upon, and that the defendant was one of the officers of the company who assisted in the whole of the proceedings, and as this money which the Nebraska Telephone Company paid for the property went to the Norfolk Company pursuant to this understanding and this sale, it follows that the defendant as an officer of the company purchased in this property at the sale for the benefit of the company itself. Therefore the proportion of the $50,000 that was applied upon this stock should have been accounted for to this plaintiff.

The only question remaining is as to the amount then owing to the defendant and the banks he was interested in for which these bonds were collateral. The total amount of the bonds outstanding was $79,000. The proportion of the $50,000 that should have been applied up-

on these bonds would therefore be $6,329.10. Mr. Wood, who was cashier of the bank where Volk's business was principally transacted, testified that these bonds were held as collateral to loans to Volk by the bank and defendant, and was then asked: "I will ask you if you ever figured up the amount due from Mr. Volk to Mr. Thomas Parmele, the defendant in this case, and the Bank of Commerce? A. About the time of Mr. Volk's death, when everything was closed up, it was in the neighborhood of $4,600." If this estimate is somewhere near the truth, the amount received for the bonds in question was "in the neighborhood" of $2,000 more than was chargeable against them. The value of these bonds, less the amount loaned thereon and not returned, would be the measure of the plaintiff's recovery, with interest from the date of the receipt of the $50,000. This is the only question left in doubt, and the case will be remanded for determination of the amount properly chargeable against these bonds on account of advancements to Volk.

REVERSED.

The following opinion on motion for rehearing was filed December 22, 1917. *Rehearing denied.*

SEDGWICK, J.

It is stated in the brief upon the motion for rehearing that "some outstanding bills" and a note to the bank were deducted from the $50,000 which was received for the property of the Norfolk Company, thereby reducing the amount actually received. Our opinion, in which it was said that the amount that should have been applied upon these bonds would be $6,329.10, is modified; and, in addition to the question heretofore submitted to the trial court, that court will also determine whether there were deductions made from the $50,000 purchase price, and so ascertain the net amount received by the Norfolk Company, and compute the

proportion that should have been applied upon these bonds accordingly. It is claimed that there are other errors in the opinion, but it does not appear that they affect the result. The motion for a rehearing is

OVERRULED.

IDA M. YOUNG, ADMINISTRATRIX, APPELLEE, V. WESTERN FURNITURE & MANUFACTURING COMPANY, APPELLANT.

FILED OCTOBER 13, 1917. No. 20078.

Master and Servant: EMPLOYERS' LIABILITY ACT: ACCIDENT. Evidence examined, and found sufficient to sustain the finding and judgment of the district court. *Held*, that the death was an accident within the meaning of the definition given in the employers' liability act (Laws 1913, ch. 198, sec. 52), and that such death grew out of the decedent's employment by the defendant.

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

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

Lincoln Frost and *Guy T. Tou Velle, contra.*

HAMER, J.

The plaintiff, Ida M. Young, administratrix of the estate of Arthur Young, deceased, brought this action in the district court for Lancaster county against the Western Furniture & Manufacturing Company, appellant. It is brought under the employers' liability act (Laws 1913, ch. 198) to recover damages on the ground that the deceased came to his death while in the employ of the defendant and under such circumstances as to make the defendant liable under that act. The evidence shows that the deceased had been employed as a general helper around the defendant's plant for many years. The defendant company was engaged in the business of manu-

facturing mattresses and other articles. The plaintiff's decedent was employed in this branch of the establishment. The briefs for plaintiff and also for appellant speak of the death as occasioned by heat stroke or heat prostration. The evidence shows that the decedent was engaged in cleaning and oiling two motors which were used by the defendant company in its business. These motors were located in the interior of the building on platforms between the ceiling and the floor. The decedent went down from one of the platforms and refilled an oil can, and attempted to ascend the ladder leading to the motors, when he staggered, and, being unable to climb the ladder, the foreman and another employee came to his assistance. They took him out into the air. He said that he wanted to return to work, and they went back with him into the building. He appears to have been only able to wipe his hands on a rag when he fell down again. Later he was taken home, and remained very ill until the time of his death, July 17, 1915. His illness began on the 10th of that month.

In appellee's brief the building where the business of the defendant was carried on is described as being about 55 by 35 feet in dimensions, and constructed of corrugated steel or sheet iron and covered with tarred roofing. The location is said to have been in the southwest portion of the city and lying low with respect to the general elevation. The purpose was apparently to show that the building was located on low ground where the heat might be excessive, and that the building was so constructed that it would be a very hot place to work in. It is said that the roof sloped from a height of about 18 feet on the east side to 12 feet on the west side, and "at such an angle as to allow the sun on a hot July afternoon to concentrate the full force and effect of its rays on said tarred roof." The building seems to have been unplastered. It was divided into four rooms. It is claimed that the deceased met his injury in the room located in the northwest corner of the building. It was the "felt" room where the pick-

ing of the filling for mattresses was conducted. It is claimed by appellee that this room was filled with dust, and that it was customary for the deceased to tie a handkerchief over his nostrils while at work there. While the thermometer stood at about 86 to 87 degrees when Young's attack began, it is claimed that this particular building was "naturally hot in summer." The contention is that a building of sheet iron with tarred roofing and insufficient ventilation, built on low ground, would be a hot place on a summer day in July.

It is contended in the brief of the appellant that the work of cleaning and oiling a motor is not strenuous labor and does not require any great physical effort. The deceased was going about his usual work, and he went about it in his own way, and he had no specific instructions from anybody. It seems that he had been away from his work for three or four days before the fatal attack began. He came back to work on Friday morning, and worked Friday and Saturday morning, and the attack began on Saturday afternoon at 3 or 4 o'clock. It is shown that the deceased may have used intoxicating liquors. He is shown to have used some whiskey at times, which he drank out of a flask, and he had often been seen at saloons in Havelock when Lincoln was dry. He was 57 years of age. It seems that the building in question had been built about 7 years, and that the deceased had worked in it during all of that time. It is claimed that before that time he had worked for the defendant in a hotter building and one more poorly ventilated than the building in question.

On behalf of the defendant it is claimed that the deceased died of heat stroke or sun stroke, and that this sort of illness "is just as much a disease as rheumatism or typhoid." It is thereupon argued that, because it is a disease, death occasioned by it is not an accident, and that the particular section of the statute referred to does not in any way relate to it.

After the evidence was in, counsel for the defendant moved the court for judgment in favor of the defendant on the ground that the petition did not state a cause of action, and that the evidence did not bring the case within the statute. The motion was overruled, and the defendant excepted.

On behalf of the defendant it is strenuously insisted by counsel that Young was not injured in person or body, and that there was no violence to his physical structure, or any disease or infection resulting from his work, and that his sickness or disease, if any, was due to natural causes, and in no way connected with or influenced by his employment, or the character or place of performing his work. It is said that the heat prostration came as a natural result of his own habits and condition of life. It is insisted that there was no accident; that there was no violence to the physical structure of the deceased's body; that the heat prostration resulting in Young's death was due to natural causes; that Young's death did not result from violence nor from the resultant effects of any violence; that his death cannot be said to have occurred in the course of employment because he died seven days after his last work, and that there is no claim that he was in the course of his employment at the time of his death.

Some cases are cited which seem in part to sustain in principle the contention made by counsel on behalf of the defendant, but there is a difference. There would have been no injury if the business had not existed. The heat and humidity, the corrugated sheet iron in the building, the tarred roof, the poor ventilation, and the dust and particles of matter in the air, all acting together caused the sickness that brought about the death of the decedent. A stronger man might have lived, but it is enough that the industry brought about this man's death. An accident is an event which proceeds from an unknown cause, or is an unusual effect of a known cause,

and, therefore, not expected. *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.,* 139 U. S. 79. An accident is "an event that takes place without one's foresight or expectation, and it may include an injury received by one in a common-law affray, where no fault on his part is shown." *Supreme Council Order of Chosen Friends v. Garrigus,* 104 Ind. 133. An accident is "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected." *Schneider v. Provident Life Ins. Co.,* 24 Wis. 28. "An accident is the happening of an event without the aid and the design of the person and which is unforeseen." *Paul v. Travelers Ins. Co.,* 112 N. Y. 472. "An accident is an event that takes place without one's foresight, or expectation; an undesigned, sudden, and unexpected event." Webster's New International Dictionary. An accident is "an unexpected event which happens as by chance, or which does not take place according to the usual course of things." *North American Life & Accident Ins. Co. v. Burroughs,* 69 Pa. St. 43.

In *Crowley's Case,* 223 Mass. 288, an employee was suffering with syphilis. While employed he suffered a shock which aggravated the disease and resulted in insanity. The court held it to be an accident. It was held: "Since the workmen's compensation act prescribes no standard of fitness to which the employee must conform, and compensation thereunder is not based on any implied warranty of perfect health or immunity from latent and unknown tendencies to disease, where the employee, after an injury received in the course of his employment, developed paralysis, paresis, and insanity, he was entitled to compensation, though previous to the injury, the disease had been present, but latent, and did not impair his ability to work, and was merely made active by the injury."

In *Dotzauer v. Strand Palace Hotel, Ltd.,* 3 B. W. C. C. (Eng.) 387, the court said: "The mere circumstance

that a particular man, in doing work arising out of and in the course of his employment, meets with an accident which a perfectly healthy man would not have met with, is no answer at all. He takes his disability with him, and it is none the less an accident on that account." In that case Dotzauer washed crocks and dishes for the Strand Palace Hotel, Ltd. He put his hands in hot water in which there was soft soap and caustic soda. His finger nails came off, and he was disabled four months and a half. The appellate court reversed the decision of the judge of the county court.

In *Manning v. Pomerene, ante,* p. 127, this court held that, as there was sufficient evidence to support the finding of the district court that the disability was caused by an accident, its judgment would not be set aside. In *Miller v. Morris & Co., ante,* p. 169, the same doctrine was announced.

The finding of the district court is to the effect that the plaintiff is entitled to $5 a week compensation for 350 weeks beginning October 9, 1915, with interest at 7 per cent. per annum from the time the payments became due, together with $100 and interest for funeral expenses. There was judgment accordingly. It is our view that compensation is a charge against the industry because the industry itself is responsible for the injury. As applied to this case, it may be fairly assumed that plaintiff's decedent would not have died at the time he did but for the fact that he went to the factory on a hot day and worked in a heated building. Held the death was an accident in the sense that it was unexpected, and it was not such a result as would naturally follow the employment, but grew out of it, and the decedent died because of it.

The judgment of the district court is

AFFIRMED.

ROSE and CORNISH, JJ., not sitting.

SEDGWICK, J., concurs in the conclusion.

MATHILDA KANSCHEIT, ADMINISTRATRIX, APPELLEE, v. GARRETT LAUNDRY COMPANY ET AL., APPELLANTS.

FILED OCTOBER 13, 1917. No. 20125.

1. **Master and Servant:** EMPLOYERS' LIABILITY ACT: ACCIDENT. The evidence examined, and found to support the judgment of the district court, and to show that an accident happened to the deceased such as is described in section 3693, Rev. St. 1913.
2. **Appeal:** CONFLICTING EVIDENCE. Where there is a conflict in the evidence as to whether the disability of the plaintiff's decedent was caused by accident, the finding and judgment of the district court will not be disturbed unless clearly wrong.

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

John G. Kuhn, for appellants.

Benjamin S. Baker and *A. B. Jaquith, contra.*

HAMER, J.

This action was brought in the district court for Douglas county under the employers' liability act (Laws 1913, ch. 198) to recover compensation because of the death of plaintiff's decedent, Charles F. Kanscheit. The trial court found that the death of the decedent was due to an accident.

The attending physician, Dr. Porter, saw the deceased very shortly after he suffered a heat stroke. He had known Mr. Kanscheit for about ten years. He knew his physical condition and his habits. He testified that the cause of his death was heat stroke. He defined heat stroke as the result of excessive heat, and that it caused the paralysis of certain centers controlling the organization of the body. The immediate cause of his decease he said was respiratory death; that it was caused by paralysis of the center of respiration. He testified that the deceased lived about an hour after he went to see him; that he took his pulse and his respiration and his tempera-

ture; that he saw no evidence of intoxication; that there was nothing to indicate it. When asked if overheat was a disease or an accident, he said he would call it an accident. He thought that the heat rays that caused the death might be external violence.

Dr. George A. Young testified that one has a heat stroke when it is hot and where there is artificial heat such as is found in a laundry. He gave it as his opinion that the death was caused by accident. He testified that heat stroke is generally recognized as an accident. He testified an accident to be an occurrence which happens suddenly and coming apparently from some outside agency; that it produces some pathological change in the body. There was a judgment for the plaintiff in the sum of $10 a week for 350 weeks, and for $100 as compensation for the expenses of the burial of the deceased.

It is contended that the deceased did not die because of any accident, and that he died of intoxication, and that his death was not due to anything within the course of his employment, but that it was due to disease, whether it was heat prostration or whatever it might have been. The evidence showed that he had been in the employ of the laundry company for about 15 years. The appellant claims that the death of the deceased was not due to an accident as defined by the employers' liability act; that the court erred in holding that the prostration and death was not due to a disease; and also erred in holding that the cause of the death arose out of and in the course of the deceased's employment. It was also claimed that there was error because the court failed to hold that the deceased was not in a state of intoxication at the time of his prostration and death. Section 3693, Rev. St. 1913, is quoted by counsel for appellant, and it is contended that the statute does not cover workmen, except while they are engaged in or about the premises where their duties are being performed, or where their service requires their presence as a part of such services at the time of the injury and during the hours of service as such workmen. Several doctors appear to have testi-

fied. There seems to have been little controversy about the fact that death was unexpected. There was testimony tending to show that the malady which caused the death of the deceased did not come suddenly and with violence, but that it was incubating prior to the date of his death, and that he complained for several days of not feeling well and being sick. It is strenuously contended that there was no evidence of an accident as an accident is usually understood. There was a strong effort made to show that the testimony of those witnesses who said that the death was due to heat stroke was probably wrong, and that the symptoms of certain other diseases were very similar to heat stroke.

The trial judge saw these witnesses as they testified and had an opportunity to judge of the credibility of the evidence which was offered. An examination of the evidence shows that there was some conflict. It was for the court to pass upon this testimony.

In *Manning v. Pomerene, ante,* p. 127, we held that the judgment of the district court in favor of the plaintiff and against the employer should be sustained, and also held that the injury received was due to an accident. It was also held that such an accident had happened as was described in section 3693, Rev. St. 1913; and that where there was a conflict as to whether the disability of the plaintiff's decedent was caused by the accident, and there was sufficient testimony to that effect, the finding of the district court would not be disturbed. That the finding and judgment of the district court would not be disturbed unless it was clearly wrong was held in *Miller v. Morris & Co., ante,* p. 169.

In view of the statute and the decisions referred to, we do not see our way clear to set aside the finding and judgment of the district court. The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

JOHN EVERSON, APPELLANT, V. IVA M. EVERSON, APPELLEE.

FILED OCTOBER 13, 1917. No. 19230.

Divorce: DECREE: VACATION: FINAL ORDER. An order made by the trial judge in divorce proceedings after the term when a divorce decree was entered, but within six months of its date, sustaining a motion asking the vacation of the decree because of mistake and inadvertence, and because of alleged fraud and deceit upon the part of the plaintiff, is not a final order, and is within the jurisdiction of the court.

APPEAL from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Appeal dismissed.*

Bernard McNeny, J. G. Thompson and *Flansburg & Flansburg,* for appellant.

O. E. Shelburn and *L. H. Blackledge, contra.*

CORNISH, J.

On August 5, 1914, plaintiff (appellant) obtained a decree of divorce. At the second term of the court thereafter, but within six months, the trial judge, on motion of the defendant stating that the judgment had been obtained by mistake and inadvertence on her part and by fraud and deceit upon the part of plaintiff, vacated the judgment and gave defendant leave to answer. Had the court jurisdiction to make the order, and is it a final order reviewable as such in this court? The question involves the construction of section 1606, Rev. St. 1913 (enacted in 1909), which reads as follows:

"A decree of divorce shall not become final or operative until six months after trial and decision except for the purpose of review by proceedings in error or by appeal and for such purposes only, the decree shall be treated as a final order as soon as rendered: Provided, if proceedings in error or by appeal shall have been instituted within said six months, such decree shall not become final until such proceedings are finally determined. If no such proceedings have been instituted, the district court

may, at any time within said six months, vacate or modify its decree, but if such decree shall not have been vacated or modified, unless proceedings are then pending with that end in view, the original decree shall at the expiration of six months become final without any further action of the court."

The legislative intent was to prevent certain practices which it was thought were becoming scandalous to the state. Divorced persons would go into a neighboring state and marry again within the six months' time allowed for appeal. The divorce decree being final, the state had no adequate preventive ready, and serious results to individuals sometimes followed. It was thought that the law would tend to prevent collusive and illegal divorces and illegal marriages. It sought to make more likely the re-establishment of the home and less likely the taking advantage of the state or the injured party who may have been misled or overreached. A penal provision, making such remarriage punishable as bigamy, was repealed at the time.

The trial courts, we believe, have generally construed the law to mean that during the six months' period the action is still pending before the court; that the trial court has power over it similar to that which trial courts have always exercised over their judgments during the term; that it is not a final order in any sense except for the purposes of appeal, but more in the nature of an interlocutory order which the court can, at any time, for good reason, vacate or modify. We are of the opinion that this construction is consistent with the language of the statute, and that the enactment is within the legislative power fixed by the Constitution. It follows that the court's order upon the motion was one which the court had jurisdiction to make, and was not a final order from which appeal can be taken.

At the hearing on the motion it was contended by plaintiff that the motion should be overruled, among other reasons because the defendant, having notice of the trial, made no appearance, and because afterwards she

recognized the decree, procured its modification, and in other ways acquiesced in the decree. To what extent such acts upon her part would operate as an estoppel against her to prevent a vacation of the decree is not decided. No doubt the general rule is that parties to a lawsuit are not permitted to take inconsistent positions or positions which merely tend to harass and annoy or mislead their adversary. We do not at this time decide whether the court's order was erroneous.

For the reasons above given, the appeal is dismissed and the cause remanded for further proceedings according to law.

DISMISSED.

HAMER, J., dissenting.

While I am not quite sure of my position, yet I am quite clear that the majority opinion is wrong. I dissent because the record, as I understand it, fails to show the right of this court to make the order dismissing the appeal.

The petition filed August 5, 1914, alleged the marriage of the plaintiff and defendant at Augusta, Maine, August 25, 1894, and their residence since that time at Alma, Nebraska; that, while the plaintiff had conducted himself toward the defendant as a faithful and considerate husband, the defendant, beginning about three years after said marriage, had been guilty of extreme cruelty toward the plaintiff, continuing, with slight variations, up to the time of filing the petition; that such cruelty consisted at times of physical violence, which is accurately described, but the defendant appears to have frequently alluded to the plaintiff as a person of low and vulgar ideals, and she would call him an ignorant foreigner, and would refer to his family in derogatory terms; that the homestead stood in the name of the defendant, and she would order the plaintiff to get out of the way and leave; that she would say to the plaintiff to get his divorce and get out of her house and to stay out of it; that she habitually nagged the plaintiff and belittled him; that she would absent herself from the home for long periods of time;

that when she was at home she gave frequent exhibitions of ungovernable temper without cause and made the home life of the plaintiff intolerable.

The journal shows that the cause came on for trial on the 9th day of November, 1914; that the case was heard before the court, and that the plaintiff was present, but "the defendant came not and her default is taken." After hearing all the evidence in the case, the court rendered a decree November 9, 1914, in which it found that there had been due service of summons; that the defendant had made default; that "the court finds generally for the plaintiff." The court "adjudged and decreed * * * that the marriage relation heretofore existing between the parties hereto be, and the same hereby is, set aside and annulled, and the parties are released from the obligations of the same." The decree provided that the "defendant be restored to her maiden name, Iva M. Haskell."

The record shows that on the 18th of November, 1914, the November, 1914, term of said court, at which the judgment was rendered, adjourned *sine die*. December 16, 1914, the defendant, Iva M. Everson, by her attorney, O. E. Shelburn, filed a motion to modify the decree. If the allegations in the petition were true, and the decree found them to be true, it might be expected that she would want the decree set aside or in some way modified so that it did not appear that she had done the violent things to her husband charged in the petition, and that she had not said the unkind things to him charged against her. The decree found the allegations of the petition to be true. The defendant had counsel and it was his duty to advise her of her rights. Presumably he did so. There is no claim that he did not. The motion filed "requests that she be allowed to retain her name of Iva M. Everson." The plaintiff consented to the request. The order modifying the decree reads: "The court being fully advised in the premises finds that said decree should be modified by striking out that part of the decree which re-

stores to the defendant her maiden name of Iva M. Haskell." This left her with the name of Iva M. Everson.

The next step appears to have been taken on January 13, 1915, and was taken at "the December, 1914, term of said court." The decree was taken November 18, 1914, and the court adjourned *sine die*. On the 16th day of December, 1914, the above motion to modify the decree was filed. She was then advised of the contents of the decree. If she consented to leave the decree stand except as to the matter of changing her name, she must be bound by what she did, and she must be deemed to have acquiesced in the decree as it then stood. She left the decree with herself adjudged as guilty of extreme cruelty charged against her. The specific acts of violence charged against her and her cruel language were not in any way questioned or denied.

But with this record standing as true she went into court on the 19th day of March, 1915, and filed a new motion. She then said that she "in good faith believed the plaintiff would abandon said claimed cause of action and would not further proceed with the matter." Her default had already been taken and judgment had been rendered against her establishing the allegations of the petition to be true, and she had acquiesced in the judgment when she had it modified. Is her contention reasonable?

John Everson made what he called a special appearance to this last application. He gave the following as reasons why the motion should not be granted: "(1) Final judgment was entered in said action on personal service on November 9, 1914, at a regular term of this court, which term adjourned without day on November 18, 1914. (2) Defendant at the regular December, 1914, term of this court requested and obtained a modification of said decree, with written consent of plaintiff, and said December term adjourned without day on January 13, 1915. (3) Said judgment and final orders of this court are in full force and effect, no appeal has been

taken therefrom, and this court is without jurisdiction in the premises."

On the 6th day of May, 1915, the cause came on to be heard on the motion of the defendant to set aside the default and the decree against her, and that she be allowed to answer and defend, and on that same day the term adjourned without day. On May 28, 1915, the plaintiff filed in the office of the clerk of said court a notice of appeal "from the order and judgment of the district court made in the above entitled cause on April 1, 1915, overruling a special appearance herein, and also from the order and judgment of said court made in said action on May 6, 1915, where the decree entered on November 9, 1914, was attempted to be set aside on motion of defendant."

There is in addition to the transcript the bill of exceptions, which contains no testimony taken at any trial. It consists only of an affidavit by Iva M. Everson, and another affidavit by John Everson. This is the bill of exceptions "at the hearing of the motion of the defendant to set aside the decree of divorce in the above entitled cause."

It is my view that, after the court had made this first modification and had put the name of Iva M. Everson in the decree, then the decree stood as the final action of the court, and that nothing else could be done without commencing a case against John Everson in the regular way. There was no new petition and no new summons, and therefore there was no jurisdiction.

Section 1606, Rev. St. 1913 (enacted in 1909) provides: "A decree of divorce shall not become final or operative until six months after trial and decision except for the purpose of review by proceedings in error or by appeal and for such purposes only, the decree shall be treated as a final order as soon as rendered: Provided," etc. By the section the decree becomes final for the purposes of review "as soon as rendered." When the case was tried the evidence was not preserved in a bill of exceptions. The bill of exceptions we have here contains two affi-

davits and is on the hearing of the special appearance and motion to dismiss the appeal. This court by a dismissal of the case would seem to leave the plaintiff without a remedy. There should have been a trial in the district court if the case was still alive in it. If the case was not alive nothing remained to be done. The trouble arises because one class of decrees is to be considered and treated entirely in a different manner from every other class of decrees. Section 1606, Rev. St. 1913, does not repeal the original provisions with regard to vacating judgments after the term. It follows that they are still in force.

In *Schafer v. Schafer,* 71 Neb. 708, this court said: "It is probably true that parties may marry again after six months from the date of the decree, if no error or appeal proceedings have been commenced; but there is no doubt that in so doing they must take their chances on having the decree vacated upon a proper application under the provisions of section 602 (Rev. St. 1913, sec. 8207). * * * Repeals by implication are not favored, and a construction which results in an implied repeal of some other enactment should only be resorted to when made necessary by the evident intent of the legislature."

It is apparent from the foregoing language that this court considers that section 602 of the Code is still in force, and that it has not been repealed.

The property in this case appears to have been divided according to the satisfaction of the parties. As the record showed that the defendant had procured the modification of the decree according to her liking, I am unable to understand why the judgment should be set aside and the appeal dismissed. I think it error of this court to set aside the judgment when there was no evidence before the district court which tended to show a different state of facts from those contained in the decree. The violence of the defendant toward the plaintiff and her cruel and abusive remarks to him were not denied by her. She comes before the court adjudged to be guilty and pro-

duces no evidence to set its judgment aside. It was error to dismiss the appeal.

The affidavit of John Everson tells a story which should be studied by every member of this court. It tells of devotion to the interests of the defendant and an untiring industry by the plaintiff on behalf of the defendant and her uncle, William Gaslin. It tells how John Everson made them prosperous and rich while he himself suffered in silence and alone. The record shows that the defendant never wanted John Everson until she wanted to punish the other woman.

J. B. BATES ET AL., APPELLEES, V. JOHN DWINELL, APPELLANT.

FILED OCTOBER 13, 1917. No. 19494.

Statute of Frauds: SALES: PAYMENT BY CHECK. In the absence of proof that a check given to the seller by the purchaser was given under agreement that it should constitute payment or part payment of the price, rather than the means of payment, the check (neither paid nor presented for payment, but tendered back to the maker the day after) was not such payment as to take the sale out of the statute of frauds.

APPEAL from the district court for Knox county: ANSON A. WELCH, Judge. *Reversed.*

Fawcett & Mockett, Richard Steele and *W. A. Meserve,* for appellant.

Fred H. Free and *J. W. Blezek, contra.*

CORNISH, J.

This is an action for damages for refusal to deliver cattle purchased by plaintiffs from defendant. Plaintiffs recover. Defendant appeals.

The question is whether the check for $5,000 on the Knox County Bank, given by plaintiffs to defendant for the cattle, constitutes payment so as to take the tran-

saction out of the statute of frauds; the defendant disputing the correctness of its amount, having, the morning after receiving it, tendered the check back to plaintiffs without having presented it to the bank for payment, and the contract being oral. The statute is in its nature technical. To serve its purpose the payment must be absolute. The courts have generally regarded such use of a check as a means to payment; as taken in lieu of cash temporarily for convenience, not amounting to payment until cash is received upon it; or, as it might be stated, it is a mode of making a cash payment, and not the giving or accepting of a security. Such holding, we believe, reflects the facts of the transaction. Of course, if a check were taken under an agreement that it should constitute payment and discharge the debt, so that the creditor would hold it at his own risk, as respects the money in the bank, the case would be different.

The evidence shows that the maker of the check had only $1,500 in the bank at the time. This being true, the check did not assign the $1,500. If the $3,500 additional was to be advanced in the nature of a loan, it would be a loan in excess of the amount permitted by the banking law to a bank of this bank's capital, $10,000. The cashier swore that the check would have been paid if presented. It is doubtful if the court will presume that the bank would have paid the check according to the cashier's promise, but rather that the bank would have refused payment, according to law.

For cases bearing upon the question considered, see *Groomer v. McMillan,* 143 Mo. App. 612; *Hessberg v. Welsh,* 147 N. Y. Supp. 44; *McLure v. Sherman,* 70 Fed. 190; 22 Am. & Eng. Ency. Law (2d ed.) 569; 29 Am. & Eng. Ency. Law (2d ed.) 970.

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

REVERSED.

SEDGWICK, J., not sitting.

HAMER, J., dissenting.

I am quite unable to agree with the views expressed in the majority opinion. It treats the check as if it did not constitute a payment. The defendant accepted it at the time it was delivered to him, and the fact that he subsequently undertook to return it, and dropped it at the feet of the man from whom he received it, does not do away with the acceptance in the first instance. The check was received as payment for 64 cattle sold by the defendant, John Dwinell, to the plaintiffs Bates and Jiracek. No objection was made to the check. It was delivered by agreement as full payment. The petition alleges that Dwinell was the owner and in possession of the cattle in Knox county, Nebraska, and that the defendant offered to sell the cattle to the plaintiffs at the lump sum of $5,000, that the offer was accepted, and that the plaintiffs paid the defendant the said sum of $5,000 in the form of a bank check drawn by the plaintiffs in favor of the defendant upon the Knox County Bank of Verdigre, Nebraska. There is also the further statement that the plaintiffs purchased the cattle for shipment, and that the cattle were reasonably worth $5,750. It is claimed that the plaintiffs' loss in profits was $600 by reason of the fact that the defendant refused to deliver the cattle. The answer is a general denial. The evidence shows that there was a refusal to deliver the cattle. At the time the check was returned it had not been presented. No one could say that it would not be paid, and the cashier of the bank testified that if the check had been presented the bank would have paid it. The contention of the defendant is that the contract for the sale of the cattle was not in writing and subscribed by the party to be charged thereby. To my mind the facts seem to show that the defendant concluded to "back out," and that he went over to Jiracek's, and told him that there was a mistake in figuring the cattle and threw the check down at Jiracek's feet. To any one familiar with this sort of transaction the case is the plainest sort of "back out." The judgment of the

district court should have been affirmed by this court.

I examined the cases cited in the majority opinion. As I understand them they do not apply, except the first case cited, *Groomer v. McMillan,* 143 Mo. App. 612. In *Hessberg v. Welsh,* 147 N. Y. Supp. 44, the payment of the check was stopped. Of course, in such a case as that, giving the check did not pay the debt. In *McLure v. Sherman,* 70 Fed. 190, it was held: "A check drawn upon a deposit in the bank named as drawee has a money value, and is a sufficient part payment of the price, upon a sale of personal property, within the statute of frauds." It will be seen that this case is in conflict with the majority opinion. In 22 Am. & Eng. Ency. Law (2d ed.) 569, it is said: "In case the check is not honored upon due presentation the original indebtedness for which it was given continues to exist." That is undoubtedly true.

In section 312, Rev. St. 1913, there is a provision limiting the power of a single corporation transacting a banking business to make a loan to any one party exceeding 20 per cent. of its paid-up capital and surplus. But in the same section it is said: "But the discounting of bills of exchange, drawn in good faith, against actually existing values, and the discounting of commercial paper actually owned by the persons negotiating the same, shall not be considered as money borrowed." It will be seen that this provision permits a credit outside of the 20 per cent. of paid-up capital. It permits such credit when it is obtained against actually existing values. There was nothing to prevent the bank from using the credit obtained by reason of the cattle. The cattle could have been shipped to market in the name of the bank, or the plaintiffs could have extended their credit in the bank by drawing on their salesman at Omaha, or on the packers to whom he might sell them. It does not follow that the bank intended to do any thing unlawful, or that the check would not have been paid.

In *Brown v. Wade,* 42 Ia. 647, it was said: "It seems to us there can be no question that the facts stated in this branch of the instruction amount to a delivery and

acceptance of the cattle. What constitutes a delivery depends largely upon the character and situation of the property. The delivery of a key of a warehouse, or making an entry in the books of a warehouse-keeper, or delivering with indorsement a bill of lading or a receipt, constitutes such delivery of personal property as will satisfy the statute of frauds."

In *Cowing v. Altman,* 5 Hun (N. Y.) 556: "One H., at the request of several of the creditors of a bankrupt, consented to act as assignee, on condition that they would pay to him the sum of $2,000 in addition to his legal fees. Subsequently the defendant bought up the claims against the bankrupt, agreeing with the creditors to pay the said sum to H., and in pursuance of this agreement he subsequently gave a check for that amount, upon which this action was brought. Held, that the agreements were illegal, under section 45 of the bankrupt act, and that as they were still unexecuted, this court would not enforce them." Subsequently this case was reversed in *Cowing v. Altman,* 71 N. Y. 435, where it was held that the check "would be valid in the hands of a *bona fide* holder for value, who took it before it was dis honored, without notice of the illegality."

Dwinell took the check. He agreed with the purchasers that they might come in the morning and get the cattle. Dwinell had agreed to feed the cattle the same as they had been fed. Was he not the agent of the purchasers for that purpose? The jury had the witnesses before them. They had an opportunity to judge of the fact as to whether Dwinell told the truth. They decided against him. What business have we to upset the verdict of the jury? We cannot do so unless it was clearly wrong. *Blado v. Draper,* 89 Neb. 787; *Boyd v. Lincoln & N. W. R. Co.,* 89 Neb. 840; *Goos v. Chicago, B. & Q. R. Co.,* 84 Neb. 651; *Sheridan Coal Co. v. Hull Co.,* 87 Neb. 117; *Bell v. Stedman,* 88 Neb. 625.

Where the evidence is conflicting it is the province of the jury to decide questions of fact, and a reviewing court cannot interfere. *Jacobs v. Goodrich,* 90 Neb. 478.

The claim is made that the cattle were worth $84 a head. There were 64 cattle. If one animal costs $84, it follows that 64 head at that price were worth 64 times as much, which would be $5,376. The claim is made that defendant thought the cattle would come to even $5,000. When did multiplying 4 by 4 produce 0? No wonder the jury found as they did in the face of such testimony as this. The facts show that there was a lump sum agreed upon. The verdict of the jury establishes their finding against Dwinell.

When a check is given to a person in the ordinary course of business it is of such value that the person who receives it cannot look to the drawer of the check for the amount named therein until he has presented the check to the drawee or payee for payment, and payment has been refused. *Murray v. Judah*, 6 Cow. (N. Y.) *484; *Cowing v. Altman*, 71 N. Y. 435; *Little v. Phenix Bank*, 2 Hill (N. Y.) 425; *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5. "Under the authorities, I think a check, such as those described in this case, must be considered to have a money value. It is certain they would be so considered by those dealing in such securities." *McLure v. Sherman*, 70 Fed. 190.

THOMAS MERKOURAS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED OCTOBER 13, 1917. No. 19611.

1. **Negligence:** CARE REQUIRED. One should in his movements exercise ordinary care for the safety of others, but in doing so he has a right to assume that others will govern their movements as ordinary persons do in exercising care for their own safety. Only those dangers and perils reasonably to be anticipated have to be provided against.

2. **Master and Servant:** INJURY TO SERVANT: CONTRIBUTORY NEGLIGENCE. A railroad company, in ordering the movements of its cars, would not anticipate that two men would engage in scuffling

upon its track, especially so when the men were its employees, working in its switch-yards and momentarily expecting the approach of cars.

3. ———: ———: DUTY OF MASTER. A railroad company does not owe its employees, engaged in its yards in which engines are constantly moving, the duty of keeping a constant lookout to warn them of dangers of which they already have knowledge.

4. ———: RULE GOVERNING SERVICE: CONSTRUCTION. A rule of a railroad company, susceptible of two constructions but which has never by the railroad company been given the construction contended for by the party asserting it, which is contrary to the custom always followed, and which rule was not relied upon by the party, will not be given such construction by the courts.

5. **Trial:** WITNESSES: EXAMINATION: IMPROPER ARGUMENT. A party surprised by the testimony of a witness, whom he has called, may in the discretion of the court be allowed to interrogate him with respect to previous inconsistent statements for the purpose of probing his recollection and to give him an opportunity to correct his mistake, if he has made one, and also to show, so far as may be, the circumstances which induced the party to call the witness. He is not permitted, however, to prove contradictory statements of his own witness and discredit him, and it is improper for counsel in argument to go outside the evidence and assert, as of his own knowledge, contradictory statements of the witness.

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

Byron Clark, Jesse L. Root, J. B. Strode and *Strode & Beghtol,* for appellant.

Wilmer B. Comstock, contra.

CORNISH, J.

Action for damages for loss of part of foot, caused by defendant's negligence. Plaintiff recovered, and defendant appeals.

At the time of the accident plaintiff, with others, was engaged as an employee of defendant in its yards at Lincoln in putting ice in refrigerator cars. A switch-track of defendant ran along an elevated platform connected with an ice-house, so that ice could be put from it into the top of the car. A ladder led from the ground

to the platform. Two empty cars, designated as "rubbish cars," were on the track in front of the ice-house, waiting to be moved onto a place farther up the track in the yards where they were to be filled with refuse. It was after the close of the noon hour. The men had been at work in the morning, and were idle, waiting for more refrigerator cars to be moved in place for filling. While waiting, plaintiff and another employee became engaged in wrestling, and in their movements got on the track in front of the rubbish cars in the direction in which they were to be moved, both men being on the ground. There is conflict in the testimony as to how they came to be upon the track in this position. Plaintiff's testimony is that it was not voluntary upon his part; that the other employee, Johnson, had been trying to "joke and play with me;" that Johnson jumped on his back and brought him down against his will. He did not know, but thought they might have been in this position 20 minutes before the accident. While they were in this position a string of 12 refrigerator cars, for which they were waiting, was backed up, it being intended first to move the rubbish cars to their proper place and finally leave the refrigerator cars also in place. When the brakeman on the approaching cars, which had reached the two rubbish cars, had made the coupling, he climbed on the rubbish car, intending to go to the front end of the string of cars as they were moving forward. When he heard the alarm from others that plaintiff was in the precarious position, he at once gave the engineer the stop sign. The engineer stopped the moving cars, but too late to prevent the injury.

Plaintiff contends that defendant failed to exercise ordinary care for his safety, in failing to ascertain that he was on the track at the time; in failing to give warning of the approach of its cars; in failing to stop the string of cars within a reasonable time after learning of plaintiff's situation; and in failing to have someone at the front end of the string of cars as they were moving forward. The evidence does not show that any failure

on the engineer's part to ring a bell or blow a whistle caused the accident, even though such failure would have been negligence. Nor does the evidence show that the brakeman, after discovering the situation of the plaintiff, was negligent in giving the stop sign to the engineer. The brakeman, as he approached the rubbish cars for the purpose of making the coupling, and paying attention to the moving cars, would not see the men at the other end, and no doubt, upon hearing the alarm, at once gave the stop sign to the engineer to stop the cars.

The question turns on whether the defendant was negligent in failing to discover plaintiff's situation in time to have prevented the accident. A railroad track in use is a dangerous place anywhere, more dangerous in switch-yards where cars are being continually moved from place to place. One who would voluntarily lie down or place himself upon a railroad track when cars are expected to move over it would be guilty of gross negligence, and ordinarily, would blame himself only if accident resulted. The rule of negligence is one of ordinary care under the circumstances. One should in his movements exercise ordinary care for the safety of others, but in doing so he has a right to assume that others will govern their movements as ordinary persons do in exercising care for their own safety. In other words, only those dangers and perils reasonably to be anticipated have to be provided against. A railroad company, in ordering the movements of its cars, would not anticipate that two men would engage in scuffling upon its track, especially so when the men were its employees, working in its switch-yards and momentarily expecting the approach of cars. The fact that one of the men engaged in wrestling was not there by his consent, while it may bear upon the question of negligence upon his part, has no bearing upon the question of negligence on the part of the railway company.

The courts recognize the fact that a railroad yard, with numerous tracks connected by switches, where cars and engines are constantly moving, is essentially a place

of danger even in the day-time. *Hoffman v. Chicago & N. W. R. Co.*, 91 Neb. 783; *Jones, Adm'r, v. Virginian R. Co.*, 74 W. Va. 666, L. R. A. 1915C, 428; *Norfolk & W. R. Co. v. Belcher's Adm'x*, 107 Va. 340; *Chicago, R. I. & P. R. Co. v. McIntire*, 29 Okla. 797. In *Hoffman v. Chicago & N. W. R. Co., supra*, where an employee, a brakeman, was rightfully on the track, crossing it on his way home from work, we held: "In an action against a railroad company for causing the death of a brakeman by backing a car against him in the night-time, evidence that there was no light on the car, that there was no brakeman thereon, and that it was moved without notice or warning," was insufficient, in the absence of a custom requiring such notice or warning, to prove actionable negligence, the brakeman being familiar with the switch-yards. In the instant case the plaintiff had been engaged in this employment for 11 days preceding the injury. It was in the day-time, and, as above stated, the employees were waiting for the cars. While there is evidence that when at work the employees might occasionally get on the track to pick up ice or remove rubbish, it shows that there was no occasion for them to do so at this time. They would not be expected to be there and were not there for any such purpose. The plaintiff's testimony is that he did not get within five feet of the track until Johnson jumped on his back. If these men had been on the track in any ordinary way reasonably to be anticipated, whether engaged in their work or not, upon hearing the cars approaching, as plaintiff swears he did, they would have had ample time to get off the track before the cars, going at about two miles an hour, reached them. Of course, if there had been a man stationed at the front end of the two rubbish cars, the accident would not have occurred. If the only occasion for stationing a flagman at such place would be to prevent accident to persons lying down or scuffling upon the track, it would be unreasonable to require it. Persons in switch-yards are expected to be on constant look-

out for moving cars. If, however, there were such a rule and custom, negligence in a proper case could be predicated upon failure to observe it. In such case, where the allegations of negligence are specific, the rule, the plaintiff's reliance upon it, and the defendant's failure to observe it should be pleaded as negligence, unless the rule is expected to be used merely as an admission. No such rule or custom was pleaded in this case.

It is contended by plaintiff that there was such a rule. In defendant's book of instruction to employees, under the head, "Movement of Trains," rule 102 reads as follows: "When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need." This evidence was admitted over defendant's objection. The parties dispute the meaning of this rule. Defendant contends that it refers only to the movement of trains, and that the string of cars in question did not constitute a train; that trains are distinguished by a flag at the rear displaying a marker. Plaintiff argues that, if they were not shifting trains or making up trains, it must come within the rule. It is answered that you do not shift trains but cars. There is room for different constructions of the rule. The evidence is uncontradicted, however, that the rule had never been interpreted as plaintiff contends; nor had there ever been a custom of stationing flagmen at the front in such movements of cars in the yards as the one in hand. This being the case, the question—what is the right interpretation of the rule—makes no difference. A rule which has never been observed or relied upon is the same as one abrogated. 1 Elliott, Railroads (2d ed.) sec. 202a; 3 Elliott, Railroads (2d ed.) sec. 1282; 3 Labatt, Master and Servant (2d ed.) secs. 1138, 1139.

We are of opinion that no negligence, based upon custom or rule of the defendant company to have a flagman stationed at the front end of the approaching string of cars, was shown in this case. Nor does the evidence

show the defendant negligent in failing to observe the rule invoked by plaintiff as laid down in *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645, that a railroad company "is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way," for the reason that at the time of the accident the plaintiff was neither known to be, nor could reasonably be expected to be, in the situation in which he was.

In *Bryant v. Beebe & Runyan Furniture Co.,* 78 Neb. 155, where employees knew of a defect in a machine which caused the injury, yet voluntarily placed themselves in a position of peril with respect thereto, we held: "To warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was a natural or probable consequence thereof, and that it ought to have been foreseen in the light of attending circumstances."

"It is within the discretion of the trial judge to allow counsel to ask a witness called by him, who takes him by surprise by his testimony, whether the witness had not at a prior time made a statement to him contradictory of or inconsistent therewith." *Cady Lumber Co. v. Wilson Steam Boiler Co.,* 80 Neb. 607. This is permitted, to probe the witness's recollection, and show the circumstances which induced the party to call him. The party, however, is not permitted to prove his contradictory statements by other witnesses; otherwise, parties might call a witness merely for the purpose of getting in his contradictory statement. In the instant case, the plaintiff was permitted to put these questions to the witness Johnson. Afterwards plaintiff sought to impeach the witness by testimony of the plaintiff to show contradictory statements. The evidence was afterwards stricken out. In his argument to the jury, counsel for plaintiff made statements as of his own knowledge, which, if true, were impeaching and directly contrary to the statements made by the witness. This was improper conduct. The

court sustained objection to the remarks of counsel, but did not caution the jury to disregard the remarks made. This caution should have been given.

For the reasons given in this opinion, the judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., not sitting.

ROSE, J., dissents.

MORRISSEY, C. J., dissenting.

Plaintiff recovered a judgment for $2,500 for the loss of part of his foot. He was an employee of defendant and was properly on its right of way. It is alleged, and I think shown to a reasonable certainty, that he sustained his injury because defendant in disregard of its own rules failed to keep a man as a lookout on the front of the cars it was switching. Had defendant observed its own rules the injury would not have been inflicted.

The jury, after being properly instructed, resolved all the disputed questions in favor of plaintiff, and I therefore dissent from the majority opinion.

GEORGE DE GRAW, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED OCTOBER 13, 1917. No. 19254.

1. **Railroads:** INCLOSURE OF RIGHT OF WAY. Sections 6035, 6036, Rev. St. 1913, construed, and *held* that railroads are thereby required to erect and maintain suitable and amply sufficient fences and cattle-guards on the right of way of each road to prevent live stock from entering thereon, except at public crossings, and also to effect a complete inclousure of the track, except in cities, towns, villages, and necessary shipping stations, and also except in such proximity to switches as would imperil the lives of employees.

2. ———: INJURY TO ANIMALS: QUESTION FOR JURY. The record examined, and *held* that the question of plaintiff's claim for damages for cattle killed by defendant's train should have been submitted to the jury.

3. ———: INCLOSURE OF RIGHT OF WAY. "A railroad company is not required to inclose that portion of its right of way, even outside of towns, villages, and cities, and public highways, the inclosure of which by the construction of fences and cattle-guards would be an increased danger to human life." *Burnham v. Chicago, B. & Q. R. Co.*, 83 Neb. 183.

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

K. W. McDonald, for appellant.

E. E. Whitted, Wright & Mothersead and *T. M. Stuart, contra.*

DEAN, J.

Plaintiff commenced this action against defendant to recover $512, the alleged value of 7 head of cattle owned by him that were killed by one of defendant's trains on its right of way. At the conclusion of the testimony the court directed the jury to return a verdict for defendant. From a judgment rendered thereon, plaintiff appeals.

The cattle that were killed, with 16 other head belonging to plaintiff gained access to defendant's right of way within the unincorporated village of Northport at a point where there were cattle-guards and wing-fences, but which were in so dilapidated a condition as to be useless for the purpose of turning stock. It appears from the testimony of the trainmaster that the cattle-guards at this particular point, and over which plaintiff's cattle entered upon the right of way, were a menace to the safety of trainmen and employees in switching and handling trains. In such case defendant was therefore absolved from the duty of maintaining cattle-guards at that place. *Burnham v. Chicago, B. & Q. R. Co.*, 83 Neb. 183. But that circumstance, significant as it is, does not decide the question before us, when we consider in all of its bearings the object and the purpose that must have

been in the legislative mind when the railroad fencing statutes were enacted. In the present case the cattle, after entering the right of way, went north thereon to the place where they were killed, which is about 1½ miles beyond defendant's switches and beyond a "Y" maintained by defendant.

Section 6035, Rev. St. 1913, provides, among other things, that the railroad company shall erect and maintain fences on both sides of the track "suitable and amply sufficient to prevent cattle, horses, sheep and hogs from getting on such railroad, except at the crossings of public roads and highways, and within the limits of towns, cities and villages."

In the absence of direct legislative expression this court has properly, as we believe, and for the best of reasons, construed the law in former decisions to mean that a railroad is not required to maintain fences or cattle-guards at any point, even outside of towns, villages and cities, where such inclosure would prevent proper access to station facilities or where it would increase the danger to the lives of its employees in handling its trains. The law has been properly so construed because, in view of the perils that are incident to trainmen in the train service and that are always attendant upon the switching and handling of trains, it is reasonable to believe that such, for humane reasons, was the legislative intent, and our interpretation seems properly to come within the purview of the law. *Chicago, B. & Q. R. Co. v. Sevcek,* 72 Neb. 793. On this point there is no longer controversy in this state. But neither the *Burnham* nor the *Sevcek* case applies to a situation where stock was killed, as in the present case, on the right of way, but perhaps a mile distant from a point where suitable cattle-guards could have been maintained that would not be a menace to the safety of employees, and more than a mile distant from the point of entry. It may also be observed that the public is concerned that the right of way be kept clear of herds of live stock. The violent impact of a rapidly moving train against a

herd of full-grown cattle roaming over the tracks or lying down between the rails is a situation laden with possibilities of peril to passenger and trainmen alike.

Section 6036, Rev. St. 1913, provides: "Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof against all live stock running at large at all points, shall be absolutely liable to the owner of any live stock injured, killed or destroyed by their agents, employees or engines."

The record before us discloses a situation where a railroad right of way, at best but a narrow lane, was inclosed on the sides only, and where the fences increased rather than diminished the danger to a herd of cattle thereon at a point a mile or more distant from an opening where they might escape. The spirit of the law, if not its very letter, requires a railroad to so fence and inclose its tracks, aside from the exceptions noted in section 6035, and also except at such points where the inclosure would endanger the lives of its employees, in such manner as to prevent stock from entering the right of way. It is clearly evident that such is the intent and ultimate purpose of the law.

In view of the record, it is not a strained construction of the law in question to hold that defendant has not complied with its provisions. The question of defendant's liability should therefore have been submitted to the jury. The judgment of the trial court is reversed for further proceedings in accordance with law.

REVERSED.

SEDGWICK, J., concurring.

The question presented in this case is an interesting one. The statute (Rev. St. 1913, sec. 6035) provides that the railroad company shall erect fences along the line of the track "suitable and amply sufficient to prevent cattle, horses, sheep and hogs from getting on such railroad." The same section says that these fences are not to be erected at crossings of public roads and highways,

and within the limits of towns, cities and villages. The statute, taken literally, does not make any exception where inclosing the right of way would endanger the lives of employees, and yet we have, and I think with great reason, considered that the legislature must have intended that.

The animals in this case were not injured at any place where it would endanger the lives of anybody to fence the track so as to keep them off. If we construe the statute so that the roads shall not be compelled to fence their track where by doing so they would endanger the lives of their employees, should we not also necessarily conclude that it was intended to require them to so fence their tracks as to prevent animals from going from these places where they are not required to fence onto the track where they are required to fence? Wherever a private way crosses the track suitable cattle-guards are required. The statute has been construed to intend that station grounds where private parties must pass from place to place in the transaction of the ordinary business of the road need not be fenced. These grounds are essentially a private way, and the statute clearly means that cattle-guards must be so placed as to prevent animals from going upon the tracks from such private way. If we construe the statute so literally as not to require the defendant to prevent animals from going upon the right of way from these private grounds of the company, we must with greater reason overrule our former decisions and apply the letter of the statute so as to require the company to either fence their private grounds or assume liability for damages to animals trespassing thereon.

It is plain that the intention of the people who made this law through their legislature is that animals shall not be allowed by the railroad company to run upon their main lines, and I think that the statute should be so construed as to enforce that provision. This would require that the railroad company be held liable in this case under the facts as represented in this record.

JAMES O'BRIEN, APPELLEE, V. SOUTH OMAHA LIVE STOCK EXCHANGE, APPELLANT.

FILED OCTOBER 13, 1917. No. 19532.

1. **Voluntary Associations:** ENFORCEMENT OF RULES: PROVINCE OF COURTS. Courts will not interfere with the enforcement of rules and by-laws of an unincorporated voluntary association or exchange, organized, not for pecuniary gain or profit, but to provide convenient facilities for the orderly conduct of business at the common expense, such rules being reasonable and uniform, and not in contravention of the law of the land, nor against public policy. In such case the association will be left free to enforce its rules and by-laws by such reasonable means as it may adopt for its government.
2. ———: MEMBERSHIP: AMENABILITY TO RULES. One who becomes a member of such association thereby voluntarily agrees to submit to its rules and is bound by their enforcement.
3. ———: ———: ANNULMENT. Where a member of such exchange, after a hearing, voluntarily pleads guilty to charges of bad faith and dishonesty in business dealings with shippers and patrons of the exchange, in violation of its rules, and where in pursuance of such plea he is expelled from membership, his certificate of membership is thereby automatically canceled.
4. ———: CHARGES AGAINST MEMBER: HEARING. In such case a hearing, conducted in pursuance of charges of bad faith and dishonesty preferred against a member of the association, is not to be tested by the strict rules of criminal pleading and practice, where the accused was notified in writing of the acts of bad faith and dishonesty complained of, and, being present, did not object, but consented to such hearing and pleaded guilty to such charges.

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

Brown, Baxter & Van Dusen, for appellant.

Lambert, Shotwell & Shotwell, contra.

DEAN, J.

James O'Brien was expelled from membership in the South Omaha Live Stock Exchange for bad faith and dishonest conduct, in violation of certain of its rules and

by-laws. The exchange is an unincorporated voluntary association of persons organized for the purpose of establishing and maintaining a commercial exchange, but not for pecuniary gain or profit. Among its professed objects are these: "To inculcate and enforce correct and high moral principles in the transaction of business; to inspire confidence in the methods and integrity of its members; * * * and, generally, to promote the welfare of the South Omaha market." An initiation fee of $1,000 was paid by Mr. O'Brien for a certificate of membership entitling him to the benefits and privileges of the exchange, the certificate by its recitals subjecting him to an observance of the rules and by-laws of the association. On August 17, 1914, after a hearing, he pleaded guilty before the board of directors to charges filed against him by the prosecuting committee of the association, wherein he was charged with "bad faith and dishonesty" in business transactions with several live stock shippers who were patrons of the exchange. In pursuance of his plea of guilty he was expelled from membership and his certificate of membership was canceled. He commenced this action against the exchange to recover $3,000, the alleged value of the certificate. The case was tried to the court without a jury. A judgment for $1,414 was recovered by him, from which the defendant exchange appealed.

Plaintiff contends that defendant unlawfully canceled his certificate of membership and thereby "forfeited and converted" his property to its own use. The state of the record demands an examination of the rules of the exchange. Section 7 of rule 11 provides that if any member shall "be guilty of any act of bad faith, or dishonest conduct, he shall be censured, fined, suspended, or expelled by the board of directors as they may determine from the nature and gravity of the offense committed." Section 10 of rule 11 provides: "An expelled member shall not be readmitted to membership except upon payment of the regular initiation fee and annual assess-

ment, and upon satisfactory evidence that he is a fit person for membership in the association."

In view of the professed objects of the exchange and of its rules and by-laws, it seems that the expulsion of plaintiff, based as it is on his admission of guilt of bad faith and dishonesty, automatically voided and annulled his certificate. It follows that all of the rights and privileges that were inherent in the certificate before expulsion then instantly ceased. The certificate from that moment was valueless in the hands of any person for any purpose. The cancelation of the certificate by the board, of which plaintiff complains, was therefore a formality both gratuitous and unnecessary.

Can human expression be more clearly and explicitly direct in meaning than the language cited from sections 7 and 10 of rule 11 of the by-laws? Can any reasonable inference be drawn therefrom other than that expulsion of a member for bad faith and dishonest conduct means the utter annulment of the certificate and every privilege that pertained thereto before expulsion? If the act of expulsion on that ground does not cancel the certificate for every purpose for which it was originally intended, no significance can then attach to this language that we find in rule 11: "An expelled member shall not be readmitted to membership except upon payment of the regular initiation fee and annual assessment."

If the rules can be held to contemplate that such certificate, after expulsion for bad faith and dishonest conduct, is of any value in the hands of any person, surely such person would be its former owner, the expelled member, who has repented and who seeks to return. But that is not the language of the rule nor its intent. In order to again become a member after expulsion he must again pay the required initiation fee and annual assessment. Plaintiff assented to this by-law upon assuming membership, and it then became an essential part of the contract between him and the exchange. And it was not an implied, but an express, agreement that lawful expulsion would cancel his certificate and every vestige of priv-

ilege in the exchange theretofore conferred by that instrument. *White v. Brownell,* 3 Abb. Pr. n. s. (N. Y.) 318.

In answer to the suggestion that the punishment of plaintiff for his confessed acts of dishonesty is excessive, it may be pointed out that sections 5 and 6 of rule 9 provide that the mere failure to pay certain assessments for 3 months works a cancelation of the membership certificate, and that "all rights incident thereto shall be taken to have been surrendered and shall thereupon revert to the exchange." It therefore appears that the rights and privileges pertaining to such certificate do not contemplate absolute ownership in the member, but a qualified ownership conditioned upon compliance with rules to which he assented when becoming a member.

A certificate of membership in an exchange is a species of property, but it cannot be bought outright, nor can it be separated from the conditions that the rules impose upon it. And it is those conditions that impart to it value. The rules of the exchange and the conditions of purchase of a certificate are inseparably incident to such certificate in the hands of whomsoever it may come. *Hyde v. Woods,* 94 U. S. 523; *Missouri Bottlers Ass'n v. Fennerty,* 81 Mo. App. 525.

The rules that apply to membership in associations that are organized for profit do not ordinarily apply to membership in voluntary unincorporated associations, organized not for pecuniary gain or profit. In the latter the association will be left free to enforce its rules and by-laws by such reasonable means as it may adopt for its government. This is because the association that is organized for profit deals as an organized entity with the public generally, while in the voluntary association organized not for pecuniary gain or profit the individual members deal with the public and one another. Hence it is imperative that in the business transactions of its membership the highest standards of commercial conduct be maintained. Failing in this the prime object of the exchange would be destroyed, and from this arises the

necessity for the adoption and enforcement of disciplinary rules.

A transcript of the proceedings before the board of directors, wherein plaintiff pleaded guilty to the charges against him, all duly certified by the notary public before whom they were taken, was offered in evidence by defendant, but excluded by the court upon plaintiff's objection. We believe the trial court should have admitted this record in evidence for the reason, among others, that one of plaintiff's contentions is that the proceedings before the board of directors were in some respects unlawful, and that his expulsion was therefore not justified. While the disciplinary proceedings in a voluntary association are quasi-judicial in character, courts do not ordinarily interfere except to discover whether such proceedings have been conducted in good faith and in pursuance of rules and by-laws that are not obnoxious to public policy nor to the law of the land. In a hearing before a voluntary association or exchange for violation of its rules by a member, it is not required that the procedure be tested by the rigid rules of criminal pleading and practice. We discover no substantial irregularities in the proceedings complained of. The tribunal was of plaintiff's own choosing. The hearing appears to have been fairly conducted. Plaintiff was given opportunity to controvert instead of entering a plea of guilty to the charges preferred against him. *Board of Trade v. Nelson,* 162 Ill. 431; *Lewis v. Wilson,* 121 N. Y. 284; *Ihnen v. South Omaha Live Stock Exchange, ante,* p. 195; *Otto v. Journeymen Tailors,* 75 Cal. 308, 7 Am. St. Rep. 156; *Belton v. Hatch,* 109 N. Y. 593.

Plaintiff contends that he was both fined and expelled for the same offense. An examination of the record shows some confusion on this point, but he was not fined. This contention arose from the fact that he with three other partners composed the "Big Four Commission Company," a concern doing business on the exchange, and against this partnership and its members a complaint was filed under another section of the by-laws by the prosecuting

committee for dishonest conduct in rendering separately to 11 shippers "account of sales showing different prices, different docks, and different weights than those shown by original settlements made with purchasers." After a hearing the company was fined $100 and expelled. Both cases were heard the same day, but there were practically two hearings. The company, a separate entity, is not a party to this suit, and any grievance it may have cannot properly be considered here.

In view of the record and of the law applicable thereto, the judgment of the trial court is

REVERSED.

CORNISH, J., concurring.

Men joining clubs, churches, brotherhoods, or exchanges understand that expulsion *ipso facto* extinguishes all rights. Why should it not? The association having performed the contract upon its part, upon what theory of the law can the member who may have, as in this case, violated the very purpose and spirit of the organization—honesty and fair dealing—recover back the consideration paid or damages? This is not forfeiture. What did he get and lose? The personal privilege of membership—a right or estate which *ab initio,* in its nature, and by the contract is limited and determined by his status as a member. The forfeiture which equity is said to abhor is the cutting off of an estate—depriving the person of something which is to vest in the injured person as a recompense. The member's interest could be likened to the license or estate which a farmer has who is permitted by his neighbor to use his private roadway so long as he will keep the gate shut and in repair. He can have no property right in the association, separate and distinct from membership. If he could, then he could sell it and retain the membership, which is absurd. In this respect it is like the interest of a partner in a firm, inseparable and untransferable except by consent of all the partners.

The association's right to expel a member for good cause and the consequent extinguishment of all his rights is primary and fundamental. If not expressed, it exists by implication, and is limited only as the rules of the association may limit it. And herein lies what room there is for controversy in the instant case. Rules which would permit the expelled member to sell the vacant seat, or to receive the proceeds of a sale, would create by contract a right incidental to membership which could be enforced. No property right, separate and distinct from membership, would arise. It would be rather a condition of the expulsion of a member. Such a provision would be a rare thing, unless made only for the benefit of creditors. There is, however, a provision that members in good standing may transfer their certificates, subject to the right of the association to refuse membership to the transferee, either because he is not a suitable person or because the membership has been in some "way impaired or forfeited." This provision is equitable and is made for those members who must move away or quit the association. It does not change the nature of a member's interest. It is a right granted to and incidental to membership as such. Being a privilege granted only to members in good standing, it never arises in favor of an expelled member, and he can base no claim upon it. Such power to transfer will not give a member to understand that he is the unconditional owner of a privilege of membership with power to transfer. It is conditioned, and the condition has not been complied with. It seems to me it never would or could give to the certificate a value on the market distinct from and independent of the qualification and right of its owner to a seat on the stock exchange, and that, in view of the terms of the contract, there is no escape from the conclusion that expulsion meant the loss of all rights acquired by virtue of the certificate. That such is the meaning of the contract appears, not only from this provision, but from the provisions of the contract providing for expulsion for fraud and the provision for reinstatement of an expelled mem-

ber only "upon payment of the regular initiation fee and annual assessment."

This holding seems to be in line with the decided cases. In the case entitled *In re Gaylord,* 111 Fed. 717, relied upon by plaintiff, and the only case, I believe, cited by plaintiff where were involved the rights of an expelled member, the plaintiff represented creditors of the member as trustee in bankruptcy. ° The dispute arose over the proceeds of the sale of the member's seat provided for by the rules. The rules provided that in the case of a suspended member or an expelled member the seat should be sold. In the case of the suspended member it provided that the proceeds should go to the member's creditors. Not to make the same application in the case of an expelled member would defeat the general purpose of the rules to protect the creditors. In the absence of explicit directions as to the application of the proceeds of the sale of an expelled member's seat, it was held that the rules as a whole intended that the proceeds should be applied in the same way, and any balance after payment of creditors should go to the member. The rules in question have no such provision.

So long as the association is not diverted from its purpose and does nothing against public policy, of course the contract controls and no estoppel arises.

SEDGWICK, J., dissenting.

1. Three questions are presented by this record and discussed in the briefs: (1) Did the paper writing known as the certificate of membership have an intrinsic market value distinct from and independent of the qualification and right of its owner to a seat upon the stock exchange? This is the fundamental question in the case and is the basis for all reasoning upon the two remaining questions. If the certificate had no distinct value but was of no value except to one who had a right to a seat upon the exchange, and was so involved in that right to such seat that it could not exist independently of the active participation of the owner of the certificate in the business of

the exchange, the plaintiff, of course, could not maintain this action if he was lawfully expelled from the exchange, and the judgment of the district court would necessarily be reversed. (2) If it should be found that this certificate has an intrinsic value independent of a seat upon the exchange, so that it constitutes an item of property that may be and habitually is transferred to and from those who have no seat upon the exchange and do not expect to have, and has a definite market value in such exchanges, then the second question is: Do the articles and rules of the association contemplate and authorize the forfeiture of this property upon the expulsion of its owner from a seat upon the exchange? (3) If it should be found that the owner of such certificate has a property interest in it distinct from his right to a seat upon the exchange, and that the articles and rules do not authorize the forfeiture of such property upon the expulsion of a member from his seat on the exchange, the third question would be whether the action of the association amounted to a conversion of this property.

Upon the first question the evidence appears to me to be clear and conclusive that the certificates sold by this association for $3,000 have a distinct value independent of the participation of their owners in the business of the exchange. The evidence is without contradiction that these certificates are and have been continually bought and sold by parties not connected with the exchange, and that they had a well-defined and generally recognized market value. The owner of such a certificate, whether or not he intends to apply for a seat upon the exchange, may deposit such certificate as collateral security for a loan at the banks of Omaha, and the banks generally receive them as such security. The defendant in this case has furnished evidence that it was understood by the directors of this association that this was the case, and that this certificate might be sold upon the markets in Omaha in the same manner that negotiable notes are sold, unless some action was taken by the association to prevent it. The defendant caused a public

notice to be published in the official paper of the exchange, which had an extensive circulation, that this plaintiff's certificate (describing it) "is wholly without value and the public are hereby warned against purchasing the same," which was an unequivocal admission and declaration that the practice of treating these certificates as articles of barter and sale by the public was known to the officers of the association, and that some affirmative action was necessary to destroy its market value. Indeed, it does not appear to be seriously questioned in the evidence, or contended in the briefs, that these certificates were not freely bought and sold by the public generally without regard to the right to a seat upon the exchange. This fact furnished an inducement to purchase these certificates from the defendant, and so enable the defendant to realize more from the sale of these certificates than in all probability it would otherwise have been able to do.

2. As these certificates had an independent value of their own upon the markets in Omaha, in determining whether the articles and by-laws authorized a forfeiture of this property upon the expulsion of a member from a seat upon the exchange, we must of course be governed by the universal rule that the law does not favor forfeitures, and that the right to declare a forfeiture must be clearly expressed and cannot be derived from inference or analogy. There is no express provision in the articles and rules of the association for forfeiting this property upon the expulsion of a member from a seat upon the exchange. The majority opinion derives this power by inference. It says: "Can any reasonable inference be drawn therefrom (sections 7 and 10 of rule 11) other than that expulsion of a member for bad faith and dishonest conduct means the utter annulment of the certificate and every privilege that pertained thereto before expulsion?" The following is quoted from rule 11 as compelling such an inference: "An expelled member shall not be readmitted to membership except upon payment of the regular initiation fee and annual assessment."

That "initiation fee and annual assessment" includes the original cost of the certificate of $3,000 may be a legitimate inference, but it is no stronger than contrary inferences that may be drawn from other language of the articles and rules. Again, in section 5 of rule 9, which is referred to in the opinion as strengthening the inference that the "initiation fee" mentioned in rule 11 should be construed to mean the original cost of the certificate, the words "initiation fee" are not used, but the "certificate of membership therein" is specified. It seems to be inferred that "initiation fee" means $3,000, the original purchase price of the certificate, and that, while in other rules the certificate is specifically named as such, in this rule it is to be inferred. In an opinion in the briefs, said to have been the opinion of the trial judge, it is said that the expulsion itself was unlawful. I do not find it necessary to examine that proposition. It is enough to know that this court in its opinion has found that "a certificate of membership in an exchange is a species of property," and that property cannot be forfeited by inference or implication, but authority to forfeit must be conferred in express words. The defendant took active and effectual measures to destroy the value of this certificate, which in law is a conversion.

I think the judgment of the district court is right and should be affirmed.

MORRISSEY, C. J., concurs in this dissent.

JULIA AHRENS ET AL., APPELLEES, V. LINCOLN G. SIMON, APPELLANT: B. A. JONES ET AL., APPELLEES.

FILED NOVEMBER 3, 1917. No. 19598.

1. **Trusts: RESULTING TRUST.** Where two persons enter into an agreement to purchase real estate, and each contributes one-half of the purchase price, but the title is taken in the name of one of the parties, a resulting trust immediately arises in favor of the other to the extent of his interest.

2. **Evidence** examined, and *held* sufficient to sustain the decree of the district court.

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

Hoagland & Hoagland and *Stout, Rose & Wells,* for appellant.

Wilcox & Halligan and *J. L. McIntosh, contra.*

MORRISSEY, C. J.

Plaintiffs, as the representatives of Milton Ahrens, deceased, instituted this proceeding in the district court for Cheyenne county for the purpose of establishing an undivided one-half interest in a quarter-section of land, which it is alleged had been purchased jointly by Milton Ahrens, now deceased, and the defendant, Lincoln G. Simon, and the title deed taken in the name of Simon, but for the benefit of both. The court entered a decree in favor of plaintiffs, and defendant has appealed.

There is little dispute between the parties as to the rule of law which would create a resulting trust, but they differ widely in the effect which they would give the evidence. Ahrens' contribution to the purchase price is shown by oral testimony, by the books of the bank through which the deed passed, and by a check, of even date with the transaction, marked "Exhibit A," and bearing a notation upon its face, claimed to be in the handwriting of Mr. Ahrens, showing that it was given in connection with the purchase of the land in controversy. The notation upon this check is denominated by appellant as a self-serving hearsay declaration, and we are urged for this reason to reject it. The check was found with other canceled checks of Ahrens, in the bank against which it had been drawn, after the death of Ahrens, and the circumstances are such, plaintiff says, that we may assume that the notation was made at the time of the transaction, and before the check was presented for payment. The check is for the sum of $575.06. And this amount, added to other items of charge made by the bank

through which the deal was had, foot up exactly one-half the purchase price of the land.

The evidence is sufficient to sustain the decree without the notation on this check. Considering all the evidence including the admissions made by defendant himself there is no escape from the conclusion that Ahrens and Simon arranged to purchase this land, each to have an undivided one-half interest, and each to contribute one-half of the purchase price, and that, pursuant to this agreement, Mr. Ahrens contributed one-half of the cash payment at or before the delivery of the deed to Simon.

The decree is amply sustained, and the judgment is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

JOHN A. LAWLER, TRUSTEE, APPELLANT, V. AMERICAN SURETY COMPANY ET AL., APPELLEES.

FILED NOVEMBER 3, 1917. No. 19631.

Costs: ATTORNEY'S FEES. In a suit on a surety company bond, the petition did not ask for attorney fees. Judgment was entered in favor of the plaintiff for the full amount prayed, with interest and costs. A motion was then filed praying for the allowance of an attorney fee. This was denied, and the judgment debtor paid into court the full amount of the judgment and costs. The judgment creditor accepted the same and entered a release of the judgment and costs on the records of the court. *Held*, that he cannot, at a subsequent term of the court, have a retaxation of the costs so as to award him an attorney fee.

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

M. A. Hartigan and *J. W. James*, for appellant.

Montgomery, Hall & Young and *Tibbets, Morey, Fuller & Tibbets, contra.*

MORRISSEY, C. J.

Plaintiff, as trustee in bankruptcy, brought suit in the district court for Adams county against defendant, as surety on a supersedeas bond. Trial was had, and judgment entered in the amount prayed, with costs, October 6, 1915. Two days later plaintiff filed an application praying for the allowance of $200 attorney fees. This was, on the same day, overruled, to which ruling the plaintiff excepted. The term of court at which this judgment was entered adjourned *sine die,* October 30, 1915. Subsequently defendant paid into court the full amount of the judgment and costs, and November 23, 1915, plaintiff received the same from the clerk and entered a full release on the court docket.

December 8, 1915, after the adjournment *sine die* of the term at which the judgment was entered, and after the receipt of the money and the release of the judgment, plaintiff filed another motion to retax costs. This motion was overruled, and plaintiff has appealed.

The original petition did not contain a prayer for attorney fees. Plaintiff says in his brief that the costs are no part of the judgment, and that the court may retax them any time the matter is called to its attention; that when the amount of the judgment is paid into court the judgment creditor may accept the same and appeal from the taxation of costs. It is only necessary to say that plaintiff accepted, not only the main judgment, but the amount taxed as costs as well, and he is now estopped to press his claim for attorney fees, if any he ever had.

The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

FIRST NATIONAL BANK, APPELLEE, V. GEORGE J. HUNT ET AL., APPELLANTS.

FILED NOVEMBER 3, 1917. No. 19678.

1. **Mortgages:** FORECLOSURE SALE: SETTING ASIDE: INADEQUACY OF PRICE. A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake.
2. ———: ———. The general rule in this state is that in judicial sales distinct tracts of land should be appraised and sold separately, but the district court may provide in a decree of foreclosure for the appraisement and sale of mortgaged property in parcels or *en masse* as the best interests of the parties may require.
3. ———: ———: SETTING ASIDE SALE. Where a decree of foreclosure contains no direction to the officer as to the manner of sale, and the property is contiguous and was mortgaged as a single tract, its appraisal and sale as such will not be disturbed in the absence of a showing of prejudice to the complaining party. *Clark v. Birge*, 100 Neb. 769.
4. ———: ———: DUTY OF MORTGAGOR. Where a tract of land consisting of many government subdivisions is mortgaged as an entire tract, the debtor, if he desires it sold in parcels, should apply to the district court to direct the officer selling the same in what manner the sale should be made, or, since the officer in the absence of directions is vested with discretionary power, he should point out to such officer the manner in which he believes the property should be divided in order to sell to best advantage.
5. ———: ———: SETTING ASIDE SALE: LACHES. Where the record does not show that the judgment debtor took steps to procure the direction of the court that the land be sold in separate tracts, or requested that the officer sell in such manner, he is not entitled as a matter of right to have the sale set aside because the land was sold *en masse*.
6. ———: ———: ———: IMPOSITION OF TERMS. Upon appeal from an order confirming a sale of real estate under foreclosure, a court of equity may in its discretion impose terms as a condition to setting aside the confirmation and allowing a resale, if it is equitable between the parties to do so.

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

F. A. Wright and *G. J. Hunt,* for appellants.

John W. Parish and *K. W. McDonald, contra.*

LETTON, J.

This is an appeal from an order confirming a sale of a large tract of land in Morrill county, consisting of over 800 acres, under foreclosure, to satisfy a decree for $31,419.87. A small portion of the tract is laid out in lots as an addition to Bridgeport. The return to the order of sale shows that the lands were duly advertised and were sold to plaintiff for $45,000, being more than two-thirds of the appraised value. A motion by plaintiff to confirm the sale was made, and an affidavit setting forth the execution of the notes and mortgage in 1907; the rendition, on June 29, 1909, of a default decree of foreclosure; that four different appraisements have been made and two offers of sale made under each appraisement without bidders; that tax liens and other liens which are prior and superior to plaintiff's mortgage together with interest and costs, will make the amount invested in the land by plaintiff by the time it secures possession nearly $50,000. There is also an affidavit that the affiant knows the land; that it has not yielded interest upon an investment of $25 an acre, and is not worth now to exceed $40 an acre; that $45,000 is more than it is worth, and that it "would not sell for as much as that under any other conditions than it was sold."

A counter affidavit was filed to the effect that there is a demand for lots and small tracts of from one to ten acres in size adjoining towns in that locality; that none of the lands in the immediate vicinity has changed hands recently; that this land is not all alike in quality, but the larger portion of it is of the quality that is considered the best in the valley; that the tract in an entirety is worth on an average $115 an acre, and, if sold in tracts within the reach of small farmers, the affiant believes that demand would be found for it at prices from $150 to $300 an acre; that a tract as large

as this could not be sold in fairness by offering it as an entirety, and by offering it on a cash basis.

Another affiant states that as an entirety the land is worth on an average at least $100 an acre; that, if sold entire, it would not bring its value, for the reason that the parties living in that section have not the means of buying and paying cash for such a large tract; that the test of value is not by what it brings at public sale for cash, but what the land sells for in small tracts and on terms; that affiant has compiled abstracts for land sold in 40, 80, and 160-acre tracts lying from six to ten miles from a railroad station at prices ranging from $60 to $85 an acre.

Defendant deposes that the land is worth more than twice the purchase price, and, if sold in smaller tracts, he believes that a subsequent sale on more reasonable terms and under modified circumstances would bring a much larger sum.

In *Kane v. Jonasen*, 55 Neb. 757, it was said: "The general rule is that distinct tracts of land sold on judicial process should be separately appraised and sold separately. *Laughlin v. Schuyler*, 1 Neb. 409. * * * It is undoubtedly within the province of the district court to provide in a decree of foreclosure for the appraisement and sale of mortgaged premises in parcels or *en masse*, as the best interest of the parties may require. *Macomb v. Prentis*, 57 Mich. 225; *Geuda Springs Town & Water Co. v. Lombard*, 57 Kan. 625; *Montague v. Raleigh Savings Bank*, 118 N. Car. 283. And, if no direction in relation to the matter is contained in the decree, the officer charged with its execution is vested with discretionary power, and his action in the premises will be sustained in the absence of an affirmative showing of prejudice by the complaining party. *Hughes v. Riggs*, 84 Md. 502; *Johnson v. Garrett*, 16 N. J. Eq. 31." In that case there was no evidence that any prejudice had resulted to defendant. The court said it would presume in the absence of evidence, that the officer was regardful of the rights of the parties, and the order of confirmation

was affirmed. Other cases bearing on this point are: *Mallory v. Patterson,* 63 Neb. 429; *La Selle v. Nicholls,* 56 Neb. 458; *Clark v. Birge,* 100 Neb. 769.

It is the general rule in other jurisdictions that, where property which is susceptible of being sold in separate tracts is the subject of a foreclosure sale, it should, if practicable, be sold in parcels, rather than as an entirety. See note to *Miller v. Trudgeon,* 8 Ann. Cas. 739 (16 Okla. 337), and note to *Thomas v. Thomas,* Ann. Cas. 1913B, 616 (44 Mont. 102), in which notes the cases are quite fully collected. The object is to allow freer competition, so that each tract may bring the best price, and that no more land be sold than enough to pay the debt. This has been adopted by this court as the proper method of sale under such decrees, and sales of tracts *en masse* have been permitted to stand only where no prejudice is shown to have resulted. Where no direction is given in the decree, the manner of sale is to some extent in the discretion of the officer. This property is in one body, but it composes many governmental subdivisions. It is not shown that it is fenced in separate tracts, or even cultivated as separate farms; the only element of division seems to be the distinction between the small portion subdivided into village lots and farm land. It would seem that the better practice, where such a large contiguous tract of land is to be sold, is that the direction of the court be taken as to the manner in which the sale should be made, or the debtor, if he desires it sold in parcels, should point out to the officer the manner in which he believes the property would sell to best advantage. The proper method would seem to be that the property should be offered first in parcels in accordance with the reasonable suggestions of the debtor or the directions of the court, and, if the total amount bid for all does not equal the mortgage debt, then it should be offered in gross. Whichever of these results produces the largest amount of money should be finally adopted and the property awarded to the proper bidder. However, if the debtor permits the sale to be made *en masse* without

objection, and afterwards, when a motion is made for confirmation, to allow him to come in with the plea that the land should have been sold in parcels would seem to allow him to take advantage of his own laches.

This court has repeatedly refused to set aside sales of real estate on account of mere inadequacy of price, unless such inadequacy was so gross as to make it appear that it was the result of fraud or mistake. *Vought v. Foxworthy,* 38 Neb. 790; *Kearney Land & Investment Co. v. Aspinwall,* 45 Neb. 601; *Iowa Loan & Trust Co. v. Stimpson,* 53 Neb. 536; *Green v. Paul,* 60 Neb. 7; *Jones v. Cleary,* 2 Neb. (Unof.) 541. But where the evidence seems to indicate that men of means sufficient to buy the whole tract are very rare in the vicinity, that the land, if sold in parcels, would be more salable, and that the price for which it actually sold is much less than its actual value, the concurrence of these factors may make the result so harmful to the rights of the debtor that a resale should be had. *Ryan v. Wilson,* 64 N. J. Eq. 797.

It appears that this land had been appraised four times and offered for sale eight times before the sale in controversy, and, so far as the record shows, the debtor made no attempt during the six years after the decree in which the sale proceedings were pending to procure the direction of the court as to the manner of sale, or to control the discretion of the selling officer by requesting and setting forth reasons why the land should be sold in separate parcels. It was said at the hearing that the sheriff had been ordered by the creditor to sell as a whole, and by the debtor to sell in separate tracts, but this was disputed, and there is no proof of either of these statements in the record. Interest on the debt and on delinquent taxes is piling up at the rate of over $200 a month. A resale will probably cause a delay of at least six months and will entail additional costs. It is over six years since the debt matured, and the creditor is entitled to its money.

Even if the land is of much less value than the defendant asserts, the proceeds of a resale in separate tracts

ought to be sufficient to pay the added costs, together with interest upon the whole debt until a resale can take place and the proceeds be realized. It is not infrequent that courts of equity impose terms upon setting aside a confirmation and allowing a resale of property. *Porch v. Agnew Co.*, 66 N. J. Eq. 232; *Henderson v. Kibbie*, 211 Ill. 556. There can be no hardship in requiring the defendant as a condition to the relief sought either by resale under the decree, or by the additional time allowed under which to sell at private sale and redeem, to enter into a bond in the sum of $2,000 to indemnify plaintiff from all loss and damages that may result in the event that the property on resale does not produce enough to pay the amount bid at the sale, with interest at the rate fixed in the decree, and the additional costs incurred by resale.

The judgment of the district court is affirmed, unless the defendant within 30 days execute and file in the office of the clerk of this court such a bond, with sureties to be approved by the clerk of the district court for Morrill county. If such bond is given and approved within said time, then the judgment is reversed and the cause remanded, with leave for defendant to apply to the district court for directions to the officer as to the manner in which the sale should be made, or to apply to the officer at or before the time of the sale to sell in separate tracts as may seem best to produce the largest amount of money.

JUDGMENT ACCORDINGLY.

WILLIAM MCCARTER, APPELLANT, V. ED A. LAVERY, COUNTY COMMISSIONER, APPELLEE.

FILED NOVEMBER 3, 1917. No. 19679.

1. **Appeal: DISMISSAL: EXTRINSIC EVIDENCE.** An appeal by the plaintiff may be dismissed, where, during its pendency, without any fault of the defendant, an event occurs to prevent the appellate court

from granting plaintiff any effectual relief in case of a decision in his favor, and an event of that nature may be shown by extrinsic evidence.

2. ———: ———: ———. An appeal by a taxpayer from a dismissal of his suit to oust a county commissioner for misdemeanors in office may be dismissed, where it is shown that the official term of defendant expired pending the appeal, that another holds the office, that no effort was made to advance the appeal for a hearing during the incumbency of defendant, and that he did not prevent an early hearing.

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

Niles E. Olsen, I. J. Nisley and *Wilcox & Halligan,* for appellant.

J. B. Strode, D. H. Moulds, W. A. Stewart, T. M. Hewitt, H. D. Rhea and *E. A. Cook, contra.*

ROSE, J.

This is a proceeding by a taxpayer to remove from office a county commissioner of Dawson county "for corruption" and "for wilful maladministration"—two statutory grounds. Rev. St. 1913, sec. 5698. Approval of excessive claims against the county and misconduct resulting in their allowance and payment are the foundations of plaintiff's charges. From a dismissal of the proceeding after a trial on the merits, plaintiff has appealed.

The appeal will not be determined. The purpose of the proceeding is to oust defendant from office. His term has long since expired and the office is now occupied by his successor. No effort to advance the appeal for a decision during the incumbency of defendant was made. The delay is not attributable to him. He made a successful defense in the trial court. Being out of office he cannot now be removed therefrom. His retirement at the expiration of his official term pending the appeal was an event making it impossible for the appellate court to grant plaintiff any effectual relief on the cause of action pleaded. That event is a ground for dismissing the

appeal, and, when not appearing on the record, may be shown by extrinsic evidence. *Mills v. Green*, 159 U. S. 651. The change in officers is asserted by defendant, and not denied. Courts properly decline to express an opinion on a mere abstraction, and may act on their own motion in dismissing an appeal involving only an inquiry of that nature. *Heesch v. Snyder*, 85 Neb. 778.

APPEAL DISMISSED.

OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE, V. WILLIAM D. COCKE, APPELLEE: FIRST NATIONAL BANK OF HASTINGS, APPELLANT.

FILED NOVEMBER 3, 1917. No. 19417.

Bills and Notes: INVALID PRINCIPAL: RECOVERY ON COLLATERAL. If a plaintiff has no interest in the note sued upon except as collateral security for a note held by him, he cannnot recover on the collateral if the principal note is wholly invalid.

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

Hainer & Craft, for appellant.

Morsman & Maxwell, contra.

SEDGWICK, J.

The First National Bank of Hastings was made defendant in a proceeding to foreclose a real estate mortgage given by the defendant Cocke, as mortgagor, to the Nebraska Hardware Company. The mortgage was foreclosed, the property sold, and the proceeds applied upon the mortgage. The bank held a note for $1,550, given it by the Nebraska Hardware Company, which it claimed was secured by the note and mortgage executed by the defendant Cocke, which had been turned over to the bank by the hardware company as collateral security, and asked the court in the foreclosure proceedings for a

deficiency judgment upon the collateral note, to be applied upon the note given to the bank by the hardware company. The defendant Cocke defended against the application for a deficiency judgment upon two grounds. He alleged that there was nothing further due upon the note and mortgage executed by him, and alleged that the $1,550 note which was given by the hardware company to the defendant bank was without consideration, was illegally issued, and was not a valid liability. The court found for the defendant, and the bank has appealed.

If a plaintiff has no interest in the note sued upon except as collateral security for a note held by him, he cannot recover on the collateral if the principal note is wholly invalid. In such case he has no title to the collateral, and is not the real party in interest in proceedings to collect thereon. Story, Bailments (9th ed.) secs. 300, 301; *Mutual Bank v. Burrell*, 60 N. Y. Supp. 522.

As the bank alleged no interest in the note upon which the mortgage had been foreclosed except as collateral security for the $1,550 note, if it should be found that there was no liability on this latter note, the bank could not recover in this action, and we will first consider that question. The $1,550 note which was given by the hardware company to the bank, it is conceded, was given in settlement of a former note which the bank held against one Fawthrop, upon which Jakway, who was the president of the hardware company, was indorser. The defendant Cocke, who was a stockholder in the hardware company and was familiar with its business, testified that there was no other consideration for the $1,550 note owned by the bank than the personal liability of Jakway and another, and that the note was fraudulently executed in the name of the hardware company by Jakway and another without any authority from the corporation to assume on its part the said liability. The records of the hardware company were not in evidence upon this question, but were under the control of Jakway and others, who were hostile to the interests of Cocke, and

were witnesses for the bank in this litigation, and it is contended on the part of the defendant Cocke that it devolved upon the bank, in the face of this evidence, to show that the corporation had authorized the assumption of this liability on its part. In answer to this contention, the brief of the bank quotes from section 5377, Rev. St. 1913, the negotiable instruments law:

"Every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

It is not contended, so far as we have observed, that the bank was a holder in due course, that is, that the bank was an innocent purchaser of this collateral and was entitled to recover thereon as such. Indeed, so far as it is pointed out in the briefs, the bank took this collateral after it was due and could not therefore be a holder in due course. The section of the statute quoted, therefore, has no application to the question whether there was any consideration for this note, and whether its execution and delivery to the bank was the valid act of the corporation. The defendant Cocke alleged and undertook to prove a negative, that is, that the corporation had not assumed the liability of Jakway and another, and had not authorized the execution of the note, and, under the familiar rule, when he had produced such positive testimony supporting his contention, it devolved upon his opponent to prove the affirmative, which, if the corporation had assumed the liability and authorized the execution of the note, would be readily proved by the records of the corporation itself. Under these circumstances, and in the condition of this evidence, the court was justified in finding that the corporation had never assumed this liability and authorized the execution of

this note. As the bank had no claim which it could enforce against the corporation, and had no other interest in the collateral, it was not entitled to a deficiency judgment thereon.

The judgment of the district court is

AFFIRMED.

LAURA LINGLE, APPELLEE, V. FARMERS MUTUAL TELEPHONE COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 3, 1917. No. 19645.

Creditors' Suit: DEFENSES: INSOLVENT CORPORATION. If an insolvent corporation sells all of its property and rights for cash or other property and distributes the same to some of its stockholders, the parties receiving it knowing all of the facts will be held to account to the creditors of the corporation for the property so received; and that they also contributed some of their individual rights to induce such sale and transfer will constitute no defense to an action to subject such property to the claims of creditors.

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

Berge & McCarty, for appellants.

R. J. Greene, contra.

SEDGWICK, J.

The plaintiff recovered a judgment against the Farmers Mutual Telephone Company. Execution was issued on the judgment and returned unsatisfied for want of property on which to levy. The plaintiff then began this action in the district court for Lancaster county against the Farmers Mutual Telephone Company and thirteen others who had been interested in that company. The plaintiff alleged that the Farmers Mutual Telephone Company, after the indebtedness was incurred upon which the judgment was rendered, had sold its property to the Lin-

coln Telephone & Telegraph Company for $525, and received in payment stock in the Lincoln Telephone & Telegraph Company which was issued and delivered to these defendants other than the Farmers Mutual Telephone Company; that the defendants who received the stock knew of existing conditions, and took the stock for the purpose of defrauding this plaintiff and preventing her from collecting the judgment. She asked that a receiver be appointed to take charge of the assets of the Farmers Mutual Telephone Company, including the shares of stock so issued to these defendants. The trial court found the issues in favor of the plaintiff and appointed a receiver as requested. The defendants have appealed.

The defendants admit the plaintiff's judgment and execution as alleged, and insist upon two principal defenses which are discussed at large both in the evidence and in the briefs.

1. The defendants say that the plaintiff was not employed by the Farmers Mutal Telephone Company, but was in reality employed and paid by independent users of telephones who owned their own telephones and the poles and the lines of the system. But the plaintiff's judgment against the company establishes that the company was indebted to her in the amount of that judgment, and as this question is foreclosed by the plaintiff's judgment it is not necessary to discuss it further here.

2. The second and principal contention of the defendants is that the property sold to the Lincoln Telephone & Telegraph Company was not the property of the Farmers Mutual Telephone Company, but was in reality the property of these other defendants and various other users of telephones. The answer to this contention plainly is that the Lincoln Telephone & Telegraph Company took a bill of sale, executed in the name of the Farmers Mutual Telephone Company, which purported to convey only property "owned by the Farmers Mutual Telephone Company in the town of Bennet, county of Lancaster, and state of Nebraska," and by this bill of sale the purchasing company of course took only such property as the grantor

in the bill of sale owned; that the Farmers Mutual Telephone Company owned some property rights that might be considered by the purchaser as of the value of $525 is clearly shown by the evidence.

Mr. Varney was sworn and testified as a witness in behalf of the defendants. He had acted as secretary and treasurer of the company for several years, and was familiar with its affairs, and was one of the parties who executed the bill of sale in behalf of the company, and testified in regard to the transaction of the sale. He testified that the real business that the Farmers Mutual Telephone Company had to do was "to see about making the exchange and the business at the central office." And when asked, "What was there in the telephone system in Bennet that was owned by the Farmers Mutual Telephone Company?" he answered, "Hardly anything." He was asked, "You know that the Nebraska Telephone & Telegraph Company now furnishes switch-board service and does the exchange for all those lines, don't you?" and answered, "Yes, sir. Q. And furnishes the switch board? A. Yes, sir." And when asked, "Now, you may state what is the difference in that system out there now than there was when the Farmers Mutual Telephone Company was operating it," he answered, "There is no difference now anymore than there was in 1907."

This is unequivocal evidence offered by the defendants themselves that the purchasing company took only the rights and interests of the judgment debtor. There is some evidence that these defendants, other than the judgment debtor, also relinquished some rights to the purchasing company for which they secured the entire consideration to the exclusion of this plaintiff and others who they say were equally interested in the company. If they parted with something in order to induce the purchaser to pay a larger price for the debtor company's interest with the intention of appropriating the entire proceeds of the sale, such conduct would not improve their position as against the plaintiff. Whether such rights and interests of the Farmers Mutual Telephone Company

were of the value of $525, which was received for them is not material in this matter. This money should have been used to pay this plaintiff her judgment for services in conducting the exchange, and the parties, who, knowing all the conditions, received the value for which the property and rights of the company were sold, should account to this plaintiff for the same. The trial court did right in appointing a receiver to take charge of these assets of the defendant company.

The judgment of the district court is

AFFIRMED.

ERNEST MEYER, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 3, 1917. No. 19343.

Action: PARTIES: REAL PARTY IN INTEREST. The evidence examined, and found not to sustain the verdict and judgment.

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

A. A. McLaughlin, Wymer Dressler and *Lyle Hubbard,* for appellant.

Weaver & Giller, contra.

HAMER, J.

This is an action against the Chicago & North Western Railway Company to recover damages because of the alleged negligence of the company in the management and control of a car-load of potatoes shipped from Gordon, Nebraska, to N. H. Nelson of Omaha, Nebraska, a broker, doing business in Omaha, and who appears to have made an agreement with the plaintiff to deliver him the car-load of potatoes "F. O. B. Omaha." The case appears to have been tried before a justice of the peace, who rendered judgment against the defendant. Then it

was taken to the district court for Douglas county by the defendant on appeal. The petition in the district court alleged that the railroad company undertook and agreed to carry the car-load of potatoes from Gordon, Nebraska, to Omaha, Nebraska; that the potatoes were delivered to the railroad company at Gordon, Nebraska, in good condition, and that on account of the negligence and carelessness of the defendant company in the management and control of the potatoes they were "negligently and carelessly permitted to become frozen." There was a trial to a jury, which found against the defendant, and judgment was rendered against it for $117.16.

It is contended by the defendant that the plaintiff, Ernest Meyer, was not the real party in interest. There was evidence before the court tending to show that the potatoes belonged to "The Fair" at Gordon, Nebraska, of which W. L. Mills was the proprietor, and that Nelson engaged the potatoes from "The Fair," and that he paid the freight, and that the potatoes were consigned to him. Nelson was doing business as a broker at Omaha. The evidence shows that he went to Meyer, the plaintiff, on the 7th or 8th of November, 1911, and said: "Meyer, I have got a wire from Gordon, Nebraska, offer Ohio potatoes 82½ cents delivery. Q. 82½ cents a bushel? A. Yes, sir; delivered. * * * Q. F. O. B. Omaha? A. F. O. B. Omaha." The foregoing is Nelson's testimony. The bill of lading is dated November 9, 1911. The consignor is shown by it to be "The Fair" at Gordon, Nebraska. The consignee is shown to be N. H. Nelson, Omaha, Nebraska. The bill of lading is signed by the agent of the railroad company at Gordon, and by "The Fair, per W. L. Mills." Nelson testified that the potatoes arrived at Omaha November 15. The next day Meyer went to the railroad yard and received the potatoes. Nelson went with Meyer (at his request) and showed him the potatoes. He testifies as follows: "Q. Who paid the freight? A. I paid the freight on the car. Q. Well, you may tell when you received that car.

A. According to my memory the car arrived here on the 15th. It was set for delivery on the 16th. * * * Q. And you paid the freight? A. Yes, sir. Q. And sold the car to the Meyer Fruit Company? A. Yes, sir." Mills testified that the potatoes were loaded in sacks; that he purchased them from Bert Hull; that the potatoes had been hauled from the Hull ranch to Gordon in wagons; that the distance was made about 8 or 10 miles; that November 8 and 9, 1911, were employed in hauling and loading the potatoes.

Nelson appears to have contracted for the potatoes with a view to selling them to Meyer. Meyer had indicated his willingness to buy the potatoes if Nelson could deliver them to him at Omaha for 82½ cents a bushel. Nelson testified that he had sold a car to Meyer before the car arrived at Omaha; but an examination of his testimony shows that he had only orally engaged to sell them to Meyer, and that they had not yet arrived, and that nothing had been paid on them. Nelson testified that the paper marked "Exhibit 3" was the bill of lading, and that exhibit 2 was the expense bill, and that exhibit 1 was his bill against the Meyer Fruit Company, and that exhibit 3 was admitted, but there was an objection which was sustained as to the introduction of exhibits 1 and 2, which were held to be incompetent and immaterial. The former was a bill as follows:

"Omaha, Neb. 11-17-1911.

"E. Meyer Fruit Company, Omaha, Nebraska.

"Bought of N. H. Nelson & Co., Brokers.

"Terms Car ARL-3624

"296 Sax 34260 potatoes at 82½ cents per bu. $471.07"

The material contents of the latter have been heretofore stated.

The evidence shows that Nelson was the purchaser of the potatoes, and that he did not disclose to the seller, Mills, the fact that he was buying the potatoes for any other person. Mills, who was the proprietor of "The Fair," did not know that Meyer was going to get the potatoes. The transaction of Nelson contemplated that

he was to be the consignee, and that he was the real owner of the potatoes until such time as he sold and delivered them to Meyer. He had not delivered them to Meyer at the time they arrived in Omaha, and he took Meyer and showed him the potatoes where they were in a car standing on the railroad track. If Mills had then seen fit to find fault with them and had refused to accept them, he could have done so. Meyer gave his check to Nelson for the price of the potatoes, but says that the price of other articles was included in the check and paid for at the same time. That would seem to show that Nelson was regarded as the owner of the potatoes both by Nelson and Meyer, and that Nelson sold them to Meyer after they arrived in Omaha. Nelson testified that he (Nelson) paid for the potatoes; also, that "he (Meyer) paid us in full for the car." Meyer testified: "Q. Do you know when you paid him (Nelson) for those potatoes? A. I could not say. I guess I paid in a few days, two or three days (from the time the potatoes arrived)." Meyer was notified by Nelson on the 15th of November that the potatoes had arrived. He (Meyer) unloaded them the next day. Meyer testified he did not pay for the potatoes until after he saw them.

While Nelson was a broker, he did not buy the potatoes from Mills as the agent of Meyer. The evidence does not show that Nelson was the agent of Meyer. The minds of Mills and Meyer never met, because they never saw each other and never communicated in any way. Nelson may have been morally bound to offer the potatoes to Meyer at 82½ cents a bushel, but he was not legally bound to do so. He could have sold them to any other proposed purchaser and such purchaser would have had a good title to them. Meyer paid no money on the potatoes before he received them, and then, after he had received them, some days after, he gave Nelson a check in payment of a balance due, and this check included other items of indebtedness due from Meyer to Nelson. Nelson could not have successfully maintained an action against Meyer for the price of the potatoes

until after he (Nelson) had delivered them. Neither could Meyer have successfully maintained an action of replevin for the potatoes against Nelson until after he (Meyer) paid for them. Meyer had no contract in writing with Nelson which obligated him (Nelson) to deliver the potatoes to Meyer. Nor had Meyer paid any money on the purchase price. The railway company could not have charged Meyer for the freight because he was not a party to the shipment. In the shipment of the potatoes the railway company did not know the plaintiff, Meyer. Meyer did not know the railway company. We are unable to say from the evidence that the potatoes were the property of the plaintiff at the time they were shipped from Gordon, and unless they were, or unless the claim for damages was assigned by Nelson to Meyer, we do not see our way clearly concerning the right of the plaintiff to maintain the action. The defendant railway company insists upon its legal rights and we cannot disregard them.

Section 7582, Rev. St. 1913, provides: "Every action must be prosecuted in the name of the real property in interest, except as otherwise provided in section twenty-six." In *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321, it was held: "If the contract between the parties expressly provides that delivery shall be made at a certain place, then the vendor's title to the property is not divested until delivery is so made." Nelson received the property at Gordon because he paid the freight upon it. In the arrangement which he made with Meyer, Meyer was to receive the property "F. O. B. Omaha." When Meyer received the property on the 16th of November, it was then delivered to him. This would make Nelson the owner of the property during the time of its transportation and until delivery to Meyer. Where the contract of purchase requires shipment and delivery of the goods at a designated place, the title does not vest in the purchaser until delivery at such place. *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321; Newmark, Law of Sales, sec.

166. See note to *Ramsey & Gore Mfg. Co. v. Kelsea*, 22 L. R. A. 415, 421 (55 N. J. Law, 320).

One who becomes the owner of goods by purchase from the consignee after transportation has ended cannot maintain an action against the carrier for damage to the goods in transit, in the absence of an assignment of such claim for damages from the consignee who was the owner during the transportation. *Union P. R. Co. v. Stickel Lumber Co.*, 99 Neb. 564.

We do not see that the plaintiff has proved a cause of action against defendant, and the judgment is therefore reversed and the cause remanded.

REVERSED.

ROSE, J., dissents.

SEDGWICK, J., dissenting.

In the majority opinion the difficult question involved in this case is not discussed. The case is determined entirely upon the question as to whether the plaintiff is the real party in interest. Nelson was a broker. Meyer was engaged in the retail business, in which he bought and sold potatoes. Nelson informed Meyer that he could get a car-load of potatoes at a certain price per bushel. Meyer told him he would take them. Nelson was not a dealer in potatoes. He ordered only the quantity wanted by Meyer, and ordered them in his (Nelson's) name. They were shipped in Nelson's name, and when they arrived Meyer took the whole order and paid Nelson the agreed price, and found that the potatoes were frozen. The real party in interest is the one who would suffer a loss by reason of the freezing of the potatoes. If Meyer agreed that Nelson should procure the potatoes for him, and Nelson did so, and Meyer furnished the money for them, Meyer is the one who suffered the loss. On the other hand, if Meyer had agreed that if Nelson would order the potatoes and get them there he would buy them from Nelson if they were in good condition, then if the potatoes were frozen Meyer would not be liable to Nelson and should not have received the pota-

toes. Neither of the parties so understood the transaction. Nelson as a broker assumed that he ordered the potatoes for Meyer, as they agreed he should, and they both understood that Meyer must take them, which he did. Even if their contract had not been plainly definite that Nelson as a broker was ordering the potatoes for Meyer, still if Nelson had so understood it, and insisted that Meyer take them as purchased for him, and Meyer had acquiesced and taken the potatoes and paid in full the original purchase price, the jury upon such evidence might find that Meyer was damaged by the freezing of the potatoes. Meyer evidently was not a very tactful witness and not very well posted in these nice questions of law, and his testimony is somewhat childlike, but if Nelson had brought this action instead of Meyer the jury might have found upon this evidence that he was not the real party in interest. Meyer has paid the full purchase price of the potatoes, so that Nelson has neither lost anything nor is he in danger of losing by the freezing of the potatoes. He could not recover any damages for he has suffered none. Meyer although paying for sound potatoes, has received frozen ones. He is greatly damaged. If the defendant negligently caused these damages, Meyer should recover in this case. The question as to whether Meyer was the real party in interest was submitted to the jury by an instruction of the court, in which the court told the jury that unless Meyer owned the potatoes he could not recover. The jury found upon that issue under this evidence that Meyer could recover. It seems very clear that this evidence supports the finding that Meyer is the real party in interest. No one but Meyer can recover, and this decision frees the defendant from liability without considering whether or not its negligence caused the damage.

DORIS ROUTT, APPELLEE, v. BROTHERHOOD OF RAILROAD TRAINMEN, APPELLANT.

FILED NOVEMBER 3, 1917. No. 19503.

1. **Insurance:** CONTRACT: CONSTRUCTION. When there is ambiguity in the terms of the contract and certificate of insurance in a fraternal beneficiary company, it will be construed in such way as to accomplish the purpose intended, whenever the same may be done without violence to the expressed terms of the contract, and in accordance with the aims and purposes of such fraternal brotherhood.

2. ———: ———: LOSS OF SIGHT. Where the peculiar malady known as "color-blindness" so impairs the sight that a member of such association who is insured therein is disabled and is unable longer to continue in the train service, and is discharged therefrom on account of such defect in his vision, this constitutes the complete and permanent loss of sight of both eyes within the meaning of the contract stated in the opinion.

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

Weaver & Giller, for appellant.

Lambert, Shotwell & Shotwell, contra.

HAMER, J.

The plaintiff and appellee brought suit in the district court for Douglas county seeking to recover on a benefit certificate held by him in the defendant company, a fraternal insurance association. He had for some time prior to June 5, 1913, been employed by the Union Pacific Railroad Company as a railway trainman. As a member of the appellant association he carried insurance to protect himself against disability. He became afflicted with what is known as "color-blindness," and was discharged from the service of the railroad company because of his infirmity. It is contended by the plaintiff that as a railroad trainman he had become totally blind, and that within the terms of the policy held by him in

the defendant association he had suffered the complete and permanent loss of the sight of both eyes. The defendant denied liability upon the ground that "color-blindness" was not a complete and permanent loss of the sight of both eyes. It was also denied that the plaintiff was totally disabled under the meaning of the constitution and by-laws of the defendant. There was a verdict and judgment for the plaintiff for the full face of the policy and interest, amounting in all to $1,740.

The question to be determined, therefore, is whether the total color-blindness sustained by a railway trainman while a member of the defendant association, and which color-blindness disqualified such member from such service, is to be construed as the complete and permanent loss of the sight of both eyes. It appears that the Brotherhood of Railroad Trainmen is an association of many thousand persons organized to promote the welfare of railway trainmen, and to provide insurance for its members, and having a grand lodge at Cleveland, Ohio, and subordinate lodges located in various cities of the United States, one of which is located in the city of Omaha, Nebraska, known as Success Lodge No. 135; that defendant is a fraternal insurance association, and receives from each of its members regular assessments to provide a fund for the payment of sick, accident and death benefits to its members; that during and prior to the month of June, 1913, plaintiff had been a member of the defendant association for a period of more than five years, and on the 1st day of July, 1913, was a member in good standing of Success Lodge No. 135; that the plaintiff had regularly paid his dues and complied with the rules and by-laws of the association; that when the plaintiff became employed by the Union Pacific Railroad Company, September 17, 1907, he was in good health and good physical condition, and was able to perform his duties as a trainman, and did so perform them up to and including the 5th day of June, 1913, when he was discharged from the employment of the said railroad company for the reason that he had become afflicted

with a disease known as "color-blindness," which disease totally and permanently incapacitated him for the duties of a railway trainman. Rule 68 of the defendant association provides: "Any beneficiary member in good standing who shall suffer the amputation or severance of an entire hand at or above the wrist joint, or who shall suffer the amputation or severance of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise." The plaintiff has complied with all the rules of the association.

In *Kane v. Chicago, B. & Q. R. Co.*, 90 Neb. 112, it was held: "A railway night switchman becoming color-blind during his employment is thereby disabled by sickness within the meaning of his employer's contract that it will pay him sick benefits for a limited period while he is disabled by sickness or accidental injury, provided the fact be established by proof of acute or constitutional disease." The court said: "There is sufficient evidence to sustain findings to the effect that the plaintiff became color-blind while in the defendant's employ, that he was discharged because of that defect, and that his condition incapacitated him from following his vocation or any other equally as remunerative." In that case the relief department had certain by-laws which, among other things, provided: "Wherever used in these regulations the word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work." A second provision in the by-laws reads: "To establish a claim for sick benefits there must be positive evidence of acute or constitutional disease sufficient to cause disability."

It is claimed in this case that if the plaintiff could use his eyes for any purpose he was not disabled within

the meaning of the provisions contained in section 68, above quoted, and the constitution and by-laws of the association.

In *Beber v. Brotherhood of Railroad Trainmen*, 75 Neb. 183, the question was whether a total loss of three fingers and an injury to the remaining finger and thumb which interfered with their use, and a cutting away of a part of the palm of the hand, constituted a total loss of the hand within the meaning of a by-law of a mutual benefit association providing "indemnity for any member in good standing suffering, by means of physical separation, the loss of a hand at or above the wrist joint." It was contended that in any event the hand should be cut off above the wrist before the plaintiff might recover. The plaintiff was a brakeman, and he was in "Class C." Section 37 of the constitution of the order provided that the member should be entitled to the amount of his certificate "upon his becoming permanently and totally disabled within the meaning of section 45." Section 45 reads: "Any member in good standing, suffering, by means of physical separation, either the loss of a hand at or above the wrist joint, or suffering the loss of a foot at or above the ankle joint, or suffering the loss of the sight of both eyes, shall be considered totally and permanently disabled, and shall receive the full amount of his beneficiary certificate, but not otherwise." In that case the plaintiff received a personal injury by cutting his left hand while splitting wood. As a result of the injury he lost his second, third and fourth fingers and about half of the second, third and fourth metacarpal bones, which removed nearly the half of the palm of his hand, damaged the first and second joints of the index finger, and caused a running sore on the thumb between the second and third joints, which stiffened and impaired the motion of the thumb and practically destroyed its usefulness. The plaintiff's testimony tended to show that the injury had destroyed the usefulness of the hand, but there was evidence offered by the defendant to show that the remaining thumb and finger on the hand

and the stiffened wrist joint were still of some utility to the plaintiff. It was a case very like this. Color-blindness is a loss of the sight and an inability to see certain colors. In the case cited a part of the hand had clearly been left. There was a thumb and a finger. This brings us to the question whether it was the use of the hand that was meant, or its actual loss. This court held it was the use. In the body of the opinion it is said: "What did the defendant company contract to insure against under the provisions of this by-law? Was it the severance of the entire hand at or above the wrist joint, or was it the entire loss of the use of the hand? * * * If the only risk assumed by defendant was the amputation of the whole hand, then the learned trial court was fully justified in directing a verdict for defendant; but, if a fair and liberal interpretation of the contract most favorable to the insured can make it a risk which includes the total loss of the use of the hand by severance, then the question as to whether such loss is established by the evidence is properly one for the triers of such facts. If the officers of the society, who prepared the by-law in which the contract is set forth, have used ambiguous terms, the ambiguities must be interpreted in the manner most favorable to the insured."

In *Lord v. American Mutual Accident Ass'n*, 89 Wis. 19, there was a policy containing a provision for the payment if the injury caused an "immediate, continuous, and total disability." In that case it was held that it was a proper question for the jury to determine whether a total loss of three fingers and part of another on the same hand, and the destruction of the joint of the thumb, and a cutting of the hand, constituted a total loss within the meaning of such provision. The court said: "It is contended that there is no such thing as the loss of the hand unless the injury is such as to require the amputation of the hand above the wrist. That would be too much of a refinement upon language for practical purposes. The hand was for use; and, if it was injured

so as to become useless as a hand, then the defendant became liable for its loss under the contract."

In *Sneck v. Travelers Ins. Co.*, 88 Hun. (N. Y.) 94, 34 N. Y. Supp. 545, the action was on a policy against a "loss by severance of one entire hand or foot." There was a loss of a part of the hand by severance. The plaintiff testified that he had no use of the hand. The court held that the word "severance" in the policy meant the method by which the accident occurred, and that it was the loss of the use of the hand that was insured against, and that the question as to whether the loss was total under the evidence was one of fact for the jury. The same case was reviewed by the court of appeals in 156 N. Y. 669, and the last majority opinion of the intermediate court was approved without division.

Applying the principle declared in the above cases, complete and permanent loss of the sight of both eyes means loss of the use of the eyesight of both eyes for the purposes of the insured's avocation. *Moore v. Ætna Life Ins. Co.*, 75 Or. 47; *Theorell v. Supreme Court of Honor*, 115 Ill. App. 313; *Supreme Court of Honor v. Turner*, 99 Ill. App. 310; *Sheanon v. Pacific Mutual Life Ins. Co.*, 77 Wis. 618; *International Travelers Ass'n v. Rogers*, 163 S. W. (Tex. Civ. App.) 421.

The plaintiff sought indemnity because of the anticipated loss of the sight of his eyes. That part of section 38 which relates to loss of the eyes reads: "Or who shall suffer the complete and permanent loss of sight of both eyes." The condition is not made that the eyes of the insured shall be taken out of their sockets and away from his physical body, but only that he "shall suffer the complete and permanent loss of sight of both eyes." It does not say that he shall become blind in both eyes so as to become unable to see objects of any kind, but that he shall lose "the sight of both eyes." This he did when he became color-blind. He lost his sight in both eyes. It affected both eyes alike. Besides, the color-blindness was "complete and permanent." He could not see, and that applied to both eyes, and he

was discharged because the defect in his vision made him unfit for railroad service. The thing for which he sought indemnity, loss of his vision, came to him. If his insurance does not indemnify him, it serves no good purpose. Besides, it is ambiguous and misleading and should be construed as the defendant knew the plaintiff would understand it.

A fraternal insurance association of railroad trainmen established and maintained with special reference to furnishing insurance for the benefit of those who are injured by sickness or accident during the time of their employment in the railroad service, and who are thereby disqualified from following their avocation as trainmen, will be deemed to have intended the benefits promised by its insurance certificate, its constitution, by-laws and rules, and, in case of ambiguity in the language used, it will be construed in such a way as to accomplish the purpose intended, whenever the same may be done without violence to the expressed terms of the contract, and in accordance with the aims and purposes of such fraternal brotherhood.

Where the peculiar malady known as "color-blindness" so impairs the sight that the member of such association who is insured therein is disabled and is unable longer to continue in the train service, and is discharged therefrom on account of such defect in his vision, it will be held that he is entitled to the benefits provided by the certificate, the constitution, and by-laws and rules of the society. In such case, while the sight of the insured may not be entirely destroyed for some purposes, it will be deemed destroyed and lost as to the particular avocation of a railroad trainman, and he will be held entitled to recover upon the benefit certificate which he holds.

We are unable to say that the judgment of the district court is wrong. It appears to be right, and it is

AFFIRMED.

LETTON, ROSE and CORNISH, JJ., dissenting.

Insurance contracts which are ambiguous should be construed against the insurer, who usually prepares the contract; but there is no ambiguity in the contract under consideration. The clause under which the plaintiff claims recovery provides: "Any beneficiary member in good standing * * * who shall suffer the *complete and permanent loss of sight of both eyes* shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise."

The plaintiff's eyes became affected in some way so that he was unable to distinguish colors, a condition known as "color-blindness." In all other respects his vision seems to have been perfect. He was 27 years old and had never worn glasses, nor had the doctors recommended them. The colors he could not distinguish were red and green. He had no trouble distinguishing white and blue, and had some trouble in distinguishing yellow. He had no trouble in reading print or seeing ordinary objects. To hold that "color-blindness" is equivalent to "complete and permanent loss of sight of both eyes" is to state a contradiction in terms. The contract was not to indemnify against the loss of the use of the eyes in his employment as a railroad brakeman as the majority opinion practically holds. It seems to be a distortion of its language to so hold. To insure a person's ability to permanently continue in his particular vocation would, in a policy, require words to that effect. In the policy under consideration there is none.

The opinion is unjust to the membership. The judgment affirmed diverts from a trust fund, created by the contributions of members as indemnity for the "complete and permanent loss of sight of both eyes" and for other purposes of indemnity, the sum of $1,740. We cannot conceive that any body of men, providing for insurance,

whether they all belong to one occupation or not, or whatever the occupation, would place a man who had merely become color-blind on the same indemnity footing with the family of the brother who had been killed, or with the brother totally disabled through loss of legs or arms, or total blindness. Loss of his job by a young trainman, because of color-blindness, might be the incident that led to his financial fortune, taking him from a job that paid from $75 to $150 and putting him into an occupation that paid several times that. Certainly color-blindness bears no resemblance to total disability. Presumptively insurance aims at indemnification—compensation according to actual loss.

The cases cited in the opinion go only to the length of holding that, when a policy provides for the "loss" of an organ, liability arises when there is an entire loss of the use of the organ for all practical purposes.

FRED GREINER ET AL., RECEIVERS, APPELLANTS, V. ROSE B. LINCOLN ET AL., APPELLEES.

FILED NOVEMBER 3, 1917. No. 19692.

1. **Appeal in Equity:** TRIAL DE NOVO. "Upon appeal in actions in equity, this court is required by the statute to try the issues *de novo*, without reference to findings of the trial court; but, when the testimony of witnesses orally examined before the court upon the vital issues in the case is conflicting, so that it would be impossible that both versions of the transaction can be true, this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank*, 99 Neb. 317.
2. **Evidence** examined, and *held* to support the finding and judgment of the district court.

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

Harry R. Ankeny, for appellants.

Reese, Reese & Stout, contra.

HAMER, J.

The receivers of the Buffalo Pitts Company, a corporation, are plaintiffs and appellants. At the trial in the district court there was a finding and judgment rendered in favor of the defendants, and the plaintiffs have appealed.

The action was brought on five promissory notes signed by the defendants and a real estate mortgage given by Rose B. Lincoln to secure the payment of the said notes. The notes and mortgage were each dated July 20, 1914. Three of the notes were for $100 each and two were for $150 each, aggregating $600. Each note drew interest at 10 per cent. per annum, payable annually. The mortgage was upon lot 1, block 2, in Lincoln Driving Park Second addition to city of Lincoln. The amended petition set up that no part of the debt had been paid, and contained the usual prayer for the foreclosure of the mortgage.

The separate answer of W. F. Jones admitted the execution and delivery of the notes, and set up that the Buffalo Pitts Company was, at the time of the transaction, engaged in the business of manufacturing and selling threshing machines and separators, and was well acquainted with their quality and value; that the said company sold to the defendant Jones a second-hand threshing machine which was worthless and of no value, and falsely and fraudulently represented to the defendant Jones, through its agents and representatives, that said threshing machine had just been rebuilt from the ground up, that there was not a pimple on the crown sheet, that the engine was in first-class condition, that new flues had just been installed, that it was in condition to do the work required of it by the defendant W. F. Jones, that the boiler would not leak, that the engine was sound, and that the engine would operate the separator with ease; and that all these representations were false and fraudulent, and were believed by the defendant Jones, and were relied upon by him, and that the plaintiff knew that the said representations were

false and untrue; that by reason of such representations the defendant Jones was induced to sign the said notes and deliver the same to the plaintiff.

The defendant Rose B. Lincoln signed the notes and executed the mortgage so as to become a surety for the purchaser, W. F. Jones. In her answer she set up the misrepresentations made to her by the agents of the company, and that she believed such misrepresentations, and relying upon them signed the notes and mortgaged her property to secure the debt. The defendant Jones testified that Stoll said that he was the manager of the company, and that he and Stoll looked the engine over, and that Stoll said that he would guarantee the engine to be rebuilt "from the ground up." Stoll himself testified on behalf of the plaintiff that he had told Jones that the engine was "thoroughly rebuilt from the ground up, and she is." Jones testified that the engine gave him constant trouble, and that it had not been rebuilt. He also testified that Mr. Stoll, the manager of the company, stated to Mr. Jones and Mrs. Lincoln that the engine "had all new flues." Jones also testified that the flues were not new, but that they were old; also, that he fired up the engine and ran it down off the platform at Lincoln and started to Waverly, and that when he got a short distance the other side of Havelock the flues began to leak. He testified that all leaked. Mrs. Lincoln set up the fact that she relied upon the false representations made to her by the plaintiff, and that she was thus induced to become a surety. She prayed in her answer that the notes be declared null and void, and that the title to the premises be quieted in the defendant, Mrs. Lincoln. The district court dismissed the plaintiff's case, and quieted the title to the lot in question in the defendant Rose B. Lincoln. There was also judgment for costs against the plaintiffs.

This case was heard before Judge Cosgrave of the district court for Lancaster county. While there is some conflict in the evidence, there is enough evidence to sustain the finding and judgment rendered. Judge Cosgrave

had the witnesses before him. He saw them. He had an opportunity to judge of their credibility. It is our duty to examine the evidence. We have done so. We are unable to discover prejudicial error of any kind in the proceedings and judgment of the district court. Where the evidence is conflicting, a judgment rendered by the court alone will not be set aside unless it is clearly wrong. *National Bank of Ashland v. Cooper*, 86 Neb. 792. In an appeal of an equity case, where the evidence is conflicting, the supreme court should consider the findings of the district court. *Coad v. Coad*, 87 Neb. 290; *McLaughlin Bros. v. Hilliard*, 97 Neb. 326; *Wynegar v. Dobson*, 98 Neb. 310; *Shafer v. Beatrice State Bank*, 99 Neb. 317.

The judgment of the district court is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

SAM O. POPE ET AL., APPELLEES, V. ROYAL HIGHLANDERS ET AL., APPELLANTS.

FILED NOVEMBER 3, 1917. No. 19637.

1. **Insurance**: CONTRACT: CONSTRUCTION. In a fraternal mutual benefit insurance association, the application for membership, the certificate of insurance and the by-laws of the society constitute the contract between the insured and the society, and all are to be construed together, and, considered with other evidence in the case, to determine the rights of the respective parties.

2. ———: MUTUAL BENEFIT ASSOCIATION: MEMBERSHIP. Where a person voluntarily becomes a member of such association, he thereby assents to and is bound by the laws under which his membership is acquired.

3. ———: ———: RECOVERY OF PREMIUMS: PLEADING. A plea by such member of ignorance of such laws will be of no avail, where he attempts to recover premiums paid while engaged in an occupation prohibited by the laws of the society and collected by the society without knowledge that the member was so engaged.

4. ———: ———: ———. Where a by-law of such association provided that "a member being engaged as a saloon-keeper * * * shall exclude him from membership, annul his certificate and void all his rights as a member," and the certificate provided that if the insured should be expelled, or be or thereafter become a saloon-keeper, his certificate should immediately become void, and that all moneys paid, and all rights and benefits, if any, "which may have accrued on account of this certificate, shall be absolutely forfeited to the fraternity;" in such case the insured cannot recover premiums paid that were received by the society without knowledge on its part that the insured was engaged in the prohibited occupation.

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

Hainer & Craft, for appellants.

Fred W. Anheuser and *C. F. Connolly, contra.*

DEAN, J.

This action was commenced to recover $160.04 paid by plaintiff Sam O. Pope to defendants, as premiums on a fraternal beneficiary insurance certificate issued to him on July 29, 1908, by the Royal Highlanders. On July 7, 1908, the insured signed an application for membership, in which he stated, among other things, that he was a laborer, and that, if he should thereafter engage in an occupation prohibited by the society, his rights and those of his beneficiary to participate in the benefit funds of the society should thereupon cease, and the applicant, without notice, would stand suspended as a member, and that thereafter any payment of dues or monthly payments by him or any receipt for such moneys issued by any officer or member of the tributary castle to which he belonged or of the executive castle should not be binding on the fraternity. The certificate provides that if the insured should be expelled, or be or thereafter become a saloon-keeper, his certificate should become immediately void, and that all moneys paid and all rights and benefits, if any, "which may have accrued on account of this certificate shall be absolutely forfeited to the fraternity." A by-law or edict of the society provides: "That a mem-

ber being engaged as a saloon-keeper, or in the manufacture or sale of intoxicating liquors, shall exclude him from membership, annul his certificate and void all his rights as a member."

The application, the certificate and the edicts are in evidence, and together they constitute the contract between the insured and the parent society.

In their brief plaintiffs concede that Mr. Pope "engaged in the saloon business on the 1st day of January, 1910, in which business he remained until after he was formally expelled from the lodge * * * December 29, 1913." In oral argument it was also conceded by plaintiffs that all dues paid after the society discovered that the insured was a saloon-keeper were repaid to him. Plaintiffs argue that the certificate was void from the time that the insured became a saloon-keeper, and therefore the premiums paid thereafter should be repaid to him because, the policy being void, there was no consideration for the payments. They also contend, as an additional reason for recovery, that the insured testified he did not know until shortly before the suit was commenced that his engagement in the prohibited occupation made his certificate void. We do not find in the record any evidence of concealment from the insured of the conditions of his contract. From his testimony he appears to be a man of intelligence and conversant with business affairs. He voluntarily became a member of the order, and thereby assented to all the conditions of the contract in pursuance of which the certificate was issued, and he is therefore bound by its rules. In the absence of fraud or concealment he is presumed to know the conditions of his contract. Such is the general rule, and we find no reason for making an exception in the present case. The expulsion of the insured and the cancelation of his certificate seem to have been in conformity with the contract between the parties, and was not unlawful.

The weight of authority and the better reasoning seems to be against plaintiffs' contention. On the subject of mutual benefit insurance it is said in 29 Cyc. 103: "If

a member is suspended or expelled his previous payments of dues or assessments cannot be recovered back, unless the suspension or expulsion is unlawful, in which case such payments are recoverable."

It is the rule in this jurisdiction that if the insured member of a fraternal mutual benefit insurance society dies while engaged in an occupation that is prohibited by its laws, and the fact that he was so engaged was unknown to the society until after his death, and was not waived by the society, his beneficiary cannot recover on the policy, for the sufficient reason that the contract provides that in such case there shall be no recovery. *Modern Woodmen of America v. Colman,* 68 Neb. 660. It would be a strange and illogical process of reasoning that would lead to the conclusion that, while a beneficiary in such case could not recover on the policy, the insured in his lifetime might have recovered the premiums that he paid on the policy. A different situation would be presented if it were shown that the society had, or was charged with, knowledge that Mr. Pope was engaged in a prohibited occupation, and notwithstanding that knowledge it accepted and retained premiums paid by him, thereby waiving the forfeiture. *Susquehanna Ins. Co. v. Perrine,* 7 Watts & Serg. (Pa.) 348; *Knights of Columbus v. Burroughs' Beneficiary,* 107 Va. 671; *United Moderns v. Rathbun,* 104 Va. 736; *Modern Woodmen of America v. Brockenridge,* 75 Kan. 373; *L'Union St. Jean Baptiste v. Ostiguy,* 25 R. I. 478; *Simeral v. Dubuque Mutual Fire Ins. Co.,* 18 Ia. 319; *Modern Woodmen of America v. Berry,* 100 Neb. 820.

Defendants argue that there is a misjoinder of parties plaintiff and defendant; but, in view of our disposition of the case, we do not find it necessary to determine the questions submitted on that feature.

The motion of defendants for a directed verdict should have been sustained. The case is reversed and remanded for further proceedings in accordance with law.

REVERSED.

SEDGWICK, J., not sitting.

FRANK IAMS, APPELLANT, V. FARMERS STATE BANK ET AL., APPELLEES.

FILED NOVEMBER 3, 1917. No. 20007.

1. **Banks and Banking:** DEPOSITORS' GUARANTY FUND: DEPOSIT. Where money purporting to be a deposit is placed in a state bank, for which the bank issues and delivers to the purported depositor certificates of deposit in terms providing for payment of 5 per cent. annual interest, and where by an understanding between the parties the bank pays to such person a bonus of 1 per cent. above the lawful rate of 5 per cent. interest, *held*, such transaction does not constitute a deposit within the meaning of the bank depositors' guaranty act (Rev. St. 1913, secs. 280-345), but is a mere loan of money to the bank.

2. ———: ———: ———. Where such bank fails and a receiver is appointed, certificates so obtained cannot lawfully be paid out of the depositors' guaranty fund. Rev. St. 1913, sec. 306.

3. ———: ———: LIABILITY. Subsequent to the issuance of the initial certificates, which were renewed from time to time, the corporate name of the bank was changed, the bank remaining unchanged in identity and personnel and in all respects, except as to name, the same as before the change in corporate name. *Held*, that such change in corporate name in no way affected the transaction between the parties.

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

John L. Webster and *William R. King*, for appellant.

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

DEAN, J.

In pursuance of a petition filed on May 24, 1916, by the attorney general and subsequent proceedings in the district court for Burt county, a receiver was appointed for the Farmers State Bank, then a failing institution at Decatur. On September 25, 1916, Frank Iams filed a petition in the case, alleging ownership of 5 certificates of deposit issued by the bank in pursuance of alleged de

posits of $12,000, and praying that his claims be allowed and paid as a preferred claim against the assets of the bank or the depositors guaranty fund. The certificates range in amount from $2,000 to $3,000 each, and except as to date and amount, necessary to conform to the fact, they are all in the following form:

"Decatur, Neb. April 16, 1916, No. 1138. This certifies that Frank Iams has deposited with Farmers State Bank two thousand dollars payable to the order of himself in current funds on the return of this certificate properly indorsed six or twelve months on demand after date with interest until maturity only at 5 per cent. per annum. This deposit is protected by the depositors' guaranty fund of the state of Nebraska.

"THEO HENNIG, V. Pres."

The attorney general filed a protest objecting to the payment of the certificates from the depositors' guaranty fund, for the alleged reason that by a fraudulent agreement between the parties the bank paid to appellant a bonus of 1 per cent. interest in addition to the 5 per cent. named in the certificates, thus creating an excessive and illegal rate, and that the certificates for that reason represent a loan by appellant to the bank, and not a deposit. Judgment was rendered denying appellant the right to participate in the depositors' guaranty fund, but the claim was "allowed as a general creditor claim against the Farmers State Bank." The petitioner has appealed.

Prior to July, 1915, the corporate name of the Farmers State Bank, the appellee herein, was Farmers & Merchants State Bank. The personnel of the bank, the identity of the corporation, and the ownership and control of the business and the assets, and liability for the debts and corporate acts remained unchanged under its new name. The certificates in suit are renewals of certificates issued by the bank in its former name of Farmers & Merchants State Bank, and any infirmity that may have been imparted to the original certificates by an unlawful act, such as an agreement for an unlawful rate

of interest, as the attorney general charges in the present case, would inhere in and vitiate the entire series of renewal certificates. The record shows clearly the payment of a bonus of 1 per cent. over the 5 per cent. allowed by statute for the use of the money of appellant that was placed in the bank while it was doing business under its former name. And it is not clear that a bonus of 1 per cent. over the lawful rate of 5 per cent. interest was not received by appellant from the bank after the certificates were renewed and while the bank was doing business in its new name. Appellant was called as a witness by the state, and, his attention being directed to three of the renewal certificates in suit, he was asked if he received "anything other than the rate stated in the certificates," to which he replied: "I may have received a present." On cross-examination he testified on this feature of the case: "I received $40 in cash from some one in a letter without anything on it. I do not know who it was from or anything about it. I can only surmise." The cashier of the bank, while it was doing business as the Farmers & Merchants State Bank and later as the Farmers State Bank, testified on the same point on cross-examination: "Q. Well, at the time you made these respective payments that you have spoken of by way of a bonus, were you at that time an officer or cashier of the Farmers & Merchants State Bank? It is the bank I want to identify. A. Yes, sir; I was. Q. And not as an officer of the Farmers State Bank? A. Yes; both. * * * Q. I will put it another way. None of these payments of a bonus in any manner or form to which you testified to, none of them were made after the dates of the issuing of these certificates of deposit by the Farmers State Bank, beginning with the one numbered 1048, dated October 14, 1915? A. I do not think I ever testified to any payment—that I made any payment as late as any of these dates." The foregoing testimony of appellant seems fairly to indicate the reception by him of a bonus from the bank after the renewal of the certificates, and the cashier's testimony, though not alto-

gether clear, may, when analyzed and considered in connection with the other testimony in the record, be construed as a failure at least to deny that a bonus was paid by him to appellant after the renewals in suit were issued.

Section 306, Rev. St. 1913, that provides for payment of interest on deposits follows: "No banking corporation transacting a banking business under this article shall pay interest on deposits directly or indirectly at a greater rate than 5 per cent. per annum. Any officer, director or employee of a bank violating the provisions of this section directly or indirectly, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the state penitentiary not exceeding three years, or both."

The payment by the bank to appellant of a bonus of 1 per cent., interest, whether made in the name of Farmers & Merchants State Bank or in the name of Farmers State Bank, was a clear defiance of the plain terms of the statute. The transaction between the parties was fraudulently conceived. It was a device intended to evade the provisions of the act. It is therefore clear that appellant's money was not a deposit within the meaning of the law. It did not partake of that part of the statutory characteristic of a deposit which provides for interest at only 5 per cent. per annum. The money that appellant placed in the bank, by whatever name it may be called, is a stranger to the act in question and cannot find asylum within its purview. The law will leave the parties where it finds them. The court properly found that appellant was only a general creditor of the bank. *Storz & Iler v. Finklestein,* 46 Neb. 577; *Gould v. Kendall,* 15 Neb. 549; Bishop, Contracts (2d ed.) sec. 1112; 10 Cyc. 155.

It may be observed that punishment by fine or imprisonment for violation of the act is by its terms con-

fined to officers, directors, and employees alone, but that question is not before us.

A change of corporate name cannot be permitted to operate to relieve the bank or appellant from the direct consequence of their joint act, nor from such liability as they may have incurred in the premises. By operation of the provisions of the statute that appellant violated, he is estopped from pressing his claim to participate in the bank guaranty fund. The act creating the depositors' guaranty fund was intended by the legislature to be a shield of protection against loss to those who in good faith deposit their money in state banks in compliance with the terms of the statute. Unless its provisions are fairly construed and impartially enforced, this salutary law might become a destructive sword in the hands of unscrupulous persons having unlawful designs on the depositors' guaranty fund.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

JOSEPH J. HAVLICEK V. STATE OF NEBRASKA.

FILED NOVEMBER 17, 1917. No. 20113.

1. **Criminal Law**: PRELIMINARY HEARING: SPECIAL APPEARANCE. Failure to give an accused person a preliminary hearing on the crime charged in an information cannot be raised by a special appearance objecting to the jurisdiction of the court.

2. ———: ABANDONMENT OF WIFE: EVIDENCE. In a prosecution for wife abandonment under section 8614, Rev. St. 1913, it is competent to prove that, subsequent to the date of abandonment alleged in the information, defendant went to another state and there procured a decree of divorce from the wife he is charged with having abandoned.

3. **Appeal**: ADMISSION OF EVIDENCE: OBJECTIONS. It is the duty of counsel to make his objections so specific that the court may understand the point intended to be raised, and, unless prejudicially

erroneous on the point presented, the admission of the evidence to which objection is offered will not be held prejudicially erroneous for some reason which counsel did not suggest at the trial.

4. **Criminal Law:** ABANDONMENT OF WIFE: PROOF. To sustain a conviction under section 8614, Rev. St. 1913, "the state must prove that the accused is possessed of money, property or other means available for the support of his wife, or, if he is without such means, that he has at least some earning capacity, and his refusal, without good cause, to maintain or provide for her." *Goddard v. State*, 73 Neb. 739. But, where it is shown that prior to his departure from home he had steady employment at remunerative wages, the state is not required to offer other proof that he had means, or that he drew a salary after his departure.

5. ———: ———: DEFENSE. In such case, his lack of means, or failure to secure employment, is matter for his defense.

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

Joseph T. Votava, for plaintiff in error.

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

MORRISSEY, C. J.

Defendant prosecutes error from a judgment of the district court for Douglas county, wherein he was sentenced to a term of one year in the penitentiary for wife abandonment.

A complaint was filed before the county judge September 28, 1915. Hearing was continued with the consent of defendant, until November 17, 1915. Thereafter it was continued from time to time without his consent until June, 1916, when a hearing was had, and defendant held for trial in the district court. Upon being arraigned in the district court he filed a special appearance objecting to the jurisdiction of the court. The special appearance was overruled, and a plea of not guilty entered. The point is made that the examining magistrate had lost jurisdiction, and that no preliminary hearing had been accorded defendant. But we are not called upon to determine the question. It was not properly presented by the special appearance. In

White v. State, 28 Neb. 341, it was held that a district court had no jurisdiction to try an accused person until a preliminary examination had been held according to law. But this holding is expressly overruled in *Coffield v. State,* 44 Neb. 417. The court had jurisdiction. The special appearance was properly overruled. No motion to quash or plea in abatement was filed, and all defects were waived by pleading to the general issue.

It is next urged that the trial court erred in the admission of evidence. Defendant took his departure from Omaha, where he and his wife resided, July 30, 1913, and the information alleged the abandonment as of that date. On the trial letters written by defendant to his wife after his departure were introduced in evidence. After she had testified to the receipt of the letters, she was asked if he had obtained a divorce from her. Objection was made to that testimony as incompetent, immaterial and irrelevant. The objection was overruled, and she answered in the affirmative. She was next asked as to the date when she received this information, and, over the same objection, was permitted to answer. The inquiry being further pressed, the trial court interrupted and remarked that the state could not prove a divorce by hearsay testimony. From the form of the objections and the argument contained in the brief it is clear that counsel did not object to the questions the witness was permitted to answer because they called for hearsay testimony or because her statement was not the best evidence, but objected on the theory that proof of what defendant did after the date fixed in the information was incompetent. In overruling the objection the trial court was, as he supposed, holding that proof of divorce was competent, and in this he was clearly right.

It is the duty of counsel to make his objections so specific that the court may understand the point intended to be raised, and, unless prejudicially erroneous on the point presented, the admission of the evidence to which objection is offered will not be held prejudicially erroneous for some reason which counsel did not suggest at the trial.

"Unless the objection to offered evidence be sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom in the court of appeal." 5 Jones, Commentaries on Law of Evidence, sec. 893.

It is said in defendant's brief "the only question is: Was the testimony prejudicial?" Without undertaking to review the testimony at length or set out defendant's letters, which are copied in the bill of exceptions, we will say that his general course of conduct was such that but one conclusion could be reached, and that was the conclusion reached by the jury. The reference to the divorce could add little or nothing to the proof furnished in his own handwriting.

It is argued that, in order to sustain a conviction, the state must prove that the accused is possessed of means available for the support of his wife, or, if he has no such means, he has at least some earning capacity, and is refusing, without good cause, to maintain or provide for her. This is the rule laid down in *Goddard v. State,* 73 Neb. 739, and we adhere thereto; but the record does show affirmatively that prior to his abandonment of his wife he was earning $185 a month; that he went away and left her with only $25 and some household furniture, the value of which is not shown, and that he absented himself for more than two years without contributing anything to her support. He did not testify in his own behalf, and no justification or excuse for his conduct is given. It is argued, however, that from his letters, which were offered by the state, it may be inferred that he was without employment, but no attempt is made to show that he might not have returned to his wife and continued at his usual employment. A husband may not leave his wife dependent upon her own efforts for support while he takes a two-year jaunt about the country, and then justify his failure to contribute to her support by saying that he has been without employment. Where it appears that prior to his going he had

steady employment, and no satisfactory reason is given for his quitting his work and going away, the state is not required to offer proof that he had means, or that he was drawing a salary after his departure. His lack of means, or failure to secure employment, is matter for his defense.

The court imposed the maximum sentence of one year's confinement in the penitentiary, and we are asked, in case of affirmance of the judgment, to exercise the power granted under section 9179, Rev. St. 1913, and reduce the sentence. The power to reduce the penalty is given to this court when, in its opinion, the sentence imposed is excessive. Further than a mere statement that the penalty imposed is the maximum, that the defendant anl his wife were without children, and that she was able to support herself, no reason is assigned for making a reduction of the sentence. No palliating circumstances are shown, or atonement promised, and he will not be heard to complain that the maximum penalty has been imposed.

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

IN RE ESTATE OF ENOS E. GROBE.
MATILDA GROBE ET AL., APPELLANTS, V. B. B. CROWNOVER, EXECUTOR, APPELLEE.

FILED NOVEMBER 17, 1917. No. 20221.

1. **Wills: ELECTION: EFFECT.** When the husband dies testate, seised of real estate which is the family homestead, and the widow elects to take under the statute and renounce the provisions made for her in the husband's will, the court will first award the widow her homestead interest in the homestead property not subject to debts of deceased, under section 3092, Rev. St. 1913, and then award her the share of an heir in the remainder of the property of the estate under section 1265, Rev. St. 1913.

2. ———: ———: ———. Where a widow elects to renounce the provisions made for her in the will of her deceased husband and take under the statute, such election does not render the will inoperative. As between other persons it will be enforced as nearly as may be in accordance with the intention of the testator.

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

Sandall & Wray and *W. L. Kirkpatrick,* for appellants.

G. M. Spurlock, contra.

MORRISSEY, C. J.

Enos E. Grobe, a resident of York county, died testate, November 7, 1914, without issue, leaving surviving him his widow, his father and mother as heirs at law, and five brothers and sisters named as devisees in his last will and testament. Decedent in his will provided first for the payment of his debts, then bequeathed a legacy of $2,500 to his widow, and the remainder of the estate he bequeathed and devised, one-half to his widow and one-half to his brothers and sisters. Within the proper time the widow filed an election to take under the statute. The only real estate of which decedent died seised was an 80-acre farm in York county, which at the time of his death was occupied by the decedent and his wife as their homestead. Decedent's debts were in such an amount that after the personal property was exhausted there remained unpaid the sum of $3,278.97. Under proceedings brought by the executor in the district court for York county, the real estate was sold to pay these debts. His action in this regard is not questioned, and this appeal is taken from an order distributing the proceeds remaining after the payment of the debts.

The property sold for $11,280. After the payment of the debts the executor brought $8,001.03 into court. The widow filed an application for one-half of the gross proceeds of the land, claiming that she took such interest under section 1265, Rev. St. 1913, the inheritance law of 1907, and asking that the present value in money of her homestead life estate in the other half of the fund be computed and paid to her.

The father and mother of decedent ask that the fund remaining after the widow's rights are satisfied be paid to

them as decedent's heirs at law. Their application presents these points:

(a) That by section 3092, Rev. St. 1913, the widow is entitled to a life estate only in said homestead proceeds of $8,001.03, and is not an "heir" of her deceased husband, and does not inherit anything in the homestead remainder under the King inheritance law.

(b) That the present value of the widow's life estate in the $8,001.03 is the sum of $4,500 and no more, and that the remainder $3,501.03, should be distributed to the father and mother as heirs.

(c) That by her election to take under the statute the entire will fails and cannot be carried out, and after the widow's life estate is deducted the remainder should be distributed between the father and mother as heirs.

(d) That the $2,500 legacy lapsed after the widow's election, and the same passed to the father and mother as heirs.

The residuary devisees ask that the money remaining after satisfying the widow's rights under the statute be paid to them under the provisions of the will. Their application presents the following points:

(a) That by section 3092 the widow is entitled to a life estate only in the $8,001.03, and is not an "heir" of her deceased husband, and does not inherit anything in the homestead remainder under the King inheritance law.

(b) That the present value of the widow's life estate in the $8,001.03 is the sum of $4,500 and no more, and that the remainder $3,501.03, should be distributed among the devisees under the will, share and share alike.

Both the father and mother as heirs and also the devisees of decedent, in their several applications, take issue with the widow, both as to the nature and amount of her interests in the land and in the fund before the court, claiming that she took no interest in fee of said lands, but only a life estate in the remainder of $8,001.03.

Before submitting the issues thus joined to the district court, the several parties in interest stipulated that, whatever the several interests of the parties might be in the

subject-matter, such interests were to be computed and paid to them in money so that the division of said fund should be final. The trial court decreed: That the debts in the sum of $3,278.97 should be allowed against the estate; that the widow takes under the law and by descent one-half of said residue, to wit, one-half of $8,001.03; and that she has a life estate of homestead in the other half of said residue of the proceeds of said sale; that the present value of said life estate should be computed at 5 per cent., or upon an annual income of $200, amounting to $2,851.03; and directed that $6,851.03 be paid to the widow, and ordered the remaining $1,150 distributed under the will among the brothers and sisters.

The widow contends that the court erred in finding that she was not entitled to one-half of the gross proceeds of the sale of the land, and in holding that the debts should first be paid before any distribution was made, and she further insists that she is not only entitled to one-half of the gross amount of the sale, but, in addition thereto, she is entitled under the homestead law to a life estate in all the remainder. She further contends that the court erred in finding that either the heirs or residuary devisees should share in the fund.

The father and mother, as heirs at law, complain because the court found the widow was an "heir" of the decedent, and has an interest in the estate under the inheritance act of 1907 (Rev. St. 1913, sec. 1265), and that she had an interest other than a life estate of homestead. They also say the court erred in giving any part of the estate to the residuary devisees under the will, and claim that the whole will failed because the widow elected to take under the statute. The residuary devisees join with the father and mother in saying that the court erred in finding that the widow was an "heir" under the inheritance act.

The money in the hands of the executor is the proceeds of the sale of the farm which was the homestead of decedent and his wife. We then have the questions: How did the same vest on his death? What interest vested in the

widow? What interest vested in the devisees? What interest vested in the heirs?

The homestead statute of 1879 (Rev. St. 1913, sec. 3092) provides: "If the homestead was selected from the separate property of either husband or wife, it vests, on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will."

The inheritance statute of 1907 (Rev. St. 1913, sec. 1265) provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, or by the deceased while the husband or wife was a non-resident of this state, which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead in the manner following: * * * Fourth. One-half to the husband or wife, if there be no children nor the issue of any deceased child or children surviving."

The decree of the trial court permits the widow to take in fee one-half of the proceeds of the property remaining after the satisfaction of the debts under section 1265, and gives her a life estate in the remaining one-half under section 3092.

The decedent's statute does not change the homestead statute at all, and these two statutes may be harmonized by holding that the homestead law gives the residuary estate to those persons to whom the law gives property that is not a homestead. The surviving spouse is not an heir under the ancient definition of the term, but takes the property of the deceased spouse whenever the conditions are such that an heir would take. Under section 1265 the ancient right of dower is enlarged into a contingent interest in the fee. On the death of the husband the

widow becomes the owner, where there are no children, of a half interest in the property that is not a homestead, and because she takes by operation of law, and not strictly as an heir, she is not excluded from taking under the homestead law. There is no inconsistency between the statutes. In the instant case it appears to make no difference whether the widow first takes under the homestead statute or under the inheritance statute. The result is the same regardless of the order in which these statutes are applied. If any difference would result it would seem that the homestead statute ought to be first applied. Under the homestead statute the widow is entitled to the present worth of her life estate in the property, after the debts are paid, and she is entitled to half of the remainder under the inheritance statute.

Counsel representing her complain of the rate at which the present worth of her life estate in the homestead was established, but no facts are pointed out to show that the district court erred in this respect, and his finding in that regard will not be disturbed.

The law is well settled that the renunciation of a will by a widow will not be allowed to break the testamentary plan further than is absolutely necessary.

"Where a widow, without regard to the provisions of the will of her deceased husband, elects to take under the law of descents and distributions, such election does not render the will inoperative. As between other persons the will will be enforced as near in accordance with the intention of the testator as it can be." *Pittman v. Pittman,* 81 Kan. 643, 27 L. R. A. n. s. 602.

After the widow's portion is set aside, the estate of decedent is not left in such condition that the remaining provisions of the will cannot be carried out according to the testator's intent.

The record is free from error, and the decree of the district court is

AFFIRMED.

CITY TRUST COMPANY OF OMAHA ET AL., APPELLANTS, V. DOUGLAS COUNTY ET AL., APPELLEES.

FILED NOVEMBER 17, 1917. No. 19606.

1. **Taxation:** CONSTITUTIONAL PROVISION. By the first clause or division of section 1, art. IX, of the Constitution, the public revenues are required to be provided by the levying of 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."
2. ———: UNIFORMITY. The rule of uniformity therein prescribed inhibits the legislature from discrimination between taxpayers in any manner whatever.
3. ———: MORTGAGES: WHERE TAXED. Where the mortgagor of real estate has not agreed to pay the taxes assessed upon the mortgage interest (which section 6349, Rev. St. 1913, declares to be an interest in real estate), individual and corporation holders of mortgages alike must pay taxes upon mortgages held by them respectively in the county in which the mortgaged land lies. Since discrimination between taxpayers is not permitted in taxation by valuation, neither an individual nor a corporate holder of such mortgages is subject to assessment or taxation of the mortgages in the county of his or its residence or domicile.
4. ———: ASSESSMENT: SHARES OF STOCK: DOMESTIC COMPANIES. Construing section 6313, Rev. St. 1913, which provides that a person is required to list as personal property "shares of joint stock or other companies, when the capital stock of such company is not assessed in this state," it is *held*, that this does not require the listing and assessment by the holder of shares of a domestic corporation when its capital stock is assessed in the state.
5. ———: ———: ———: ———. Since under the provision of the Constitution before mentioned the same rule must be applied to corporations as to individuals, with respect to taxation by valuation, neither an individual nor a corporation is compelled to list for taxation shares of such domestic corporations owned by either of them, and if the value of such shares has been included in the valuation of the capital stock of a trust company it is entitled to have such value deducted in determining the actual value of such stock for the purpose of taxation.

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

McGilton, Gaines & Smith, for appellants.

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

LETTON, J.

The board of equalization of Douglas county fixed the valuation of the capital stock of the City Trust Company, a corporation, for the purpose of assessment at $318,120. On appeal by the corporation and by O. C. Redick and W. G. Silver, stockholders, the district court set aside this valuation and found that the capital stock should be valued for assessment purposes in the sum of $208,120, being divided into 2,000 shares. The City Trust Company and the stockholders named appeal from this judgment.

The evidence shows that among the assets of the City Trust Company are included $39,500 of real estate mortgages upon land in Nebraska, and 865 shares of stock in a corporation known as the City National Bank Building Company worth from $110,000 to $115,000. The appellants insist that the $39,500 invested in Nebraska mortgages and the $110,000 to $115,000 stock in the City National Bank Building Company should be deducted from the value of its capital stock for the purpose of assessment. They argue that the Constitution of the state requires that every person or corporation shall be assessed and taxed in proportion to the value of his, her or its property and franchises; that there can be no discrimination between a corporation and an individual; that a trust company must list its property the same as an individual and it must be valued as though owned by an individual. It is then argued that since real estate mortgages, under section 6349, Rev. St. 1913, are declared to be interests in real estate, and the amount and value of mortgages on real estate is assessed and taxed to the mortgagee or his assigns, an investment in real estate mortgages cannot be considered in determining the value of capital stock, as, otherwise, there would be double taxation and a violation of the provisions of the Constitution. The record fails to show that the owner of the mortgaged land has agreed

to pay the taxes upon the mortgage interests, and the mortgages are properly taxable to the corporation or individual holding the same.

Under the former system in this state, if either an individual or a corporation loaned money upon a farm, the fact that the owner was indebted and that that indebtedness was secured by a mortgage on the farm was not taken into consideration. A farm worth $20,000 might be incumbered for $10,000, yet the owner of the land was required to pay a tax upon the entire value of the land, while the owner of the mortgage, whether a person or a corporation, if a resident of Nebraska, was required to return for assessment the amount of his investment in the mortgage. The taxing body, therefore, imposed taxation to the amount of $30,000, although there was only $20,000 of actual value in the farm. This was believed to be unjust, and in 1911 the legislature enacted chapter 105, Laws 1911, providing that mortgages on real estate in this state should be considered an interest in the land to the extent of the debt for the purpose of taxation, and should be assessed to the mortgagee (unless the mortgagor agreed in the mortgage to pay the tax thereon), and the remaining value of the land be assessed to the title holder. In *First Trust Co. v. Lancaster County,* 93 Neb. 792, construing this law, together with section 56 of the revenue act (Comp. St. 1911, ch. 77, art. I), which provided: "Whenever any such bank, association or company shall have acquired real estate or other tangible property which is assessed separately, the assessed value of such real estate or tangible property shall be deducted from the valuation of the capital stock of such association or company"—it was held that such mortgages, being "assessed separately," fell within the provisions of this section and should be deducted from the value of the capital stock.

After the holding in the *First Trust Company* case, the legislature of 1915 amended this section. Laws 1915, ch. 108. The principal change made was the addition of the following proviso: "Provided mortgages, trust deeds and all other liens or interests in real estate less than a fee

title and held as security for loans shall not be considered or assessed as part of the capital stock for purposes of taxation, and shall not be deducted from the capital, surplus or undivided profits."

Under section 1, art. IX of the Constitution, each person and corporation shall pay a tax in proportion to the value of the property owned by each, but the value is to be ascertained in such manner as the legislature shall direct. The property of individuals is valued and assessed directly, but the property of such corporations, except that which is separately assessed, is taxed indirectly by finding the value of each share of stock, requiring the corporation to pay the tax on the shares, and giving it a lien on the stock for the taxes paid. Rev. St. 1913, sec. 6343; Laws 1915, ch. 108. The result is the same as if the property of the corporation was directly assessed. Where the mortgagor has not agreed to pay the tax, the mortgage owner, whether corporation or individual, is compelled to pay it where the land lies. If the individual cannot be taxed at his place of residence on the value of the mortgages in his hands, neither can the corporation or its stockholders.

The provision is that mortgages "held as security for loans shall not be considered or assessed as part of the capital stock." It is also required that they "shall not be deducted from the capital, surplus or undivided profits;" that is, mortgages shall not be included as part of the capital stock and shall not be deducted from the capital. If not included, how can they be deducted? If not to be *considered or assessed,* then the $39,500 of mortgages returned should have been excluded from consideration by the assessor, the board of equalization, and the district court, and the value of the capital stock reduced accordingly. This, in the case of mortgages where the mortgagor has not agreed to pay the tax, puts individual and corporation mortgage holders on a parity and each pays in proportion to the value of his or its property. Where the mortgagor agrees to pay the tax a different condition may arise if the individual mortgage owner is assessed at his place of residence on the value of the mortgage he holds.

In such a case, if the corporation is under no duty to return its mortgages for taxation, there would seem to be a discrimination in its favor, though this is not before us and we do not so decide. As to mortgages which do not contain such an agreement, the amendment does not change the actual result.

Should the value of the capital stock in the corporation which owns and holds the City National Bank building also be deducted?

Section 6313, Rev. St. 1913, provides, in substance, that each person must list, among other items of personal property, "moneys, credits, bonds, or stocks, shares of joint stock or other companies, *when the capital stock of such company is not assessed in this state.*" Section 6314 requires that the capital stock of corporations "shall be listed and taxed in the county, precinct, township, city or village, and school district where the principal office or place of business of such corporation or person is located within this state." This tax is assessed and collected in the same manner as specified for banking corporations by requiring the corporation to pay the tax upon the shares. *State v. Fleming,* 70 Neb. 529. Such shares in the hands of individuals may not again be assessed and taxed, and since like treatment must be accorded to corporations, such shares are not assessable or taxable in the hands of a corporation. Having once been taxed, their value should be deducted from the value of the capital stock.

Since the recent amendments, the statutory provisions are confused and hard to construe; but, bearing in mind the fundamental provision that each individual and corporation when taxed under the first provision of section 1, art. IX of the Constitution, must pay a tax by valuation in proportion to the value of their respective properties that construction should be adopted which places all upon the same plane. To require more than this is both unlawful and unjust. To construe the law as contended for by the defendant would make it discriminatory and violative of the Constitution. *State v. Poynter,* 59 Neb. 417, 429, 430. The assessment should be reduced as indicated.

What has been said with reference to equality in the taxation of corporations and individuals has no reference to taxes which may be imposed upon corporations under the second provision of section 1, art. IX, Const. As to such taxes uniformity as to the class taxed is the sole requisite.

The judgment of the district court is reversed and the cause remanded, with directions to allow the deductions of the value of the mortgages and of the shares of stock.

REVERSED.

HAMER, J., not sitting.

HIRAM E. WALDO, APPELLANT, V. CHARLES W. LOCKARD ET AL., APPELLEES.

FILED NOVEMBER 17, 1917. No. 19684.

1. **Appeal:** SUPERSEDEAS: LIABILITY OF OBLIGOR. In an action on a supersedeas bond to "abide and perform the judgment or decree rendered or final order which shall be made by the supreme court in the case," defendants are not liable for rentals and interest, where the superseded judgment does not require appellant to pay them.
2. **Specific Performance:** DECREE: RES JUDICATA. In a suit for specific performance, all damages growing out of defendant's breach of contract are litigable, and separate subsequent actions to recover different elements of such damages for the same breach cannot be maintained.
3. ———: ———: ———. After full satisfaction of a decree requiring defendant to specifically perform a contract to transfer real estate and personal property to plaintiff, the latter cannot, on account of the same breach, maintain a separate action to recover rents and interest for detention of the same property pending litigation.

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

H. C. Vail, for appellant.

Prince & Prince, contra.

ROSE, J.

This is an action on a supersedeas bond. The trial court sustained a demurrer to plaintiff's petition. From a judgment of dismissal plaintiff has appealed.

In the district court for Wheeler county plaintiff prevailed in a former suit—specific performance of an exchange contract obligating defendant Lockard to transfer to plaintiff both real estate and personal property. From the decree in favor of plaintiff for specific performance, Lockard appealed and executed a supersedeas bond to "abide and perform the judgment or decree rendered or final order which shall be made by the supreme court in the case." Upon a trial of the appeal, the superseded judgment was affirmed. *Waldo v. Lockard,* 96 Neb. 490. After the affirmed decree had been satisfied according to its terms, plaintiff brought this action on the supersedeas bond to recover from Lockard and his surety interest on the value of the personal property and the rental value of the realty pending the appeal. The decree for specific performance did not require the payment of such interest and rental pending the appeal. These items were, therefore, not protected by the supersedeas bond.

It is argued, however, that the petition in the action on the supersedeas bond is sufficient to charge Lockard with a common-law liabilty for interest and rentals. This position is also untenable. The original suit was one in equity for specific performance. Plaintiff prevailed because Lockard made and violated an agreement to transfer to the former personal property and real estate. There could have been no decree in favor of plaintiff in the action for specific performance without a failure on the part of Lockard to comply with his agreements. All of the damages growing out of his breach of contract were litigable in the original suit in equity. The law does not permit the complete remedy by specific performance to be split into separate actions for different elements of damages flowing from a single breach of contract. It follows that the petition in the action on the supersedeas bond was demurrable.

AFFIRMED.

LETTON, J., dissents.

MATHILDA FLAXEL, APPELLEE, V. FRANK FLAXEL, APPELLANT.

FILED NOVEMBER 17, 1917. No. 19689.

1. **Divorce:** PLEA IN ABATEMENT. In an action for divorce the defendant may plead in abatement another action pending in a court of competent jurisdiction between the same parties and for the same cause, and when so pleaded the court has jurisdiction to try and determine that issue.
2. ———: ———? FAILURE TO PLEAD. If the husband, as defendant in such action, fails to so plead the former action, and fails to answer or defend against a motion for suit money of which he has due notice in the second action, a final order of the court for the payment of a necessary and reasonable amount as suit money will not be reversed upon appeal.

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

Lowell L. Walker and *C. N. McElfresh,* for appellant.

Albert & Wagner, contra.

SEDGWICK, J.

The plaintiff began this action for divorce and alimony on the 8th day of May, 1915, in the district court for Platte county. Summons was issued to the sheriff of Butler county, where the defendant resided, and was served on the defendant on the 12th day of May, 1915. Also on the 12th day of May the plaintiff caused to be served upon the defendant a notice of the filing of her petition, and that on the 22d day of that month she would apply to the district court for Platte county for an order for temporary alimony and suit money in said cause. The application for alimony and suit money was heard on the 29th day of May, and the court ordered that the defendant pay the plaintiff the sum of $50 for suit money, and the further sum of $15 a month for maintenance, "payable June 1, and on the 1st of each succeeding month, during the pendency of this action." Afterwards on the 3d day of June,

the defendant filed in this case a paper which he styled "Special Appearance of Defendant." This paper was duly verified, and alleged that he had begun, on the 19th day of April, 1915, an action in the district court for Butler county against the plaintiff herein for a divorce, and that the plaintiff, as defendant in that action had entered her voluntary appearance therein, and that on the next day the plaintiff and defendant entered into a written agreement whereby it was agreed that this plaintiff, as defendant in that action, should be paid by the plaintiff therein, "in full of any and all allowances, suit money and alimony, the sum of $125," and that on the 26th day of June, 1915, he paid to the plaintiff the sum of $100, being the balance in full of the said $125 agreed upon; $25 thereof having been before that time paid. In his so-called special appearance he asked that this action in Platte county be dismissed, and that the order made therein for suit money and temporary alimony be set aside. The court treated this paper as a "special appearance and plea in bar," and dismissed this action, and modified the order for temporary alimony, but refused to vacate the order for the payment of $50 suit money. The defendant has appealed, and now insists that the order for suit money was without jurisdiction and should be reversed.

When two actions are pending in different courts of competent jurisdiction between the same parties and for the same cause, the pendency of the first action will be sufficient ground for a plea in abatement to the second action, and if final judgment is entered upon the merits in the first action, such judgment will be a bar to further proceedings in the second action. The pendency of the first action is a fact which may be pleaded in bar or in abatement to the second action, and when so pleaded the court has jurisdiction to try and determine that issue. It cannot therefore be said that the court did not have jurisdiction to enter the order for suit money upon motion and due notice to the defendant. He suggests that, if the court in one county has jurisdiction to entertain an action where another action between the same parties and for the same

cause is pending in another county, this plaintiff "might have gone into each and every judicial district in the state of Nebraska and repeated the performance." But the law does not allow such vexatious litigation, and furnishes ample remedies if it is attempted.

When the defendant was served with summons and notice of the motion for alimony and suit money in this case, he failed to inform the court of the pendency of a prior action, but, instead, undertook to obtain a judgment in his prior action before the court in Platte county should be aware of the existence of such action. He seems to have had the mistaken notion that, if he obtained a decree in Butler county before any final decree was entered in this action in Platte county, the court in this action would be without jurisdiction from the beginning. If he had defended against the motion for alimony and suit money in this case, and had made it appear to the trial court that this plaintiff was not acting in good faith in the matter, and that he had paid, or was ready to pay, suit money and alimony in his action pending in Butler county, the trial court undoubtedly would have refused to enter any order for alimony and suit money in this case. There is no doubt of the jurisdiction of the court at the time that the order for alimony and suit money was made to enter such order, and, as the case then appeared upon the record, it was a suitable and proper order to make. It was this defendant's own fault that made such order necessary, and he is not entitled to have it set aside. The trial court apparently modified its former order, and in the final order adhered to its former decree only so far as it required the payment of $50 suit money, which was entirely justified by the record herein.

The judgment of the district court is

AFFIRMED.

JOHN P. MCCULLOUGH, APPELLEE, V. ST. EDWARD ELECTRIC COMPANY, APPELLANT.

FILED NOVEMBER 17, 1917. No. 19706.

1. **Husband and Wife: ACTION FOR DAMAGES: PARTIES.** The interest of a wife in the real estate of her husband, other than the homestead, under section 1265, Rev. St. 1913, is not such as to require that she be made a party in an action by the husband against a corporation with the right of eminent domain to recover damages for the taking of the land or for injury thereto in the construction of a public improvement.
2. ———: ———: ———. In such case the husband in his own right can recover the damages caused to the land by such taking.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Affirmed.*

Albert & Wagner and *F. D. Williams,* for appellant.

H. C. Vail, J. A. Price and *A. E. Garten, contra.*

SEDGWICK, J.

The defendant, St. Edward Electric Company, constructed a dam across a stream of water called Beaver river in Boone county, and the plaintiff brought this action in the district court for that county alleging that the construction of the dam caused the waters of the river to overflow his land and damage the same. The defendant denied that the plaintiff's land was damaged by the construction of the dam, and contends that the plaintiff's wife was a necessary party to the suit. This latter contention was overruled by the court and a trial was had resulting in a judgment for the plaintiff, from which the defendant has appealed.

The principal question discussed in the briefs is whether the wife under our statute has such an interest in the land as to make her a necessary party to the suit. It is suggested in the defendant's brief that the land in question was the homestead of the parties; but this is not discussed, and it would appear from the record that the case must be determined upon the theory that the land is not a home-

stead. Our statute of descent provides: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seised of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest either legal or equitable at the time of his or her death, which has not been lawfully conveyed by the husband and wife while residents of this state, or by the deceased while the husband or wife was a non-resident of this state, which has not been sold under execution or judicial sale, and which has not been lawfully devised, shall descend subject to his or her debts and the rights of homestead;" one-fourth, one-third, or one-half to the surviving husband or wife, depending upon the number and parentage of the children. Rev. St. 1913, sec. 1265.

In condemnation proceedings the owners of property must be paid or secured before the property can be taken. "All parties having an interest in the land are 'owners' within the meaning of the statute." *State v. Missouri P. R. Co.*, 75 Neb. 4. That case and the cases cited and quoted from in the opinion were all considering a fixed legal interest, as a lien of a mortgage or for taxes. The question in the case at bar is whether the wife has such an interest in the real estate of the husband, other than the homestead, as to make her a necessary party to such proceedings. This right of the wife is a peculiar one under the statute. She takes by descent, but is not technically an heir in the sense that a conveyance by her husband would defeat her right. She takes the property of her husband whenever the conditions are such that an heir would take, and the husband cannot defeat her claim by his voluntary conveyance. The right is substituted for the right of dower and is in many respects analogous to that right. An owner whose real estate is taken by a corporation having the right of eminent domain can without condemnation proceedings maintain an action against such corporation for the value of the land so taken. So far as such action is for damages for land taken or injured by the proper construction of a public improvement, the right of action accrues when the land is taken, and such action can only be maintained within the

statute of limitations. Under the statute of descent the wife's right in the real estate of the husband is contingent upon her surviving him. She has no interest in such real estate that she can dispose of by will or that her heirs will inherit unless she survives her husband. If we should hold that by the taking of the land her interest in the real estate would be damaged so as to give her a right of action, that interest might afterwards be entirely annulled by her decease before that of her husband, and, if she delays action until her right becomes fixed by her husband's decease, the statute of limitations may have intervened. In 10 R. C. L. 215, it is said: "The right to compensation is a personal one and does not run with the land, and if the owner dies after the taking but before receiving compensation, the right to the money passes to his personal representatives and not to his heirs or the devisees of the land; but if the land is taken during the owner's lifetime the personal representatives are entitled to the condemnation money."

In *Haggerty v. Wagner,* 148 Ind. 625, the supreme court of that state said: "Where real estate is appropriated upon compensation in the exercise of the power of eminent domain, or in case of the dedication of lands of the husband to public use in making highways, canals, railroads, streets and the like, the inchoate right of dower, or its substitute, the inchoate right of the wife to one-third in fee simple in her husband's lands, is extinguished without her joining in any deed therefor, or being made a party thereto in any manner or form."

In our state the question is new, and not without difficulty. We conclude that while the husband is living the interest of the wife in his real estate, other than the homestead, is not such as requires that she be made a party to an action of this kind, and that the plaintiff herein can recover the entire damage to the land by the taking complained of.

AFFIRMED.

STATE, EX REL. ERNEST A. CALLING, APPELLANT, V. O. D. SMITH, APPELLEE.

FILED NOVEMBER 17, 1917. No. 20057.

1. **Counties: COMMISSIONERS: TERM.** To comply with the constitutional provision that elections shall be on the even-numbered years, the legislature has fixed the term of county commissioners at four years and named the specific years that shall constitute such terms hereafter. Rev. St. 1913, sec. 1955.
2. ———: ———: **ELECTION.** That section provides that, in counties having three commissioners, "two commissioners shall be elected in the year nineteen hundred and fourteen and every fourth year thereafter," and one "shall be elected in the year nineteen hundred and sixteen and every fourth year thereafter," but it does not forbid the election of more than one in the year 1916, if the terms of two commissioners have expired or will expire in the succeeding January. In that case two commissioners should be elected.

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

H. D. Rhea and *Wilcox & Halligan,* for appellant.

George C. Gillan, E. A. Cook and *W. M. Cook, contra.*

SEDGWICK, J.

Dawson county is not under township organization, and has three commissioner districts, numbered respectively, 1, 2, and 3. The relator was elected commissioner for the third district in the fall of 1912, his term beginning in January, 1913, and he concedes that he could not, by virtue of that election, hold longer than until January, 1917; but he contends that he is entitled to hold over because there was no valid election of a successor. At the election in 1916 the respondent was elected county commissioner for the third district. The contention is that this election is invalid and the respondent is not entitled to serve because a commissioner was also elected at the same election for the first commissioner district, and the statute (Rev. St. 1913, sec. 1955) provides: "In counties not under township organiza-

tion having * * * three commissioners, two commissioners shall be elected in the year nineteen hundred and fourteen and every fourth year thereafter, and one commissioner shall be elected in the year nineteen hundred and sixteen and every fourth year thereafter." The relator construes this statute to be an absolute prohibition, and that, as the election of the commissioner of the first district was clearly valid, no more than one commissioner could be elected in that county at that election, and the alleged election of the respondent was therefore invalid. If we should give this statute that construction, the result would be embarassing to all counties not under township organization until the statute could be changed. If a commissioner should die, or be removed from office soon after taking the office, no successor could be elected under such construction of the statute until the four years' term was completed. This is clearly not the meaning of the statute. It provides affirmatively that two shall be elected in 1914 and every fourth year thereafter, and one shall be elected in 1916 and every fourth year thereafter, but does not forbid the election of more than one in the year 1916 if, because a vacancy has occurred or for any reason, there are two commissioners whose terms for which they were elected expire before or in the succeeding January. The argument that there was no vacancy because the relator was entitled to hold over until January, 1917, is irrelevant. Under the constitutional amendment elections are to be held on the even-numbered years. To comply with this provision it was necessary that the term of office of county commissioner should be for an even number of years. To accomplish this change the statute was enacted fixing the terms of two commissioners, in counties having three, for the four years beginning in January, 1915, and every fourth year thereafter. Their election was to be in 1914 and every fourth year thereafter. The terms of one commissioner are for the four years beginning in January, 1917 and every fourth year thereafter, the election being in 1916 and every fourth year thereafter. Under the statute the four years' term for district No. 3 began in Janu-

ary, 1915, and will end in January, 1919. The relator has held two years of his successor's term (*Calling v. Gilland*, 97 Neb. 788), and respondent's term will expire in January, 1919. His successor should be elected at the fall election in 1918. Therefore relator's successor was properly elected at the election of 1916 for the remainder of the term expiring January, 1919, as in others cases where the term of a holding officer expires in or before January after the regular election. The term of office for districts No. 2 and No. 3 began in January, 1915, and will end in January, 1919. The respondent was elected for the remainder of this term in district No. 3. In 1918 commissioners will be elected for the regular four years' term beginning in January, 1919, for districts No. 2 and No. 3.

The trial court correctly found for the respondent and dismissed the relator's case, and the judgment of the district court is

AFFIRMED.

MICHAEL CAVEY, APPELLEE, v. THOMAS REIGLE, APPELLANT.

FILED NOVEMBER 17, 1917. No. 20202.

1. **Counties: COMMISSIONERS: ELECTION.** In a county having three commissioner districts, if the full term for which the commissioner in one district was elected would expire in or before January, 1917, his successor should have been elected in the 1916 election, if two commissioners had been elected in 1914 and duly qualified and were holding the office.

2. ———: ———: **TERM.** In such counties the official term fixed by the statute is four years from January, 1915, for two commissioners, and four years from January, 1917, for one commissioner, and succeeding terms will be for four years from the end of the terms which precede them.

APPEAL from the district court for Boone county: FREDERICK W. BUTTON, JUDGE. *Reversed and dismissed.*

A. E. Garten, O. M. Needham and *Prince & Prince,* for appellant.

Albert & Wagner and *Vail & Flory, contra.*

SEDGWICK, J.

The plaintiff Cavey was elected to the office of county commissioner for the first commissioner district of Boone county in the year 1912, and took the office in the following January. Boone county is not under township organization and has three commissioner districts. The defendant Reigle was elected county commissioner for that district at the election in 1916, and duly qualified and claimed the right to hold that office for the term beginning in January, 1917. The other defendants are the two remaining county commissioners, and the plaintiff brought this action in the district court for Boone county to restrain the defendant Reigle "from presenting himself before the commissioners of the said county as a member of said board, from taking or attempting to take his seat as a member thereof, and from discharging or attempting to discharge any of the duties of the said office," and to restrain the other commissioners "from recognizing the said Reigle as a member of said board, and from allowing or permitting him to exercise any of the powers or functions as a member thereof." The district court found the issues in favor of the plaintiff and entered decree as prayed. The defendant Reigle has appealed.

The plaintiff contends in the brief that his official term began in 1915, and that the election of 1916 is invalid; that the term for which he was elected was by the force of the statute extended for four full years, so that he held by right until January, 1919. In *De Larm v. Van Camp,* 98 Neb. 857, it was said: "Mr. Berg was holding the office in 1906, and until January, 1907, must be regarded as filling the term that expired at that time. From January, 1907, he must be considered as holding over into that term." It was not said that his term was extended, as the relator now construes that language. This theory is derived from a construction of the former terms of the commissioners in

the three districts, respectively. The trial court, in a carefully prepared opinion, says: "The question then is, which two districts should have elected commissioners in 1914, and which district should have elected a commissioner in the year 1916? Very obviously this must be told by going back to the expiration of the respective terms of office subsequent to the legislation of 1905"—and concludes that in district No. 1 and in one of the other districts the term was from January, 1915, to January, 1919, and the election should have been held in 1914, and therefore no election could be held for those districts in 1916. And although for both districts No. 2 and No. 3 commissioners were elected in 1914, he concludes that they could not have been elected for the full term because of the former terms for which commissioners were elected in those districts. In *State v. McFarland,* 98 Neb. 854, the provision of the act of 1913 (Rev. St. 1913, sec. 1955), fixing the terms of commissioners at four years, is quoted, and it is said: "This change expressed the legislative construction of the former conflicting statutes, and two commissioners should have been elected in Madison county in 1914." And in *State v. Smith,* 102 Neb. —, the effect of this change in the law is further considered, and it was held: "To comply with the constitutional provision that elections shall be on the even-numbered years, the legislature has fixed the term of county commissioners at four years and named the specific years that shall constitute such terms hereafter." So that, whatever may have been the former practice, the terms of two commissioners began in 1915, and, if two were elected in 1914, the third should be elected in 1916. This plaintiff having been elected in 1912, he must be considered to have been elected for the remainder of the term which expired in January 1916, and from that time was holding for the term for which he was elected; so that his successor was properly elected in 1916 for the term commencing January, 1917. As the defendant Reigle was elected for that term commencing in 1917, he is entitled to the office, and the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

JOSEPHINE N. TYNON, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED NOVEMBER 17, 1917. No. 19737.

Railroads: ACCIDENT AT CROSSING: INSUFFICIENCY OF EVIDENCE. Evidence examined, its substance stated in the opinion, and found insufficient to sustain the verdict.

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

J. A. C. Kennedy, Kelligar & Ferneau and *Philip E. Horan,* for appellant.

Lambert & Armstrong and *R. F. Neal, contra.*

HAMER, J.

This action was brought by Josephine N. Tynon, plaintiff and appellee, to recover damages because of a personal injury claimed by her to have been sustained on account of the negligence of the defendant railway company. She had a verdict and judgment for $1,029.

She was in a buggy going from her home at Peru to Auburn, at which latter place she expected to take a train for Omaha where she was engaged as a teacher. The day was January 4, 1914. She was in an ordinary top buggy drawn by a team of horses which were driven by a Dr. Vance. The accident happened just east of Auburn at what is known as the "Good Road" or "Rock Road" crossing of the railroad track. It is claimed on behalf of the plaintiff that she looked and listened, but did not see or hear the approaching train, and was not aware of its approach until about the instant before the engine struck the buggy, and that the engineer in charge of the train saw the team and buggy approaching the track and knew that a collision was probable, and also that he was made aware of the danger when at a sufficient distance from the team and buggy to have prevented the collision by giving an alarm whistle, and

that if he had done so Dr. Vance, the man driving the team, could have stopped the same before the horses went upon the track. The plaintiff claims that the engineer failed to do anything to avoid the collision. This is the chief issue in the case. It should be stated that the defendant's train usually reached Auburn at 3 o'clock in the afternoon, but that the schedule had just been changed, and on that particular day the train was due to arrive at 2:30. The plaintiff appears to have known of the previous time fixed for the arrival of the train, but was not aware of the change in the schedule. She therefore did not know that the train was about due at the crossing. It is claimed by counsel for defendant that one of the horses in the team was very much afraid of trains and could not be driven anywhere near an engine, and that the witness Ivers had warned Dr. Vance of this fact and against hitching the team near the depot. It is claimed on behalf of the plaintiff that this fact becomes material on the disputed issue as to whether or not the bell was ringing, as is claimed by the defendant.

The day was cloudy and cold and with a wind from the north. The curtains of the top buggy prevented the occupants from seeing out except in front of them. The team traveled along at a rate estimated from four to six miles an hour. There is testimony that shortly before reaching the crossing the plaintiff pulled aside the top of the curtain and looked to the southeast along the track for the purpose of discovering whether there was a train coming, and she saw none. There is also testimony that Dr. Vance leaned forward and looked out of the buggy, but did not see the train. There appears to have been a down-hill grade on the railroad from a point something over a mile south of the "Good Road" crossing to a point beyond said crossing and clear to the depot at Auburn. On behalf of the plaintiff there is evidence that the train came around the curve at the brickyard something more than 40 miles an hour, but that the steam was then shut off and the train was left to drift. There is a conflict in the evidence as to whether the train was traveling 20 or 40 miles an hour. The engineer fixed the rate of speed at 20 to 25 miles an hour. It

appears to be conceded on both sides that at a short distance east of the track the team slowed down from a jog trot to a walk and continued this walk until just before the collision. The engineer of the train testified that he noticed the team at a distance of 70 or 80 feet from the railroad track and just after it had crossed the little bridge, which is just east of the crossing, and that he observed the slowing down of the team, and placed the distance of the team from the track at from 12 to 15 feet just before the accident. The engineer testifies he did not whistle or give the alarm as the train got close to the crossing, because he thought the team would stop before going on the track; that he had the team under observation from the time it slackened its speed until the collision occurred; that he could not see the occupants of the buggy, and only saw the slacking of the team, and that caused him to think that the team was about to stop. The slowing down of the team appears to have occurred from 50 to 75 feet from the track, and from this place the team continued to travel at a slow walk until just the instant before the collision occurred, when the horses made a jump. The horses were thrown high into the air and one was instantly killed. They were both thrown a considerable distance from the railroad track. The buggy lodged on the pilot, and the plaintiff and Dr. Vance remained in the buggy and were carried along on the pilot about 500 feet.

Counsel for the plaintiff in their brief seem to concede that she may have been negligent, but say that if she was negligent "her negligence consisted in not looking and listening sufficiently well;" that "she looked and listened, but did not see or hear the train," and "did not hear the whistle that was blown as the train was rounding the curve at the brickyard, nor the other whistles" which were blown, and did not hear the ringing of the bell, if any bell was rung. Plaintiff's counsel suggest in their brief that plaintiff failed to hear the whistles because the sound was probably drowned by the noise of the team and buggy traveling over the "Good Road," which was built out of ground rock, and may have failed to hear the roar of the train or the ringing of the

bell for the same reason. The argument is also made that if the bell had been ringing the horses would have heard it, and that it was a skittish team. Attention is called to the fact that the plaintiff had reason to believe that the train was not due for half an hour, and that this fact may have somewhat affected her diligence in looking for the train. The argument in the brief is very candid, because it concedes that, "if the plaintiff was guilty of any negligence, it consisted in the manner in which she looked and listened."

The railroad extended from the south toward the north. The train was running north. The road on which the team and the buggy were approaching extended from the east toward the west across the railroad track, and the buggy was going from the east toward the west. By looking out of the buggy in a southerly or southeasterly direction the train might have been seen approaching the point where the collision occurred. That the occupants of the buggy, including the plaintiff, did not carefully look and listen is apparent from the testimony of the witnesses. If they had done so, this accident would probably never have happened. This brings us up to the consideration of the doctrine of "the last clear chance." Of course, if the engineer of the train saw the team and buggy approaching the crossing and saw that there would probably be a collision if he did not stop, then it was his duty to warn the occupants of the buggy of the danger by blowing the whistle, or in any way possible, and to stop the train if he could.

In *Dailey v. Burlington & M. R. R. Co.*, 58 Neb. 396, this court held: "Notwithstanding a party has negligently placed himself in a position wherein he is exposed to injury, if another, after discovery of such condition, inflicts the injury by reason of failure to exercise ordinary care to avoid it, the former may have an action for damages against the latter." In the same case it is said in the body of the opinion: "It is a well-established doctrine that, notwithstanding a person may have so placed himself as to be liable to injury, yet if another, after knowledge of the fact, inflict injury because of the failure of the latter to exercise ordinary care to avoid it, the former may recover damages.

Union P. R. Co. v. Mertes, 35 Neb. 204; *Omaha Street R. Co. v. Martin*, 48 Neb. 65; *Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb. 563." The foregoing authorities seem to sustain the position taken.

In *Zitnik v. Union P. R. Co.*, 91 Neb. 679, this court held: "The rule of 'the last clear chance' implies that the one charged with negligence knew the person injured was in a place of danger and negligently failed to avoid injuring him, but his testimony that he did not have such knowledge is not conclusive. Such knowledge may be shown by proof that the person injured was in a situation of imminent danger and so situated that the one injuring him, if he used his senses as human beings ordinarily do, must have known the danger."

This brings us to the consideration of conditions immediately preceding the collision.

Dr. V. V. Vance, a witness called for the plaintiff and who drove the team, testified that he thought he was back about 100 feet when he looked down the railroad track for the last time and could see down there for 200 yards, that after he had passed over the bridge at a slow trot he came onto the slight incline up to the railroad track, and that then the team slowed up. Clyde Harper, called as a witness for the plaintiff, testified that he thought the team slowed up as it reached the railroad track. C. B. Petticrew, called for the defendant, testified that it seemed to him that at a point about 50 feet from the track, where the incline began, the team checked up, and it looked to him from where he stood that they were urged across the track, and at the moment they got on the track the locomotive hit the buggy, throwing the team toward the depot.

There was evidence tending to show that the railroad track at the crossing was about five feet higher than the surrounding country; also, that the "Good Road" is elevated about 3½ feet above the surrounding land, and that this road approaches the track of the railroad on an upgrade about 70 feet long; also, that the surface of the ground is not uneven, and that the distance from the "Good Road" crossing south to the first whistling post is about a quarter

of a mile. Dan Pardue, George Stevens, and E. M. Bogart, witnesses called on behalf of the defendant, testified that the buggy curtains were closed, and that the team was trotting, and that the train was in sight, and that there was nothing to obstruct the view of the persons in the buggy. Roy Shanks, called on behalf of the plaintiff, testified that the train was in plain sight of the buggy; that he first saw the buggy about 200 or 250 yards from the crossing; that there was nothing to prevent the occupants of the buggy from seeing the train. Dr. Vance further testified that it was cloudy, but that the cloudiness did not interfere with the view of the occupants of the buggy, and that there was nothing between them and the train to obstruct their view. Art Bamber, called for the plaintiff, testified that he did not hear the train whistle until it reached the crossing; that when he first saw the train it was about 100 yards from the crossing; that when he heard the train whistle at the mile post it gave a long whistle.

The plaintiff testified that Dr. Vance was driving the team; that when they tried to ascertain whether there was a train on the track she pulled down the curtains and looked down the track, but that she never saw or heard anything; that when she looked she reported to Dr. Vance that the track was clear. She also testified that she did not know whether she could have seen the train if she had looked, but that there was nothing to obstruct the view. Dr. Vance further testified that he asked Miss Tynon to look, and that she lifted the side curtain, and then told him that the track was clear. He testified also that a little further on, four or five buggy lengths, he reached forward and looked again; that the team slowed down as they reached the incline leading to the railroad track; that he thought that the incline commenced about 70 or 80 feet from the track.

As the railroad track was elevated, and the "Good Road" was elevated, and there was also an incline still further elevated as the road approached the crossing, it would seem, according to the testimony, that there was nothing to obstruct the view of the railroad track from the buggy, and that the plaintiff and Dr. Vance should have seen the ap-

proaching train. As the train was not considered to be due until 3 o'clock, that may have affected their alertness and vigilance.

The team appears to have been about 12 to 15 feet distant from the railroad track after it checked up and just immediately before the collision. There is testimony that it nearly stopped. Then it jumped forward. The engineer saw the team slow up. He testified that he "thought they were stopping. * * * I thought they were almost stopped. They were almost stopped. * * * I got it in my head they were stopping." Counsel for the plaintiff interrogated the witness: "Q. You thought they were going to stop? A. Yes, sir. Q. And that is why you didn't whistle? A. Yes, sir. Well, the whistling wouldn't do any good anyhow. * * * I supposed they were going to stop * * * I thought they were almost stopped. They come to a check-up; and, if they were going on the track, I thought it was no use to whistle. I went for the air." Farther along in the evidence it is shown that after the team had checked up it suddenly started forward. When asked what he then did, the engineer testified: "I throwed the air into the emergency and tried to stop." When asked why he gave the attention to the air and the emergency, he answered: "Because it was the only thing that would do any good at that time; the whistle would do no good." While we may not accurately know the distance between the engine and the buggy at that time, only a second or two could intervene between throwing on "the air and the emergency" and the collision. He testified: "I had to turn the sand on to stop it quick." Perhaps what the engineer did lessened the speed of the train sufficiently to save the lives of both occupants of the buggy. With the horses jumping for the track, it cannot be said that the engineer acted unwisely.

Shortly before the collision the engineer seems to have blown the whistle on four separate occasions. The evidence shows that the engineer blew the whistle for the crossing south of the brickyard, for the crossing north of the brickyard, and that at about half way between there and the "Good Road" crossing he whistled for Auburn, and at the

whistling post at the "Good Road" crossing he again whistled. As the road crossing whistles are each two long and two short blasts, and the station whistle is one long blast, he must have whistled much of the time. There would be four blasts for each road crossing, making twelve for road crossings, and one long blast for the station would make thirteen in all; and these blasts were all given within a mile of Auburn. The last road crossing whistle was given within a quarter of a mile of the station at Auburn. It would seem that so much whistling ought to have been heard. Then the "automatic bell" had been set to ringing. "It was working all the time since we left Atchison."

It would seem that, if the plaintiff has been negligent and her negligence places her in a place of danger, this will not warrant the defendant who finds her in such place of danger in perpetrating an unnecessary injury upon her; but if the physical facts show that she should have seen the train, and she testified that she looked out and did not see it, it must be presumed that the train was there, and that the fault of failing to see it was her fault and due to her negligence. *Erie R. Co. v. Hurlburt,* 221 Fed. 907; *Pittsburgh, C., C. & St. L. R. Co. v. Fraze,* 150 Ind. 576, 65 Am. St. Rep. 377; *Union P. R. Co. v. McDonald,* 152 U. S. 262; *Lynch v. Pennsylvania R. Co.,* 88 N. J. Law, 408; *Pennsylvania R. Co. v. Righter,* 42 N. J. Law, 180.

In *Erie R. Co. v. Hurlburt, supra,* Judge McCall, delivering the opinion of the court, said: "It challenges human credulity to be asked to believe that Mrs. Hurlburt looked and listened, as she says that she did, and neither saw nor heard the train that smashed into her buggy and wrought such havoc. There is no evidence that tends to explain why she did not see the oncoming train. Her testimony explodes every theory upon which to predicate an explanation that would tend to excuse her. Indeed, it is so improbable that it does not afford a scintilla of evidence upon which to go to the jury. We are of opinion that it was error to refuse the company's motion for a directed verdict at the close of all the evidence."

In *Lynch v. Pennsylvania R. Co., supra,* the court said: "As has already been stated, from the point where the plaintiff says he stood when he made his observation, the view along the track in the direction from which the engine was approaching was practically unobstructed for a distance of approximately 250 feet. That the engine was still within this distance when the plaintiff made his observation is demonstrated by the fact that at once after doing so he stepped upon the track and was immediately struck. It follows, therefore, either that he was mistaken in his statement that he looked, or else that he looked in such a perfunctory manner that he was not conscious of what was immediately before his eyes. In either event he failed to use that reasonable care for his own safety which the law requires of all persons when approaching these places of known danger."

In *Hooker v. Wabash R. Co.,* 99 Neb. 13, a deaf man named Davis was walking on the track ahead of a freight train. He could talk and was able to understand what was said to him by watching the lips of the speaker. Two of his friends had warned him against the danger of walking on the railroad track, and to one of them he had replied that he "would have to keep his eyes open for that train, because he had to depend on his eyes for his ears." He was struck by the locomotive and killed. A judgment for $15,000 was awarded the administrator of his estate. On appeal this court held that the facts shown by the evidence were "not sufficient to warrant the application of the rule of 'the last clear chance.'" It also held: "Where the undisputed evidence shows that none of the train crew had any knowledge that an adult person walking upon the track was deaf, or was afflicted with any other infirmity, that the engineer used all proper signals to warn him of the approach of the train up to the instant when it appeared that he was not going to step off the track, and at that instant did everything possible to stop the train and avoid a collision, it cannot be said that the engineer carelessly ran the pedestrian down." In the body of the opinion it was said: "There was no time after Davis was discovered upon the track, up to the very

minute when he was struck by defendant's engine, that he could not have avoided the injury to himself by merely stepping off the railroad track, and we think it cannot be said that he was discovered to be in a state of peril at any point of time before the engineer used his utmost endeavor to stop the train." Many authorities were cited in support of the view that the facts were not sufficient to invoke the doctrine of "the last clear chance." Among these we refer to *Drown v. Northern O. T. Co.*, 76 Ohio St. 234; *Dyerson v. Union P. R. Co.*, 74 Kan. 528; *Green v. Los Angeles T. R. Co.*, 143 Cal. 31; *Holwerson v. St. Louis & S. R. Co.*, 157 Mo. 216; *Merritt v. Foote*, 128 Mich. 367.

The case at bar does not belong to that class of cases to which the doctrine of "the last clear chance" is properly applicable. The engine was too close to the buggy and too near to the unexpected and apparently inevitable collision to enable the engineer to long reflect. He was compelled to act at once, and his impulses were in the direction of saving life by stopping the train or reducing its speed. He was successful in his efforts, for the occupants of the buggy were saved from the instant death which threatened them, although one of them was injured as the train could not be stopped at once. No one may say with certainty that the engineer, who was confronted by probable death to the persons just ahead of him, and who had a duty to perform concerning the safety of the passengers behind him, did not exercise a wise discretion. Because of the unsatisfactory character of the plaintiff's testimony, and because of the known physical facts shown to be apparent in the case, as well as because of the evidence in favor of the defendant, it would seem that there is nothing to support the doctrine of "the last clear chance."

The defendant railroad company is not liable, because there was no negligence upon the part of its engineer in charge of the train which in any way tended to bring about the plaintiff's injury. He had the whistle give thirteen blasts in the distance of a mile, which was probably traveled in a little more than two minutes immediately preceding the accident. He had the whistle give four blasts for the

"Good Road" crossing, and when the last blast was given the engine could not have been far from the crossing itself where the accident happened, as the whistling posts were placed only a quarter of a mile from each crossing, and, while the four blasts were being given, the train, as shown by the evidence, would run its length toward the crossing. He had a right to believe that the two persons in the buggy had seen and heard the train, and knew that it was approaching and that it was close to the buggy, and he also had a right to believe that the buggy was about to stop. This belief was justified, because the buggy nearly stopped within a few feet of the track, and up to the time that the horses suddenly sprang forward, as if to cross the track, he had no reason to suppose that the buggy was going upon the track. It cannot, therefore, be said that plaintiff "was discovered to be in a state of peril at any point of time before the engineer used his utmost endeavors to stop the train."

The plaintiff has failed to establish her case, because her conduct could not reasonably be anticipated by the engineer of the train, and her injury appears to be due to her own negligent action, and not to any act of the defendant or its railway engineer.

REVERSED AND REMANDED.

ROSE and SEDGWICK, JJ., not sitting.

MCCAGUE INVESTMENT COMPANY, APPELLANT, V. METROPOLITAN WATER DISTRICT, APPELLEE.

FILED NOVEMBER 17, 1917. No. 19665.

1. **Municipal Corporations: WATER DISTRICT: SPECIAL ASSESSMENTS: APPEAL.** The statutes of this state make no provision for appeal from the equalization and assessment of special taxes by a metropolitan water district, and an attempt to prosecute such an appeal confers no jurisdiction on the district court to review the order made.

2. ———: ———: PROCEEDINGS IN ERROR. District courts have jurisdiction to review by proceedings in error an order by the board of equalization of a metropolitan water district.

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

Charles Battelle, for appellant.

John L. Webster and *William R. King, contra.*

CORNISH, J.

The first question presented is whether appeal lies from the equalization and assessment of special taxes by a metropolitan water district, on lots abutting on its water mains. The trial court found that it did not.

Such districts are a separate body corporate, created by law, and may include (in this case did include) more than one municipality. They come under the provisions of the general law relating to water main extension or enlargement by districts. Rev. St. 1913, secs. 5263-5269. Section 5267, besides providing for assessment against abutting property and the manner of payment of the special taxes, concludes as follows: "Prior to the levy of such special taxes herein provided, the same shall be equalized in the same manner as is provided by law for the equalization of special assessments levied in such cities and villages."

The tax in controversy was on lots in the city of Omaha. Section 4343, Rev. St. 1913 (section 241, Omaha charter), provides in detail the manner of the city council sitting as a board of equalization, and provides that, after corrections have been made, the council at a regular meeting thereafter may, by ordinance, levy special assessments, which ordinance is made subject to appeal. It is to be remembered that the lots under consideration might have been situate in some other territory within the district, outside of the city of Omaha—might have been in South Omaha, whose charter had no such provision for appeal.

It is contended by plaintiff that, the lots being in the city of Omaha territory, and section 241 of the Omaha charter, providing for equalization of taxes, permitting ap-

peal from the final order of the city council, plaintiff is entitled to appeal. We think this is a *non sequitur*. The directors of the water district, or board, were the authority having power to make the equalization. A direction as to the "manner" in which equalization shall be made refers to "manner" alone. The right of appeal given in section 241 of the charter being an appeal from an ordinance by the city council, based upon the work done by the city's board of equalization, is a thing distinct from the "manner" of arriving at the benefits or equalization. The metropolitan water district of Omaha is a separate body corporate, and, if the legislature had intended to give the right of appeal from the findings of the board of directors, sitting as a board of equalization, it would have said so. Boards of this character have certain discretionary powers. A right of appeal substitutes the discretion of the appellate tribunal for that of the board to whom it has been specifically committed. This court has denied the right of appeal in such cases unless it is clearly shown to exist by statute.

In *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30, it was held that no appeal lay from the county commissioners, sitting as a board of equalization, although appeal did lie from the action of the county board on matters properly cognizable before them. The two boards, it was said, are separate tribunals.

In *Whedon v. Lancaster County*, 76 Neb. 761, an appeal from the action of the county board making a tax levy was denied, although appeal was allowed from the action of the county board of equalization, the court saying: "The right of appeal in this state is purely statutory, and, unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist."

In the instant case, the granting of the right of appeal from the ordinance of the city council of Omaha, a separate and distinct body from the water district, can have no reasonable reference to the powers which are or should be given to the water board. For other cases, bearing upon the question of the right of appeal from boards of this character, see *Webster v. City of Lincoln*, 50 Neb. 1; *Dodge Coun-*

ty v. Acom, 72 Neb. 71; *Wead v. City of Omaha*, 73 Neb. 321; *Keokuk & Hamilton Bridge Co. v. People*, 185 Ill. 276.

No doubt, the action of such a board may be reviewed by proceedings in error. *Munk v. Frink*, 75 Neb. 172; Rev. St. 1913, secs. 7880, 8175. It is not necessary to consider the other points raised in the case.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

GLADYS BAILEY, APPELLEE, v. SCOTT HURTT, APPELLANT.

FILED NOVEMBER 17, 1917. No. 19708.

1. **Appeal:** CONFLICTING EVIDENCE. Where there is competent evidence to sustain the verdict, the judgment of the trial court will not be disturbed, even though the testimony conflicts on a material point.
2. ———: INSTRUCTIONS. Where the trial court in its instructions has stated the law that is applicable to the issues raised by the pleadings and the testimony, a party to the action cannot predicate error upon the failure of the court to instruct the jury upon a particular point in the absence of a request therefor.
3. **Bastardy:** EVIDENCE. "Evidence of the unchastity of a complainant in a bastardy proceeding, outside the period of gestation, is irrelevant to the issues presented for trial." *State v. O'Rourke*, 85 Neb. 639.

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

John Stevens and *O. E. Shelburn*, for appellant.

Lambe & Butler, contra.

DEAN, J.

Gladys Bailey is an unmarried woman who resides in Furnas county. She filed a complaint charging Scott Hurtt with the paternity of a bastard child born to her July 12, 1915. She recovered a judgment for $1,200, from which he has appealed.

Plaintiff testified that she met defendant on the evening of October 2, 1914, at a dance at Wilsonville, and that after the dance was over she accepted his offer to escort her in his buggy to her father's home, distant about 5 miles, and that on their way home the offense was committed. Defendant introduced testimony tending to prove that on the night in question he was at a party given by some friends in Beaver City, and he denied that he was in the company of Miss Bailey at any time during that night, or that he ever committed the offense charged. He admitted that he once escorted her from a dance at Wilsonville to her home, but he says it was about two weeks before the time named by her at the trial. The testimony with respect to these discrepancies was all fairly submitted to the jury, and any doubt that may theretofore have existed on this point was dispelled by the verdict.

It is argued by defendant that the jury could not properly find from the testimony that the bastard child was born alive. This contention cannot prevail, for the obvious reason that the babe was at the county seat at the time of the trial, but was not in the courtroom. It would serve no good purpose to analyze the testimony at greater length. We find that it supports the verdict, and with that we are content.

Defendant contends that the court erred in instructing the jury that the plaintiff's reputation for chastity was not a proper subject for their inquiry, and insists that "this should have been considered by the jury in judging her credibility as a witness." On this point the jury were correctly informed that the chastity of the complaining witness was not one of the issues in the case. *Clow v. Smith,* 85 Neb. 668; *State v. O'Rourke,* 85 Neb. 639. He also argues that the instructions state the law incorrectly with respect to the credibility of the respective witnesses where the testimony conflicts on points that are material. This contention is obviously without merit in view of the explicit instruction No. 3, given evidently in pursuance of the provisions of section 361, Rev. St. 1913, and also in view of instruction No. 5 wherein the jury are correctly informed on the points to

which defendant calls our attention. *Nelson v. Spratt,* 100 Neb. 690.

The court instructed the jury fully on all of the issues properly triable by it. Defendant requested no instructions, and, in view of those given, he cannot now be heard to urge that additional instructions should have been given.

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

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

T. J. BRUNER COMPANY, APPELLEE, V. FIDELITY & CASUALTY COMPANY OF NEW YORK, APPELLANT.

FILED DECEMBER 1, 1917. No. 19715.

1. **Insurance:** INSURANCE AGAINST BURGLARY: USE OF EXPLOSIVES. A burglar insurance policy indemnified the assured from loss by the stealing of property from a fire proof safe "by any person or persons who shall have made entry into the safe or safes by the use of tools or explosives thereupon." The outer doors had been locked by a combination lock, but there was no evidence of the use of tools or explosives thereupon. The steel inner doors which were locked by a key lock had been opened by the use of explosives. *Held,* that "entry into the safe" was made by the use of explosives, and that it was not material that the outer doors had not been so opened.

2. ———: ———: EVIDENCE. Evidence examined, and *held* to sustain a finding that no employee or servant of the plaintiff was criminally implicated in the burglary.

3. ———: ———: ———: BOOKS OF ACCOUNT. Certain minor errors and discrepancies were shown to exist in some of the books of the assured. These were called to the attention of plaintiff's manager at the trial and were corrected. *Held,* that they were not of such importance as to justify the forfeiture of the insurance on account of a provision of the policy that there should be no liability "unless books and accounts are regularly kept by the assured and the loss can be accurately determined therefrom by the company."

4. **New Trial:** REVIEW. The granting of a new trial is largely committed to the discretion of the trial court, and unless a clear abuse

has been shown this court will not interfere. *Grand Lodge, A. O. U. W. v. Bartes*, 69 Neb. 636.

5. **Attorney and Client: FEES: REVIEW.** A motion in the lower court to retax costs is unnecessary to review a judgment awarding an attorney fee in an action on an insurance policy. *American Fire Ins. Co. v. Landfare*, 56 Neb. 482.

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

Morsman, Maxwell & Crossman, for appellant.

J. C. Kinsler, contra.

LETTON, J.

Plaintiff, a wholesale jeweler, procured from the defendant insurance corporation a burglary insurance policy. The material parts of this policy which apply to fire-proof safes are that the defendant agrees to indemnify the assured "for all loss—

"(A) In consequence of the felonious abstraction during the day or night from within the safe or safes described in the schedule and located in the premises as hereinafter defined, by any person or persons who shall have made entry into the safe or safes by the use of tools or explosives thereupon," of money, securities and merchandise.

"(B) By damage to the said safe or safes, and to the said property contained therein, and to the premises, and to the office furniture and fixtures therein, caused by any person or persons while making or attempting to make entry into the safe or safes, or into any vault containing such safe or safes, by the use of tools or explosives thereupon."

It further provided that the company shall not be liable for any loss—

"(g) If any servant or employee of the assured, or any person lawfully upon the premises, is criminally implicated as principal or accessory in effecting or attempting to effect loss covered under this policy;

"(h) Unless books and accounts are regularly kept by the assured and the loss can be accurately determined therefrom by the company. * * *

"(1) From within any safe unless at the time of the occurrence of the loss the safe was properly locked by all combination locks on same."

The proof on the part of the plaintiff tended to show that on the evening of Sunday, May 23, 1915, the office rooms of the insured, which are located in an office building in the city of Omaha, were opened by the use of a chisel or jimmy near the latch, and the outer door of safe No. 4, which was locked with a combination lock, opened without the use of tools or explosives, and the double inner doors, which were locked with a key lock, blown open by an explosion, and diamonds and other property to the value of $3,357.91 feloniously abstracted; that this was discovered by the night watchman on beginning his rounds about 7:30 p. m., who immediately notified the plaintiff's manager, T. J. Bruner, and the police. Plaintiff at once gave notice of the loss to defendant, which denied liability and refused to pay for the loss. In its answer defendant denied that any person unknown to plaintiff made entry into the safe by the use of tools or explosives thereupon, and feloniously abstracted any property covered by the policy and damaged the safe. It pleads the conditions of the policy above set forth, and alleges that, if the plaintiff suffered any loss from said safe No. 4, access was not had by the use of tools or explosives upon the outside of the safe; that all the combination locks were not then locked; that the plaintiff has failed to keep proper books of account; and that the loss, if any, was occasioned and caused by some person or persons connected with plaintiff and being lawfully upon the premises, whose names are unknown to defendant. The reply is a general denial. The plaintiff recovered a judgment in the sum of $3,391.88. The court allowed the sum of $800 as attorney's fees and taxed the same as part of the costs. Defendant appeals.

A number of assignments of error are made. Defendant insists that the provision that the policy only insures against loss caused by "any person or persons who shall have made entry into the safe or safes by the use of tools or explosives thereupon" means the use of such instrumen-

talities upon the outside doors of the safe, and that the court erred in holding that it was only necessary to prove that the safe or some part of the safe was entered by the use of tools or explosives. This safe had double doors. Until the inner doors were opened no access could be had to its contents, and no entry made into the safe proper. Explosives were used upon the inner door. We think the district court was right in its construction of the language of the contract. *Fidelity & Casualty Co. v. Sanders,* 32 Ind. App. 448; *Mt. Eden Bank v. Ocean Accident & Guarantee Co.,* 96 S. W. (Ky.) 450.

It is next said that the court should have directed the jury to return a verdict for the defendant because Bruner, the manager of the plaintiff corporation, was the only man who knew the combination, and since the outer doors were opened in the ordinary way, and the chance of working the combination in an hour's time is one in several millions, the conclusion is inevitable that the safe was not locked, or else it was opened by Bruner. We think this conclusion is a *non sequitur.* There is evidence that such safes may be opened by experts by manipulation of the knob of the combination lock, and other evidence which is sufficient to support a finding by the jury that no employee was a participant in the burglary. The evidence on behalf of plaintiff is that Bruner left the office about 12:45 on Sunday afternoon and did not return until about 7 o'clock that evening when called by the night watchman. This man came on duty at 6 o'clock, and in making his rounds noticed some marks upon the office door and jamb indicating that the lock had been forced. On making an investigation he found that the outer doors of one of the safes were open, and that the inner doors had been blown open by an explosion. There were remains of a soap dam around the keyhole of the inner doors, and soap apparently had been used upon the flanges of the outer doors to confine the air and gases of the explosion and to silence the noise. The lock to the inner doors was broken, scattered and destroyed. A witness for defendant testified that he heard a sound like an explosion in the building between 1 and 2 o'clock in

the afternoon. Defendant argues that in all probability Bruner did not leave the building at 12 o'clock and go home to lunch, as he testified, but that he remained until after the explosion occurred, and virtually charges him with robbing the safe. The testimony of Bruner as to his movements is quite strongly corroborated by apparently disinterested witnesses. It was for the jury to determine what the actual facts were from all the evidence, and we are not able to say that they arrived at an erroneous conclusion.

Another assignment is that the plaintiff had not kept books from which the loss could be accurately determined. It is claimed that a memorandum book which listed the diamonds purchased, with their weight and cost, had a number of erasures and alterations in it. The testimony shows that when a diamond left the place of business, either when sold or upon approval, an entry was made in the margin of this book showing the disposition of the gem. Many of these entries were customarily made in pencil. Sometimes stones would be returned. Instead of making a new entry, the pencil memorandum would be erased, and when the diamond went out again a new pencil entry would be made. It developed upon the witness-stand that some mistakes had been made with reference to the description and disposition of some of the stones listed as having been stolen. The jury were instructed by the district court that such items should not be charged against the defendant insurance company, and that certain discounts which it was shown by cross-examination of Bruner had been received on certain articles should also be allowed defendant. These mistakes were in small proportion to the amount of the loss. It is shown that full sets of double-entry books of account had been kept since the business was begun, and these, with cash book, sales books, invoices and inventory taken January 1, 1915, were produced to the defendant long before the trial. We are of opinion that the provision of the policy mentioned should not be construed so strictly as to forfeit the insurance on

account of the minor mistakes or discrepancies in the diamond record.

The district court instructed the jury that plaintiff admitted there were errors in the account amounting to $39.39, and that discounts had been taken amounting to $106.83, for which plaintiff could in no event recover: The court further instructed the jury in substance that, before the plaintiff could recover the burden of proof was on it to prove by a preponderance of the evidence: (1) That the safe was feloniously entered by the use of tools or explosives; (2) that the property described in the petition was in the safe and was stolen therefrom; (3) the value of the property stolen; (4) that the safe was properly locked; "(5) that plaintiff kept books of account from which the loss could be accurately ascertained; (6) that no employee or servant of the assured, and no person or persons lawfully on the premises, was implicated as principal or accessory in the burglary: If plaintiff has so proved all the above facts, then your verdict should be for the plaintiff. If plaintiff has failed to so prove all the above facts, then your verdict should be for the defendant."

The defendant argues that in its opening statement to the jury it asserted its reliance upon the violation of the conditions that there should be no recovery if the combination lock was not locked at the time of the entry; and that no recovery could be allowed unless the assured kept books of account from which the loss could be accurately ascertained, and complains that these two defenses were "improperly and indiscriminately included and commingled in a general instruction;" that the refusal to give specific instructions upon these points deprived it of its right to submit to the jury its theory of the case. The district court had correctly instructed the jury upon each of these points and it was unnecessary to restate the law. The instructions, taken as a whole, are pertinent, clear and concise, without unnecessary repetitions or involved language, plain to the understanding of the average man.

The next assignment of error, and that which is perhaps most earnestly argued, is that a new trial should have been

granted on account of newly discovered evidence. The motion for a new trial filed in the district court alleges that one of the attorneys for the defendant had many conversations before the trial with Ada James, bookkeeper for the plaintiff, concerning the alleged burglary, but was unable to obtain the facts set forth in her affidavit from her; that after the trial an affidavit was made by Mrs. James in substance as follows: That she became connected with the Bruner company in 1914 when the company opened for business in its present location; that she had charge of the books; that at several times during her employment she made entries in the books at Mr. Bruner's directions with reference to the sales and credits which were incorrect, more especially with reference to the sale of certain jewelry for which a victrola was taken in part payment, and of an automobile for which a diamond was taken out of the stock and given as part of the purchase price, as well as a number of smaller items for which no proper charge was made; that she first mentioned these items for which no proper charge was made in September, 1915, after the burglary, when she spoke to Riggs, Jr., one of the stockholders; that after the trial, at the annual meeting of the company, at which she was not present, she understood that these items were called to Bruner's attention, and that she personally knows that since the meeting an arrangement has been made whereby Bruner is to pay into the treasury of the company $50 a month to cover things which he has taken and which have never been charged; that after the meeting Bruner made it unpleasant for her, and for that reason she left the employment of the company; that on the morning after the buglary Bruner suggested they had better make a list of the losses, and that this was made, a copy of which is the original claim list given to the insurance company. Before the list was made, at Bruner's instructions, she made entries in the stock books of the salesmen showing the return of certain goods which were not in the safe at the time of the burglary, but were in the traveling men's trunks; that though they inquired as to the books she did not tell plaintiff's attorneys about the en-

tries. Counter affidavits were filed to the effect that Mrs. James had stated to plaintiff's attorneys that she kept the books herself, knew they were absolutely correct, and that the records would show that all the diamonds claimed to have been stolen were stolen. There are also affidavits by each of the three salesmen denying specifically and in detail the statements that part of the property claimed to have been stolen was at the time of the burglary in their trunks or traveling cases. Riggs, Jr., to whom Mrs. James made certain charges of irregularity against Bruner, deposes that he and the other stockholders made a careful investigation of the books, and of the charges made by Mrs. James, and that they found all of the charges of irregularity to be wholly unfounded; that Bruner's conduct was approved, and at the annual meeting it was voted to increase his salary, to give him a vacation, and to allow him $200 additional pay; that he and the other stockholders were fully cognizant of the purchase of the automobile and the manner of payment, and of the procurement of the accident insurance and the payment for the gasoline used in the machine, and that all these matters were fully sanctioned and authorized. He further states that an examination of the books has been made since the filing of Mrs. James' affidavit and the charges of irregularities in the entries are wholly unfounded and untrue. The affidavit of the senior Riggs, who it was stated is the principal stockholder in the company, is to the same effect. Mr. Bruner also files an affidavit, stating that the charges made by Mrs. James were false, and denying specifically and in detail a number of statements made in her affidavit. Attached to Mr. Bruner's affidavit are photographic copies of certain books mentioned in the affidavit of Mrs. James. These exhibits seem to bear out the denials made by Mr. Bruner.

Where charges of such serious moment and grave import are made against parties interested in an action, the district court should scrutinize the evidence in support of the charges or in denial thereof with great care, and should

take particular pains to see that no fraud or deceit has been practiced upon the court or jury. Most of the persons making the affidavits were present in court during the trial. Several of them were witnesses, and the district judge had an opportunity to see and observe their conduct and listen to their statements. It would be impossible for him in considering the affidavits to disassociate his mind from the impressions he received at the trial. Indeed, it would be undesirable that he should do so. Among the strongest aids to the ascertainment of truth are the inflections in the language, the demeanor, appearance, and expression of the countenance of witnesses. There are other indicia of veracity which cannot easily be explained, but of which every judge of experience is aware. The affidavit of Mrs. James, when met by the counter affidavits of the other affiants, failed to convince the district judge that a fraud had been perpetrated as alleged by her. The granting of a new trial is largely committed to the discretion of the trial court, and unless a clear abuse has been shown this court will not interfere. *Grand Lodge, A. O. U. W. v. Bartes,* 69 Neb. 636.

The trial court allowed a fee of $800 to plaintiff's attorney, which is assessed as costs, and which is complained of as excessive and unauthorized. The plaintiff argues that a motion to retax costs was necessary, and that although one was filed it has never been acted upon by the district court, and hence cannot be reviewed. In *Hartford Fire Ins. Co. v. Corey,* 53 Neb. 209, and *American Fire Ins. Co. v. Landfare,* 56 Neb. 482, it was held that a motion in the lower court to retax costs is unnecessary to review a judgment awarding an attorney fee in an action on an insurance policy. The fee allowed is nearly 25 per cent. of the recovery and seems excessive. It seems to us that a fee equal to 10 per cent. of the judgment is as much as should be taxed as costs, and the allowance is reduced to that amount.

In conclusion, while there is a possibility that the safe might have been opened in the manner charged by the

defendant, and while there are some matters in the evidence which are not entirely satisfactory, the preponderance of the testimony supports the verdict of the jury, and the action of the trial court in overruling the motions for a new trial. The judgment is

AFFIRMED.

SEDGWICK, J., not sitting.

ARTHUR HAUSER V. STATE OF NEBRASKA.

FILED DECEMBER 1, 1917. NO. 19862.

1. **Venue:** APPLICATION FOR CHANGE: REVIEW. A motion for a change of venue is directed to the discretion of the trial judge, and unless an abuse thereof is disclosed by the record his ruling will not be reversed in the supreme court.
2. **Identification of defendant** as the person who committed the felony charged, *held* sufficient.
3. **New Trial:** RULING. Where the presiding judge is unavoidably prevented from ruling on the motion for a new trial, another judge may perform that duty.

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

R. S. Horton and *J. E. Bednar,* for plaintiff in error.

Willis E. Reed, Attorney General, contra.

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Arthur Hauser, defendant, was convicted of murder in the first degree and was sentenced to the penitentiary for life. As plaintiff in error, he presents for review the record of his trial.

One of the assignments of error challenges the overruling of a motion for a change of venue. It is contended that the public mind was inflamed against defendant by reports that he was guilty and that he had committed other

cruel and revolting crimes. In this connection it is argued that the prejudice shown was sufficient to prevent accused from having a fair trial in the city of Omaha, where the homicide occurred. To establish these propositions defendant relies on testimony of newspaper reporters and on articles in the daily press. The inquiries which prompted individual expressions of prejudice to which the reporters testified were directed to a small number of persons, when compared with the public generally. The expressed prejudice against accused resulted principally from newspaper reports. It does not necessarily follow that, in a great center of population like Douglas county, there was thus established public prejudice or ill feeling sufficient to prevent a fair and impartial trial before an unbiased jury, limited in their deliberations to proper proofs of the felony charged. Threats of violence were not shown. There was no attempt to interfere with an orderly trial. On review there is no suggestion that any juror impaneled had been influenced or prejudiced against defendant, or that any juror, during the trial, was guilty of misconduct. The motion was directed to the discretion of the trial court, and the conclusion is, upon a consideration of the entire record, that an abuse of discretion in denying a change of venue is not shown. The assignment of error is therefore overruled.

The insufficiency of the evidence to sustain the verdict is also urged as a reason for reversing the judgment. The failure of proof, according to the defense, is the lack of identification of accused as the person guilty of the felony charged. The point does not seem to be well taken. Near the intersection of Thirty-first and Dodge streets in Omaha, William H. Smith was feloniously shot and killed about 10 o'clock at night October 16, 1915. It had been raining and the night was dark. When shot Smith was walking with Grace Slater, who was on her way to her home. The victim was left where he fell. Following the homicide, for an hour perhaps, Grace Slater was involuntarily in the company of the person who did the shooting. During most of that time she was compelled to walk ahead of the felon

at arm's length. They walked in vacant lots where there were weeds and bushes. Sometimes they were in the streets. At other times they were in the shadows of buildings. He talked almost constantly. Finally he took what money she had, gave her five cents, and permitted her to depart on a street car. This is a portion of her story as told on the witness-stand, and it is not questioned. At one time she expressed a doubt about being able to identify the felon without hearing his voice. Later, however, she did thus identify defendant in a prison in Wichita, Kansas. From there he was taken to Omaha, tried and convicted. Defendant challenges the identification on the following grounds: The night was dark. The man who shot Smith was behind Grace Slater during all of the time they were together. At first he wore a mask. Without it she did not see his face. Before seeing defendant at Wichita she admitted she could not by sight identify the person who shot Smith. The record answers the argument on this point by evidence tending to prove the following facts: It was not raining all of the time Grace Slater was in the custody of the felon, and he was then without a mask. She saw the side of his face a number of times. She saw him in the light of the street lamp. She observed his stature and clothing. She recognized his voice and identified him positively. He was in Omaha when Smith was killed. Defendant was observed not far from the scene of the felony both before and after it was committed. Under the circumstances the jury were justified in finding that a front view of his face was not necessary to identification. Recognition of a profile is not uncommon and is not necessarily unreliable. In photography the profile is common as a likeness. The mental faculties of Grace Slater, while observing the felon on the night of the homicide, would naturally be aroused by the tragedy, by the distressing experiences which followed, and by her own peril. Her account of the ordeal indicates that she did not lose her self-possession. Frequent observations at arm's length, even at night, when the mind is alert, may make deep and accurate impressions. The conclusion is

that the identification and the other evidences of guilt are sufficient to sustain the verdict.

The final assignment of error argued is the overruling of the motion for a new trial. The chief proposition under this head is that a judge who does not preside at the trial is without authority to pass on the motion for a new trial. The judge before whom the present case was tried died before passing on the motion for a new trial and it was overruled by another judge. It is argued that the trial judge is a part of the tribunal to try the issues of fact, and that he hears the testimony, observes the witnesses and takes note of all that affects the rights of accused while in court. Defendant insists that he lost the advantages which personal observation gave to the presiding judge. There is force in this argument, and the advantages which the presiding judge obtains by his presence in court should be seriously considered in the deliberations on each case where necessity requires another judge to act on a motion for a new trial. While the courts are not in harmony in their answers to the question here presented, this court has taken a view at variance with the contention of defendant herein. *State* v. *Gaslin*, 32 Neb. 291; *Lauder* v. *State*, 50 Neb. 140; *Goos* v. *Krug Brewing Co.*, 60 Neb. 783. Adherence to the rule announced in these cases results in the overruling of this assignment of error, an abuse of discretion in denying a new trial not having been shown.

AFFIRMED.

SEDGWICK, J., not sitting.

LILLIAN UNZICKER, APPELLANT V. FRANK UNZICKER, APPELLEE.

FILED DECEMBER 1, 1917. No. 19599.

1. **Divorce**: PERSONAL VIOLENCE. Although unpleasant relations between husband and wife have been caused by the intermeddling of third parties, and not wholly by the husband himself, such cir-

cumstances will not justify him in using personal violence against his wife.

2. ———: ———. The law does not allow a husband to use personal violence against his wife even for her own good. He cannot justify striking or slapping his wife by showing that it was necessary to to do so in order to compel her to go out for a ride for the benefit of her health.

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

Hoagland & Hoagland, for appellant.

L. O. Pfeiffer, contra.

SEDGWICK, J.

The plaintiff, in her petition in the district court for Deuel county, asked for a divorce from the defendant upon the ground of cruelty, and asked for the custody and care of her infant daughter. The trial court, after hearing the evidence, dismissed her petition, and left the infant daughter in the custody of the defendant. The plaintiff has appealed.

From the pleadings and evidence it appears that these parties were married in June, 1912. They went to live at a hotel that was being managed by the defendant's mother, who was separated from her husband. There was an understanding between the parties at the time of their marriage that they would live a short time at this hotel and would then live in a home by themselves. There was more or less trouble between these parties from the time of their marriage and during all the time that they stayed at the hotel. They were young, and the plaintiff's father and mother and the mother of the defendant appear to have disagreed, and perhaps to have quarrelled and to have interfered too much with these young people. This may have been largely the cause of their trouble, and it is difficult to tell from the evidence who of these older people was more at fault and was most responsible for the trouble between this husband and wife. They lived at the hotel for nearly a year, and during that time the plaintiff was called upon to and

did perform services that she disliked to perform in connection with the running of the hotel, and at her solicitation they began housekeeping in a small house owned by the defendant in the same town. While they lived at this house the defendant was more or less interested in the hotel and spent a portion of his time in assisting there. When they had lived by themselves for three or four months their child was born in September, 1913. In October following they returned to the hotel, and in the following month the plaintiff's father took her to a hospital in Omaha. She remained there a little more than a month, and her husband brought her back to the hotel. A few days later the plaintiff returned to the home of her father and mother, and after recovering from her illness began this action.

The plaintiff testifies that her compulsory staying at the hotel and her treatment there was the cause of her illness. The defendant and his mother represent that the conduct of the plaintiff herself and of her parents was the cause of her trouble, and, as we have already suggested, it is difficult to tell from this evidence which party was the most at fault in causing the general conditions that existed. It, however, seems clear from the evidence of the plaintiff and the admissions of the defendant that these unfortunate conditions led the defendant and his mother to suppose that they were justifiable and were required to use force and violence against the plaintiff, which the law will not justify. The plaintiff alleges that, when the defendant took her from the hospital in Omaha, she was not able to travel, and that after he had taken her to the hotel of her mother-in-law he "slapped her because she refused to go out into the cold while she was ill and in a state of nervous collapse, and that the defendant cruelly compelled the plaintiff to go with him." In answer to this allegation, the defendant does not contend that the plaintiff was in good health at the time, or that she desired or was willing to go out of the house upon that occasion, but insists that the local physician and the doctor at Omaha advised it, and says: "The defendant insisted upon plaintiff's getting out on account of her health, and, while trying to get plaintiff properly dressed

so she might go out, the plaintiff bit the defendant and he warded her from injuring him." These physicians, on whose advice he relied, were not present at the time, and it does not appear that they advised him to force her to go out when she herself felt unable to do so. He concedes that he was trying to get her "properly dressed" against her will, and that in doing so he had to do what he did to prevent her from injuring him, and justifies this by saying that before that time she was "getting better under the efforts of the defendant." The defendant was evidently advised by his mother that the plaintiff needed such treatment, and under the influence of his mother he may have thought that it was in the interests of all parties concerned that he should so treat his wife. He should have disregarded such advice. The law does not require the plaintiff to submit to such treatment. It amounts to cruelty.

There are other circumstances of cruelty disclosed in this record. While the plaintiff was holding her infant girl, not yet a year old, in her arms, the defendant took the child from her by force and against her will. These and other acts of violence that are substantially conceded by the defendant justified the plaintiff in returning to her parents and amount to extreme cruelty. The plaintiff should have been granted a divorce.

The judgment of the district court is reversed and the cause remanded, with instructions to enter a decree of divorce from the bonds of matrimony in favor of the plaintiff, and giving her the custody and care of the infant child. The defendant should pay the costs of these proceedings and a reasonable attorney fee, and the trial court should determine the question of alimony and the support of the child. For this purpose the parties should be allowed to amend their pleadings and introduce further evidence if so advised.

REVERSED.

MORRISSEY, C. J. I dissent from the majority opinion because it does not seem to me to be a fair reflection of the evidence.

LETTON, J., concurs in this dissent.

EVA BELLE HAIGHT, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 1, 1917. No. 19973.

1. **Pleading.** A defendant may plead as many defenses as he has. Allegations of fact showing that the negligence of the plaintiff was the sole cause of her injuries would amount to a specific denial of the allegation that defendant's negligence was the proximate cause.

2. **Negligence:** BURDEN OF PROOF. In an action for damages caused by defendant's negligence, the burden is upon the plaintiff to prove negligence and that it was the proximate cause of her injury. So far as plaintiff's negligence is material, the burden is upon the defendant to make such proof.

3. ———: ———: INSTRUCTIONS. In such action, if defendant pleads in one count, as special denial, facts that are inconsistent with plaintiff's allegations of negligence, and also facts that would amount to negligence of plaintiff, defendant cannot complain of instructions that the burden of proving defendant's negligence is upon plaintiff, and of proving plaintiff's negligence is upon defendant, in the absence of a request for more specific instructions.

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

John L. Webster, for appellant.

Weaver & Giller, contra.

SEDGWICK, J.

Plaintiff recovered a judgment for $5,300 for personal injuries alleged to have been sustained by her by reason of the premature starting of a street car while plaintiff was alighting therefrom, and defendant appeals.

The first question presented is upon the instructions, as to the burden of proof in the peculiar condition of the pleadings and evidence.

Plaintiff in her petition in the district court alleged that she became a passenger on one of defendant's cars, and "that after she had boarded said car and gave the conductor

in charge thereof her transfer she requested him to stop said car at the intersection of Yates street with said Sherman avenue for the purpose of permitting her to alight; that when said car approached Yates street said conductor gave the usual and customary signal of one bell to stop the car and said car was thereupon brought to a standstill at about said intersection; that when said car had been brought to a standstill as aforesaid plaintiff passed out the door onto the rear platform for the purpose of alighting from said car; that while in the act of so alighting therefrom, and before plaintiff had a reasonable and sufficient time so to do, and without giving her the necessary and usual time for that purpose, said conductor in charge and control of said car negligently and carelessly, and without any regard whatever for the safety of life and limb of this plaintiff, gave the usual and customary signal to go ahead, to wit, two bells, whereupon said car was suddenly and immediately started forward by defendant, its agents and employees, and plaintiff was thereby jerked, thrown, and dragged down from said car to and upon the pavement."

The defendant's answer denies: "That the car on which the plaintiff was riding started forward while the plaintiff was in the act of alighting therefrom, and denies that the conductor in charge of said car gave any signal for the said car to start forward while the plaintiff was in the act of alighting therefrom, and denies that the said plaintiff was jerked or thrown from the said car, and denies that the defendant, its agents and employees were guilty of any negligence whatever. The defendant for further answer avers the facts to be as follows: That the plaintiff was riding on a car south-bound on Sherman avenue; that the said car was brought to a stop at the regular stopping place at the west side of the intersection of Sherman avenue with Yates street for the purpose of permitting whatever passengers, if any, who desired so to do, to board or alight from the said car; that the said car remained standing at the regular stopping place for a reasonable length of time to permit all passengers, who so desired, to alight from said car; that the

plaintiff herein sat in her seat without manifesting any indication or making any sign that she desired to alight from the said car at the said street intersection; that after the said car had so remained standing at the said street intersection and after it was evident to the conductor in charge of said car that no other persons desired to alight from or board the said car at the said street intersection, the said conductor thereupon signaled the motorman to start the said car; that after the said car had been started forward the plaintiff herein arose from her seat and rushed to the rear platform of the said car and indicated to the conductor that she desired to alight from the said car at Yates street; that, thereupon, the said conductor signaled the motorman to again stop the said car for the purpose of permitting the plaintiff to alight therefrom." The defendant further "avers that whatever injuries, if any, the plaintiff received were the result of her own negligence in alighting from a moving car as hereinbefore more specifically pleaded." The plaintiff for reply denied seriatim the several affirmative allegations of the answer, and denied "that she was guilty of any negligence whatever at the time she was attempting to alight from said car."

A defendant may plead as many defenses as it has. This is by express provision of the statute. Allegations of fact showing that the negligence of the plaintiff was the sole cause of her injuries would amount to a specific denial of the allegation that defendant's negligence was the proximate cause. Such allegations might also amount to a plea that the negligence of the plaintiff contributed to the cause of her injuries, and admit proof of such contributory negligence. It does not seem in the case at bar that the defendant really attempted to plead contributory negligence in a technical sense. The attempt was to plead facts entirely inconsistent with the plaintiff's claim; that is, inconsistent with the idea that the car had stopped and was suddenly started while the plaintiff was trying to get off. The gist of the negligence charged against the defendant is that they suddenly started the car, and the plaintiff ought not to be allowed to recover unless that was the fact, and that is-

sue should have been so submitted to the jury. The burden of proof is upon the plaintiff to show that she attempted to alight from the car while it was standing, and that the defendant started it suddenly while she was doing so, which was the cause of her injury, and the burden to make this proof is upon the plaintiff. Unless she proves this by a preponderance of the evidence we should find for the defendant. That was all the burden of proof that was upon the plaintiff.

In pleading the special denial that the plaintiff was not attempting to leave the car while it was standing still, and that the accident was not caused by the defendant suddenly starting the car while she was alighting, it was not necessary to allege that she negligently did what she did. The denial of the plaintiff's cause of action would be just as effective without the word "negligent" or "negligently." So far as the negligence of the plaintiff was material in this case, the burden of course was upon the defendant to prove such negligence. To illustrate: Suppose that the evidence should turn out to be that the plaintiff was about to get off the car while it was standing still, and that the defendant suddenly started the car before she had alighted, but the plaintiff, knowing that the car was in motion, negligently stepped off the car and so contributed to her injury, then the evidence would show negligence on the part of the defendant in starting the car just as the plaintiff was about to alight, and contributory negligence on the part of the plaintiff in voluntarily getting off the car while it was in motion. In such case, that she did so voluntarily get off while the car was in motion would be for the defendant to prove, and the burden of this proof would rest upon the defendant throughout the trial. Apparently it is to hedge against such a situation that the defendant in such cases insists upon alleging, not only that the accident happened in a different way and at a different place from what the plaintiff alleges, but also that the plaintiff negligently got off the car while it was in motion. If the fact was that she negligently stepped off the car while it was in

motion, then she could not recover, even though the defendant had negligently started the car just as she was about to alight from it. And this is the reason that the defendant charges her conduct to be negligent. It does not seem to be a fair way to plead, and yet no other way is suggested that the defendant could consistently plead so as to avail itself of any situation that the evidence might develop. Such pleading is not to be commended. If the defendant relied upon these allegations as a defense, they might reasonably be presented to the jury in the opening statement of counsel, but can be of no use in the answer, unless the evidence should disclose a situation, as alleged by plaintiff, showing negligence of defendant, and it might become necessary to rely upon contributory negligence as a defense.

If, after the evidence was submitted, the defendant desired to have the case submitted by the instructions upon the theory that, if the jury found the defendant negligent as alleged, they should further consider whether the plaintiff was not also guilty of contributory negligence, the defendant should have offered instructions pertinent to such a theory. No such instructions were offered. The defendant's manner of pleading tends to confuse the issue, and to mislead the plaintiff and the court. After stating the issues at length as presented by the parties, the court said: "If the evidence as to the manner in which the accident occurred preponderates in favor of defendant, or is equally balanced as between plaintiff and defendant, then your verdict should be for defendant." The court then stated that part of defendant's answer which might be construed as pleading contributory negligence, and said: "The defendant has alleged in its answer that her injuries were caused by her own negligence. The burden of proof is on the defendant to prove this allegation by a preponderance of the testimony. Now, if, after a fair and full consideration of all the testimony, you find that defendant has so proved plaintiff's negligence, then your verdict should be for the defendant." The defendant cannot complain of these instructions. The defendant presented seven requests for instructions. The most of these were incorporated in the in-

structions given by the court. They related entirely to the general and special denials of the answer. If given, they would have had no effect but to repeat and emphasize the instruction given by the court: "If the evidence as to the manner in which the accident occurred preponderates in favor of defendant, or is equally balanced as between plaintiff and defendant, then your verdict should be for defendant." There was no attempt to assist the court in presenting the supposed defense of contributory negligence, and defendant ought not to complain of any incomplete presentation of that issue to the jury.

The plaintiff testified fully as to how the accident occurred. She was not supported by any other witness. The defendant quotes the evidence of seven witnesses, some of whom appear to be disinterested. The court instructed the jury: "By a preponderance of the evidence is meant not necessarily the greater number of witnesses, but that amount of evidence which on the whole produces the stronger impression upon the minds of the jury, and convinces you of its truth when weighed against the evidence in opposition thereto." The defendant insists that "the unsupported evidence of the plaintiff is not sufficient to sustain this verdict and judgment in view of the large number of witnesses who impeach the plaintiff on every statement made by her as to the manner in which the accident occurred;" and that "the court should have said to the jury that, where the witnesses had an equal opportunity of seeing and knowing that about which they testified, and are of apparent credibility, then the number of witnesses should be considered, if not controlling." No such instruction was requested by defendant. The writer would hesitate to find that this verdict is sufficiently supported; but a majority of the court are of opinion that the plaintiff's evidence was so direct and consistent that reasonable minds might differ as to its accuracy, and that the court cannot say that the verdict of the jury is clearly wrong.

The judgment of the district court is therefore

AFFIRMED.

LETTON and CORNISH, JJ., not participating.

HAMER, J., concurring in part and dissenting in part.

I concur in the argument contained in the opinion and in the statements contained in paragraphs 1 and 2 of the syllabus. While I think both are to be commended for their clearness of language and their aptness of expression, I am wholly unable to agree with the majority opinion that the judgment should be affirmed. I think the evidence is insufficient to sustain the verdict and judgment of the district court, and for that reason I dissent from the majority opinion, and agree with the personal opinion of its writer that he would "hesitate to find that this verdict is sufficiently supported."

If the burden of proof is upon the plaintiff to establish the allegations in her petition, then when the proof is all in, if the allegations in the petition are not established, it is the duty of the jury to find for the defendant, and it is their duty to do so in any event and without considering any other question. The instruction complained of requires the evidence to preponderate in favor of the defendant or to be equally balanced before there can be a verdict for the defendant. I am opposed to the instruction. I believe it to be wrong. I think the case should be reversed. I think that the jury should have been told in substance that, if upon the whole evidence they were unable to say that the plaintiff's case was established by a preponderance of such evidence, then they should find for the defendant.

LEMUEL JONES V. STATE OF NEBRASKA.

FILED DECEMBER 1, 1917. No. 19734.

1. **Larceny:** SUFFICIENCY OF EVIDENCE. Evidence examined, its substance stated in the opinion, and found insufficient to sustain a conviction of the crime of stealing a gelding as charged in the information.
2. ———: FELONIOUS INTENT. To constitute the crime of stealing, there must have existed a felonious intent in the mind of the accused at the time of the taking.

ERROR to the district court for Grant county: JAMES N. PAUL, JUDGE. *Reversed and dismissed.*

P. R. Halligan and *Wilcox & Halligan,* for plaintiff in error.

Willis E. Reed, Attorney General, contra.

HAMER, J.

The plaintiff in error, Lemuel Jones, hereinafter called the defendant, was informed against in the district court for Grant county, on the 12th day of May, 1916, and was charged with stealing a gelding in said county on the 26th day of September, 1915, the personal property of one Emery Preston, and of the value of $85. There was a verdict of guilty, and judgment on the verdict, which sentenced the defendant to be imprisoned in the penitentiary at hard labor for not less than one year or more than ten.

It is conceded by the prosecution that the defendant took the horse under an alleged claim of right, but it is denied that he had such right, and, in an ingenious argument, counsel for the state strenuously endeavor to show that the conduct of the defendant was at least questionable and deficient in explanation.

It is immaterial whether the claim of the defendant to the possession of the horse was well founded, as he might think that the horse was his under the arrangement which he claims to have made with Preston, the main witness for the state, and which arrangement is supported by other testimony. The defendant may have had a right to take the horse, even though the jury might justly reach a different conclusion upon the evidence. In the case tried they were not trying title to the horse. They were trying to ascertain whether the defendant was guilty of the charge made against him. There can be no theft without a felonious intent upon the part of the person charged, and whether there was such intent was the sole question to be determined. The question of the defendant's guilt should not be made to depend upon whether he actually owned the horse and was entitled to its possession. The defendant

cannot be found guilty upon the theory that his title has failed.

It is claimed on behalf of the defendant that the evidence fails to support the verdict, and that the question of the defendant's felonious intent was properly submitted to the jury.

The jury were probably uncertain concerning the guilt of the accused, because they recommended a "light sentence." The jury are not very likely to do that sort of thing in a county where the chief business is to raise cattle and horses, and where every one perhaps feels the necessity of the protection of such property by severity of punishment. The evidence shows that the defendant needed to raise money to assist his sister in defraying the expenses of their mother's last illness and of her funeral. He went to a neighbor named Goslin, and the two consulted together as to what was best to be done. Goslin had a horse which he was willing to sell. He authorized the defendant to sell his (Goslin's) horse for $95, or he was willing to accept the defendant's horse in exchange for his horse, provided the defendant succeeded in selling Goslin's horse and failed to sell his own. Goslin seemed willing to do anything reasonable to help his neighbor out. Goslin turned his horse over to the defendant, and the defendant took the two horses down to Hyannis to meet the horse dealer there, whose name was Preston. Of course, if the defendant had sold his own horse to Preston he could have returned Goslin's horse to Goslin, or if he had sold Goslin's horse to Preston he could then have taken his own horse back and delivered it to Goslin. In any event the money which he was to receive, whether for his own horse or for Goslin's, would be his to use, and there would be no entangling or embarrassing circumstances connected with the transaction. It would then have been a clean deal. Preston insisted on buying both horses, and he put the price at $150 for the two. Preston knew that one of the horses did not belong to the defendant. He testified that Jones so told him, and that Jones "said the man (Goslin) sent him in and he had

a right to sell him." Preston was willing to buy the horses at once, although it was then late in the evening, and he did so, giving his check to Jones for $150. Preston testified that he bought the two horses in the livery barn, and that the defendant said to him that "if I would buy them that night it would be a great accommodation;" that George Galliard "held a lantern and I looked them over." The check given in payment for the horses appears to have been written by the light of a lantern. Preston testified: "George held the lantern while I gave the check." Then Preston took the horses over to his barn, so he testified. Jones testified that he told Preston that he could let him have the brown horse for a lower price than he could sell him the bay; that the brown horse belonged to him and the bay belonged to Mr. Goslin; that Goslin wanted so much, and he had brought the horse in, and "the arrangement was I could take him back or take mine and make myself square with Goslin." Also, he told Preston that Goslin had to have $95. The defendant testified that Preston told him to bring in the horses, "and he asked my price, and I told him, and then he started to jew me down, and I told him the arrangement was that I could take $75 for either horse, and I could take his horse back, and I couldn't sell both horses, and I told him that time and time again, and he kept railing at me and railing at me, and finally I said I was going home if he didn't take them, and he wanted me to take a check, and I finally took his check." Jones appears to have been dissatisfied with the deal which he had made with Preston, and the next morning he went to see him. "Q. Did you have another conversation with him the next morning? A. Yes, sir; and he knew then he had swindled me on the horses, and he said then that $75 was all that the Goslin horse was worth, and if Goslin was any man he would be satisfied. Q. Tell me what you said to him the next morning. A. I said I would give him $80 for either one of them back, I was afraid Goslin wouldn't be satisfied, and he said if the horses was there I could have them, and he said they was out at the Rangers Station, and if the old man was there I could leave the

money with him and take the horse." Will Dent testified that he saw Jones talking with Preston; that he heard part of the conversation: "Mr. Jones wanted a horse of Preston that Preston had bought of him, and he offered some price, and Mr. Preston said the horse wasn't here, but it was out at the Rangers Station, and he told him if it was here he could get it, and he said it was out at the Rangers Station, and he could get it there and leave the money with the man out there." The defendant testified that the Rangers Station was on his way home. He appears to have gone to the house at the Rangers Station as he went home, and he went out in the pasture and caught his horse and brought him back to the wagon and fed him, and then hitched him up and took him home. He took the horse in the presence of others. He testified that he intended to go to the post office the next morning and register the money back. He appears to have stayed at Jackson's that night, and it was late when they got there, and it was 8 o'clock in the morning before anybody woke up; that he didn't have any saddle to ride, and he knew the mail would be gone before he could get it there; that he was going to send the money from the Eddie post office.

When he got back he seems to have gone to see Goslin. He told Goslin he had brought his (Jones') horse back. Preston went to see Jones. Jones describes his interview with Preston as follows: "He said, 'Good morning,' and I said, 'Good morning,' and he said he came for the brown horse, and I said he couldn't have him unless he settled with Mr. Goslin, and I said, 'Here is your money,' and he said, 'I bought that horse and I am going to have him.'" Preston then seems to have called for White, and he told White that Jones had lied about the horse, and that Jones did not intend to turn him over unless Goslin said so. "He said all he wanted was to have a witness that I wouldn't turn him over. Q. Did you offer him the money again? A. Yes, sir; after they got in the automobile and started the engine, but had not started the wheels, I said 'Here is your money.'"

Jones then testifies that the transaction was on the night of the 24th, the same night as Home Day, and that he saw Preston the next morning and told him that he wanted one of the horses back, and that Preston told him that he could have one of them, and said that if the horse was there he could have it, but that the horses were not there; that they were at the Rangers Station, and "he said I could get the horse and leave the money with the old man. * * * I told him I would give him $80 for one of them. Q. Did you say which one? A. No, sir. * * * Q. And when you took a horse out of the pasture to replace Goslin's horse you took your horse? A. Yes, sir. Q. You were making the selection of the horse you was to take? A. The only one Preston would make an offer on singly was Goslin's horse, and I supposed that was the one he wanted." He testified also that he got the check cashed on the 25th. "Q. Did you have the money when you talked about paying him $80? A. I think I did." He testified he looked for the old man out at the place, and that the old man said he would be there; that he saw the old man as he went out, but that the old man was not there when he got there. He explained that he did not leave any word with anybody at the place because there was nobody there. Jones appears to have been ashamed of the transaction. He testified: "Q. You sort of evaded the answer; you didn't tell them that you had sold these horses, but that you were taking one back? A. No, I was ashamed of my deal, I had been skinned too bad. * * * Q. How much money did you offer him back? How much did you tender him? A. Just the amount of the Goslin horse. Q. How much was that? A. $75." Goslin testified to the arrangement made between himself and the defendant Jones, and that, when Preston came and met Jones and said that he came after the horse, Jones said: "The horse is Goslin's and you can settle with him. * * * He had a roll of bills, and he said, 'Here is your money.'" The testimony of the defendant concerning the arrangement to go out and get the horse does not seem to be clearly denied, and Preston admits there was talk about taking one of the horses back. While

he did not find the old man at the house, and so did not give him the money, he took the horse in the presence of one Jackson, and there was no concealment of the taking.

Instruction No. 7 reads as follows: "You are instructed that in this case, in order to convict the defendant of the crime charged in the information, you must find from the evidence, beyond a reasonable doubt, that at the time of taking said gelding defendant then and there intended to deprive the owner of said property permanently and to convert it to his own use and benefit." This instruction omits the necessity of finding a felonious intent in order to justify a verdict of guilty, and it authorizes the jury to find the defendant guilty without proof of such intent. *Dobson v. State,* 61Neb. 584; *Wallace v. State,* 91 Neb. 158; *Mead v. State,* 25 Neb. 444. In *Dobson v. State, supra,* the court instructed the jury, in substance, that if Dobson took the calf into his possession and sold and delivered the same to Jerry Kelly, with the intention then and there to convert said calf to his own use, and to permanently deprive the owner thereof of said property, then you are instructed that such action would constitute a larceny of said calf. In the syllabus it was said: "An instruction whereby the whole case is attempted to be covered, but which omits an essential element, is erroneous, and is not cured by another instruction which covers the point." In *Mead v. State, supra,* the instruction said nothing about felonious intent, but did say: "With the intent to permanently deprive the owner thereof of his property."

When the defendant took the horse he is shown by the evidence to have believed that Preston had authorized him to do so. In that event he could not have had any felonious intent. *Mead v. State,* 25 Neb. 444; *Wallace v. State,* 91 Neb. 158; *Bartels v. State,* 91 Neb. 575.

We have carefully examined instructions Nos. 5 and 8, and the argument of counsel for the state concerning them. No. 5 makes the guilt to depend upon the "intent of permanently converting it (the property) to a use other than that of the owner." No. 8 devotes five typewritten lines to "asportation or carrying away," and says that the tak-

ing of an article is feloniously accomplished by holding, grasping, seizing, or taking possession of it, but nothing is said in that part or in the latter part as to what sort of purpose constitutes a felonious intent, and the jury are not instructed concerning the subject.

Preston, in the presence of Dent, seems to have told Jones that he (Jones) could go out to Rangers Station and take one of the horses, leaving the money with the old man in charge. Jones and Dent so testified, and even Preston admits there was talk about Jones taking back one of the horses. Jones caught one of the horses and took it in the presence of Jackson. While he did not leave the money, as he alleges because there was no one there to receive it, he has since been trying to pay it to Preston, who refuses to accept it. When Preston went to Jones' house the horse was there, and Jones and his brother promptly said so. Jones did not try to run the horse out of the country, nor is it shown that he tried to sell it, or otherwise dispose of it. Neither did he slink away or try to conceal himself, and when Preston talked of arresting him, and charged him with being a thief and became somewhat obtrusive, Jones met him more than half way, and Preston appears to have thought he was compelled to defend himself by the use of a board which he held up in front of him as a guard against Jones' threatened attack. Because of the giving of the above instruction, and because the evidence wholly fails to establish a felonious intent on the part of the defendant, the judgment of the district court is reversed and the case dismissed.

REVERSED AND DISMISSED.

SEDGWICK, J., not sitting.

CHARLES MEYERS, APPELLEE, v. GERMAN FIRE INSURANCE COMPANY ET AL., APPELLANTS.

FILED DECEMBER 1, 1917. No. 19634.

1. Insurance: ADDITIONAL INSURANCE. The rule that the taking of additional insurance on property insured, without the consent of the company, renders the policy void is not obviated by the fact that the original insurance is on a class of property, rather than any particular property.
2. ———: UNEARNED PREMIUM. "When an insurer has elected to treat a policy of insurance as void for breach of condition providing for a forfeiture, the assured has no claim upon the company for any unearned premium." *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488.
3. ———: POLICY: CONSTRUCTION. What is known as the "*pro rata* clause" in a policy of insurance, providing that concurrent insurers of the property shall share the loss, if any, applies only in case the defendant's policy is valid, and does not constitute a waiver of a provision for forfeiture in case of additional insurance being taken without the consent of the company.

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

Stout, Rose & Wells and *E. P. Clements*, for appellants.

E. J. Babcock and *A. Norman, contra.*

CORNISH, J.

Defendant appeals from a judgment in suit on a fire insurance policy.

It appears that, without the knowledge or consent of defendant, plaintiff violated the forfeiture provision against additional insurance. In the absence of waiver, this rendered the policy void or voidable at the instance of the insurance company. *Hughes v. Insurance Co. of North America*, 40 Neb. 626; *Home Fire Ins. Co. v. Wood*, 50 Neb. 381; *Slobodisky v. Phœnix Ins. Co.*, 52 Neb. 395; *Nebraska Mercantile Mutual Ins. Co. v. Sasek*, 64 Neb. 17.

It is argued that if the facts of the case do not bring it within the reason and purpose of the rule—the mischief intended to be met by it—the rule does not apply. This is true. It is said that there could be no such thing as over-insurance in this case because no particular property was insured. Being blanket insurance on horses, cattle, hay, etc., of which the insured might have much or little at the time of the fire, the recovery being limited to actual value regardless of the amount of insurance, it is thought additional insurance could not profit the insured, but rather the insurer because of its right to prorate.

Let us consider this argument. The courts have always held that, regardless of the amount, number, or kind of policies, or even of the insertion of this provision, the contract being one of indemnity only, the total recovery is limited to actual loss. *German Ins. Co. v. Heiduk & Skibowski*, 30 Neb. 288; 19 Cyc. 892.

Why is the provision against over-insurance considered material to the risk and enforceable? Is it not because additional insurance increases the moral hazard? The more insurance, the less care to protect and save the property, and, as stated in *Hughes v. Insurance Co. of North America, supra*: "It is designed as a check upon the disposition of the evil-minded to over-insure their property and destroy it." In this case plaintiff was also proceeding against the other company. This increased risk applies to one kind of insurance about the same as to another.

The argument proves too much. Why take additional insurance unless with the expectation of either collecting on both policies or relinquishing the first one? If we could assume that the plaintiff and others over-insuring in this case would know that they could not profit by it, either lawfully or by unlawful means, then the argument would be good. This cannot be assumed as a fact. The provision being material to the risk, good faith or mistake in a particular case could make no difference. 19 Cyc. 767.

The fact that some investigation of loss was made by the defendant is not evidence of waiver. At least this is true when considered in connection with the non-waiver agree-

ment introduced in evidence by plaintiff. *Schmidt v. Williamsburgh City Fire Ins. Co.*, 95 Neb. 43.

The failure of the insurance company to return the consideration of the policy before standing upon its terms does not constitute a waiver. The company does not fail in its promise by insisting on the conditions of its policy: "Not having broken its contract, it has a right to retain the consideration." *Schmidt v. Williamsburgh City Fire Ins. Co., supra* (p. 51). See, also, *Farmers Mutual Ins. Co. v. Home Fire Ins. Co.*, 54 Neb. 740; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488; *Farmers Mutual Ins. Co. v. Phœnix Ins. Co.*, 65 Neb. 14.

The "*pro rata* clause" in the policy, providing that concurrent insurers of the property shall share the loss, if any, applies only in case the defendant's policies are valid. It applies where the provision against additional insurance has been complied with by making a written indorsement on the policy consenting to such additional insurance, or where the breach of the provision has been waived. It does not constitute a waiver.

An examination of the evidence does not show that the defendant at any time waived the forfeiture provision of the policy. On the contrary, after learning of the forfeiture it at all times treated the policy as not in force.

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

REVERSED.

ROSE and SEDGWICK, JJ., not sitting.

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12. If the motion for a new trial does not challenge the attention of the trial court to the inadequacy of the verdict, the point will not be considered on appeal. *Fairchild v. Wilson* 608
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3. Compliance with the statute is requisite to an attorney's lien. *Vanderlip v. Barnes* 573

Bankruptcy.

A preferred creditor is chargeable with notice of facts which a reasonable inquiry might be expected to disclose, though it is not necessary under the bankrupt act that the creditor should know or believe that the debtor was insolvent. *Walter v. National Fire Ins. Co.* 639

Banks and Banking. See MANDAMUS.

1. In an action by the receiver of an insolvent national bank to collect a stock assessment, the value of property delivered by a stockholder to the receiver to be credited on any subsequent assessment may be set off, where the receiver refused to return it and has turned it into the bank's assets. *Cole v. Adams* 21
2. Where one in good faith places money on interest in a state bank subject to check, it is a deposit, and is a charge against depositors' guaranty fund. *Central State Bank v. Farmers State Bank* 210

Banks and Banking—*Concluded.*

3. A "depositor" is one who delivers to or leaves with a bank money subject to his order, either upon time deposit or subject to check. *Farrens v. Farmers State Bank* 285
4. A director of a state bank, as to his deposit, is in the same position as any other depositor. *Farrens v. Farmers State Bank* 285
5. Money placed in a state bank as a purported deposit, with understanding that the bank will pay a bonus thereon above the lawful rate of interest, *held* not to be a deposit within the bank depositors' guaranty act, but a mere loan. *Iams v. Farmers State Bank* 778
6. Where a state bank fails and a receiver is appointed, certificates of deposit in fact representing a loan cannot be paid out of the depositors' guaranty fund. *Iams v. Farmers State Bank* 778
7. Change in corporate name of a bank in no way affects the nature of transactions therewith. *Iams v. Farmers State Bank* 778

Bastardy.

Evidence of unchastity, outside the period of gestation, *held* irrelevant. *Bailey v. Hurtt* 823

Bills and Notes. See PLEADING, 5, 6.

1. Under sec. 5354, Rev. St. 1913, an indorsement, "Pay to any bank or banker. All previous indorsement guaranteed"—is not a restrictive indorsement. *National Bank of Commerce v. Bossemeyer,* 96
2. Where one deposited a sight draft with bill of lading attached, and it was indorsed generally and sent to a correspondent bank, which gave credit to the remitting bank, without knowledge of its custom to give the depositor credit on his checking account, *held* that the receiving bank was a holder for value in due course and entitled to recover from the drawer. *National Bank of Commerce v. Bossemeyer* .. 96
3. If plaintiff has no interest in a note sued upon except as collateral security for a note held by him, he cannot recover on the collateral if the principal note is invalid. *Omaha Loan & Building Ass'n v. Cocke* 750
4. In an action on notes and a mortgage, evidence *held* to sustain finding that notes were obtained by false representations. *Greiner v. Lincoln* 771

Bonds. See COUNTIES AND COUNTY OFFICERS, 1, 2.

Carriers. See EVIDENCE, 4.

1. Under sec. 6162, Rev. St. 1913, the duty to promptly deliver cars is not ended when they are placed on a "hold track"

Carriers—*Concluded.*

to await orders, but time allowed for delivery is only suspended while cars are so held. *Sunderland Bros. Co. v. Missouri P. R. Co.* 119

2. Both shipper and carrier must comply with published tariff rates and regulations, and erroneous statements of the carrier or its construction of the regulations as to refunds in other cases are immaterial. *Fremont Milling Co. v. Chicago & N. W. R. Co.* 362
3. A milling in transit rate is an entirety, and must be accepted and carried out in its entirety or not at all. *Fremont Milling Co. v. Chicago & N. W. R. Co.* 362
4. A shipper cannot sue in Nebraska for unused transit credit on shipments from points in Nebraska to points outside and to one point in Nebraska, where parts of each car were forwarded indiscriminately to points of destination, and where milling in transit privileges have not been complied with. *Fremont Milling Co. v. Chicago & N. W. R. Co.* 362
5. Under bill of lading requiring notice of claim for "damages for loss of or injury to" live stock, notice is not required where the claim is for damages for loss of a favorable market, shrinkage, and expense caused by delay in transportation. *McElwain v. Union P. R. Co.* 484
6. Where there is proof of unreasonable delay in shipment of live stock, the burden is on carrier to prove that delay was not caused by its negligence, though owner accompanied the shipment. *McElwain v. Union P. R. Co.* 484
7. A corporation organized under the general railroad statutes, with authority to construct and operate a railway between two cities for performing all the duties of a common carrier, is a "railroad company," within sec. 6052, Rev. St. 1913, regulating the liability of such companies for injuries to passengers. *Webb v. Omaha & S. I. R. Co.* 596
8. In an action for damages for loss of shipment, evidence *held* not to sustain finding for plaintiff. *Meyer v. Chicago & N. W. R. Co.* 756
9. In an action for damages caused by carrier's negligence, the burden is on plaintiff to prove negligence, and that it was the proximate cause of her injury; but, as to plaintiff's negligence, the burden is on defendant. *Haight v. Omaha & C. B. Street R. Co.* 841

Commerce.

The reciprocal demurrage act (Rev. St. 1913, secs. 6159-6167), as applied to commerce within the state, is not unconstitutional. *Sunderland Bros. Co. v. Missouri P. R. Co.* 119

Common Law.

Under sec. 3697, Rev. St. 1913, any provision of the common law of England inconsistent with any law passed by the legislature is not the law of this state. *Moran v. Moran* 386

Constitutional Law. See COMMERCE. MUNICIPAL CORPORATIONS, 4.

1. Sec. 7732, Rev. St. 1913, as amended by ch. 145, Laws 1915, requiring plaintiff to be a *bona fide* resident for six months preceding filing of petition in attachment, is not violative of sec. 2, art. IV of the federal Constitution providing that citizens of each state shall have the privileges and immunities of citizens of the several states. *Tanner v. DeVinney* .. 46
2. Advisability of conferring upon a city power to levy a tax for corporate purposes is a question of public policy for the legislature. *Sinclair v. City of Lincoln* 163
3. Tax by city of Lincoln for university campus extension being levied for a corporate purpose, secs. 1, 4, art. IX, state Const., and amendment 14, Const. U. S., have no application. *Sinclair v. City of Lincoln* 163
4. An ordinance defining garbage and prohibiting its removal by any one not employed by the city *held* not unconstitutional. *Urbach v. City of Omaha* 314
5. Parties whose constitutional rights are not affected will not ordinarily be permitted to challenge the constitutionality of a law. *Urbach v. City of Omaha* 314

Continuance.

1. Ordinarily a party who fails to issue a subpœna for a witness and relies upon his promise to appear has not exercised such diligence as requires a continuance if the witness fails to appear. *Jackson v. Omaha & C. B. Street R. Co.* 456
2. Nonattendance of witnesses subpœnaed by plaintiff is not ground for a continuance at request of defendant who relied upon plaintiff's efforts to procure their attendance. *Jackson v. Omaha & C. B. Street R. Co.* 456

Contracts. See HUSBAND AND WIFE, 1.

1. Where the terms of a contract are ambiguous, the interpretation placed thereon by the parties is conclusive as to their respective rights. *Katz-Craig Contracting Co. v. City of Cozad.* 189
2. An agreement entered into without consideration is unenforceable. *Western Brick & Supply Co. v. Mid-West Construction Co.* 254

Corporations. See CREDITORS' SUIT.

Costs.

1. After acceptance of amount of the judgment and costs, it is too late to ask for attorney fees. *Lawler v. American Surety Co.* 741
2. A motion to retax costs is unnecessary to review a judgment awarding an attorney fee in an action on an insurance policy. *Bruner Co. v. Fidelity & Casualty Co.* 825

Counties and County Officers.

1. A county board in letting contract for construction of county building must take a bond of the contractor, conditional as required by sec. 3840, Rev. St. 1913. *Concrete Steel Co. v. Rowles Co.* 400
2. A contractor for construction of a public building, who purchased material from a dealer and paid therefor in good faith, without notice of liability of dealer, is not liable on his bond, given under sec. 3840, Rev. St. 1913, to the manufacturer from whom the dealer purchased such material. *Concrete Steel Co. v. Rowles Co.* 400
3. Under sec. 1955, Rev. St. 1913, fixing terms of county commissioners, two commissioners should be elected in 1916, if terms of two have expired or will expire in the succeeding January. *State v. Smith* 805
4. In a county having three commissioner districts, where the full term for which one commissioner was elected would expire January, 1917, his successor should have been elected in 1916, if two commissioners elected in 1914 were holding office. *Cavey v. Reigle* 807
5. In counties having three commissioner districts, sec. 1955, Rev. St. 1913, fixes terms of four years from January, 1915, for two commissioners, and four years from January, 1917, for one commissioner, and succeeding terms will be for four years. *Cavey v. Reigle* 807

Courts. See DESCENT AND DISTRIBUTION, 2, 4. JUDGMENT, 6.

Creditors' Suit.

Stockholders who appropriated the proceeds of all property of an insolvent corporation *held* accountable to the corporation's creditors. *Lingle v. Farmers Mutual Telephone Co.* . . . 753

Criminal Law. See ADULTERY. BASTARDY. HOMICIDE. INDICTMENT AND INFORMATION. LARCENY. RAPE.

1. An extrajudicial confession is not of itself sufficient evidence to establish *corpus delicti*. *Cryderman v. State* 85

Criminal Law—*Continued.*

2. If the evidence other than the extrajudicial confession of accused establishes the killing of a human being by violence not self-inflicted, the *corpus delicti* is proved. *Cryderman v. State* 85
3. It is only when the same matter is in issue that the accused is twice put in jeopardy for the same offense. *Koenigstein v. State* 229
4. Under the general allegation of an indictment that the accused received a bribe from a keeper of a disorderly house, it may be shown that he had a system requiring all disorderly houses to pay him money to prevent prosecution. *Koenigstein v. State* 229
5. On a trial for receiving a bribe from a keeper of a disorderly house, *held* that evidence of receipt of a bribe from the keeper of another such house is admissible to show a general system under which the bribe was received; but that accused should have been permitted to show in rebuttal his acquittal on a trial for that offense. *Koenigstein v. State*.... 229
6. The jury must determine the issues submitted solely upon the evidence admitted in open court on the trial. *Koenigstein v. State* 229
7. Where a juror assumes to state facts not in evidence and which might influence the verdict, such misconduct will require a new trial. *Koenigstein v. State* 229
8. In a prosecution for unlawfully receiving property with felonious intent, evidence *held* insufficient to sustain a conviction. *Hodge v. State* 419
9. Where the jury panel in a felony case was exhausted and the court, under sec. 8143, Rev. St. 1913, directed that jurors be summoned from "bystanders," and no objection to the order nor to a juror so drawn was made until after verdict, the giving of the direction was error without prejudice. *Jordan v. State* 430
10. When the sheriff is a witness for the state, it is not ordinarily error for the court to refuse to exclude him from the courtroom during examination of other witnesses. *Jordan v. State* 430
11. Where it appears that questions to a witness and his answers thereto were not prejudicial to accused, error in asking leading questions will not require a reversal. *Jordan v. State,* 430
12. Argument of county attorney *held* not so prejudicial as to require a reversal. *Jordan v. State,* 430
13. Evidence *held* to sustain conviction of murder in first degree. *Jordan v. State* 430

Criminal Law—*Continued.*

14. Attorney appointed to assist county attorney *held* not disqualified under sec. 5601, Rev. St. 1913. *Jordan v. State* .. 430
15. Order permitting accused to interview state's witnesses, leaving it optional with them whether they should submit to such an interview, *held* to fully protect accused in his rights. *Jordan v. State* 430
16. A statement of facts will not be considered as a confession of guilt, unless it is first shown to have been voluntarily made. *Cheney v. State* 461
17. Where transcript of record in justice court shows that accused waived preliminary examination, and it is claimed there was no such examination, the question should be raised by plea in abatement. *Gammel v. State* 532
18. Adultery may be established by circumstantial evidence. *Reinhardt v. State* 667
19. Verdict will not be set aside for want of evidence, unless it is clearly insufficient. *Reinhardt v. State*..... 667
20. Counsel must make his objections specific, and, unless prejudicially erroneous on the point presented, admission of evidence will not be held prejudicially erroneous for reasons not suggested at the trial. *Havlicek v. State* .....?..... 782
21. Question of failure to give a preliminary hearing is not raised by a special appearance objecting to jurisdiction. *Havlicek v. State* 782
22. In a prosecution for wife abandonment, evidence that after abandonment accused procured a divorce is admissible. *Havlicek v. State* 782
23. To sustain a conviction under sec. 8614, Rev. St. 1913, for wife abandonment, the state must prove that accused has available means for her support, or earning capacity, and that he refused, without good cause, to provide for her. *Havlicek v. State* 782
24. In a prosecution for wife abandonment, where it is shown that prior to his departure accused had steady employment at remunerative wages, the state is not required to prove that he had means after his departure. *Havlicek v. State* 782
25. In a prosecution for wife abandonment, the husband's lack of means, or failure to secure employment, is matter of defense. *Havlicek v. State* 782
26. Instructions which give the impression that conviction of accused is of more importance than the acquittal of the innocent are erroneous. *Koenigstein v. State* 229
27. It is not error to refuse a requested instruction as to matter covered by an instruction given. *Samuels v. State* 383

Criminal Law—*Concluded.*

28. Where the charge, considered as a whole, correctly states the law, the verdict will not be reversed merely because a single instruction, when considered separately, is incomplete. *Samuels v. State* 383
29. Instruction as to reasonable doubt *held* prejudicial. *Hodge v. State* 419
30. Cautionary instruction as to testimony of officers *held* free from error of which accused might complain. *Jordan v. State,* 430
31. On a trial for rape upon a female under 15, where the evidence as to her age and chastity was conflicting, refusal of instruction as to burden on state of proving her previous chastity *held* error. *Gammel v. State* 532
32. Instruction as to "reasonable doubt" *held* erroneous. *Gammel v. State* 538
33. An instruction as to the weight and credibility of the evidence of police officers *held* not prejudicially erroneous. *Romero v. State* 650
34. Instruction by the court of its own motion relative to weight of evidence *held* not prejudicial to accused. *Reinhardt v. State* 667

Damages.

1. Verdict of $17,500 for injury to foot *held* excessive. *Stapleton v. Chicago, B. & Q. R. Co.* 201
2. Verdict of $9,625 for fracture of the femur *held* excessive. *Ryba v. Swift & Co.* 216
3. Verdict of $20,000 for permanent injury to spine *held* excessive. *Wright v. Omaha & C. B. Street R. Co.* 292
4. Damages for permanent personal injuries impairing earning capacity should be based on the probable expectancy of plaintiff's life immediately before the injury, but damages for future mental and physical suffering should be considered in connection with the probable expectancy of plaintiff's life in his injured condition at time of trial. *Webb v. Omaha & S. I. R. Co.* 596

Deeds.

1. Sec. 6195, Rev. St. 1913, providing that every conveyance shall be so construed as to carry into effect the intent of parties, applies to deeds. *Moran v. Moran* 386
2. Deed construed, and *held* to convey to grantee a life estate, with a remainder to his heirs. *Moran v. Moran* 386

Descent and Distribution. See WILLS, 15.

1. Proceeds of realty *held* not ancestral property, but to be distributed under sec. 1275, Rev. St. 1913, as other personal property. *In re Estate of Howe* 380
2. The county court has jurisdiction to determine who are heirs of a decedent. *State v. Keller* 552
3. A finding in a decree for final distribution that a certain person is the sole heir and an order assigning the estate to him complies with secs. 1494, 1495, Rev. St. 1913, and is a sufficient adjudication of heirship. *Fischer v. Sklenar* 553
4. The probate court in adjudicating heirship does not determine title to realty, as the statute of descent passes title upon the fact found. *Fischer v. Sklenar* 553
5. Adjudication of heirship by the probate court is binding upon all parties interested in the estate, unless it is set aside on appeal. *Fischer v. Sklenar* 553

Divorce.

1. Under sec. 1571, Rev. St. 1913, personal service of summons outside the state in a divorce action properly brought in the state is sufficient. *Williams v. Williams* 369
2. Evidence *held* sufficient to sustain a decree of divorce for nonsupport. *Williams v. Williams* 369
3. Under sec. 1571, Rev. St. 1913, the district court has jurisdiction to grant a divorce in any county where the parties, or one of them, reside. *Williams v. Williams* 369
4. Preliminary to an order appointing a receiver of a husband's property under sec. 1589, Rev. St. 1913, there must be an order requiring the husband to give security for payment of alimony, and a refusal on his part to give such security. *Ford v. Ford* 648
5. An order vacating a decree of divorce after the term, but within six months of its rendition, *held* not a final order, and to be within the jurisdiction of the court. *Everson v. Everson* 705
6. In a suit for divorce, defendant may plead in abatement another action pending between the same parties and for the same cause, and the court has jurisdiction to determine that issue. *Flaxel v. Flaxel* 799
7. In a suit for divorce, where defendant failed to plead pendency of another suit for the same cause, or to defend against a motion for suit money, a final order for suit money will not be reversed on appeal. *Flaxel v. Flaxel* 799
8. Intermeddling of third parties will not justify husband in using personal violence against his wife. *Unzicker v. Unzicker* 837

Divorce—*Concluded.*

9. The law does not allow a husband to use personal violence against his wife even for her own good. *Unzicker v. Unzicker* 837

Ejectment.

Ejectment will lie to recover land occupied by an encroaching structure of an adjoining proprietor. *McDivitt v. Bronson*.. 437

Elections.

Under secs. 2095, 2124, Rev. St. 1913, in an election contest because sufficient votes to change the result were illegally counted for contestee, contestant may put in evidence properly preserved ballots, without first making proof of his charges, where such ground is specifically alleged. *Frum v. Leamer* 675

Equity.

One in possession of land may rest in security until his title or possession is attacked, and a failure to appeal to equity during that period will not prejudice his right either to quiet title or to assert an equity against the holder of the legal title. *McNea v. Moran* 476

Estoppel. See INFANTS.

Evidence. See APPEAL AND ERROR, 14, 22-28. CARRIERS, 6, 8, 9. CRIMINAL LAW. STATUTES, 4. WILLS, 1-6, 9, 12-14. WITNESSES.

1. Knowledge on which a witness as to market value of realty bases his opinion acquired long after the rights of the parties became fixed is too remote. *Willman v. Sandman* 92
2. In an action for contribution against a cosurety, parol evidence is admissible to show the actual relation of the parties to the obligation discharged. *Frew v. Scoular* 131
3. Where a transcript of proceedings on an administrator's sale, introduced without objection, showed written consent to the sale by remaindermen, then minors, but the original document was not introduced, it will be presumed that the written consent was genuine. *Criswell v. Criswell* 349
4. Opinion testimony of qualified witnesses, as to shrinkage of cattle held two days at destination, is admissible to prove claim for shrinkage. *McElwain v. Union P. R. Co.* 484
5. Declarations derogatory to title of ancestor, made by him after he transferred title, are not admissible as exception to hearsay rule merely because grantee acquired the property without monetary consideration. *Johnson v. Petersen* 504

Evidence—*Concluded.*

6. Declarations against pecuniary interest of declarant when made may be admissible after his death. *Johnson v. Petersen* 504
7. While entire statement in connection with a declaration against interest may be admissible as exception to hearsay rule, such parts as are not against his pecuniary interest may be entitled to little credit, where in those respects he had strong motives for misrepresentation. *Johnson v. Petersen* 504
8. Photographs of place of accident, taken two years afterwards, and after the surroundings had been materially changed, are not ordinarily admissible in evidence. *Tankersley v. Lincoln Traction Co.* 578
9. The opinion of a nonexpert witness as to genuineness of a disputed signature may be rejected, if based alone on a comparison of disputed and genuine documents in evidence; the jury being as competent in such respect as the witness. *In re Estate of O'Connor* 617
10. Where a witness is shown to be absent from the state, his testimony at a former trial of the same cause between the same parties is admissible, if otherwise unobjectionable. *In re Estate of O'Connor* 617
11. Where circumstances justify the reading of testimony of an absent witness, all of his testimony on a former trial may be read, if otherwise admissible, though his cross-examination might have been waived had he been present at the second trial. *In re Estate of O'Connor* 617
12. Refusal to permit a witness to identify a disputed signature of a decedent was not abuse of discretion, where proper foundation had not been laid. *In re Estate of O'Connor*..... 617
13. In the contest of a will for forgery, the value of expert testimony on handwriting depends on the reasons for the opinion, and its weight and the credibility of the witnesses are for the jury, where there is a conflict. *In re Estate of O'Connor* 617
14. The question of marketability of title is generally a question of fact; but, when questions of law are involved, expert testimony is peculiarly applicable. *Farmers State Bank v. Butler* 635

Execution.

Property not exempt, acquired after judgment, may be sold upon execution to satisfy the judgment. *Miller v. Miller*.... 405

Executors and Administrators. See PARTNERSHIP.

1. No appeal is allowed from the appointment of a special administrator under sec. 1341, Rev. St. 1913, but an appeal is allowed from an appointment under sec. 1381, by the general provision for appeals from orders of the county court. *In re Estate of Enyart* 25

Executors and Administrators—*Concluded.*

2. An administrator cannot appeal from the final order of distribution unless he is pecuniarily affected in his representative capacity. *In re Estate of Craig* 439
3. An administrator who without an adjudication of heirship distributes the residue of the estate assumes responsibility of making distribution to the proper persons. *In re Estate of Craig* 439
4. An administrator who without an order naming the distributees distributes the proceeds of a judgment recovered for the death of the intestate cannot in his representative capacity appeal from a final order directing distribution to others. *In re Estate of Craig* 439

Exemptions. See HOMESTEAD, 1, 2.

Forcible Entry and Detainer.

In an action of forcible detainer, the only issue is the right of possession. *Van Sant v. Beuder*..... 680

Fraud.

1. Evidence in an action for fraud *held* insufficient to sustain verdict for plaintiff. *Willman v. Sandman*..... 92
2. In an action for fraud in the sale of stock of an oil company, verdict for plaintiff *held* inadequate as not responding to the evidence. *King v. Day* 346
3. Representations which lead a party to suppose existence of certain facts, if made designedly and fraudulently, are fraudulent misrepresentations. *Hlavaty v. Blair* 414

Fraudulent Conveyances.

1. When there is no mutual fraudulent intent, any person, solvent or insolvent, may dispose of his property for a valuable consideration, which may be future services agreed upon between the parties. *Vanderlip v. Barnes* 573
2. A conveyance of land between near relatives will be closely scrutinized to discover if it was made to hinder, delay, or defraud subsequent creditors of the vendor. *Tanner v. Frink* 660
3. The wife will not be chargeable with the fraudulent intent of her husband, unless she had guilty knowledge of the intended fraud. *Tanner v. Frink* 660

Garnishment.

1. Under sec. 7746, Rev. St. 1913, a debt of an Illinois corporation payable in that state to another Illinois corporation may be subjected by garnishment in Nebraska to the payment of a debt owing to a resident of Iowa. *Morrison v. Illinois C. R. Co.* 49

Garnishment—*Concluded.*

2. Where a citizen of Iowa brought an action against an Illinois corporation by attachment and garnishment of two Illinois corporations for personal injuries sustained in Iowa, *held* that the trial court had jurisdiction. *Morrison v. Illinois C. R. Co.* 49

Homestead.

1. The liability for alimony is not a contract liability, and a government homestead is not exempt by sec. 2296, Rev. St. U. S. 1878, from levy upon a judgment for alimony. *Miller v. Miller* 405
2. Exemption of a homestead is limited to 160 acres occupied as a family home. *Miller v. Miller* 405
3. Occupancy of wife's property as a home is evidence of its homestead character, but is not conclusive. *Zeng v. Jacobs* 645
4. Where occupancy of the wife's property was temporary, and was thereafter abandoned, and she had never consented to its selection as a family homestead, the husband acquired no homestead right therein. *Zeng v. Jacobs*..... 645
5. Temporary absence from the home does not amount to abandonment of homestead right therein. *Zeng v. Jacobs*..... 645
6. Evidence *held* to show abandonment of homestead. *Zeng v. Jacobs* 645

Homicide. See CRIMINAL LAW, 1, 2, 13.

1. Under sec. 9179, Rev. St. 1913, it is the duty of the supreme court to determine from the evidence whether the death penalty for murder is warranted. *Cryderman v. State* 85
2. Where the evidence showed that the mind of accused, convicted of murder in the first degree, was not normal and that there was no rational motive for the crime, the death penalty will be reduced to imprisonment for life. *Cryderman v. State* 85
3. When two or more by common design enter upon a burglary, armed and prepared to kill if opposed, and where one of them trying to escape kills one trying to arrest him, all are equally guilty of the homicide, though such killing was not part of the prearranged plan. *Romero v. State*..... 650
4. Identification of accused as the person who committed the felony charged *held* sufficient. *Hauser v. State*..... 834

Husband and Wife. See CRIMINAL LAW, 22-25.

1. The Nebraska statute limiting the right of married women to contract does not apply to a note executed in and governed by the laws of another state. *Farmers State Bank v. Butler* 635
2. The wife is not a necessary party to an action by the husband to recover damages for the taking of his land under right of eminent domain. *McCullough v. St. Edward Electric Co*..... 802

Indictment and Information.

1. The court in its discretion may permit the county attorney after commencement of trial to indorse on the information the name of an additional witness. *Samuels v. State* 383
2. Under sec. 8579, Rev. St. 1913, procuring and abetting commission of felony is a distinct offense, and on an information therefor accused cannot be convicted of the principal offense; but there may be a conviction of the crime charged, though the evidence would also convict of the principal offense. *Guignon v. State* 587
3. Where the information alleges facts showing that the crime charged was committed in the county of the trial, it will not, after conviction, be held insufficient for not formally stating the venue; no objection being made before trial. *Guignon v. State* 587

Infants.

Minor remaindermen coming of age must affirm or disaffirm an administrator's sale and failure to disaffirm within a reasonable time will estop them from disputing the purchaser's title. *Criswell v. Criswell* 349

Injunction. See INSURANCE, 2, 3. SCHOOLS AND SCHOOL DISTRICTS, 1. TAXATION, 5. WATERS, 3.

Insurance.

1. Judgment in a suit by the state against Supreme Forest, Woodmen Circle, *held* to be intended to preserve the society's affairs *in statu quo* until the governing body could interpret or amend its laws. *State v. Supreme Forest, Woodmen Circle* 29
2. Where, in a suit against a beneficial association, the supreme court has issued a restraining order, complaints of violations of the order or of misdemeanors of officers must be addressed to that court. *State v. Supreme Forest, Woodmen Circle* 29
3. When the supreme court has taken jurisdiction of the affairs of a beneficial association at the suit of the state insurance board, and has entered judgment and a restraining order, it will see that its judgment is not violated by the parties. *State v. Supreme Forest, Woodmen Circle*..... 29
4. An insurance company which requires a fixed premium in advance and provides benefits not dependent upon assessments, and does not provide for extra assessments, is not an assessment association as defined by sec. 3138, Rev. St. 1913. *Western Life & Accident Co. v. State Insurance Board* 152
5. Under secs. 3138, 3139, 3233, 3235, Rev. St. 1913, the state insurance board may require a mutual insurance company

Insurance—*Continued.*

which guarantees dividends in the form of paid-up insurance to provide a reserve fund to meet such liability. *Western Life & Accident Co. v. State Insurance Board*..... 152

6. Where suicide is a defense in a suit on a certificate of accident insurance it is error to direct a verdict for plaintiff, if different minds may reasonably draw different conclusions from the evidence. *Rawitzer v. Mutual Benefit Health & Accident Ass'n.* 219
7. The secretary of a local lodge of a beneficial association who collects dues from members and remits to the association is its agent, and is presumed to inform the association as to his acts in its service. *Chandler v. Royal Highlanders* 223
8. Where the custom of an association to receive dues after time for payment leads assured to believe that his policy will not be forfeited if he pays in accordance with such custom, the association waives the right to forfeit the policy for such a delay. *Chandler v. Royal Highlanders*..... 223
9. Where the local lodge or its secretary makes payments for assured at his request as a loan, the fact that assured does not return such loan as agreed will not establish a custom by the association to extend time of payment. *Chandler v. Royal Highlanders* 223
10. Where the local lodge or its secretary advances assured's dues, and thereafter receives payment from him, the presumption is that the advances were at his request and as a loan. *Chandler v. Royal Highlanders* 223
11. Where assured requests the local lodge to advance his dues as a loan, and they are not forwarded within time, the association does not waive right of forfeiture provided in the contract. *Chandler v. Royal Highlanders* 223
12. A benefit society, incorporated in another state, doing business in Nebraska is subject to the same limitations as such an association organized in Nebraska. *Dworak v. Supreme Lodge* 297
13. Sec. 3298, Rev. St. 1913, prescribing beneficiaries of beneficiary associations, governs in Nebrasks contracts; the law of the domicile of a foreign association having no application. *Dworak v. Supreme Lodge* 297
14. The statute should be liberally construed in determining whether the beneficiary is a "dependent" within its meaning. *Koenigstein v. Finke* 449
15. When the beneficiary performs personal services for the insured under an agreement that he will contribute to her support by provision therefor in his will, she is to that extent dependent upon him. *Koenigstein v. Finke*..... 449

Insurance—*Continued.*

16. Where insured made one his beneficiary in his will, and the insurer with notice did not object, and in an action by the beneficiary and the administrator paid the money into court, *held* that it was a change of beneficiaries. *Koenigstein v. Finke* 449
17. Ambiguous terms in a certificate of insurance will be construed so as to accomplish the purpose intended, if that may be done without violence to expressed terms of the contract. *Routt v. Brotherhood of Railroad Trainmen* 763
18. Color-blindness so impairing sight that a trainman was unable to continue in train service, *held* complete and permanent loss of sight of both eyes within the meaning of an insurance certificate. *Routt v. Brotherhood of Railroad Trainmen* 763
19. A member's ignorance of by-laws of an insurance association does not entitle him to recover premiums paid while engaged in a prohibited occupation. *Pope v. Royal Highlanders* 774
20. The application for membership, certificate of insurance, and by-laws of a benefit association are to be construed together in determining the rights of the parties. *Pope v. Royal Higlanders* 774
21. Where a person voluntarily becomes a member of a benefit association, he is bound by by-laws under which membership is acquired. *Pope v. Royal Highlanders* 774
22. Under a policy insuring against loss by theft from a safe by use of tools or explosives, opening of inner doors by explosives *held* an "entry into the safe" by explosives, though the outer doors were not so opened. *Bruner Co. v. Fidelity & Casualty Co.* 825
23. In an action on a burglary policy, evidence *held* to sustain finding that no employee of insured was criminally implicated in the burglary. *Bruner Co. v. Fidelity & Casualty Co.* 825
24. Minor errors in books of assured *held* not to justify forfeiture of insurance under a provision against liability unless books of account were regularly kept. *Bruner Co. v. Fidelity & Casualty Co.* 825
25. The rule against additional insurance is not obviated by the fact that the original insurance is on a class of property, rather than any particular property. *Meyers v. German Fire Ins. Co.* 855
26. When insurer has elected to treat the policy as void for breach of condition providing for a forfeiture, assured has no claim for any unearned premium. *Meyers v. German Fire Ins. Co.* 855

Insurance—*Concluded.*

27. The "*pro rata* clause" providing that concurrent insurers shall share the loss applies only where the policy is valid, and is not a waiver of a provision for forfeiture in case of additional insurance being taken without insurer's consent. *Meyers v. German Fire Ins. Co.* 855

Judges.

1. Where a county judge was removed from office and another was appointed to fill the vacancy, and where on appeal the judgement of ouster was held void, *held* that the appointee was a *de facto* officer. *Hallowell v. Buffalo County*..... 250
2. Where a county has paid the salary of a county office to one in possession of the office, performing its duties with color of title, before his right to the office has been determined against him, it cannot thereafter be compelled to pay the same salary to the *de jure* officer. *Hallowell v. Buffalo County*.. 250

Judgment. See SPECIFIC PERFORMANCE, 2, 3.

1. A judgment based on a void act of the legislature will be reversed, if properly assailed, on appeal. *Sandhill Land & Cattle Co. v. Chicago, B. & Q. R. Co.* 24
2. Where, in an action for specific performance of a contract to sell land, plaintiff received credit for money paid on the contract, he could not thereafter sue to recover further damages for breach of contract. *Cunningham v. Lamb*..... 288
3. Judgment recovered in a foreign jurisdiction upon a domestic judgment will be voidable, where the original judgment is set aside and final judgment entered for adverse party. *Janous v. Columbus State Bank* 393
4. Where preponderance of evidence by officers and persons present when attempted service was made shows that no legal service was made, the service and judgment will be set aside and a new trial ordered. *Janous v. Columbus State Bank.* 393
5. Where plaintiff has recovered more than one judgment for the same injury against persons jointly and severally liable, his acceptance of satisfaction of one is satisfaction of all, except costs, and a bar to another action. *Irwin v. Jetter Brewing Co.* 409
6. The county court is a court of general jurisdiction in probate matters, and its judgments therein made upon due notice are final and cannot be collaterally attacked. *Fischer v. Sklenar* 553

Judicial Sales.

A judicial sale of land will not be set aside for inadequacy of price, unless it is so gross as to make it appear that it was the result of fraud or mistake. *First Nat. Bank v. Hunt*.. 743

Jury.

1. Sec. 9106, Rev. St. 1913, relating to a special venire, applies only when two or more persons are charged in the same indictment or information, and one of them has had a separate trial. *Koenigstein v. State* 229
2. Under sec. 8143, Rev. St. 1913, relating to summoning "other jurors," the sheriff need not apportion them equally to all parts of the county, and such apportionment to try a particular case is exceptional. *Koenigstein v. State* 229

Justice of Peace.

1. Interest accrued should be considered in computing the amount in controversy to determine jurisdiction of a justice of the peace. *Henke v. Deemer* 126
2. Actual amount of demand determines jurisdictional amount in justice's court. *Henke v. Deemer* 126
3. Where bill of particulars and summons both disclosed that amount of debt with interest exceeded $200, justice of the peace had no jurisdiction. *Henke v. Deemer* 126

Landlord and Tenant.

1. In absence of warranty, deceit, or fraud, lessee cannot recover for personal injuries from latent defects in the premises, of which lessor had no knowledge, and which were as patent to lessee as to lessor. *Rankin v. Kountze Real Estate Co...* 174
2. A farm lease, "for the term of one year with privilege of three years subject to sale," construed to authorize the lessor, by a sale and notice, to terminate the tenancy at the end of any rental year during the three-year period. *Van Sant v. Beuder* 680

Larceny.

1. To convict of cattle stealing, the state must prove beyond a reasonable doubt that accused participated in the larcenous taking with the intent to convert the animals to his own use. *Cheney v. State* 461
2. A felonious intent to convert stolen property to one's own use is a necessary element of larceny. *Cheney v. State* ... 461
3. Evidence *held* insufficient to sustain a conviction of cattle stealing. *Cheney v. State* 461
4. Evidence *held* insufficient to sustain conviction of larceny. *Jones v. State* 847
5. To constitute larceny, there must have existed a felonious intent in the mind of the accused at the time of the taking. *Jones v. State* 847

Libel.

1. One who publishes a statement relative to a candidate's qualifications and fitness for office is not liable in damages if the statement is true and is made with good motives, though such statements is libelous *per se*. *Estelle v. Daily News Publishing Co.* 610
2. The condition and situation in life of one injured by a libel may be shown in evidence and may be considered by the jury upon the question of damages. *Estelle v. Daily News Publishing Co.* 610

Life Estates.

Possession of land by life tenant is not adverse to remainderman, unless knowledge is clearly brought home to him that the life tenant claims the entire estate. *Criswell v. Criswell* 349

Limitation of Actions.

Limitations do not commence to run against a suit by the administrator of the estate of a beneficiary to recover from the trustee until the trustee repudiates his trust and refuses to transfer the property. *Holmes v. Doll* 156

Mandamus.

The action of the state banking board in granting or refusing a bank charter is reviewable by petition in error in the district court, which affords adequate remedy, and mandamus to compel a different action cannot be maintained. *State v. Morehead* 37

Master and Servant. See TRIAL, 4, 5.

1. Under the facts, plaintiff's injury *held* to be the result of an accident which arose out of and in the course of his employment, within the workmen's compensation act. *Manning v. Pomerene* 127
2. Where the evidence as to whether disability was caused by an accident was conflicting, but sufficient to sustain the finding to that effect, the judgment will not be disturbed. *Manning v. Pomerene* 127
3. In an action by a switchman for personal injuries, evidence *held* insufficient to show that locomotives being moved when he received his injuries were instruments of interstate commerce. *Stapleton v. Chicago, B. & Q. R. Co.* 201
4. Under secs. 3674, 3679, Rev. St. 1913, of the employers' liability act, the limit of six months for claiming compensation and one year for agreeing on compensation, or for filing petition, does not begin to run until six months after removal of physical or mental incapacity. *Simon v. Cathroe Co.* 211

Master and Servant.—*Continued.*

5. In an employee's action under employers' liability act, evidence *held* to sustain finding, as to time of filing claim for compensation, that plaintiff was physically incapacitated from time of accident to time of trial. *Simon v. Cathroe Co.* 211
6. In an action by a street railway conductor for personal injuries from contact with a charged wire, defendant's negligence in maintaining it 5½ feet above top of car *held* a question for the jury. *Wright v. Omaha & C. B. Street R. Co.* 292
7. In an action by an employee for injury, where the defense was that the danger was obivous, and that the employee assumed the risk, but the evidence showed that he protested and was peremptorily ordered to perform the task, there was a waiver of the defense. *Shick v. Johnson* 328
8. In an action by an employee for injury from a hidden danger which was known to the master, it is sufficient to show that the service was in the line of his employment and was consented to by the employer without warning of the danger. *Shick v. Johnson* 328
9. Under the workmen's compensation act, compensation cannot be awarded for loss of a toe unless the injury has impaired the employee's earning power. *Epsten v. Hancock-Epsten Co.* 442
10. Under the workmen's compensation act, the fact that the employee earns higher wages after than before the injury will not deprive him of compensation, where he receives such higher wages by reason of his subsequent education and training. *Epsten v. Hancock-Epsten Co.* 442
11. Under the workmen's compensation act, an employer who has provided necessary medical attention during three weeks subsequent to an injury is not liable for medical expenses subsequently incurred after blood poisoning developed. *Epsten v. Hancock-Epsten Co.* 442
12. Where place to work and appliances are reasonably safe, the employer is not liable for misuse of such appliances by a fellow employee employed with reasonable care as to his fitness. *Poos v. Krug Brewing Co.* 491
13. The employer is not liable for anything that he could not avoid by foresight and care. *Poos v. Krug Brewing Co.* 491
14. The employer must furnish a reasonably safe place to work and reasonably safe tools and appliances, and he is liable for injury by failure to do so, unless the employee was negligent or assumed the risk. *Poos v. Krug Brewing Co.* .. 491

Master and Servant—*Concluded.*

15. Where the nature of the act shows that accident was due to negligence of a fellow servant, and not to any defect in place to work or appliances, the employer is not liable. *Poos v. Krug Brewing Co.* 491
16. The employer performs his duty when he furnishes place to work and appliances which are safe when used in the usual and proper way. *Poos v. Krug Brewing Co.* 491
17. Where place to work and appliances are unsafe, the employer must make them reasonably safe, and he cannot delegate such duty. *Poos v. Krug Brewing Co.* 491
18. Under the employers' liability act, dependency is not based solely upon a present legal obligation to support. *Parson v. Murphy* 542
19. Under the employers' liability act, the question of a parent's dependency is not determined by whether decedent had or had not contributed to parent's support before the accident. *Parson v. Murphy* 542
20. Evidence *held* to show that claimant was a dependent. *Parson v. Murphy* 542
21. In an action under the employers' liability act, evidence *held* to sustain finding for plaintiff. *Young v. Western Furniture & Mfg. Co.* 696
22. Death of employee *held* due to "accident," as defined by sec. 52 of the employers' liability act. *Young v. Western Furniture & Mfg. Co.* 696
23. Evidence *held* to sustain finding that death resulted from an accident, as defined by sec. 3693, Rev. St. 1913. *Kanscheit v. Garrett Laundry Co.* 702
24. The master should exercise ordinary care for the safety of his employees, but he may assume that they will exercise the same care for their own safety. *Merkouras v. Chicago, B. & Q. R. Co.* 717
25. A railroad company, in ordering movements of cars, would not anticipate that two switchmen would scuffle upon its track, while momentarily expecting the approach of cars. *Merkouras v. Chicago, B. & Q. R. Co.* 717
26. A railroad company does not owe its employees the duty of keeping a constant lookout to warn them of dangers of which they already have knowledge. *Merkouras v. Chicago, B. & Q. R. Co.* 717
27. A rule of a railroad company, susceptible of two constructions, one of which has never been given it, and which was not relied upon by the party asserting it, will not be given that construction by the courts. *Merkouras v. Chicago, B. & Q. R. Co.* 717

Mortgages.

1. The holder of a deed, given to secure advances, who pays one of a series of notes secured by mortgage on the land is not entitled in foreclosure proceedings to share *pro rata* in proceeds of the sale. *McQuilkin v. Ford* 474
2. In absence of agreement therefor, mortgagee is not required to insure buildings on mortgaged premises, nor to prosecute at his own expense a disputed claim for insurance on account of a prior policy which he had on the building destroyed. *McQuilkin v. Ford* 474
3. The district court may decree the sale of mortgaged property in parcels or *en masse*. *First Nat. Bank v. Hunt* 743
4. Where a foreclosure decree does not direct the manner of sale, and the property is contiguous and was mortgaged as a single tract, its sale as such will not be disturbed, in absence of showing of prejudice to complainant. *First Nat. Bank v. Hunt* 743
5. Where land is mortgaged as an entire tract, the debtor, if he desires it sold in parcels, should apply to the court to direct the officer as to manner of sale, or should point out to the officer the manner of sale to best advantage. *First Nat. Bank v. Hunt* 743
6. Where the record does not show that the judgment debtor requested that land be sold in separate tracts, he cannot have the sale set aside because it was sold *en masse*. *First Nat. Bank v. Hunt* 743
7. A court of equity on appeal may impose terms as a condition to setting aside confirmation and allowing a resale of land. *First Nat. Bank v. Hunt* 743

Municipal Corporations. See CONSTITUTIONAL LAW, 2-4.

1. The Omaha city charter makes no provision for appeal from equalization and assessment of special taxes by the metropolitan water district, and an attempt to appeal confers no jurisdiction on the district court. *McCague Investment Co. v. Metropolitan Water District* 820
2. District courts have jurisdiction to review by proceedings in error an order by the board of equalization of the metropolitan water district. *McCague Investment Co. v. Metropolitan Water District* 820
3. Sec. 5300, Rev. St. 1913, providing for the selection and removal of officers by the city council, *held* to apply to the city of Lincoln. *State v. City of Lincoln* 57
4. Levy of tax by city of Lincoln for campus extension to induce location of state university is for a corporate purpose,

Municipal Corporations.—*Concluded.*

and sec. 4546, Rev. St. 1913, authorizing such levy, does not violate sec. 6, art. IX, Const. *Sinclair v. City of Lincoln* .. 163

5. Whether location of state university in city of Lincoln would be beneficial to the city at large was a question for the city authorities. *Sinclair v. City of Lincoln* 163
6. Under a contract for construction of city water-works, city's supervising engineer *held* the sole arbiter between the contractor and the city, and that in absence of fraud his final estimate of amount due the contractor was conclusive. *Katz-Craig Contracting Co. v. City of Cozad* 189
7. Sec. 4583, 1913, requiring written notice of defective street to be filed with the city clerk five days before occurrence of an injury, does not apply where defects were obvious and existed when the city opened the street, without guarding or warning against them. *McMasters v. City of Lincoln* 278
8. In an action for injury from defect in a street which the city had left unguarded when it opened the street, city's negligence was question for the jury. *McMasters v. City of Lincoln* 278
9. Where a city motor vehicle was being tested under its direction and was not in performance of any governmental duty, the city is liable for damages caused by its operation. *Opocensky v. City of South Omaha* 336
10. The right to occupy part of a public street in front of one's place of business must yield to public necessity, of which necessity the municipal governing body is the judge; but such body cannot arbitrarily deny the right to one and grant it to another. *Kenney v. Village of Dorchester* 425
11. Sec. 4210, Rev. St. 1913, reserves to the state the right to fix the compensation of firemen in cities of the metropolitan class. *Adams v. City of Omaha* 690
12. Sec. 4210, Rev. St. 1913, as amended by ch. 77, Laws 1915, fixes the compensation of firemen in metropolitan cities, and the city authorities have no power to provide different compensation. *Adams v. City of Omaha* 690

Negligence. See MASTER AND SERVANT.

1. In an action for damages for negligence of defendant, plaintiff may recover, although himself guilty of contributory negligence, if his negligence was slight as compared with defendant's negligence. *Sodomka v. Cudahy Packing Co.* 446
2. Whether plaintiff's contributory negligence, if any, was slight as compared with defendant's negligence is a question for the jury. *Sodomka v. Cudahy Packing Co.* 446

Negligence—*Concluded.*

3. To open the door of an elevator shaft and then turn one's back and enter it without looking to see whether the elevator is there is gross negligence preventing recovery for injury from falling down the shaft. *Sodomka v. Cudahy Packing Co.* 446
4. Evidence of repairs made or precautions taken after an injury is not admissible to prove antecedent negligence. *Tankersley v. Linclon Traction Co.* 578

New Trial.

1. Where the presiding judge is unavoidably prevented from ruling on motion for new trial, another judge may perform that duty. *Hauser v. State* 834
2. A new trial should not be granted for newly-discovered evidence, unless such evidence is shown to be material, and could not by reasonable diligence have been produced at the trial. *Jackson v. Omaha & C. B. Street R. Co.* 456
3. The granting of a new trial being discretionary with the trial court, its action will not be disturbed, unless abuse is shown. *Bruner Co. v. Fidelity & Casualty Co.* 825

Parties. See CONSTITUTIONAL LAW, 5. HUSBAND AND WIFE, 2.

Under secs. 7609-7611, Rev. St. 1913, any person claiming an interest in the subject-matter of an action may intervene at any time before trial, as a matter of right. *In re Estate of Keller* 115

Partnership.

1. A special administrator to settle with the surviving partner of a decedent is authorized by sec. 1381, Rev. St. 1913, only when such surviving partner is also executor or administrator of the decedent's estate, including the residuary estate. *In re Estate of Enyart* 25
2. Where a decedent's surviving partner is executor of a will disposing of only a part of the estate, and there is also a general administrator for the whole property, the general administrator must settle with the surviving partner, and special administration is not allowed therefor. *In re Estate of Enyart* 25

Pleading. See APPEAL AND ERROR, 2, 3.

1. Where, pending administration, a claimant petitioned to be decreed the sole heir, and the state filed answer and cross-petition denying the heirship and praying for an escheat, *held* that the pleading, though irregular, alleged an interest adverse to the petitioner, and that it was error to strike it from the files. *In re Estate of Keller* 115

Pleading—*Concluded.*

2. Where a petition, construed with reference to its general theory, states a cause of action for negligence, the refusal to construe it as also stating a cause of action for trespass based on an allegation amounting to a legal conclusion is not error. *Omaha Electric Light & Power Co. v. Butke* 159
3. A defendant may plead several defenses, provided they are not so repugnant that if one be true another must be false. *Rawitzer v. Mutual Benefit Health & Accident Ass'n* 219
4. In an action against two joint tort-feasors, plaintiff cannot by supplemental petition plead a settlement with one and the amount paid. *Tankersley v. Lincoln Traction Co.* 578
5. Allegation in petition in an action on a note that plaintiff is an innocent purchaser for value before maturity does not constitute the cause of action, but is a plea in avoidance, and is usually reserved for the reply. *Farmers State Bank v. Butler* 635
6. Where an answer sets up special defenses against a note, plaintiff may allege facts in avoidance in reply. *Farmers State Bank v. Butler* 635
7. Allegation that plaintiff's negligence was the sole cause of her injuries amount to a specific denial of allegation that defendant's negligence was the proximate cause. *Haight v. Omaha & C. B. Street R. Co.* 841

Pledges.

A creditor who sells collateral for more than the amount of his claim and refuses to pay the surplus to he debtor is liable in an action for conversion of such surplus. *Palmer v. Parmele* 691

Principal and Surety.

A surety, in whose favor limitations have not run when he pays his principal's debt, may exact contribution from a cosurety in another state, under whose laws the creditor's claim against the cosurety was barred when the debt was paid. *Frew v. Scoular* 131

Process. See JUDGMENT, 4.

1. Where a judgment is attacked collaterally, or where the correctness of the sheriff's return is assailed long after judgment, great faith and credit must be given to the return. *Janous v. Columbus State Bank* 393
2. Where the officer hands copy of summons to defendant, and immediately retakes it, the proof must show that defendant knew, or had reason to suppose, that it was a summons for her, or such service will be invalid. *Janous v. Columbus State Bank* 393

Railroads. See MASTER AND SERVANT, 24-27.

1. Where a railroad company had permitted a bridge to be used as a passageway for many years, and this was well known to its agent and employees, a pedestrian using the bridge was not a trespasser, but a licensee, and the company was bound to use ordinary and reasonable care to see that he was not injured by its negligence. *Peterson v. Chicago, M. & St. P. R. Co.* 3
2. One driving on a highway approaching a railroad crossing must look and listen, and his failure to do so, without reasonable excuse, is negligence. *Askey v. Chicago, B. & Q. R. Co.* 266
3. The driver of an automobile approaching a familiar railroad crossing, whose view is obstructed, must keep his car under control. *Askey v. Chicago, B. & Q. R. Co.* 266
4. Railroad company *held* not liable for death of automobile driver in collision at crossing. *Askey v. Chicago, B. & Q. R. Co.* 266
5. A passenger in an automobile who failed to request the driver to stop or to take necessary precautions while approaching a dangerous railroad crossing cannot recover for personal injuries from collision, though no signal was given. *Morris v. Chicago, B. & Q. R. Co.* 479
6. A traveler on a public highway approaching a railroad crossing must exercise ordinary care, and if he fails to do so, and is injured by collision, he cannot recover. *Morris v. Chicago, B. & Q. R. Co.* 479
7. To recover for injury at a railroad crossing, it is not enough to show that claimant was injured at the crossing, and that no signal was given, but he must further show that such neglect was the proximate cause of injury. *Morris v. Chicago, B. & Q. R. Co.* 479
8. Evidence *held* insufficient to sustain recovery for injury at crossing. *Morris v. Chicago, B. & Q. R. Co.* 479
9. Law stated as to railroad's duty under secs. 6035, 6036, Rev. St. 1913, as to inclosure of right of way. *DeGraw v. Chicago, B. & Q. R. Co.* 724
10. Under the evidence, *held* that liability for price of cattle killed on railroad right of way was for the jury. *DeGraw v. Chicago, B. & Q. R. Co.* 724
11. Railroad company *held* not required to inclose its right of way where it would increase danger to human life. *DeGraw v. Chicago, B. & Q. R. Co.* 724
12. Evidence, in action for injury at crossing, *held* insufficient to sustain verdict for plaintiff. *Tynon v. Missouri P. R. Co.* 810

Rape. See CRIMINAL LAW, 31.

1. The unsupported evidence of prosecutrix that rape was repeated subsequent to alleged commission of offense charged is not corroborative of her testimony as to commission of that offense. *Gammel v. State* 532
2. Testimony of the prosecuting witness alone will not support a conviction of rape. *Gammel v. State* 532
3. Facts and circumstances necessary to corroborate testimony of prosecuting witness must be proved by other witnesses, and her testimony as to other matters is not corroborative of her own testimony as to the principal fact. *Gammel v. State* 538

Receivers. See DIVORCE, 4.

Remainders.

Possession by one under a void administrator's deed was adverse to remaindermen, so as to commence running of statute barring an action *quia timet* or for possession, from the time they knew or might have known that the one in possession claimed the entire estate. *Criswell v. Criswell* 349

Schools and School Districts.

1. Expenses incurred by president of board of education and superintendent of schools in attending a congress of school hygiene, under authority of the board, are not necessary expenses in the performance of official duties, and their payment may be enjoined. *Smith v. Holovtchiner* 248
2. Plaintiff *held* entitled to attend public school in defendant school district without payment of tuition on the ground of residence; a married sister with whom plaintiff lived standing *in loco parentis*. *Martins v. School District* 258
3. Omaha school district *held* not justified in refusing to admit qualified nonresident pupils to its high school on payment of statutory fee. *State v. School District* 263
4. An order of a board adjusting boundaries of school districts *held* reasonable. *Gauchat v. School District.* 377
5. The policy of Nebraska is to furnish free high school education to all youth of the state. *School District v. Wilson*.. 683
6. Sec. 6831, Rev. St. 1913, requires each county to furnish free high school privileges to the youth of the county; but there is no statute requiring parents of children entitled to such privileges to pay therefor. *School District v. Wilson*.. 683
7. Where children of a district having no free high school were certified to an adjoining district and there attended high school without objection, *held* that the law did not imply an agreement by their parents to pay therefor. *School District v. Wilson* 683

Set-Off.

1. Claims for damages for torts cannot be offset against promissory notes. *Vanderlip v. Barnes* 573
2. A judgment may be set off against another judgment or against a claim upon contract. *Vanderlip v. Barnes* 573

Specific Performance.

1. An oral agreement to convey realty will be specifically enforced where the evidence is clear and plaintiff has fully performed. *McNea v. Moran* 476
2. In a suit for specific performance, all damages from defendant's breach of contract are litigable, and separate actions to recover different elements of such damages cannot be maintained. *Waldo v. Lockard* 797
3. After satisfaction of a decree for specific performance of a contract to transfer property to plaintiff, he cannot, on account of the same breach, maintain a separate action for rents and interest for detention of the property pending litigation. *Waldo v. Lockard* 797

States.

1. The state is not bound by the unauthorized acts of its agents, and public policy requires that such acts be restrained, and, when contrary to public interest, annulled. *State v. Cording*, ... 243
2. Where the state by its authorized agents executes an ambiguous conveyance, and it has been understood and acted upon by the public generally in a manner acquiesced in by the state, the original right of the state to assert a different construction, after great lapse of time, may be considered as abandoned. *State v. Cording* 243

Statute of Frauds.

In absence of proof that a check was given under agreement that it should constitute payment or part payment of the price of live stock, it was not such payment as to take an oral contract of sale out of the statute of frauds. *Bates v. Dwinell* 712

Statutes. See JUDGMENT, 1.

1. In the construction of a statute, effect must be given, if possible, to its several parts. *State v. City of Lincoln* 57
2. In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but not to enlarge its scope to include a subject not fairly expressed in the body of the statute. *State v. City of Lincoln* 57

Statutes—*Concluded.*

3. It is the duty of the court to discover, if possible, the legislative intent from the language of the act. *State v. City of Lincoln* 57
4. In the construction of a statute, courts take judicial notice of events and conditions generally known within their jurisdiction. *State v. City of Lincoln* 57
5. Amendment (Rev. St. 1913, sec. 4546) authorizing city to levy taxes for university campus extension is germane to the general provision of the statute specifying purposes for which taxes may be levied. *Sinclair v. City of Lincoln* 163
6. Ch. 121, Laws 1915, providing for adjustment of boundaries of school districts, *held* not in violation of sec. 11, art. III of the Constitution. *Gauchat v. School District* 377

Taxation. See CONSTITUTIONAL LAW, 2, 3. MUNICIPAL CORPORATIONS, 4. STATUTES, 5.

1. Facts which render property exempt from taxation under sec. 6301, Rev. St. 1913, must be affirmatively established. *Mt. Moriah Lodge v. Otoe County* 274
2. Evidence *held* insufficient to show that property of plaintiff lodge is exempt from taxation, as used solely for charitable purposes. *Mt. Moriah Lodge v. Otoe County* 274
3. A pipe line connecting springs with a railroad's water system and the necessary land about the springs should be assessed by the state assesment board, and not by the county board. *Chicago, B. & Q. R. Co. v. Webster County* 311
4. Under sec. 6351, Rev. St. 1913, the total taxable value of mortgaged land cannot exceed the sum of the interest of the mortgagor and mortgagee. *Bowen v. Holt County* 642
5. Where more than the total value of mortgaged land is made the basis of assessment and taxation, collection of tax upon such excess may be enjoined on application of the party injured. *Bowen v. Holt County* 642
6. The rule of uniformity prescribed by sec. 1, art. IX, Const., inhibits the legislature from discrimination between taxpayers. *City Trust Co. v. Douglas County* 792
7. Where mortgagor of realty has not agreed to pay taxes on mortgage interest, which under sec. 6349, Rev. St. 1913, is an interest in realty, individual and corporation holders of mortgages must pay such taxes in the county in which the mortgaged land lies. *City Trust Co. v. Douglas County* .. 792
8. Discrimination not being permitted in taxation by valuation, neither an individual nor a corporate holder of a mortgage is subject to assessment for taxation of the mortgage in the county of his or its domicile. *City Trust Co. v. Douglas County* 792

Taxation—*Concluded.*

9. Sec. 6313, Rev. St. 1913, does not require the holder to list for assessment shares of a domestic corporation when its capital stock is assessed in the state. *City Trust Co. v. Douglas County* 792
10. Where the value of individuals' shares of stock of a domestic trust company has been included in valuation of its capital stock, such valuation will be deducted in determining the actual value of such stock for taxation. *City Trust Co. v. Douglas County* 792

Treaties.

Treaties should be construed liberally. *Fischer v. Sklenar* ... 553

Trial. See APPEAL AND ERROR. CRIMINAL LAW. RAILROADS, 10.

1. It is error to instruct the jury that certain allegations of negligence are to be considered, and also that such allegations should be disregarded. *Peterson v. Chicago, M. & St. P. R. Co.* 3
2. It is error to give an instruction which assumes as established a disputed question of fact. *Willman v. Sandman*.. 92
3. The court should instruct the jury to find for defendant when the evidence is not sufficient to sustain verdict for plaintiff. *Pollock v. Pearson* 284
4. An instruction describing an alleged act not counted upon as negligence justifying a recovery, on proof of which the jury might infer that they should find for plaintiff, is erroneous. *Shick v. Johnson* 328
5. Where the petition alleges several acts of negligence, but alleges facts amounting to actionable negligence in only one, an instruction to find for plaintiff if defendant is found guilty of any act of negligence alleged is erroneous. *Shick v. Johnson* 328
6. Aggravated misconduct of counsel in stating prejudicial facts outside the record and in urging a disregard of the law requires a reversal of a judgment for his client, notwithstanding the court's reprimand and direction that the jury base their findings on the evidence and instructions. *Hansen v. Mallett* 339
7. Where it is necessary to use photographs of place of accident taken after material change in surroundings, the court should charge the jury as to the extent of their use. *Tankersley v. Lincoln Traction Co.* 578
8. Though an instruction is not specific, if it is not misleading, it is not cause for reversal, where complainant made no request for a more specific instruction. *Webb v. Omaha & S. I. R. Co.* 596

Trial—*Concluded.*

9. Where the evidence does not warrant a verdict for defendant, the court should instruct for plaintiff. *Farmers State Bank v. Butler* 635
10. It is improper for counsel in argument to go outside the evidence and assert, as of his own knowledge, contradictory statements of a witness. *Merkouras v. Chicago, B. & Q. R. Co.* 717
11. Where defendant pleads facts inconsistent with plaintiff's allegations of negligence, and also facts amounting to negligence of plaintiff, he cannot complain of instructions that plaintiff must prove defendant's negligence, and that he must prove plaintiff's negligence, in absence of request for more specific instructions. *Haight v. Omaha & C. B. Street R. Co.* 841

Trusts.

1. Where two persons purchase realty, each contributing one-half of the purchase price, and title is taken in the name of one, a resulting trust arises in favor of the other. *Ahrens v. Simon* 739
2. Trust property conveyed by a trustee *ex maleficio* to his prospective wife in consideration of marriage cannot be followed by the *cestui que trust*, where the grantee acquired title in good faith. *Johnson v. Petersen* 504
3. Evidence *held* to establish a resulting trust. *Ahrens v. Simon* 739

Vendor and Purchaser.

In an action for breach of a contract to convey land, the amount paid on the contract is a proper element of damages. *Cunningham v. Lamb* 288

Venue.

Refusal of change of venue being discretionary with trial judge, his ruling will not be disturbed unless abuse is shown. *Hauser v. State* 834

Voluntary Associations.

1. Courts will not interfere with enforcement of reasonable rules of a voluntary association. *O'Brien v. South Omaha Live Stock Exchange* 729
2. One becoming a member of a voluntary association thereby agrees to submit to its rules and is bound by their enforcement. *O'Brien v. South Omaha Live Stock Exchange* 729
3. Where a member of a live stock exchange pleaded guilty to violation of its rules, and was expelled from membership, his certificate of membership was automatically canceled. *O'Brien v. South Omaha Live Stock Exchange* 729

Voluntary Associations—*Concluded.*

4. A hearing on charges of bad faith and dishonesty against a member of a live stock exchange is not to be tested by the strict rules of criminal practice, where the member was notified in writing of the charges, and consented to the hearing and pleaded guilty. *O'Brien v. South Omaha Live Stock Exchange* 729
5. A member of an unincorporated voluntary live stock exchange consents to its reasonable and uniform rules and is subject to the discipline they provide. *Ihnen v. South Omaha Live Stock Exchange* 195

Waters.

1. Overflow waters of a stream which disappear by evaporation or percolation may be defended against as surface waters, but overflow waters which flow in an accustomed course into the same or another stream are not surface waters, and, if negligently obstructed by a railroad embankment, the company is liable for damages to crops caused thereby. *Murphy v. Chicago, B. & Q. R. Co.* 73
2. Where some damage to crops would have resulted from overflow of stream if a railroad embankment had not been built, the company was only liable for the additional damages caused by the embankment. *Murphy v. Chicago, B. & Q. R. Co.* 73
3. Injunction to prevent village from diverting waters along a highway to plaintiff's railroad embankment *held* properly denied, where plaintiff had disregarded its duty under sec. 3016, Rev. St. 1913, to construct a culvert at the highway crossing, and failed to prove that injury from such diversion would nevertheless have occurred. *Union P. R. Co. v. Village of Eddyville* 149
4. While a prior appropriator carrying water for hire is developing its right, an upper proprietor's use of water under a subsequent appropriation which does not deprive the prior appropriator of water is not adverse. *Kilpatrick Bros. Co. v. Frenchman Valley Irrigation District* 155
5. Under sec. 5119, Rev. St. 1913, a village may furnish water for public purposes and for the use of the inhabitants in arid and semi-arid districts. *Thornton v. Kingrey* 631

Wills. See EVIDENCE, 9-13.

1. When it is shown that a will has been signed and attested by the statutory number of witnesses, and it is conceded that the testator was of sound mind, the will is presumed to be valid. *In re Estate of Dovey* 11

Wills—*Continued.*

2. To set aside a will on the ground that it was procured by undue influence, competent proof is required, and the burden of proof is ordinarily on the contestant. *In re Estate of Dovey* 11

3. Evidence *held* to justify a finding that a contested will expressed the true intention of the testatrix and was not procured by undue influence. *In re Estate of Dovey* 11

4. The due execution of a will may be proved by the testimony of the attesting witnesses, though the attesting clause is excluded from the consideration of the jury. *In re Estate of Dovey* 11

5. It is within the discretion of the trial court to reject evidence of declarations, made by testatrix four or five years before she executed her will, that she did not intend to make a will. *In re Estate of Dovey* 11

6. Where evidence of undue influence is specifically denied, a verdict that the will was valid will not be disturbed for lack of evidence. *In re Estate of Dovey* 11

7. Where in a will contest there was no evidence to sustain the allegation of undue influence, the court properly withdrew that question from the jury. *Beindorff v. Anthes* 44

8. Will construed, and *held* that devised land should be divided equally among testator's heirs and his wife's heirs. *Dunn v. Elliott* 411

9. Devise of "our land" to wife for life and on her death to be distributed between "our heirs," where there were no children to whom such words could apply, *held* to present an ambiguity permitting parol evidence to ascertain its meaning. *Dunn v. Elliott* 411

10. An option to purchase property of the estate, whether at an appraised value or at a price agreed upon, may be created by will. *Watson v. Riley* 511

11. Under a will giving right to take certain land at a price, acceptance of devise and offer to pay the price *held* to vest title in devisee. *Watson v. Riley* 511

12. In a contest of a will for forgery, where the subscribing witnesses are dead, proof of their signatures and of testator's signature is necessary. *In re Estate of O'Connor* 617

13. In a contest of a will for forgery, proponent should introduce all his evidence as to the genuineness of signatures of subscribing witnesses and of testator, and the court may refuse to permit him on rebuttal to offer additional affirmative evidence on that issue. *In re Estate of O'Connor* 617

Wills—*Concluded.*

14. Evidence, in a contest of probate of a will for forgery, *held* to support finding for contestants. *In re Estate of O'Connor* 617
15. Where the husband dies testate, seised of a homestead, and the widow elects to take under the statute, the court will first award her homestead interest not subject to debts. under sec. 3092, Rev. St. 1913, and then award her share as heir, under sec. 1265, Rev. St. 1913. *In re Estate of Grobe*.. 786
16. Election by widow to take under the statute does not render the will inoperative as to other persons. *In re Estate of Grobe* 786

Witnesses. See EVIDENCE.

1. When one submits to an examination by a physician, the knowledge acquired is privileged. *Stapleton v. Chicago, B. & Q. R. Co.* 201
2. Where plaintiff permitted a physician to take a radiograph of his injured foot to ascertain the extent of injury, the radiograph was not admissible in evidence over plaintiff's objection. *Stapleton v. Chicago, B. & Q. R. Co.* 201
3. A transaction or conversation within sec. 7894, Rev. St. 1913, is an action participated in by witness and decedent, to which, if alive, decedent could testify of his personal knowledge. *Hlavaty v. Blair* 414
4. It is error to exclude evidence tending to impeach a witness on a material fact sworn to by him, where proper foundation has been laid therefor. *State v. Turnquist* 417
5. In an action involving title to realty, a wife whose husband claimed as purchaser under an oral agreement is competent to testify to a conversation between her husband and the vendor, since deceased, in which she took no part. *McNea v. Moran* 476
6. A party surprised by testimony of witness may, in the court's discretion, interrogate him as to previous inconsistent statements, to give him opportunity to correct any mistake, and to show the circumstances which induced him to call the witness. *Merkouras v. Chicago, B. & Q. R. Co.* 717
7. A party cannot prove contradictory statements of his own witness, to discredit him. *Merkouras v. Chicago, B. & Q. R. Co.* 717