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JOSEPH A. NORRIS, APPELLEE, v. WILLIAM H. TOWER ET AL., APPELLANTS.

FILED MAY 4, 1918. No. 20104.

1. **Constitutional Law:** CONTRACTS: LAWS AFFECTING. Generally speaking, the laws in force at the time a contract is entered into form a part of it and enter into its obligation, but the law then in force affording a remedy for a breach of the contract may be modified or changed without impairing the obligation of the contract, provided that an adequate remedy is left.

2. **Mortgages:** RIGHTS: REMEDIES. A mortgage imposes upon the mortgagor the obligation to pay the debt secured thereby and gives the mortgagee the right to sell the property mortgaged if he fails to do so. Either party to the contract has the right to a legal remedy not more prejudicial to his interest than the law in force when the contract was made.

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

Lambe & Butler, for appellants.

James I. Rhea and *J. W. James, contra.*

Prior to 1915, sales of real estate under mortgage foreclosure proceedings required that the selling officer should "call an inquest of two disinterested freeholders, who shall be residents of the county where the lands taken on execution are situated, and administer to them an oath impartially to appraise the interest of the person, or persons, or corporation against whom the execution is levied, in the property so levied upon, and such officer, together with said freeholders, shall appraise said interest at its real value in money." Rev. St. 1913, sec. 8068. It was also provided that the appraisers should deduct from the real value of the lands levied upon the amount of all prior liens and incumbrances. Section 8069. A provision was made that certificates should be obtained from the county clerk, the clerk of the district court, the county treasurer, and the treasurer of

municipalities, setting forth the amount of prior liens (section 8070), and it was provided: "In no case shall he sell any such real estate, lands, or tenements for less than two-thirds the appraised value of the interest of the person, persons, or corporation against whom the execution was issued, unless it appear from the appraisement that the liens and incumbrances thereon equal or exceed its real value in money." Section 8071. As to confirmation of sale, it was provided that if the court "shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this title, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements." Section 8077.

In 1915 this statute was amended (Laws 1915, ch. 149) in such manner as to repeal all the provisions providing for appraisement, and the section relating to confirmation (section 3) was changed to read, as follows: "If the court, upon the return of any writ of excution, or order of sale for the satisfaction of which any lands and tenements have been sold, shall after having carefully examined the proceedings of the officer, be satisfied *that the sale has in all respects been made in conformity to the provisions of this title and that the said property was sold for fair value, under the circumstances and conditions of the sale, or, that a subsequent sale would not realize a greater amount,* the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements."

In 1911 the defendants Tower excuted a mortgage to the plaintiff of certain lands. A decree of foreclosure was entered on June 7, 1915. In October, 1915, the land was sold under the decree under the provisions of the

act of 1915. Objections were filed to confirmation for the reason that no appraisal was had, and that the sale was not conducted under the law as it stood prior to the amendment of 1915. A hearing was had upon the return of the officer and the objections to the confirmation, upon evidence introduced in open court. The court found that the sale had been made in all respects in conformity to the law, that the property sold for a fair value, under the circumstances and conditions of the sale, and that a subsequent sale would not realize a greater amount, and the sale was confirmed. Defendant Tower appeals.

LETTON, J.

The only question presented is whether the amended statute by which appraisal is dispensed with impairs the obligation of the contract, and is, therefore, in violation of the Constitution of the state and of the United States. Generally speaking, the laws in force when a contract is entered into form a part of it and enter into its obligation. But there is a consensus of opinion that the laws giving a remedy for its breach may be modified or changed without impairing its obligation provided an adequate remedy is left. Chief Justice Marshall said: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." *Sturges v. Crowninshield,* 4 Wheat. (U. S.) *122, *200.

In *Bronson v. Kinzie,* 1 How. (U. S.) *311, *315, Chief Justice Taney said: "Undoubtedly a state may regulate at pleasure the mode of proceeding in its courts in relation to past contracts as well as future, * * * and, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will

not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract." The legislature may change the form of the remedy, provided it does not affect injuriously the rights of either party to the contract. *Oshkosh Waterworks v. Oshkosh,* 187 U. S. 437; *Architectural Decorating Co. v. National Surety Co.,* 115 Minn. 382; *United States, Cincinnati & Columbus Traction Co. v. Baltimore & O. S. W. R. Co.,* 226 U. S. 14; Black, Constitutional Prohibitions, sec. 135. The mortgage contract imposed upon the defendant the obligation to pay the debt secured thereby, and gave the creditor the right to sell the lands of the debtor if he failed to do so. It also gave the debtor the right to have this done by means of a legal remedy not more prejudicial to his interests than the statute then in force.

In most of the cases in which the question has been raised, it is the creditor who has been the complaining party, the legislators having imposed limitations or burdens upon the means provided for the collection of his debt. In an early Nebraska case, however, a debtor was the complaining party. Under the former law appraisement was required to be made, regardless of any incumbrance on the property, and the sale must be for at least two-thirds of the appraised value, while under the new act the sheriff was directed to ascertain incumbrances of record, and after deducting them to return the remainder as the real value. It was said by Lake, J.: "This we regard as in no sense impairing the obligation of the contract, but merely as a change of the remedy or mode of enforcing the contract, which is clearly within the control of the legislature." *Jones v. Davis,* 6 Neb. 33.

Under the former statute affecting the sale in this case, the appraisers acted judicially, and unless their appraisal was attacked for fraud or other reason, when a sale was made for two-thirds of the appraised value

of the land, it was the duty of the court to confirm the sale. Objections to the appraisement were required to be made before the sale, and were usually supported by affidavits that the property exceeded in value the amount fixed by the appraisal. These were met by counter affidavits, and the court determined the question thus presented at the time of the confirmation. If the appraisement was not so low as to indicate fraud, a sale made at two-thirds of the appraised value was usually confirmed. A more unsatisfactory method of determining the real value of the property than by such *ex parte* affidavits could hardly have been devised. A somewhat extended experience in the district court has convinced the writer that it was often more of a contest as to the skill of those who drew the affidavits and the elasticity of conscience of those who signed them than a real inquiry as to the actual value of the land, and the rights of the debtor were apt to be injuriously affected unless great discrimination was exercised.

Under the new law it is incumbent upon the court to be satisfied that the sale has in all respects been made in conformity to the law, that the property was sold for fair value under the circumstances and conditions of the sale, or that a subsequent sale would not realize a greater amount. This substitutes a judicial investigation of value, by a court, in which witnesses may be examined and cross-examined, for the judgment of appraisers who may be selected by the sheriff, at his option, from persons living anywhere in the county, perhaps remote from the premises to be valued, or perhaps from persons living in cities or towns and unfamiliar with the price of agricultural property, or *vice versa*. We are convinced that the new act merely affects the remedy. It seems fully to guard the interests of the debtor, and does not impair the obligation of the contract or violate the Constitution of the state of Nebraska or that of the United States.

AFFIRMED.

N. H. NELSON & COMPANY, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 4, 1918. No. 20110.

1. **Carriers:** LIABILITY. A common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God, the public enemy, or some other cause which would exempt it from liability at common law.

2. ———: ———: PERISHABLE GOODS. A common carrier was not liable at common law for damages for losses arising from the inherent nature or vice of the articles carried, such as live animals or perishable goods.

3. ———: INJURY TO GOODS: BURDEN OF PROOF. Where loss or injury to freight while in a carrier's possession is shown, a *prima facie* case is established, and it then devolves upon the carrier to bring itself within one of the exceptions allowed by the common law.

4. ———: ———: INTEREST. Where a claim or demand is made upon a common carrier for loss or injury to goods shipped, interest is properly allowable from the date of such demand.

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

A. A. McLaughlin, Wymer Dressler and *Lyle Hubbard,* for appellant.

Weaver & Giller, contra.

LETTON, J.

The petition alleges that on the 4th of November, 1911, the defendant, who is a common carrier, undertook to carry a car-load of potatoes from Gordon to Omaha; that on account of defendant's negligence the potatoes were allowed to become frozen and unmarketable; that on account of the negligence in the handling, management and control of the potatoes and the delay in shipment the plaintiff suffered a loss on the car-load in the sum of $250. The answer is practically a general denial.

The jury returned a verdict for plaintiff. Defendant appeals.

Four errors are assigned: 1. That plaintiff is not the real party in interest. That plaintiff was the consignee of the car-load of potatoes. He paid the freight and received the goods, and the title passed to him. The fact that he has not paid for them in full is immaterial.

2. That the evidence is not sufficient to show that the potatoes were in good condition at the time of the shipment. Several witnesses testified to facts showing that the potatoes when shipped were in good and marketable condition. There is no evidence to the contrary, unless by inference from the fact that they were frozen when received.

3. That there is error in instruction No. 2 given by the court. The instruction complained of, in substance, told the jury that if it was established that the potatoes were delivered for transportation in a good and marketable condition, and that when delivered they were in a damaged and frozen condition, the plaintiff would be entitled to recover. Defendant offered no explanation for the delay, and did not show that it had not been guilty of negligence in caring for the potatoes.

Defendant argues that a carrier is not an insurer of perishable freight against loss or damage "due to natural elements inherently affecting the goods." The question seems to be settled in this state in *Wabash R. Co. v. Sharpe,* 76 Neb. 424: "The common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God and the public enemy. The delivery of goods to the carrier in good order, and their arrival at the place of destination in bad order, makes a *prima facie* case against the carrier. It then devolves upon it to show that the loss or damage was caused by the act of God or some other cause which would exempt it from liability."

"Some other cause which would exempt it from liability" evidently means some other cause which at common law would give exemption. It had never been considered at common law that a carrier was liable for damages for losses arising from the inherent nature or vice of the articles carried, such as live animals, or goods of a perishable nature. But the duty is incumbent on the carrier to see that proper care is taken of such goods while in its possession. The carrier, having the goods in its own custody and care, has the evidence in its own possession as to whether the loss occurred by a cause arising out of the nature of the goods or from lack of care on its part. The burden of showing that no negligence occurred is, therefore, placed upon it. 4 Halsbury, Laws of England, 10. If the carrier shows that it exercised due diligence and proper care under all the circumstances, and that the loss occurred from causes or elements inherent in the article transported, it is exonerated from liability. We conclude that, where loss or injury to freight while in the carrier's possession is shown, a *prima facie* case is made, and it then devolves upon the carrier to bring itself within one of the exceptions allowed by the common law. 10 C. J. 373, sec. 576.

4. That the verdict is excessive.

The district court required a remittitur, which reduced the amount of the verdict to $320.01. Taking into consideration the facts that 40⅓ bushels of the potatoes were shown to be frozen and worthless and the remainder of the car was greatly depreciated in value the verdict is supported by the evidence. Complaint is made because the court allowed interest on the amount of the recovery. A claim for damages to the shipment was filed with defendant on January 11, 1912, and in the final judgment interest was allowed from that date. This was proper. We find no ground for appeal.

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

EDWIN C. HOXIE ET AL., APPELLEES, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 4, 1918. No. 19895.

Trial: PEREMPTORY INSTRUCTION. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, it is error to overrule a motion for a peremptory instruction in favor of defendant.

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

Frank M. Hall, A. A. McLaughlin, Lyle Hubbard and *Wymer Dressler,* for appellant.

Berge & McCarty, contra.

ROSE, J.

Katie A. Hoxie was struck and killed by a passenger train on defendant's railroad track, and this is an action by the administrators of her estate to recover resulting damages in the sum of $20,000; her husband and a daughter being survivors. From the judgment on a verdict in favor of plaintiffs for $9,000, defendant has appealed.

The accident occurred November 13, 1914, about 6 o'clock in the evening, after dark, at a private crossing in the outskirts of Sioux City, Iowa, three and one-half miles south of the station, where the railroad right of way is fenced with barbed wire; there being an iron gate on each side. For more than two miles south of the private crossing and for more than a mile north of it there is a single, straight, railroad track running nearly north and south on a roadbed several feet above the natural surface of the ground. West of the railroad, between the right of way and the Missouri river, there is a narrow strip of land occupied by a farmer. The private crossing was maintained for his benefit and he generally kept the gates locked. They were in fact

closed at the time of the accident. His outlet was a fenced lane, 23 feet or more in width, extending east a few rods from the east gate at the private crossing to a public highway running northward toward Sioux City. Alex Armstrong, another farmer, lived about 200 feet east of the railroad right of way and 40 feet or more north of the lane described. Katie A. Hoxie had been a guest of the Armstrongs. She had been missed during the evening, and the Armstrongs and some of their neighbors began to search for her. The 6 o'clock northbound, passenger train passed without slackening its speed and ran to Sioux City, where clothing and blood were found on the locomotive. The crew of a later passenger train, running in the same direction on the same track, were notified by wire to look for a human body. Not long after 7 o'clock the same evening this crew and the local searchers found parts of the body on the railroad track about 350 feet north of the private crossing, near the north end of a railroad bridge. Other parts were found between the bridge and the private crossing.

Defendant is charged with negligence in failing to give proper signals, in running its train at a high rate of speed, in failing to keep a proper lookout, and in failing to make proper efforts to stop the train after decedent was, or should have been, discovered in a place of danger. The answer of defendant, among other defenses pleaded, contains a denial of negligence on its part.

The first assignment of error challenges the overruling of a motion by defendant for a peremptory instruction on the ground that the evidence is insufficient to sustain a verdict in favor of plaintiffs. This is the vital question in the case. The reading and the analyzing of the evidence were difficult tasks, requiring considerable time. The details of the accident cannot be contemplated without emotion. The loss sustained by the husband and by the daughter makes a strong

appeal to human sympathy. In addition, there was able advocacy on behalf of plaintiffs. The verdict in their favor, therefore, should have occasioned no surprise, after the trial court, by submitting the case to the jury, held the evidence sufficient to sustain a finding against defendant. In the final analysis, however, the sufficiency of the evidence must be determined without the influence of either emotion or sympathy.

Was plaintiff guilty of negligence in failing to give highway signals? No one rang the bell or blew the whistle. The accident occurred at a private crossing where there was a closed gate in the right of way fence on each side of the railroad track. Neither the rules of defendant nor the laws of Iowa required signals at that place. Custom did not require them. The thunder of the train and a powerful headlight gave warning for more than a mile. A short distance east of the private crossing, a man in a wagon, while driving northward on the public highway, heard the train and saw the headlight. The approach from the south was thus observable for a long distance. It is insisted, however, that pedestrians had constantly passed through an opening in the fence, and had thus worn a path between the lane and defendant's roadbed. It is argued that this use of the railroad property required signals. Some of the pedestrians had walked along the track past the private crossing. Others crawled under one or two wires through a short panel south of the gate in the east fence. The lower wires of the fence only had been trampled down or broken. The broken or misplaced wires were constantly restored by the section foreman. Defendant never consented to the misplacing of the lower wires or to the use which pedestrians made of its property. Highway signals were not required at the private crossing, and the record contains no evidence that defendant was negligent in failing to give them.

Is proof of a high rate of speed evidence of negligence? The passenger train, on a straight track sev-

eral feet above the natural surface of the ground, throwing electric light 1,200 feet ahead of the locomotive, passing through a farming community between fences, ran at the rate of 40 or 45 miles an hour. This was the usual rate of speed at the private crossing in question. That speed alone, under such circumstances, is not evidence of negligence.

Will the evidence sustain a verdict in favor of plaintiffs under the doctrine of the last clear chance? At the private crossing planks had been laid lengthwise beside the rails; the space between the east rail and the plank on the west side of it being about two and one-half inches. The indications are that the impact occurred near the south end of this plank; the train coming from the south. Plaintiffs assert that the engineer and the decedent were both on the east side of the track; that one foot of decedent was fastened between the plank and the rail; that the engineer saw, or should have seen, her in time to stop the train before striking her. Where she went onto the track, or why, is a mystery. How far away the train then was is not shown. No one testified to having seen her on the track before the accident. The engineer testified that he was constantly at his post keeping a lookout; that an electric lamp on the locomotive lighted the track 1,200 feet ahead; that in looking for danger in time to avoid accidents he watched the track from 600 feet ahead of the engine to the extreme limit of the lighted area; that this was his custom; that, thus keeping a lookout, he saw the crossing; that it was clear; that he saw no one; that he did not suspect he had run over any one until after he examined his engine according to custom at Sioux City. He said, however, that he was conscious of a grinding sensation at or near the private crossing, but that he attributed it to the presence of sand on the rails; engineers on freight trains having used sand there. This evidence is uncontradicted. It is not unreasonable beyond belief,

and it is not refuted by circumstances. Plaintiffs point to testimony tending to show that a scuffed shoe, stripped of buttons, was found north of the private crossing, and that fresh splinters had been knocked off the east edge of the south end of the plank west of the east rail, near blood stains. The evidence falls far short of sustaining a finding that decedent was fastened to the track by a shoe when struck by the train, and that the engineer was negligent in failing to discover her there in time to avoid the accident. There is uncontradicted testimony that blood was found two feet south of the splintered end of the plank, that the flanges of car wheels splinter crossing-planks, and that other trains had passed over the private crossing after the accident and before the splintering had been discovered. Evidence that the proximate cause of Katie A. Hoxie's death was the negligence of defendant has not been found in the record.

It follows that the overruling of the motion for a peremptory instruction was erroneous. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

SEDGWICK, J., not sitting.

RALSTON BUSINESS MEN'S ASSOCIATION ET AL., APPELLEES, v. BENJAMIN F. BUSH, RECEIVER, APPELLANT.

FILED MAY 4, 1918. No. 20040.

Carriers: EXPENDITURES: GOVERNMENT CONTROL. The federal government being in control of the railroads of the country as a war measure, state courts and administrative tribunals should consider the general welfare in adjusting between private suitors controversies involving the expenditure of railroad funds for the improvement of local transportation facilities.

APPEAL from the State Railway Commission. *Reversed.*

J. A. C. Kennedy and *Philip E. Horan,* for appellant.

James H. Adams, contra.

ROSE, J.

The Nebraska State Railway Commission ordered defendant to provide at the village of Ralston a station and other shipping facilities near the intersection of Seventy-seventh street and the Missouri Pacific Railway track. The case is presented here upon an appeal by defendant.

Three-fourths of a mile from the industrial part of Ralston defendant has a building and a team track. The Chicago, Burlington & Quincy Railroad Company has a station at the village itself, where three employees are engaged in the railway service. The sufficiency of existing shipping facilities and the necessity for improvements were controverted issues.

On appeal the decision of the Nebraska State Railway Commission is challenged as unreasonable. The order was made before the United States engaged in the present war. As a military measure, the federal government is now controlling defendant's railway system. The enforcement of the order challenged on appeal will require labor, materials, and money. Owing to the exigencies of war, the government is making extraordinary demands for funds, men, materials, and railroad equipment. Defendant's lines of railroad transportation are connecting links between a granary of the nation and millions of men now engaged in the common defense. In this emergency the general walfare should be considered in adjusting between private suitors controversies involving expenditures for the improvement of local railroad facilities. When the order was made there was no occasion or opportunity to present or consider these features of the questions presented by the appeal. The new situation grew out of facts requiring the judicial notice of the appellate court. The Nebraska State Railway Commission should have an opportunity for further inquiry in view of changed con-

ditions. To that end, following *Marshall v. Bush, ante,* p. 279, the order challenged by defendant is vacated and the proceeding remanded to the Nebraska State State Railway Commission for further consideration.

REVERSED.

LETTON, J., not sitting.

THOMAS J. SNIDE, APPELLEE, V. MIKE SMITH, APPELLANT.

FILED MAY 4, 1918. No. 20066.

Malicious Prosecution: WANT OF PROBABLE CAUSE: EVIDENCE. In a criminal proceeding instituted by a private individual before a justice of the peace, the mere discharge of defendant without the participation of a public prosecutor, and without a trial or finding on the merits of the case, is no evidence of want of probable cause for the filing of the complaint.

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

Ringer & Bednar, for appellant.

William R. Patrick, contra.

ROSE, J.

This is an action to recover damages in the sum of $2,500 for malicious prosecution. From the judgment on a verdict in favor of plaintiff for $175, defendant has appealed.

While Snide was cultivating a field of corn, Smith was likewise engaged in a contiguous cabbage patch. Under a lease Smith claimed a share of the corn as rental for the land, and asserted the right to participate in its cultivation. Snide had undertaken to raise the corn on the shares, and disputed Smith's right to cultivate it under existing conditions. After a controversy between the two, a warrant for Snide's arrest was issued on a complaint filed by Smith. In a few days each party with his counsel appeared before the justice of the peace who had issued the warrant. Snide ob-

jected to being prosecuted by private counsel. The county attorney had not been consulted about the filing of the complaint, had not personally investigated the facts, declined on behalf of the county to incur liability for costs under the circumstances, and refused to prosecute Snide under Smith's complaint. The justice of the peace excluded private counsel for the prosecution, and the proceeding was consequently dismissed without a trial or a finding on the merits of the case. The present suit by Snide against Smith for malicious prosecution followed. Probable cause for the complaint was a vital issue in the civil action. On that issue the following instruction is challenged as erroneous:

"You are instructed that what is probable cause is not contingent upon the fact of the guilt of the accused. The discharge of the plaintiff in the justice court is not of itself conclusive evidence of want of probable cause, and in this case plaintiff must do more than prove that he was not guilty of the offense charged in the justice court and that he was discharged therein, but he must further prove by a preponderance of the evidence that the defendant, Mike Smith, acted without probable cause and with malice in instituting said prosecution."

The direct reference to the "discharge of plaintiff" and the specific statement that it "is not of itself conclusive evidence of want of probable cause" are equivalent to instructing the jury that Snide's discharge by the justice of the peace is evidence that Smith had made the criminal complaint without probable cause. This is not a correct statement of the law. The dismissal of the criminal proceeding was either a direct or an indirect result of a motion by Snide. No public prosecutor said that the criminal charge had been made without probable cause or that Snide had not been guilty of a breach of the peace. The issue raised by Snide's plea of not guilty had never been tried in a

criminal court. No magistrate or court had ever passed on the merits of the criminal proceeding. Under the circumstances narrated, the dismissal was no evidence whatever of the want of probable cause. The rule based on reason and sustained by the weight of authority was recently stated as follows (12 L. R. A. n. s. 717): "The mere release without prosecution of one arrested under charge of crime does not create a presumption that the one procuring the arrest acted without probable cause." See notes to *Bekkeland v. Lyons*, 64 L. R. A. 474 (96 Tex. 255), and *National Life & Accident Ins. Co. v. Gibson*, 12 L. R. A. n. s. 717 (31 Ky. Law Rep. 101); 18 R. C. L. p. 41.

Was the erroneous instruction prejudicial to Smith? In the civil case the testimony of each party tended to show that the other had been the trespasser and the aggressor in the controversy resulting in the criminal charge. The testimony of Smith, of his wife, and of his farm-hand indicated that Snide, in a violent and threatening manner, came into the cabbage patch, used vile and profane language, and was prevented by the farm-hand from making an assault on Smith. The only testimony that Smith was the trespasser and the aggressor came from Snide. In this condition of the proofs the trial court in effect told the jury that Snide's discharge was evidence that the complaint had been made without probable cause. This discharge, erroneously held by the trial court to be evidence of want of probable cause, was thus thrown into the balance against Smith. Under the circumstances the error was clearly prejudicial. In addition, the cross-examination of one of Smith's witnesses, in an apparent attempt to disclose collateral facts already excluded by the trial court, went beyond proper bounds.

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

REVERSED.

LETTON, J., not sitting.

CHARLES BOSCHULTE, APPELLANT, v. ELKHORN RIVER DRAINAGE DISTRICT, APPELLEE.

FILED MAY 4, 1918. No. 19946.

1. **Drains:** DAMAGES. One who sells and conveys to a drainage district right of way through land owned by him, and releases the district from all claim for damages by reason of occupancy and use of the land so conveyed, may recover damages caused by carelessness and negligence in the construction of the improvement. Such release relates only to damages caused by proper construction of the improvement.

2. **Mandatory Injunction:** DRAINAGE IMPROVEMENT. In an action for damages caused by negligence in the construction of such an improvement, a mandatory injunction requiring radical and continual changes in the plan of construction of the improvement will not be granted without clear proof of the necessity and practicability of such changes.

3. **Appeal:** TRIAL TO COURT: FINDING. If a jury is waived in such action, the findings of the trial court, as to questions of negligence in the construction of the improvement and damages caused thereby, are entitled to the same consideration upon appeal as the findings of a jury upon such questions.

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

W. M. Cain and *N. H. Mapes*, for appellant.

Courtright, Sidner & Lee, contra.

SEDGWICK, J.,

The plaintiff brought this action in the district court for Dodge county for an injunction and to recover damages alleged to have been caused by the construction of the defendant's drainage ditch. The case was tried to the court without a jury, and the court denied the injunction, but found that the plaintiff's damage was $300, for which judgment was entered, and the plaintiff, not satisfied with these findings and this judgment, appealed to this court.

It appears that the Elkhorn river flows through Dodge and Washington counties, and when the defendant drainage district was about to construct its ditch in 1909 its plans contemplated the excavation of several considerable cuts with a view to straightening the course of the river. Pursuant to this plan, it purchased from the plaintiff a right of way across part of his land, and plaintiff executed to the defendant his deed conveying a strip of land 200 feet wide across certain lands of the plaintiff, amounting to about nine acres, for which the defendant paid the plaintiff the sum of $900, being about $100 an acre for the land so purchased. The deed contained the stipulation that "said land is to be used perpetually according to the present or future plans of said drainage district, its successors and assigns for drainage purposes." It is conceded that the plans for the construction of the ditch through the land so purchased had been made and were accessible to the parties at the time of entering into the contract to purchase the right of way, and that these plans contemplated that this excavation would not be made of sufficient width to carry the whole flow of the river; that the then existing course of the river should not be interfered with; and that reliance was to be placed upon the probability that the water of the river finding a more direct channel through this ditch would, by erosion, enlarge the ditch, and perhaps finally furnish a sufficient channel for the whole stream. But the plaintiff alleges "that defendant was careless and negligent in the construction of said ditch, in that defendant made the same too narrow and too shallow and insufficient to receive, take and carry the waters of said Elkhorn river; that defendant negligently and without due care made said ditch of a width of less than forty (40) feet on top and only about ten (10) feet wide at the bottom." It seems to be conceded that the Elkhorn river, for some distance both above and below this land in question, is a very crooked stream and subject to excessive flood

waters at various times, and by erosion has frequently changed its channel at various places. In crossing the plaintiff's land the channel of the river was very crooked; it appeared to both parties very desirable to have its course straightened; and the deed provides that the grantor will "release all damages and claims thereto on account of and by reason of the occupancy and use of said land." What the result would be was more or less of an experiment, but the parties to the deed appear to have anticipated beneficial results. This release of damages, of course, was predicated upon the assumption that the work would be properly done in reasonable compliance with the plans and specifications, and the defendant would be liable for any damage caused by its negligence in the construction of the work.

An injunction was asked for "commanding, requiring and enjoining defendant to construct riprap work or some other suitable work upon and along the east bank of said Elkhorn river where same passes through plaintiff's said land, and to prevent further encroachments of said river upon said land, and perpetually enjoining and requiring defendant to maintain the same." The trial judge, with the parties interested, viewed the work complained of and the land affected. The court refused the injunction, and "finds the district has not committed any negligence," but allowed the plaintiff compensation for the land actually occupied by the river bed, in addition to the 200 feet conveyed in the deed. There is no doubt that a large tract of the plaintiff's land was overflowed, and it may be that this injury to the plaintiff's land was increased, at least temporarily, by the improvement undertaken. The evidence is very voluminous, mostly relating to the injury to the land, and with some attempt to show that this injury was at least in part caused by carelessness of the defendant district. The trial judge appears to have given unusual care in the investigation and determination of the questions presented. The question as

to these alleged damages is essentially a question of fact, and, under the circumstances, the findings of the trial court in that regard are entitled to the same consideration as the findings of a jury upon such questions. Upon the whole record, we cannot say that the findings as to these damages are so clearly wrong as to require this court to interfere.

The judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed October 18, 1918. *Rehearing denied.*

SEDGWICK, J.,

The brief on the motion for rehearing suggests that the quotation in the opinion, *ante* p. 451, from the finding of the district court, "finds the district has not committed any negligence," is misleading because it does not quote the remainder of the finding, "but in so far as it made the river its agent to make the excavation and thereby excavated 350 feet in width, it was either negligence or the equivalent of negligence." It seems to us that the positive finding is that the district was not guilty of negligence, but making the river its agent, and so forth, was in law equivalent to negligence; that is, the law will hold the district liable the same as it would if it had been guilty of negligence. This conclusion of law by the trial court we think is not justifiable under the circumstances.

"In crossing the plaintiff's land the channel of the river was very crooked." It would therefore naturally appear "to both parties very desirable to have its course straightened." No evidence that it so appeared is required.

The contract between the parties was made in view of the plans on file for the construction of this ditch, which plainly contemplated "that this excavation would not be made of sufficient width to carry the whole flow of the river; that the then existing course of the river

should not be interfered with; and that reliance was to be placed upon the probability that the water of the river finding a more direct channel through this ditch would, by erosion, enlarge the ditch, and perhaps finally furnish a sufficient channel for the whole stream." Thus it was agreed that the river should be made "the agent to make the excavation," not of one party, but the agent of both parties. It was not supposed that in so doing the river would overflow the plaintiff's land not included in the purchase, and the contract contained no agreement that either party should guarantee the other that the river would not overflow its banks. If more of plaintiff's lands were covered with water by such overflow than was or might be released by reclaiming the land covered by the former crooked course of the river, the plaintiff may have lost instead of gaining by his venture.

There is no contention that the contract was fraudulent or in any wise unfair, nor even that the plaintiff will not, on the whole, recover more land than he will lose.

The defendant has not appealed from the judgment of $300, and it is, therefore, not necessary to determine whether it was erroneous.

The motion for rehearing is OVERRULED.

BANCROFT DRAINAGE DISTRICT, APPELLEE, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT.

FILED MAY 4, 1918. No. 19949.

1. **Dismissal Without Prejudice After Remand.** A plaintiff, at any time before final submission, may dismiss his action without prejudice to a new action for the same cause. If the action has been removed to the federal court, and judgment for plaintiff in that court has been reversed by the circuit court of appeals and the cause remanded for further proceedings, and the federal trial court then dismisses the action without prejudice upon motion of plaintiff, such proceedings will not be a bar to a new action.

2. **Removal of Causes:** REDUCTION OF DEMAND. In such case, the plaintiff may reduce the amount of his claim, and so prevent another removal to the federal court.

3. **Drains:** BENEFITS: NOTICE: PUBLICATION. Section 1877, Rev. St. 1913, requires that the notice of the meeting of the directors of a drainage district to apportion benefits shall "be inserted for at least one week in a newspaper published at the county seat." *Held*, that such notice must be published during an entire week immediately before the time specified for the hearing.

4. ———: ———: ———. When publication is required for one week, and the notice is for a time less than one week after the week for which publication is made, it is immediately before the hearing within the meaning of this rule.

5. ———: ———: ———. These requirements are complied with by publication in a weekly paper on the 3d day of September, of notice of meeting to be held at 8 o'clock in the morning of the 11th, although the paper is also published on the 10th.

6. ———: DRAINAGE DISTRICT: ASSESSMENT: LIENS. The provision of section 1888, Rev. St. 1913, that a list of the tracts of land assessed shall be returned to the county clerk, enables the district to fix a lien upon lands of the district generally, and provides a means of collecting the tax. The section also provides that assessments against public corporations and railroad companies may be presented as other claims are. If not paid when so presented, they may be collected by suit.

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

A. A. McLaughlin, Wymer Dressler, and *Lyle Hubbard,* for appellant.

P. M. Moodie and *O. C. Anderson, contra.*

SEDGWICK, J.

Plaintiff brought this action in the district court for Cuming county to recover an assessment against the defendant. From a judgment in the plaintiff's favor, the defendant has appealed.

The defendant concedes that the organization of the district was regular, and contests the validity of the assessment upon two grounds: That the apportionment of benefits against the defendant was invalid because

of the insufficiency of the notice of the action of the board in apportioning the benefits; and because the assessment was not certified to the county clerk and spread upon the tax list of that county. The defendant also relies upon a judgment of the federal court of appeals as a bar to this action.

1. The assessment against the defendant amounted to more than $2,000, and the plaintiff began an action in the district court of the state, and upon application of the defendant the cause was removed to the federal court. Upon trial in that court, before the Honorable W. H. Munger, a judgment was rendered in favor of the plaintiff, and upon writ of error to the United States circuit court of appeals, the judgment was reversed on the ground that the notice of the meeting of the board for the apportionment of benefits was insufficient under our statute; two judges of that court agreeing to the reversal, and one judge dissenting. *Chicago, St. P., M. & O. R. Co. v. Bancroft Drainage District.* 219 Fed. 103. This illustrates the difficulty and importance of the construction of our various statutes upon the question of service by publication of notice; four eminent federal judges, in whom we have great confidence, have passed upon the question, two holding that the notice in question was insufficient, and two considering the notice sufficient.

After the circuit court of appeals had reversed the decision of the lower court and remanded the cause for further proceedings therein, the trial court, upon plaintiff's motion, dismissed the case without prejudice to a future action. The plaintiff then began this action in the district court for Cuming county asking judgment for $1,999 and interest. The defendant pleaded the judgment of the circuit court of appeals as a bar to this action, and now contends that the judgment of that court was a final disposition of the plaintiff's claim.

Our statute provides: "An action may be dismissed without prejudice to a future action: First. By the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court." Rev. St. 1913, sec. 7654. This right exists after a judgment upon the merits has been reversed by an appellate court, and the cause remanded for further proceedings. *Illinois C. R. Co. v. Bentz,* 108 Tenn. 670, 58 L. R. A. 690; *Young v. Southern Bell Telephone & Telegraph Co.,* 75 S. Car. 326, 7 L. R. A. n. s. 501, and note; *Baltimore & Ohio R. Co. v. Larwill,* 83 Ohio St. 108, 34 L. R. A. n. s. 1195, and note. After such dismissal in the federal courts, the plaintiff may prosecute an action in the state court for less than $2,000, and so prevent another removal to the federal court. *McIver v. Florida C. & P. R. Co.,* 110 Ga. 223, 65 L. R. A. 437.

2. Section 1877, Rev. St. 1913, provides: "A notice shall be inserted for at least one week in a newspaper published at the county seat, stating the time when, and the place where, the directors shall meet for the purpose of hearing all parties interested in the apportionment of benefit by reason of the improvement." A notice was published in a weekly newspaper on the 3d day of September, 1909, that the board would act in the matter on the 11th day of September. The 10th of September was also a regular publication day of the paper, but no publication of the notice was inserted on that day. The contention is that, under this statute, the notice must be published for and during the week immediately preceding the action of the board, and as more than a week intervened between the publication of the notice and the action of the board, and in the meantime the paper was published on the 10th day of September, the statute was not complied with. It is universally held that, when jurisdiction of a party is to be obtained by publication of a notice, the statute allowing such service must be strictly complied with.

In *State v. Hanson,* 89 Neb. 724, 737, it is said: "It is apparent that the phrases, 'shall publish a notice once each week for three weeks,' and 'a notice shall be given for three weeks by publication,' have different meanings. In the first 'for three weeks' limits the number of publications, and in the other phrase 'for three weeks' fixes the period of time during which the publication must be made." The plaintiff contends that this language is applicable to the case at bar. In that case, the requirement was that the notice shall be published "once each week for three weeks." In the case at bar, the requirement is that the notice "shall be inserted for at least one week." If this difference in the language distinguishes the cases, and we hold that in this case the statute "expresses the duration of the notice," it becomes necessary to consider whether this statute has been strictly complied with. Publication "for one week" means during one week. *Lawson v. Gibson,* 18 Neb. 137. In *Leavitt v. Bell,* 55 Neb. 57, it is said that it is held in *Lawson v. Gibson, supra,* "that the notice must be published during the thirty days immediately preceding the date of sale."

If we consider that the week "for" which it was published was the day on which it was published and the next succeeding six days, then the week began at midnight after September 2, and ended at midnight after September 9, and, as the meeting of the board was on the 11th, one whole day intervened. Our statute provides: "The time within which an act is to be done as herein provided, shall be computed by excluding the first day and including the last." Rev. St. 1913, sec. 8570. If we exclude the first day of publication and include the seventh day thereafter, the week for which it was published ended at midnight after the 10th, and the morning of the 11th was the earliest time that the meeting could be held.

If we say that the week "for" which the publication was made began at the precise minute when the paper

was published and ended the same minute of the seventh day thereafter, we have this condition to contend with. The facts upon which the trial court determined the action were stipulated by the parties. From this stipulation, it appears that the paper containing this notice was published before noon of the 3d day of September, and that the published notice specified that the meeting of the board to determine the apportionment of benefits would be held at 8 o'clock in the forenoon of the 11th day of September. Thus, the notice was for more than seven days and for less than eight days. If the meeting had been held at the same hour of the 10th day of September, the notice would not have been published for a week of seven entire days before the meeting. So that, although the notice was published for one week, the board could not hold their meeting under such notice at any time other than the afternoon of the 10th day of September. Perhaps the argument would carry us still farther. If, because a part of a day intervenes between the completion of the publication and the action of the board, the notice must be held to be insufficient, it might be difficult to determine how much time might intervene between the completion of the publication and the action of the board, and still the notice be sufficient. If the notice was published at a given hour, say 11 o'clock in the forenoon of the 3d day of September, must the board convene precisely at 11 o'clock of the 10th day of September? Would two hours delay for luncheon, and the calling of the meeting for 1 o'clock in the afternoon of the 10th, have been fatal? Webster's New International Dictionary says that "immediately" is "opposed to mediately, * * * without intervention of any person or thing." The statute deals with weeks. The notice must be inserted for at least a week. If a week had intervened between the time for which the notice was inserted and the time of hearing, it might perhaps with reason be contended that there had been an intervention of a thing regarded by the statute as

substantial in such matters. If less than a week's time intervening would prevent the publication from being considered immediately prior to the action of the board, it might be difficult to say whether the intervention of a day or an hour would be sufficient. It seems clear that the law, which does not care for trifles, would consider that this notice was published for a week immediately preceding the time specified in the notice for the meeting.

The question is not free from difficulties. The argument that, one publication day having passed and the paper having been published on that day without this notice, it cannot be said that the publication was continued to the time of the meeting is worthy of consideration.

Our conclusion is that, under the rule of the statute to exclude the first day in computing time, it is more reasonable to hold that the week for which the notice was inserted in the paper was immediately before the time fixed for the meeting of the board within the meaning of our former decisions.

3. Section 1888, Rev. St. 1913, provides a method for the collection of assessments against the lands generally of the district. It requires that a list of such tracts shall be returned "with the amounts of money chargeable to each * * * to the county clerk of each county, where lands are located, who shall place the same on the duplicate tax lists against the lands and lots so assessed." It then provides that the proper officers shall collect such assessments as other taxes on realty, and that the assessment shall be a lien upon the real estate until paid. It then contains a provision applying to this defendant, as follows: "The drainage district may file claims against any county, city, village, railroad company, or other corporation, private or public, for the share of any annual apportionment to be paid by any such corporation, and if the same is not paid, it may be recovered by action in court." This

seems to be a plain provision that assessments against public corporations and railroad companies may be presented as other claims are presented. If not paid, they may be sued for. There doesn't seem to be any merit in this contention.

The judgment of the district court is

AFFIRMED.

CARL O. SCHLANBUSCH, APPELLEE, v. FRED A. SCHLANBUSCH ET AL., APPELLANTS.

FILED MAY 4, 1918. No. 19966.

1. **Arbitration and Award.** When an arbitration is had by agreement of the parties pursuant to statute, the courts will not proceed further in a cause involving the same matters pending before such arbitration, but will dismiss such cause and act upon the arbitration.
2. ———: APPEAL: DISMISSAL. If such arbitration is had after appeal to this court in the cause so pending, this court, upon proper proof of such arbitration, will dismiss the cause so appealed.
3. ———: STAY OF PROCEEDINGS. If a pending cause is submitted to arbitration upon order of the court under section 8222, Rev. St. 1913, the court will stay proceedings until such arbitration can be completed, and will then dispose of the cause and the accrued costs therein.

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

J. S. Armstrong and *F. D. Williams,* for appellants.

A. E. Garten and *H. C. Vail, contra.*

SEDGWICK, J.

While this action was pending in this court on appeal from the district court for Boone county, the parties, who are brothers, entered into a stipulation: "For the purpose of settling the differences which have existed between the parties above named for a number of years, each hereby agrees to submit the same to arbitrators." The stipulation then recites the matters involved in this lawsuit as the subject of settlement by arbitration.

Afterwards the plaintiff, who was appellee, filed in this court a motion to dismiss the appeal, and with the motion filed a duly certified copy of the proceedings in arbitration, from which it appears that the arbitrators duly met and made their award and filed the same in the district court for Boone county pursuant to the statute. This court then entered an order to show cause within 20 days why the action itself should not be dismissed, and the parties made their showing therein, and, after hearing, the matter was duly submitted for a decision.

Section 8216-8235, Rev. St. 1913, provide for the submission of controversies to arbitration, and provides the practice thereon. The stipulation for arbitration provided that the district court for Boone county "shall render judgment upon the award," as provided in section 8219, and also provided that "all actions pending between the parties shall be settled by this award." Our statute also provides: "A submission to arbitrators of the subject-matter of a suit may also be made by an order of court, upon an agreement of parties, after suit is commenced." Rev. St. 1913, sec. 8222. The law favors settlement of controversies by the parties interested, and, when such settlement is made or agreed upon by the parties, the courts will not proceed further with litigation between the parties that was pending at the time that such settlement was entered into. *Reeve v. Mitchell,* 15 Ill. 297; *Cunningham v. Craig,* 53 Ill. 252. These cases were decided under statutes apparently similiar to ours. The statute provides the practice in the court to which the arbitration is returned, and that practice and the jurisdiction of the district court therein are not affected by this decision. The parties cannot longer litigate in this case, after they have agreed upon the matters involved.

The judgment of the district court is therefore reversed, and the cause dismissed. Each party will pay one-half of the costs incurred in this action.

REVERSED AND DISMISSED.

HARVEY E. GLATFELTER, APPELLANT, V. SECURITY INSURANCE COMPANY, APPELLEE.

FILED MAY 4, 1918. No. 20010.

1. **Insurance:** PAROL AGREEMENT. An oral agreement to insure is enforceable, but it must be definite as to all of the material terms of the contract.

2. **Evidence:** COLLATERAL FACTS. Collateral facts are not allowed in evidence, unless such facts throw light upon the issue being tried. It is not ordinarily allowed to prove collateral facts for the purpose of explaining other collateral facts.

3. **Trial:** EXPLANATORY INSTRUCTION. An instruction that properly explains the application of a principle of law stated in a previous instruction is not erroneous.

4. **Appeal:** INSTRUCTIONS: ASSUMPTION OF FACT. From the facts in evidence, indicated in the opinion, it does not appear that the jury could have been misled by assuming in the instructions that "no effort to pay (the insurance premium) had been made."

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

W. T. Thompson and *Martin & Bockes,* for appellant.

Stout, Rose & Wells, Elmer E. Ross, and *Alfred Munger, contra.*

SEDGWICK, J.

Plaintiff alleged that he made an oral contract with the defendant for fire insurance on a building in Central City; that the contract was made on the 8th day of May, 1914, and that the property was destroyed by fire on the 27th day of December, 1914. No premium had been paid and no policy delivered. The jury found a verdict for the defendant, and the plaintiff has appealed, and in the brief discusses two assignments of error.

1. Plaintiff complains that the court erred in striking out the evidence that the insurance agent, with whom he claims to have made the oral contract, was indebted

to the plaintiff for rent at the time the contract is alleged to have been made. It is argued that this evidence, in connection with evidence that the agent received a commission on the insurance obtained by him, tends to show the interest that the agent would have in making such a contract, and tends to explain the delay of the agent in demanding a premium and the delay of the plaintiff in demanding a delivery of the policy. "Evidence of collateral facts corroborative of the statement of one party with respect to the main issue is admissible if confined to such matters as throw light upon the question." *Farmers State Bank v. Yenney,* 73 Neb. 338. In the case at bar the main issue was the question of the making of such a contract. The long delay of over seven months was not the main issue but was allowed in evidence as a collateral fact throwing light upon the main issue. The fact of the agent's indebtedness to the plaintiff and his opportunity to pay a part of that indebtedness by his commissions would not be a stronger inducement to enter into a contract than the fact that he was to receive such commissions in cash would be. Under the circumstances in this case, it seems entirely improbable that the evidence of his indebtedness would have been of assistance to the jury in determining the main issue. The ordinary course of insurance is to issue a policy specifying definitely the contract and its terms. An oral agreement to insure is enforceable, but it must be definite as to all of the material terms of the contract. As to the amount of insurance agreed upon, the plaintiff in his petition alleged that it was to be "an amount not exceeding $2,500," and as to the premium agreed upon to be paid therefor, the plaintiff testifies, "I did not know the exact amount."

2. The plaintiff also complains of the giving of instruction No. 10 by the court on its own motion, as follows: "While, as hereinbefore explained, it is competent for the insurance company to extend credit in

the matter of the payment of the premium yet the jury may take into consideration the fact that no premium was or had been paid prior to the loss, and that no demand therefor had at any time been made, and no effort to pay had been made, in determining the question as to whether the contract claimed by plaintiff was in fact and actually made and entered into."

It is complained that this instruction "brings into the case the element of extension of credit." The court had already, in behalf of the plaintiff, instructed the jury that "an insurance company may waive the cash payment of a premium and may extend the time for the payment of the same." This is referred to in the instruction complained of. It is also complained that the instruction assumes that "no effort to pay had been made." The plaintiff testified that at one time during the seven months he put a blank check in his pocket and went to the office of the agent for the purpose of paying the premium, but the plaintiff also testified that the agent "is out of town most of the time," and that the door of his office "was locked, as it usually is," and that at other times he went to the agent's office to collect rent, but did not testify that he, at those times, made any tender of payment. It he had tendered payment, and it had been refused, it might well be contended that an "effort to pay had been made." Under the circumstances in this case, we cannot consider that it was probable that the verdict of the jury was affected by the assumption that the act of the plaintiff in going to the agent's office, when he knew that the agent would probably be away, was not an effort to pay. The plaintiff's evidence as to the making of the alleged contract is emphatically contradicted by two cempetent witnesses, and his own allegations and proof, as we have already seen, are not so definite as to the terms of the alleged contract as to justify the conclusion that the jury has been misled in the matters complained of.

We find no substantial error in the record requiring a reversal, and the judgment of the district court is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

MATHILDA PLATH, APPELLEE, V. JOHN BRUNKEN, APPELLANT.

FILED MAY 4, 1918. No. 20037.

1. **Work and Labor:** SERVICES: PAYMENT: PRESUMPTION. When an incompetent person, unable to support herself, is taken into a family and cared for and furnished with board and clothes and the necessaries of life, the presumption is that any services rendered by such incompetent are fully paid for by the support furnished.
2. ———: ———: ———: ———. If such person is competent to do all kinds of labor and able to earn much more than her care and support, and does in fact earn very much more than any reasonable estimate of the cost of her board, clothes and care, the presumption is that the party so taking her into the family will pay the reasonable value of her services over and above her support and care.
3. ———: ———: ———: ———. When a young girl is taken into a family and kept until majority, the law, in the absence of any circumstances showing a different presumption, would imply that such services as she might render during her minority were compensated by her care and keeping.
4. ———: ———: ———: IMPLIED CONTRACT. In such case, if, upon reaching her majority, she was able to render valuable services and continued to do so for thirty years, the law, in the absence of an express contract, might imply an agreement to compensate her reasonably for such services.
5. ———: ———: COMPENSATION: QUESTION FOR JURY. If the evidence is substantially conflicting as to the conditions and circumstances under which the plaintiff was taken into and retained in the defendant's family, and as to the value of the services rendered, whether such person is entitled to compensation is ordinarily a question of fact for the jury.
6. **Trial:** INSTRUCTIONS: COPYING PLEADINGS. The trial court should submit to the jury a plain statement of the issue to be determined. Copying the pleadings in full in the instructions is generally objectionable, and, if it appears to have misled the jury, may require a reversal.

7. **Appeal:** INSTRUCTIONS: REVIEW. When the motion for new trial challenges formally all or many of the rulings of the court in giving and refusing instructions, and only a few of such rulings are discussed in the briefs upon appeal, and the record does not show that the complaining party offered suitable instructions in lieu of those complained of, or in any manner called the attention of the trial court to the specific question relied upon in this court, this court will not ordinarily regard the supposed error as material, when from the whole record it does not appear that the jury were probably misled thereby.

8. **Objections to evidence** cannot be considered in this court unless the same were made and passed upon in the trial court.

9. **Trial:** FINDING OF FACTS: INFERENCES. When the jury find the facts and circumstances upon which their verdict will depend from a preponderance of the evidence, it is for them to determine the "fair inference" from the facts so established.

10. **Appeal:** CONFLICTING EVIDENCE. The verdict of a jury upon substantially conflicting evidence will not be reversed as unsupported unless, upon the whole record, it must be found to be clearly wrong.

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

Albert & Wagner, for appellant.

Reeder & Lightner and *Otto F. Walter, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court for Platte county to recover for alleged services rendered the defendant while in the defendant's family as a member thereof. The verdict and judgment were in her favor, and the defendant has appealed.

It is earnestly contended on the one side that when an incompetent person, unable to support himself or herself, is taken into a family and cared for and furnished with board and clothes and the necessaries of life, the presumption is that any services rendered by such incompetent are fully paid for by the support furnished. On the other side it is as strenuously contended that, if such a person is competent to do all kinds of labor and able to earn much more than her care and support, and does in fact earn very much more than any

reasonable estimate of the cost of her board, clothes and care, the presumption is that the party so taking her into the family will pay the reasonable value of her services over and above her support and care. Under the authorities presented on either side, it appears that both of these propositions are correct. The defendant cites several cases on his proposition that a member of a family is not entitled to compensation for services rendered, and among them *Wise v. Outtrim,* 117 N. W. 264 (139 Ia. 192), in which it was said: "In the absence of an agreement, one who renders domestic services in a family of which she is a member is not entitled to recover compensation therefor." This statement in the syllabus is immediately followed by the statement: "While domestic services, rendered in a family by a member thereof, are presumed to be gratuitous, such presumption is rebuttable, and whether or not an agreement for remuneration existed is a question of fact." The question then becomes a question of fact as to the existing conditions and circumstances under which the plaintiff was taken into and retained in the defendant's family. If the evidence in regard to the facts showing the conditions and circumstances of the case is substantially conflicting, the proper course then is to submit the question to the jury with suitable instructions. The petition, upon which the case was tried, alleged that the plaintiff in her infancy was injured by a fall which she received while in the care of her sister, who afterwards became the wife of this defendant, and that as a result of this injury the plaintiff became "an incompetent person," and that afterwards, in 1875, plaintiff's sister had intermarried with the defendant, and, because of her sister's responsibility for the accident, the defendant "took the plaintiff into their family as a member thereof." The petition then alleges: "It was the intention of the defendants at the time the plaintiff was so taken into their home and the intention of the plaintiff, so far as she was capable of forming and having

an intention, that she was to remain with and have a home with the defendants, including board, clothing and all necessaries, during the remainder of her lifetime, or, in case of the defendants' death before hers, that she should be provided for by them or paid by the defendants for her services, and it was the further intention of the plaintiff and defendants that, if at any time they failed to provide her a home, board, clothing, and other necessaries, they should pay her at such time the reasonable value of her services during the whole period of time she remained with them." Plaintiff evidently assumed that this is an allegation of an implied contract, because in the petition it is followed with the allegation: "That the plaintiff faithfully performed said contract and remained with the defendants from about the 3d day of May, 1875, to the 8th day of November, 1915. During said period, the plaintiff not only did a large amount of the housework of said defendants, including washing, ironing, cooking, scrubbing, housecleaning, etc., but milked the cows, did the outside chores, worked in the fields, and did other outside work. That her average earnings during all of said time were not less than $200 per year, in addition to her board, clothing, and other necessaries furnished by the defendants."

The trial court evidently considered these allegations of the intentions of the parties as allegations of an implied contract on their part, and repeated the allegations in full in the instructions to the jury. The court also, instead of a plain statement of the issue to be tried, repeated in the instructions other similiar allegations of the petition. Such practice has frequently been criticized by this court, and in *Hutchinson v. Western Bridge & Construction Co.*, 97 Neb. 439, it is said: "It may be reversible error to include such statements in that part of the charge of the court defining the issues to be tried, and, if the reviewing court is satisfied that the jury has been misled by so doing, it will be its duty to grant a new trial." This instruc-

tion is challenged in the motion for new trial in these words: "The court erred in giving instruction No. 1 on its own motion." And each action of the court in giving or refusing an instruction, some 12 or 13 in all, is complained of in the motion for a new trial in an exactly similiar manner. Whether the particular instruction now being considered was especially called to the attention of the court is not shown by the record, and it does not appear that the defendant offered and requested an instruction in lieu thereof. Under the rule that alleged errors of the trial court will not be considered in this court unless they are brought to the attention of the trial court in the motion for new trial, the practice has grown up of alleging in the motion for new trial seriatim and perfunctorily innumerable rulings of the trial court in the course of the trial, very few of which are discussed or challenged in the briefs, and apparently few, if any, of them especially called to the attention of the trial court. This practice undoubtedly frequently results in misleading the trial court, and may result afterwards in reversals for errors that have not been fully presented to and considered by the court. Under such circumstances we have continually given consideration to the fact that no suitable instruction has been prepared and presented to the trial court in lieu of the instruction particularly complained of in the brief filed in this court. In such case, unless it clearly appears that the jury were misled by the instruction complained of, the error has not been considered to require a reversal.

The plaintiff and her father were both taken into defendant's family, and cared for until the father died. When they so went into defendant's family, the plaintiff was about ten years of age. She was mentally incompetent, and it could not be considered probable that for some time at least she would be able to earn her own support. She, however, remained in the defendant's family for more than 40 years; that is, for more than 30 years after she became of legal age. During

that time the defendant was so situated that the kind of services that this plaintiff could render would be necessary and valuable. He had little or nothing at the time that plaintiff became of age, and from that time on improved his condition financially until he left his farm and went to town to live and enjoy a competency. He then left the plaintiff on the farm in the care of his son, who soon quarreled with the plaintiff, or, as the defendant alleges, the plaintiff quarreled with him, and the son refused longer to care for the plaintiff, and she was, in her old age, consigned to the care of her sister, who was not so favorably situated to care for her as the defendant had been. There was evidence from which the jury might find that from the time the plaintiff became of age until about the time the defendant left her at the farm she was competent to do all kinds of work that might be expected of a woman of her age, and that her services were of much greater value than the expense of her keeping. The defendant insists that the implications of the law as to his liability must be derived entirely from the conditions and circumstances at the time that the plaintiff, at the age of ten years, was taken into his family. If, when she became of age, she had left his family and had gone where she could obtain fair compensation for her services, the presumption the defendant insists upon would be indulged. When a young girl is taken into a family and kept until majority, the law, in the absence of any circumstances showing a different presumption, would imply that such services as she might render during her minority were compensated by her care and keeping. If, however, upon reaching her majority, she was able to render valuable services and continued to do so for 30 years, the law, in the absence of an express contract, might imply an agreement to compensate her reasonably for such services. And in this case, if the jury believed this evidence in regard to the services she rendered and the value thereof, they might find an implied agreement on the defendant's part to in some

manner compensate her for those services. If he had continued to provide for her during her lifetime, there would be more ground for the presumption that she had been compensated for her services. The defendant's complaint that evidence in regard to her abandonment by the defendant in her old age was incompetent cannot now be considered. The plaintiff in the brief alleges that no objection was taken to this evidence at the time it was given, and the defendant in his reply brief does not call our attention to any objections of that kind, and we have not discovered them in the record.

The court instructed the jury: "Under the issues formed by these pleadings the two questions for you to determine are: Whether the services performed by the plaintiff were so performed as a member of the Brunken family, or whether they were so performed as a hired servant, or under such circumstances as would lead to a fair inference of an implied promise to pay for the same. Then, in the event that you shall find that the services were performed as a hired servant or under such circumstances, as shown by the evidence, as leads to a fair inference of an implied promise on the part of John Brunken to pay for the same, you are called upon to determine what the value of these services were, over and above the value of the food, lodging and clothing furnished to and provided for her, and of the necessary care, if any, necessarily bestowed upon her."

The defendant complains that this instruction submits the question whether there was an implied promise to pay for the services, and says that is an issue not tendered by the petition. The reason alleged is that the plaintiff was only ten years old when taken into defendant's family, and that fact rebuts any presumption of an implied promise to pay for services. But, as we have already seen, the implied promise might arise when the plaintiff became of mature age and was rendering valuable services.

The instruction is also objected to on the ground that "it proceeds upon the theory that, if there was an

implied contract between the plaintiff and the defendant, it covered the entire period she was an inmate of the defendant's home." This is perhaps a more serious objection to the instruction. If the instruction had read, "whether the services or some part thereof performed by the plaintiff," etc., the objection would have been obviated, and, if the defendant had offered an instruction proper in that regard, the court would no doubt have adopted it. It is true that it could not be implied that the defendant would pay the plaintiff for services during her minority, but it seems clear that the jury did not consider that she could recover for such services, and, in the absence of any request for a correct instruction upon that point, the defendant is not entitled to a reversal for this inaccuracy.

The instruction is also objected to because of the use of the words "a fair inference," but the jury in the court's instructions were told that the facts and circumstances from which they find their verdict must be proved by the plaintiff by a preponderance of the evidence, and when the circumstances are so proved and found by the jury, it is for them to decide what is a fair inference therefrom. This instruction might have stated the issue more definitely and accurately, and, if a suitable instruction had been tendered in lieu thereof, it would no doubt have been given. This same suggestion applies to the objection to other instructions in which the same expression occurs.

The defendant objects to the competency of the evidence as to the value of the plaintiff's services, and says: "Not one of the witnesses offered upon this point showed himself competent to testify." He names one of the witnesses in particular as having failed to show a proper foundation for her testimony. This witness, when asked what such services were worth, answered: "I can't say what it is worth to Mr. Brunken what she did, but I can say if she had worked for me what it is worth." Other similiar evidence of this witness shows that she knew the value of such services.

These objections to the competency of the witness upon this point should have been carefully called to the attention of the court, and without doing so the defendant is not in a position now to ask for a reversal because of the admission of such testimony.

The objection that the evidence as a whole is not sufficient to support the verdict will not require a reversal. There is in the record substantial evidence of value, and the fact that there is some conflicting evidence would not justify taking the case from the jury. The trial seems to have been closely contested by energetic and competent attorneys, and while it is perhaps not free from difficulties, we have not found such errors in the record as we consider require a reversal.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

SUSANNAH RANDALL, APPELLEE, v. FIRST NATIONAL BANK, APPELLANT.

FILED MAY 4, 1918. No. 19682.

1. **Landlord and Tenant:** INJURY TO TENANT: LIABILITY. Where, in a personal injury case brought by the plaintiff against a landlord, two stairways were maintained by the defendant for the use of the plaintiff to enable her to reach the rooms furnished to her and her husband, one being on the outside of a building, and the other on the inside of the building which she and her husband occupied, both being for her convenience, she was at liberty to use either, and if the stairway on the outside of the building was a common stairway leading from the ground to certain rooms occupied by the tenants of the defendant, and was maintained in so negligent a manner that the plaintiff, who was one of the tenants, was by such negligence caused to fall and was injured without her fault, the defendant was liable for the damages sustained.
2. Evidence examined, stated in the opinion, and *held* sufficient to sustain the verdict.

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

C. M. Skiles and *R. D. Fuller,* for appellant.

Matt Miller and *Hastings & Coufal, contra.*

HAMER, J.

This is an action to recover for personal injuries. It was brought by Susannah Randall, a married woman, against the First National Bank of David City, Nebraska. The suit was commenced by the plaintiff in her lifetime. She alleged that the defendant was negligent in maintaining a stairway through which she fell, and by reason of which fall she claimed to have been seriously and permanently injured. A trial in the district court for Butler county resulted in a verdict and judgment in plaintiff's favor for $3,500. The defendant has appealed.

Since the appeal was perfected the plaintiff departed this life, and the action has been revived in the name of Henry Randall, the administrator of her estate. The title of the case as originally brought is retained in this opinion.

It is shown by the evidence that the plaintiff's husband rented a two-story building in David City from the defendant bank; in the front part of the first story the husband appears to have maintained a shoe repair shop, and the back part was used by the family as a kitchen; the second story was used by the family as a sitting-room and for sleeping apartments; on the outside of a building just north of the building so used by the plaintiff's husband and herself the defendant maintained a stairway which led to the second story of said building and was connected with the building used by the plaintiff and her husband by a platform which led to their sleeping rooms. It is also shown that there was a stairway going down from these sleeping rooms on the inside of the building to the kitchen. The plaintiff was accustomed to use either stairway. The

defendant denied that the stairway was negligently constructed, and denied any knowledge as to its condition.

On the evening of the 30th day of September, 1913, while the plaintiff's husband was assisting her up said outside stairway in order to get to their sleeping rooms, the eleventh step from the bottom gave way, and they both fell through said stairs to the ground, or fell upon said stairway, and the plaintiff was seriously and permanently injured.

It is strenuously contended by the defendant that the damages are excessive. It is also contended that the verdict is not sustained by sufficient evidence. The evidence shows that prior to the time of the alleged injury the plaintiff was an invalid, and that she spent the previous winter in Florida for the purpose of regaining her health, if possible. When she went to Florida she was afflicted with diabetes and sciatic rheumatism. She appeared some better on her return, but was not cured. There was a sharp conflict in the evidence, and it was for the jury to determine which of the witnesses were worthy of belief.

The plaintiff testified concerning the manner in which the injury happened. She describes her injury to the right leg as it would be if paralyzed, and also testified to her back hurting her, and also her head. She also described her condition before she received the injury as such that she could use her right leg and "walk all over town." She also described the outside stairway as used for the purpose of reaching rooms in both of these buildings; that there was a platform which led to their rooms and to other rooms; that the platform appears to have connected the two buildings; that there were several tenants there during the time that she and her husband lived in the building, and that these tenants used the same stairs that she and her husband used. The outside stairway appears to have been a common stairway for the use of all the tenants.

It may be that the physical condition of the plaintiff was such that she might have died in the not remote future even if she had not received the injury, but that she was hurt and that she suffered in consequence cannot well be doubted under the evidence. The court heard this evidence and sustained the verdict and denied the motion for a new trial. The jury saw her and heard her testify, and also heard the other witnesses testify.

In *Shirley v. City of Minden,* 84 Neb. 544, the judgment of the district court was affirmed. The syllabus in *City of Omaha v. Houlihan,* 72 Neb. 326, was quoted with approval, where it is said: "Issues as to the the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different conclusions as to these questions from the facts established."

"Where, in an action at law, the evidence is conflicting, it is not the province of this court to examine it further than to see that there is sufficient to justify the conclusion reached." *Young v. Kinney,* 85 Neb. 131.

The condition of the record does not seem to require further discussion of the case. We cannot say that the injury did not hasten her death, and yet, while the jury by its verdict found for the plaintiff upon evidence sufficient to sustain a verdict for such plaintiff, we are nevertheless constrained to believe that the verdict is, under all the circumstances, excessive, and, unless the plaintiff files a remittitur of $2,500 within 30 days, the judgment of the district court will be reversed and the cause remanded for further proceedings.

As thus modified, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissenting.

The rule as to negligence of a landlord in leasing premises is the same as in case of alleged negligence

of a vendor in the sale of the same premises. That is to say, the landlord is under no greater obligation to disclose defects in the premises than a vendor would be. If the defendant had sold this old building to the plaintiff, and the plaintiff had knowledge of its age and its condition, generally speaking, and some time after purchasing the property had, by reason of breaking a stair, been injured, would we hold that the vendor of the property was liable for such damages? The answer would be "yes" if there was a defect that in its nature would not be noticed by the plaintiff and was known to the seller of the property; or if it was of such a nature that the seller ought to have known of the defect, so that it might be held that the seller was guilty of fraud in not informing the buyer of the dangerous condition, the seller would be liable for the damages. Under the same conditions a landlord who rented the premises would be liable for damages. It seems to me very doubtful indeed that the defendant knew or ought to have known the condition of this stair, which appeared to be all right and presented no outward indication of defect, but was so decayed that the plaintiff could break it in ordinary progress going upstairs. There is a piece of the stair attached to the bill of exceptions, from which it would appear that the wood was old and could be broken more easily than a new stair could be, but it would seem doubtful about the stairs breaking through so that the plaintiff could fall through the stairs as she testified she did. It seems incredible that one landlord in a thousand would have thought that these stairs were dangerous under the conditions disclosed in this evidence. There is some evidence from which it might possibly be found that other people occasionally used this stairway, but the plaintiff on the witness-stand testified that at the time of the injury there was no one occupying the north rooms. And yet the majority opinion is mainly predicated upon the idea that this was a public stairway.

The stairway was against the north building, and the plaintiff, in going up this outside stairway, had to cross over the platform to her room. They had procured a stairway to be put inside for the plaintiff's use. Her sitting-room and bed-rooms were upstairs, but her kitchen was downstairs, and she would have it appear in her evidence that she preferred the outside stairway, although the inside stairway was put in at her request. The bank did not know that they were using the outside stairway at all, and, as the officers of the bank never had occasion to go up the stairway, they did not know the condition of it any further than that it was old and exposed to the weather, and the whole building and stairway were becoming perhaps weaker. In this condition the defendant asked the court to instruct the jury: "If you find from the evidence that an inside stairway was built for the special use of plaintiff and family, and that after same was built plaintiff, without the knowledge of defendant, continued to use the outside stairway, and was injured thereon as claimed, plaintiff cannot recover, and your verdict should be for the defendant." Nothing is said about this in the opinion, but it seems to me it is worthy of some mention. There are a good many requests for instructions, and all of them refused. Some of them, perhaps most of them, are covered by the general instructions given by the court, but this particular instruction which I have just copied is not given, nor its substance; and I think some other important instructions requested were not given. The opinion seems inconsistent with *Davis v. Manning,* 98 Neb. 707, which was decided after careful consideration. I cannot agree with the conclusion reached.

BANK OF BENSON, APPELLANT, v. W. A. GORDON ET AL., APPELLEES.

FILED MAY 4, 1918. No. 19738.

Appeal: REVERSAL: TRIAL DE NOVO. When the maker and indorser of a promissory note are sued thereon jointly, and defend jointly on the theory that neither of them is liable on the note, and judgment in their favor is rendered in the trial court, which judgment is reversed upon plaintiff's appeal to this court, the action is for trial *de novo*, entitling the defendants, or either of them, to join issue and have adjudicated the question of their rights and liabilities on the note as between each other.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed by Commission. Motion to correct mandate sustained.*

D. L. Johnston, for appellant.

Byron G. Burbank and *William Baird & Sons, contra.*

CORNISH, J.

Motion of Brodegaard Jewelry Stores, Incorporated, to modify and correct judgment herein, in that it leaves as if undecided the question of the corporation's liability on the note sued on.

The suit was upon a promissory note given by the defendant Gordon to the corporation and by it indorsed by one Brodegaard, its president, to the plaintiff. Brodegaard also indorsed the note as an individual. Gordon, maker of the note, the corporation, payee and indorser, and Brodegaard were made defendants. Brodegaard filed no pleadings. Gordon answered, setting up that the note was obtained by fraud; that he supposed he was dealing with the corporation, getting its preferred stock as a consideration for the note; that the note was conditional, it being agreed in writing that he could return the stock and take up his note within a limited period; that the plaintiff bank was not an innocent purchaser; and that the act of Brodegaard,

president of the corporation, in indorsing the note was *ultra vires*. Afterwards the corporation filed its answer, denying liability, and alleging that it was not the owner of the stock sold to Gordon; that it never received anything out of the transaction; that the bank was not an innocent purchaser and holder of the note; that the act of Brodegaard, as president, in indorsing the note was *ultra vires* and not binding upon the corporation. No issues were joined by the defendants as between each other. At the conclusion of the trial separate motions were made by Gordon and the corporation, requesting directed verdicts in their favor, which motions were sustained and verdict directed. These rulings of the court were duly excepted to by plaintiff. Motion for a new trial was made and overruled, and the case appealed to this court; the defendants being made parties to the appeal.

Because the defendant Gordon, neither in the trial court nor in this court, made any affirmative claim that, as between himself and the corporation, the corporation would be liable primarily upon the note, but always contended that neither of them was liable upon the note, and because, further, the judgment of the trial court was in its favor, from which judgment the defendant Gordon did not appeal, it is thought by the corporation that, as between it and Gordon, the judgment of the trial court is final, and that on retrial the defendant Gordon should not be permitted to plead that, as between himself and the corporation, the corporation is primarily liable upon the note. In furtherance of its contention, the corporation also quotes from Gordon's brief in this court, in which he stated that the corporation had no interest in the note and did not accept or indorse it. But, as answered by Gordon in his brief on this motion, "this court, however, held the direct contrary, and because it did so Gordon is held liable on the note." The opinion of this court in reversing the judgment entirely reversed the position of liability as established in the trial court, and the question is

whether, under such circumstances, the parties have a right to proceed to a final determination of the case in the light of this court's interpretation of the rights of the parties to the controversy—whether in such case the order should not be for a trial *de novo,* entitling the parties, or any of them, to make such amendments of their pleadings and introduce such further evidence as to the trial judge would seem right and proper under the rules of law applicable. We are of opinion that such is the rule. These defendants had the right in the first trial, if they thought the law and the facts sustained them in it, to make the common defense that the bank was not an innocent purchaser, and that the act of Brodegaard in indorsing the note was *ultra vires.* They did do this, and the trial court found with them. The fact that they were mistaken in their position, and did not, as codefendants, anticipate possible conflicting claims as between themselves, ought not to prejudice either of them in asserting any rights that he may have under the law as announced by this court. No estoppel by pleading, judgment, or otherwise, has arisen to prevent this, so far as the record before us discloses.

The decisions of a court of justice are presumptively the law. A party to a lawsuit should always be privileged to assume that the judgment of the trial court in which he is willing to acquiesce is just. It would be a sort of contrariness in the law if the party submitting to the judgment, though possibly with doubt and reluctance, must anticipate error. He knows of course that the judgment to which he submits may be wrong. If wrong, however, he can assume a readjudication, and that he will be restored to the position he was in in his relation to all of the parties to the suit at the time the trial was had and the judgment entered. If, in the light of the law as finally determined, he could have asserted rights, as against other parties to the suit, which enter into the final judgment, he should, ordinarily, be permitted to do so. Or, even though he

did in the original trial assert his rights as against other parties to the suit, and the judgment to which he submits was erroneously against him upon such issue, yet upon a new trial he should, ordinarily, be permitted to reassert his rights in accordance with the law as finally announced. We are of opinion that this should be our judgment, even though the corporation had not been made a party to the proceedings in this court. It is no hardship upon the defendant corporation to hold that, when the trial court entered its judgment releasing it from liability on the note, the finality of the decision, as between any of the parties to the suit, is contingent upon whether or not it was the correct decision. It must know that other defendants may not appeal solely because they are satisfied with the decision as it is. The trial should be *de novo;* no question of fact being determined.

It is to be understood that we are discussing only those estoppels which may arise by reason of the pleadings, trial, and judgment, and only those cases where this court does not find it proper to decide the case upon its merits; nor are we discussing the rights of the parties as between each other, except as affected by the rules of pleading and procedure. Such appears to be the rule of procedure as established by this court. In *Badger Lumber Co. v. Holmes,* 55 Neb. 473, the plaintiff was given a mechanic's lien upon part only of the lots which were included in the lien. There were other defendants who had liens upon some of the several lots, all claiming priority of liens. One of the defendants appealed, making the plaintiff only a party to the appeal. This court found error in the trial court's judgment fixing the various liens. This affected the rights of the Badger Lumber Company, so that originally it would have been entitled to liens upon lots not included in the trial court's decree. Those whose liens had been established upon such lots in the original decree contended that, inasmuch as they had not been made parties to the appeal, the original decree was

final in their favor. The trial court on retrial found against them and tried the case *de novo,* giving the various parties liens in accordance with the law as finally announced. On reappeal to this court the final decree of the trial court was sustained; the court holding that, when a cause is "remanded to the trial court for further proceedings, the situation of the plaintiff is precisely the same as if his rights had never been tried."

Troup v. Horbach, 57 Neb. 644, and *Olson v. Lamb,* 61 Neb. 484, were suits in equity. We held that, upon the cause being remanded for further proceedings, the trial court may permit a reformation of the issues in a trial *de novo.* In *Troup v. Horbach* the court in its opinion makes the question of permitting further pleadings and evidence depend upon the sound judicial discretion of the trial judge. This no doubt means that the trial court should permit such further pleadings or evidence as may be conducive to justice and conformable to the rules of law and procedure. In 4 C. J. p. 1241, it is said: "Where no principle of estoppel is shown, the fact that the case was previously tried on a different theory does not deprive plaintiff of his right to prove anything material to the controversy." The question of procedure is also discussed at pages 1224, 1227, and 1239.

In the instant case the judgment intended, and the proper judgment, is that the case is reversed and remanded for further proceedings, which means for trial *de novo.* The court has stated the law of the case and the rights and liabilities of the parties only as disclosed by the record before it. Just what the rights of the parties may be upon a new trial, had in conformity with the law announced, we do not attempt to decide at this time, except that it would seem that the trial court, in the exercise of a sound judicial discretion, should permit, if requested, such amendment of the pleadings as may be necessary in furtherance of justice

and proper under the law for the determination of the rights of the defendants as between each other.

Our order should be interpreted as one for trial *de novo,* and not as one intending to finally decide the case upon its merits. The liability of the defendants, either upon the note or as between each other, is determined only so far as the rule of law announced, applicable to the record before us, may determine it. The mandate, in so far as it may appear to fix absolute and final liability upon the defendants, is corrected in that respect.

JUDGMENT ACCORDINGLY.

LAURA CLARE, APPELLEE, V. AMELIA FRICKE, APPELLANT: CLARK VAN BROCKLIN ET AL., APPELLEES.

FILED MAY 4, 1918. No. 19956.

1. **Public Lands:** DEATH OF ENTRYMAN: RIGHT OF HEIRS. The wife of Fred Fricke, after his death, furnished final proofs under a timber culture entry made by her husband, when patent issued to his heirs. *Held,* that the heirs of Fricke took the entire estate in fee simple. Whether a homestead interest in the timber culture claim can exist under our statute is not decided.
2. **Homestead.** The homestead provided for by section 3076, Rev. St. 1913, is limited to 160 acres of land.

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

Fred H. Free and *Richard Steele,* for appellant.

E. A. Houston and *W. A. Meserve, contra.*

CORNISH, J.

The heirs of Fred F. Fricke (who died in 1893), as plaintiff and cross-petitioners, seek to have title quieted in them to the land in controversy, held by Fricke's wife, appellant herein, as her homestead. The trial court found against her.

The land, her husband's timber claim, is the northwest quarter of section 32. The southeast quarter of section 31, which corners with the timber claim to the southwest, was entered by her husband as a government homestead, and was afterwards conveyed to her by him as a home for the family. The house in which the family resided and all of its appurtenances were located upon this quarter. The defendant contends that the requirements of the timber culture law having been complied with by her husband before his death, six weeks before the time for final proof, he was the equitable owner of the timber claim; that a homestead right may exist as to property held by equitable title; that from the time of her husband's death to the time when she first made final proof and patent issued "to the heirs of Fred Fricke," and afterwards, the homestead character was impressed upon the land by reason of its occupation and use; that the patent issued only passed the legal title of her deceased husband; that the homestead is not limited to 160 acres of land, but that she is entitled to the whole 320 acres of land as her homestead.

After the judgment had been rendered in the district court, she filed an affidavit, setting forth that she had not selected her homestead, and that she desired to select 40 acres out of the original government homestead and 120 acres out of the timber culture tract as her homestead. This motion was overruled by the court; the court evidently believing that the government homestead, upon which the family lived and which was conveyed to her by her husband after the timber culture entry was made, constituted the family homestead. We are convinced that this decision was in conformity with the law and the evidence. While the cultivated land upon the timber culture tract was treated as a part of the whole 320-acre farm, it had never been selected as a part of the homestead by any one, and it was too late, after a judgment had been rendered against the defendant upon the issues raised by her, to attempt to change her position and assert a homestead right in part of it.

It is unnecessary to decide whether a conveyance under like circumstances by the United States "to the heirs of" a deceased timber culture entryman may ever inure in equity to the widow. The writer, however, is unhesitatingly of the opinion that the heirs take, not by inheritance, but by direct grant from the government, and that it follows that no right, title, or interest in the land can be asserted by any person except as "heir." Neither the right of dower nor the family homestead right comes by virtue of heirship; hence, they cannot be asserted. *Walker v. Ehresman*, 79 Neb. 775. A majority of the judges prefer that this question remain an open one.

The claim of homestead cannot be upheld. Section 3076, Rev. St. 1913, provides: "A homestead not exceeding in value two thousand dollars, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, * * * shall be exempt from judgment liens, and from execution or forced sale, except as in this chapter provided." Neither the dwelling house in which the family resided nor its appurtenances were situated upon the timber claim. It is contended by appellant that the homestead right is not limited to 160 acres of land, and that both tracts can be included in the same homestead. We are of opinion that appellant is in error in this contention. The case of *Meisner v. Hill*, 92 Neb. 435, is relied upon. It is not necessary to enter into a discussion of that case. It holds that the $2,000 "limitation is solely for the purpose of fixing the rights of the homestead claimants and the creditors, respectively." The question is put: "What is a homestead? Is it the present worth of the exemption which the statute allows against the claims of creditors, or is it the family home?" The opinion recognizes that a "homestead as provided by law," a "statutory homestead," has always existed and now exists in

Nebraska, but insists that the part exempt from the claims of creditors is not made by the statute "the whole homestead." The 160-acre limitation upon the homestead is assumed as part of its definition.

The judgment of the trial court is

AFFIRMED.

HAMER, J., dissents.

REGINA STANSBERRY, APPELLANT, v. E. W. STANSBERRY ET AL., APPELLEES

FILED MAY 4, 1918. No. 20060.

1. **Husband and Wife:** ANTENUPTIAL CONVEYANCE: AVOIDANCE. An antenuptial conveyance of property on eve of marriage may be voided by the wife, provided it was either actually or constructively fraudulent as to her.

2. ———: ———: ———. Whether the conveyance was fraudulent or not depends upon the facts and circumstances of the case. If made with fraudulent intent to defeat the wife of her just marital rights, or if, whether so intended or not, it operated to defeat her of her just expectancy as fiancée so as to work a fraud upon her marital rights, then the conveyance will be held fraudulent as to her.

3. ———: MARITAL RIGHTS: FRAUD: STATUTE. Section 1269, Rev. St. 1913, empowering either husband or wife, seised of land in this state, to convey it when the other is not a resident of this state, does not, as between husband and wife, or others who are parties to the fraud, empower either of them to make conveyances in fraud of the marital rights of the other.

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

E. H. Estey and *J. L. Rice,* for appellant.

M. F. Harrington and *W. R. Starr, contra.*

CORNISH, J.

Action in equity to have a prenuptial deed, made by plaintiff's husband, since deceased, adjudged void as in

fraud of her marital rights, and that plaintiff, as widow, be adjudged to be the owner of one-fourth interest in the land. From a judgment denying the relief, plaintiff appeals.

It appears that at the time of marriage plaintiff and her husband were advanced in years, he the older; that they were then and continued to be residents of the state of Iowa, and that both were possessed of property, the husband owning considerable property besides the 80 acres in controversy; that the marriage was an unhappy one, the wife leaving him some two years afterwards; that, while the wife knew that he possessed Nebraska land, she knew nothing about the amount or value of it; that no false representations were made by him to her about it, or that as an inducement to marriage she should have an interest in it; that the land was both acquired and disposed of by him after the marriage engagement; that during their engagement he made other dispositions of property without objection from her; that at his death he left other real estate in Nebraska and property elsewhere undisposed of; that the land in controversy was originally owned, subject to a mortgage, by his son Joseph; that he paid off the mortgage, taking a deed to the land; that the deed recited "one dollar and other consideration;" that subsequently he deeded the land back to his two sons, defendants herein, taking from them, on their suggestion, a life lease; that no consideration was paid by them further than what the facts above shown would indicate; that his two sons were his only surviving children by his first wife; that at the time of making the deed to his sons he stated to them that it was understood between himself and his intended wife that the property of each should go to the children of each; that after the deed was made he paid no taxes on the land, nor was any rent paid to him; that the deed to his sons was delivered at the time it was made, but not recorded until afterwards.

Under these circumstances, was the deed to his two sons in fraud of his wife's marital rights? The question is, primarily, one of good faith or intention to defraud. Where, however, the conveyance is one which must work a fraud upon the wife's marital rights, such as where one conveys all of the property that he has, then the conveyance will be held to be constructively fraudulent. The courts, however, as bearing upon the question of fraud, take into consideration the fact that the conveyance is made to one's own children by a former marriage, or to other members of the family. Was the conveyance one which the person, under the circumstances, could and would make without intending to do or doing his wife a wrong? This inquiry is important and determining, because, under the marriage contract, the fiancée expects and has a just expectancy that she will share more or less in his property.

Counsel for defendants (appellees) argues that section 1269, Rev. St. 1913, which provides that neither husband nor wife can "inherit" real estate "if either such husband or wife be not a resident of this state," and the conveyance is made "by the one seised at the time of such conveyance," is conclusive against the plaintiff. While there may be room for doubt about it, we are hardly of the opinion that this provision of the law, although it empowers the husband to make a deed which would have deprived the wife, or prospective wife, of claiming any interest in the land as against a purchaser, can be said also to give a right, as between himself and her, to make a conveyance in fraud of her marital rights. The main purpose of this statute was to protect innocent purchasers. Its existence, however, does have a direct bearing upon the question of fraudulent intent. The fact that he could have conveyed this land and given a good title to a purchaser, and did not do so, is a circumstance going to show that he was not attempting to deprive his prospective wife of anything that in fairness should go to her.

We are of opinion that the trial court was right in finding that the deed was neither actually nor constructively fraudulent. The husband's ownership of the land was not an inducement to the marriage engagement. No false representations were made touching it. He got it and disposed of it during the period of the engagement and before marriage. The circumstances of his acquiring the property might indicate an intention to reconvey to his own children, who would also have claims upon him. If actuated by fraud, he need not have acquired the property in the way he did, or could have otherwise conveyed it, in spite of her, after marriage. It constituted only a portion of his estate, and it is not improbable that when these people married they knew the uncertainty of a happy marriage at their ages, and understood that each should be free in the handling of his property. How much other property he had does not appear, but it does appear that, although living in Iowa, he had during the period of the engagement improved real estate in McCook which was not conveyed.

Butler v. Butler, 21 Kan. 521; *Goodman v. Malcolm,* 9 Kan. App. 887, 58 Pac. 564; *Hamilton v. Smith,* 57 Ia. 15; *Bell v. Dufur,* 142 Ia. 701; *Dudley v. Dudley,* 76 Wis. 567; *Allen v. Allen,* 213 Mass. 29; *Nelson v. Brown,* 164 Ala. 397; and note to *Deke v. Huenkemeier,* 48 L. R. A. n. s. 512 (260 Ill. 131).

AFFIRMED.

HAMER, J., dissents.

LETTON and SEDGWICK, JJ., not sitting.

RIVETT LUMBER & COAL COMPANY ET AL., APPELLEES, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MAY 4, 1918. No. 20081.

1. **Carriers:** DISCRIMINATION: REMEDIES. Where there is attempted discrimination between persons and associations by a common car-

rier, and a person or association is not allowed "reasonable and equal terms, service, facilities and accommodations," section 5978, Rev. St. 1913, affords proper and prompt redress by the courts. But when the question is whether a community or locality is properly served by a railroad company, not only is the question of rates involved, but other questions and conditions as well are to be considered that are peculiarly within the province of the state railway commission.

2. ———: STATE RAILWAY COMMISSION: JURISDICTION. In the latter case, the state railway commission has jurisdiction, and not the courts.

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

A. A. McLaughlin, Wymer Dressler and *Lyle Hubbard,* for appellant.

William Baird & Sons, contra.

DEAN, J.

The Rivett Lumber & Coal Company and George Stoltenberg, plaintiffs and appellees, began this action under section 5978, Rev. St. 1913, against the Chicago & Northwestern Railway Company, defendant and appellant, in the district court for Douglas county, to compel defendant to construct a branch side-track with necessary switch connections adjacent to and opposite certain vacant properties owned by plaintiffs under contracts of purchase, upon which they proposed to establish certain industries at West Benson, located about a mile distant from Benson, in Douglas county. Plaintiffs obtained judgment, and defendant appealed.

Defendant contends that the court is without jurisdiction to compel compliance with plaintiffs' demands, and that the question is one for inquiry and control by the state railway commission. The argument is based mainly on the proposition that a compliance with the order of the trial court in the premises would be equivalent to the establishment of a station, and defendant insists that this question is subject to supervision and control by the state railway commission.

It also points out that, until the state railway commission has ordered that a station be established at the point in question and prescribes rates for the transportation of freight thereto and therefrom, it is powerless under the law to establish the railroad facilities required by the order of the district court. It argues that plaintiffs' demands are unreasonable and unjust, and that a compliance therewith would unreasonably interfere with the operation of its railroad and in the performance of its duties to the public as a common carrier, and that the act in question does not contemplate that a carrier should maintain a side-track at a place in the open country remote from stations, nor that it should accept and deliver freight at places other than a station.

The intent and purpose of the statute under which the action is brought is "to compel railroad companies of Nebraska to afford and give to all persons and associations reasonable and equal terms, service, facilities and accommodations for the transportation and terminal handling of merchandise, produce, commodities and other property of every kind and description." Although statutes of this nature were enacted before the constitutional amendment providing for a state railway commission, this section of the act has been frequently amended by the legislature, and finally revised in Laws 1913, ch. 138. It seems clear that it was not the purpose of the legislature by the re-enactment and amendment of this section to encroach upon the province of the state railway commission. The powers and duties of the commission include "the regulation of rates, service and general control of common carriers." While the Constitution authorizes the legislature to provide by law how these powers and duties of the commission shall be exercised, it was clearly not intended that the legislature should confer the general power to regulate rates, service or control generally of common carriers upon some other body or jurisdiction. If the legislature under the Constitution could confer

jurisdiction upon the courts either to regulate rates or service or to control generally common carriers, it follows that it could confer jurisdiction to do all of the things enumerated in the railway commission statute, and the constitutional provision establishing a railway commission would then become nugatory. It is admitted by plaintiffs in their reply that "there is no station located, and that there is no rate in force for transporting freight to or from said place (West Benson), and that the state railway commission has not ordered or directed a station to be established at said place, nor prescribed or attempted to prescribe for the transportation of freight to or from the place." And it is contended by defendant, and seems to be fairly established by the evidence, that the place where plaintiffs are desirous of having the side-track established is outside of any incorporated city or village, and is in the open country at a point two miles distant from the nearest station or side-track, and is about midway between Dodge street station and Irvington station, those being the nearest points at which freight is accepted or delivered by defendant railway company, and that there are no rates in force or effect to the point where plaintiffs demand that a side-track be established, and the state railway commission has not authorized or directed the establishment of such side-track or the accepting or delivering of freight at such place.

Where there is attempted discrimination between persons and associations, and a person or association is not allowed "reasonable and equal terms, service, facilities and accommodations," the statute in question affords proper and prompt redress by the courts. But when the question is whether a community or locality is properly served by the railroad company, the question of rates is involved, and many other questions and conditions that affect generally all the service afforded by the railroad company, not only at that locality, but in other localities also, and such questions are

peculiarly within the province of the state railway commission. It is urged by the plaintiffs that section 5978, Rev. St. 1913, indicates, among other things, that the courts are expected to compel the construction of side-tracks at points where no stations have been established, but we do not so construe the act in question.

Section 5978, Rev. St. 1913, among other things, provides: "Every railroad company or corporation owning or operating a railroad in the state of Nebraska shall afford reasonable and equal terms, service, facilities and accomodations to all persons and associations who are engaged or desire to engage in the operation of grain elevators or any other industry, or in the handling or shipping of merchandise, produce, commodities or other property, at, near or contiguous to any railroad or any station of its road; and such person or association may make application to said railroad company requesting it to construct, equip and maintain a branch side-track of suitable length and grade within four feet of the outer edge of its right of way adjacent to and opposite the located or proposed industry, and in all cases as near the located or proposed industry as may be necessary to permit the loading and unloading of cars and the convenient and economical handling of the commodities in which such person or association is engaged; or such persons or association, if they desire to construct side-tracks for terminal facilities upon property owned or controlled by them, may make application to connect such tracks with the tracks of said railroad company so as to permit the loading and unloading of cars from side-tracks on the property of such person or association."

If one person or association at a station already established is allowed a side-track to its elevator, the railroad company should, under similar conditions and circumstances, allow a competitor a side-track at the same station. These side-tracks may be at the station, that is, at the regular stopping place of trains, but, even if they are so far removed from the stopping place

of the trains as to raise the question as to whether they are at the station, still the company should not refuse privileges to one individual or association which it allows to others similarly situated. The use of the word railroad in this connection and in legislation in regard to the powers and duties of the state railway commission is therefore capable of being given a reasonable construction without conflicting with the purpose and spirit of either the statute or of section 19A, art. V of the state Constitution, which in creating the railway commission, among other things, provides: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law." It seems clear to us that the object of plaintiffs' action is not to prevent discrimination between persons and associations, but to regulate the service of the railroad company, and is therefore entirely within the jurisdiction of the state railway commission.

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

REVERSED AND DISMISSED.

LETTON, J., not sitting.

THOMAS C. ANDERSON, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MAY 4, 1918. No. 20087.

1. **Waters: RAILROADS: BRIDGES: FLOOD WATERS.** Where a railroad company builds a bridge on its right of way over a stream of running water, it is bound to construct an outlet of sufficient capacity to carry any flood that may or should have been reasonably anticipated when the railroad was built.

2. ———: ———: ———: **NEGLIGENT CONSTRUCTION: LIABILITY.** Where a railroad company so negligently constructs such channel or outlet as to obstruct and overflow the creek beyond its banks in a flood that was or reasonably should have been anticipated when the

railroad was built, and damage from such overflow thereby ensues to the lands or the crops of another, such company is liable to respond in damages at the suit of the injured person.

3. ———: SURFACE WATERS. Overflow water that escapes from the banks of a running stream, and that does not return to its banks, nor find its way to another stream or water-course, is surface water.

4. **Appeal:** CONFLICTING EVIDENCE. Where the testimony conflicts on every material point at issue, but is sufficient to sustain a verdict for either party, the verdict will not be disturbed.

5. **Pleading:** NONSPECIFIC PLEA. It is not error to submit testimony to a jury in a law action on a material issue that has not been specifically pleaded where such issue has been generally pleaded.

6. **Damages:** PERENNIAL AND ANNUAL CROPS. The measure of damage for the destruction of a perennial crop, such as alfalfa and the like, is the difference between the value of the land with such crop growing thereon and the value of the land after the destruction of the crop. The measure of damage for the destruction of growing annual crops, such as corn and the like, is the value thereof immediately before their destruction.

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

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

Bernard McNeny, contra.

DEAN, J.

Thomas C. Anderson, plaintiff and appellee, began this action in Franklin county to recover for damages to growing crops occasioned by the negligent diversion of surface water to and upon his land by defendant in 1914 and 1915. Plaintiff recovered judgment, and defendant appealed.

Mr. Anderson owns 120 acres of farm land abutting on the north line of defendant's right of way. The railroad runs almost due east and west at that point for a distance of more than three-quarters of a mile. The farm is a quarter of a mile in width. About a quarter of a mile north of plaintiff's farm there is a range of hills, and leading almost directly south to his central and west forties there are two canyons that

drain to the south and that are about 80 rods apart. There is a third canyon about 40 rods west of plaintiff's west line that drains in the same direction. A creek about a half mile west of the north line of plaintiff's farm, that flows to the southwest passes under a railroad bridge maintained by defendant, and empties into the Republican river about a half mile distant. The railroad at the point in question is about a half mile north of and almost parallels the river. On the west line of plaintiff's farm a north and south highway intersects the railroad at right angles in a cut made by defendant, but there is no culvert in the road on the right of way north of the tracks. Another north and south highway is located a quarter of a mile west of the Anderson land, and intersects the railroad at right angles in a cut called "Mallory's crossing," where defendant maintains a culvert in the highway on the north of its tracks to carry surface water in the ditch from the west to the east. Defendant also maintains a railroad bridge almost directly south of plaintiff's southeast corner that was evidently erected to permit surface water from the north to escape under the track to the south. The railroad bridges are about a mile and a half apart, and between them defendant maintains no other opening through its roadbed to permit the escape of water.

Plaintiff introduced testimony tending to show that, before the bank was cut through the ridge by defendant for its road at the Mallory crossing or the Mallory culvert was installed, the surface water then flowing from the north hills and canyons and from the north or west generally, after reaching the Mallory ridge, flowed west into the creek that empties into the Republican river. It was shown that, when such surface water now reaches the Mallory crossing or ridge, it flows on east through the cut and the culvert until it reaches the highway at the southwest corner of plaintiff's farm, where defendant has not installed a culvert, and that the surface water, after flowing through the cut there,

is by the highway embankment diverted to the north for about 30 or 40 rods, and flows thence east over the highway and southeast over and upon plaintiff's land almost to the southeast corner, and that the water stood in some places on his land long enough to damage and to destroy the alfalfa and growing corn. There was also testimony on the part of plaintiff tending to show that for the years 1914 and 1915 defendant negligently permitted the ditch on the north side of its tracks to become clogged with rubbish and drift, and that the same condition prevailed in the channel or waterway under its bridge near the southeast corner of plaintiff's farm, so that the surface water that reached the bridge was not permitted to escape thereunder, but was backed up and stood upon his land. Plaintiff also offered proof to establish the fact that the channel or waterway under the west bridge, through which the creek flowed, was not of sufficient capacity to carry such water as should ordinarily and reasonably have been anticipated by defendant when the road was built, and that ordinarily and reasonably was to have been expected from occasional heavy rainfalls, and that because of such defect in the bridge swollen bodies of water escaped from the creek banks and, not again returning thereto, nor to any other stream or watercourse, flowed and stood upon his land and contributed to the damage to his crops. Plaintiff testified that in 1915 part of the water that flowed over his land from the west did not pass through the culvert at Mallory's crossing, but ran about two rods north of the railroad tracks. He testified that the creek did not overflow in the year 1914.

On the part of defendant, testimony was offered tending to show that the damage to plaintiff's crops, in part at least, was occasioned by high water in the Republican river that caused the water to cover the entire valley in the vicinity of plaintiff's farm. There was also testimony offered by defendant to show that the channels under the two bridges were of sufficient capacity to serve the purpose for which they were

constructed. But from the testimony of one of defendant's civil engineers and other witnesses it is established that the ditch on the north side of defendant's track was discontinued to the east at plaintiff's southeast corner, and that the ditch there passed under the railroad bridge, but that the land lying south of the railroad bridge at that point "is two and a half feet higher than the (railroad) ditch north of the track and under the bridge," and that this high land "prevents the water from flowing down the ditch under the bridge and to the river to the south." This seems to substantiate plaintiff's contention of negligent construction that caused the water to back up on his land. Or it may be the waterway to the south was improperly and negligently located. If, as defendant contends, the water from the Republican river overflowed the entire valley, it is probable that the high bank south of the railroad bridge would tend to prevent its escape when the river receded. Defendant's contention that the overflow of the river contributed to, if it did not entirely, destroy plaintiff's crops, at least for one year, was contradicted by some of plaintiff's witnesses, who testified that the damage to plaintiff's crops was complete some time before the river freshet occured.

There was also testimony given by one of defendant's witnesses, an employee, to the effect that the water over the railroad creek bridge in times of high water rose to a point "four feet over the track west of the bridge," but that the water did not then "come up to within four rails of the (Mallory) crossing." The same witness testified that the Mallory crossing was the high point in that vicinity, where the water divided, a part flowing west toward the creek, and a part flowing east toward the bridge near plaintiff's southeast corner. Another employee of defendant testified that "the summit of our railroad grade is about 800 feet west of the Mallory crossing," and that the suface water there divides, a part flowing east and a part flowing west to the creek.

Defendant points out that there is no specific allegation in the petition respecting damage from overflow water from the creek, and that on this point testimony is therefore not relevant. Both of the parties introduced some testimony on this feature of the case, and, in the absence of a motion to require plaintiff to make his petition more definite in the particular noted, we cannot hold the admission of the testimony to be erroneous. There is considerable testimony tending to show that the damage, in part, at least, occured because of overflow creek water that was occasioned by negligent construction and insufficient capacity of the channel beneath the railroad bridge that spanned the creek, and under the circumstances presented by the record such overflow became surface water, and must be so recognized. 40 Cyc. 639. The case was evidently tried as if the matter now complained of by defendant had been specifically and in terms pleaded. On this point we hold that the reference in the petition to surface water flowing from the west sufficiently pleaded the overflow of plaintiff's land by creek water that overflowed and escaped its banks.

Defendant complains of the instructions on the measure of damages, but on this point we believe the jury were correctly informed. The measure of damage for the destruction of a perennial crop, such as alfalfa and the like, is the difference between the value of the land with the crop growing thereon and the value of the land after the destruction of the crop. The measure of damage for the destruction of growing annual crops, such as corn and the like, is the value thereof immediately before their destruction. The jury were so instructed. The question of damages in this class of cases, while somewhat difficult, is not more so than those that juries are ordinarily called upon to decide. Some discretion must of necessity be vested in the jurors when they are considering facts upon which the testimony is so conflicting as in the present case, and in view of the record we are not disposed to disturb the verdict.

Complaint is made by defendant respecting other instructions that were given by the court, and the failure to give some instructions offered by defendant, but we do not find reversible error in the respects noted. Apparently the case was warmly contested. The testimony seemed to cover a wide range, and while it conflicts at every material point there seems to be sufficient testimony to support the verdict. All of the controverted points were fairly submitted to the jury as triers of disputed questions of fact.

Defendant contends that Andrew Jensen, a son-in-law of plaintiff, had some interest in the crops in question, and that he should have been made a party to the suit. Mr. Jensen appeared as a witness and testified on the part of plaintiff, and seemed to acquiesce in plaintiff's action. He is not now apparently in position to maintain an action.

We find no reversible error in the record, and the judgment, in view of defendant's complaint respecting Jensen's alleged interest, is affirmed on condition that plaintiff procure from Andrew Jensen and file in the district court within 20 days his disclaimer and waiver of any right or interest in the cause of action and the judgment. Otherwise, the judgment will be reversed.

AFFIRMED ON CONDITION.

SEDGWICK, J., not sitting.

JACOB KOCAR, APPELLEE, V. JAMES WHELAN, APPELLANT.

FILED MAY 17, 1918. No. 20017.

1. **Appeal:** INSTRUCTIONS: SUFFICIENCY. A judgment will not be set aside because a more accurate statement of the law might have been made than that contained in the instructions, when from a consideration of the instructions as a whole no prejudicial error appears.
2. **Assault and Battery:** EXCESSIVE DAMAGES. Evidence examined, and the amount of recovery *held* to be so excessive as to require a remittitur.

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

I. J. Dunn, for appellant.

J. E. Von Dorn, contra.

MORRISSEY, C. J.

Plaintiff recovered a judgment for personal injuries received at the hands of defendant. Defendant called at plaintiff's house for the purpose of collecting rent. Plaintiff appears to have provoked the fight that ensued. If defendant is liable at all, it is because he exercised too much force in repelling the assault.

The assignments of error deal chiefly with the instructions. The criticism is directed to a statement wherein the jury are told: "That the defendant would not be justified in using any more force than was reasonably necessary under the circumstances to repel an assault by plaintiff, and, if he did use more than necessary force, defendant would be liable for any injuries to plaintiff attributable to such excessive force." In substance, this statement is repeated in three separate paragraphs of instructions. Complaint is made that the instruction does not specifically state that, if defendant believed he was in danger of assault, or about to be assaulted, and was in danger of receiving bodily harm from such assault, his right to defend himself was not measured by the actual danger, but that he had the right to do all that seemed to be necessary, as viewed by an ordinarily reasonable man under the circumstances and surroundings at the time. This is the general rule. But in instruction No. 7, given by the court on its own motion, the court pointed out to the jury the right of defendant to defend himself, to repel force with force, if the circumstances and surroundings were such that he had the right to believe himself in danger. When the instructions are considered together in connection with the evidence adduced, it does not appear that the instructions complained of are so prejudicially erroneous that we can say they misled the jury or call for a reversal of the judgment.

There is a sharp conflict in the testimony on the principal point involved. Plaintiff is corroborated by his wife and daughter, while to a great extent defendant is corroborated by the testimony of disinterested witnesses. Defendant's witnesses, however, were not in position to see the parties at the time the hostilities began. Defendant offered to prove that, before the date of the trouble, plaintiff had made threats against his life, and that these threats had been communicated to him. The court excluded this offer of proof. These threats are alleged to have been made a year or two prior to the trouble. In the meantime plaintiff had done nothing towards carrying these threats into effect. If the defendant had knowledge of the threats, it is evident he did not regard them seriously. He testified that there had been no serious difficulty between himself and plaintiff; their relations appeared to have been amicable; he went alone and unarmed to plaintiff's residence the day this fight occured, and his general course of conduct was such that it cannot in reason be said that his mind was influenced by any stories that had been carried to him. We cannot believe that the proof offered, if received, would have influenced the jury in arriving at its verdict.

The final assignment, "The verdict is excessive," appeals to us with more force. No permanent injury, so far as we can see, was inflicted on the plaintiff. He suffered a severe beating. Two ribs were fractured, his face was bruised and cut. He claimed to have sustained a severe nervous shock. He claimed to have suffered a hernia, but this claim is not borne out by the testimony of his own medical expert. Plaintiff's condition had so far improved at the time of the trial that the verdict, which was for $1,990.08, seems excessive. If plaintiff will file a remittitur in this court within 20 days of all in excess of $1,000, the judgment will be affirmed; otherwise, reversed.

AFFIRMED ON CONDITION.

LETTON, J., not sitting.

STATE, EX REL. EVAN R. GADDIS, APPELLANT, V. CHARLES W. BRYAN, MAYOR, ET AL., APPELLEES.

FILED MAY 17, 1918. No. 20367.

Mandamus: JUDICIAL DISCRETION: FIREMAN'S PENSION. Section 2518, Rev. St. 1913, contemplates the presentation of proof by an applicant for pension, a consideration thereof, and a decision thereon by the governing body of the city as a condition precedent to the right to a pension, and, in rendering its decision, such body exercises a judicial discretion that will not be controlled by mandamus.

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

B. F. Good, W. G. Hastings and *A. W. Richardson,* for appellant.

C. Petrus Peterson and *Charles R. Wilke, contra.*

MORRISSEY, C. J.

Appeal from an order of the district court for Lancaster county denying a writ of mandamus. Relator brought this action to compel respondents to place him upon the pension list of the city of Lincoln under the following provisions of section 2518, Rev. St. 1913:

"In case any fireman in a paid fire department in any metropolitan city, or city of the first class, shall become permanently and totally disabled from accident or other cause, while in the line of his duty, such fireman shall forthwith be placed upon the roll of pensioned firemen, at the rate as provided for retired firemen in the second preceding section: Provided, * * * in case of partial disability of a fireman received while in the line of duty, he shall receive his salary during the continuance of such disability for a period not to exceed twelve months: Provided, further, if it shall be ascertained by the board of fire and police commissioners or other proper municipal authorities within twelve months that such disability has become per-

manent, then his salary shall cease, and he shall be entitled to the benefits of the provisions with reference to pensions referred to in this article."

It was alleged that relator, a fireman in the employ of the city of Lincoln, had been permanently disabled by injuries received while placing some calks in the shoes of one of the horses of the department. Application had been made to the city commission for a pension, but that body, after a hearing, rejected the application on the ground that the evidence failed to show such a disability as the statute required. Action was thereupon brought in the district court for a writ of mandamus. That court denied the writ on the ground that mandamus would not lie to review the decision of the city commission.

The rule is well established that mandamus will lie against a public board to compel the performance of purely ministerial duties, but not to control the exercise of judicial functions. *State v. Churchill,* 37 Neb. 702. A duty is deemed to be of a judicial nature when it calls for the determination of a question of fact involving the examination of evidence and the passing on its probative force and effect. 18 R. C. L. 125; *Secretary v. McGarrahan,* 9 Wall. (U. S.) 298, 312.

The section of the statute under which this action is brought contemplates a hearing, the presentation of proof, and a decision based thereon by a board of city officials as a condition precedent to right of pension. The case is easily distinguishable from that of *State v. Love,* 89 Neb. 149, 95 Neb. 573.

The judgment is

AFFIRMED.

SEDGWICK, J., dissenting.

The majority opinion, in the syllabus, declares the law to be that the city council will be held to have exercised "a judicial discretion" whenever the law "contemplated the presentation of proof," "a consideration thereof, and a decision thereon." This radical change

in our law is of so much importance that it ought not to be announced without referring to our former decisions and furnishing the reasons for the change. Mandamus will not lie to control the "judicial discretion" of an administrative officer, or any other officer. The question in such cases generally is whether the officer has a "judicial discretion" to do or to refuse to do the act required. It has never before been decided by this court, or any other so far as my observation has gone, that in all cases where evidence of a fact is required, and must be considered and determined, the officer has a "judicial discretion" to refuse to act, as this syllabus and similar language in the opinion declares the law to be. This new departure will very much restrict the use of the writ of mandamus. Indeed, nearly all of the cases in which heretofore the writ has been allowed would be wrong under the law as now declared. In nearly every case there was some important fact that must be considered and determined upon which the right to the writ depended, and, if the controverted fact was so clearly proved that reasonable minds could not differ as to its existence, it was held that the respondent could not be held to have a "judicial discretion" as to such matters.

Whether the board of transportation had investigated charges against a railroad company, etc, was a question of fact that required proof and determination, but the respondent did not have a judicial discretion in determining that fact, and was compelled to act by mandamus. *State v. Fremont, E. & M. V. R. Co.,* 22 Neb. 313.

Whether an agricultural society had complied with the provisions of the law so as to entitle it to county funds was a question of fact which the supervisors must determine, but it did not involve judicial discretion, and they were compelled to act by mandamus. *State v. Robinson,* 35 Neb. 401, 17 L. R. A. 383.

The existence of a judgment is a question of fact, but the validity of a judgment against a county may

be determined on application for a mandamus to compel the county officers to pay the judgment. *Boasen v. State,* 47 Neb. 245.

Whether the dean of the faculty of the Lincoln Medical College had passed upon the standing of a student, and had certified that he was entitled to graduation, was a question of fact that the directors of the college had to determine, but involved no judicial discretion, and they were compelled to act by mandamus. The court said: "Evidence in this case examined, and found to be sufficient to sustain the action of the district court." *State v. Lincoln Medical College,* 81 Neb. 533, 17 L. R. A. 930.

The respondents were required by mandamus to place Haberlan on the pension list, because "(a) under the fact shown the service of the applicant was in a paid fire department of the city for more than 22 years; (b) that the evidence shows that the applicant elected to retire from active service; (c) that when he retired he was entitled to an honorable discharge"—three, at least, important questions of fact that had to be taken into consideration by the city council. *State v. Love,* 95 Neb. 573.

In these and innumerable similar cases, it has been held that an officer cannot defend against a mandamus by asserting that he exercised a "judicial discretion" in determining a fact, when the proof of that fact was clear and unequivocal.

This new departure in the law makes it unnecessary to determine the vital and important issues in this case. The trial court found: "The relator has failed to show by a preponderance of the evidence that the said injury, of which he complains in his petition, totally and permanently disabled him, and the court therefore finds against relator, and finds that the said injury did not totally and permanently disable the relator, within the meaning of the statute under which this action is brought." This seems to mean that, because the injury which he received was not the cause of his being dis-

abled, he was not entitled to a pension. The statute says if he shall become "disabled from accident *or other cause,* while in the line of his duty, such fireman shall forthwith be placed upon the roll of pensioned firemen." The brief for the relator is very well written, and it contends that the words "or other cause" are not given any force in this construction of the statute. It contends that if a fireman, who has served for five years, as this one had, and is still serving as a fireman, is disabled for any cause, he is entitled to go upon the pension list. This is a very important matter. The evidence is without contradiction that he was so far disabled that he could not perform the duties of fireman, and that he was discharged for that reason by the respondents. Can they now say that he was not disabled within the meaning of the statute which is enacted with reference to the fire department and its members?

The relator contends that the remedy by appeal or petition in error would not be adequate. The appeal would be from the findings of the city council upon the facts in the case, and when upon that appeal the facts have been found definitely, still the remedy would be incomplete because the appellant would not thereby be placed upon the pension roll. This may not be conclusive because it may be that, under our practice upon such an appeal, the court would enter an order requiring the council to place him upon the pension roll; but it is not clear and certain that the court would have jurisdiction upon such an appeal to make such an order. At least, in order to hold that the remedy by appeal is adequate, we would have to decide that point.

I am not saying that the conclusion of the majority opinion is wrong. I am opposed to the change made in the law of mandamus, and, unless that change is made, we would be required to decide the important issues presented by this record.

ALICE GEARY, APPELLEE, v. WILLIAM J. GEARY, APPELLANT.

FILED MAY 17, 1918. No. 20028.

1. **Divorce:** SUPPORT OF CHILDREN. "The fact that the marriage relation is dissolved does not relieve the father of the duty to support his minor children, and will not defeat an action therefor." *Eldred v. Eldred*, 62 Neb. 613.

2. **Infants:** WARDS OF STATE. Resident minor children are wards of the state in whom the government is interested.

3. ———: JURISDICTION. General jurisdiction to protect minors domiciled in Nebraska and to enforce paternal obligations to offspring has been committed by law to the district courts.

4 **Judgment:** FOREIGN JUDGMENT: FAITH AND CREDIT. Nebraska courts are required to give to an Iowa judgment the effect only to which it is entitled in Iowa.

5. ———: ———: ———. Mere procedure resulting in a judgment or in the modification thereof is not protected by the full faith and credit clause of the federal Constitution.

6. **Divorce:** FOREIGN DECREE: RES JUDICATA. An Iowa decree, if confined to divorcing husband and wife and to awarding the custody of their minor children, is not effective in Nebraska for the purpose of enforcing the continuing duty of the father to support such children after they and their parents have become residents of Nebraska.

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

T. M. Zink and *A. R. Davis,* for appellant.

R. E. Evans, T. P. Cleary and *J. P. Shoup, contra.*

ROSE, J.

As presented on appeal, this is an independent suit in equity brought in the district court for Wayne county, Nebraska, to enforce the duty of defendant to support two of his minor children while in the custody of plaintiff, their mother. To defeat the action defendant pleaded a divorce procured by him in the district court for Plymouth county, Iowa, August 12, 1907, and

an executed contract for the payment of alimony. Plaintiff and defendant have eleven children. In the Iowa divorce court three minors were committed to the father and four minors to the mother. The decree of divorce and the contract for alimony are silent on the subject of support for the children. The district court for Wayne county, Nebraska, found that two of the minors committed to plaintiff are self-supporting, but made allowances for the other minors committed to her, their names being Frank Geary and Stella Geary. For the period between the bringing of the present action July 15, 1914, and the entry of the decree October 9, 1916, plaintiff was allowed $1,800. Beginning October 18, 1916, defendant was ordered to pay $30 a month for the support, maintenance and education of Frank Geary, while attending school during his minority, and $30 a month for the support, maintenance and education of Stella Geary during her minority. It is from this decree that defendant has appealed.

In ordering defendant to support the two minor children named, did the district court for Wayne county, Nebraska, give "full faith and credit" to the Iowa judgment, within the meaning of that term as used in the Constitution of the United States? This is the question presented by the appeal. On issues raised by the pleadings, the following facts are established by the evidence:

Plaintiff and defendant were married in Iowa June 29, 1881. In a suit in which the district court for Plymouth county, Iowa, had jurisdiction of the subject-matter and of the parties, while both were domiciled in that county and state, the marriage tie was dissolved August 12, 1907. The decree of divorce did not mention alimony for the wife or support for the children, but the custody of four minors, including Frank Geary and Stella Geary, was committed to their mother. The parents had entered into a contract obligating the husband to pay the wife $7,250 in full of all alimony. This sum he subsequently paid, but out of it the wife

had obligated herself to pay the claims of a number of creditors. He had been a resident of Nebraska five years when sued here. Plaintiff, with the minor children in her custody, had been a resident of Nebraska nearly two years when the decree in her favor for the support of Frank Geary and Stella Geary was rendered. During her entire residence in Nebraska she has been without sufficient means to support, maintain and educate the minor children named, and they are not self-supporting. Their father is abundantly able to support them, but refuses to perform his paternal duty in that respect. The allowances made by the district court for Wayne county, Nebraska, are both reasonable and necessary. These facts and those narrated in the preliminary statement herein are fully established by the evidence.

The contract for the payment of alimony does not on its face include support for the minor children. In the divorce suit there was no plea for their support or for alimony. The decree of divorce did not touch those subjects.

Under the laws of Nebraska it is the continuing duty of a father to support his minor children, and his obligation to do so cannot be evaded by neglect, improper contract, or other unjustifiable means. After parents have been judicially divorced, reasonable and necessary allowances for the support of minor children in the custody of the mother, if not formerly adjudicated, may be made in an independent suit by her against the father. Resident minor children are wards of the state in whom the government is interested. Education of children is compulsory as a public function. General jurisdiction to protect minors domiciled in the state and to enforce paternal obligations to offspring has been committed by law to the district courts.

Does the Iowa judgment, confined as it is to the divorce and the order relating to the custody of the minor children, suspend the power of the Nebraska

court to protect them in an independent suit, parents and children now being residents of this state? The Nebraska court did not attempt to change the divorce or the custody of the children—the only questions adjudicated in the Iowa divorce court. The father argues, however, that the Iowa court first acquired, and afterward retained, jurisdiction to enforce his paternal duty to his minor children, and that their mother is limited to supplemental proceedings in that forum. If this proposition is sound, the state of Nebraska as *parens patriæ,* represented by the judicial department of government, must withhold from its resident wards needed relief. In that event the mother must leave her home and residence in Nebraska, go into a court in Iowa to procure for the first time an order on a nonresident of Iowa to pay to another nonresident of Iowa money for the support of minors domiciled in Nebraska. If the father's position is tenable, the mother must open up Iowa litigation that has been slumbering in executed judgment for many years, make new pleas, pray for new relief, and adduce new proofs. If she should prevail, the Iowa court would be without power to enforce its new judgment in Nebraska, and in the end she would be required to resort again to the district court for Wayne county, Nebraska. The full faith and credit provision of the federal Constitution does not require her to pursue such a course. The Nebraska court is only required to give to the Iowa judgment the effect to which it is entitled in Iowa. *Haddock v. Haddock,* 201 U. S. 562; *Harding v. Harding,* 198 U. S. 317. In Iowa the decree of divorce is not effective for the purpose of enforcing the continuing duty of the father to support his minor children and the extraterritorial effect is no greater. Mere procedure resulting in a judgment or in the modification thereof is not protected by the full faith and credit clause. That part of the supreme law is directed to the judgment. The power of the Iowa divorce court to make provision for the support of the minor children

while they were residents of Iowa was not invoked or exercised. The new conditions which justified the relief granted to the mother by the Nebraska court were not in existence when the Iowa divorce was granted and could not then have been pleaded or proved. They arose in Nebraska after parents and children became residents of Nebraska. Some courts have gone far enough to hold:

"A judgment of a court of one state awarding the custody of minor children in a divorce proceeding is not *res judicata* in a proceeding before a court of another state, except as to facts and conditions before the court upon the rendition of the foreign decree. As to facts and conditions arising subsequently thereto, is has no controlling force, and the courts of other states are not bound thereby." 15 R. C. L. p. 940, sec. 417. *Alderman v. Alderman,* 157 N. Car. 507, 39 L. R, A. n. s. 988.

The district court for Wayne county, Nebraska, however, did not disturb the custody of the children, the divorce of the parents, or the stipulated alimony, but, on changed conditions, enforced only the unadjudicated, continuing duty of the father to support his own children after they and their parents had become residents of Nebraska. This was not a violation of the full faith and credit provision of the federal Constitution.

AFFIRMED.

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

AMERICAN SECURITY COMPANY, APPELLANT, v. BARKER COMPANY, APPELLEE.

FILED MAY 17, 1918. Nos. 20079, 20166.

1. **Contract:** JOINT ENTERPRISE. A contract by which the parties thereto agree to purchase real estate in the name of one of the parties who shall furnish the money with which to purchase and improve the same, and also agree to sell the property within a

specified time and divide the net profits equally between the parties, after applying rents received and so much of the proceeds of sale as may be necessary in repayment of the money so advanced for the purchase thereof and an agreed rate of interest thereon, is analogous to a conveyance of title to secure the payment of money.

2. ———: ———: RELIEF. In such case, if the contract fixes a definite time for the sale of the property and termination of the contract, and the property is not sold accordingly, either party may obtain sale of the property and division of the proceeds in accordance with the terms of their contract by proceedings in equity.

3. ———: ———: RIGHTS OF PARTIES. In such case, the expiration of the time so limited without such sale of the property will not of itself terminate all interest of either party in the property.

4. ———: ———: ———. If the contract provides that one of the parties shall have the care of the property and collect the rents, and after the time provided for the termination of the contract the other party, who under the contract furnished the money to purchase the property, takes possession thereof and collects the rents and applies the same in satisfaction of the amount so advanced by him, his position becomes analogous to that of a mortgagee in possession, and a court of equity in determining the rights of the parties will not allow him a commission for caring for the property and collecting the rents, unless it is so expressly agreed in the contract.

5. ———: ———: EXPENSES. If he so takes possession thereof, and, without the knowledge or consent of the other party, donates money to induce the construction of a building on the same street and near the property so held by him, he will be held to have donated the money for public benefit or to increase his own profits, and not in behalf of the other party to the contract; and such donation will not be allowed as an item of expense chargeable against the property under a clause in the contract that "such improvements as may be agreed upon" shall be made and "charged as a part of the cost of said property."

6. ———: ———: INTEREST. The agreement in the contract that interest shall be allowed on the moneys so advanced for the purchase and improvement of the property until such time specified for the sale of the property and termination of the contract requires the allowance of such interest until the property is sold, either by agreement of the parties or decree of the court.

7. ———: ———: ———. In determining the interest accrued for the money so advanced for purchase and improvement of the property, the rule of partial payments should be applied.

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

James H. Adams and *Byron G. Burbank,* for appellant.

W. J. Connell, contra.

SEDGWICK, J.

In this action in equity in the district court for Douglas county, the plaintiff claimed an interest in a piece of real estate in Omaha. The defendant denied that the plaintiff had any interest in the property, and the court found in favor of the plaintiff, and found the interests of the respective parties in the property, and entered a decree that the property be sold and the proceeds disposed of in accordance with the findings of the court. From this decree each party took an independent appeal to this court, and upon motion the two appeals were consolidated and heard together.

The defendant contends that the evidence does not support the findings and decree that the plaintiff has an interest in this property, and the plaintiff contends that the decree gives the defendant a larger interest in the property than the evidence will justify. The plaintiff formerly transacted business in the name of Shimer & Chase Company, and the transactions which are involved in this action were entered into by Shimer & Chase Company with the defendant. The plaintiff, in its former name, entered into a written contract with the defendant, which was in evidence upon the trial, and there seems to be little if any controversy as to the facts which resulted in this litigation. In 1908 the plaintiff, by contract with the then owners of the property, had an option to purchase the property at a specified price, and then made the contract with the defendant under which the defendant furnished the money and the property was purchased. The title, for convenience, was taken in the name of the wife of the president of the plaintiff company, and by her conveyed

to the defendant. The principal question in the case arises from the construction of this contract between the plaintiff and defendant. It seems to have been carefully prepared and provides at great length for the details of their agreement. It is contended by the plaintiff that this contract gave the plaintiff an interest in the real estate. The defendant contends that "the contract, as shown on its face, is one of agency and compensation of agent, and not for an interest in the property or a lien upon the property." The contract recites:

"Said party of the second part (this plaintiff) has an option on property described herein, the title to which, as a matter of convenience, has been executed in the name of Mabel V. Shimer. It is agreed by and between the said parties as follows, to wit: First. The party of the first part (this defendant) has this day taken up said option and purchased said property described as follows: (Description)—paying therefor twelve thousand eight hundred ($12,800) dollars, which is the net cost of said property to said second party. Second. The title to said property is taken in the name of the Barker Company, to be held by said Barker Company for the objects and purposes herein named. The said first party to furnish such additional sums of money from time to time as may be needed to carry said property and for making such improvements as may be agreed upon, and such sums so advanced shall be charged as a part of the cost of said property. * * * All the rentals or incomes that may be received from said property shall be applied first to the payment of taxes, insurance and repairs and other necessary expenses incurred on said property, and the balance of said income, if any, after paying such expenses, shall be paid to the Barker Company to apply first in payment of interest, and second in payment of the principal sum or sums of money invested under this contract. When sale of said property has been made and a final account is had under this agreement, the proceeds re-

ceived shall be applied first to the repayment to said Barker Company of all sums advanced by said first party under this contract in buying and improving and in carrying said property, and the net profits derived from said property, after repaying all of such sums advanced by first party, are to be equally divided between the two parties hereto as follows: One-half to first party for furnishing money, and one-half to second party for their option on said property, for services rendered and to be performed in connection with said property until it is sold, including superintending building, renting and collecting rent and selling, in whole or in part. * * * The price at which said property is to be sold shall be agreed upon between the parties hereto. The parties hereto agree to sell said property, and the first party agrees to execute proper conveyance to purchaser, whenever second party secures a purchaser ready, able and willing to buy within the limits of time of this contract, but first party reserves the right to retain the property at the price offered by such proposed purchaser, and thereby becomes the sole, absolute and exclusive owner thereof, and the amount of the purchase price shall be disposed of, divided, or appropriated, as herein provided, and in the event of first party becoming the owner thereof, its title shall be deemed absolute upon the disposition of, division or appropriation of the price thereof in the manner and according to the provisions of this contract."

These provisions of the contract by themselves would of course be construed to reserve to the plaintiff a substantial interest in the property itself. It provides in express terms that the title is taken in defendant's name to be held "for the objects and purposes herein named;" that when sale of the property is made "the net profits derived from said property, after repaying all of such sums advanced by first party, are to be equally divided between the two parties hereto as follows:" One-half to each party. That "the price at which said property is to be sold shall be agreed upon

between the parties hereto." It then provides that under certain conditions the defendant can purchase the property, "and thereby becomes the sole, absolute and exclusive owner thereof, and the amount of the purchase price shall be disposed of, divided, or appropriated, as herein provided;" and that defendant's title shall become *absolute* "upon the disposition of, division or appropriation of the price thereof in the manner and according to the provisions of this contract."

The contract also provided: "Said second party is to act as exclusive agent for said property, giving such time as may be necessary in looking after same, using its best efforts to dispose of the same to the best possible advantage, keep accurate accounts of receipts and disbursements, and render statements of same and strictly account for any income to first party as first party may desire."

The defendant contends that this provision indicates that the contract was simply one of agency, and is inconsistent with the idea that the plaintiff reserved a substantial interest in the property, but this provision does not purport to make the plaintiff the agent for the defendant, but rather the "agent for such property," and as such it was, so far as this provision is concerned, acting for both itself and the defendant.

The contract also provided: "It is hereby agreed and understood that the above described property shall be sold and this contract terminated on or before February 1, 1908."

The defendant contends that as the contract, by agreement, terminated February 1, 1908, the interest and right of the plaintiff in the property was canceled thereby. No doubt either party could under this provision insist that the property should be *sold* and the proceeds distributed and this terminate the contract. This is what the trial court decreed. But the defendant had no greater interest or title in the property than in the ordinary case in which a creditor takes and holds the title to real estate to secure payment of certain

sums and performance of certain conditions. If such contract provided in express terms that failure to make such payment or perform such conditions should work a forfeiture, or, in other words, terminate of itself all interest of the plaintiff in the property, the rule in this state is that the rights of the parties can only be determined by a court of equity, and that there must be an opportunity to redeem after the equities have been determined and fixed by the court. And, so, in this case the interest of neither party was terminated and canceled by the fact that no purchaser was found and the property sold within the time limited by the contract.

The plaintiff contends that whether this be construed a partnership or a joint ownership, interest on the money advanced by defendant should be allowed only to the time the "contract expired," February 1, 1908. The court allowed interest to the time the property is sold under the decree. We have considered that there was and still is a joint ownership of the property as above stated. The plaintiff by express agreement guaranteed to the defendant "interest on the said sum or sums invested under this contract at the rate of ten (10%) per cent. per annum, and should one-half of the profits not be sufficient to pay said first party interest at the rate of ten (10%) per cent. per annum, then said first party shall receive at the rate of ten (10%) per cent. on the money advanced under this contract before said second party shall be entitled to any part of said profits, and should all of the profits not be sufficient to pay said first party at the rate of ten (10%) per cent. on such money advanced under this contract, then said second party hereto hereby agrees to pay to said first party said interest at the rate of ten (10%) per cent. per annum on the 1st day of February, 1908." Soon after February, 1908, the defendant took possession of the property and has since collected the rents, and, as neither party took any action to have their equities determined, the position of the defendant became analogous to that of a mortgagee in possession. The rate

of interest expressly agreed upon would continue until the equities of the parties were determined and the property sold. The trial court found: "In determining the amount of interest due the defendant for the moneys advanced by it for paying for the ground and improvements thereon, as found in paragraph 1 hereof, the rule of partial payments should be applied, which is, that whenever the net amount of rents received shall equal or exceed the interest then due, then the net amount of rents shall be deducted from the amount of the principal and interest then due. The court further finds that at no time did the net amount of rents in the hands of the defendant, after paying the expenses of carrying said property, as herein found, equal the interest at 10 per cent. per annum, allowed the defendant on the money it had invested in said property, as shown by the statement of account in paragraph 1 hereof, and that, by reason thereof, the defendant is not chargeable with 10 per cent. interest per annum, or any interest on the several amounts of net rents which it collected and which the court finds the defendant then and there appropriated to its own use and benefit, as the court finds the defendant was entitled to do." The trial court was therefore right in its computation of interest.

It appears that as late as December, 1915, the defendant donated to the Omaha Grain Exchange $500, which the trial court found was "for the purpose of aiding in inducing it to locate its seven-story brick, stone, and iron building on the land immediately across the street and south of the land in this controversy, and that the defendant made said gift without the consent, knowledge, or approval of the plaintiff, and that said gift was a reasonable one and should be allowed the defendant as an item of expense to be charged against the property described in the petition." The contract provided that the defendant should "furnish such additional sums of money from time to time as may be needed to carry said property and for making such improve-

ments as may be agreed upon, and such sums so advanced shall be charged as a part of the cost of said property." The relation of the defendant to the property was at that time analogous to that of a mortgagee in possession. This donation was not "agreed upon;" the plaintiff was not consulted in regard to it, and under such circumstances the defendant must be held to have donated this money to increase its own profits, and not in behalf of plaintiff. The decree should be modified in that respect.

The contract provided that the plaintiff as his contribution towards the undertaking, and for his interest in the property under the contract, should procure the title under his option to be conveyed to the defendant, and should give "such time as may be necessary in looking after same (the property purchased), using its best efforts to dispose of the same to the best possible advantage, keep accurate accounts of receipts and disbursements, and render statements of same and strictly account for any income to first party as first party may desire;" and that the net profits of the undertaking should go "one-half to second party for their option on said property, for services rendered and to be performed in connection with said property until it is sold, including superintending building, renting and collecting rent and selling, in whole or in part." Thus, the necessary expense of "collecting said rents and caring for said property" was fully provided for as part of the consideration for entering into the contract. But the trial court found that "on or about the 11th day of February, 1908, the defendant notified the plaintiff that it would thereafter collect all rents from the property in controversy and take charge of said property and that the plaintiff objected to said action by the defendant. The court finds that the total amount of gross rents collected by the defendant from the 27th day of November, 1907, to the 10th day of March, 1917, inclusive, is $57,147.88, and that a reasonable compensation for collecting said rents and caring

for said property during said period is 5 per cent. on the gross amount of said rents collected, which is $2,857.39, and the same is allowed the defendant as a part of the expense of said property." There is no finding, nor, so far as we have observed, any evidence, of any failure or neglect or misconduct of plaintiff in performing the duties thus put upon it under the contract. Plaintiff "objected to said action by defendant." Under such circumstances, a mortgagee who takes possession of the property after default would only be allowed for necessary expenditures if made in the care of the property, and not for personal services, and by analogy we cannot see why, in equity, this defendant should be allowed such commission. The trial court was wrong in this finding.

The plaintiff contends that, if the defendant is allowed to charge 10 per cent. per annum on the money advanced by it, "then it follows of necessity that under the contract the *balance* of the proceeds of the sale must be allowed to the appellant *until* it receive 10 per cent. per annum, and *thereafter* the remainder of the proceeds of the sale should be divided *equally* between the parties to this action." By considering the 10 per cent. allowed to defendant as "profits," and not as compensation for the use of its capital, the plaintiff derives the argument that profits should be divided equally, and the express agreement that 10 per cent. is guaranteed to defendant means only that its share of the profits must amount to at least 10 per cent. on its investment, and that otherwise the profits must be divided equally. We do not so construe the contract. The defendant is allowed so large a percentage for the use of its capital—the full amount that the law will allow as interest—because of the risk it runs that there will be no profits, and because it will not in any event be entitled to a deficiency judgment against the plaintiff. The finding of the trial court is right in this particular.

The contention that plaintiff should be allowed interest on the amounts collected by defendant as rents of the property, we think, is already answered. The trial court was right in the computation of interest as above stated.

The findings of the trial court in regard to the $500 donation to the Omaha Grain Exchange, and for the services of defendant in taking charge of the property and collecting the rents, should be changed as herein indicated, and for that purpose the decree is reversed and the cause remanded for a decree in accordance with this opinion.

REVERSED.

CORNISH, J., dissents.

LETTON, J., not sitting.

The following opinion on motion for rehearing was filed November 1, 1918. *Judgment modified, and motion overruled.*

SEDGWICK, J.

Upon considering the motion for rehearing in this case, we find that we were in error in saying in our former opinion, *ante,* p. 515: "By considering the 10 per cent. allowed to defendant as 'profits,' and not as compensation for the use of its capital, the plaintiff derives the argument that profits should be divided equally, and the express agreement that 10 per cent. is guaranteed to defendant means only that its share of the profits must amount to at least 10 per cent. on its investment, and that otherwise the profits must be divided equally. We do not so construe the contract." There is no doubt that, "in determining the amount of interest due the defendant for the moneys advanced by it for paying for the ground and improvements thereon, * * * the rule of partial payments should be applied, which is, that whenever the net amount of rents received shall equal or exceed the interest then due, then the net amount of rents shall be deducted from the amount of the principal and interest then

due." But the plaintiff is right in contending that the interest due the defendant is, under this contract, to be paid out of the defendant's share of the profits if the profits are sufficient for that purpose. That is, the contract was that the defendant should furnish the capital and the plaintiff should perform certain services specified in consideration for the profits that each of them contemplated would ensue, with the further guaranty on the part of the plaintiff that the profits in the deal would be sufficient so that the defendant's share thereof would amount to 10 per cent. on the net amount invested by it, and if the defendant's share of the profits were not sufficient to repay the money invested by the defendant, with 10 per cent. interest thereon, the defendant might recover the deficiency from the plaintiff. The rents received by defendant would be accounted for as partial payments of the money advanced.

The judgment of the district court is therefore further modified accordingly. The motion for rehearing is

OVERRULED.

LETTON, J., not sitting.

MABEL E. GOULD, APPELLEE, V. BOARD OF HOME MISSIONS OF THE PRESBYTERIAN CHURCH, APPELLANT.

FILED MAY 17, 1918. No. 19629.

1. **Foreign Corporations:** RIGHT TO HOLD LAND. Under section 6273, Rev. St. 1913, corporations not incorporated under the law of the state of Nebraska are prohibited from taking or holding lands in this state in trust for the use and benefit of another.

2. ———: ———: RIGHTS OF HEIRS. The power to raise the question of the right of the corporation to take the property is not confined to the state, but the question may be raised by the heir or next of kin in an action to quiet title.

3. **Wills:** DEVISE: CHARITABLE TRUST: INDEFINITENESS. The will under consideration devised to the defendant, a foreign corporation, the

real estate in controversy, "to be appropriated and applied for the use and benefit of the Woman's Board of Home Missions of the Presbyterian Church in the United States of America." *Held*, that the quoted words denote a charitable trust or use for a religious purpose, the beneficiaries of which are uncertain and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being.

4. ———: ———: ———: INCOMPETENCY OF TRUSTEE. A valid charitable trust created by will will not be permitted to fail because the trustee named therein is incompetent to take title to the real estate, but the court will appoint a competent trustee.

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

F. M. Hall, John N. Dryden, H. W. Baird and *F. D. Williams,* for appellant.

H. M. Sinclair, W. D. Oldham and *N. P. McDonald, contra.*

CORNISH, J.

Agnes V. Gould, deceased, devised to the defendant, a foreign corporation, subject to a life estate in her daughter, the plaintiff, the real estate in controversy, "to be appropriated and applied for the use and benefit of the Woman's Board of Home Missions of the Presbyterian Church in the United States of America." A demurrer to plaintiff's petition was overruled, the will was declared void, and judgment quieting title in plaintiff, heir at law, was entered, from which defendant appeals.

Section 6273, Rev. St. 1913, provides: "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."

Under this prohibition of the statute, intended as a part of the public policy of the state touching land, it is unlawful for the trustee named to take, and hence unlawful for the testator to give to it, the land in con-

troversy. Some cases are cited interpreting statutes limiting the amount of real estate which corporations may acquire, holding that such statutes are regulatory merely of the corporation and can be invoked only by the state. These cases do not apply. This statute is prohibitory. If the language above quoted, together with the sections following, do not forbid and prevent foreign corporations from taking or holding Nebraska land, as against anybody, it would be difficult for a legislature to find words that would accomplish in full a purpose which, in some form or other, has possessed every people which has occupied a territory as its own.

It is thought by the judges that the previous decisions of this court, touching the rights of foreign corporations to hold real estate in this state, should be distinguished. The writer had thought this unnecessary. It would seem to be axiomatic that what the law prohibits is unlawful. In only one case, *Nebraska Power Co. v. Koenig,* 93 Neb. 68, has the statute been invoked. The case was in equity and involved a water-power. Koenig, a fiduciary and agent of the nonresident corporation, undertook to invoke the law under consideration to perpetrate a fraud for his own benefit. Conceding that a water-power right is land, still the case was rightly decided, because, first, as held by the court, Koenig was estopped; second, as recognized in the opinion, the statutes of the state touching the waters of public streams had invited the investment which the nonresident corporation had made; third, the statute which we are considering makes an exception of foreign corporations acquiring real estate necessary for a manufacturing establishment.

In *Carlow v. Aultman & Co.,* 28 Neb. 672, there was a purchase under judicial sale for the collection of a mortgage debt due the nonresident corporation. This was before the present statute, and is clearly within its exception. Rev. St. 1913, sec. 6276. Plaintiffs were estopped. Their attempt to dispute a sale, contractually authorized by their mortgage, the consideration for

which went to them, would amount to fraud upon their part.

In *Myers v. McGavock,* 39 Neb. 843, the court held that the Union Pacific Railway Company, under its charter from the United States, had power to take land for depot purposes. The statute under consideration was not invoked nor discussed, and the rights of the parties accrued before the statute was enacted. The right of a railroad company to acquire necessary real estate is also made an exception in the statute which we are considering. Section 6276, *supra.*

In *Watts v. Gantt,* 42 Neb. 869, a nonresident corporation had a lien upon the land, which it foreclosed. This also comes within the exceptions of the statute. The statute was not invoked nor considered. The contention was that the nonresident corporation under its charter could not acquire the land. This court, following *Missouri Valley Land Co. v. Bushnell,* 11 Neb. 192, held that the question whether the nonresident corporation was attempting to acquire land in excess of its charter authority, and the question whether the nonresident corporation was authorized to do business in this state, could not be raised in that action.

No doubt at common law the right of a foreign corporation to hold land was a matter of comity between it and the state. Learned arguments, based upon the common law and previous legislation and decisions of this state, to show that it was the legislative intent to continue the common-law rights in whole or in part, must be absolutely unavailing in the face of the plain reading of the statute. With certain exceptions, clearly stated, it prohibits taking or holding in any way, and does not make any provision for the disposal of lands so held by a foreign corporation. If further inquiry as to legislative intent is needed, why may we not take judicial knowledge of the fact that this law was passed at a time when the evils of alien landlordism were agitating the public mind everywhere, and especially in

Nebraska, where it was reported that land in solid blocks of from 25,000 to 75,000 acres was already owned by aliens and foreign corporations?

It is said by the attorneys for appellee in their brief that no decision can be found interpreting a statute like ours, which is prohibitory, and not regulative, but holds that a devise, such as the one which we are considering, is void, and the question may be raised by the heir. None has been called to our attention.

3 Clark and Marshall, Private Corporations, secs. 838, 841, 856; *United States v. Fox,* 94 U. S. 315; *Kennett v. Kidd,* 87 Kan. 652; *Proctor v. Board of Trustees,* 225 Mo. 51; *In re Estate of McGraw,* 111 N. Y. 66; *De Camp v. Dobbins,* 31 N. J. Eq. 671; *Wunderle v. Wunderle,* 144 Ill. 40.

It follows that the trustee cannot take. Does it also follow that the will is void, and that the trust or use intended must fail? The inquiry arises whether the trust intended is a public or private trust. If a private trust or gift and invalid for want of a competent trustee, then the trust fails and the will is void. If, on the other hand, it is a charitable trust and ineffectual for want of a trustee competent to take and administer it, a court of equity will give its aid and appoint a trustee, if need be, who can administer it. A distinction between the two classes of trusts is that in private trusts a *cestui que trust* is or may be clearly identified by the terms of the instrument creating the trust; whereas, it is characteristic of a public or charitable trust that its beneficiaries are uncertain—a class of persons described in some general language, changing in their individual members and partaking of a quasi-public character. The intention of the donor to create some kind of a charity must also be clear.

Manifestly the words above quoted do denote an intention to create a charity for a distinct religious purpose, and is it not equally manifest that the intended beneficiaries of this gift for "Home Missions" are an

uncertain and indefinite portion of the public until selected or appointed by the board named?

True, as stated in plaintiff's brief, the board mentioned "are not persons or individuals that cannot be pointed out," and hence, it is argued, the requirement of uncertainty for a charitable trust is wanting. But would it not be strained construction of this language to hold that it means the individuals constituting the board are to be the beneficiaries? Must we not, in the absence of any allegation to the contrary, presume from this language that there is such a board in existence, and that the members of it are not the actual beneficiaries of funds coming into their hands? If the facts are to the contrary, it is for the plaintiff to allege it. It is alleged that the board is "neither a natural nor an artificial person and has no legal entity." This may have been the reason why the devisor thought it necessary to appoint a trustee to take the property in trust. If the board was a body incapable of taking and holding the property, and the devisor sought to obviate this difficulty by naming a trustee, this fact ought not to be permitted to change the nature of the trust. Cases have arisen in which it has been held that, where property has been willed to a charitable organization in trust for such purposes and the organization was incapable of taking, the court will appoint a trustee to enforce the trust. The courts generally, including our own, hold that donations by will for charitable purposes are viewed with favor.

We are of opinion that the trial court erred in overruling the demurrer to plaintiff's petition. The trustee named in the will being incompetent to take, a suitable trustee should be appointed.

For cases bearing upon the questions involved, see *St. James Orphan Asylum v. Shelby,* 60 Neb. 796; *In re Estate of Nilson,* 81 Neb. 809; *In re Estate of Wiese,* 98 Neb. 463, 466; *Hitchcock v. Board of Home Missions,* 259 Ill. 288; *Cummings v. Dent,* 189 S. W. (Mo.) 1161; *Eccles v. Rhode Island Hospital Trust Co.,* 90 Conn.

592; *Chase v. Dickey*, 212 Mass. 555; 3 Pomeroy, Equity Jurisprudence (3d ed.) sec. 1021; 11 C. J. pp. 324, 332, 333; 5 R. C. L. p. 342, sec. 73, and p. 346, sec. 80.

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

REVERSED.

LETTON and HAMER, JJ., dissent.

CITY TRUST COMPANY OF OMAHA, APPELLEE V. BANKERS MORTGAGE LOAN COMPANY, APPELLANT.

FILED MAY 17, 1918. No. 20051.

1. **Corporations:** INTERLOCKING DIRECTORS. The fairness of contracts between corporations having directors in common must be shown by clear and convincing proof, and it must be made to appear that they are absolutely free from fraud.

2. **Principal and Agent:** UNAUTHORIZED CONTRACT: RATIFICATION. The ratification of an unauthorized contract can take place only where the person or body assuming to perform the act had the power either to do it or to authorize the doing of it in the first instance.

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

William Baird & Sons and *McGilton, Gaines & Smith*, for appellant.

E. W. Simeral, contra.

CORNISH, J.

Action for an accounting between the parties in reference, first, to an interest amounting to $35,000, in the note of $75,000, given by the W. D. Moore Lumber Company to the defendant, said $35,000 interest claimed by the plaintiff to have been assigned to it on February 8, 1915, as part consideration for the purchase from the plaintiff of safety deposit vaults, lease, and good will, the consideration for the vaults being

$75,000; second, for an accounting for rental of the vaults. The defendant denied liability, contending that the alleged sale of the vaults was an unlawful transaction and in fraud of its rights. From a judgment in favor of plaintiff, defendant appeals.

In September, 1913, the City Trust Company (plaintiff) and the Bankers Mortgage Loan Company (defendant) made a working alliance under which the business of the two companies should be carried on under one management, the profits of the two companies to be divided between them *pro rata* in proportion to their capital stock, each company to retain its name, business, and separate identity. In February, 1915, one John F. Flack was president of both of these corporations, and also of another, the City National Bank. Eleven directors of the City National Bank were on the board of fifteen directors of the plaintiff, and seven of these eleven directors of plaintiff, which included five of the directors of the City National Bank, were on the board of fourteen directors of the defendant.

At this time the Moore Lumber Company was indebted to the City National Bank in the sum of $190,000, which the bank was required by the federal authorities to have reduced. It was reduced by the lumber company's payment of $75,000, loaned to it by the defendant, and further reduced by fourteen of the directors giving their personal notes for $3,500 each to the bank in lieu thereof.

The plaintiff was the owner of a set of safety deposit vaults and a considerable business in connection therewith. At a meeting of directors of the plaintiff, held February 8, 1915, it was moved and carried that plaintiff sell to the defendant its safety deposit vaults, with lease and good will, "at a price of $40,001, and receiving in payment therefor $40,000 in cash or securities, plus $35,000 of the $75,000 W. D. Moore Lumber Company note," above mentioned, held by the defendant. On the same day defendant gave its check for $40,000, and the City National Bank passed a resolution

that the bank purchase the safety deposit vaults of the defendant for $75,000, giving in payment therefor 500⅔ shares of the common stock of the plaintiff, then owned by the bank, at a valuation of $50,000, and giving other good securities to the extent of $25,000. On March 4 following, at a meeting of the directors of the City National Bank, a resolution was passed rescinding the action of the board of February 8. On March 4 the plaintiff also passed a resolution to rescind its action authorizing the sale of the vaults to the defendant, the motion reciting, "with the consent and approval of the Bankers Mortgage Loan Company."

At the time of these several actions of the respective boards, the vaults in question had a valuation of not to exceed $40,000. They were being carried as an asset on the books of the plaintiff at $32,000. On March 8 the defendant received from the plaintiff a list of assets and securities, and from that time forward the alliance, or working agreement, between them was in the main discontinued, entirely so after April 3, 1915. On March 25 the plaintiff's board of directors reconsidered their resolution rescinding the sale contract and revoked the rescission. On April 3, 1915, plaintiff and defendant signed an instrument, entitled "Release, Waiver and Settlement," upon which plaintiff relies. It is signed on behalf of defendant by John F. Flack, president, and Walter Silver, secretary, and recites an executed sale to defendant of the vaults, etc., on February 8, "for the sum of forty thousand ($40,000) dollars, plus a portion of a seventy-five thousand ($75,000) dollar note, amounting to thirty-five thousand ($35,000) dollars;" that "John F. Flack, individually, is in controversy with the City Trust Company as to an irregularity in said sale;" that defendant "is desirous of selling said vaults to the City National Bank at a price of thirty-two thousand ($32,000) dollars;" that the working agreement for the sale of securities and division of profits between plaintiff and defendant has been terminated at the instance of the defendant; that "whereas

some controversy may hereafter arise by the termination of said working alliance and separation, as to any and all of the affairs of the respective corporations," the agreement is made. It further recites that a certain sum, $37,832.24, is due from plaintiff to defendant, and it is agreed that the plaintiff will pay to defendant $8,000, the difference between $40,000 and $32,000, "to cover the entire difference in controversy upon the sale of said vaults." It also recites that other amounts then due from plaintiff to defendant are not in controversy.

It appears not only that the vaults were not worth to exceed $40,000, but, further, that at the time of the sale the plaintiff did not expect to realize for itself to exceed $40,000, or $40,001, for the vaults, and in the final transaction, by which the City National Bank acquired title to the vaults from defendant, it paid for them only $32,000. It seems that the purpose of including the $35,000 interest in the $75,000 note, as part of the consideration for the vaults, was to provide a way that the fourteen directors, who had given their notes for $3,500 each, might be recouped in part for their losses represented by these notes. The officers and directors common to these interlocking boards no doubt knew the situation, and it is contended by defendant that the action of its officers and representatives constituted a violation of their trust relations to it, making the transaction itself unlawful. The vaults being worth not exceeding $40,000, the upshot of the transaction would appear to be that the defendant would receive no consideration for the $35,000 interest in the $75,000 note, assigned to plaintiff for the benefit of the directors of the City National Bank, either directly in its purchase of the vaults or indirectly in its sale thereof. The transaction as a whole was largely a matter of bookkeeping, although the defendant did give its check for the $40,000. This constituted a wrong upon the stockholders of the defendant, of which all parties had notice.

The learned trial judge appears to have based his finding in favor of plaintiff upon the settlement had between the parties April 3. The courts encourage settlements, especially when free from fraud, the parties having full knowledge of the facts. The evidence is conflicting as to what was understood by the parties in the settlement agreement, the evidence of defendant being that the only dispute between them, and the only one talked about, was whether the vaults should be taken at $40,000 or $32,000. This contention may appear somewhat contrary to the recital in the settlement, but, on the other hand, it is difficult to believe that the officers of the defendant, informed as to their rights and the facts, and acting in good faith, would agree to such a settlement.

The fairness of contracts between corporations having directors in common must be shown by clear and convincing proof, and it must be made to appear that they are absolutely free from fraud. The transaction of February 8 undertook to take an undue advantage of defendant, amounting to fraud, and was voidable at the instance of the defendant.

We are also of opinion that the agreement of April 3 cannot be held to amount to a waiver or confirmation of what was done on February 8. The ratification of an unauthorized contract can take place where the person or body assuming to perform the act had the power either to do it or to authorize the doing of it in the first instance. Flack and Silver, who signed the agreement of April 3, as president and secretary, in behalf of the defendant, were participants in the action of February 8. They could not ratify their own unauthorized act. It is probable that the action of February 8, which attempted to take out of the assets of the defendant corporation $35,000 without consideration, could not be ratified by the defendant corporation itself as long as any shareholder made timely objection. We are not speaking of ratification which might arise in

other ways, such as by acquiescence or retaining benefits with knowledge of the situation.

The defendant is not in a situation to restore to the plaintiff the vaults. It cannot claim any benefits from the settlement of April 3, and should account to the plaintiff for whatever, if anything, it may have realized out of the vaults in excess of $32,000. *McLeod v. Lincoln Medical College,* 69 Neb. 550, 555; 2 Thompson, Corporations (2d ed.) secs. 1241, 1242, 2002, and White's Supplement, sec. 2030; 2 and 3 Pomeroy, Equity Jurisprudence (3d ed.) secs. 964, 965, 1083.

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

REVERSED.

LETTON, J., not sitting.

MARION LEON, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MAY 17, 1918. No. 19569.

1. **Negligence:** QUESTION FOR JURY. Where different minds may reasonably arrive at different conclusions from the same state of facts, as to whether the facts proved established negligence, the question of negligence in such case is for the jury, and not for the court.
2. **Carriers:** DUTY TO GUEST OF PASSENGER. Where a person, with the permission of an employee of a railroad company, enters a passenger coach with a departing guest who is a passenger, to see such passenger off, it is the duty of the company to exercise ordinary care to prevent injuring such person while entering and while within and while alighting from the coach.
3. ———: INJURY TO GUEST OF PASSENGER: LIABILITY. In such case, the company is liable for negligently injuring a person who so accompanies a guest into one of its coaches.
4. ———: ACTION FOR INJURIES: PETITION: EVIDENCE. The record examined, and *held,* the petition states a cause of action and the verdict is supported by the testimony.

APPEAL from the district court for Douglas county: CHARLES LESLIE, JUDGE. *Former judgment of reversal vacated, and judgment of district court affirmed.*

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

Lambert, Shotwell & Shotwell and *Edward Simon, contra.*

DEAN, J.

Mrs. Marion Leon, plaintiff and appellee, aged 22, sued defendant for personal injuries alleged to have been sustained by her in being thrown from the lower step of one of defendant's coaches that was "negligently and carelessly moved, jerked and suddenly started," as alleged, at its Omaha depot as she was about to alight therefrom after accompanying into the coach one of defendant's outgoing passengers who was her guest and about to leave the city. She recovered a judgment for $1,350, and defendant appealed. This cause is before us on rehearing. The former hearing was before the commission, and on their recommendation we reversed the judgment of the district court.

Plaintiff's petition alleges in substance that she was permitted by the employees of defendant to pass through the depot gate and to board a coach in defendant's train that an employee negligently and carelessly represented to her "would remain stationary for a period of four to five minutes from the time she boarded it; that, relying and depending upon said permission, advice and representation, plaintiff boarded said car and remained there * * * not more than two minutes; that she then immediately left said car, and that while she was in the act of stepping therefrom * * * defendant, acting by and through its agents, negligently and carelessly moved, jerked and suddenly started said car without giving plaintiff any notice or warning whatever that said car was about to be moved, thereby throwing plaintiff violently to the ground and upon said brick pavement; * * * that, as a direct, immediate and proximate result of the negligence and carelessness of defendant," she received the injuries complained of.

Defendant's answer denied generally the averments of the petition, and alleged that "none of its servants, * * * had authority to represent to the plaintiff * * * that its trains would remain stationary for any period whatsoever; * * * that any injury or inconvenience plaintiff may have suffered as the result of the movement of any of defendant's trains, same resulted from plaintiff's carelessness and negligence, and by reason of risks which she assumed in going upon defendant's premises and into its cars, and did not result from any negligence or carelessness on the defendant's part." Plaintiff's reply was a general denial.

Miss Grojinsky had been plaintiff's guest at her home in Omaha for about two weeks. She was a stranger there, and being unacquainted with the streets and car service plaintiff accompanied her to the depot at about 3 o'clock in the afternoon of August 3, 1914. Together they were permitted to proceed through the station gate to the train, upon Miss Grojinsky showing her ticket to the gatekeeper. Miss Grojinsky testified that when they arrived at the coach this conversation took place between her and defendant's brakeman who was standing at the steps: "I showed him my ticket and said, 'Red Oak?' He said, 'Yes, ma'am. This is the train.' I said, 'How many minutes before my train leaves?' He said, 'Ten minutes.' I said, 'Then my friend will have time to go on the train a minute to say good-bye?' 'Yes, lady, plenty of time;' and he ushered us on." She said that at the time she told the brakeman that Mrs. Leon was there merely to see her off. She added that plaintiff was in the coach with her not to exceed two minutes, and that a few seconds after Mrs. Leon left her seated in the coach "there was a sudden lurch of the car. * * * I was jarred, kind of thrown forward in my seat. * * * Q. What did you observe when you looked out of the window? A. Marion Leon had fallen from the car. A gentleman was assisting her. * * * Q. Where was she when you looked out of the

car? A. Lying on the brick—Q. Brick pavement? A. Or the ground." The witness said the coach at the time moved several feet forward, and that no signal was given that the train was about to be moved. On cross-examination she testified, "Q. How far did the train move after this jerk that you spoke of before the train came to rest? A. Several feet. * * * About 7 or 8 feet. * * * Q. How long after it came to rest, after this jolt, before it departed? A. About 4 or 5 minutes."

Plaintiff testified that she left her guest seated in the coach about two minutes after her entrance, and that as she was descending the steps, and just at the moment when her left foot was on the lower step and her right foot was in position to step down on the pavement, and while she was holding to the hand-rail of the car, "this train gave a sudden jerk and I was thrown * * * to the pavement." She added that she was not warned and did not know the train was about to be moved, and that as a result of its sudden movement she fell violently to the pavement on her right side, thereby incurring the injuries complained of. Her testimony was substantially to the same effect as that of Miss Grojinsky respecting the conversation with the brakeman at the car steps. She testified that no box step was in sight, nor was any employee of defendant to be seen when she came out of the coach, and that when she fell she was assisted to her feet by a young man of about 18, a stranger, who partly supported and partly carried her through the depot gate and up the steps into the main waiting-room, and that after a brief period of rest, though in great pain, she boarded a street car that carried her to the store of her husband, and that he at once called a physician who came and administered first aid, and that she was again examined by the physician the same evening after being taken by her husband in a taxi to her home. She testified that as a result of the fall her entire right side was bruised and her arm was bleeding and her right foot was sprained, and that she

was in bed for ten days immediately after the accident, the doctor attending her "about twice a day," and that she was "up and down for about six weeks," suffering greatly all of the time. Plaintiff's testimony was corroborated by her husband, and by a nurse who attended her a few days, and who saw her often afterwards, respecting the bruised condition of her body and the length of time that she suffered. They also testified that before the accident plaintiff was strong and free from bodily ills and able to do ordinary housework, but that she was afterwards subject to nervous attacks and was unable to do but little of such work.

The attending physician testified that he examined plaintiff two times on the afternoon and evening of August 3. He said that on arriving at the store of plaintiff's husband "Mrs. Leon was sitting on a box at the rear end of the store, * * * suffering quite a bit of pain, and pretty sick, and I simply bandaged up the leg. It was badly swollen, and I ordered her to be taken home at once, and I saw her late in the afternoon again." He testified that plaintiff was in the third or fourth month of pregnancy, and that she bled internally, and that her injuries threatened to result in a miscarriage, and that because of the pain she suffered he administered morphine hypodermics for about two days. He also said that plaintiff was "flat on her back * * * from seven to ten days, and she was under observation for about four or five or six weeks after that." He was acquainted with her for about a year before he attended her and said that her health was good before the injury.

Defendant does not complain of the amount of the recovery; but, in view of its contention that the accident complained of by plaintiff was not sustained by her upon the premises of the railroad, we have discussed the pleading and the testimony at unusual length. In its brief defendant argues that the testimony adduced in support of plaintiff's petition, "viewed in the light of the uncontradicted and unimpeachable

evidence adduced by appellant, is as extravagant as a tale in the 'Arabian Nights.' Nothing but the gullibility of twelve mere men in passing upon the claim of an attractive woman can account for the verdict in this case." On the main points in dispute respecting the occurrence of the accident defendant's testimony was confined to that of several of its employees who worked at the Omaha depot and trainmen who were in charge of the train on the day of the accident, but they were apparently unable to recall the circumstances testified to by plaintiff and Miss Grojinsky.

The following facts seem to have been established to the satisfaction of the jury: That appellee was permitted by the carrier's agents to enter the railroad yards and the coach with her guest, and that they were informed by an employee at the car entrance that the train would not leave for ten minutes, and that she, in reliance thereon, remained in the coach about two minutes, when the train was negligently "jolted" or "jerked" forward several feet without warning to her, and that as a direct result of such negligent movement of the train as she was about to step from the coach she was thrown violently to the brick platform and thereby seriously injured. We conclude that the trial court properly refused to sustain appellant's motion for a directed verdict either on the ground of insufficiency of the petition or of the testimony. When different minds may reasonably arrive at different conclusions from the same state of facts, as to whether the facts proved establish negligence, the question of negligence in such case is for the jury. Appellant assigns numerous errors respecting the giving and refusing of instructions and also on the admission of testimony. We have examined the assignments and find that no reversible error was committed in the respects noted.

On the question of the liability of a common carrier for negligence in this class of cases, the weight of authority seems to be in accord with the conclusion we have adopted. Plaintiff was not a trespasser. She

was more that a bare licensee. She entered defendant's coach on the implied invitation of defendant, and, though she was not a passenger, yet the relation that she sustained to defendant in the premises that we have discussed was such that the carrier was bound to use such reasonable and ordinary care in the handling of its train as would permit her to alight without the infliction of serious injury to her person through the negligence of its employees. Failing in this the company is liable to respond in damages. 4 R. C. L. p. 1053, sec. 503; 6 Cyc. 615; *Doss v. Missouri, K. & T. R. Co.,* 59 Mo. 27; *Cherokee Packet Co. v. Hilson,* 95 Tenn. 1; *Whitley v. Southern R. Co.,* 122 N. Car. 987; *Missouri, K. & T. R. Co. v. Hibbitts,* 49 Tex Civ. App. 419; *Cooper v. Atlantic C. L. R. Co.,* 78 S. Car. 562; *McElvane v. Central of G. R. Co.,* 170 Ala. 525; *St. Louis S. W. R. Co. v. Cunningham,* 48 Tex. Civ. App. 1; *Morrow v. Atlantic & C. A. L. R. Co.,* 134 N. Car. 92; *Missouri, K. & T. R. Co. v. Miller,* 15 Tex. Civ. App. 428.

The authorities hold generally that the carrier is not liable where a person who is not a passenger, but who accompanies a passenger into a coach, is injured in alighting therefrom after the train has begun its journey on schedule time, unless the injured person had previously notified some one in charge of the train of his purpose to alight. But that such is not the present case is obvious from a review of the record. Plaintiff entered defendant's coach by permission, and it is sufficiently pleaded, and to the jury's satisfaction proved, that those in charge of its train, with knowledge of defendant's entrance and before its scheduled time of departure and without warning, negligently "jerked and suddenly started" the coach from which she fell, and that such negligence was the immediate cause of her injury. *Johnson v. Southern R. Co.,* 53 S. Car. 203. In the present case defendant's witnesses denied any knowledge of the happening of the accident complained of by plaintiff. Some of the depot officers and trainmen testified that, if such an occurrence had

taken place at the time and under the circumstances that were related to the jury by plaintiff and Miss Grojinsky, they would have known about it. But the jury were not only the triers of fact, they were as well the judges of the credibility of the witnesses, and they adopted the plaintiff's version of the accident and we are not inclined to disturb their finding.

In boarding the coach of a common carrier a person is bound to anticipate such movements of the coaches as are usual and ordinary in making up its trains, such as the attaching of the engine or additional coaches or the like. But the duty devolves upon the carrier to use ordinary care under such circumstances. The carrier should anticipate that persons who have a right to be upon its coaches at its stations may be in the act of boarding or alighting therefrom, and it should therefore at such times use ordinary care to avoid violent and abrupt movements of its trains without warning. We would be loath to hold that a person, with the knowledge and under the implied invitation of the carrier, could not enter one of its coaches with a passenger to speed a parting guest who had been an inmate of the home and practically a member of the family without assuming the risk of injury from the negligence of its employees.

Defendant charges that plaintiff's petition does not allege that she entered the coach for the purpose of bidding her guest farewell, nor to render to her any necessary assistance. No motion to make plaintiff's petition more definite and certain in the particulars complained of appears in the record, nor was the objection that is now made to the pleading brought to the attention of the trial court in the motion for a new trial. In such case the practice is well settled that the case may be disposed of as if such issue had been pleaded, or amendments may be allowed at any time to conform to the proof. In the present case we find the petition was sufficient and no amendment was required.

Our former judgment is vacated, and finding no reversible error in the record the judgment of the district court is

AFFIRMED.

ROSE and CORNISH, JJ., dissent.

SEDGWICK, J., dissenting.

There is no doubt that any one has a right to go upon a passenger train of a common carrier to accompany a departing guest, or for any lawful purpose, and "in boarding the coach of a common carrier a person is bound to anticipate such movements of the coaches as are usual and ordinary in making up its trains, such as the attaching of the engine or additional coaches or the like. But the duty devolves upon the carrier to use ordinary care under such circumstances. The carrier should anticipate that persons who have a right to be upon its coaches at its stations may be in the act of boarding or alighting therefrom, and it should therefore at such times use ordinary care to avoid violent and abrupt movements of its trains without warning." (Majority opinion.) The cars did not leave the station within the time that the trainmen informed the plaintiff they would remain there, and if the starting of the car was an ordinary matter, such as passengers and others might expect at any time when a passenger train is standing, then passengers and others getting on and off the train should have that in mind and should not put themselves in a position where they would be thrown down by such a movement of the car. The question as to just how much the record shows that the car was jarred or moved is a very important question. The fact that the plaintiff fell and was severely hurt does not prove that there was any extraordinary movement of the car. It does not prove negligence on the part of the defendant. Her fall is equally consistent with a failure on her own part to use due care under the circumstances.

The plaintiff testified that there was a "jerk or jolt" and she fell. Cars are seldom coupled without a "jerk or jolt." Plaintiff's friend testified "there was a sudden lurch of the car. * * * I was jarred, kind of thrown forward in my seat." She was not moved in her seat so that she could say without qualification that she was "thrown forward." She was "kind of thrown forward." That amounts to saying that it made some noticeable impression upon her. Any, even the slightest, movement might have had as much effect. This evidence fails to sustain the burden of proof which is upon the plaintiff to prove negligence of the defendant which was the proximate cause of her injury. If there is such an extraordinary impact or concussion as to necessarily throw persons down who are carefully entering or alighting from the train, there would ordinarily be plenty of witnesses by whom such fact could be proved. No one testified to any such fact except plaintiff and her friend, and their testimony fails to establish anything serious or unusual. If there had been any such extraordinary circumstance the trainmen would have known it. If their testimony is to be believed, we have affirmative proof that there was no negligence of defendant, and no proof of such an occurrence as would amount to negligence on the part of defendant.

LUELLA WATSON, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MAY 17, 1918. No. 20032.

1. **Appeal:** CONFLICTING EVIDENCE. When the evidence is conflicting on a material point, the verdict of the jury is final when the issue has been fairly submitted by the rulings and the instructions of the court.

2. ———: INSTRUCTIONS: HARMLESS ERROR. When the evidence will not sustain a verdict other than that returned by the jury, errors

that are assigned respecting the giving or refusing of instructions, may be disregarded.

3. **Railroads:** TEAM TAKING FRIGHT: LIABILITY. A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road. *Hendricks v. Fremont, E. & M. V. R. Co.*, 67 Neb. 120.

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

Bernard McNeny, for appellant.

E. E. Whitted, T. M. Stewart, Jr., and *J. L. Rice, contra.*

DEAN, J.

Luella Watson, by William W. Watson, her father and next friend, sued the defendant railroad company in the district court for Franklin county to recover for personal injuries sustained from colliding with a freight train on a public highway that crosses the railroad at right angles. The case was tried twice to a jury, and at both trials defendant recovered a verdict, and plaintiff appealed.

The accident occured at about 4 in the afternoon on September 5, 1914. Plaintiff was about 10 years of age, and her brother George, who was 13, was driving the horse as they returned from school in a buggy. The train came from the west and the buggy approached the track from the north, crossing it diagonally toward the southeast at a point 10 or 12 feet east of the plank crossing. When the buggy was about to clear the south track, the engine struck the left hind wheel turning it over and throwing the occupants out.

George was the principal witness produced by plaintiff at both trials. At the second trial his testimony differed on a material point from that formerly given with respect to the events immediately preceding the collision. At the first trial he testified: "Q. Now, you say you stopped? A. Yes, sir. Q. At what point did you stop the horse? A. Just as soon as we got started

on the right of way. Q. At the place where you stopped, state whether or not you had a clear view up the railroad track toward the west? A. Yes; I had a clear view. * * * Q. Tell the jury about how far west you could see at that place along the track. A. About a quarter of a mile." At the second trial he testified on direct examination that from the point where he stopped the horse he could see along the track to the west only about 200 feet and no further on account of growing corn and tall weeds. At another period in the direct examination on the same point he testified that a person "couldn't see any more than 200 feet up the track until you got right on the track."

The defendant called several witnesses to whom George talked after the accident, some of whom were neighboring farmers and the others were trainmen in charge of the train at the time. They testified that George told them in substance that he stopped the horse, which had become frightened and unmanageable, because he saw or heard the train coming, and that in his efforts to hold the frightened animal in check the right line broke. It seems that he then pulled on the remaining line sufficiently to turn the horse toward the southeast, which perhaps accounts for the direction that the horse was going when it plunged over the track in front of the engine about 10 or 12 feet east of the plank crossing.

Plaintiff did not testify at the first trial. At the second trial she testified that just as the buggy passed the corner of the fence, which was about 30 feet north of the track, they stopped, and that she looked and listened, but heard neither bell nor whistle nor the rumble of the train, and did not know of its approach until "just as the horse was stepping on the track." A witness called by plaintiff was moving a steam threshing rig in the highway at the time of the collision and about a quarter of a mile north of the crossing in question. He testified that he saw and that he also heard the rumble of the approaching train when it was

three-quarters of a mile away, but that he did not hear a whistle sounded and was not sure whether the bell was ringing.

On the day of the accident two or more witnesses traced the buggy tracks on the highway from a point about 70 feet north of the railroad track to the place where the buggy crossed to the other side, and they testified that the tracks at the north indicated that the horse seesawed back and forth, and that at a point about 35 feet north of the railroad track, as shown by a plat in evidence, the course of the buggy veered to the southeast and crossed the railroad track diagonally about 12 feet east of the plank crossing. There was testimony that certain of the Watson mail was dropped out of the buggy, and that it was found in or very close to the seesaw tracks made by the buggy.

The engineer and one or more trainmen testified that the whistle was sounded about a quarter of a mile west of the crossing, and that the bell was kept ringing continuously by an automatic device from the time they left Franklin, which is the first station east of the crossing. There is nothing in the record tending to show that the train was operated in any other manner than such as is ordinarily employed in running through open country, and it has been held by this court that in such case a railroad company is not liable for injuries that are caused by a team taking fright at the ordinary operation of a train upon its road. *Hendricks v. Fremont, E. & M. V. R. Co.*, 67 Neb. 120; *Clinebell v. Chicago, B. & Q. R. Co.*, 77 Neb. 538. At the close of the second trial the jury, on request of defendant, was permitted to go and for itself view the scene of the accident.

From the testimony we conclude that the jury were justified in bringing in a verdict for the defendant. That the case was twice tried by a jury in the vicinity of the accident and the same result reached at both trials is significant. Where the evidence is conflicting on a material point, the verdict of the jury, under our

uniform practice, must be regarded as final when the issue has been fairly submitted by the rulings and the instructions of the court.

Plaintiff complained that the court erred in refusing to give certain instructions offered by her, and among them one informing the jury that she and her brother were required to exercise only the degree of care that is ordinarily exercised by children of their age. The assignment does not appear to us to be well founded. The court instructed the jury specifically with respect to the degree of care that must be exercised by children of tender age in a like situation, and, while he did not in specific terms refer to George, nevertheless the instructions were such that an intelligent jury would not have been misled in the premises. Apparently the jury concluded from the testimony that both plaintiff and her brother saw and heard the train in time to have avoided the accident or could have done so if they had exercised such reasonable care as the law imposes upon persons of like age.

Finding no reversible error the judgment is

AFFIRMED.

ROSE and HAMER, JJ., not sitting.

KEARNEY COUNTY, APPELLANT, V. H. HAPEMAN, EXECUTOR, APPELLEE.

FILED MAY 17, 1918. No. 20098.

Inheritance Tax: APPEAL. Chapter 113, Laws 1915, gives to the county the right of appeal from the county court for alleged inadequacy of assessment of an inheritance tax upon the estate of a decedent. That which is implied is as much a part of the statute as that which is expressed.

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

Lewis C. Paulson, for appellant.

M. D. King, contra.

DEAN, J.

Kearney county appealed from the county court to the district court for alleged inadequacy of appraisement and assessment of a portion of the estate of a testate decedent under chapter 113, Laws 1915. On motion of the executor alleging that "the court had no jurisdiction" the appeal was dismissed by the district court, and the county appealed.

Mrs. Carrie R. Hapeman died in Minden on April 24, 1915. By the terms of her will her husband was made sole beneficiary and executor of her estate, which consisted for the most part of real estate in Kearney county, which was appraised at $51,900 by the appraiser appointed by the county judge.

The executor, who is defendant and appellee, contends that the main question is: "Has the county a right of appeal to the county court and from there to the district court? Is the county even a proper party to the action?" He argues that the statute does not contemplate an appeal by the county, and insists that it has no appealable interest, and that the "district court had no jurisdiction in this action for the reason that it is a special proceeding," and because the county could not be required to give security "to pay all costs, together with all taxes." Chapter 113, Laws 1915, provides:

"Any person or persons dissatisfied with the appraisement or assessment may appeal therefrom to the county court of the proper county within sixty days after the making and filing of such appraisement or assessment, conditioned upon the giving of security to the court to pay all costs, together with all taxes that may be fixed by the court."

The language that provides for an appeal to the county court from the appraisement or assessment, when considered in connection with the object of the statute, appears to indicate that it must have been the intention of the legislature that an appeal from the county court was contemplated. It seems that it has

been understood that a county can appeal in such cases. *Dodge County v. Burns,* 89 Neb. 534, involved a controversy over an inheritance tax between certain counties and the legal representatives of a testate decedent. In that case the representatives prevailed and the counties appealed. While the question of the right of the counties to appeal from an adverse decision was not raised, it was assumed that such right existed, and the appeal was entertained by this court and the rights of the parties adjudicated.

The question is important from whatever angle it may be viewed. The county as a unit of government is a representative of the sovereign power, the state, in matters affecting revenue, and as such it has a vital interest in questions relating to revenue. A person whose inheritance is affected by the tax in question is also interested, and neither the state nor the individual should be denied the right of having an adverse decision reviewed. The law favors the right of appeal, and that, too, on equal terms and without discrimination as to either party. It is elementary that a statute providing otherwise would be unconstitutional. It is held generally that, if a statute grants the right of appeal to one party, such statute will not be construed to be exclusive as to the other party. 2 R. C. L. 28; 2 Sutherland (Lewis') Statutory Construction (2d ed.) secs. 516, 717. While not bearing on the present case, but merely to show the solicitude of the people that the right of review shall be held inviolate, it will be borne in mind that the Bill of Rights provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." Const., art. I, sec. 24.

In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent, although thereby particular provisions are not construed accord-

ing to their literal reading. That which is implied is as much a part of the statute as that which is expressed. When the literal enforcement of a statute would result in absurdity, the courts will assume that such consequences were not intended. *People v. City of Chicago*, 152 Ill. 546.

It appears to us that the district court had jurisdiction to entertain the appeal. The judgment is therefore reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

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

STATE, EX REL. C. F. STOCKWELL ET AL., APPELLEES, V. J. H. BERRYMAN ET AL., APPELLANTS.

FILED MAY 17, 1918. No. 20265.

1. **Statutes:** AMENDMENT. Chapter 120, Laws 1915, and section 6833, Rev. St. 1913, all relating to county high school districts, construed, and *held* to be in harmony with section 11, art. III of the Constitution.

2. ———: COUNTY HIGH SCHOOL ACT: VALIDITY. An act of the legislature that by its terms relates alike to all the counties in the state that do not have within the county a duly accredited high school is not objectionable as class legislation, such act by its terms including all counties in that class.

3. **Mandamus:** STATUTORY DUTY: COUNTY HIGH SCHOOL. Where the regents of a county high school district without sufficient cause refuse in a proper case to perform a statutory duty with respect to such district, a resort may properly be had to the writ of mandamus to compel performance.

4. **County High School:** DISCONTINUANCE. The law requires each county in the state to maintain a county high school, "in which there is not now located a twelfth grade high school accredited to the state university," and after such school is established the establishment of a precinct high school in the county will not cause the county high school to be discontinued.

APPEAL from the district court for Rock county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

J. A. Douglas, for appellants.

H. J. Miller, and *J. A. Donohoe, contra.*

DEAN, J.

This is a proceeding in mandamus commenced on July 6, 1917, by relators to compel respondents, who constitute the board of regents of the Rock county high school district, to convene and "proceed to secure a suitable and proper building or buildings within which the said high school may be maintained, to properly furnish and equip the same for that purpose, to employ a suitable and competent superintendent and assistant teachers and other employees as may be necessary and required to maintain said school, and to make and enter into contracts with such employees for their service, and to make an estimate of the amount of funds required for the support of said high school during the fiscal year next ensuing; said estimate to be made and delivered forthwith to the county board of Rock county." The relators, who are plaintiffs and appellees, prevailed, and respondents, who are defendants and appellants, have brought the case here for review.

In their answer respondents admitted that they had not purchased a school site nor leased a school building nor employed a superintendent or teachers for the ensuing year, nor made an estimate of the funds required for the support of the county high school for the fiscal year of 1917. They denied generally all other allegations of the petition. For affirmative defense respondents, among other things, allege: "That in the year 1915 the board of regents of the Rock county high school, and in the ensuing school year, conducted a county high school," using a part of the Bassett schoolhouse for that purpose. "That in the year 1916 the school districts of the county, by their directors assembled," elected regents, "and the regents so elected, to the end that there might be a real county high school in Rock county, employed teachers and conducted a county high school in the school year commencing in

1916 in the upper part of the aforesaid Bassett schoolhouse."

In their argument respondents assail chapter 120, Laws 1915, as being repugnant to that part of section 11, art. III of the Constitution of Nebraska, which reads: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." In *Peterson v. Anderson*, 100 Neb. 149, in which this same county high school is considered, it was held that the county high school was duly established, and that the act of 1915 is not in conflict with the act of 1913. The 1915 act amends a section of the complete act and is germane thereto, and it repeals the section amended, and therefore is in conformity with the requirements of section 11, art. III of the Constitution.

On the merits respondents argue that the law does not require them to lease buildings or experimental grounds for a county high school, where neither buildings nor grounds have been provided by the county commissioners, and where the regents have no funds for that purpose, and they insist that the discretion of respondents in the premises cannot be controlled by mandamus. Respondents occupy a statutory office that requires intelligent and constructive action, but they neither act as is their duty, nor do they resign as is their right, but instead they formally notify the county board "that, in order to have the county high school continued after this present school year, it will be necessary for the county to provide a suitable and well equipped building, with five acres of ground, for the county high school as required by law, and the regents will refuse to employ teachers or request the levy of taxes for that purpose, unless compelled by mandamus to do so."

It seems to us that the regents are not justified in the position they assume. There are 1182 school children in

the county, of which 165 are eligible to high school privileges. Will it be contended that pupils in any county in like situation should be denied the opportunity of acquiring in their home county the education and the training that is contemplated by the statute in question?

Respondents complain that the statute under consideration is class legislation because it relates only to counties not having schools with 12 grades. This argument cannot prevail because the act applies equally to all counties in that class. It is fundamental that the legislature may make reasonable classification for legislative purposes.

They also make a complaint that is purely incidental, and argue that Bassett, unless it maintains an accredited high school with twelve grades, which would exempt it from a tax levy for high school purposes, will profit by the location there of a county high school that is supported by the entire county, with the exception of such districts as are exempted by section 6830, Rev. St. 1913. But the same complaint of incidental benefit to a community could be made with respect to the location of the state capitol or almost any state institution, and of course cannot properly be considered. That there was no high school having twelve grades in Rock county when chapter 120, Laws 1915, became operative sufficiently appears in respondents' answer, but the establishing of a precinct high school in the county would not operate to discontinue the county high school already established.

The county high school has been conducted as such in Rock county, and the number of pupils in attendance discloses that both patrons and pupils appreciated the educational advantages which it offered. While some of the buildings they were compelled to use are not suitable for school purposes, the record discloses that there are buildings in Bassett that can be obtained and used for county high school purposes until more suitable buildings can be provided. No sufficient reason appears why the respondents should not have complied with the

terms of the law in question. The judgment of the trial court requiring a compliance therewith is right, and it is therefore

AFFIRMED.

ROSE, J., dissents.

CHITTENDEN & EASTMAN COMPANY, APPELLANT, V. SAUNDERS COUNTY NATIONAL BANK, APPELLEE.

FILED JUNE 15, 1918. No. 19806.

Guaranty: RECOMMENDATION TO JOBBER: LIABILITY. When a bank writes a jobber that a third party has made arrangements with it to remit in payment of a bill of goods "upon arrival of the goods, subject to inspection," and the letter is treated as a "recommendation" only, and the goods are shipped and delivered to the third party without acknowledgment of receipt of the letter or notice of shipment, within a reasonable time, no liability for payment of the goods arises against the bank.

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

Fawcett & Mockett, F. A. Peterson, E. E. Placek and *E. S. Schiefelbein,* for appellant.

Charles H. Slama, contra.

MORRISSEY, C. J.

Plaintiff appeals from a judgment of the district court for Saunders county in favor of defendant. A jury was waived and the cause tried to the court on a stipulation of facts.

Plaintiff is a manufacturer and jobber of furniture, with its principal place of business at Burlington, Iowa. Defendant is in the banking business at Wahoo, Nebraska. One Iverson was desirous of purchasing a bill of goods from plaintiff, but plaintiff would not extend credit to Iverson. Iverson had on deposit with defendant $206. He made arrangements with defendant to borrow enough to bring his deposit up to $262.32,

the amount of the bill of goods, and defendant at his solicitation wrote plaintiff as follows:

"Saunders County National Bank.

"Wahoo, Nebraska. June 21, 1911.

"Chittenden Eastman Co., Burlington, Ia. Gentlemen: Mr. G. S. Iverson, of this city, has made arrangements with us to remit to you the sum of $262.32 upon arrival of goods, subject to inspection as listed on your memorandum dated April 8, 1911, addressed to Morrow & Iverson, Dalton, Neb.

"Yours truly, J. J. Johnson, Cashier."

Upon receipt of this letter plaintiff shipped the goods to Iverson, but did not acknowledge receipt of defendant's letter or notify it of the shipment of the goods. September 21 following plaintiff drew a sight draft on Iverson through defendant bank for $267.91. No letter accompanied the draft, nor was there anything to indicate that this draft was on account of the goods mentioned in defendant's letter of June 21. Iverson had no money on deposit with defendant at that time, and the draft was dishonored. October 3 plaintiff wrote defendant inclosing statement of Iverson's account, explaining that they had not theretofore called defendant's attention to it because its letter of June 21 had been mislaid, but stating that the shipment had been made relying upon defendant's letter. Defendant replied that they supposed the Iverson account had been closed long ago, as plaintiff had allowed more than three months to go by without acknowledging receipt of the letter or giving notice that the goods had been shipped; that Iverson had withdrawn his deposit, and defendant denied liability. Other letters were exchanged, in one of which plaintiff said: "We extended this man a credit of $267.91 purely upon the recommendation of the cashier of your bank. It is true that legally the letter you wrote us was not a guaranty, but in every other sense of the word it was."

Plaintiff complains that the judgment is not sustained by the evidence and is contrary to law. Iverson had

part of the fund necessary to pay for this bill of goods on deposit with defendant and had arranged to borrow the necessary balance. Defendant stated the situation correctly when it wrote that Iverson had made arrangements to remit upon arrival of the goods, subject to inspection. The letter could not be construed to mean that the bank was assuming personal liability for the debt, nor could it be expected to hold indefinitely the fund provided to pay for the goods without any notice of the acceptance of the offer or the shipment of the goods. Impliedly, at least, this letter called for an immediate acceptance. It was not made. The account was permitted to run beyond the time usual in business transactions before the bank was notified that any action whatever had been taken, relying upon its letter.

It is argued that shipment of the goods was a sufficient acceptance, but the shipment was made without the knowledge of the bank and without notice to it. The account was charged, not to the bank, but to Iverson, and the draft was drawn for a greater amount than that which defendant indicated it would honor. Finally plaintiff states in its correspondence that no legal liability exists. This statement may have no bearing other than to show the construction placed upon the correspondence by the parties that originally both parties gave it the construction now insisted upon by defendant. The conduct of plaintiff shows that it did not regard defendant as primarily liable for the debt, but regarded its letter as "a recommendation."

The judgment of the district court is amply sustained by the evidence, and is

AFFIRMED.

HAMER, J., not sitting.

IN RE ESTATE OF CAROLINE FENSTERMACHER.
MARY C. LUDWIG, APPELLEE, V. SARAH A. BRESSLER, APPELLANT.

FILED JUNE 15, 1918. No. 19878.

1. **Wills:** CONTEST: BURDEN OF PROOF. In an action to set aside a will because of improper or undue influence exerted upon testatrix, the burden of proof is ordinarily upon contestant.
2. **Evidence** *held* to support the verdict.

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

A. R. Davis and *Fred S. Berry,* for appellant.

Brome & Brome and *F. D. Hunker, contra.*

MORRISSEY, C. J.

Appeal from a judgment admitting to probate the will of Caroline Fenstermacher, deceased. Proponent and contestant are the daughters and only heirs of testatrix. Contestant was bequeathed the sum of $5, and the remainder of testatrix's property, consisting of real estate in the city of West Point of the value of about $1,200, was bequeathed to proponent. Contestant alleges lack of mental capacity of testatrix, and, also, that the will was made by reason of improper and undue influence exerted by proponent upon the testatrix.

When the will was executed, testatrix was 85 years of age, and for several years prior to the making of the will had made her home with proponent, who was married and residing with her family in Cuming county. Contestant also was married and residing with her husband and children in Missouri. There had been no trouble between testatrix and contestant, and apparently testatrix's love and affection for one daughter was the same as for the other. Testatrix and her husband at one time were the owners of 400 acres of land in Cuming county, but prior to the execution of this will the land had been conveyed to proponent. The property herein

involved represents but a small part of the property secured by proponent from her parents, but the title to the farm land is not involved in this action. The will was executed January 8, 1915, and testatrix departed this life June 29 following.

The court instructed the jury that the burden of proof was on contestant to show the exercise of undue influence by proponent upon testatrix in inducing the execution of the will. This instruction is assigned as error, and it is said: "The court erred in not instructing the jury that the burden of proof was upon the proponent to show the absence of undue influence in the execution of the will."

Contestant cites a number of cases which hold that in transactions between parent and child the circumstances may be such as to cast upon the grantee of a deed the burden of showing that it is untainted with undue influence, imposition, or fraud, but she has cited no authority where that rule is applied to the execution of a will. The case at bar is so similar to that of *In re Estate of Dovey,* 101 Neb. 11, which is the last expression of this court on the subject, that we are constrained to follow the rule announced therein. The instruction complained of conforms to the rule there announced. There is no evidence showing undue influence, and it may be said that the only thing to suggest either undue influence or lack of mental capacity is the apparent unfairness in the division of the property. This may, however, be explained from the fact that for many years testatrix had made her home with proponent, and the property covered by the will had been their home for many years, and she may have been desirous that it remain the home of the daughter with whom she spent her declining years.

The jury were properly instructed. The verdict is sustained by the evidence, and the judgment is

AFFIRMED.

ROSE, J., not sitting.

PRINCE L. TRAPP, APPELLANT, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLEE.

FILED JUNE 15, 1918. No. 19940.

Insurance: BENEFICIAL SOCIETIES: ULTRA VIRES. The determination of this case is controlled by the rule laid down in *Haner v. Grand Lodge, A. O. U. W.*, p. 563, *post.*

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

Vinsonhaler, McGuckin & Caldwell, for appellant.

McGilton, Gaines & Smith and *D. E. Bradshaw, contra.*

MORRISSEY, C. J.

This is an action in equity brought by plaintiff to compel defendant, a fraternal beneficiary society, to issue and deliver to him a paid-up policy in the sum of $2,000, under the provisions of a by-law of defendant in force at the time the plaintiff became a member of the society. The by-law provided that every person joining the society, after reaching the age of 42 years and remaining a member thereof in good standing for a term of 20 years, "shall not thereafter be required to pay any assessment or dues and shall receive a paid-up certificate, payable at death to his designated beneficiary." There was judgment for defendant, and plaintiff appeals.

It is admitted that plaintiff fell within the class specified, and remained a member in good standing for the period mentioned, but the answer alleges that defendant was organized under the laws of the state of Nebraska; that under its articles of incorporation it was authorized to create a fund from which there should be paid upon the death of a member the proceeds of one assessment upon the surviving members, not exceeding the amount designated in his beneficiary certificate; that defendant had the right to issue benefi-

ciary certificates to its members, the amount thereof to be paid upon the death of a member, but had no right or power to issue any other kind or class of certificate, and that the society never had the right under the law to issue a paid-up certificate; and that the by-law relied upon is *ultra vires*. There are other allegations in the answer, but it is unnecessary to set them out.

The main questions presented have been determined adversely to plaintiff in the case of *Haner v. Grand Lodge, A. O. U. W.*, p. 563, *post*, and on the authority thereof the judgment of the district court is

AFFIRMED.

GEORGE T. HANER, APPELLANT, V. GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN, APPELLEE.

FILED JUNE 15, 1918. No. 20280.

1. **Insurance: CONTRACT: ULTRA VIRES: ESTOPPEL.** A fraternal beneficiary society is not estopped from pleading *ultra vires* as to a contract which is beyond the powers conferred upon it by the statute under which it is organized.

2. **———: BY-LAW: INVALIDITY.** A by-law of a fraternal beneficiary society in contravention of the statute under which it is organized is *ultra vires*, and, as between such society and a member chargeable with knowledge of the society's want of power to make a contract based thereon, it is wholly void.

APPEAL from the district court for Saline county: RALPH D. BROWN, JUDGE. *Affirmed.*

Barth & Busse and *R. M. Proudfit*, for appellant.

Ralph R. Horth and *Edward J. Lambe, contra.*

MORRISSEY, C. J.

This is an action to compel appellee, a fraternal beneficiary society organized under the laws of this state, and doing business exclusively herein, to make payment of a sum fixed under section 170 of its by-laws, giving members the right to a definite cash settlement

upon reaching the age of 70 years. The defendant association falls within the class of fraternal beneficiary associations mentioned in section 3295, Rev. St. 1913. June 1, 1888 defendant issued to plaintiff its benefit certificate, in which it was provided:

"That Brother George T. Haner, a master workman degree member of Friend Lodge, No. 115, of said order, located at Friend, in the state of Nebraska, is entitled to all the rights and privileges of membership in the Ancient Order of United Workmen and do participate in the beneficiary fund of the order to the amount of $2,000, which sum shall at his death be paid to Lydia A. Haner, his wife."

May, 1907, the following section was adopted by the proper governing body of the association and made a part of its by-laws, to wit:

"Section 170. Surrender Value. Any member in good standing, seventy years or more of age, may make application for a final card as provided in these laws, and, upon complying with the conditions necessary to the granting of the same, shall be entitled to be paid from the beneficiary fund, at the time of the issuance of the same, a sum equal to all beneficiary assessments paid by him to the Grand Lodge of Nebraska, and a sum equal to all emergency fund payments made by him since the adoption of article 29 of the Grand Lodge by-laws in 1905, together with four per cent. simple interest on each of said sums, said interest to be figured on the payments made each year from January 1st after the same were paid."

It is alleged in plaintiff's petition that the adoption of section 170 of the by-laws was an inducement to him to remain a member of the association; that he remained a member, and paid his dues and assessments from the date of issue of his certificate until the bringing of this action; that plaintiff "was at the commencement of this suit of the age of seventy years and upwards, and was under permanent physical disability by reason thereof; * * * that under the provisions

of said section 170 of the by-laws of said defendant order there is due and payable to this plaintiff from said defendant the said sums of money he has heretofore paid, together with interest thereon from the date of payment at the rate of 4 per cent. simple interest, making a total due the plaintiff from said defendant order of $671.90." It is further alleged that plaintiff has complied with all the terms of the contract on his part; that he has made application in due form for a final card and settlement of the "amount due him on his said beneficiary certificate under section 170 of the by-laws of said defendant order."

Defendant interposed a general demurrer, which was sustained by the court, and the plaintiff appeals.

The ruling of the trial court is based upon the theory that section 170 of the by-laws was *ultra vires* and void under the statutes regulating the defendant association. The statutes cited read, in part, as follows:

"A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such beneficiary association shall have a lodge system, with ritualistic form of work, and a representative form of government." Rev. St. 1913, sec. 3295.

"Such society shall make provision for the payment of benefits in case of death, and may make provision for the payment of benefits in case of sickness, temporary or permanent physical disability, either as a result of disease, accident or old age: Provided, the period in life at which payment of physical disability benefits on account of age commences shall not be under seventy years." Rev. St. 1913, sec. 3296.

Is section 170 of the by-laws *ultra vires* and wholly void? The statute gives power to bestow aid upon members who are sick or disabled, as a result of disease, accident, or old age, but provides that benefits shall not accrue because of old age until the member has reached

the age of 70 years. It does not give the right to confer such benefits upon a member merely because he reaches the age of 70 years; physical disability must be coupled with his years. The section of the by-laws forming the basis for this action fixes a definite surrender value without regard to the physical condition of the member. It is alleged that plaintiff is under permanent physical disability "by reason of having reached the age of 70 years." It is a matter of common knowledge that the attainment of this age does not necessarily work disability, and this statement in the petition adds nothing to the provisions of section 170 of the by-laws. Under the terms of this by-law disability is of no consequence; the time for settlement is fixed and definite without regard to the member's physical condition. The statute of Kansas governing his class of associations, is essentially the same as ours. It has there been held that the statute does not authorize such payment. *Kirk v. Fraternal Aid Ass'n,* 95 Kan. 707. In support of this holding there are a number of citations which we do not here set out, but they may be found in the original report.

It is argued that the association is estopped to deny the validity of this section of the by-laws. The association was operating under the statute at the time plaintiff became a member. Plaintiff, as a member of the association, was a party to the adoption of this by-law. He does not stand in the same relation to the association as does the holder of a policy in a standard life insurance company, but occupies the dual position of insurer and insured. The association could not directly write a contract for this class of insurance, and the law will not permit the association to evade the statute and do by indirection what it may not directly do. 22 Cyc. 1417. The holdings seem to be that a fraternal society may waive its own by-laws or any of the provisions made for its management, but it cannot waive the provisions of the statutes made for its government.

It is argued that the contract was with the Grand Lodge, and that plaintiff was not a member of that body, but was a member of one of the subordinate bodies. This contention is without merit. Section 3295, Rev. St. 1913, gives to members of subordinate lodges a vote on the adoption of changes or amendments to their constitution or by-laws. The very nature of the organization is such that the Grand Lodge and its subordinate lodges must for some purposes be regarded as a single entity. The Grand Lodge has no means of raising money except only as it is raised in the local lodge, and the local lodge is without a responsible governing body without the Grand Lodge. One is indispensable to the other. Plaintiff will be presumed to have had knowledge of the statute under which the association is doing business, and he knew or ought to have known that the by-law was *ultra vires.*

The demurrer was properly sustained, and the judgment is

AFFIRMED.

BURT-WASHINGTON DRAINAGE DISTRICT, APPELLEE, V. ROBERTS-ROSE RANCH COMPANY, APPELLANT.

FILED JUNE 15, 1918. No. 20570.

Drains: USE OF WATER: INJUNCTION. Evidence examined, and found insufficient to entitle plaintiff to the writ prayed.

APPEAL from the district court for Washington county: CHARLES LESLIE, JUDGE. *Reversed, with directions.*

Fradenburg, Van Orsdel & Matthews, for appellant.

W. M. Hopewell, contra.

MORRISSEY, C. J.

Appeal from the district court for Washington county. Plaintiff was granted a writ of injunction, and defendant appeals.

Plaintiff is a duly organized drainage district, maintaining a system of drainage ditches, the main canal being called the Cameron ditch. Defendant owns a tract of land lying entirely within the boundaries of the plaintiff district. Running across defendant's land is a natural drain, or water-course. In order to facilitate the flow of flood waters, defendant has constructed a ditch intersecting this natural stream at a point near the upper side of its land and running nearly parallel with the stream for a distance of half a mile or more, where it again intersects the natural channel, and from thence the water flows about 200 feet, when it empties into Cameron ditch. Defendant's ditch has a much greater fall than the natural channel and a much greater fall than Cameron ditch. It is alleged that defendant's ditch will carry silt into Cameron ditch and fill up the same to plaintiff's damage.

Appellant makes four assignments of error: First, that plaintiff has failed to prove there will be any damage to its property by the construction of the new ditch. Roy N. Towle was the engineer in charge of the construction of both drainage projects. His is the only testimony offered by either party having a direct bearing on the issue. For the most part Mr. Towle's answers are given in response to leading and suggestive questions, and in this respect are unsatisfactory. We find no place where he definitely says that defendant's ditch or system of drainage, if completed, would work to the serious injury of plaintiff. He shows that the velocity of the water will be greater in defendant's ditch than in Cameron ditch, and that silt and debris may be carried in and deposited, but the amount is not satisfactorily shown. His testimony also suggests that with increased flow there is a tendency to clear the ditch of silt and debris. In answer to the question whether the damage from defendant's ditch would be appreciable, he replied: "There are conditions where it would be and other conditions where it wouldn't be. Q. Isn't it practically impossible with any absolute

certainty to say that it will be damaged? A. It would be for me after studying the situation as I have. I couldn't say what the extent of damage would be, or the extent of the deposit. * * * Q. Can you say to a mathematical certainty that Cameron ditch will be damaged by the construction of this ditch? A. No; only based on certain conditions. Q. And there are certain other conditions under which it won't be damaged at all? A. That is true."

At the conclusion of plaintiff's case Towle was called as a witness for defendant, and testified that in the watershed immediately north of defendant's land a ditch somewhat similar to defendant's proposed ditch is in operation and emptying its flow into Cameron ditch. He stated also that an appreciable amount of silt is carried into Cameron ditch, and added that the ditch cleanses itself fairly well. "Q. And the Cameron ditch is not to any great extent damaged by the silt from that stream, is it? A. It didn't seem so at the time of planning the work. Q. And the conditions in both the stream south of there and the new ditch are very similar, you say? A. Practically the same; yes."

With the testimony showing that another ditch emptying into Cameron ditch under practically the same conditions is not working to the damage of plaintiff, we fail to find such a condition as calls for the issuance of injunction. Having reached this conclusion, it is unnecessary to discuss the other questions presented. This judgment is entered without reference thereto, and without prejudice to another suit any time the plaintiff is able to furnish evidence to support the allegations of its petition.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment in favor of defendant.

REVERSED.

SEDGWICK and HAMER, JJ., not sitting.

STATE OF NEBRASKA v. FRANK SMITH.

FILED JUNE 15, 1918. No. 20685.

Food: MISBRANDING: VIOLATION OF STATUTE. Copy of label on which a charge of misbranding is based set out in the opinion, and *held* not a violation of section 2551, Rev. St. 1913.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Exceptions overruled.*

T. J. Doyle and *F. A. Peterson,* for plaintiff in error.

G. E. Hager, contra.

MORRISSEY, C. J.

Defendant is charged with the violation of section 2551, Rev. St. 1913, which reads:

"No person shall within this state manufacture for sale therein, or have in his possession with intent to sell, offer or expose for sale, or sell any liquors, beverages, remedies, medicines or articles of food or drug which is adulterated or misbranded within the meaning of this article."

The district court dismissed the proceeding, and the county attorney prosecutes error under section 9185, Rev. St. 1913. The specific charge is that defendant sold a certain beverage which was misbranded. There is a discrepancy between the allegations of the complaint and the proof which we shall pass over and deal with the question presented as shown by the proof.

The label found in the bill of exceptions reads:

"DANCIGER'S
Non-alcoholic
CORDIALS
Harmlessly & Artificially
Flavored & Colored
Invigorating and Refreshing
A Beverage Triumph
BLACKBERRY
Flavor
Contains 1/10 of 1 per cent. Benzoate Soda."

There is some difference in the size of the type used and also in the color of the ink, but every word is printed in type which is of good size and is easily read. There is some contention that defendant violates the statute by using the word "Cordials," which word it is claimed has a well-known meaning and is descriptive of a beverage containing a substantial amount of alcohol. If the word stood alone there might be some basis for this claim, but it is preceded by the descriptive words: "Danciger's Non-alcoholic." No person possessing even a rudimentary knowledge of the English language will be deceived by this label into believing that he is buying a beverage containing alcohol.

The further claim is made that the public may be deceived by the label, thinking that the beverage is made from the juice of the blackberry. We find no basis for this contention. The label expressly states that the beverage is "Harmlessly & Artificially Flavored & Colored." It is true that the words "Blackberry Flavor" are prominently displayed on the label, but they must be considered with that which immediately precedes them.

A letter from the agricultural department, submitted in evidence and found in the bill of exceptions, shows that the label meets the requirements of that department. We fail to find that it violates the provisions of section 2551, Rev. St. 1913, under which the prosecution is brought, and the exceptions are

OVERRULED.

HAMER, J., not sitting.

THOMAS G. BOWKER, APPELLANT, V. DRAINAGE DISTRICT, APPELLEE.

FILED JUNE 15, 1918. No. 19979.

Judgment: RES JUDICATA: ASSESSMENT OF DRAINAGE BENEFITS. A judgment is not *res judicata* of a matter not involved and tried in

the action. If it appears from the record that upon an appeal from an assessment for the cost of construction of a drainage system the subject-matter involved and tried was the proportionate share of such cost chargeable against appellant's land, and the original assessment of benefit to appellant's land was not involved nor tried, the fact that the proper proportion of the cost of construction chargeable to the land was miscalled "benefits" will not make the judgment *res judicata* as to benefits.

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

C. F. Reavis, for appellant.

Kelligar & Ferneau, contra.

LETTON, J.

This is an appeal from a second supplemental assessment made by the defendant drainage district against the lands owned by the plaintiff within said district. Objections to the appraisement were filed on the ground that in an appeal from the original assessment to the district court it was adjudicated that the total benefits to the same lands by reason of the construction of the drainage improvements were fixed, and that the decree and the benefits so fixed were *res judicata;* that the benefits so adjudged have all been paid to the drainage district; and that the second supplemental assessment is void and without authority in law because it is in excess of said adjudication. The district court found for the drainage district, and the landowner appeals.

Upon the original creation of the drainage district an assessment of benefits was made by the engineer and adopted by the drainage board fixing the benefits at $40 an acre, or $1,600 for 40 acres (except where deductions were made from several tracts by reason of highways). In the assessment to pay the cost of construction, land that had been classified at 100 per cent. was assessed at $7.92 as its proportionate cost of construction. The plaintiff appealed from this assessment.

In the petition on appeal it was said that the report of the engineer of the probable cost "does not of itself form a basis of estimating possible benefits to the several tracts of land included in said district." Objection was also made "because the cost of making the improvement contemplated by the creation of said drainage district is fixed by the engineer as the probable benefits to accrue to the lands in said district, and costs and benefits are substantially made correlative pecuniary equivalents, which is not admissible." Many other objections were made which it is unnecessary to mention here.

The verdict of the jury on that appeal recites that the jury "do find for the drainage district and assess the benefits accruing to the following lands by the construction of the drainage works at the amount set opposite each separate tract of land respectively in the following schedule or description." These amounts are in each instance 65 per cent. of the amount estimated by the engineer as the cost of constructing the work in the original estimate and assessment made by the board. In the judgment it was ordered "that the real estate of said Thomas G. Bowker, plaintiff, be and the same is hereby assessed for benefits for drainage improvements," and the amount is set opposite each tract. Thus it appears that the matter involved and tried was whether Bowker's land had been charged with a disproportionate amount of the cost of construction. The jury found in Bowker's favor, and that an assessment of $7.92 an acre was more than his proportionate share of the original cost of construction.

At the time these proceedings were had the creation of drainage districts was a new thing in Nebraska, and the methods of procedure by such bodies were evidently not very well understood by counsel. In the petition on appeal and in the formal verdict prepared for the jury, the assessment of benefits and the costs of the improvement were confused, and the costs were spoken of as benefits. On appeal to this court (*Drainage District v.*

Bowker, 89 Neb. 230) the same confusion of language took place. There is nothing to show that the jury considered the amount of the benefits which the land would ultimately receive when the improvement was made. The jury evidently considered that the estimate made by the drainage board was too high as compared with other lands, and reduced the same to the extent of 35 per cent. The supplemental assessment involved here was based upon 65 per cent. of the original assessment of benefits. It is not contended that the amount of the proposed supplemental assessment is not required for the legitimate purposes of the district.

The real question presented here is whether a judgment which uses a misnomer for the matter involved and which was actually tried and determined is a bar as to the matter for which the misnomer is the proper designation. In other words, does a judgment which ostensibly assesses benefits, but which as a matter of fact only ascertains the comparative cost of construction, prevent a court in a later action from ascertaining the real matter tried and determined?

If we should hold as the plaintiff desires, the effect would be to relieve him from his proportionate share of the burden imposed upon all landowners within the drainage district, on account of an erroneous use of language made in the first place by his counsel, and overlooked and followed by counsel for the drainage district and the district court. Under such circumstances we believe it our duty to consider the substance, the real issue tried, and to hold that the former proceedings do not constitute a bar to later necessary assessments by the drainage board within 65 per cent. of the benefits as found and ascertained in the original assessment by that body.

The judgment of the district court is therefore

AFFIRMED.

CORNISH and HAMER, JJ., not sitting.

FLORA BELLE CRAIG, APPELLANT, v. JOHN D. SHEA, APPELLEE.

FILED JUNE 15, 1918. No. 20038.

1. **Bastards:** SUPPORT. Construing the provisions of sections 5795 and 8614, Rev. St. 1913, together, it is *held* that the common-law rule has been abrogated, and that the illegitimate child of a married woman, living separate and apart from her husband, is entitled to support from the actual father.

2. ———: ———. There being no provision in the statute allowing bastardy proceedings to be brought by a married woman, and no other remedy being afforded except criminal prosecution, an illegitimate minor child may, by her next friend, maintain a suit in equity against her putative father to declare her status and recover support and maintenance.

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

C. J. Campbell and *R. J. Greene,* for appellant.

John J. Ledwith, contra.

LETTON, J.

This is a suit in equity for support and maintenance. The defendant filed a general demurrer to the petition, which was sustained and the cause dismissed. Plaintiff appeals.

The petition, in substance, sets forth that the action is brought on behalf of a minor, who is three years of age, by her mother and next friend, Belle E. Craig; that Belle E. Craig, though a married woman, has been separated from her husband, and has not had access to him nor had sexual intercourse with him for a long period of time before the birth of plaintiff; that about nine months prior to the birth of plaintiff she was keeping house as a domestic for John D. Shea; that Shea unlawfully had carnal knowledge by force with said Belle E. Craig, and begot this plaintiff; that Shea, since the birth of plaintiff on October 29, 1912, without

good cause abandoned her, and wilfully neglected and refused to maintain and provide for her; that he has at all times acknowledged that he is her father; that he is amply able to maintain and educate her; that both she and her mother are destitute, that her mother's husband is living and is the apparent father of plaintiff, although not such in fact; that both Mr. Craig and Mr. Shea are advanced in years, and that it is necessary that the evidence of her paternity be perpetuated. The prayer is that her status be established as the child of John D. Shea; that she be declared a ward of the court, and defendant be required to provide for her maintenance and support; that she recover from Shea $20,000 for her maintenance and education, or such sums as to the court may seem right and proper; that the testimony of the persons referred to be taken and perpetuated, and for other equitable relief.

Plaintiff concedes that she is presumed to be the legitimate child of Mr. Craig, but contends that this is a rebuttable presumption, and that the facts set forth in the petition and admitted by the demurrer conclusively establish that she is the illegitimate child of defendant. Her position further is that, since section 5795, Rev. St. 1913, provides in substance that every poor person who shall be unable to earn a livelihood on account of any bodily infirmity, idiocy, lunacy or other unavoidable cause "shall be supported by the father, grandfather, mother," etc., and "such poor person entitled to support from any such relative may bring an action against such relative for support in his or her own name and behalf," and since section 8614, Rev. St. 1913, provides: "Whoever, without good cause, abandons his wife, and wilfully neglects or refuses to maintain or provide for her, or whoever abandons his or her legitimate or illegitimate child or children under the age of 16 years and wilfully neglects or refuses to provide for such child or children, shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one

year, or by imprisonment in the county jail for not more than six months''—these statutory provisions set aside the common law, and create a new duty and liability not theretofore existing. She also concedes that such an action would not lie at common law.

Defendant insists that the statute is a criminal one and does not furnish a basis for a civil action, and argues that, even in a criminal proceeding under it, plaintiff would be required to show, before a conviction could be had, that the paternity of the child had been established in a bastardy proceeding.

The presumption of legitimacy arising from the birth of a child during marriage may be rebutted. *Gaffery v. Austin,* 8 Vt. 70; 5 Cyc. 626, 627; Rev. St. 1913, sec. 1591.

The bastardy statute, since amended in 1875 (section 357, Rev. St. 1913), by its terms applies only to women who were unmarried when pregnancy began. The mother of plaintiff could not avail herself of its provisions to recover support for her child. *Parker v. Nothomb,* 65 Neb. 315. We are of opinion that the provisions of the statutes mentioned indicate that it was the intention of the legislature that the burden of support of an illegitimate child of a married woman should, as in the case of an illegitimate child of an unmarried woman, be cast upon the man responsible for its existence. The statute does not in express terms allow an action for the support of an illegitimate child, but it would seem that the legislature intended to remove the restrictions imposed by the common law, to impose a duty not theretofore existing, and to make that duty enforceable both by criminal and civil process. For a violation of the duty to support the plaintiff she is entitled to redress. 1 R. C. L. p. 321, sec. 7. If plaintiff is the illegitimate child of defendant, she is as much entitled to be supported by him as if her mother had been an unmarried woman, and, there being no remedy provided by statute, recourse may be had to a civil action to enforce

the duty of maintenance. *Trier v. Singmaster,* 167 N. W. (Ia.) 538, a recent Iowa case, was an action by an illegitimate child to establish her status, and her right to inherit was sustained even though no bastardy proceedings had been brought, and with good reason, for if support is voluntarily furnished by the father there is no need for such proceedings.

An action in equity for support and maintenance of a wife is maintainable in this state (*Hoon v. Hoon,* 82 Neb. 688), and by analogy such an action should lie under the facts alleged in this case. *Paxton v. Paxton,* 150 Cal. 667.

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

REVERSED.

HAMER and CORNISH, JJ., not sitting.

CHARLES W. ANDERSON, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JUNE 15, 1918. No. 20090.

1. **States:** MILITARY RESERVATIONS: OPERATION OF STATE STATUTES. If the war department of the United States, in control of a reservation for military purposes, jurisdiction over which has been ceded by the state of Nebraska to the United States, determines that a statute of the state in existence at the time of the cession is inconsistent with and would probably defeat or impair the use of the territory for the purpose for which the cession was made, such statute is not operative within the limits of the reservation for that reason.

2. ———: ———: RAILROADS: FENCES: LIABILITY. The defendant railroad company attempted to fence its right of way within the limits of the Fort Robinson military reservation. It was prevented from so doing by the war department of the government for the reason that the erection of fences "would very greatly restrict the use of the reservation for drill and maneuver purposes," and would "largely defeat the purpose for which the government maintains the reservation." Certain cattle trespassing upon the reservation were killed by an engine of defendant upon its tracks

thereon. *Held*, that the refusal of the war department to permit the erection of the fences constitutes a defense to an action against the railway company, for the value of the cattle killed, under the statute of the state making it liable for such killing if it fail to inclose its tracks.

APPEAL from the district court for Dawes County: WILLIAM H. WESTOVER, JUDGE. *Reversed, and dismissed.*

A. A. McLauglin, Wymer Dressler and *Lyle Hubbard,* for appellant.

J. E. Porter, contra.

LETTON, J.

Plaintiff is the owner of five head of cattle which were killed by a train of the defendant on the Fort Robinson military reservation in Dawes county. The answer admits the killing, and that the railway through the reservation is not fenced, and pleads as a defense that the reservation is under the exclusive jurisdiction and control of the government of the United States, and not under the control or subject to the laws of the state of Nebraska; that the United States government, exercising its jurisdiction through its duly appointed officers, has ordered and determined that the reservation shall not be incumbered with right of way fences, but shall remain free and open to be used for military maneuvers and for drill grounds, and that the government has expressly ordered and commanded the defendant not to fence its right of way through the same; that, for that reason, the laws of the state of Nebraska as respects fencing of railroads have there been superseded, and the defendant is not liable on account of the absence of a fence. Both parties moved for a directed verdict. The court instructed for plaintiff, and defendant appeals.

In 1885 congress granted a right of way to the Fremont, Elkhorn & Missouri Valley Railway Company through the Fort Robinson military reservation, the location of same to be subject to the approval of the secretary of war. This approval was granted, and the

railroad built accordingly. In 1887 (Laws 1887, ch. 83) jurisdiction over the reservation was ceded to the United States by the state of Nebraska. About half of the length of the right of way through the reservation was fenced by the defendant. In 1911 a controversy arose between the officer in command at the reservation and the defendant regarding the extension of the fences through the reservation. The matter was referred to the war department, and in a letter from the acting secretary of war to the superintendent of the defendant railway company the following is found: "The state, by act of March 29, 1887, ceded exclusive jurisdiction over this reservation, subject to the usual reservations for service of process, and no statute of the state requiring railways to fence their rights of way can be regarded as operative within the reservation of Fort Robinson. Your right of way across that reservation divides it into two nearly equal parts. To place fences thereon would very greatly restrict the use of the reservation for drill and maneuver purposes, and, even though you should put in numerous passage-ways, would cause great inconvenience to the troops there stationed. To permit the fencing of your right of way across the reservation would, therefore, militate against the efficiency of the troops stationed at Fort Robinson and would largely defeat the purpose for which the government maintains the reservation.

"By reason of the above considerations, I am constrained to inform you that the government will not permit the erection of fences along the right of way of your company within the Fort Robinson military reservation, and you are hereby notified to remove all such fences heretofore erected by your company."

Efforts were made by the defendant to procure a modification of this order, and on October 30, 1911, a letter was sent to the attorney for the defendant by the acting secretary of war containing the following: "Referring to your letters, dated September 11 and October 19, 1911, asking for a reconsideration of the

war department's decision not to permit the C. & N. W. Ry. to fence its right of way through the Fort Robinson military reservation, I have the honor to inform you that this matter was most carefully considered prior to the decision of the department, made known to you in office letter of May 23, 1911, and that, since the receipt of your letter of September 11, the case has been thoroughly reviewed with the result that the department is constrained to adhere to its former decision in the premises.

"The commanding officer, Fort Robinson, states that the entire reservation is inclosed by fences with the exception of the wood reserve about six miles from the post proper; that the entire reservation is used for instruction and maneuver purposes; that the railroad passes diagonally through the reservation, separating it into two parts, and, if fenced in as proposed by the railway company, it will greatly interfere with the use of the land for maneuver and drill purposes." Following these communications, defendant made no further efforts to fence the line.

Under the laws of this state, defendant would be liable for the value of the cattle killed on the reservation, unless the action of the war department relieves it from the duty to fence. In *Chicago, R. I. & P. R. Co. v. McGlinn,* 114 U. S. 542, several of the questions involved in this case have been decided. That action was for the value of a cow alleged to have been killed within the Fort Leavenworth military reservation by an engine of the Chicago, Rock Island & Pacific Railroad Company. The facts are very similar to those in this case. Before the cession of that reservation to the United States, a fencing statute of Kansas was in force similar to that of this state. A cow was killed by a train within the limits of the reservation, where the road was unfenced. A judgment in favor of the owner of the cow was affirmed by the supreme court of Kansas, and on appeal to the supreme court of the United States that court held that the same principles apply to the

cession of the reservation to the United States as are in force whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another; that all laws in conflict with the political character and Constitution of the new government would be at once displaced. "But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. *American & Ocean Ins. Co. v. Canter,* 1 Pet. (U. S.) *511, *542; Halleck, International Law, ch. 34, sec. 14."

The *McGinn* case was submitted upon an agreed statement of facts. The United States government had not asserted that the fencing of part of the reservation would defeat or interfere with the purpose of the cession. The question involved in this case was not necessary to a decision, and was not considered. The decision of that case, therefore, does not determine the issue presented here. The real question in this case is whether the refusal of the war department to allow the defendant to erect a fence constitutes a justification, and excuses its failure to obey the statute. Defendant argues that the fencing statute has been abrogated because the erection and maintenance of fences is inconsistent with the uses of the ceded territory as a military post, and that, if inconsistent with the purpose for which jurisdiction over the territory was ceded, the statute ceased to exist at the time of the cession. Much support to this contention may be found in the opinion of the supreme court of the United States in *Fort Leavenworth R. Co. v. Lowe,* 114 U. S. 525. The Fort Leavenworth military reservation was selected from the public lands. Afterwards it was included in the state of Kansas. The state of Kansas in the case of cession reserved to itself "the right to tax railroad, bridge, and other cor-

porations, their franchises and property, on said reservation." It was asserted by the plaintiff in that case that a state tax levied on the property of a railroad within the reservation was void, and that the saving clause was invalid, congress having exclusive jurisdiction. The principal point decided was that under section 8, art I, of the Constitution of the United States, congress has exclusive legislative authority over "all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," but that, as to territory acquired by other means within the boundaries of a state, the United States will hold the land subject to this qualification: "That if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, *will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed.* Such is the law with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits." It was also said: "It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the states. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority

and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the legislature of the state."

The war department has decided that the fencing of the right of way would impair the effectiveness of the territory for the purpose for which the cession was made. That department possesses peculiar and technical skill and knowledge of the needs of the nation in the training of its defenders, and of the necessary conditions to make the ceded territory fit for the purpose for which it was acquired. It is not for the state or its citizens to interfere with the purposes for which control of the territory was ceded, and, when the defendant was forbidden to erect the fences by that department of the United States government lawfully in control of the reservation, no other citizen can complain of nonperformance or hold defendant guilty of a violation of law.

The defense made is supported by the evidence and constitutes sufficient justification for the refusal to fence. It may be noticed that in several instances we have held that a railroad company may be justified in refusing to fence, even though the statute, literally interpreted, required fences to be built in that locality. *Chicago, B. & Q. R. Co. v. Sevcek,* 72 Neb. 799; *Burnham v. Chicago, B. & Q. R. Co.,* 83 Neb. 183. In short, common sense has been applied and a reasonable construction of the statute has been made.

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

REVERSED AND DISMISSED.

MORRISSY, C. J., and ROSE, J., dissent.

HAMER, J., not sitting.

ANNA COSTER, ADMINISTRATRIX, APPELLEE, v. THOMPSON HOTEL COMPANY, APPELLANT.

FILED JUNE 15, 1918. .No. 20613.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: ACTION FOR COMPENSATION: PARTIES. Sections 3665, 3685, Rev. St. 1913, construed, and *held* that an action to recover compensation for death may be brought either by the dependent or dependents entitled thereto, the legal guardian or trustee of a minor dependent, or by the executor or administrator of the deceased.
2. ———: ———: ACCIDENT IN COURSE OF EMPLOYMENT. A workman injured by collision with a street car while on the way to procure materials to be used in the work for which he was employed, and the ordering and procuring of which materials was a common incident of his duties, was injured "by accident arising out of and in the course of employment" (Rev. St. 1913, sec. 3650), and his dependents became entitled to compensation.

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

Gurley & Fitch and *Ralph M. West,* for appellant.

Strode & Beghtol, contra.

LETTON, J.

This is an action under the Workmen's Compensation Act for compensation for the death of Peter J. Coster, the husband of plaintiff. The court awarded compensation, and defendant appeals.

The deceased was engineer and general foreman of mechanical work for a hotel owned by the defendant. He had complete charge of the engine room, in which there were eight or nine men employed, and of other men doing mechanical work. He had authority to buy materials and to employ and discharge men in his department, was not required to report to the hotel for duty at any particular hour, and had no regular hours. About the time of his death some plumbing work was in progress at the hotel under his direction. It was his custom to buy materials and, if quickly needed, take them to the hotel himself. On the morning of the accident, before he left his home, he

gave directions by telephone to some of his men as to their work, he also telephoned to a material company with reference to the purchase of materials to be used in the hotel, and further arranged with a plumber that he would call for some plumbing supplies and take them to the hotel. Such acts were ordinary incidents of his employment. On the way, and before he reached the plumber's shop, the motorcycle which he was riding collided with a street car, and injuries were caused which resulted in his death.

Two contentions are made: First, that in such an action as this the defendants, and not the administrator of the deceased, are the proper parties to bring the action. The statute is a little peculiar. Section 3665, Rev. St. 1913, provides in part: "The death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto, or their legal guardians or trustees." Section 3685, Rev. St. 1913, provides: "In case of death, where no executor or administrator is qualified, the said court shall, by order, direct payment to be made to such persons as would be appointed administrator of the estate of such decedent, upon like terms as to bond for the proper application of compensation payments as are required of administrators." These sections, construed together, seem to authorize recovery to be had by the dependent or dependents themselves, their legal guardian or trustees, the executors or administrator of the deceased, and, if no such representative be qualified, the payment may be made "to such persons as would be appointed administrator of the estate of such decedent." The statute is confusing upon its face and inconsistent, but it should be liberally construed, and, if it is borne in mind that its object is to furnish compensation to those dependent on the deceased for support, it does not seem very important in whose name the action is brought, so long as the relief is sure to reach the proper party. If the dependent is of full age, apparently the action can be brought in the individual name and the

death benefit be directly recoverable by, and payable to him or her. If a minor, the action may be brought by and the money paid to the legal guardian or trustee. If an administrator or executor is appointed for the deceased, the action may be brought and the money be paid to that officer, to be applied under the direction of the county court for the benefit of the persons designated in the statute. The provisions of section 3685 seem to be applicable only where an action is brought by one dependent and there are others entitled to share in the fund who are not parties to the suit. Evidently this section is for the protection of dependents who are not parties. Such dependents are made in a certain sense the wards of the court, and the intention is that the court shall protect their interest by seeing that, when compensation is paid to another than the dependent himself or his legal representative, security shall be taken that the money shall be paid as the statute directs.

The next point argued by the defendant is that the death "was not caused by accident arising out of and in the course of employment." We cannot take this view. It was a part of Coster's duty to obtain materials. He was his own master as to his hours and place where he might engage in his master's service. When he ordered material by telephone from his house he was in the course of his employment, and when he was accidentally struck and killed upon the street while on the way to procure materials, the accident arose out of the employment. Both the order for the goods and the going to procure them were strictly within his duties. The fact that he rode upon a motorcycle which he commonly used in performing errands and in going to and from his home, does not alter the case. He had the right to use such instrumentalities as were best fitted to perform his master's work.

The cases cited by the defendant do not seem applicable.

The judgment of the district court is

AFFIRMED.

WENZEL CERNIK, APPELLEE, V. MCKEEN MOTOR-CAR COMPANY, APPELLANT.

FILED JUNE 15, 1918. No. 19849.

Master and Servant: INJURY TO SERVANT: NEGLIGENCE: EVIDENCE. In a suit by an employee to recover from his employer damages for personal injuries resulting from the latter's negligence, proof tending to show that defendant did not furnish proper appliances or men enough for the work in hand *held* sufficient to sustain a verdict in favor of plaintiff on those issues.

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

Edson Rich, A. G. Ellick and *C. A. Magaw,* for appellant.

Jefferis & Tunison, contra.

ROSE, J.

This is an action to recover $25,000 for personal injuries. From the judgment on a verdict in favor of plaintiff for $11,860, defendant has appealed.

Defendant is a manufacturer of railway motor-cars at Omaha. In its shop plaintiff was injured while he and two other employees were using an iron pipe in handling a heavy iron bolster. Under issues raised by the pleadings the trial court submitted to the jury two charges of negligence—failure to furnish a proper appliance and failure to provide men enough for the work in hand.

Defendant takes the position that there is no evidence of negligence on its part, and that therefore there should have been a peremptory instruction in its favor. Existing conditions enter into both acts of alleged negligence included in the charge to the jury. In determining the sufficiency of the evidence to sustain the verdict, material facts of which there is proof, are regarded as established. The separate parts of the bolster, some of them heavy pieces of iron, were assembled and fastened together on a

railroad flat-car. This was the work of three men. After the flat-car had been moved to the proper place in the shop, an iron pipe one inch in diameter and about five feet in length was used in carrying the bolster. For this purpose the middle of the pipe was placed under the bolster at right angles in front of the center of mass, plaintiff holding one end of the pipe, a fellow employee holding the other end of the pipe, and the foreman in charge holding the rear end of the bolster. In this manner it was taken from the flat-car, one end being inserted in the forge and the other end resting on a wooden horse. While it was being carried in the manner indicated from the forge to the anvil, after it had been pulled out of the fire, it slipped on the iron pipe toward plaintiff, increasing his load and injuring his back. In addition to the bolster, to the wooden horse, and to the anvil there was a column of the building near. In taking the bolster to the anvil, after one end had been heated in the forge, the men were required to lift it, remove the wooden horse, walk backward in pulling the hot end out of the fire, turn to one side, and walk several feet. It was in performing these duties that plaintiff was injured. There was no shoulder or flat surface on the pipe or other device to prevent the bolster from slipping. Plaintiff was a small man, smaller than either of the other men. This handicap had a tendency to increase his burden and to make the bolster slip toward his hands. He was without experience, not having previously assisted in carrying more than two or three bolsters. He had nothing to do with the selection of the pipe, was not instructed in regard to it, and was not warned of the danger of its slipping, but was ordered to use it. He did not know the weight of the bolster, but had seen four men carrying a similar one in the shop. Plaintiff could not use the iron pipe alone or control the acts or conduct of the other men. He was required to work in conjunction with them, and was thus handicapped in his own movements and labors. The heated end of the bolster, the moving of the wooden horse, walking backwards,

turning, avoiding collision with stationary objects in the shop, holding the pipe and carrying a heavy load were matters requiring the attention of plaintiff, though he could not act independently in performing the duties assigned to him. These conditions could not be overlooked by the employer in furnishing appliances and men. The evidence sustains a finding that plaintiff was not at fault, and that he did not know the danger or assume the risk. With the issues and the proofs in the condition outlined, the trial court could not determine as a matter of law that there was no negligence on the part of defendant. Negligence in both particulars described in the instructions of the trial court may fairly be inferred from evidence tending to prove the facts outlined. There is abundant proof that such negligence was the proximate cause of the injury to plaintiff's back, and that Pott's disease resulted therefrom. There was therefore no error in submitting to the jury the two issues of negligence mentioned. In this view of the evidence there is no error in the record.

AFFIRMED.

CORNISH and HAMER, JJ., not sitting.

IN RE ESTATE OF FRANK M. GUNDERMAN.
AUBREY A. SMITH, APPELLANT, V. RAYMOND GUNDERMAN, APPELLEE.

FILED JUNE 15, 1918. No. 20091.

1. **Executors:** RIGHT OF APPEAL. The executor named in the will offered for probate is a proper party proponent, and, if upon appeal to the district court by contestant the proposed will is denied probate, the executor may appeal to this court.

2. **Appeal:** ERRORS: REVIEW. Alleged errors not brought to the attention of the trial court in the motion for new trial will not ordinarily be considered in this court.

3. ———: WITHDRAWAL OF ADMISSION. An admission of fact by counsel in the trial of a cause may be withdrawn with consent of the court, and such consent and withdrawal will be presumed

if the record shows that thereafter the parties fully tried the matter so supposed to have been conceded.

4. ———: VERDICT: SUFFICIENCY OF EVIDENCE: QUESTION FOR COURT. It is for the courts to determine whether there is such a failure of evidence to support the verdict that all reasonable minds must on consideration of the evidence alone conclude that it is clearly wrong. They are not called upon to say what their decision would be upon conflicting evidence if the law required them to determine upon which side of the question it preponderates.

5. ———: ———: ———. Upon the question whether the verdict of a jury can be sustained, the judges sometimes disagree, but this is no indication that they would disagree as to the preponderance of the evidence, if that question was submitted to them. We cannot find that the evidence is so clear and conclusive in this case as to require the court to interfere with the province of the jury.

6. **Evidence:** NONEXPERT WITNESS: MENTAL CAPACITY. "A nonexpert witness cannot give her opinion as to the mental capacity of testatrix unless such opinion is based solely on facts relating to the conduct and action of the testatrix as detailed in the evidence of the witness."

7. **Appeal:** OPINION OF NONEXPERT: HARMLESS ERROR. In contest of a proposed will, if it is alleged that the testator was intoxicated when the will was executed, and that it was procured by undue influence, the fact that a witness who was familiar with his condition at the time was allowed to state her opinion as to "whether he was competent or incompetent to transact important business" will not require a reversal, if it appears that the witness was testifying solely to his intoxication and his condition in that respect, and that the appellant was not prejudiced by the form of the question and answer.

8. **Wills:** PROBATE: MENTAL CAPACITY: INSTRUCTION. An instruction that, in determining whether the testator was of sound mind and had sufficient mental capacity to make a valid will, the jury may consider "the terms and provisions of the will itself, whether the same are just or unjust, reasonable or unreasonable, natural or unnatural," and similar matters indicated in the opinion, will not be held erroneous requiring a reversal, if the jury are plainly told that such matters will not alone warrant the presumption of mental incapacity, but should be considered as circumstances in connection with other facts bearing on the condition of the testator's mind.

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

A. M. Post and *Frank D. Williams*, for appellant.

Vail & Flory and *A. E. Garten*, *contra*.

SEDGWICK, J.

A writing, purporting to be the will of Frank M. Gunderman, deceased, was filed in the probate court of Boone county, and Aubrey A. Smith, who was named therein as executor, filed his petition in that court for the probate of the same as the will of Frank M. Gunderman. The probate was contested by Raymond Gunderman, a son of the deceased, and upon the hearing that court found that it was the will of Frank M. Gunderman and admitted it to probate as such. The contestant appealed to the district court for that county, and upon trial therein the jury found in favor of the contestant. From a judgment thereon the proponent, Smith, appealed to this court. A motion was filed in this court to dismiss the appeal on the ground that the appellant as executor had no appealable interest in the controversy. This court upon consideration overruled that motion.

The proponent quotes paragraphs 3 and 16 of the court's instructions to the jury and assigns error thereon. We do not find that any question as to these instructions was submitted to the trial court in the motion for new trial, and therefore these objections will not be further considered.

It is further contended that the only objection in the pleadings to the probate of the will was "general incompetency or mental derangement," and that therefore this judgment can be sustained only upon that ground; and it is further contended that upon the trial it was conceded by the contestant that the deceased was not generally incompetent. The conclusion in the brief seems to be that, as the only ground of contest alleged and relied upon was conceded not to exist, the judgment must be reversed for that reason. The record shows that counsel for contestant upon the trial asked a witness, "What would you say as to his being intoxicated fre-

quently, and about how often, during those later years?" This question being objected to as "incompetent, irrelevant, and immaterial," contestant's counsel stated, "We admit that at times this man was competent, but when he was drinking he was incompetent." The court then remarked, "If it is admitted that the man was mentally capable when reasonably sober, and only when unreasonably drunk was he mentally incapable, then we might as well confine ourselves to the immediate fact we have in hand at the time of the execution of the will." Whereupon counsel for contestant said, "Now, we will take just a moment for consultation." The court thereafter remarked, "We will proceed on the theory that he was mentally incapable to transact business." Thus, it appears that the contestant's counsel had made an admission, which, when his attention was called by the court to the full effect of it, he desired to qualify, and asked for time to consider it. What the result of his considering the matter was is not shown from the record, unless we infer it from the remark of the court. This language of the court in regard to the theory on which they would proceed is perhaps a little indefinite, but it must mean that they would proceed on the theory that the question was whether he was generally incompetent, and the subsequent evidence shows beyond question that that was the theory upon which the trial proceeded.

The original brief of the proponent is devoted almost entirely to a discussion of the sufficiency of the evidence to support the finding of the jury. The contestant, Raymond Gunderman, is the only child of the deceased, and it appears that when this child was quite young the deceased was divorced from his wife, and the care and custody of the boy was given to the wife, whose residence was so far from that of the deceased that there was little intercourse between the father and son for several years. The son, however, visited his father on several occasions, and when the father supposed that he was about to die

he sent for the son, who promptly came to his father and assisted him as he could. The deceased had no other relative in whom he was interested except a sister, who had cared for the deceased in his youth. By the proposed will, the property of the deceased was substantially given to this sister, who was in poor circumstances, and the son was practically disinherited. There are circumstances, shown in the evidence, indicating a strong attachment on the part of the deceased for this sister, and also indicating to some extent a disregard for the son. On the other hand, there are circumstances indicating exactly the reverse. The courts are not called upon to say what their decision would be upon this conflicting evidence, if the law required them to determine upon which side of the question it preponderates. It is for the courts to determine whether there is such a failure of evidence to support the verdict that all reasonable minds must on consideration of the evidence alone conclude that it is clearly wrong. Upon the question whether the verdict of a jury can be sustained, the judges sometimes disagree, but that is no indication that they would disagree as to the preponderance of the evidence, if that question was submitted to them. We cannot find that the evidence is so clear and conclusive in this case as to require the court to interfere with the province of the jury.

A serious question is presented by the objection that "It was error to receive opinion of witness Minnie Burns touching competency of deceased." That witness was asked the question, "Mrs. Burns, basing your opinion on your knowledge and acquaintance with Frank M. Gunderman, what would you say as to whether he was competent or incompetent to transact important business on the morning of the 22d day of September, 1914, at the time this will was written?" which was objected to as incompetent, irrelevant, and immaterial, and no proper foundation laid. The objection was overruled, and the answer was, "I don't think he was competent. He

realized that fact himself." Upon motion, the last part of the answer, "He realized that fact himself," was stricken out as not responsive to the question. The rule that "A nonexpert witness cannot give her opinion as to the mental capacity of testatrix unless such opinion is based solely on facts relating to the conduct and action of the testatrix as detailed in the evidence of the witness" is almost, if not quite, universally applied in such cases. *Furlong v. Carraher,* 102 Ia. 358. This, of course, relates to the mental capacity to make a will, which is generally the issue presented. In the case at bar the objections to the will alleged the mental incapacity to make a will, and also alleged the continual use of intoxicating liquors to the very time of executing the proposed will as a cause of such incompetence; and also that the will was obtained by undue influence. This witness had been his nurse for several years, and had ample opportunity to know his drinking habits, and especially his condition in that regard at the time of making the will. She testified at large as to his habits of intoxication for the several years immediately prior to the execution of the will, and then fully in regard to his condition in that respect when the will was made. Ordinarily, where the question is as to his general incompetency mentally to make a will, such question upon that issue would be held to be incompetent. One may be competent mentally to make a will, and yet not be in a condition to transact important business generally. This question could only be considered proper upon the theory that it was understood by all parties to relate to the degree of intoxication of the testator at the time the will was made.

From an examination of the evidence of this witness and the objections interposed and rulings of the court thereon, it does not seem so clear that the answer to the question objected to was understood by any one to be an opinion upon the issue presented to the jury, as to require a reversal. It seems rather to have been considered as showing the extent of his indulgence in intoxicating

liquors, and that at the making of the will there was opportunity for undue influence. Under these circumstances, and in the light of the general instructions given the jury as to the evidence to be considered by them in determining the issue submitted, we cannot find that the evidence was prejudicial to the appellant.

The court instructed the jury that, in determining whether the testator was "a man of sound mind and had sufficient mental capacity to make a valid will, you may take into consideration the terms and provisions of the will itself, whether the same are just or unjust, reasonable or unreasonable, natural or unnatural, and you may take into consideration the evidence as disclosed to you upon the trial relating to the financial condition of the contestant, the only son of said testator, and the financial condition of the other devisee under said will at the time of the execution of said instrument." It is contended that this was erroneous, and *Donnan v. Donnan,* 236 Ill. 341, is cited. The instruction criticised in that case told the jury that "inequality and unreasonableness in a testamentary disposition of property, though not, in itself, conclusive evidence of unsoundness of mind or of undue influence, may be considered," etc. The court thought that the use of the word "conclusive" implied that such evidence "alone is to be considered as evidence tending to show unsoundness of mind or undue influence," and, for that and similar reasons, held that the instruction was erroneous. In the instruction here complained of the court told the jury "the apparent inequality or inequity in the provisions of the will do not alone warrant the presumption of mental incapacity, but they may and should be considered as circumstances in connection with other facts bearing on the condition of the testator's mind at the time of executing the will."

There being no such substantial error as requires a reversal, the judgment is

AFFIRMED.

ROSE and HAMER, JJ., not sitting.

SUSAN L. SIPPEL, ADMINISTRATRIX, APPELLEE, v. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED JUNE 15, 1918. No. 20099.

1. **Trial:** DIRECTION OF VERDICT. Although there is substantial evidence tending to establish each fact necessary to a recovery, so that in the absence of any conflicting evidence a verdict for the plaintiff must be allowed to stand, still there may be such evidence in the record that no reasonable mind could believe that the facts existed as alleged, and in such case the court should so direct the jury.
2. **Negligence:** PRESUMPTION. When there is no evidence as to negligence on the part of the person injured, the presumption of due care that arises from the instinct of self-preservation generally obtains.
3. **Railroads:** NEGLIGENCE: QUESTION FOR JURY. Whether it is negligence to push cars before an engine without placing a guard on the foremost car to signal those in control of the train if any person is in danger, and to warn such person, depends upon the circumstances and conditions surrounding the operation of the train. It may be negligence *per se*. In most cases, it will be a question of fact for the jury.
4. **Negligence:** BURDEN OF PROOF. In an action to recover damages caused by alleged negligence, plaintiff must prove both negligence of defendant and that such negligence was the proximate cause of the injury complained of.
5. **Railroads:** INJURY TO PEDESTRIAN: SUFFICIENCY OF EVIDENCE. The evidence in this case, indicated in the opinion, will not support a finding that negligence of the defendant was the proximate cause of the injury complained of.

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

E. J. White, G. L. DeLacy, J. A. C. Kennedy and *M, V. Beghtol,* for appellant.

Berge & McCarty, contra.

SEDGWICK, J.

The body of Charles Sippel was found on the tracks of defendant over a bridge in the defendant's yards.

He had evidently been run over and killed by one of defendant's trains. The administratrix of his estate brought this action in the district court for Lancaster county to recover damages, alleging that his death was caused by the negligence of the defendant. The trial resulted in verdict and judgment for the plaintiff, and the defendant has appealed.

There is no complaint of the manner of the trial, nor of the rulings of the trial court, except in refusing to direct a verdict for the defendant on the ground of a failure of evidence. The plaintiff in the brief assumes that, "if there is any evidence to support the verdict, if there is any evidence to support a finding in favor of plaintiff on the various elements of the case, then the judgment of the lower court should be affirmed." This is not an accurate statement of the law. It is for the jury to determine the preponderance of the evidence. If there is a substantial conflict and reasonable minds might differ as to the existence of facts necessary to entitle the plaintiff to recover, it is for the jury to determine those facts, and not for the court. The verdict of a jury will not be disturbed unless it is clearly wrong. If there is substantial evidence tending to establish each fact necessary to a recovery, so that in the absence of any conflicting evidence a verdict for the plaintiff must be allowed to stand, still there may be such evidence in the record that no reasonable mind could believe that the facts existed as alleged, and in such case the court should so direct the jury.

It is conceded that the evidence shows that the defendant's train, by which decedent was killed, was operating in the switching yards of the defendant at Nebraska City; that an engine in charge of an engineer and fireman was pushing one car before it to the north over what is called the high bridge, and drawing five or six freight cars after it, moving at a slow speed, perhaps three or five miles an hour. At the approach to this bridge the defendant had posted a sign, which read: "Danger—Trespassing on

this bridge is forbidden." There is evidence that, notwithstanding the danger to foot-passengers crossing over this bridge, and the warning of the defendant, some people did walk over the bridge from time to time in preference to using the main traveled road, or what is called the lower bridge, which is less dangerous. The plaintiff insists that the bridge was "commonly used by pedestrians," and that the deceased was a licensee on the bridge. The evidence is very voluminous upon this question and is somewhat conflicting, and we assume that it was a question for the jury as to whether the conditions were such that the defendant was required to use reasonable care to avoid injuring the deceased. We regard that question as determined in favor of the plaintiff. No one saw the accident, and there is no evidence as to how it happened. Where there is no evidence as to negligence on the part of the person injured, the presumption of due care that arises from the instinct of self-preservation generally obtains. The evidence as to the character of the deceased and his conduct just prior to the accident as tending to rebut this presumption is so conflicting that we assume that the question of due care on his part was for the jury to determine and has been resolved in favor of the plaintiff. The question of difficulty in this case is whether there is substantial evidence of negligence on the part of the defendant which was the proximate cause of the accident. The negligence alleged, and apparently the only negligence of the defendant relied upon in the briefs, is thus stated: "It is negligence to back train without lookout on end to give warning to pedestrians."

If several cars are being pushed through a street frequented by people, and no one in control of the train is so situated as to know whether the track is clear or to give warning, and avoid injuring those who may be exposed to danger from the approach of the train, it is negligence *per se* to fail to station a lookout who can give such warning. In a case of that kind the court said: "There could be no doubt that the evidence * * * was am-

ply sufficient to justify the court in refusing, at the instance of the defendant, to instruct the jury to find for it." *Chicago & A. R. Co. v. Wilson,* 225 Ill. 50.

On the other hand, if a train is being moved over a bridge, where it is manifestly dangerous for people to walk, and proper signs are placed so as to warn people of the danger of trespassing thereon, and only active persons who court danger attempt to cross the bridge, it would not be expected that a lookout would be stationed to prevent accidents. "Whether it is negligence or not for the servants of a railroad company to run an engine backwards, or push cars ahead of an engine, without stationing some one on the tender, or foremost car, to signal its approach to a person who may be on the track, is a question which is controlled by the circumstances under which the engine or train is operated. Under some circumstances, the act has been held to be negligence as a matter of law; but in most cases it has been held to be a question of fact to be submitted to the jury." *Southern R. Co. v. Daves,* 108 Va. 378.

Is there such substantial conflict in the evidence as to the facts upon which the charge of negligence depends as to make it a question for the jury, and, if so, was such negligence the proximate cause of the injury? There was only one car being pushed by the engine; the others followed the engine. The engineer and firemen both testified that the car was no obstruction to their view of the tracks; that they could, and continually did, see the tracks before them, and that there was no one upon the tracks. This evidence was not contradicted. No one testified that the deceased was upon the tracks as the train approached the bridge. He was evidently injured as the train approached the bridge from the south. He was a night watchman, accustomed to sleep from about 6:30 o'clock in the morning, and, as testified by his wife, "would get up about 10 o'clock and eat, and then he would talk a while, and he would retire again and get up about four. * * * He came home, and I had break-

fast on the table, and I asked him if he would eat, and he said 'No, because I will get up about 10 o'clock,' and he retired, and about 8 o'clock I went up, * * * and in a few minutes he got up and dressed and came down, and I said to him, 'Well, why, what did you get up so early for?' And he said, 'Well, I want to go to the water-works.' And I said, 'What are you going there for?' He said, 'I have been over there, you know, several times.' * * * Well, he said he wanted to go to the water-works, and that night was his pay night, he got his pay in the evening, and he says, 'I want to go over to the water-works because I have been promised a position there, I am tired.' * * * Well, he dressed, and then I asked him if he would eat something before he went, and he ate some cakes, and he said, 'When I come back,' and he went. * * * And he said, 'I will take those (some decayed potatoes) with me and throw them in the river.' * * * I had large washings, and I couldn't do it alone without help, and draw the water, and he said, 'I will be right back, I will go to the water-works and come right back. Now, whatever you do, don't start to draw that water until I come,' and I said, 'All right.' And that was the last ever seen of him.''

He had not taken his usual sleep; he was ''tired.'' No one knows how long he had been on the bridge. He may have been some time on or about the bridge. It is more probable that he was loitering somewhere about the bridge than that he was passing over the bridge in an ordinary manner on his way to town. The uncontradicted evidence of the engineer and fireman that he was not upon the tracks as the train approached the bridge disposes of that question. No witness saw him approach the river, nor while he was throwing his refuse therein. If he climbed upon the bridge after having disposed of his refuse, or if he stopped at the entrance of the bridge to throw his refuse in the river, there is no evidence that he could be observed by a lookout on the car immediately before the engine, and there is positive evidence

that he was not on the track where he could be seen from the approaching train. Under these circumstances, it cannot be said that there is substantial evidence that any negligence of the defendant was the proximate cause of his injury.

If it had been shown that the deceased was upon the tracks when the cars were approaching the bridge, there might be room for the last clear chance doctrine, if it could be found that the engineer or fireman knew or ought to have known that he was in danger. In any view of the case, there is a total failure of evidence that anything that this defendant did, or failed to do, was the proximate cause of his injury, so as to create a liability for damages.

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

REVERSED.

ROSE, J., not sitting.

LETTON, J., dissenting.

I am of opinion that the evidence as to the use of the bridge as a way by the public, to defendant's knowledge, was sufficient to make it a question for the jury whether the defendant's employees used ordinary care to avoid injury to licensees when they backed an engine and cars over the bridge without a lookout or man stationed at the end of the car to give warning to persons liable to be walking on the track.

MARTHA E. COATES, APPELLEE, V. CHARLES L. O'CONNOR, APPELLANT.

FILED JUNE 15, 1918. No. 19630.

1. **Judgment:** VACATION. Where it is shown that there is a good defense, and that failure to defend was due to the mistake or miscalculation of defendant's attorneys as to the time allowed to plead, an application to open the judgment made at the same term should be sustained.

2. **Attachment: Sale: Notice to Purchaser.** In such case, if there has been a sale of attached property under circumstances which would amount to notice to the purchaser of the rights of the defendant, he will be held to purchase subject to the defendant's rights.

Appeal from the district court for Lancaster county: Willard E. Stewart, Judge. *Reversed.*

Flansburg & Flansburg, for appellant.

O. B. Clark, contra.

T. F. A. Williams, amicus curiæ.

Hamer, J.

This is an appeal from an order made on a motion to set aside a judgment and an order of confirmation of real estate sold under attachment. The application and motion were overruled, and the defendant has appealed.

The action was brought on an account for work and labor and for nursing the defendant's wife, the plaintiff's mother, during an illness. The court made an order permitting service by publication, and also issued an order of attachment, which was levied on two lots of defendant situated in an addition to the city of Lincoln. The service was made, by publication. The plaintiff and defendant were residents of California. There was a default taken against the defendant on the 27th day of September, 1915, and a judgment was entered for $600, and the attached property was ordered to be sold to satisfy the judgment and costs. The lots appear to have been advertised together, and were sold November 30, 1915, to Roy A. Bickford for $600. The case was set for hearing on an application for an order of confirmation December 4, 1915. On that date the order of confirmation was made, and the sheriff was ordered to make a deed to the purchaser. The order of confirmation is shown by the journal entry to have been made December 4, 1915. The order to show cause only left two intervening days between its date and the time fixed as "Friday next"

when cause should be shown why the sale should not be confirmed. The rather rapid succession of the orders indicates some desire on the part of the plaintiff to "speed up." The facts seem to show that the confirmation was rapidly expedited, and on the same day that the sale was confirmed the sheriff's deed was delivered to the purchaser. That the purchaser had notice that the proceeding would be contested is quite apparent, and the utmost haste was made to get in out of the possible rain before the storm arrived.

The facts set forth in the affidavits of C. C. Flansburg and Leonard A. Flansburg, in behalf of defendant, do not seem to be specifically denied, but only partly and in a vague way. The affidavits deny the employment of appellee and deny that any services were rendered. It is undisputed that some of the essential allegations of the petition were false.

If the facts alleged in the answer tendered by the defendant are true, then the judgment rendered takes away from the defendant at least $1,600 worth of property on a debt which he did not owe. According to the answer there was never any foundation for the claim of the plaintiff, and what she did, if the affidavits are to be believed, was to avoid stating her claim to the defendant, and, without letting him know that she claimed any sort of indebtedness against him, she went out of the neighborhood where they lived and went to a foreign state for the purpose of surreptitiously attaching and selling his property there without his knowledge.

No one disputes the affidavit of O'Connor that the plaintiff was his mother-in-law; that she and her husband came to the defendant O'Connor's home in California; that the plaintiff was never requested to nurse her daughter, or to do the housework; that there was a nurse, and that there was a servant employed who did the housework part of the time; that the plaintiff never requested payment from her son-in-law, or in any way indicated that she believed her son-in-law owed her, although he

was financially able to pay her. The case wholly depends on affidavits. The plaintiff, without letting her son-in-law know that she had any claim against him, commenced this case in a foreign state by attachment against his city lots. All the parties seem to have acted with more or less notice and more or less knowledge of the rights of all the parties. Where it is shown that there is a good defense, and that failure to defend was due to the mistake or miscalculation of defendant's attorneys as to the time allowed to plead, an application to open the judgment made at the same term should be sustained. A reasonable opportunity should not be denied to the defendant. If the plaintiff has a cause against him, she should be able to make it when the case is heard before a court and a jury.

Decisions cited by appellee in actions or motions for new trial after the term at which the judgment was entered are not in point. When default judgment is entered, without personal service and on constructive service only, and application is made at the same term for an opportunity to defend, and a good defense is shown with the application, the trial court will generally allow the defendant an opportunity for trial upon the merits. If the failure to appear and defend is attributable to negligence or carelessness of defendant, the court will impose such terms as to costs as appear to be just. But when, as in this case, the proceedings have been urged with unseemly haste on the part of the plaintiff, and there has been evidence offered of an attempt on plaintiff's part to prevent settlement or a fair trial, if application for a trial upon the merits is made at the same term, and within a few days after the default and sale, such application is never refused. Under such circumstances, one who purchases the property at the sale for a mere fraction of its real value will be held to have acted at his own risk, so far as the rights of the defendant are concerned. His rights as against the plaintiff and those assisting him will depend upon circumstances not affecting the defend-

ant. In *Bigler v. Baker,* 40 Neb. 325, this court said, in substance, that in reversing a decision of the lower court on a motion to vacate a judgment, it will, in deciding whether or not there was an abuse of discretion, require a much stronger showing to substantiate an abuse of discretion when the judgment is vacated, than when it is not. In 23 Cyc. 897, it is said: "If he (the party) shows himself plainly and justly entitled to the relief demanded, the court must grant the application and has no discretion to refuse it."

We think that the order of confirmation should be set aside, and the case opened, with leave to the defendant to make such defense as the facts in the case may warrant.

REVERSED AND REMANDED.

The following opinion on motion for rehearing was filed October 18, 1918. *Rehearing denied.*

SEDGWICK, J.

The question on this motion for rehearing is as to the proper construction of section 8087, Rev. St. 1913. Section 7646, Rev. St. 1913, has no application because this application to vacate the judgment was not after the term, but during the term at which judgment was entered, and section 7646 applies only to applications made after the term. Section 8087 provides that the reversal of a judgment "shall not defeat or affect the title of the purchaser or purchasers." It follows that, merely because the judgment is reversed, the title of the purchaser is not defeated nor affected. But that does not mean that any one and every one under all circumstances gets good title by purchase at a judicial sale. For instance, a guardian who purchases his ward's property at a judicial sale does not necessarily get good title. This has frequently been decided by this court, and in *Kazebeer v. Nunemaker,* 82 Neb. 732, it was carried a step further, and held that the purchaser from the guardian, who had purchased

at the judicial sale, did not necessarily get good title. The syllabus says: "A *bona fide* purchaser under said decree will be protected by section 508 of the Code, even though the judgment is thereafter reversed." This, of course, is the meaning of section 8087. One who purchases at a judicial sale, knowing that the proceedings are fraudulent, and that he is assisting in the fraud by so purchasing, does not get good title by such purchase. The purpose of the paragraph of the syllabus, which is complained of in this motion for rehearing, was to leave the question open as to whether Roy Bickford, the purchaser, was entitled to the protection of the statute as a purchaser in good faith. If he was a purchaser in good faith, then by these proceedings, fraudulent on the part of the judgment plaintiff in the attachment, the defendant in that case is defrauded of his land, and Roy Bickford, the purchaser, by paying $600 has procured property that is worth at least $1,600. The paragraph of the syllabus, which is complained of, leaves the question open as to whether Roy Bickford purchased in good faith. The motion to open the default and to be allowed to defend was made at the term at which the default was entered. Under conditions existing in this case, the trial court would generally sustain such motion. The purchaser of real estate at a sale during the term at which judgment by default was entered would not ordinarily be presumed to be protected by the statute, if the default is set aside, but would be required to show his good faith in the purchase.

The motion for rehearing is

OVERRULED.

WILLIAM POEGGLER, APPELLANT, v. SUPREME COUNCIL CATHOLIC MUTUAL BENEFIT ASSOCIATION, APPELLEE.

FILED JUNE 15, 1918. No. 20107.

1. **Judgment:** VACATION. Default judgment was entered against the defendant, service being had upon the auditor, who had not been authorized by the defendant to receive and transmit copy of summons for it as required by law. The defendant was without actual notice of the action. Seven months afterwards the defendant, tendering a meritorious defense, instituted proceedings under sections 8207-8215, Rev. St. 1913, for a vacation of the judgment and a trial upon the merits. *Held*, that, under the circumstances of this case, the judgment should be vacated on the ground of unavoidable casualty preventing a defense.

2. ———: JURISDICTION: QUAERE. Where service is had upon the auditor of the state, as attorney in fact for a foreign insurance company doing business in this state, which has not given the auditor authority in writing to receive summons for it as required by section 11, ch. 47, Laws 1897, and which is without actual notice of the action—*quære*: Does the court obtain jurisdiction to enter default judgment against the defendant in such action?

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

Smith & Schall, for appellant.

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

CORNISH, J.

Plaintiff's appeal from a judgment vacating a former judgment and permitting defendant to file answer, in proceedings had under sections 8207-8215, Rev. St. 1913, on the grounds of unavoidable casualty and fraud.

Defendant is a fraternal beneficiary association of New York, with branches or local lodges in Nebraska. Plaintiff's claim, after more or less negotiations covering a period of two years, was definitely rejected by the de-

fendant. Afterwards the plaintiff commenced this action, service of summons being had upon the auditor of the state, whom the defendant had not authorized to receive service of summons for it, as required to do by the Nebraska statute. Seven months after judgment was entered the defendant instituted this proceeding. The trial court, we believe, was justified in finding that the defendant had no actual notice of the action until about the time of its appearance asking that the judgment be vacated. The defendant tendered an answer entitling it to a hearing upon the merits in case the prior judgment should be vacated. Although it had been doing business for some time prior to the enactment of the statute, requiring such associations to authorize the auditor in writing to accept service for them, it appears to have been in ignorance of the law.

Defendant's first contention is that the mere fact that it did business in this state would not make the auditor its attorney in fact to receive such service of summons for it, and that the summons not forwarded to it is invalid; that judgment following such service would violate the rule that jurisdiction sustaining a judgment cannot be acquired without notice. Plaintiff's reply is that persons doing business in this state are bound to know its laws, and that, as between plaintiff and defendant, the defendant is estopped to deny that the auditor was its duly appointed agent. It is not necessary to determine this question, because we are of opinion that the judgment of the trial court must be affirmed on other grounds.

In asking that the judgment be vacated, the defendant's attitude was not that of denying the jurisdiction of the court over it, and we will assume that the court acquired jurisdiction and consider the case from the standpoint of unavoidable casualty, preventing an appearance. In general, the absence of a party from unavoidable accident or misfortune, where it is apparent that he had a meritorious defense to the action, will be sufficient to authorize

a new trial. The question ordinarily turns upon laches or want of reasonable diligence upon the part of the person prevented from appearing and making his defense.

Plaintiff urges estoppel, and certainly, unless the defendant is estopped to deny notice, the judgment rendered is itself void. The question arises: What is the extent of the estoppel? It is based upon the principle that one is estopped to set up his own wrong as a defense. What was the wrong? Failure to authorize the auditor according to law. Plaintiff's contention is that defendant is estopped to deny that he so authorized the auditor. Let this be conceded. Does it not follow that in such case it became the duty of the auditor to transmit to the defendant a copy of the process served upon him as required by section 11, ch. 47, Laws 1897? This he did not do. Neither did he resort to the penalty and other provisions of the statute to require defendant to comply with it, which, if done, would have informed the defendant of the pendency of the action. Can it not be urged with much force that the same law which makes the auditor an agent should also require of him the duties of an agent? But any laches on his part in failing to notify defendant could not be imputed to the defendant because it had no power or control over him in the discharge of his duties—the basis of the rule *respondeat superior*. If it is still insisted, which it is not in terms, that it was defendant's wrong in failing to authorize the auditor which occasioned his failure to notify it, that the auditor was not called upon in the absence of the required authority to transmit the notice, then the answer is that it is questionable whether this is true—whether the auditor ought not, under the circumstances, either to have advised the defendant, or to have required compliance with the law upon its part. Whatever may be the law in this particular, we are satisfied that the trial court did not err in granting a trial upon the merits. *Radzuweit v. Watkins*, 53 Neb. 412; *Thompson v. Sharp*, 17 Neb. 69; *Van Every v. San-*

ders, 69 Neb. 509; *Spence v. Miner*, 90 Neb. 108; *National Surety Co. v. State Bank*, 120 Fed. 593; *Chicago Life Ins. Co. v. Robertson*, 147 Ky. 61.

AFFIRMED.

ROSE, J., not sitting.

STATE, EX REL. CHARLES A. FLIPPIN, APPELLANT, V. GUSTAV SIEVERS, SHERIFF, APPELLEE.

FILED JUNE 15, 1918. No. 20243.

1. **Habeas Corpus:** RES JUDICATA. The principle of *res judicata* does not apply in cases of habeas corpus to a judgment discharging the prisoner, when such previous discharge was not upon the merits, but for defect of proof, such as failure to prove venue, or where a new state of facts, warranting his restraint, is shown to exist, different from that which existed at the time the first judgment was rendered.
2. ———: DISCHARGE: EVIDENCE. Where the testimony shows that an offense has been committed and there is testimony tending to show that the accused committed the offense, the court, on a writ of habeas corpus, will not discharge him. The rule, as applied in *In re Balcom*, 12 Neb. 316, approved.

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

Prince & Prince and *E. G. Kroger*, for appellant.

Willis E. Reed, Attorney General, and *John L. Cutright, contra.*

CORNISH, J.

The relator, appellant, detained under a complaint charging him with feticide and homicide, committed upon one Emma Staack, appeals from the order of the district court for Hall county denying his application for a writ of habeas corpus. He contends that the evidence did not show the commission of the crime or any possible connection of the appellant with the crime.

We are of opinion that the evidence was sufficient to justify the magistrate in finding that a criminal abortion was committed upon Emma Staack, resulting in her death. This is the fair inference from the testimony of the three doctors who testified, and, when Doctor Phelan used the word "abortion," he evidently used it in the popular sense of criminal abortion. The evidence also makes it probable that the accused committed the crime. No defensive showing was made. The girl's father testified that he attended her when she was sick, and the witness Bordman testified to an admission by the accused that he had delivered a fetus from her. At a preliminary examination, only a *prima facie* showing is required, and, where the testimony shows that an offense has been committed, and there is testimony tending to show that the accused committed the offense, this court, on a writ of habeas corpus, will not weigh the evidence to see whether it is sufficient. *In re Balcom,* 12 Neb. 316; *State v. Banks,* 24 Neb. 322; *Rhea v. State,* 61 Neb. 15; *Jahnke v. State,* 68 Neb. 154.

The appellant had been previously discharged on habeas corpus on a complaint in the same form and for the same offense as the one under consideration. It is contended that under section 9255, Rev. St. 1913, the previous discharge is *res judicata.* It appears that the first discharge was ordered on the ground "that the record fails to show that any crime was committed in Hall county, Nebraska," the place alleged. Section 9255, *supra,* is in part as follows: "Any person who shall be set at large upon any habeas corpus, shall not be again imprisoned for the same offense, unless by the legal order or process of the court wherein he or she shall be bound by recognizance to appear, or other court having jurisdiction of the cause or offense." This is substantially the same law as in England, and in most of the states, as to the effect of a discharge. It is generally held that, where on habeas corpus the accused is discharged from custody for reasons that do not go to the merits of the

offense, such as failure to prove the venue, such discharge and acquittal are not a bar to a subsequent prosecution, in which venue or a new state of facts is shown. Applying this rule, which we believe to be the proper one, we are of opinion that appellant is not entitled to be discharged from custody on this ground. 12 R. C. L. p. 1254, sec. 72; Church, Habeas Corpus (2 ed.) sec. 386; *Attorney General of Hong Kong v. Kwok-a-Sing,* 5 P. C. (Eng.) 179; *Yates v. Lansing,* 5 Johns. (N. Y.) 282; *Barbee v. Weatherspoon,* 88 N. Car. 19.

AFFIRMED.

HAMER, J., not sitting.

MAHLON C. OTTO ET AL., APPELLANTS, V. GUNNARSON BROTHERS ET AL., APPELLEES.

FILED JUNE 26, 1918. No. 19905.

1. **Appeal in Equity:** CONFLICTING EVIDENCE: REVIEW. When, on the trial of a suit in equity the material issues are submitted on conflicting evidence, adduced orally before the trial court, and the court makes a personal examination of the property forming the basis of the litigation, this court will consider such circumstance in determining the issues.
2. **Evidence** found to support the judgment of the trial court.

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

Hainer, Craft & Edgerton, for appellants.

Roscoe R. Smith, T. J. Doyle and *J. H. Grosvenor, contra.*

MORRISSEY, C. J.

Plaintiffs brought a suit in equity to cancel and annul a contract for the purchase of a farm tractor, and to recover back the purchase price. There was judgment for defendants, and plaintiffs appeal.

Plaintiffs allege that the tractor was warranted to do certain work, and that it failed to measure up to the warranty in several particulars. The answer sets up a written warranty and alleges it was the only one given. Several defenses of a more or less technical nature are set up, but we do not deem it necessary to go into the merits of these defenses and shall not enter upon their discussion. Ordinarily the questions of fact herein presented should be tried by a jury, but, because of the form of the action brought, plaintiffs forestalled the submission of these questions to a jury and they were tried to the court. No special findings were made, and the judgment entered is a general finding in favor of defendants.

The complaints made against the tractor are that it was faulty in construction; it did not develop sufficient horse-power; it consumed too much fuel; it was too difficult to start; and it did not do good work. Plaintiffs deny that they are bound by the strict letter of the written warranty given by the seller, but claim that the written warranty was supplemented by an oral agreement made by the local dealer.

Many citations of authority are given in support of their right to rely on the oral warranty, if one was given. Assuming that plaintiffs are correct in this, and also assuming that defendants waived the time within which to give notice of the defects, or of unsatisfactory work, we will consider the evidence in support of plaintiffs' allegations. On these points there is a sharp and decisive conflict in the testimony. A number of witnesses testify on either side of the controversy. According to plaintiffs' witnesses the engine failed miserably. Defendants, on the other hand, deny the making of the oral agreement, testify in detail as to what they claim the agreement was, and also offer testimony to show that the engine worked satisfactorily; that it was able to give, and did give, the service which might be expected and required under all the circumstances; and that there was no breach of warranty.

The witnesses testified in the presence of the trial judge. He made a personal inspection of the engine, saw it in operation, and had a better opportunity to determine the disputed questions of fact than we can have from the record before us. The case is here *de novo,* and we are free to pass an independent judgment on the evidence; but we do not find that the evidence preponderates in favor of plaintiffs, or that we ought to disturb the finding of the trial court, and the judgment is

AFFIRMED.

HAMER, J., not sitting.

ANNA DRAMSE, APPELLANT, V. MODERN WOODMEN OF AMERICA, APPELLEE.

FILED JUNE 26, 1918. No. 19815.

Trial: DIRECTION OF VERDICT. Where the facts in evidence would not sustain a verdict for the plaintiff, a trial court is justified in directing a verdict for defendant.

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

E. D. Crites, F. A. Crites, W. T. Thompson and *Reese & Stout,* for appellant.

Nelson C. Pratt and *Truman Plantz, contra.*

LETTON, J.

Action brought upon a benefit certificate issued in 1910. The assured died October 26, 1914. He paid all assessments and dues required by the certificate and the by-laws of the association up to and including the month of February, 1912. He defaulted in making the payment required for the month of March, 1912, and all assessments thereafter.

Under the provisions of the certificate it became null and void and the membership of the assured ceased upon

his failure to pay the March assessment. In order to constitute an excuse for this failure, the petition alleges in substance that shortly prior to the 1st day of February, 1912, the executive council of the association unlawfully increased the rates of assessment, which resulted in the deceased and other members failing to pay the increased assessment; that deceased offered to pay at the former rate, but this payment was refused; that a resolution was later passed by the association allowing those who had defaulted after the raise in rates to be reinstated, and that the plaintiff then offered to pay the assessment, but defendant refused to accept the same.

The answer denies membership at the time of death; denies any offer or tender to pay assessments; alleges that no demand was ever made upon deceased to pay increased rates; that they were not to go into effect until January 1, 1913, nine months after deceased defaulted, and that before the time they were to go into effect they were enjoined, afterwards abrogated, and never were attempted to be collected. The reply is virtually a general denial and restatement of part of the petition.

At the trial the plaintiff proved the issuance of the certificate and the death of Dramse on October 26, 1914; that proper proofs of death were made; and that the defendant has refused to pay the amount of the certificate. The defendant then proved the failure of Dramse to pay the assessment for March, 1912; that no attempt had ever been made by the association or its officers to collect a larger sum than Dramse had always paid; that the increased assessments were not to be payable until January 1, 1913; that before that time elapsed an injunction had been issued against the collection of any increased assessments; that the proposed rates were afterwards abrogated by the act of the head camp of the association; that they had never gone into force, and that no attempt had ever been made to collect them.

There is absolutely no proof in the record that the action of the Chicago head camp had anything to do with

the failure of Dramse to pay the March, 1912, assessment. It is undisputed also that no demand was ever made upon him for any larger payment than the amount of the former assessments; and that he never tendered or offered to pay the March, 1912, or any later assessment. If Dramse had continued to pay the monthly assessments as he always had done, he would not have lost his membership. His obligations were mutual and equal with those of the other members of the association. If this certificate were held valid and a recovery allowed upon it, he would have obtained nearly two years additional insurance for nothing, and the other members of the association would be compelled to pay more than their just share, on account of his default. A tender made after suit was begun could not reinstate his lapsed membership. If the defendant had ever attempted to collect an increased rate of assessment, as plaintiff's pleadings allege, or if other statements in the pleadings and briefs were sustained by proof, a different case would be presented; but, as it is, the evidence seems to show that he voluntarily and intentionally abandoned his membership in the association. The provision afterwards made whereby suspended members might, by taking certain action, be reinstated is of no relevancy, because Dramse failed to avail himself of the opportunity thus afforded.

The district court properly directed a verdict for defendant.

AFFIRMED.

HAMER, J., dissents.

OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE, V. WILLIAM D. COCKE, APPELLEE: FIRST NATIONAL BANK OF HASTINGS, APPELLANT.

FILED JUNE 26, 1918. No. 19417.

Notes: OWNERSHIP: GENERAL DENIAL: PROOF. If a general allegation of ownership of a promissory note is supported only by evidence

that it is held as collateral security, the party sought to be charged may, under a general denial of such ownership, prove that there is nothing due upon the principal note, and so defeat a recovery.

Opinion on motion for rehearing of case reported in 101 Neb. 750. *Former opinion adhered to.*

SEDGWICK, J.

In our former opinion in this case, 101 Neb. 750, we said: "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 appellant, First National Bank of Hastings, in its motion and brief for rehearing asserted: "That no issue is made by the pleadings in this cause by the appellee on the validity of the principal note, and to which the note and mortgage herein sued upon are collateral." Upon this statement argument was had before the court, and upon examination of the record we find that the bank in its answer and cross-petition alleged the execution of the $2,500 note secured by the mortgage that was being foreclosed, and upon which decree had been entered in favor of the Omaha Loan & Building Association, plaintiff, upon one of the $2,500 notes secured by the mortgage, and then in its answer the bank alleged that "for a good and valuable consideration said note and mortgage securing the same were duly assigned, transferred and set over to this answering defendant on or about the 1st day of June, 1911, and that this answering defendant is now and ever since has been the owner of said note and mortgage, and that no part of the amount called for by said note and mortgage has been collected or paid, and the said note and mortgage have long since been due and payable." Nothing further is alleged in this answer of the bank as to its title and interest in this note, and it appears that upon the trial the bank claimed that its title and interest in the note was as collateral

security to the $1,550 note mentioned in our former opinion. The answer of the defendant Cocke to this cross-petition of the bank denied the allegation that the bank was the owner of the note, and when the bank proved its ownership only by showing that it held it as collateral to the $1,550 note, it was clearly proper for the defendant Cocke to show that there was nothing due upon the $1,550 note for which the bank claimed to hold the note in litigation as collateral.

The judgment of the district court is fully sustained for the reasons stated in our former opinion, which is therefore adhered to.

FORMER OPINION ADHERED TO.

JOSEPH H. MILES, APPELLEE, V. JOHN LAMPE, APPELLANT.

FILED JUNE 26, 1918. No. 20119.

1. **Brokers:** CONTRACT: INTENTION OF PARTIES. Whether a broker is authorized by his contract to execute a binding contract of sale of land in the name of his principal depends upon the intention of the parties to the contract, which must be determined from a consideration of the whole contract in the light of the circumstances surrounding the making thereof.
2. ———: ———: CONSTRUCTION. When the language of such contract of brokerage is ambiguous and doubtful upon its face, the construction that the parties themselves have put upon the contract is very controlling in determining the true intention of the parties.
3. **Specific Performance:** SALE BY BROKER. If the broker, instead of assuming that he has power to execute such contract, refers it to his principal, and when he finds, after more than two days' effort, that he cannot induce his principal to agree to such contract of sale, allows the proposed vendee to sign the contract and himself signs it in the name of his principal, and the vendee immediately begins action thereon to enforce specific performance, all parties knowing that the owner did not desire to have his land so disposed of, and that the brokerage contract reserves to the owner the right to take the land from the market upon two days' notice, a court of equity will not enforce specific performance.

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

Lambert & Armstrong, E. B. Quackenbush and *Berge & McCarty,* for appellant.

John J. Sullivan and *Kelligar & Ferneau, contra.*

SEDGWICK, J.

The defendant, Lampe, who was the owner of 640 acres of land in Butler county, Kansas, gave to one Shubert, a real estate broker, a contract in writing by virtue of which the broker afterwards executed a contract in Lampe's name agreeing to convey the land to the plaintiff. Lampe refused to convey the land, and the plaintiff brought this action to compel a specific performance of his contract. The trial court entered a decree in favor of the plaintiff, and the defendant, Lampe, has appealed.

The defendant's contract with the broker was entitled, "Contract for sale of real estate, made with——," and recited: "I, or we, hereby list the below described property with A. G. Shubert for sale and authorize them to keep the same on their list until sold or given two days' notice that the same is hereby withdrawn from the market. * * * I hereby give them the exclusive right to sell the same. And if they sell or furnish me a buyer, or in any way cause the same to be sold, I agree to pay them a commission of 2 per cent. or $———. * * * And if within 30 days after the withdrawal of said property from the market I should sell to a customer of A. G. Shubert I owe and agree to pay them the above commission the same as if they had made said sale." Then follows a description of the land and of the improvements and its location, and it continues: "Lowest cash price $25 per acre, or $500 amount down to bind the bargain $1,000. $——on March 1st. Balance to run———years at ——— per cent., with the privilege of paying $——."

In pursuance of this writing the plaintiff alleges that Shubert agreed to sell the land to him for $25 an acre, and took the plaintiff's check payable to himself for $500

as payment thereon. Several days later Shubert reported to the defendant that he had made such agreement, and presented to defendant a written contract purporting to be executed by the defendant to the plaintiff in accordance with the terms of the alleged agreement. This contract had been signed by the plaintiff, and the defendant was requested to sign it. This he did not do. The evidence is somewhat conflicting as to the reasons he gave for not doing it. He testified that he had investigated and found that the land was worth more money, and refused to sign it under the provision in the broker's contract that upon two days' notice he might withdraw the land from the market. After some days of futile effort to persuade the defendant to sign the contract, and something over 30 days after the alleged oral contract by the agent with the plaintiff, the agent signed the defendant's name to the contract with the plaintiff, and the plaintiff immediately began this action to compel a specific performance of that contract.

The first question presented is whether the broker's contract authorized him to execute a contract of sale in the name of his principal that a court of equity would specifically enforce. It has been decided in this state, and by other courts, that the use of the word "sale" or "to sell" in a broker's contract is not necessarily conclusive that the broker may execute a binding contract of sale in the name of his principal, but, like other contracts, the real intention of the parties in that particular is to be determined from a consideration of the whole contract in the light of the circumstances surrounding the making thereof. *Whitehouse v. Gerdis,* 95 Neb. 228.

The broker's contract in question is in some respects peculiar. It contains matters that might indicate that the broker was authorized to bind his principal in a written contract of sale, and also contains matters that indicate the reverse. In addition to the use of the word "sale" and the exclusive right to sell the same, it contains the clause: "If they sell or furnish me a buyer, or in

any way cause the same to be sold, I agree to pay them a commission of 2 per cent. or $———." This last clause might perhaps indicate that what is said in the contract in regard to selling the land is for the purpose of definitely fixing the right to commission upon the sale. On the other hand, the contract, while it names a definite price for which the land may be sold, in the same clause continues, "or $500 amount down to bind the bargain $1,000." This seems to have been construed, and perhaps properly, to mean that $500 could be paid by the purchaser as earnest money, and that the $1,000 was to be considered as part payment upon the execution and delivery of the deed and proper securities for the remainder. The written contract which the broker made with the plaintiff for the sale of the land provided that the price should be $16,000, "the sum of $500 cash in hand paid, the receipt of which is hereby acknowledged. The sum of $1,000 due and payable on March 1st, 1916, without interest, the balance over and above incumbrances to be paid on delivery of warranty deed and abstract showing good title." That "the party of the first part (the defendant Lampe) to retain possession of said premises until the payment day of balance of purchase price, when the same shall be delivered up to said party of the second part, upon his compliance with the agreements hereinbefore contained. * * * The said parties for the true and faithful performance of all the covenants and agreements herein named do hereby bind themselves, each to the other, in the penalty sum of $500, as liquidated damages to be paid by the second party. First party to furnish a complete abstract, showing a good title to the premises, and, when deed is delivered as herein provided, to properly transfer insurance now upon the buildings on said premises." None of which matters are specified or authorized in the brokerage contract, and it is at least unusual that the landowner should leave such important matters entirely to the judgment and discretion of the broker. So that it may fairly be said that the intention

of the parties to the broker's contract in that regard would upon the face of the contract be doubtful. And, if the broker had executed the contract at the time that he says it was agreed upon, relying upon his authority to so bind his principal, it might be difficult to determine the question of his authority so to do. When the language of a contract is ambiguous and doubtful upon its face, the construction that the parties themselves have put upon the contract is very controlling in determining the true intention of the parties. This broker, instead of assuming that he had power to execute such a contract, referred it to his principal, and when he and the plaintiff found that they could not persuade the defendant to sign the contract after waiting and negotiating for more than a month, the broker, without the consent and against the protest of the defendant, after having offered to assign the $500 check to the defendant, himself signed the defendant's name to the contract and delivered it to the plaintiff, who immediately began this action. Under these circumstances we think it should be held that the intention of the parties to this broker's contract was that the broker should find a purchaser, and, before making the contract of sale, should refer the matter to his principal. If the defendant then, without excuse, was unreasonable in refusing to execute the contract, he might still be liable to the broker for his commissions, but a court of equity would not enforce the contract in favor of the grantee therein.

It appears that the defendant, more than two days before the alleged contract of sale was delivered, refused to sell the land upon the proposed terms. This he had a plain right to do under the provision of the contract, which was that the broker should not keep the land on his list for sale after the owner had given two days' notice that he withdrew it from the market. The plaintiff's answer to this is that the contract of sale was made orally before the owner of the land had given any notice that he withdrew the land from the market, and that the

execution and delivery of the written contract is only relied upon as the proper legal evidence of what the oral contract really was, and, while the contract could not be proved by parol, it may be proved by a subsequent writing which specified the terms of the oral contract. The plaintiff relies upon *Pierce v. Domon,* 98 Neb. 120, in which it was held that under section 2628, Rev. St. 1913, a broker could collect his commissions which he had earned under an oral agreement to pay the same, if that agreement was afterwards reduced to writing and signed by the party to be charged with the commissions. That section provides that every such contract of brokerage shall be void unless in writing. The word "void" is so often used for "voidable" that the case cited so construes it. In *Riley v. Bancroft's Estate,* 51 Neb. 864, the same construction was given to the word "void" in section 2631, Rev. St. 1913. In the opinion JUDGE IRVINE fully discusses the reason of the rule, and states that reason in the second paragraph of the syllabus: "The object of the statute of frauds is to prevent frauds and perjuries, and, while certain contracts are by the terms of the statute declared void, the uniform construction placed upon the statute by the courts renders such contracts not void, but merely unenforceable for want of the evidence which the statute requires." Section 2623, Rev. St. 1913, provides: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same." These words are very positive and explicit. In addition to the prevention of frauds and perjuries, this section requires the title and interest in land shall be created, granted, assigned, surrendered, or declared only "by deed of conveyance in writing." And it may well be doubted whether the

ownership of land, either legal or equitable, relates to the time of some oral agreement to sell, rather than to the deed of conveyance in writing, or can be transferred by parol even if such attempted parol transfer is afterwards acknowledged in writing.

It does not appear that the defendant attempted to avoid payment of commissions to the broker, or that he intentionally violated the reasonable construction of his contract with the broker. The attempt of the plaintiff and the broker to compel the defendant to dispose of the land against his will after they had referred the matter fairly to the defendant's decision, and found that he did not desire to have his lands disposed of in that way, does not commend itself to the conscience of a court of equity.

The trial court should have entered judgment in favor of the defendant, and the judgment entered is reversed and the cause remanded for that purpose.

REVERSED.

STATE, EX REL. OTTO D. KEMPER ET AL., APPELLANTS, V. DORCHESTER FARMERS CO-OPERATIVE GRAIN AND LIVE STOCK COMPANY ET AL., APPELLEES.

FILED JUNE 26, 1918. No. 20517.

1. **Quære.** Is section 5, art. XI*b* of the Constitution, which provides for cumulative voting by stockholders of corporations, self-enforcing—*quære?*

2. **Corporations:** CUMULATIVE VOTING. The record in this case shows that there are no stockholders of this corporation who own or have any equity in the stock of any competing corporation. The legislature could grant the right of cumulative voting to such corporations, and so comply in part with the Constitution, and this is the purpose of this statute. What has been done is not unconstitutional on the ground that the act does not do all that the Constitution intends.

3. **Statutes:** PARTIAL INVALIDITY. If the proviso added to the act of 1915, chapter 174, is invalid so far as it attempts to prevent some

stockholders from cumulative voting, that does not render the whole act unconstitutional, since it is not inconsistent with the purpose to provide for cumulative voting for stockholders who are not also stockholders in competing corporations.

APPEAL from the district court for Saline county: RALPH D. BROWN, JUDGE. *Reversed, with directions.*

Charles F. Barth and *Glenn N. Venrick,* for appellants.

Stocker & Foster and *T. J. Doyle, contra.*

SEDGWICK, J.

Upon the trial of this case in the district court for Saline county, it was held that chapter 174, Laws 1915, providing for cumulative voting by stockholders of incorporated companies, was unconstitutional and void, and judgment was entered dismissing the plaintiffs' case, from which judgment the relators have appealed. Some other questions of minor importance are involved in the record, but the discussion in the briefs is confined to the question of the constitutionality of the act assailed. Section 5, art. XI*b* of the Constitution, provides: "The legislature shall provide by law that in all elections for directors or managers of incorporated companies, every stockholder shall (have) the right to vote in person or proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock, shall equal, or to distribute them upon the same principle among as many candidates as he shall think fit, and such directors or managers shall not be elected in any other manner." The act of the legislature in question is entitled, "An act, to provide for cumulative voting, and for voting by proxy, by stockholders of any company incorporated under the laws of the state of Nebraska, and in all elections for directors or managers of such company, and to declare an emergency," and the act itself is in the language of the constitutional provision with the proviso added: "Pro-

vided, the right of cumulative voting in this act shall not apply to stockholders of a corporation who own stock in another corporation engaged in a competing line of business, nor to any one who holds stock, the equitable owner of which is a stockholder in a corporation and engaged in a competing line of business nor to their agent or representatives."

The contention is that this proviso renders the whole act unconstitutional. We do not find it necessary in this case to determine whether the constitutional provision is self-enforcing. The provision that "such directors or managers shall not be elected in any other manner" might perhaps indicate that it was the intention to make the constitutional provision self-enforcing. "When courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." Cooley, Constitutional Limitations (7th ed.) 252.

If public policy requires some restriction on the right to vote by stockholders who own stock in two or more competing corporations, the legislature might without doubt, by proper enactment, prevent such practices, and while the purpose of such legislation should be made plainly to appear in the title to the act and in the act itself, we do not find it necessary to determine in this case whether such regulation might be made by proviso to the act intended to comply with the constitutional requirements in regard to cumulative voting. If it is conceded that this proviso, not being mentioned in the title to the act, and for other reasons, is invalid, the question still is whether the unconstitutionality of this proviso would render the whole act void as in conflict with the

Constitution. It is argued at large in the briefs that this proviso must be considered as an inducement to the passage of the act. That is to say, that the unavoidable conclusion from the language of the act itself and of its title must be that the legislature would not have enacted the statute if it was to apply to stockholders holding stock in competing corporations. Even if this is true and we consider the act as a whole, it appears beyond question that the purpose and intention of the legislature was to grant the right of cumulative voting to all stockholders not owning stock in competing corporations. That is, the legislature has complied with the constitutional provision in part, and if it has not gone as far as it should have gone in obedience to the requirements of the Constitution, we are not for that reason compelled to invalidate legislation that was clearly within the duty imposed upon the legislature by the Constitution. If additional legislation is necessary in order to fully comply with the Constitution, that duty will devolve upon subsequent legislatures. The record in this case shows that there are no stockholders of this corporation who own or have any equity in the stock of any competing corporation. In a somewhat similar case, this court said: "The purpose of the act is laudable, and the court should not lightly set it aside if by any reasonable means it can be so construed as to uphold its validity. * * * It is a well-established rule that no one can complain that a statute is unconstitutional unless he is injuriously affected thereby, and that the courts will not set aside a law as violative of the Constitution for the reason that there is a possibility that one's interest may be injuriously affected in the future." *Peterson v. Anderson,* 100 Neb. 149, 155.

Also, in an analogous case, the supreme court of Texas said: "The courts have no power to enforce the performance of this duty in whole, and, in our judgment, have as little right to strike down, as unauthorized, a performance of it in part, merely because the legislature has

not gone as far as the Constitution may require. When the legislature has provided for one term in a county, it has not done a thing prohibited or unauthorized by the Constitution, but has done a part of that which the Constitution commands it to do." *St. Louis S. W. R. Co. v. Hall,* 98 Tex. 480.

We do not feel compelled to hold that the statute in question is unconstitutional as applied to this corporation.

The judgment of the district court is therefore reversed and the cause remanded, with instructions to enter judgment in favor of the relators.

REVERSED.

HAMER, J., not sitting.

GERTRUDE M. GROSVENOR, APPELLEE, v. FIDELITY & CASUALTY COMPANY, APPELLANT.

FILED JUNE 26, 1918. No. 19929.

1. **Evidence:** DEATH BY SUICIDE: PRESUMPTION. The presumption against death by suicide is *prima facie* only and rebuttable. It prevails when the cause of death is unknown. It does not prevail as a presumption in the presence of facts bearing upon the question whether death is intentional or accidental.
2. ———: ———: ———: REBUTTAL. When evidence is adduced which is contrary to such presumption, or the presumption is met by conflicting presumptions, it disappears, although the fact upon which it rests may still remain, proper to be considered in arriving at a conclusion.
3. **Insurance:** PLEADINGS: BURDEN OF PROOF. The petition averred death from "accidental carbolic acid or toxic poisoning." This the answer denied and averred "suicide by the intentional drinking of deadly poison, namely, by the drinking of carbolic acid." The reply contained a denial and admission of death from "drinking a deadly poison, to wit, carbolic acid." *Held,* that the burden was upon plaintiff to produce evidence showing that the death was accidental and not suicidal.
4. **Evidence:** SUFFICIENCY. The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by mere guess or conjecture.

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

Morsman, Maxwell & Crossman, for appellant.

Sullivan, Rait & Pratt, contra.

CORNISH, J.

Plaintiff's petition in her action upon a policy, insuring against accident, for the death of her husband caused by accidental means, contained an allegation that "Walter B. Grosvenor did lose his life by accidental carbolic acid or toxic poisoning." The answer contained a general denial, and alleged that Grosvenor "took his own life and committed suicide by the intentional drinking of a deadly poison, namely, by the drinking of carbolic acid." The reply contained a denial and admission that "Grosvenor died by means of drinking a deadly poison, to wit, carbolic acid." When the cause came on for trial, the plaintiff, and afterwards the defendant, declined to offer evidence; whereupon the court, apparently upon the theory that, death from a deadly poison being admitted, the burden would be upon the defendant to introduce enough evidence to rebut a presumption in plaintiff's favor that the death was accidental, rather than suicidal, directed a verdict in favor of the plaintiff. The defendant, believing that the court erred in its holding, in that the pleadings failed to show death produced by bodily injury and caused by accidental means, failed to show that it was not suicidal nor caused exclusively by drinking carbolic acid, the burden being upon plaintiff to show these facts, appeals.

The party who would be defeated, if no evidence were given on either side, must first produce his evidence. Rev. St. 1913, sec. 7846.

Assuming that the burden is upon the plaintiff to prove death by accidental means, and that the mere fact of death raises a presumption or inference that the death was accidental, was the trial court right in its conclusion

based upon the facts shown by the pleadings? Our opinion is to the contrary.

Because men love life and fear death, they instinctively avoid obvious danger. This fact, drawn from experience, is the basis of a presumption, relied upon by plaintiff, that when the cause or manner of death is unknown we infer that it was not suicidal. The inference is not based upon a law of nature which is invariable. Men do frequently commit suicide. It is one of a multitude of legitimate inferences, in which we infer the unknown, from the known, having greater or less degrees of probability, which we use in reasoning to arrive at the ultimate fact. Being a probability resting upon human experience, in its nature, it is controlling only in the absence of evidence of the actual.

When, knowing only that one has died from drinking carbolic acid, you say you are in doubt as to cause, and then, bringing into service the presumption against suicidal intent, you finally conclude that the death was accidental, are you not guilty of that error known in logic as *petitio principii?* Had you not, in reaching your first conclusion, given the theory of accident the benefit of the truth upon which the presumption is founded? Had you assumed as a fact that the deceased contemplated suicide or was indifferent to life, you might not have entertained the doubt. Let us suppose experience has shown that of all the persons who have died from drinking carbolic acid three out of four were cases of suicide; then, would it not be palpably absurd to infer in the given case that the death was not intentional? The rule invoked arises when we are ignorant of the intent and loses its force as a presumption in presence of actual facts bearing upon intent. The presumption then comes in conflict with other presumptions or facts which may overcome it. There is the almost conclusive presumption that when one drinks he drinks voluntarily; the presumption that when one drinks he knows what he is drinking, especially so if he is drinking carbolic acid; the pre-

sumption that when one drinks carbolic acid he knows the poisonous character of the liquid; and the presumption that one intends the natural consequences of his own act. These presumptions bear upon the question of intent, and the force of the original presumption must be lessened by the force given to them. While it may well be argued that we are still uncertain as to the actual intent, the presumption against intentional death can no longer prevail as *prima facie* proof.

The burden was and remained upon plaintiff to prove his case. *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381. Without evidence being produced by the plaintiff to show that the death was not intentional, the jury would be left to mere conjecture for determining the actual facts. It will not do to say that as long as there is room for doubt as to the intent the defendant must offer evidence. Rather the contrary. The burden is upon the plaintiff to show that the death was accidental; or, in other words, that it was not suicidal. This he must do by evidence of the actual facts or a situation from which accident is *the* reasonable inference, not *a* reasonable inference or possible one.

The question decided in *Rawitzer v. Mutual Benefit Health & Accident Ass'n,* 101 Neb. 219, is really decisive in this case. Different minds may reasonably draw different conclusions. It is held to be an issue of fact for the jury to determine. The explanation, given in the case cited, of the first two paragraphs of the syllabus in *Walden v. Bankers Life Ass'n,* 89 Neb. 546, is important. The rule as stated applies only to an appellate court's review of a jury's finding. In *Walden v. Bankers Life Ass'n,* the burden was upon the insurance company to show suicide. In the instant case, the burden is upon plaintiff to show accidental death. Here, as there, it will not do to say, as a proposition of law for the guidance of the jury, that accident must be "so clearly and unmistakably" shown or indicated as to exclude all reasonable probability to the contrary. It is a question of

clear preponderance of the evidence, going to establish the essential fact, so that the jury will not be left to mere guess or conjecture in arriving at its conclusion. 9 Ency. of Evi. p. 885; 2 Chamberlayne, Modern Law of Evidence, sec. 1053; *Sovereign Camp, W. O. W., v. Hruby,* 70 Neb. 5, 12; *Hardinger v. Modern Brotherhood of America,* 72 Neb. 869; *Merrett v. Preferred Masonic Mutual Accident Ass'n,* 98 Mich. 338; *Connerton v. Delaware & Hudson Canal Co.,* 169 Pa. St. 339.

The insurance was against death by "accidental means." It is contended by the defendant insurance company that, inasmuch as death was caused by voluntary act—drinking carbolic acid—the means cannot be said to have been accidental. As said by Judge Cooley in Briefs on Law of Insurance, vol. 4, p. 3156: "Strictly speaking, a means is accidental perhaps only when disassociated from any human agency, but this narrow interpretation is not recognized in the law of accident insurance." This view seems to have been heretofore recognized by this court. "Any event which takes place without the foresight or expectation of the person acted upon or affected thereby" must be considered accidental, even though the accident would not have happened but for a voluntary act upon the part of the person receiving it. *Railway Officials & Employees Accident Ass'n v. Drummond,* 56 Neb. 235; *Rustin v. Standard Life & Accident Ins. Co.,* 58 Neb. 792.

REVERSED AND REMANDED.

ROSE and HAMER, JJ., not sitting.

NATIONAL SURETY COMPANY, APPELLANT, v. THOMAS LOVE, APPELLEE.

FILED JUNE 26, 1918. No. 19958.

1. **Attachment:** RESIDENCE. "It is the actual residence of the debtor, and not his domicile, which determines the status of the parties in attachment proceedings." *Webb v. Wheeler,* 79 Neb. 172.

2. **Evidence examined, and *held* to show the defendant a nonresident for purposes of attachment.**

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

Crane, Boucher & Sternberg and *F. S. Baker,* for appellant.

Allen G. Fisher and *Justin E. Porter, contra.*

CORNISH, J.

Appeal from a judgment quashing the writ of attachment, issued on the statutory ground of nonresidency, the trial court finding that the defendant was at the time a resident of Sioux county. The evidence shows that he was not at the time in Sioux county, and that for several months he had spent most of his time in South Dakota.

When the inquiry is directed to the place of residence where summons may be served, the one who says it was at some particular place should at once designate it. This saves mental work and worry. It furnishes a starting point for the investigation. The record does not disclose clearly just where in Sioux county defendant contends his home was. It would probably be either on the land attached or at the home of Mrs. Doyle. But the sheriff found the farm house untenanted and unfurnished, with unmistakable evidence that a late occupant was bovine. If defendant lived at Mrs. Doyle's home, then it is strange that neither he nor she has said so. She denied it to the sheriff on his search, and to another witness.

If the contention is, as is likely, that defendant's domicile is shown to be in Sioux county, it must be answered that this is not sufficient. Under the attachment statute, the debtor must have a place of residence in the state, either of a temporary or permanent character, at which a service of summons may be lawfully made.

The motion upon which the court acted, although in form a special appearance objecting to jurisdiction over the person of defendant, asks that the writ of attach-

ment "be quashed and held for naught." This motion and the court's order entitle plaintiff, under section 7776, Rev. St. 1913, to appeal.

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

REVERSED.

RACINE-SATTLEY COMPANY, APPELLANT, V. FREDERICK POPKEN ET AL., APPELLEES.

FILED JUNE 26, 1918. No. 20053.

Process: SERVICE: EVIDENCE. When a sheriff's return of summons is attacked, and the testimony of the officer who made the service is taken soon after the alleged service was made, and he relates in detail the facts connected with such alleged service, and there is a substantial conflict in the evidence as to the facts of the service, such issue must be determined from a preponderance of the evidence under all of the facts and circumstances. *Janous v. Columbus State Bank*, 101 Neb. 393.

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

Hoagland & Hoagland, for appellant.

L. O. Pfeiffer, contra.

DEAN, J.

Plaintiff began this action to foreclose a second mortgage for $4,800 and accrued interest, and to set aside a sheriff's deed to 320 acres of land that was issued to defendant Wertz, who purchased the land under a first mortgage foreclosure proceeding wherein plaintiff, not having appeared, was defaulted. Plaintiff offered to pay into court for defendant the money he paid for the land with interest and costs. Wertz was the only answering defendant. He pleaded that he bought the land in good faith, and asked that plaintiff be denied any relief. The action was dismissed, and plaintiff appealed.

The first mortgage foreclosure action under which the land was sold to defendant was begun by A. Benzen and prosecuted to decree and sale and confirmation. Plaintiff

contends that no summons was ever at any time served upon it, and that none of its officers or employees ever at any time had any knowledge that the Benzen mortgage was in process of foreclosure or that it was foreclosed until about a month after the sale of the land to Wertz was confirmed, and that immediately upon making such discovery, or as soon as it could reasonably do so, it commenced this suit. The return by Cassidy, the deputy sheriff of Douglas county, that is in the usual form, recites in substance that on February 24, 1913, plaintiff was served by delivering to Joseph C. McConney, managing agent, a certified copy of the writ.

At the trial there was only one witness who testified respecting the value of the land. On this point Mr. Epperson, who is the county treasurer and a long-time resident of the county, testified that the land in question was worth from $25 to $40 an acre, at the time the sheriff sold it to Wertz for a trifle over $7 an acre. The discrepancy between the actual value and the amount realized at the sheriff's sale is so great as to shock the conscience. It raises a presumption of mistake or error of some kind, notwithstanding the land was twice appraised, as defendant points out, at only about $1,000 more than it brought at the sheriff's sale. With the exception of the county treasurer and G. E. Hendricks, who testified solely to identify the two letters from plaintiff, all the testimony was in the form of depositions, so that we have the same opportunity as that of the trial court to pass on the probative value of such testimony.

Deputy sheriff Cassidy testified on the part of defendant respecting service. He said that plaintiff was located in a large eight-story building in Omaha that was occupied by several implement machinery firms besides plaintiff. He entered the building and, speaking to some person that he did not know, he asked for the officers of the company. From what this stranger said he concluded that a man in one of the offices, who subsequently said that his name was McConney and that he was man-

ager, was the person to serve, and he gave him a copy of the writ. He said that he never saw the man whom he served before nor after the time of the service. The testimony of Cassidy shows that under the peculiar circumstances that are detailed by him he might easily have been mistaken about the identity of the person he served; and, when all of Cassidy's testimony is considered in connection with that of McConney and the other testimony, we conclude that he was mistaken in the return that he made.

McConney testified that no summons was served on him, and that he did not know Cassidy and had no recollection of any talk with him, and that he would have remembered so unusual an occurrence as the service of a summons, the company having been so served only two times that he knew of since he entered its employ twenty years before. He said that he never heard of the Benzen mortgage or suit, nor of the mortgage in suit, until after the land was sold to Wertz. Three letters of plaintiff were introduced by defendant that were addressed to Benzen's attorneys in December, 1912. All had to do with the mortgage in suit, and show that the parties were negotiating for delay in beginning the Benzen suit. The last of the series was dated December 23, 1912. In that letter plaintiff noted and thanked counsel for their courteous offer of delay in beginning the Benzen foreclosure case. In a little more than six weeks, namely, February 8, 1913, the Benzen foreclosure case was commenced. So far as the evidence shows, the plaintiff had reason to rely upon an understanding between the parties that no foreclosure would be begun without further notice to the plaintiff. It may be noted that the three letters so introduced by defendant were not written by McConney, but by Ed Wallace, cashier of plaintiff's Omaha branch, that was then in process of liquidation. It is also shown that plaintiff, by its treasurer, wrote to Mr. Benzen from the home office in Springfield, Illinois, on this subject before the Benzen action was begun, but received no re-

ply. The evidence respecting the correspondence seems to corroborate McConney's testimony that he was ignorant of the existence of both the Benzen and the plaintiff's mortgages.

It is elementary that to impeach an officer's return of service in a collateral attack the evidence must be clear and convincing. *Janous v. Columbus State Bank*, 101 Neb. 393 is in point. It is there held, in an opinion written by SEDGWICK, J., that in an action to set aside the service of summons when the validity of the service depends upon the facts, and the officer and the persons who were present when the supposed service was made testify in detail as to the facts of service, the question then is as to the preponderance of the evidence, and, if the preponderance of the evidence shows that no legal service was made, then the judgment may be set aside.

The equities appear to be with plaintiff. Almost $6,000 was its due when this case was commenced. Plaintiff, without fault on its part, did not have its day in court, and appears to have been deprived of its rights in the premises. The land that was of sufficient value to have paid all of the obligations against it was sold for a trifling sum as compared with its real value. It is not denied that plaintiff's officers and employees had no knowledge of the pendency of the Benzen foreclosure action until about two months after the sale of the land to Wertz was confirmed. It is reasonable to believe that, if they had known of the pendency of that suit, they would have taken immediate steps to protect their interests. It appears to us that the court erred in denying to plaintiff the relief prayed for. Testimony was introduced by defendant with the view of establishing the fact that McConney was the managing agent of plaintiff, which it denied; but that point we do not decide.

The judgment is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

MORRISSEY, C. J., not sitting.

JOHN C. JORDAN, APPELLEE, v. JOHN ALLEN, DEFENDANT: CHARLES A. HETZEL, INTERVENER, APPELLANT.

FILED JUNE 26, 1918. No. 20080.

1. **Error** cannot be predicated upon a direction to return the only verdict that the record will sustain.
2. **Replevin:** COSTS. "A defendant in replevin who unsuccessfully seeks to establish a right of possession in himself is liable for costs, although no demand was pleaded or proved." *Tilden v. Stilson*, 49 Neb. 382.

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

E. D. Crites and *F. A. Crites*, for appellant.

C. Patterson and *Lloyd H. Jordan, contra.*

DEAN, J.

This is a replevin action commenced by John C. Jordan in the district court for Sheridan county to obtain possession of 800 bushels of wheat that was raised by John Allen on land owned by Charles A. Hetzel, defendant. Hetzel, who intervened, filed an answer and cross-petition asserting ownership. At the close of the testimony the court directed a verdict for plaintiff for 750 bushels of the wheat. The grain having been sold, defendant recovered $42.80, that being the surplus that remained after plaintiff's claim and expenses were paid. Each party was required to pay his own costs. The intervener as defendant has appealed.

By the terms of an oral lease between Hetzel and Allen made in the fall of 1914, the crops were to be divided equally between them. Allen gave a mortgage to "The Fair," a general merchandising concern at Gordon, on his half interest in 100 acres of growing wheat and some corn that was in shock on the farm, and also some live stock. Plaintiff purchased the note and mortgage in suit from "The Fair." The instruments are both dated

September 26, 1914, and the mortgage was recorded February 4, 1915. They were executed while Allen was living on Hetzel's land.

Hetzel's claim to the wheat in suit was based in part on an assignment from Allen to him, dated November 14, 1914, and acknowledged July 26, 1916. It was offered in evidence, but excluded on the ground that the question at issue "relates to the ownership and possession" at the time of the commencement of the suit, namely November 26, 1915. The discrepancy between the dates that appears on the assignment is not explained. Hetzel harvested the wheat in 1915, and he maintains that Allen, having abandoned the premises, forfeited his claim to the crop, and that the mortgage was invalid on that ground as well as upon other grounds. Defendant also contends that the chattel mortgage in evidence is void for uncertainty of description. He resisted plaintiff's claim on both grounds. To support his argument respecting uncertainty of description defendant cites *Wattles v. Cobb*, 60 Neb. 403. But that case is not in point. There is an element here that was lacking in the *Wattles* case. Hetzel recognized the mortgage in evidence as being a valid instrument both as to the corn and the wheat before plaintiff bought it. While defendant earnestly insisted that he had no talk with the assignee of the mortgage, he admitted that he sold the corn that is described in the mortgage, and upon demand by W. W. Mills, manager of "The Fair," defendant paid to Mr. Mills half of the money that he received for the corn. This payment was made on November 17, 1914, the day after Allen, who then was insolvent, left the country, and the payment was indorsed on the note. The day following Allen's disappearance Hetzel and Mills went together from Gordon in a car a distance of eight miles to the farm to look after the stock and the property that was abandoned by Allen. On the following day they made another trip for the same purpose. Mills testified that the mortgage in question was talked about between Hetzel and himself on both trips,

and that later there was an agreement entered into that in effect provided that the winter wheat crop should be harvested by defendant and that the mortgagee should receive net a percentage of the grain that the evidence shows approximates the amount of wheat that was recovered by plaintiff. As consideration for Hetzel cutting the wheat, Mills agreed to take a less quantity of the grain than he was entitled to on the basis of an equal division. This was the second admission of the validity of the mortgage by defendant, but he denies all of this, and testified that he knew nothing about the mortgage when he paid Mills for one-half of the corn, but his admission of payment corroborates Mills' testimony. As a reason for dividing the money with Mills, Hetzel testified: "I done that so as to be good friends." It is unreasonable to believe under the circumstances that defendant was in ignorance of the lien, not only on the corn, but on the wheat as well. It appears that he treated the mortgage as a valid instrument throughout. Every interest of Mills' principal would be best subserved by telling Hetzel about the mortgage and all of the property that it covered. It was the reasonable thing for Mills to do.

From all of the facts considered together we conclude that defendant must be mistaken about the time when he first learned about the Allen mortgage, though he admits that Mills showed it to him in February, 1915. Defendant having recognized the right of plaintiff's assignor, the original mortgagee, to half of the corn and by cutting the wheat for a consideration, he cannot now be heard to challenge the validity of the mortgage. It seems to us that Hetzel had ample notice of plaintiff's lien and that he sufficiently recognized it so as to be charged with liability. The district court did not err in the direction that it gave to the jury.

Error cannot be predicated upon a direction to return the only verdict that the record will sustain. Defendant argues that in any event all of the costs should have been

taxed to plaintiff because the action was begun before demand was made for the property. The rule is that "a defendant in replevin who unsuccessfully seeks to establish a right of possession in himself is liable for costs, although no demand was pleaded or proved." *Tilden v. Stilson,* 49 Neb. 382.

Finding no reversible error, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

DORIS ROUTT, APPELLEE, V. BROTHERHOOD OF RAILROAD TRAINMEN, APPELLANT.

FILED JULY 8, 1918. No. 19503.

Opinion on motion for rehearing of case reported in 101 Neb. 763. *Former judgment of affirmance vacated, and judgment of district court reversed, and action dismissed.*

PER CURIAM.

For the reasons stated in the opinion in *Kane v. Brotherhood of Railroad Trainmen,* p. 645, *post,* the judgment of affirmance heretofore entered herein is set aside, the judgment of the district court is reversed, and the action dismissed.

REVERSED AND DISMISSED.

HAMER, J., dissents.

CHARLES JOHNSON ET AL., APPELLANTS, V. WILL FORREST JOHNSON ET AL., APPELLEES.

FILED JULY 8, 1918. No. 20121.

Deeds: UNDUE INFLUENCE: SUFFICIENCY OF EVIDENCE. Evidence found to support the judgment of the trial court.

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

H. G. Wellensiek and *P. E. Boslaugh,* for appellants.

A. C. Epperson, contra.

MORRISSEY, C. J.

This is a suit in equity to cancel a contract by which plaintiffs, their brother and sisters conveyed a life estate to their father, Will Forrest Johnson, in a farm in Clay county. There was a decree in favor of defendants, and plaintiffs have appealed.

The land was owned by plaintiffs, their brother, Howard W. Johnson, and their sisters, Alida Mae Johnson and Agnes Johnson subject to a life estate held by defendant Will Forrest Johnson in an undivided half interest in 80 acres referred to as school land.

Plaintiffs' mother, through whom the land was inherited, was dead. The father had married a second time and was living on the property with his second wife. There had been considerable litigation between the father and his first wife's parents; but, after this litigation was settled, the children and the father met at the county seat and this contract was made. It provided that the father should have the use of the land during his lifetime, and, in consideration therefor, he should make certain payments that were still due on the school land; he should build a barn on the premises, pay all taxes, maintain the improvements in good repair, and agreed, "as a part of the consideration for this contract, that he will

devise or otherwise convey to those of the first parties, who are his children, or to their heirs, all of the property of which he may die seised, subject to the marital rights of his wife, and subject also to his privilege of devising or otherwise conveying to his wife a life estate in his property, both real and personal, of which he may die seised, it being understood that the above described real estate reverts to those of the first parties who are the children of the second party, immediately upon his death, to said children and their heirs."

Plaintiffs contend that they were induced to execute the agreement because of duress, undue influence, and misrepresentation on the part of the father, and that they should be relieved from the contract because the father and his counsel, who prepared the contract, exercised such dominion over them that they did not freely and voluntarily enter into the agreement. When the contract was made, plaintiffs were 25 and 23 years of age, respectively. We may assume that plaintiffs were governed to some extent by the natural desire of the child to be generous to its parents, but there is no proof of undue influence, and their brothers and sisters deny the existence of such influence, and affirm their part of the contract. The contract, in its present form, was not drawn until about the time of its execution, but the parties had been considering some such contract for several months. The plaintiffs were married, and their wives were interested parties; it was their duty to consult their wives, and we may assume they did so, because the wives joined in making the contract.

Nor is the contract unilateral. In addition to the permanent improvements defendant agreed to place on the premises, and the payment of the taxes, interest, and charges against the property, which he bound himself to pay, he also bound himself as part of the consideration to devise to these children all of the property of which he might die seised, subject only to such interest therein as his wife might take under the statute, and his right to

leave her a life estate only in the property. This provision of the contract may be advantageous to the children, and it is entirely probable that it was one of the considerations which induced plaintiffs and their wives to join in making the contract.

The district court properly found: "The plaintiffs have failed to establish that this contract was obtained either through fraudulent representations or undue influence."

The judgment is

AFFIRMED.

LETTON and HAMER, JJ., not sitting.

JOHN KANE, APPELLEE, V. BROTHERHOOD OF RAILROAD TRAINMEN, APPELLANT.

FILED JULY 8, 1918. No. 19938.

1. **Insurance:** CONTRACT: TOTAL DISABILITY. One who is color blind, but whose vision in other respects is unimpaired, has not suffered "complete and permanent loss of sight of both eyes." The fact that plaintiff is a railroad trainman, and on account of color blindess was discharged from his employment, does not entitle him to recover the amount payable under a provision of a benefit certificate that a member of the organization in good standing, "who shall suffer the complete and permanent loss of sight of both eyes, * * * shall be considered totally and permanently disabled;" there being no provision that the term "totally disabled" should mean "totally disabled" from following railroad work.
2. **Case Overruled.** *Routt v. Brotherhood of Railroad Trainmen*, 101 Neb. 763, overruled.

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

Weaver & Giller, for appellant.

Smith & Schall, contra.

LETTON, J.

The facts in this case are similar to those in the case of *Routt v. Brotherhood of Railroad Trainmen*, 101 Neb.

763. A motion for rehearing in that case has been filed, and will be considered and disposed of with the case at bar. Several questions are presented, but the main and determining question is identical with that presented in the *Routt* case. The constitution of the defendant provides that a beneficiary member of the class to which the plaintiff belongs, in good standing, "who shall suffer the complete and permanent loss of sight of both eyes, * * * shall be considered totally and permanently disabled, but not otherwise, 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."

The majority opinion in the *Routt* case held, in substance, that the language of the contract was ambiguous, and that a member of the association who is unable longer to continue in train service, and is discharged therefrom, on account of color blindness, has suffered a complete and permanent loss of sight of both eyes, within the meaning of the contract.

The order, by its constitution, insures only against death and against certain specified disabilities. It makes no provision to insure against the multitude of other classes of injuries which a member may sustain, and which may equally incapacitate him from carrying on his work, and is therefore not avocational insurance.

The evidence shows that plaintiff's sight is perfect except that he is unable to distinguish certain colors. In the ordinary use and meaning of language, when one has suffered the complete and permanent loss of sight of both eyes, he is totally blind. It is true that ambiguous expressions in an insurance contract should be construed most strongly against the insurer, because he writes the contract, but where there is no ambiguity, and the plainest and clearest of ordinary language is used, courts are not warranted in striving to give distorted and unusual meanings to words in order to reach what is believed to be a benevolent result. Furthermore, section 85 of the constitu-

tion of the defendant order specifies its provisions "shall be interpreted and construed according to their most plain and obvious meaning." In order to bring plaintiff within the insured class, there must be a complete perversion of the usual and ordinary meaning of the language employed.

In a case in Kentucky, *Holcomb v. Grand Lodge, B. R. T.*, 171 Ky. 843, the facts were that a flagman was insured by this defendant under the same provisions as the plaintiff. He was injured by a cinder striking his left eye, by which he practically lost the sight of that eye, and the vision of the other was injured, and in consequence lost his position as a flagman. His eyesight, after the injury, was much more defective than that of plaintiff. The construction of the contract is discussed at length in the opinion, and it is said: "The language is clear, explicit and unambiguous, and that appellant has not suffered the complete and permanent loss of the sight of both eyes is perfectly clear, and for that reason there can be no recovery." The court of appeals of Ohio, the state where the order is domiciled, takes a similar view as to the obligations of the contract.

We are of the opinion that the district court erred in instructing the jury that, "under the laws of the state of Nebraska, one who is in the train service of a railroad company and is color blind to the extent that he is unable to distinguish colors and signals such as are used in the train service of a railroad company has suffered the permanent loss of sight of both eyes."

Its judgment is therefore reversed, and the cause dismissed.

REVERSED AND DISMISSED.

HAMER, J., dissents.

STATE OF NEBRASKA, PLAINTIFF, V. WILLIAM G. URE ET AL., DEFENDANTS.

FILED JULY 8, 1918. No. 19972.

1. **County Treasurer:** INTEREST ON STATE FUNDS. A county treasurer is chargeable with interest on state funds if he fails "to pay into the state treasury the amount due the state on his account, for state and other taxes at the time or times required." Rev. St. 1913, sec. 6509.
2. **States:** COUNTY TREASURERS: STATEMENT OF ACCOUNTS: INTEREST. He must fully state to the auditor the condition of his account with the state upon blanks furnished him by the auditor; and, when the auditor has adjusted the account and stated the amount due the state, the account so stated is then "due the state," and he will be chargeable with interest thereon until it is paid to the state treasurer.
3. ———: ———: ———. If the auditor fails to furnish "suitable blanks for the settlements of county treasurers with the auditor," as required by section 6520, Rev. St. 1913, or if he refuses to countersign the state treasurer's receipt as required by section 6508, money in the hands of the county treasurer is not "due the state on his account" within the meaning of section 6509.
4. ———: ———: SETTLEMENT OF ACCOUNTS. It is only when money is transferred to the state treasurer voluntarily by the county treasurer, waiving the formalities that are required for his protection and the protection of the public, that "no formal settlement with the county treasurer is necessary."

Original action against county treasurer to recover interest on delayed payment of state taxes. *Objections to report of referee overruled, report approved, and judgment for defendants.*

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

William Baird & Sons and *W. C. Ramsey, contra.*

SEDGWICK, J.

In March, 1916, upon the application of the state treasurer this court allowed a writ of mandamus against the defendant herein, as treasurer of Douglas county, re-

quiring him to pay into the state treasury $170,000 of the funds in his hands belonging to the state. *State v. Ure,* 99 Neb. 486. Afterwards the state auditor brought this action against the defendant to recover interest on alleged amounts due the state on his account, which he had failed to pay when due. Honorable John M. Stewart was appointed referee to take the evidence and report his findings of fact and conclusions of law. The referee, upon the facts found by him, reported that there was nothing due from the defendant. The case was submitted upon the briefs and oral argument, upon exceptions to the report of the referee. The exceptions to the report of the referee which are principally discussed are: "(1) The referee erred in finding as a matter of fact that the defendant Ure did not make monthly payments of state moneys in his hands into the state treasury because the state auditor would not furnish him with blanks on which to make his monthly statements of account and would not countersign his receipts for money paid. (2) The referee erred in holding, as a conclusion of law, that interest does not begin to run on the account of a county treasurer with the state until after such account has been settled and adjusted by the state auditor." The remaining exceptions are formal, and, so far as the questions here presented are concerned, are included in the second exception above.

Section 6509, Rev. St. 1913, is: "Any treasurer failing to pay into the state treasury the amount due the state on his account, for state and other taxes at the time or times required by this article, shall pay interest at the rate of ten per cent. per annum from the time the same became due until the same is paid; and it shall be the duty of the auditor to charge such interest to the account of every treasurer failing to pay at the time or times required by this article. In no case shall the auditor be permitted to remit such interest, unless satisfactory evidence from the county board is presented to him showing, by official action taken by such board, lawful excuse

why the treasurer could not pay over in part or in whole the amount due on such treasurer's account with the state."

Under this section the question here is whether the county treasurer has failed "to pay into the state treasury the amount due the state on his account, for state and other taxes at the time or times required." The brief of the relator is principally devoted to the proposition that this question was adjudicated in the former case above referred to. It appears from the opinon in that case that the state treasurer, relying upon section 6507, Rev. St. 1913, required the county treasurers of the several counties of the state to make monthly remittances to the state treasurer of all funds in their hands belonging to the state. Thereupon many questions arose as to the powers and duties of the state and county treasurers, respectively, the state auditor, and possibly other public officers. In that case, we said:

"It is clear that the auditor is the proper official to bring an action against a county treasurer, like the one at bar, and in such action summarily compel such treasurer to exhibit on oath a full and fair statement of all moneys by him collected or received, and to disclose all such matters and things as might be necessary to a full understanding of the case; and the court upon such hearing would have the power to give such judgment as the evidence would require. If such an action had been instituted, this court would have been relieved of much unnecessary time and labor. But, however preferable such a course might have been, was such course exclusively the one which should have been pursued? * * * If the respondent, when called upon by the relator to pay over moneys in his hands, had promptly furnished the auditor full information as to the condition of his accounts by exhibiting to him his accounts and vouchers, as required by section 5547, he would have been under no obligation to turn over the money in his hands until the auditor had passed upon the statement so furnished.

* * * When the state treasurer makes demand upon a county treasurer to pay over state taxes collected by him, and the treasurer admits that he has in his hands, belonging to the state, moneys to the amount of the state treasurer's demand, then, so far as the custody of that particular sum of money is concerned, it is immaterial that the auditor has not made an examination, and * * * the amount of the sum demanded being admitted to be state money, and in the hands of the county treasurer, that admission is equivalent to an admission that the state treasurer is entitled to the custody of the money demanded."

This was the basis of our former decision. Section 5547, Rev. St. 1913, was quoted in the opinion. It is as follows:

"All county treasurers, or other persons who are by law required to make settlements or pay money into the state treasury at certain specified times, shall, on or before such date, exhibit their accounts and vouchers to the state auditor, who shall, as soon as practicable, examine, adjust and settle such accounts and report to the state treasurer the balance found due the state; and if any county treasurer or other person so required by law to pay funds into the state treasury shall fail to make the settlement herein required at the proper time, or to pay the amount so found due to the state treasurer and produce his receipt to the auditor within ten days after the settlement above required, the delinquent shall forfeit to the state all collection fees and mileage allowed by law, and also a penalty of ten per cent. on the amount wrongfully withheld and interest on the whole at the rate of fifteen per cent. per annum from the time the same should have been paid until actual payment, and the auditor shall charge such delinquent accordingly; and the whole amount of principal and forfeiture may be recovered by action on the official bond of the delinquent, or otherwise, according to law."

And it was said: "It was the duty of the respondent, when called upon by the relator to pay over all state moneys in his hands by a certain date, to exhibit to the auditor, before such date, his accounts and vouchers for examination. * * * We think it was his duty to prepare a statement of the state moneys then in his hands and present that statement, with his vouchers, to the auditor." It was also said that it is the duty of the county treasurer to make "the first move in the making of such settlement by exhibiting to the auditor his accounts and vouchers;" but in that suggestion it was assumed that the auditor had furnished the county treasurers with the necessary blanks and instructions.

The auditor is the state accountant; he represents the state in settlements between the state treasurer and the various county treasurers. "The auditor is declared to be the general accountant of the state, and the keeper of all public account books, accounts, vouchers, documents and all papers relating to the accounts and contracts of the state, and its revenue, debt and fiscal affairs, not required by law to be placed in some other office or kept by some other officer or person." Rev. St. 1913, sec. 5544. Section 5648 provides that the auditor of public accounts shall supervise the establishment of a "uniform system of keeping all accounts pertaining to the office of county treasurer." Section 6520 provides: "It shall be the duty of the auditor to furnish suitable blanks for the settlements of county treasurers with the auditor, and all other books and blanks required by this chapter not otherwise herein provided for." From this section it appears that the settlements of the county treasurers are not to be made with the state treasurer, but with the auditor. This is specifically provided by section 5547, above quoted. Section 6508 provides that, when the auditor shall ascertain the amount that is due the state from the county treasurers, he shall give the treasurer a "statement of the amount to be paid." The county treasurer then presents this statement to the state treasurer and pays over

the amount indicated in the statement. The state treasurer executes duplicate receipts and gives one of these to the auditor, who finds that it corresponds with his statement to the state treasurer and countersigns the receipt to be given to "the person making the payment." It appears from the record now before us that in some cases under the monthly calls of the state treasurer the respondent, in one case at least, paid to the state treasurer more than the amount that was due from the county treasurer. The difference was carried as a credit to the county treasurer and deducted from his subsequent remittance. It is only upon the theory that these payments are voluntarily made by the county treasurer, waiving the formalities that are required for his protection and for the protection of the public, and that he pays over the money upon the understanding that if it should be more or less than the actual balance as adjusted by the auditor the discrepancy will be corrected in the auditor's adjustments afterwards, that it can be said that "no formal settlement with the county treasurer is necessary in such case." *State v. Ure, supra.* If the payment by the county treasurer is compulsory under the call of the state treasurer, the formal settlement and adjustment of the account by the auditor is necessary, as is plainly stated in our former opinion. The evidence in this case will justify the finding of the referee that for part of the time involved the state officers refused to furnish to the respondent a receipt countersigned by the auditor for money paid into the state treasury pursuant to these monthly calls, and that under the practice of many years there had never been "established a uniform system of keeping all accounts pertaining to the office of county treasurer" under the supervision of the auditor, and the auditor did not furnish to the respondent "suitable blanks for the settlements of county treasurers with the auditor" pursuant to these monthly calls, but, on the other hand, the auditor and state treasurer both assumed that such settlements were unnecessary. This evidence supports the

referee's finding of fact which is complained of, and his conclusion of law that under such circumstances the treasurer would not be liable for interest necessarily follows.

It was said in our former opinion: "There is no question of shortage in the accounts of the respondent, nor any claim of incompetency. In the brief of council for relator it is gracefully conceded that the important office of county treasurer of Douglas county is 'so efficiently presided over by the respondent himself.'" It would seem that at the time of the former trial the state officers were themselves to some extent misled by the long-established practice of their predecessors in office, and that all parties to this controversy have endeavored to perform the duties of their respective offices as the law required. There is no doubt of their good faith in the matter, and, that being so, under such circumstances as these, the respondent ought not to be found in default in his management of the public funds.

The objections to the referee's report are overruled, and the report approved, and judgment entered accordingly.

OBJECTIONS OVERRULED, AND JUDGMENT FOR RESPONDENTS.

MARY A. GOOD, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JULY 8, 1908. No. 20515.

Master and Servant: EMPLOYERS' LIABILITY ACT: CLAIM FOR COMPENSATION. The mere fact that the employer has knowledge that the employee has received an injury will not dispense with the necessity of the claimant's making his claim for compensation, as provided by section 3674, Rev. St. 1913 (Employers' Liability Act).

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

John A. Rine and *L. J. TePoel,* for appellant.

George H. Merten, contra.

CORNISH, J.

Defendant's appeal from judgment awarding compensation under the employers' liability act, for the death of plaintiff's husband, a policeman, killed while in the line of duty.

We have to determine the necessity of making claim for compensation. No claim was made or notice of injury given. The defendant's admission, however, that it knew of the injury and death at the time of the occurrence obviates the necessity of notice under a special provision of the statute touching notice in such case.

Section 3674, Rev. St. 1913, reads in part as follows: "No proceedings for compensation for an injury under this article shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same, or in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity."

It is argued by plaintiff that this provision makes no distinction between giving "notice of injury" and making "claim for compensation," and that, inasmuch as the notice is unnecessary where the employer has knowledge of the injury, then in such case no claim for compensation need be made. We are of opinion that the provision will not bear such construction and is unambiguous. In *Simon v. Cathroe Co.*, 101 Neb. 211, we recognize the giving of notice and the making of the claim as distinct and separate prerequisites to the bringing of an action. The fact is, the requirement of the statute is only what a person acting in good faith would be likely to do without a statute. One receiving an injury, for which he expects to hold another liable, would feel called upon, as soon as practicable after receiving the injury, to give the other notice of it, and would feel called upon, as soon as he knew

the nature and extent of his injury, to make his demand for compensation. In courts of justice, the good faith of a claim is always more or less discredited by the fact that no immediate demand was made or that prosecution was long delayed. The employer is entitled to an early demand, so that he may know the nature and amount of the claim; may settle it, if possible, or, if not, may investigate the facts and preserve his evidence.

Section 3679, Rev. St. 1913, reads in part as follows: "In case of death, all claims for compensation shall be forever barred unless, within one year after the death, the parties shall have agreed upon the compensation under this article, or unless within one year after the death, one of the parties shall have filed a petition as provided in the next following section hereof."

Because this provision makes no reference to the requirement that claims must be made within six months, and because either party is privileged to go into court to settle any dispute arising, it is contended that the six-months' provision has no application. We think this, too, would be an unreasonable construction of the provision. It has no reference to invalid claims or claims otherwise barred. It is a statute of limitations, telling the claimant having a valid claim within what time he must prosecute it, if at all. The seeming contradiction in the language, in that the employer appears to be privileged to begin the suit within one year, whereas the claimant's rights might be lost by his failure to make the claim within six months, exists, if at all, in the words, not the sense. Surely, no substantial right would be denied the employer, even if denied the right to commence an action to have settled a claim against him already barred. *Fierro's Case,* 223 Mass. 378; *Johnson v. Wootton,* 4 B. W. C. C. 258; *Devons v. Anderson & Sons,* 4 B. W. C. C. 354; *Armstrong v. Oakland Vinegar & Pickle Co.,* 197 Mich. 334.

The city in its brief presents other arguments for our consideration bearing upon plaintiff's right of recovery,

and asks that we decide the questions raised, whether necessary to be decided in this case, or not.

Subdivision 3, sec. 3656, Rev. St. 1913 (Employers' Liability Act, amended in Laws 1917, ch. 85), excepts from the provisions of the act those persons whose employment is "not for the purpose of gain or profit by the employer." It is argued that the policeman's service cannot possibly be said to be "for the purpose of gain or profit." If this is so, then, under the statute, it must apply equally to all employees, not officers, of the state, or its governmental agencies, whose service is not for gain or profit, but merely governmental, which would include nearly all of such employees. The other provisions of the statute would appear to intend to include all of the employees of the state or its governmental agencies, not officers. The question would turn on whether or not, taking the act as a whole, the quoted words must be given the interpretation contended for by the city.

The act also excepts from its provisions officers appointed for a regular term of office. The question is raised whether this provision would not exclude policemen as officers.

It also appears that the plaintiff draws $40 a month pension from the city by reason of the death of her husband while in the line of duty. Section 3652, Rev. St. 1913 (Employers' Liability Act), limits the compensation permissible under the act to those provided for in subdivision 2 of the act. This raises the question, to what extent, if at all, a pension may be considered as compensation, and also whether a pension would be considered as "benefits derived from any other source," mentioned in section 3671.

The judges are not agreed upon the law involved in these questions, and we do not decide them. If the law is uncertain or ambiguous in these respects, it may be better that it be made certain by legislative enactment,

wherein the legislature may express more clearly what its intention was.

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

REVERSED.

LETTON and SEDGWICK, JJ., not sitting.

DAVID HANNA ET AL., APPELLANTS, V. ANNA C. BERGQUIST ET AL., APPELLEES.

FILED JULY 8, 1918. No. 19680.

1. **Limitation of Actions:** FRAUD. An action for relief on the ground of fraud must be commenced within four years, and, in any event, within four years of the discovery of the fraud. Rev. St. 1913, sec. 7569.

2. **Fraudulent Conveyances:** HUSBAND AND WIFE. Fraud is never presumed. Its existence must be clearly established by competent proof, but a conveyance from husband to wife, whereby a creditor is prevented from realizing upon his judgment, will be closely scrutinized, and, unless it is made in good faith, will be set aside.

3. ———: ———: EVIDENCE. Evidence examined, and *held* not to show bad faith on the part of the wife in purchasing and taking a conveyance of the land.

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

J. B. Barnes and *Dravo & Dilworth,* for appellants.

O. E. Shelburn, contra.

DEAN, J.

Plaintiffs began this action in the district court for Harlan county to set aside certain conveyances of land from Peter Bergquist to his wife, on the ground that they were made without consideration and to defraud creditors. Plaintiffs' petition was dismissed, and they appeal.

The action is in the nature of a creditor's bill and is based on a judgment for $2,312, obtained in the district court for Phelps county against Andrew Vandell as principal and Peter Bergquist as surety, on November 4, 1913. On December 1, 1908, Bergquist, "in consideration of $1 and love and affection," as stated in the deed, conveyed to his wife 240 acres of land in Harlan county, subject to a mortgage of $1,350. Of this tract 160 acres was the homestead upon which the Bergquist family resided for more than 20 years immediately preceding Peter's death, and there, without interruption, his widow and children resided at the time of the trial. On October 29, 1913, Bergquist conveyed to his wife an additional 160 acres of land, a tree claim adjoining the homestead for a stated consideration of $2,500. Both conveyances were recorded the day they were executed. Plaintiffs seek to subject so much of the land to the payment of their judgment as may be necessary for that purpose.

Peter Bergquist died intestate in Harlan county May 6, 1914. Anna C. Bergquist, his widow, and his seven children, some of whom are minors, are defendants, and they are his only heirs at law. Medora Bergquist, a daughter, was appointed and qualified as administratrix of the estate.

Section 7569, Rev. St. 1913, provides: "Within four years, * * * an action for relief on the ground of fraud" shall be commenced. There is an exception noted in the statute, but plaintiffs' claim does not come within that exception. So that as to the conveyance by Peter Bergquist to his wife on December 1, 1908, the present action is barred by the statute of limitations, the action in Harlan county having been commenced more than four years after the conveyance was made that is complained of. The timber culture tract conveyance of October 29, 1913, was not yet patented when the debt sued on was contracted, but it does not appear whether the final certificate was issued to Bergquist

before that time. 20 U. S. St. at Large, ch. 190, sec. 4, p. 114. But respecting that conveyance the district court expressly found that ample consideration passed from Mrs. Bergquist to Peter Bergquist therefor, and that it consisted of money "out of her separate estate, and in consideration of her relinquishing all her interest in certain lands owned by Peter Bergquist in Mexico."

It is also shown that the separate estate of Mrs. Bergquist consisted in part of $2,500 or $3,000 that she received from her father's estate, and that she paid this money to her husband on the land. It sufficiently appears too that Mrs. Bergquist had no knowledge of plaintiffs' claim that would charge her with participation in or knowledge of any alleged fraud with respect to either of the conveyances at the time when they were executed. But as this is an equity case, we have examined the evidence and tried the case *de novo*. From this examination we find that there is ample testimony to support the judgment of the district court, and we have reached the same conclusion announced by that court.

Other questions are raised and argued in the briefs that we do not find it necessary to decide. Finding no reversible error, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., not sitting.

COATES LUMBER & COAL COMPANY, APPELLEE, v. A. F. KLAAS: CHARLES W. BASKINS, APPELLANT.

FILED JULY 8, 1918. No. 19928.

Mechanics' Liens: SUBCONTRACTOR'S LIEN. Sections 3823, 3824, Rev. St. 1913, construed, and *held*: The subcontractor's right to a lien for services or material furnished to the contractor does not depend upon the terms of the contract entered into between the owner and the contractor. *Frost v. Falgetter*, 52 Neb. 692, overruled.

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

C. L. Baskins, for appellant.

Hoagland & Hoagland, contra.

DEAN, J.

Plaintiff began this action in Lincoln county to recover on a mechanic's lien for building material furnished to A. F. Klaas, who contracted with defendant Baskins to erect a building for him. Plaintiff recovered a judgment for $636, from which defendant Baskins appealed.

The action was brought under sections 3823, 3824, Rev. St. 1913. So much of section 3823 as applies to the present case reads: "Any person who shall perform any labor or furnish any material * * * for the erection * * * of any house, * * * by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, * * * and the lot of land upon which the same shall stand." The section following, namely, section 3824, provides generally that to perfect such lien a sworn statement must be filed by the claimant in the office of the register of deeds of the county where the land is situated, within sixty days after the labor is performed or the material is furnished, setting forth the amount of the labor performed or material furnished as the case may be. This section also provides that the subcontractor shall have a lien upon the "lot or lots and the improvements thereon from the same time and in the same manner as such original contractor; and the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days hereinbefore specified."

The language last cited can scarcely be construed to mean that, unless it can be shown that the owner is indebted to the contractor, the subcontractor cannot "have a lien to secure the payment" of his claim either for

labor or material. To so construe the act would be to prepare the way for a cunning and unscrupulous owner and an equally unprincipled contractor to so contrive together as to defeat the valid claims of those whom the statute was enacted to protect. This language from the act, "and the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days hereinbefore specified," clearly contemplates that the owner shall be held to the limit of time specified in the act for the value of the labor and material that is furnished to the contractor and that is appropriated and used by such contractor in the repair or erection of the owner's building.

In his brief defendant argues: "That the subcontractor, laborer, and materialman are limited in the recovery on their liens to the orginal contract price where all the money arising from the contract between the owner and the contractor is applied upon the payment of the liens. Subcontractors, laborers, and materialmen are bound to take notice of the original contract as existing between the owner and original contractor."

The sections of the law under consideration should not be given the construction insisted upon by defendant. In support of his contention he cites *Frost v. Falgetter*, 52 Neb. 692, but that case upon analysis does not seem to find support in the statute. It was there held: "Where a contractor agrees in writing with the owner of real estate to furnish the labor and material and erect thereon a building, and in payment for such services to accept a conveyance from such owner of certain real estate described in said contract, such contractor is not entitled to a lien on the real estate on which he erects the improvement, in the absence of fraud or a failure of the owner to make the conveyance promised. In such case a subcontractor who has furnished labor or material to the contractor for such improvement cannot assert a lien against the owner's real estate." In the body of the opinion it is said: "This statute contemplates a contract between

the owner of real estate and a contractor in and by which the owner shall pay the contractor money for erecting an improvement upon the real estate; * * * the right of the subcontractor to a lien rests, then, (1) upon the original contractor's money indebtedness to him, and (2) upon the owner's money indebtedness to the contractor, and these two things must exist or the subcontractor has no lien."

We do not find any language in the mechanics' lien law that will support the construction that is placed upon the act in the *Frost* case. In that case the learned commissioner based the decision for the most part on the cases of *Dore v. Sellers,* 27 Cal. 588, and *Bayard v. Mc Graw,* 1 Ill. App. 134. But neither the California nor the Illinois citation seems to be in point because the statutes there construed, in express terms, make a subcontractor's lien to depend upon the contract between the owner and the contractor, each of the statutes providing in substance that liens of subcontractors could not exceed in amount the contract price agreed upon between the owner and the contractor. The Nebraska statute contains no such restriction, and it follows that the California and Illinois cases are not in point.

It seems clear to us that the subcontractor's right to the lien is not made by our statute to depend upon the terms of the contract between the landowner and the contractor. If the legislature had so intended it could have so expressed itself in clear and unmistakable language. We will not read into the act a meaning that is not fairly supported by its language. Our decision in the present case is in harmony with our former decisions. *Foster v. Dohle,* 17 Neb. 631; *Colpetzer v. Trinity Church,* 24 Neb. 113; *Drexel v. Richards,* 48 Neb. 322; *Way v. Cameron,* 94 Neb. 708. It is the opinion of a majority of the court that the case of *Frost v. Falgetter,* 52 Neb. 692, should be overruled as not being in accord with the apparent intent of the statute. Defendant cites *Campbell v. Kim-*

ball, 87 Neb. 309, but that case does not seem to be fairly in point.

Indiana has a statute similar to ours, and its constitutionality has been questioned on two grounds, namely, that it impairs the obligation of the contract between the owner and the contractor, and that it deprives persons of their property without due process of law by permitting subcontractors who are strangers to the contract to subject the owner's property to the payment of their claims. In *Barrett v. Millikan,* 156 Ind. 510, it was held that the act was not unconstitutional in the respects noted, for the reason that the owner enters into the contract with full knowledge of all of the statutory obligations imposed upon him, and thereby he binds his property by his own voluntary act. To the same effect was the earlier case of *Smith v. Newbaur,* 144 Ind. 95.

On motion the district court struck from defendant's answer certain allegations respecting the amount paid by him to the original contractor on his contract, and the amounts paid to other mechanics and laborers to complete the building in accordance with the contract that he entered into with the orginal contractor. In view of our decision, error can not be predicated upon this ruling by the district court. The defendant charges that the plaintiff's lien was not filed within the time contemplated by the statute, but this assignment is not sustained by the evidence.

Finding no reversible error, the judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissents.

HAMER, J., not sitting.

EDWARD FITZGERALD ET AL., APPELLANTS, V. JOHN P. SATTLER, MAYOR, ET AL., APPELLEES.

FILED JULY 8, 1918. No. 20276.

1. **Municipal Corporations:** CREATION OF PAVING DISTRICT: PETITION. A city of the second class having more than 1,000 and less than 5,000 inhabitants has authority by a vote of three-fourths of the members of the council, under section 5110, Rev. St. 1913, to create a paving district and levy special assessments in the manner pointed out by statute to pay the expense of the paving, without a petition of the resident owners of the property subject to assessment.

2. ———: IMPLIED POWERS. Incidental powers that are necessary to make effective the object of a legislative act are impliedly granted.

3. ———: IMPROVEMENTS: POWER OF COUNCIL: VALIDITY OF STATUTE. Section 5110, Rev. St. 1913, in providing that, "unless three-fifths of the resident owners of the property subject to the assessment for such improvements petition the council or trustees to make the same, such improvements shall not be made until three-fourths of all the members of such council or board of trustees shall by vote assent to the making of same," is not therefore violative of section 6, art. IX, of the Constitution.

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

A. L. Tidd and *D. O. Dwyer,* for appellants.

J. E. Douglass and *C. A. Rawls, contra.*

DEAN, J.

This suit was begun in Cass county against the mayor and city council of Plattsmouth to enjoin the levy of a special assessment of $17,862.70 against the property of 24 plaintiffs situate in paving district No. 12. From a dismissal of the action, except as to plaintiff Alfred W. White, in whose favor the injunction was made perpetual, and to which the city did not except, all other plaintiffs have appealed.

Plattsmouth is a city of the second class having more than 1,000 and less than 5,000 inhabitants. The paving district was created by an ordinance that was adopted by all the members of the city council at a regular meeting held on April 24, 1916, under sections 5080-5194, Rev. St. 1913. Some amendments were added in 1915 that have no bearing on this case. On May 22, 1916, almost a month after the passage of the ordinance in question, a remonstrance was filed by a majority of the owners protesting against the levy on the ground that the "council were without authority to create said paving district and assess the expense of paving to the property." Plaintiffs argue that, because no petition was filed with the council by the plaintiffs and interested property owners asking for the creation of the district, the city is therefore without authority to levy a special assessment to pay for the paving, and cite as authority *Orr v. City of Omaha,* 2 Neb. (Unof.) 771, a case that is not in point because the statute there construed had to do with a statute that applied to the government of cities of the metropolitan class, and that did not have this provision that we find in section 5110, Rev. St. 1913, namely: "But unless three-fifths of the resident owners of the property subject to the assessment for such improvements petition the council or trustees to make the same, such improvements shall not be made until three-fourths of all the members of such council or board of trustees shall by vote assent to the making of same."

The power of a council of a city in the Plattsmouth class to create a paving district without a petition of property owners therefor, and to levy a special assessment to pay the expense of paving in the manner pointed out in section 5110, Rev. St., 1913, has been in effect ever since 1879, and, though the act has been the subject of amendment, city councils in that class have never been deprived by the legislature of the right so conferred by that body, nor has this court ever held

that the legislature under section 6, art. IX, of the Constitution, was without authority to confer this power of taxation on such city council. The principle of tax levy herein discussed having been recognized by the legislature for almost 40 years is an indication that the act in question is believed by that body to be in harmony with the fundamental law. The authority of the legislature in this respect is approved in *Hoopes v. City of Omaha,* 99 Neb. 460, 464, wherein it is said: "The legislature might have authorized the making of improvements by the city council without any petition." But it will be noted that in the *Hoopes* case the court had under consideration section 4287, Rev. St. 1913, a statute that applies only to cities of the metropolitan class, and that expressly provides that certain improvements may be made "only upon petition of the record owners of a majority of the frontage of taxable property in such district." The form of taxation assailed by plaintiffs has been recognized in other jurisdictions under similar grants of power. *Londoner v. City and County of Denver,* 210 U. S. 373; *Beecher v. City of Detroit,* 92 Mich. 268.

It is fundamental that a municipal corporation is without power to levy a special assessment for public improvements unless authority is expressly conferred by statute, in which case the statute must be strictly followed. That the incidental powers necessary to make effective the object of a legislative act are impliedly granted is elementary.

Plaintiffs argue that the levy is in excess of any benefits to the property. On this point the evidence conflicts, but there is sufficient to support the judgment. After an examination of the evidence, we have arrived at the same conclusion that was reached by the trial court, and therefore the judgment will not be disturbed.

It is contended by plaintiffs that they have not had their day in court, but in this they are not supported by the record. The notice that the city council would

sit as a board of equalization to make the levy was regularly published in the manner pointed out in section 5113, Rev. St. 1913, but plaintiffs did not appear. Had they appeared before the council, the right of review would have remained in case of an adverse ruling. In view of the record, plaintiffs are not in position to complain in the respect noted. Every jurisdictional requirement in the proceedings was complied with by the council, and throughout the vote of that body on every such requirement was unanimous, with the exception of the vote of one member on one or more minor features.

Plaintiffs also contend that some of the property was not "abutting on or adjacent to" the street that was paved. On the authority of *Hoopes v. City of Omaha*, 99 Neb. 460, this contention cannot be upheld.

Finding no reversible error, the judgment of the trial court is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

HENRY G. GUYLE v. STATE OF NEBRASKA.

FILED JULY 25, 1918. No. 20414.

Criminal Law: ELECTION. Where on a trial for incest, charged, not with a *continuando*, but as a single act upon a date specified, evidence is introduced of acts of sexual intercourse between the prosecutrix and the defendant, distinct offenses from the one charged in the information, it was the duty of the court, upon motion of the defendant, made when the state rested its case, to require the state to elect upon which one of the several acts it intended to rely for a conviction.

ERROR to the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Charles W. Beal and *H. L. Wilson*, for plaintiff in error.

Willis E. Reed, Attorney General, and *John L. Cutright, contra.*

CORNISH, J.

Defendant (plaintiff in error), charged with the crime of incest with his daughter in their home at Broken Bow, "on or about the 26th day of August, A. D. 1917," was found guilty. At the conclusion of the state's evidence defendant's motion to require the state to elect upon which specific act of intercourse it would rely for conviction (the information charging but one act, and the testimony tending to prove several) was overruled. This ruling and the failure of the court to instruct the jury that the testimony, tending to prove other and prior acts of intercourse between defendant and the prosecuting witness, was for the purpose only of showing the intent and disposition of defendant toward her, are assigned as error.

Under our Criminal Code, when, as here, time is not of the essence of the offense, the prosecution is not limited in its proof to the time alleged in the information. It is also true that other incestuous acts may be shown as bearing upon the probabilities of the one charged. A single or continuous incestuous relationship may also be shown without direct proof of the specific act of intercourse by proof of circumstances from which the fact of cohabitation is the only reasonable inference.

The question is: There being evidence of other acts constituting the offense, and the state not being concluded by the date named in the information, when, if ever, should it be required to elect upon what particular act it relies for conviction? Somewhat depends upon the nature of the evidence and of the charge made, whether a single act or a continuing one. The right may rest more or less in the discretion of the trial judge. No election would be required where, from the nature of the evidence, none could be made. On the other hand, the accused must not be tried for one offense

and convicted of another. He must not be subject to undue hardships in preparing for trial or in submitting evidence to prove his innocence. It is not fair to him to compel him to be prepared to meet the evidence bearing upon 50 separate acts when he can only be convicted of one.

In the case in hand, the defendant was accused of but one act of incestuous intercourse occurring on or about August 26, 1917. From a review of the record, we are of opinion that the jury may well have been in doubt as to a crime committed either on or about that date, and that it was prejudicial error for the court to overrule the defendant's motion to require the state to elect upon which date it relied for conviction.

Where the state, to prove the defendant guilty of a particular crime charged, offers evidence of other crimes committed which is admitted as going to show guilty knowledge, intent, disposition, a plan or scheme, corroborative in its nature of the main evidence of the crime charged, the court, at least when requested, should make clear to the jury the purpose for which the evidence of other offenses is admitted, in order to prevent the jury from being misled as to the real issue. It appears that no request was made.

Complaint is made of instruction No. 12, telling the jury that improper sexual relations of the prosecuting witness with men other than her father would not excuse him if he were guilty of the improper sexual relations charged, because the instruction did not go farther and inform the jury as to the purpose and bearing of such testimony in the case. No instruction covering the point made was requested. It is doubtful if the instruction as given would be misleading to an intelligent jury. Of course, the defendant is entitled to an instruction, if he requests it, informing the jury that the evidence of unchastity should be considered by them as it may bear upon the question whether or not

the prosecuting witness contracted gonorrhœa from her father. *State v. Lawrence,* 19 Neb. 307; *Yeoman v. State,* 21 Neb. 171; *State v. Hurd,* 101 Ia. 391; *David v. People,* 204 Ill. 479; *State v. Higgins,* 121 Ia. 19; *People v. Patterson,* 102 Cal. 239; *State v. Browning,* 94 Kan. 637; *Smith v. Commonwealth,* 109 Ky. 685; *Montour v. State,* 11 Okla. Cr. Rep. 376.

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

REVERSED.

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

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1918.

NELLY MASTERS, APPELLEE, v. MODERN WOODMEN OF AMERICA, APPELLANT.

FILED OCTOBER 5, 1918. No. 20101.

1. **Death:** PRESUMPTION. "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." *Holdrege v. Livingston*, 79 Neb. 238.

2. ———: ———. "In such case the presumption is that the absentee died during the first seven years of his unexplained absence. There is no presumption that his death occurred at any particular time during said period." *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71.

3. ———: ———: INSURANCE. "In such case an insurer cannot avoid its contract of insurance on the life of such absentee because of an alleged violation by the insured of a by-law adopted by the insurer during such unexplained absence, without evidence that the insured was living when the by-law was adopted." *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71.

4. **Insurance:** ACTION: ATTORNEY'S FEES. Section 3212, Rev. St. 1913, is so far controlled by section 3299, Rev. St. 1913, as to preclude the court from taxing, as part of the costs, an attorney fee in a suit based upon a certificate of membership in a fraternal beneficiary association.

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

Truman Plantz, Thomas S. Allen, Lambe & Butler and *Nelson C. Pratt,* for appellant.

John Stevens, contra.

MORRISSEY, C. J.

Defendant appeals from a judgment entered against it, based on a fraternal benefit certificate issued upon the life of one Masters.

Plaintiff, the wife and beneficiary of the insured, offered no direct proof of death, but relied upon the presumption raised by more than seven years' continued and unexplained absence. Masters disappeared in 1907, and this action was instituted in 1916. At the time of his disappearance, Masters had a life expectancy of 34.6 years.

Defendant contended that the presumption of death is unavailing to plaintiff because of the following by-law adopted by the society in 1908: "Section 66. The disappearance or long-continued absence of any member unheard of shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the society until the full term of the the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired."

The trial court refused to direct a verdict for defendant, and this constitutes one of the principal errors assigned. The by-law was adopted after Masters' disappearance. It is not binding on the plaintiff. *Olson v. Modern Woodmen of America,*— 164 N. W. (Ia.) 346; *McLaughlin v. Sovereign Camp, W. O. W.,* 97 Neb. 71.

It is further urged, however, that the evidence in the present case overcame any legal presumption of death. One of defendant's witnesses testified that he saw Masters alive in the state of Washington in 1909, but his identification was not positive and unequivocal, and,

on a special interrogatory submitted at the request of defendant, the jury answered that they did not believe the facts thus sought to be proved. Again, with regard to defendant's attempt to account for Masters' disappearance by showing that before his disappearance he mortgaged property not belonging to him and thus rendered himself liable to criminal prosecution, the jury returned a special finding that they did not believe that a fraudulent mortgage had been given. The jury were the sole judges of the credit to be given the testimony offered, and, in view of the special findings made, there is nothing in the record to rebut the presumption of Masters' death. Under this view there is no error either in the instructions given or refused.

Defendant's motion for a new trial on the ground of newly discovered evidence also was properly overruled. The supporting affidavits by which it was sought to be shown that Masters had been seen alive since his disappearance by witnesses other than the one who had testified at the trial, were not such as warranted a setting aside of the verdict. The statements of one of the affiants were purely hearsay, while the date fixed in the other affidavit was prior to the adoption of the by-law in question and more than seven years before the bringing of the present suit. The showing made was not such, therefore, as could have overcome the presumption of death.

The final assignment of error made is the taxing of a $250 attorney fee against defendant as part of the costs of suit, under section 3212, Rev. St. 1913. This section deals generally with life, accident and indemnity insurance. Section 3299, Rev. St. 1913, previously enacted, deals directly with such associations as defendant. It provides: "Such societies * * * shall be exempt from the provisions of the statutes of this state relating to life insurance companies except as hereinafter provided; and no law hereafter passed shall apply to them unless they be expressly designated

therein." Section 3212 does not expressly designate fraternal beneficiary associations, and it follows that the attorney fee was improperly taxed.

The judgment is modified by striking therefrom the item allowed for attorney's fees, and, as thus modified, it is

AFFIRMED.

LETTON, J., not sitting.

SENA OSTERGARD, APPELLEE, V. CHRIS NORKER ET AL: EDGAR B. HARVEY, APPELLANT.

FILED OCTOBER 5, 1918. No. 20092.

Vendor and Purchaser: BONA FIDE PURCHASER: NOTICE. The general rule is that the open, notorious possession of real property by a tenant is notice to the world of the landlord's title.

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

Willis E. Reed, for appellant.

M. B. Foster and *W. J. Mossholder, contra.*

CORNISH, J.

Plaintiff was induced by fraud and without consideration to make her deed of the land in controversy to the defendant Norker. Soon afterwards the defendant Norker deeded the land to defendant Harvey. At the time of these conveyances the plaintiff was in actual and visible possession of the premises by her tenant. She never surrendered the possession, nor consented that possession be given to either of the defendants. Harvey, at the time of his purchase, made no inquiry of the tenant or plaintiff respecting plaintiff's rights. This action seeks the cancelation of these conveyances. The trial court found that defendant Harvey purchased without knowledge of the fraud perpetrated upon the plaintiff; but further found that he was not a *bona fide*

purchaser, for the reason that he had constructive notice of plaintiff's rights and interest in the land, and entered judgment and decree accordingly. Defendant Harvey appeals.

The inquiry is whether the possession of land under such circumstances is notice of the title of the possessor alone, or whether the possession of the tenant is the possession of the landlord and notice of the former is notice of the latter. In a majority of the American cases the latter rule has been adopted (see note to *Garbutt & Donovan v. Mayo,* 128 Ga. 269, 13 L. R. A. n. s. 58, 101, 102), and has been recognized by this court (*Conlee v. McDowell,* 15 Neb. 184; *Smith v. Myers,* 56 Neb. 503). It is an equitable rule that possession of property is notice to the world of whatever rights the possessor has in it. The fact that the possession is by a tenant under circumstances such as in this case should make no difference. If Harvey had inquired of the tenant, he would have learned that he held as lessee of another. Exercising reasonable prudence, he would not have stopped his inquiry at that point, but would have inquired of the landlord (Mrs. Ostergard) and would have learned, as he afterwards did learn, that she was unwilling to surrender possession and claimed ownership of the land.

Defendant Harvey in his brief raises a question of estoppel, which was neither pleaded nor litigated in the trial court and cannot be considered here.

We are of opinion that the judgment and decree of the trial court should be

AFFIRMED.

SEDGWICK, J., not sitting.

H. W. HORTON ET AL., APPELLANTS, v. TABITHA HOME, APPELLEE.

FILED OCTOBER 5, 1918. No. 20136.

1. **Appeal:** LAW OF THE CASE. At a former hearing of this case, reported in 95 Neb. 491, it was held that the Tabitha Home, a charitable institution, did not and, under its charter, could not enter into a valid contract for the payment of the claims of materialmen, the material having been furnished for the purpose of constructing a hospital. *Held*, that this previous holding constituted the law of the case to be adhered to, the evidence adduced remaining substantially the same.

2. **Charitable Institutions:** IMPROVEMENTS: LIABILITY. Where a charitable institution has received substantial benefits from improvements made upon its property, but is not liable for the cost thereof because the main object of such improvements was not within the powers and purposes of the institution under its charter, and the institution, because of the substantial benefits which it has received from the improvements, makes provision for the raising of a fund for the payment of the value to it of such benefits received, the court will order the application of any such fund so raised to the payment of the cost of any benefits so received.

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

Fawcett & Mockett and *Strode & Beghtol,* for appellants.

Boehmer & Boehmer, contra.

CORNISH, J.

This suit was originally commenced by the plaintiff and cross-petitioners who furnished material for improvements made on the main building of Tabitha Home, a charitable institution, to foreclose their mechanics' liens. The trial court allowed the liens. The defendant Tabitha Home appealed. Our opinion is reported in 95 Neb. 491. In reversing the case we held that the improvements were made for the construction

of a hospital at the home; that the home is a public charity organized "to furnish a home for the aged and infirm, and a home for indigent orphans to be given a common school education to fit them to become nurses and attendants on orphan homes, and similar institutions," and under its charter would not be empowered to expend its funds or property for the purpose of maintaining a hospital; and, further, that it did not appear from the record that the trustees of the institution had, as such, contracted to make it liable for the improvements. We further held that, no application having been made to the district court for authority to so expend the funds of the institution, a mechanics' lien could in no event attach to the real estate of the institution. On a retrial of the case, the trial court found against the materialmen. They have appealed the case, contending that they are entitled to judgment against the institution for the value of material furnished.

We are of opinion that the question of the right of the materialmen to a judgment against the defendant for the value of the material furnished was passed upon in our former opinion and judgment, which decision has become the law of the case. We are of opinion, too, that we were right in holding that the trustees of the corporation would not be empowered to contract for the expenditure of its funds to build a hospital, and that persons dealing with a public charity are bound to know the extent of its powers.

It is insisted, however, that these materialmen all supposed that they were dealing with the home in improving its main building, which was at the time and has since been used by its inmates; that the improvements made and material furnished were more or less for the benefit of the home. We are of opinion that the record does show that these contentions are true. It is further insisted that the officers have, as they promised to do, raised a fund for the satisfaction of the claims of these

materialmen. The evidence does not show the amount of it, if any has been raised. The materialmen have at all times asked for such equitable relief as good conscience may require. It would appear from the record that, the benefits of these improvements having, in part at least, gone to the home, it ought to make its best endeavor to pay for such improvements as it has had and as were necessary to the home.

We have concluded to remand this case to the district court, with leave to the parties to amend their pleadings so that the exact value of improvements beneficial and necessary to the home may be determined, and, if it is further found that the home has made provision for or has raised a fund donated for the purpose of paying the value of such improvements, then an order should be made requiring the application of any fund so raised *pro rata* to the payment of the claims of these materialmen, so far as the court may find the improvements made were necessary and beneficial to the home for the purposes for which it was established under the law.

REVERSED AND REMANDED.

ROSE, J., not sitting.

LETTON, J., dissenting.

Upon the former appeal of this case, I dissented because "unable to agree with the conclusions of fact announced in the opinion, and also with the legal principles stated as applying to the facts in evidence in the case." 95 Neb. 491.

I regret that I am again compelled to dissent. The facts are that certain individuals, most of them members of the Lutheran church, adopted articles of incorporation, which recited that the objects and business of the corporation are: "(1) To erect and maintain an orphan home for the benefit of the orphans of our land. (2) To erect and maintain a place where the sick and needy and feeble may be cared for."

Afterwards the trustees determined, upon the solicitation of a number of physicians, that part of the premises might be remodeled and used as a hospital. The authorized officials purchased material and supplies from the several plaintiffs for that purpose, and for the purpose of making necessary repairs upon the building. For some reason the hospital was not successful. When it was attempted to foreclose mechanics' and materialmen's liens for the material supplied, a majority of this court held that no such lien could be asserted against a charitable institution. The great weight of authority is to the contrary. See annotation to the opinion in this case on page 1145, Ann. Cas. 1915D, and in 51 L. R. A. n. s. 161.

The case was remanded to the district court, where it was sought unsuccessfully to recover a judgment for the contract price. The majority opinion denies the right to such a judgment, but sends the case back to ascertain the amount of a somewhat uncertain, doubtful, or mythical fund, and to apply it *pro rata* on the claims. I am unable to agree with this conclusion. It has always been my opinion that the materialmen were entitled to the liens they asserted. Most certainly, if not entitled to liens, they should be entitled to a judgment against the corporation for the price of the articles supplied. To hold otherwise is to permit a corporation organized for charitable purposes to use charity as a sword, and not as a shield, and to obtain property of others without paying for it, which is repugnant to every legal and moral principle. Charity is said to cover a multitude of sins. In this case it is used to cover the wrongful deprivation of these merchants of their property without compensation. If it would be a diversion of charitable funds to pay for the goods, it is certainly a diversion of them to indulge in the cost of litigation to defeat just and meritorious claims.

PHILIP C. FUNK ET AL., APPELLANTS, V. JOHN STEVENS ET AL., APPELLEES.

FILED OCTOBER 5, 1918. No. 20328.

1. **Insurance:** INCREASE IN RATES. A member of a mutual benefit society cannot complain of an increase of rates necessary to enable the society to comply with its contract.

2. ———: MUTUAL ASSOCIATIONS: OBLIGATIONS OF MEMBERS. The mutual promise of every member of such society is to pay the certificate of every other member. There is no vested right in any provision of the contract, either express or implied, that is not subject to and controlled by the duty of the member to pay the cost of his own insurance, for, under no construction of a mutual contract, can he demand more than he is willing to give.

3. ———: ———: BY-LAWS. The power to enact by-laws is an inherent and continuous one. The duly authorized representatives of the members are alone vested with the power of determining when a change is demanded, and the courts will interfere only when there is an abuse of discretion.

4. ———: ———: CHANGE IN ASSESSMENTS. A change in assessments. so as to make them conform to the cost of insurance according to age, made in conformity to the law of experience in such matters, is a reasonable change. It is not the fixing of an arbitrary age or class distinction.

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

J. C. McReynolds, J. L. McPheely, W. P. Hall and *C. W. Meeker,* for appellants.

John Stevens, Edward J. Lambe and *Edward F. Leary, contra.*

CORNISH, J.

The Ancient Order of United Workmen, a fraternal life insurance company, originally fixed assessments at $1 each on death of a member, regardless of age. The plan in this particular was improvidential, unscientific. The average age of members increases. Twice in its

history during the plaintiffs' membership, and before the change in rates of assessment, which is the subject of this controversy, it became apparent to the membership that the organization could not survive under the old rates. Accordingly, changes in rates of assessment were made more in consonance with the necessities of the case, making the rate correspond more nearly to the risk carried as affected by the member's age, which changes were acquiesced in by the members, including the plaintiffs.

But still it was found that a sufficient increase in rates, adjusting them according to age, had not been made if the obligations of the order were to be kept. The directors rightfully called a session of the grand lodge, which amended the law fixing assessments as the law now reads. Afterwards, at the regular meeting of the grand lodge, a majority voted to repeal the previous law as amended. Later the body voted to reconsider this action. A motion to table was lost and a motion to finally adjourn carried. This situation left the law as adopted at the earlier meeting in force, whether or not its repeal required a two-thirds vote, unless it is invalid for other reasons.

The objection made to it by plaintiffs is that it fixes the assessment on an aged member so high as to make it unprofitable, and might, in instances, make it financially impossible for him to remain a member. If past 60 years old, he has to pay $11.20 a month on a $2,000 policy. The increase on older members was, in the earlier increases above mentioned, in greater proportion than that on younger members. Is this permissible? The laws of the order have always fixed the rate and contained a provision for their amendment. The member's certificate left the order's obligation subject to these amendments. By acquiescing in the previous amendments, the plaintiffs agreed that the contract permitted a burden increasing with age.

Courts will not undertake to direct or control the internal policy of such societies. It is only when there is an abuse of their discretionary powers—an unreasonable and arbitrary invasion of private rights—that the courts interfere.

Now, if there is any obligation of the society more binding upon it or its members than another, it is the promise made in the statement of the objects of the order to pay each member's beneficiary $2,000 upon his death. In morals and in law that promise must, if possible, be kept. The member must not forget that he is an insurer as well as an insured. When the order is faced by inevitable financial ruin for want of funds impossible to be raised under the existing rule of assessment, no member can disassociate his certificate or contract and insist that the object of the fraternity is to pay him in full without reference to his fellow members. To increase the number of assessments, or, which is the same thing, to increase assessments proportionate to amount being paid, does not at all reach the difficulty. The original assessments were unscientific and, in fact, inequitable. The members did not appreciate how the average age and cost of insurance would increase, and the infusion of new blood would not prevent it. In its appeal to the young man, even fraternal objects must be just as well as generous. The scheme contemplated continuous additions as old members died. If ten men mutually promise to pay each other $10,000 at death, the $10,000 must be gathered from the promisors if all are to be paid.

Under such circumstances, in order to keep the pact to prevent the deficit and meet the obligation, what proposition could be more equitable than this: Henceforth each member shall pay according to the cost of his insurance to the society and the value of it to him? This is the proportion which should not be violated—each pay in proportion to what he is

getting. This is what the National Fraternal Congress rates, based upon actual experience, and adopted by the society, attempts to accomplish. Shall we say that the society ever undertook to insure its members at less than cost? The plaintiff Hallgren joined when 39 years old and has been a member for 25 years. He has had his insurance for 82 cents per month per thousand. This has not been a bad bargain and is not much, if any, above cost of insurance. The same is true of the other plaintiff. Can they complain, even though it is true, that when they joined they paid slightly more than cost? If advancing age increases cost of insurance, justice requires this fact to be considered.

But, say the plaintiffs, if this is so, then we and others have been grossly deceived. Such extreme rates were never contemplated in the early days of the order. The answer is that this may be true. It was a common blunder. The plaintiffs were deceivers as well as deceived, and, so long as the rate of increase is necessary and reasonable and proportionate, the young and the old members contributing according to the risk assumed in carrying each, without arbitrary discrimination, they ought not to make this fact an excuse for taking an attitude which must bring ruin to the order and prevent its meeting its obligations.

If following the rule that each member must pay from year to year according to his age and risk results (as it probably will) in making fraternal insurance less desirable as old-age insurance, it leaves it what has always been its chief attraction—the more desirable as young men's insurance. The young man, possibly with wife and little children, the calamity of whose death is greatest of all, will still be able to get his insurance at cost, or nearly so, during the youthful period of his life when the cost is trifling compared to what it is in old age. This view, we believe, is in accordance with the

prevailing opinion of the courts. *Farmers Mutual Ins. Co. v. Kinney,* 64 Neb. 808; *Fisher v. Donovan,* 57 Neb. 361; *Thomas v. Knights of Maccabees of the World,* 85 Wash. 665, L. R. A. 1916A, 750, and note; *Supreme Lodge, K. P., v. Knight,* 117 Ind. 489; *Supreme Lodge, K. H. v. Bieler,* 58 Ind. App. 550; *Reynolds v. Supreme Council, Royal Arcanum,* 192 Mass. 150; *Uhl v. Life & Annuity Ass'n,* 97 Kan. 422; *Clarkson v. Supreme Lodge, K. P.,* 99 S. Car. 134; *Strauss v. Mutual Reserve Fund Life Ass'n,* 126 N. Car. 971, 83 Am St. Rep. 699, and note.

The plaintiffs rely somewhat upon the decisions in *Tusant v. Grand Lodge, A. O. U. W.,* 163 N. W. (Ia.) 690, and *Wagner v. Supreme Lodge, Knights of Pythias,* 116 N. E. (Ind. App.) 91. In the *Tusant* case the older members were, as that court held, arbitrarily placed in a distinct class and denied the benefit of the insurance carried by other members. Here also the order undertook to reduce the amount of insurance that should be paid to the beneficiary of the owner, so that, for instance, at the age of 70 years the beneficiary would receive only $366 on a $1,000 certificate. The court held that the member had a vested right in the amount of his certificate. In the *Wagner* case the organization undertook to make the aged members pay an increased amount for the cost and expenses of investigating and adjusting death claims, so that, while at the age of 21 years this charge would be only $3.03, at the age of 82 it was $18.17. This, it would seem, was an altogether arbitrary discrimination against the aged member. In the instant case no such attempt is made to classify or penalize according to age.

AFFIRMED.

MORRISSEY, C. J., not sitting.

SEDGWICK, J., dissenting.

That "a member of a mutual benefit society cannot complain of an increase of rates necessary to enable the

society to comply with its contract" is a little too strong. This paragraph of the syllabus is the key to the whole opinion. No burden put upon a member or a class of members is too great or too inequitable if it is "necessary to enable the society to comply with its contract." If, as stated in the syllabus, "the mutual promise of every member of such society is to pay the certificate of every other member," and in the opinion, "it became apparent to the membership that the organization could not survive under the old rates," they should have some provision in their agreement by which each member should be bound to do his share to make up the deficiency. This they had. Their by-laws provided: "Whenever the amount in the beneficiary fund uninvested, after providing for all reported death losses, shall be less than $4,000, and the finance committee shall by resolution declare it expedient and advisable to levy an additional assessment upon the members, it shall be the duty of the grand recorder to call an additional or second assessment for the next month, upon all of the members, notice of which shall be given as provided in section 159, and shall be paid by the members as in these laws provided." Section 158, Laws of the Grand Lodge of A. O. U. W. 1915. This they could have done, and by amending their rates as to new members they would have avoided all danger of insolvency. But, acting upon the principle announced in the syllabus of the present opinion, they concluded that no member could complain of any "increase of rates necessary to enable the society to comply with its contract." They could by a vote say to any member: "You put up enough to enable us to comply with our contracts or we will cancel your policy." They changed their mutual agreement so that a certain class of their members should pay a larger proportion of this deficiency than their agreement provided. And they were very generous in not putting this burden on one

or two members. They put it upon all those over 60 years of age. This they could do because the necessary two-thirds to so act were much under that age and would not be burdened, but directly benefited, by their action.

The cases cited in the opinion will not justify such a rule. The true rule is that the rates should be arranged so that new members of whatever age should pay in proportion to the benefits received by them and sufficient to enable a compliance with their mutual agreements as to such new members. But existing members should all pay their agreed proportionate share to make good any deficiency arising from their mutual mistake. They should have levied additional assessments on all existing members in proportions specified in their contracts to enable them to carry out their mutual promises. This above-quoted provision of their laws required that, as well as the ordinary law of contracts and natural justice. The power to "adopt by-laws for the regulation of the business of the grand lodge, * * * not in conflict with the provisions of these laws," comes very far short of enabling them to change the contract existing between themselves as to bearing the common burdens which they mutually assumed. To put a larger and disproportionate portion of the common burden which they had mutually contracted upon the minority because the majority had a direct pecuniary interest in so doing was "in conflict with the provisions of these laws," which provided for levying additional assessments on all of the existing membership to make up the deficiency.

The decisions of respectable courts generally are that the power to make laws for the government of the society does not include power to change the contract right among the existing members.

URIAH H. MALICK v. STATE OF NEBRASKA.

FILED OCTOBER 5, 1918. No. 20564.

1. **Criminal Law:** INSTRUCTION: HARMLESS ERROR. An instruction authorizing the jury to convict the defendant for a sale of intoxicants made at any time within eighteen months prior to the filing of the information, when the law under which the prosecution was maintained had been in force only a little more than six months prior to that time, was improper; but, as the only evidence given against the defendant was of a sale made a little more than a month after the law was in force, the error was without prejudice and immaterial.
2. **Intoxicating Liquors:** QUESTION FOR JURY. Under the evidence, the question as to whether the liquor described in the information was intoxicating was a question for the jury.

ERROR to the district court for Franklin county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

George W. Prather, for plaintiff in error.

Willis E. Reed, Attorney General, and *Orville L. Jones, contra.*

DEAN, J.

In the district court for Franklin county Uriah H. Malick was convicted under chapter 187, Laws 1917, of selling "intoxicating liquors, to wit, Hostetter's Bitters" to Carl Dunn, on or about June 16, 1917. From a fine of $100 and costs, defendant prosecutes error to this court.

Defendant says the verdict is not supported by the evidence, and that the court erred in giving instructions numbered 3 and 5. Instruction 5 informs the jury that to convict defendant it must appear: "That he sold Hostetter's Bitters to Carl Dunn; * * * that said Hostetter's Bitters was intoxicating; (3) that it was sold and used as a beverage, or that it was capable or fit for use as a beverage; (4) that said offense was

committed in Franklin county, Nebraska, at any time within 18 months prior to the filing of the information in this case, which information was filed on the 12th day of November, 1917." He points out that the act became effective May 1, 1917, and that the instruction is misleading because it informed the jury that defendant could be lawfully convicted for selling to Dunn before the act became effective, namely, at "any time within 18 months prior to * * * the 12th day of November 1917."

Elsewhere in his brief defendant says: "The only witness that testified or attempted to testify to any sale of Hostetter's Bitters, or any other kind of liquor, to Carl Dunn or any other person, by the plaintiff in error was Carl Dunn." On this point Dunn testified that he bought a bottle of the bitters from the defendant on June 16, 1917, the date charged in the information, and that he drank it on the same day. If that is true, the sale was a little more than a month after the prohibitory law (Laws 1917, ch. 187) became operative, namely, May 1, 1917, so that if Dunn is to be believed on that point, and evidently the jury believed him, the offense, so far as the sale was concerned, was complete when Dunn made the purchase. There was also sufficient testimony to submit to the jury the question as to whether Carl Dunn drank any other liquor or was intoxicated on June 16. Dunn said he never at any other time bought Hostetter's Bitters from defendant, and defendant denied that he ever sold Hostetter's Bitters to Dunn. As to the sale, the jury apparently accepted Dunn's testimony and rejected that of the defendant. A different question would have arisen if there had been evidence to show that defendant sold the bitters to Dunn both before and after May 1. It is apparent that defendant was not convicted for selling to Dunn before the prohibitory act became effective, and therefore error cannot be pred-

icated on the giving of instruction numbered 5. From the fact that the only evidence of a sale was subsequent to the taking effect of the act, the error was without prejudice and therefore immaterial. *Jolly v. State*, 43 Neb. 857; *Monroe v. City of Lawrence*, 44 Kan. 607; *Hofheintz v. State*, 45 Tex. Cr. Rep. 117; *State v. Huff*, 76 Ia. 200.

Respecting the question whether the bitters was an intoxicant and whether it was used as a beverage, the evidence was conflicting and unsatisfactory. There was nothing to show the ingredients of which the liquor was composed except that there was some testimony to the effect that it contained 25 per cent. of alcohol, and some to show that it had no more alcohol than was sufficient to hold certain ingredients in solution. What the ingredients are does not appear. But for the purpose of the present case there is sufficient evidence to support the charge of the information and the verdict of the jury.

No reversible error appearing in the record, the judgment is

AFFIRMED.

RUDOLPH KRAUS V. STATE OF NEBRASKA.

FILED OCTOBER 5, 1918. No. 20575.

1. **Criminal Law:** HOMICIDE: INSTRUCTIONS. Where one is charged with having committed murder in the first degree, it is the duty of the court to instruct regarding all the inferior degrees of homicide to which the evidence is properly applicable, even though such instructions are not requested.

2. **Homicide:** INSTRUCTIONS: INTOXICATION. Intoxication is not an excuse for committing a crime. But when in a criminal prosecution the evidence tends to prove that the defendant was intoxicated at the time of the commission of the offense charged, even though the killing is admitted, it is the duty of the court to instruct the jury that if they believe from the evidence that de-

fendant was intoxicated, and that he was so intoxicated at the time of the shooting as to be incapable of deliberation or premeditation, or of forming a felonious intent to shoot and to kill decedent, in such case it would be their duty to return a verdict of murder in the second degree, or of manslaughter, or of not guilty.

3. **Criminal Law:** TRIAL: REMARKS BY COURT. After sustaining an objection to a question that the court propounded, the court remarked: "If the counsel for the defense objects to securing information, we want the objection sustained." *Held*, the remark was improper and was prejudicial to the rights of the accused.

4. ———: ———: APPOINTMENT OF COUNSEL. Error cannot be predicated on the refusal of the court to appoint counsel, under section 9081, Rev. St. 1913, to defend an indigent person accused of crime, when counsel who is competent to conduct such defense announces in open court that he will appear for the defendant "as a friend of the court," even though other counsel should be appointed.

5. **Counties:** INDIGENT PERSONS: LIABILITY FOR COUNSEL. In such case the counsel making such proffer to defend, and who does conduct such defense, is not entitled to receive pay from the county for the services so rendered, nor for services and expenses in this court.

ERROR to the district court for Saline county: RALPH D. BROWN, JUDGE. *Reversed.*

Bartos & Bartos, for plaintiff in error.

Willis E. Reed, Attorney General, Orville L. Jones and *Charles F. Barth, contra.*

DEAN, J.

This case was brought here on error from the district court for Saline county. Rudolph Kraus, a young man 26 years of age, was charged with feloniously shooting and killing his wife. He was convicted of murder in the first degree and sentenced to the penitentary for life. The killing was admitted. The defense was insanity superinduced by intoxication, and intoxication at the time of the killing.

The tragedy occurred on February 21, 1917, at the farmhouse of defendant, where, besides his wife, he shot and killed his only children, a daughter and a

son aged two and four years, respectively. He attempted suicide, shooting himself in the left temple and in the center of his forehead and also just below his heart. The bullet that entered his temple totally and permanently destroyed his eyesight. The bullet that entered his forehead was yet imbedded in the front part of his brain when the case was tried.

Defendant was a farmer. His assets amounted to $1,800 and his liabilities were $3,800. The day before the shooting he went to the nearby town of Daykin, and visiting a saloon there he drank some beer. While there he was told by some neighbors that the winter wheat was all killed. He said that discouraged him, and he drank some more, and also bought a gallon of beer, a bottle each of whiskey and kimmel, the latter an intoxicant, and took the entire purchase home with him, where he arrived shortly before midnight. His wife had not yet retired. He said that he consumed nearly all of the liquor, and that sometime between 4 and 6 in the morning he entered the house and shot and instantly killed his sleeping victims by shooting them through the head. Immediately thereafter he lay down between his children and attempted to take his own life. He testified that, between midnight and the time of the shooting, he wandered about the premises and heard voices telling him to destroy his family. He said: "I listen, it may be from God. * * * I not see nobody." Besides his own, there is disinterested testimony which shows that defendant was apparently fearful that himself and his entire family inherited a tubercular tendency. But it appears that there was not a trace of that malady in any member of his own nor his father's family.

He testified: "Q. Why didn't you kill yourself and let your wife and the babies live? A. Because I love mine wife and kids. * * * Because I knew according to or along side of my mother and my sisters and

my brother that tuberculosis is incurable, and because I knew that I have lots of debts, and that the wheat is gone, and I was relying on that that I would get help out of the wheat after threshing it out. I had 70 acres of wheat. And the voices kept urging me on that I should do this. Then I went into the kitchen, and I cut off the lives of my dear ones, and wanted to cut off my own life."

It was not shown that there had ever been any ill feeling between defendant and his wife. That defendant was financially embarrassed and that he had lost his wheat crop was the only motive ascribed to the accused by the state for the commission of the crime with which he was charged.

There was disinterested testimony showing that Kraus had been a hard drinker of intoxicants for many years. The proof seems to show that he drank nearly, if not quite, all the liquor that he brought from Daykin, and in oral argument here the county attorney stated that he was unable to say from the record that the defendant did not drink the liquor before the shooting. Notwithstanding the testimony respecting intoxication, the court entirely ignored that issue in the instructions, and informed the jury in instruction numbered 20: "That the defense in this case is the insanity of the defendant, and that if you acquit this defendant you must state in your verdict that you do so on the ground of insanity." In view of the record, the court erred in so restricting the inquiry of the jury. It should have been instructed on the question of intoxication as well. If the defendant was sane, but was so intoxicated at the time of the shooting, if he was intoxicated, as to be incapable of deliberation or premeditation or of forming a felonious intent to kill, that was a question of great importance.

Defendant also complains because the jury was not instructed respecting any degree of homicide save only

as to murder in the first degree. On this point in the instruction numbered 4 the court informed the jury: "The essential elements of the crime of murder in the first degree, as charged in the information, are: (1) An unlawful killing of a person; (2) that the killing was done purposely; and (3) that it was done with deliberate and premeditated malice." In view of the evidence, the court erred in omitting to instruct the jury respecting the different degrees of homicide. The rule in this country is almost universal that in a case charging first degree murder it is the duty of the court to instruct respecting all of the inferior degrees of homicide to which the evidence is properly applicable, even though such instructions are not requested. *Carleton v. State,* 43 Neb. 373; *Young v. State,* 74 Neb. 346; 13 R. C. L. 933.

The court interrogated a witness, and in sustaining an objection interposed by defendant remarked: "Owing to the objection, the question may be withdrawn on the objection of counsel for the defense. If the counsel for the defense objects to securing information, we want the objection sustained." The defendant argues earnestly that the remark was prejudicial to his rights. It seems to us that in the respect noted the court erred. If the information sought was material the objection should have been overruled. In any event the remark was out of harmony with the spirit that should prevail in the trial of a defendant for a capital offense. Such an observation would scarcely fail to cause an intelligent jury to believe that in the opinion of the court the defense was seeking to conceal material testimony, and the remark was therefore prejudicial to the accused. It is well known to those who are familiar with jury trials that jurors are usually alert to discover the attitude of the court respecting the merits of the case, and particularly in criminal actions. For this reason, among others, the court should avoid even the appear-

ance of partiality as between the parties. The court's inadvertence is evident, and the objectionable remark was unwarranted.

Defendant is penniless. All of his assets were prorated among his creditors before the trial. His counsel in the present case appeared for him at the preliminary hearing, and the usual request was made in the district court under section 9081, Rev. St. 1913, for the appointment of counsel to conduct his defense. The court refused to make any appointment for the reason that F. W. Bartos, Esquire, in open court announced that his firm would appear in the case "as a friend of the court," even though other counsel were appointed. The act providing for appointment of counsel to defend in a felony trial was enacted primarily for the benefit of an indigent defendant, to the end that his rights might be fully protected. In the present case the accused had a vigorous and able defense and his every right was safeguarded. No abuse of judicial discretion in the premises is shown, and under the circumstances error cannot be predicated on the court's refusal to appoint counsel. It has been well said that the conduct of causes is not the function of the *amicus curiæ*. *Taft v. Northern Transportation Co.*, 56 N. H. 414. We believe it proper to say that the ethics of the profession forbid that one who volunteers his services as "a friend of the court" should accept either fee or reward for services so rendered. In oral argument defendant's counsel suggested that in any event they should be repaid for the expense of printing the brief of their client in this court. But such claim cannot be allowed for the same reason.

Many other assignments of error have been called to our attention, but they do not seem to require discussion. For the errors pointed out, the judgment is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

FRED DWORAK ET AL., APPELLEES, V. GEORGE DOBSON, APPELLANT.

FILED OCTOBER 18, 1918. No. 20020.

1. **Appeal:** MOTION TO MAKE DEFINITE: REVIEW. When a defendant moves the trial court to strike out or make more definite certain specified paragraphs of a petition in equity, and such motion is sustained in part and overruled in part, and the plaintiff with leave of court thereafter files an amended petition, and the defendant answers without renewing his motion, the ruling of the court on the motion to the original petition cannot be considered in this court upon appeal.
2. **Gaming:** SALE OF GRAIN. The delivery of grain to an elevator company, with the understanding that it shall be paid for when payment is demanded at the price then prevailing, is not made criminal by our antigambling statutes, and is not prohibited by our warehouse law.
3. **Principal and Agent:** UNDISCLOSED PRINCIPAL: LIABILITY. An undisclosed principal is liable for property which he obtains through the contracts of his agent, although such contracts were made by the agent in his own name. The fact that the owner of the property understood at the time that he was selling to the agent will not estop him to afterward collect the value of the property from the principal who in fact received and converted it.
4. **Appeal in Equity:** CONFLICTING EVIDENCE. Upon appeal in actions in equity, this court, in determining the issue, will not disregard the opinion of the trial court, upon conflicting evidence of witnesses examined in open court, in believing one version of the facts rather than the opposite.

APPEAL from the district court for Butler county: GEORGE F. CORCORAN and EDWARD E. GOOD, JUDGES. *Affirmed.*

Matt Miller and *T. J. Doyle,* for appellant.

Norval Bros., J. J. Thomas, Hastings & Coufal, A. W. Richardson and *A. M. Bunting, contra.*

SEDGWICK, J.

The plaintiffs began this action in the district court for Butler county to recover the value of grain which

they alleged they had delivered to the Ulysses Grain Company at Ulysses, Nebraska. George Dobson, John Dobson, Jesse A. Smith, First Bank of Ulysses, Ulysses Grain Company, and Central Nebraska National Bank of David City were made defendants. Judgments were entered against the defendant George Dobson and some others of the defendants, and George Dobson alone has appealed to this court.

The petition alleged that the defendant George Dobson was, at the times mentioned in the petition, the owner of the Ulysses Grain Company, and that he with the other defendants entered into a conspiracy to defraud these plaintiffs of their grain. On account of the large number of plaintiffs and the diversity of their claims, and perhaps for other reasons, the action was in equity, and the petition alleged that some of the grain of the plaintiffs had been converted into money, and the money was on deposit in the respective banks, and that the defendant George Dobson was attempting by legal proceedings and otherwise to get possession of that money. A restraining order was asked for enjoining such proceedings. The petition also asked that a receiver be appointed to take possession of the money in the Central Nebraska National Bank, and that the money be distributed to the plaintiffs in accordance with their interests therein. They asked for judgment against George Dobson, the First Bank of Ulysses, and also against William T. Spelts, who does not appear to be named as defendant in the "second amended petition," upon which it appears that the action was tried. The petition also contained the usual prayer for "such other and further relief as is just and equitable." A temporary injunction was allowed impounding the funds in the banks, and there was a general finding that the allegations of the plaintiffs' amended petition, as against the defendants George Dobson, William T. Spelts, and Jesse A. Smith, were true, and for the

plaintiffs on the issues joined as against said defendants, and in favor of the First Bank of Ulysses and John Dobson. The court also found that the plaintiffs had each respectively delivered grain to the Ulysses Grain Company as alleged, finding the dates and amounts of such delivery by each of the plaintiffs, respectively, and the value of the grain so delivered. The court also found the amount of money in the banks, and the amount that should be paid to each of the plaintiffs, respectively, and entered a judgment against the defendant George Dobson for the balance of the value of the plaintiffs' grain so delivered.

The controversy was between these plaintiffs and the defendant George Dobson. No answer was filed by the other defendants, and no part taken by them in the trial of the case except as witnesses. The defendant George Dobson filed a general demurrer to the petition, which was overruled. He also filed a motion to make more definite and certain, which was confessed in part by the plaintiffs and overruled in part by the court. Afterwards the plaintiffs filed an amended petition. We do not find that any motion was made to this amended petition, and the rulings of the court and proceedings upon the original petition are therefore not now before this court. The defendant George Dobson filed a general denial. Upon the trial he denied that he had any interest in the funds in the banks, and is therefore not in a position to urge the objection now that the parties interested in that fund were not all brought before the court.

The second amended petition alleged that the defendant George Dobson bought the elevator and established the business of the Ulysses Grain Company in 1908, and from that time until the 19th day of December, 1915, the said business was "owned and so operated by the said George Dobson in the trade name 'Ulysses Grain Company,' " and that while he so owned

and operated said business and on the dates specified the plaintiffs delivered grain in the amounts specified to the said Ulysses Grain Company pursuant to a plan which was adopted by the said George Dobson and others to procure the said grain for their own use. It was therefore immaterial in determining liability for the value of the grain whether they sold the grain or delivered it for bailment.

The evidence tends to show that the understanding was that the grain so delivered should be paid for at any time the plaintiffs demanded at the price then prevailing. If we regard that as established, it amounts to completion of the sale at the time the price was fixed under the arrangement, and is not made criminal by any of our antigambling acts that have been brought to our attention, and is not prohibited by our warehouse law.

The main question tried by the court was whether the defendant George Dobson was in fact the owner of the business, and, as such, received the grain of the plaintiffs. It was claimed by him that he had leased the elevator to the defendant Smith, and that Smith alone, and not Dobson, was liable to the plaintiffs. The defendant Smith was the manager of the business and for several years had been in the employ of Dobson as such. It is insisted that the checks given by Smith for some of the grain recited on their face that Smith was the proprietor of the business. The contention of the plaintiffs is that at one time Smith attempted to assist Dobson in representing that Smith was the proprietor, and the question of Dobson's liability depends upon the ultimate fact whether he was the owner of the business and so received the grain at the time that it was delivered there. The manner of conducting the business and circumstances surrounding it might be evidence upon this point, but would not necessarily be conclusive, and the fact that the plaintiffs, if it was a fact, were

misled to suppose that Smith was the owner of the business would not estop them to afterwards allege and rely upon the liability of the real owner.

The difficult question in this case is as to the ownership of the business when this grain was delivered by these plaintiffs to the Ulysses Grain Company. In determining this question there are many circumstances to be considered. There was an immense amount of documentary evidence offered, some indicating that Smith was the owner of the business, and some that the defendant Dobson was the owner. The two judges of the district court sitting together were occupied several weeks in the trial of the case. The principal difficulty is in reconciling the evidence of the witnesses which upon its face is apparently irreconcilable. The defendant Dobson testified to a state of facts that indicate strongly that he leased the elevator to Smith in the spring before any of this grain was delivered there, and that the business was then by him entirely turned over to Smith. In this he has some support from the defendant Spelts, and perhaps other witnesses, who were more or less interested with him in various business transactions. The defendant Smith, who was the manager of this business from the time of its purchase by Mr. Dobson, and during the whole course of the business, testified that in the spring Dobson told him that he (Dobson) thought of quitting the business himself and leasing the elevator to some other parties, and that he (Smith) suggested that Dobson lease the elevator to him; that the rental value of the elevator was suggested by Dobson to be $125 a month, and that Smith contended that it should not be more than $100 a month, and that Dobson said he would consider the matter, and that nothing more was done in regard to it until the liability for this grain was incurred, and that then Dobson desired to make it appear that he had leased the elevator and turned over the business to Smith in

the spring. This evidence was denied by Dobson, and some circumstances were testified to by defendant Spelts which seem inconsistent with Smith's evidence. Also, it appears that Smith had attempted to make it appear that he was the owner of the business, and had been from early in the spring. Smith's own testimony in another earlier suit was inconsistent with the evidence which he now gives in this case. It is contended, and there is some evidence for the contention, that early in the summer it was discovered by Dobson and some who were interested with him in business matters that the grain business in which he was interested had suffered severe losses and incurred liabilities that would soon be pressing, and that the plan to avoid these liabilities, so far as Dobson was concerned, was by making it appear that Smith alone was liable, or causing Smith to procure grain from farmers that might be converted into money with which to liquidate such liabilities as might be fastened upon Dobson. Smith testified that such an arrangement was made, and admitted that he had been attempting to assist Dobson in carrying out this plan. Smith, it appears, was insolvent, and not financially responsible, and he having been in the employment and under the direction of Dobson for so many years, it is not inconceivable that he might have been induced to assist Dobson in such an undertaking and so continue his own employment.

These witnesses testified in open court, and were submitted to cross-examination, and the most delicate and difficult duty devolved upon these two judges was, by observing all of the circumstances in the case, and particularly the testimony of these witnesses and their demeanor and manner of testifying, their frankness or reserve, as the case might be, to satisfy themselves as to which version of the facts was more deserving of confidence and so determine the fact as to the owner-

ship of this business when the grain was delivered. These two trial judges appear to have given great, and perhaps unusual, care to the investigation of this important question, and, while we are to try this case *de novo* and without reference to the findings of the trial court, their opportunities of estimating the probative force of the somewhat conflicting evidence of these witnesses, who were examined in their presence, and the fact that they under those conditions believed the witness Smith and those who agreed with him in their testimony, must be regarded by this court as an important consideration. After considering all the conditions that have been brought to our attention, we cannot come to a different conclusion.

The judgment of the district court is therefore

AFFIRMED.

WILLIAM F. BELK, APPELLEE, V. CAPITAL FIRE INSURANCE COMPANY, APPELLANT.

FILED OCTOBER 18, 1918. No. 20635.

1. **Insurance:** DEFAULT. A provision in a fire insurance policy "that, in case any portion of the assured's premium contract is not paid when due, this policy shall lapse, and the same shall be suspended, inoperative, and of no force or effect so long as any portion thereof remains past due and unpaid," is valid, and may be enforced by the insurer.
2. **Bills and Notes:** PAYMENT. A bank which holds a note for collection is the agent for that purpose of the owner of the note, and the agreement of the bank with the maker of the note to pay the note out of a special deposit of the maker, and the cancelation and surrender of the note to the maker pursuant to such agreement, amounts to payment by the maker.
3. **Insurance:** ACTION: ATTORNEY'S FEES. Chapter 234, Laws 1913, provides for the taxation of attorney's fees in judgments upon insurance policies in all classes of indemnity insurance not expressly exempted by law.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed in part, and reversed in part.*

G. E. Hager, for appellant.

R. J. Greene, contra.

SEDGWICK, J.

The opinion on the former appeal in this case (100 Neb. 260) sufficiently states the nature of the action. The trial court had instructed the jury to find a verdict for the defendant. The judgment was reversed and the cause remanded for another trial, with the suggestion that the questions involved were for the jury. Upon this second trial the court instructed the jury to find a verdict for the plaintiff, and the question now presented to this court is whether there was such a substantial conflict in the evidence that the cause should have been submitted to the jury.

In the main the evidence was by the plaintiff himself in his own behalf, and by the cashier of the bank in behalf of the defendant. The note given for this insurance became due on the 1st day of August, 1913, and the fire occurred on the 4th day of August. Immediately after the fire, and on the same day, the note was canceled by the cashier of the bank and the money called for by the note was remitted by the cashier to the defendant company. The plaintiff testified that, from about the middle of July until after the note was canceled, he had a special deposit in the bank, more than the amount of the note, and that before the note became due he instructed the cashier to pay the note out of that special deposit, and that the cashier agreed to do so, and before the fire notified him that the note was paid. The cashier admits the deposit as testified to by the plaintiff, but testified that immediately after the fire the note was paid, and, "to my best recollection, it was paid by Mr. Yost." He had given his evidence twice before in this

case, the first time about four months after the transaction, and he conceded that his recollection at that time would be as good, if not better, than when he was now testifying, which he said was about three years after the transaction. Upon cross-examination this witness testified that in his earlier deposition he had testified, "I gave the note to Belk on August 4th," and that, when he was asked whether the note was paid on that same day, he had answered, "Well, I can't say as to that," and that at the time of giving this later evidence he still could not say whether the note was paid on the 4th of August. When he was asked whether he testified in his earlier deposition that "you would not say that he did not pay the note with that money left that those parties left for him in July," he said, "I have testified that he may have told me, or at some time there may have been some arrangement made that I did not remember about." As stated in the former opinion, "For the purpose of collecting this note the banker was the agent of the defendant," and this testimony of the cashier, taken together, would not amount to a denial of the plaintiff's testimony, which is clear and unequivocal that he had instructed the cashier to pay this note out of that deposit, and that the cashier had done so, and had informed him before the fire that the note was paid. The only defense interposed was that the note was past due and unpaid at the time of the fire, and the fact that the cashier failed to cancel the note and to remit the money does not tend to contradict the direct evidence of the plaintiff as to the payment of the note. There was, therefore, no such substantial conflict in the evidence as to require the submission of that question to the jury.

The plaintiff asked the court to tax an attorney's fee as part of the costs in the case. This the trial court refused to do, and the plaintiff has taken a cross-appeal complaining of this as error. Under the valued

policy act of 1889 (Laws 1889, ch. 48), it was provided by the first section of the act that in an action upon a policy of insurance of real property against loss by fire, tornado or lightning, if the property insured "shall be wholly destroyed," the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured. The second section of the act provided that it should apply to "all policies of insurance hereafter made or written upon real property," and to renewals of policies made after the act took effect. The third section provided: "The court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs." This third section of the act was construed in *Hanover Fire Ins. Co. v. Gustin,* 40 Neb. 828, and was held to apply to all policies of insurance of real estate, although the property was not "wholly destroyed." This decision is cited in many later cases, and in several it has been held, or assumed, that attorney's fees could be allowed under the act only in actions upon policies of insurance of real estate.

Chapter 234, Laws 1913, extended this provision for attorney's fees to other cases. The act is entitled, "An act to require the court upon rendering judgment against any company or person in an action upon any policy of life, accident, indemnity, sickness, guaranty, or other insurance of a similar nature, to allow the plaintiff a reasonable sum as an attorney's fee, in addition to the amount of his recovery, to repeal all acts in conflict herewith and to declare an emergency." The act itself is substantially in the same words as the title. Although life, accident, and sickness insurance had generally been considered as a separate class of insurance from indemnity and guaranty insurance, both of these classes of insurance are named as those in

which attorney's fees may be taxed as costs, and then follow the words, "or other insurance of a similar nature." Webster's New International Dictionary defines "indemnity" as "protection or exemption from loss or damage, past or to come; security; insurance." "The idea of indemnity also underlies all policies of insurance, whether fire, marine, fidelity, employers' liability, or others, except life insurance, which is not a contract of indemnity, but is a contract to pay to the beneficiary a certain sum of money in the event of death in consideration of certain payments made during life." 14 R. C. L. p. 43, sec. 2. And "guaranty" is "a promise to answer for the debt, default, or miscarriage of another person." 12 R. C. L. p. 1053, sec. 1.

Analyzed in this way, the act of 1913 would seem to apply, not only to all kinds of insurance of whatever nature, except life insurance and such as are expressly exempted from its provisions, but to some other classes of contracts as well, and in a recent case this court, without discussion or hesitation, has applied the act to contracts of burglary insurance. *Bruner Co. v. Fidelity & Casualty Co.*, 101 Neb. 825. While the point does not seem to have been insisted upon or technically considered in that case, it seems to be a comparatively reasonable solution of the difficulty, and it follows that under this new statute an attorney's fee may be allowed and taxed as part of the costs in the case in all actions in which the plaintiff recovers on contracts of life insurance or indemnity, which includes all contracts of insurance except those of fraternal beneficiary societies. It follows that the trial court erred in refusing to tax an attorney's fee in this case, and its order in that respect is reversed and the cause remanded for that purpose.

The judgment for the plaintiff is affirmed.

AFFIRMED IN PART, AND REVERSED IN PART.

ROSE and CORNISH, JJ., not sitting.

ANDREW DAY v. STATE OF NEBRASKA.

FILED OCTOBER 18, 1918. No. 20561.

Rape: CORROBORATIVE EVIDENCE: INSTRUCTIONS. Defendant was charged with the crime of statutory rape. He testified in his own behalf and denied that he committed the act. The court, among others, submitted this instruction: "The jury are instructed that in this case there must be testimony on behalf of the state corroborating the testimony of the witness, May Bader, to justify a conviction, but it is not essential to a conviction that she should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of the guilt of the defendant may be drawn." Evidence examined, and the giving of the instruction *held* to be without error; and *held* that the verdict is supported by the evidence.

ERROR to the district court for Boone county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

Vail & Flory, for plaintiff in error.

Willis E. Reed, Attorney General, Orville L. Jones and *W. J. Donahue, contra.*

DEAN, J.

Defendant was convicted under section 8588, Rev. St. 1913, of the crime of statutory rape, and sentenced to serve a term of not less than three years in the penitentiary. He prosecutes error.

It is argued that the verdict is not supported by the evidence; that the testimony of May Bader, the prosecutrix, is not corroborated, and that the court therefore erred in giving the instruction numbered 11 that appears in the syllabus.

Defendant was twenty-six. May Bader was fourteen. She was working at an Albion hotel when defendant called on her there at about 7 o'clock on Sunday evening

December 16, 1917, and on his invitation she went carriding with him and a young man named Fox a few miles into the the country, to a place where a sixteen-year-old girl friend of Fox and the prosecutrix was working. The party returned to Albion at about 8 and went together to an unoccupied three-room apartment that had recently been rented by Fox and his mother, but into which they had not yet moved. In this apartment, unfurnished except for some chairs, a cabinet, and a stove, defendant and May Bader and Fox and his girl companion remained from 9 at night until about 6 the next morning.

The prosecutrix testified that she and defendant occupied one of the rooms, and that he there had sexual intercourse with her. She said that Fox and the other girl occupied another room. The latter testified that, by the aid of a flashlight, she saw defendant and the prosecutrix lying on the floor in a compromising position. It is seldom that the offense in this class of cases is so clearly proved.

Respecting corroboration, it appears that shortly after his arrest defendant made a voluntary statement to the sheriff that in effect corroborated the evidence of the prosecutrix as to the principal fact constituting the crime. There was other corroborative evidence tending to support that of the prosecutrix on the same point that it is not necessary to discuss here.

The instruction appearing in the syllabus was given by the court. Defendant in his testimony denied that he had sexual intercourse with the prosecutrix. It was not error to give the instruction. *Hammond v. State,* 39 Neb. 252.

The testimony of the prosecutrix was amply corroborated. Reversible error does not appear in the record. The judgment is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

R. C. ROPER, APPELLEE, v. LEO E. PRYOR, APPELLANT.

FILED NOVEMBER 1, 1918. No. 20150.

Injunction: NOMINAL DAMAGES. An attorney entered into a contract of employment with a brother attorney, whereby he agreed to refrain from the practice of his profession within a specified county, for a definite term of years from the termination of such employment. The validity of the contract and the reasonableness of its restrictive terms being unquestioned, *held*, the plaintiff is entitled to an injunction to prevent its violation, even if only nominal damages can be proved.

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

Hastings & Coufal, for appellant.

R. C. Roper, contra.

MORRISSEY, C. J.

In October, 1914, plaintiff was engaged in the law practice in Butler county. Defendant had just completed a course in a law college and been admitted to the bar. Plaintiff employed defendant, at a salary not in excess of that paid to an ordinary clerk. Their contract was reduced to writing, and by its terms defendant agreed, "in consideration of this employment contract and the salary herein agreed upon," that upon the termination of the contract he would not, for a term of ten years from such termination, enter into or engage in the practice of his profession in Butler county.

Defendant remained with plaintiff until August, 1916. Shortly thereafter he opened an office in David City, the county seat of Butler county. In November following plaintiff brought this action, based upon the contract mentioned, to restrain defendant from following his profession in Butler county. A permanent injunction was granted, and defendant appeals.

Actions of this kind are not uncommon in some lines of business, but, after a diligent search, the writer finds no case where, under circumstances such as disclosed by this record, an established lawyer has sought, in a court of equity, to withhold from a brother practitioner, who has served as his clerk and assistant, the opportunity of engaging in his profession. However, we are not asked to pass upon the validity of the contract, or the reasonableness of its restrictive terms. The point presented by defendant is that the breach in this case is a mere technical one, for which plaintiff should be left to his remedy at law. While the circumstances in this case are unusual, in that defendant did not have an opportunity to come in close contact with the clients of plaintiff, and that, up to the time of suit, none of such clients had gone over, or threatened to go over, to defendant, yet it seems that the extent of the damage is not a subject of inquiry. 14 R. C. L. sec. 94, p. 394. The fact that there was a continuous breach, and that plaintiff was entitled to recover at least nominal damages, was sufficient for the assumption of jurisdiction and the granting of relief. *Brown v. Kling,* 101 Cal. 295. See, also, *Freudenthal v. Espey,* 45 Colo. 488, 26 L. R. A. n. s. 961, and note in 15 Ann. Cas. 696 (*Simms v. Burnette,* 55 Fla. 702).

It follows that the decree of the district court should be

AFFIRMED.

JAMES SHONKWEILER, APPELLEE, v. MILLARD F. HARRINGTON ET AL., APPELLANTS.

FILED NOVEMBER 1, 1918. No. 20021.

1. **Conversion:** ELECTION OF REMEDIES. One whose property has been wrongfully converted by others may maintain an action in tort

against the wrongdoers, or may waive the tort and sue as upon an implied contract to pay the value of the property, but he cannot maintain an action as upon an implied contract against some of the wrongdoers and at the same time another action in tort against other wrongdoers.

2. **Bankruptcy**: TORTS: REMEDIES. In such case, if the principal wrongdoer has become bankrupt, and plaintiff has proved his claim as upon an implied contract against such bankrupt, and received his dividends thereon, he cannot at the same time or thereafter maintain an action in tort against those who may have assisted the principal wrongdoer in converting the property.

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

Stiner & Boslaugh and *Tibbets, Morey, Fuller & Tibbets,* for appellants.

McCreary & Danley and *Charles E. Bruckman, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court for Adams county against these appellants, who were the president and secretary of the Harvard Co-operative Grain & Live Stock Company, a corporation. He claimed that the corporation had received his wheat and had converted it to their own use, and were, therefore tort-feasors, and that the president and secretary, having assisted the corporation in doing so, were joint tort-feasors.

The principal discussion is as to whether this wheat left at the elevator of the corporation was a bailment or a sale of the wheat. The evidence is very strong, if not conclusive, that the wheat was left at the elevator under an agreement of sale, the price to be determined at the market price for wheat when the plaintiff should demand payment. Under such circumstances, of course, the plaintiff could not maintain an action in tort against some of the officers of the corporation purchasing the wheat. There is, however, another question presented in the record which seems

to us to be decisive of the case. The elevator company failed in business and was declared a bankrupt. The plaintiff filed his claim for the value of the wheat in the bankruptcy court, and received dividends thereon before beginning this action, and afterwards, while the action was pending, he received another dividend upon his claim in the bankruptcy court. Thus, as suggested by the defendants' brief, he was maintaining two inconsistent actions at the same time, based upon the same transaction. The bankruptcy courts generally hold that a claim sounding in tort cannot be adjudicated by a bankruptcy court, but if the claim is based upon tort it may be proved in a bankruptcy court "whenever it may be resolved into an implied contract." As was said by the federal court in *Clarke v. Rogers,* 183 Fed. 518: "For example, it is a settled rule that where a tort-feasor by conversion of personal property has sold the property converted, and received cash therefor, the true owner may sue him for money had and received as on an implied contract. This, of course, is a mere fiction of law; but, like all other such fictions, it is effectual when it will accomplish the ends of justice. So that, in that case, the owner of the property may proceed for a tort, or, at his option, on an implied contract, which would entitle him to make proof under section 63."

And, again, in *Standard Varnish Works v. Haydock,* 143 Fed. 318: "One from whom a bankrupt obtained goods by means of fraudulent representations, which were not paid for, has his election to confirm the sale and assume the position of a creditor for the price, or to repudiate the sale and recover the goods, but, having made such election, with knowledge of the facts, by proving his claim and voting as a creditor in the bankruptcy proceedings, he is concluded thereby, and cannot thereafter withdraw his claim and recover the goods."

And, so clearly, as against the corporation, this plaintiff by filing his claim in bankruptcy and accepting his proportion thereon is concluded, and "cannot thereafter withdraw his claim and recover the goods." It was with the corporation that the plaintiff transacted this business, and if he could not withdraw his claim in bankruptcy and recover the goods or their value from the corporation, it would not seem that he could recover the value of the goods from those who he says assisted the corporation in committing the tort, which he has waived. In *Crook v. First Nat. Bank,* 35 Am. St. Rep. 17 (83 Wis. 31), it was said: "An action *ex contractu* to recover money paid by a bank to defendant, and received by him to the use of plaintiff, is an election by the latter to affirm the payment by the bank, and he is thereby estopped from subsequently asserting as a basis for recovering the money from the bank that such payment was wrongful." That is, even if he had not authorized the bank to pay the money to John Doe, but afterwards elected to sue John Doe for the money, he could not then bring another action against the bank. And so here, if he has waived the tort and collected from the corporation upon the implied contract to pay for the goods, he cannot afterwards allege against anybody that he did not sell the goods to the corporation.

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

REVERSED AND DISMISSED.

LETTON, J., not sitting.

H. G. SANDY ET AL., APPELLEES, V. WESTERN SARPY DRAINAGE DISTRICT ET AL., APPELLANTS.

FILED NOVEMBER 1, 1918. No. 20645.

1. **Drains:** APPORTIONMENT OF BENEFITS: INJUNCTION. If one of the alleged grounds for enjoining the district board of a drainage

district from proceeding to an apportionment or reapportionment of benefits under the drainage act is that the state board has not approved of the plans and specifications of the improvements, the district court should allow the district board to submit its plans and specifications to the state board, and, if approved by that board, the court should thereupon proceed accordingly, but should not allow any contract to be let or work begun without application for such approval of the state board.

2. **Appeal:** REVIEW: STIPULATION. A stipulation made for the purpose of assisting the trial court in determining whether a temporary injunction shall be continued until the final trial of the case will not be considered in this court to prevent the parties from contesting here the only question which was afterwards finally tried upon its merits.

3. **Drains:** STATUTE: APPLICATION. Chapter 145, Laws 1911, does not apply to drainage districts organized before its enactment.

4. ———: APPORTIONMENT OF BENEFITS: INJUNCTION. The fact that the purpose of the proposed changes and improvements is the same as the purpose of the original plans and specifications is immaterial. The question here is whether the proposed plans and specifications contemplate such changes as may, in the reasonable discretion of the district board, render the original apportionment of benefits unequal and unjust.

5. ———: ———: ———. In this action to enjoin the district board from proceeding with the proposed reapportionment of benefits, it is not necessary to determine whether the original plans might have been so promptly and thoroughly executed as to accomplish the purpose of the improvement under the original apportionment, since the evidence will not justify the finding that the district board failed to exercise a reasonable discretion as to the time and manner of performing the work under the circumstances.

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

Stout, Rose & Wells, A. E. Langdon and *E. S. Nickerson,* for appellants.

Vinsonhaler, McGuckin & Caldwell, contra.

SEDGWICK, J.

The defendant drainage district was organized under the act of 1907, Laws 1907, ch. 153 (Rev. St. 1913, secs. 1866-1901). The board of directors duly made an ap-

portionment of benefits under the statute, and afterwards proceeded and was about to make a reapportionment of benefits under the proviso of section 1879, Rev. St. 1913, which is as follows: "If there is such a change of plans or enlargement or extension of the work, as to make a different apportionment necessary, then the board of directors as to the future expenditures shall make a new apportionment of benefits, in which event all the procedure above mentioned for the original apportionment shall apply." This plaintiff and others began this action in the district court for Sarpy county to enjoin the proposed reapportionment of benefits. After the action had been dismissed as to all other plaintiffs, the district court found the issues in favor of this plaintiff, and enjoined the district from proceeding with the reapportionment, from which judgment the defendants have appealed.

The evidence shows without contradiction that it had become necessary for the district to make a further considerable expenditure of money, and the defendants contend that this work involved a change of plan or enlargement or extension of the work so that a reapportionment was necessary. This the plaintiff denied, and contends that "there was no change of plans, enlargement or extension of work from that originally adopted," and also contends that where there is a necessary change of plans the board cannot reapportion benefits when the change in the plans and specifications will cause additional expense "more than 15 per cent. above the estimated cost of the original plans," without such change and increased liability has been authorized, by an election, and no election has been held authorizing such proceedings.

It appears that the district board had not applied to the state board of irrigation, highways and drainage for an approval of its plans for this additional work when this action was begun, but afterwards, while the

action was pending in the district court, did make such application, and the said board, with a certain modification, approved the plans. The statute requires that such approval shall be had "before any contract is let or work begun." Rev. St. 1913, sec. 3423. The district board immediately modified its plans so as to conform to the decision of the state board and proceeded in this action accordingly. As this approval of the state board was made "before any contract is let or work begun," and the action of the state board was brought to the attention of the trial court before its final decree, it would seem to be proper for the trial court, in this equitable action, to consider that the plans of the district board had been properly approved, and to make its final judgment accordingly.

It is also contended that the decree of the trial court was entered by stipulation of the parties, and provided that the work might be proceeded with as approved by the state board, and the further order that it should be paid for by assessment upon the original apportionment. The contention seems to be that there is no issue left as to the necessity of new plans or any change of plans. After the temporary injunction had been allowed in this case, the question was raised whether it should be continued until the case could finally be tried and determined. The defendants had made some change in their plans in accordance with the findings and order of the state board, and the trial court, in passing upon the question whether the temporary injunction should be continued in view of these changes in the plans, recited in its order that the parties had stipulated that the temporary injunction should be continued in force restraining the defendants "from making any reapportionment of the benefits for the purpose of levying assessments or raising money to pay for any improvements now contemplated as shown by the plans and specifications

offered in evidence on the hearing for temporary injunction," and recited in the order: "It being understood that said improvements, now contemplated, shall be paid for by assessment levied on the basis of the old apportionment heretofore made in said district." It is contended that the defendants are estopped by this recitation of the stipulation to now insist upon their right to proceed with the reapportionment. This order was entered in November, 1917, and the case was continued for trial upon its merits and tried in April following. The question then tried by the parties and determined by the court was as to whether the defendants should be perpetually enjoined from proceeding with the reapportionment; no reference in the trial being made to any stipulation to the contrary. Although the defendants made no objection to this recital in the order upon the application to continue the temporary injunction, they clearly are not now, under the circumstances, estopped to present the merits of the controversy upon this appeal.

In 1911 chapter 145 of the Laws of that year was enacted. Its purpose, as expressed in the title, was to amend one of the sections of the former act and to add other sections to the act. One of the sections added is section 44 (Rev. St. 1913, sec. 1914). It provided that the directors of the district should submit the plans, specifications and estimate of cost for the contemplated improvements to a vote of the electorate of the district, and then provided that "no changes in such plans and specifications shall be made thereafter by said board which shall cost in the aggregate more than 15 per cent. above said estimated costs." In this case the proposed change in the plans and specifications would involve a cost of more than 15 per cent. of the estimated cost of the first plans and specifications, and it is contended that, as these proposed changes were not submitted to a vote of the electorate, the board was

not empowered to make this reapportionment of benefits. But this new section by its express terms applies only to "districts hereafter organized," and the words "such plans and specifications" refer plainly to the plans and specifications as have been adopted by a vote of the electors, and not the plans and specifications adopted by the board of directors under the statutes as they were when this company was organized.

The plaintiffs insisted and introduced a considerable evidence of experts and others to show that the "proposed work, upon which is based appellants' claim for a new apportionment, is identical in purpose with the plans originally adopted and upon which the present apportionment is based." The purpose of the original plans, and the purpose of the present plans, is to prevent the water from the rivers which adjoin the district and other waters from overflowing these lands, and to drain such lands as are, or may become, so wet as to need drainage. The plaintiffs' evidence showed that this purpose was at all times, and still is, the general purpose of the improvement. The plans and specifications for these improvements, as they are now contemplated, have been approved by the state board. The district board has authority to proceed with the improvements according to these plans and specifications. The question is whether "there is such a change of plans or enlargement or extension of the work as to make a different apportionment necessary." Rev. St. 1913, sec. 1879. The district borders for some distance on the Elkhorn and Platte rivers. The water from these rivers has affected some of the tracts of land in the district much more than was anticipated when the original apportionment of benefits was made. It has washed away and destroyed the major part of some of the tracts of land, so that it is now impossible that they should be benefited as it was anticipated that they

would be. Other tracts of land in the district are not directly affected by the action of the river. By the original plans and specifications it was estimated that much the larger proportion of the expense would be occasioned by the necessity of draining the lands not so directly affected by the river. Under the proposed change in the plans and specifications, which has been approved by the state board, it is estimated and contemplated that much the larger proportion of the expenses will be made necessary to protect the tracts of land that are exposed to the action of the river and to the overflow of water therefrom. It seems clear from this evidence that some of these tracts of land will receive a much larger proportion of benefits from the improvements now contemplated than they could have received from the improvements contemplated under the former apportionment. On the other hand, many tracts of land will be little, if any, benefited by the additional expense made necessary by the proposed changes. It is contended that the district board failed to properly carry out the original plans; that their neglect to perform the work as called for by the plans is the cause of the necessary expense of the plans now adopted. The board replies that this plaintiff was a member of the district board while the work was done under the original plans, and made no objection to the manner of doing the work, nor to any act or failure to act by the board, but, on the contrary, participated therein. However that may be, we do not find in the record sufficient evidence to establish any such misconduct or neglect on the part of the board.

We have in this case only to determine whether any changes should be made in the apportionment of benefits. The question as to what changes should be made, and how the apportionment should be made, is not before the court, and should not be at all prejudiced by these proceedings The district board will

fix a time for making the reapportionment, giving notice to the electors as the statute provides, and all parties interested or affected by the apportionment will be given an opportunity to be heard before the board. If the district board should make any improper or unjust apportionment of benefits, the parties affected may, under the statute, appeal from the reapportionment.

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

REVERSED AND DISMISSED.

LETTON and ROSE, JJ., not sitting.

ROBERT DIERS ET AL., APPELLEES, V. CHARLES F. AHRENDT, APPELLANT.

FILED NOVEMBER 1, 1918. No. 19732.

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

Cain & Mapes, for appellant.

Frank Dolezal, contra.

CORNISH, J.

This case involves a strip of ground, 20 feet wide, running from the northwest corner of the plaintiffs' land a half mile south to the public highway, partly located upon plaintiffs' quarter section. The strip is claimed to be a public highway, and would be a continuation of the disputed road, the subject of controversy in *Burk v. Diers,* p. 721, *post.* The facts in these two cases are substantially the same, except that in the instant case the road in dispute is along a section line, and there is some evidence that at one time the father of the defendant, when road overseer, did some

work upon it. These facts, however, should not alter the conclusion arrived at. On the west and south sides of defendant's quarter section are established public highways, and there is no need of a public highway at this point. If defendant's father, as road overseer, did any work upon this road, it would hardly be notice to the plaintiffs that the public was claiming a right in it. Defendant's father lived immediately to the east of plaintiffs, and the evidence shows that they wanted this road for communication between the two farms. It is not shown that plaintiff Robert Diers knew of the work being done. He swears he did not. If he had seen Ahrendt, Sr., working on the road, he would naturally have thought that he was doing it for his own convenience.

The trial court found for the plaintiffs in this case, and we are of opinion that its judgment should be

AFFIRMED.

MORRISSEY, C. J., dissents.

ROSE, J., not sitting.

JOHN C. BURK, APPELLEE, V. ROBERT DIERS ET AL., APPELLANTS.

FILED NOVEMBER 1, 1918. No. 20325.

1. **Highways:** DEDICATION. To constitute implied dedication by the owner of land of its use for a public highway, there must be present the intent to appropriate the land for public use. The intent may, however, be expressed in the visible conduct and open acts of the owner. If the acts are such as would lead ordinarily prudent men to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation.

2. ———: ———. In such case the facts and circumstances must be such as indicate an unequivocal intent to devote the strip of land to the public use.

3. ———: ———. The passive permission by the owner of land of the use of it by the public is not alone evidence of an intent to dedicate it to such use. *Postal v. Martin*, 4 Neb. (Unof.) 534.

4. ———: ———. If a road claimed as a highway was a mere neighborhood road, much stronger evidence of a dedication or prescriptive right would be required than if it were a thoroughfare or a part of an acknowledged highway.

5. ———: ———: PRESCRIPTION. To establish a highway by prescription, it must appear that the general public, under a claim of right, and not by mere permission of the owner, has used the same without interruption for the statutory period of ten years.

6. ———: ———: ———: EVIDENCE. Evidence examined, and *held* not to show such intent to dedicate or reliance thereon and acceptance by the public as is necessary to constitute a public highway by dedication, nor such adverse user under claim of right by the public for a period of ten years as is necessary to establish a highway by prescription.

APPEAL from the district court for Dodge county: EDWARD E. GOOD, JUDGE. *Reversed.*

Frank Dolezal, for appellants.

W. M. Cain and *N. H. Mapes, contra.*

CORNISH, J.

Plaintiff owns the northwest quarter and defendant the southwest quarter of section 6. Suit to enjoin defendant from interfering with a strip of ground, 16 to 18 feet wide, running between the quarter sections. At its east end the south line of the strip lies three and one-half feet, and at the west end nine feet, south of the dividing line between the quarter sections. The trial court, finding it to be a public highway, granted the injunction. Defendant appeals.

We believe the court erred in its conclusion. If a public highway, it was acquired either by prescription or implied dedication. Both are urged. The law on this subject is not always clearly stated and is frequently difficult of application. Evidence to show dedication may also bear on the question of prescription, and

vice versa. No express dedication, either oral or written, is claimed.

Elliott, in his work on Roads and Streets, at section 191, says: "Prescription refers the right to the highway to the presumption that it was originally established pursuant to law by the proper authority, while dedication refers it to a contract either express or implied. Dedication implies a conveyance and an acceptance, while prescription requires an unbroken possession or user under a claim of right." On the subject of implied dedication, at section 138, he says: "It is essential that the donor should intend to set the land apart for the benefit of the public, for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to the public use. * * * The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation." And, further, at section 144: "While it is true that the intent to dedicate may be inferred from facts without proof of express declarations, yet it is also true that the facts must be such as indicate an unequivocal intent to devote the strip of land to the public use." What constitutes an acceptance by the public, he says (section 170), "may be implied from a general and long continued use by the public as of right."

Speaking of prescriptive right, at section 194, the author says: "As a general rule, 'before a highway can be established by prescription, it must appear that

the general public, under a claim of right, and not by mere permission of the owner, used some defined way without interruption or substantial change, for a period of twenty years or more.' " Under our statute relative to adverse possession it would be ten years.

We believe this, as a general statement of the law, is consistent with the previous decisions of this court. The case turns upon the facts.

As bearing upon either issue, prescription or dedication, somewhat depends upon the character of the road and the need of it for a public highway. On the section lines, both to the north and south, running east and west, were established highways. A half mile to the east and a half mile to the west of these quarters were also public roads running north and south. At the east the disputed road ended in a gate going onto private grounds, and two or three gates had to be gone through before one reached a public highway. At the west it came for outlet to another disputed road, now the subject of litigation in this court. It was not a public thoroughfare, nor used by the public, except when occasion might make it convenient in visiting those living in the territory inclosed by the public roads above described. Neither plaintiff nor defendant often used it. The public had no need of it for a thoroughfare, and hence would not be likely to claim it adversely as such, and for the same reason neither defendant nor plaintiff would care to dedicate it for public use.

Another important, sometimes made a controlling, fact in determining either adverse user by the public under claim of right, or intent to dedicate, is whether the public authorities have ever assumed control of the road or repaired it. If so, it is evidence either of adverse user or of intent to dedicate, or both. Here the public authorities never attempted to establish, control, or repair the road.

In *Lewis v. City of Lincoln,* 55 Neb. 1, we held: "To establish a highway by prescription there must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land." See, also, *Hill v. McGinnis,* 64 Neb. 187. We have since held that such action on the part of the public authorities is not always necessary. The holding in the cases cited should probably not be construed as meaning that action by the public authorities is always necessary. In *Lewis v. City of Lincoln, supra,* our holding in *Engle v. Hunt,* 50 Neb. 358, is cited with approval. In the *Engle* case it is held, according to the general rule, that the prescriptive right may be established by adverse user alone. The general rule is that the adverse user must be with the knowledge of the owner, or so openly visible and notorious as to raise the presumption of notice to the world that the right of the owner is invaded intentionally, so that if he remains ignorant it is his own fault.

The road in controversy, if it was a road, which is disputed, was a neighborhood road. Oftentimes farmers or owners of city lots, out of mere generosity and neighborly feeling, permit a way over their land to be used, when the entire community knows that the use is permissive only, without thought of dedication or adverse user. This use ought not to deprive the owner of his property, however long continued. Such rule would be a prohibition of all neighborhood accommodations in the way of travel. *Hall v. McLeod,* 2 Met. (Ky.) 98. As held in *Postal v. Martin,* 4 Neb. (Unof.) 534, "The passive permission by the owner of lands of the use of them by the public is not alone evidence of an intent to dedicate them to such use."

The evidence shows that defendant never actually intended to dedicate this ground to public use. If such

had been the intention, the parties would have seen to it that each furnished half of the road when the fence was being built along the north side of it. We think it likely, as testified by defendant, that this fence was mistakenly thought to be the dividing line. Within the time required for the statute to run there was quarreling about the road, and the defendant more than once interrupted its use, some one shortly afterwards tearing away his inclosing fence.

No doubt, in the early days and before these lands were inclosed, there was a road in the vicinity of this road; but it was not this road, and, of course, when the lands came to be inclosed for farms, the old road ceased to exist. The use necessary to estop the owner from claiming his land must be such that interruption would affect private rights or public convenience. Where the public has exercised no control or dominion over the road, nor used it to such an extent as to inform the owner, exercising reasonable care for his rights, that the public is using it under claim of right, then neither implied dedication nor adverse user is shown. There is no evidence in this case that the general public has depended upon the existence of this road and will be seriously inconvenienced by the loss of it; nor have private persons made improvements in the belief that this is a road. In fact, the road is a cul-de-sac.

In this state, by statute, section lines are declared to be public highways; the law, however, requiring notice and payment of damages when the road is opened. The mere fact that a road is on a section line is, ordinarily, evidential of the claim that it is a public highway. This is so, because the public naturally regards a section line as a highway, and the owner of land would therefore have reason to believe that it was being used under claim of right. The instant road was not on the section line.

If the defendant had not at all times paid taxes on the ground he claims, going to the quarter section line, this would be a strong circumstance to show dedication. Note to *Ramstad v. Carr,* L. R. A. 1916B, 1175 (31 N. Dak. 504).

It should also be borne in mind, as a circumstance bearing upon adverse user or acceptance by the public, that when a public highway is declared the public is at once clothed with new duties and responsibilities, involving expense, in the care of it. Where the road is necessary or beneficial to the public, acceptance ordinarily will be presumed when dedication has been shown.

Plaintiff relies on *Brandt v. Olson,* 79 Neb. 612. That was a section line road. Plaintiff's grantors testified that it was recognized as a road for ten years. Witness Smith testified that, when owner, he "cultivated the land on the west side of the road, leaving the strip in controversy for the sole use of the public, intending that it should be used as a highway." The opinion also states that the plaintiff acquiesced in its use as a public highway.

We are of opinion that the evidence does not show such use by the public under claim of right, or such dedication of the land to the public by the owner, accepted by the public, as is necessary to make this a public highway either by prescription or dedication; nor do we think that the evidence shows that the plaintiff has acquired an easement in the defendant's land.

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

REVERSED.

MORRISSEY, C. J., dissents.

ROSE, J., not sitting.

GEORGE CLARK v. STATE OF NEBRASKA.

FILED NOVEMBER 1, 1918. No. 20560.

1. **Larceny:** INDICTMENT: SUFFICIENCY. The use of the generic name "hog" is a sufficient description under the statute providing punishment for stealing a "sow, barrow, boar or pig."
2. **Indictment:** VARIANCE. "A variance between a descriptive averment of the information and the evidence given in support thereof is not fatal, unless such variance is material to the merits of the case or prejudicial to the defendant." *Goldsberry v. State*, 66 Neb. 312.
3. **Criminal Law:** EVIDENCE: OTHER ACTS. To make evidence of other acts available in a criminal prosecution, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, which is of itself evidence bearing upon the particular act charged.

ERROR to the district court for Boone county: GEORGE H. THOMAS, JUDGE. *Affirmed.*

A. E. Garten, for plaintiff in error.

Willis E. Reed, Attorney General, J. M. Wild and *W. J. Donahue, contra.*

CORNISH, J.

The information charged the stealing of "four hogs." Defendant, convicted, brings error to this court.

The sufficiency of the description is questioned, and our attention is called to the statutory description (Rev. St. 1913, sec. 8640), which uses the words, "sow, barrow, boar or pig." It is not denied that a "hog" is either a "sow, barrow, boar or pig," but defendant insists that he was entitled to know the species, so that he "might be prepared to meet the evidence." The point is too technical. The rule contended for is not needed for the protection of the accused, and so the courts hold that the use of a generic name, which includes the specific, is generally sufficient, although

the contrary may not be. *Whitman v. State,* 17 Neb. 224; *Hase v. State,* 74 Neb. 493; 25 Cyc. 83, 84.

At the trial the defendant admitted that he assisted another person in loading the hogs and sending them off to market, but denied any knowledge of the purpose for which they were being taken, and denied any prearrangement, plan, or conspiracy to steal. Guilty knowledge or intent was liable to be left in doubt. The trial court, as bearing upon criminal intent, permitted, over the objection of defendant, evidence of the stealing, by defendant, from the same place, of other hogs eight days before, and the stealing of hides thirteen days before, the crime alleged, in conjunction with three others, including the one above mentioned, in pursuance of a common plan. This was not error. The mere fact that the person has committed one crime is not, in law, evidence that he committed another. The accused must not be tried for one offense and convicted of another. To make evidence of other acts available, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or other quality, which is of itself evidence bearing upon the particular act charged. Knowing only that defendant helped to load the hogs under suspicious circumstances might not be convincing. When we know that he participated in the same way in other stealings from the same place, all under suspicious circumstances, the probability or possibility of innocence is not so great. When, as sought here, it is shown that he participated in the proceeds of the other stealing and had a common plan or design with others to rob the owner, the evidence may become quite convincing that theft was intended in the case in hand. *Knights v. State,* 58 Neb. 225; *Goldsberry v. State,* 66 Neb. 312; *Clark v. State,* 79 Neb. 473; *Becker v. State,* 91 Neb. 352; 1 Wigmore, Evidence, sec. 192; 17 R. C. L. sec. 80, p. 75.

The information alleged ownership of the hogs in Gus Weigand, the evidence tending to show that it was, in fact, in him and his wife. The court instructed the jury that if they found the title in him, or that it was the joint or common property of himself and wife, that was sufficient. The hogs were in the possession and control of the husband. The instruction was not erroneous. *Sharp v. State,* 61 Neb. 187; *Martin v. State,* 78 Neb. 826; *Merriweather v. State,* 33 Tex. 789; 25 Cyc. 92, 94. Nor can we see how the fact that the information alleged stealing "from the premises of one Gus Weigand," when the title was in his wife, is such variance as is material to the merits of the case or prejudicial to the defendant.

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

M. T. HIATT ET AL., APPELLANTS, v. HENRY W. TOMLINSON ET AL., APPELLEES.

FILED NOVEMBER 1, 1918. No. 20657.

1. **Counties:** CONTRACTS: PAYMENT TO ASSESSORS. Sections 1104-1106, Rev. St. 1913, construed, and *held* not to include within their terms money paid to precinct assessors for official services.
2. **Appeal:** DEMURRER: DISMISSAL. When plaintiff stands on a demurrer and refuses to plead further, and the judgment of the district court is affirmed here, the action will be ordered dismissed. *Estabrook v. Hughes,* 8 Neb. 496.

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

Howell M. Uttley, for appellants.

J. J. Harrington and *J. A. Donohoe, contra.*

DEAN, J.

This case was begun by plaintiffs as resident taxpayers "in behalf of the county of Holt," then under township organization, to recover $2,979 from defendants, who were members of the board of supervisors

in 1914. It is alleged that the money was unlawfully ordered paid by defendants out of county funds to the precinct assessors on their claims for official services in that year. A demurrer to the answer was overruled, and, plaintiffs refusing to plead further, the action was dismissed. Plaintiffs appealed.

This case was brought here before by plaintiffs. The former opinion is entitled *Holt County v. Tomlinson,* 98 Neb. 777. In that case the district court sustained motions to dismiss that were filed, respectively, by defendants and Holt county. On appeal the judgment was reversed and the cause remanded, "with directions to overrule the motion to dismiss the case, and to permit appellants to amend the title of the case, and make the county a party defendant, if they so desired." It is also there said: "The only issue presented is whether the district court erred in sustaining the motions to dismiss."

In the present case paragraph 4 of the petition alleged that the claims of the assessors did not "show the date of each day on which the claimants were employed," as provided in section 6427, Rev. St. 1913; that in more than half of the assessment books made up by the county assessor from the several schedules returned by the township assessors the oath required by section 6426, Rev. St. 1913, was not affixed by the precinct assessors; that a large number of the claims of the precinct assessors "were not indorsed with the written approval thereon of the county assessor before the same were allowed by the board, as required by section 2451, of the 1913 Revised Statutes."

Defendants in their answer admitted that some of the claims before payment were not formally indorsed by the county assessor, but alleged that they were all approved by that officer before payment; admitted "that about one-half of the precinct assessment books * * * were not formally sworn to, as required by section

6428 (6426)." Defendants denied "each and every other allegation contained in said paragraph 4" of plaintiffs' petition.

It is not pleaded by plaintiffs, nor is it argued, that the county lost any money by the acts of defendants that are complained of. In plaintiffs' brief it is said: "Our cause of action was because the claims were not made out as required by statute and were not properly verified." Elsewhere they argue that the only question to be determined is whether "the penalty fixed by sections 6427 and 1105 can be recovered in this action under the admissions made by the defendants in their answer."

Chapter 55, Laws 1905, appears in Rev. St. 1913 as sections 1104, 1105 and 1106, and should be construed together. Section 1104 provides: "All contracts, either express or implied, entered into with any county board, for or on behalf of any county, and all orders given by any such board or any of the members thereof, for any article, service, public improvement, material or labor in contravention of any statutory limitation, or when there are, or were, no funds, legally available therefor, or in the absence of a statute expressly authorizing such contract to be entered into, or such order to be given, are hereby declared unlawful and shall be wholly void as an obligation against any such county."

Section 1105 provides: "Any public official, or officials who shall audit, allow, or pay out, or cause to be paid out, any funds of any county for any article, public improvement, material, service, or labor, contrary to the provisions of the next preceding section, shall be liable for the full amount so expended, and the same may be recovered from any such official or the surety upon his official bond by any such county, or any taxpayer thereof."

Section 1106, so far as applicable to this case, provides generally that no judgment shall be rendered

against any county under any contract entered into in violation of the provisions of the two preceding sections.

It is obvious that plaintiffs' action cannot be maintained under section 1105, as argued by them, nor under any of the foregoing sections. Those sections have no application to the facts in the present case, because they relate solely to a penalty to be recovered for the payment of any public funds "contrary to the provisions of" section 1104. The services of the precinct assessors were not performed under contract, either express or implied, with the county board, but in pursuance of an election by the people. There was no contractual relation between the county board and the precinct assessors for their services. Hence, those sections do not apply.

Section 6427 is relied upon in part by plaintiffs for recovery. That statute provides generally that, if the county board allows the bills of precinct assessors that are not made out in accordance with its provisions, the board "shall be liable on their bonds for amount of same." The only violation of section 6427 alleged in the petition is that the claims of the precinct assessors did not show the date of each day on which they were employed. The answer denied that allegation, and plaintiffs' demurrer in effect admitted the truth of defendants' plea. Hence, the court properly overruled the demurrer and motion for judgment on the pleadings filed by plaintiffs.

When plaintiffs stand on a demurrer and refuse to plead further, and the judgment of the district court is affirmed here, the action will be ordered dismissed. *Estabrook v. Hughes,* 8 Neb. 496. The judgment is affirmed, and plaintiffs' action must therefore be dismissed.

AFFIRMED AND DISMISSED.

LETTON and ROSE, JJ., not sitting.

STATE, EX REL. FRANK W. ACTON, RELATOR, V. MABEL C. PENROD, COUNTY CLERK, RESPONDENT.

FILED NOVEMBER 1, 1918. No. 20867.

1. **Elections:** CANDIDATES: MANDAMUS. Mandamus will not lie to compel a county clerk to place on the nonpartisan judiciary ballot the name of a person as a candidate for the office of judge of the county court who is not one of the two candidates who received the highest number of votes at the primary.
2. ———: STATUTES: CONSTRUCTION. Sections 2140, 2165, Rev. St. 1913, pertain to the subject of elections generally. The nonpartisan judiciary act with its amendments is a statute complete in itself and relates to an independent subject. It is an elementary rule of construction that special provisions in an act relating to particular subject-matter will prevail over general provisions in other statutes, so far as there is a conflict.

Original proceeding in mandamus by relator to compel respondent, as county clerk, to place the name of relator on the nonpartisan ballot as candidate for county judge. *Writ denied.*

Willis E. Reed, Attorney General, L. W. Colby, Alfred Haslett and *T. J. Doyle,* for relator.

Rinaker & Kidd and *Sackett & Brewster,* for respondent.

DEAN, J.

This is an original application, commenced in this court, for a writ of mandamus to compel respondent to place the name of relator upon the nonpartisan judiciary ballot as a candidate for the office of judge of the county court. The writ must be denied.

It appears that under the nonpartisan judiciary act, namely, sections 2209-2211, Rev. St. 1913, as amended by chapter 37, Laws 1917, three candidates filed for the office in question at the primary. After the primary it became the duty of respondent, under the law, to place

upon the nonpartisan ballot the names of the two candidates receiving the highest number of votes. F. W. Messmore was one of the two successful candidates, but before the primary he entered the military service of the United States. About two months after the primary, which was within the time provided by statute, he filed in the office of respondent his resignation. Subsequently relator and another citizen, neither of whom were candidates at the primary, filed their respective petitions in the office of respondent with the view of becoming candidates at the general election for the office.

The petition in behalf of relator contained more than 300 names, and requested "that his name be placed on the official ballot as a nonpartisan candidate by petition." He argues that, because his petition was the first to be filed after the resignation of Mr. Messmore, therefore section 2140, Rev. St. 1913, confers upon him the right to have his name placed on the ballot. Section 2140 provides that candidates nominated under its provisions "shall be termed 'candidates by petition,' and upon the ballot upon which their names are printed shall be printed after such names the words 'by petition.'" It seems clear to us that section 2140, in requiring the designation "candidates by petition" to appear on the ballot, apparently conflicts with the nonpartisan judiciary act, which provides that the names of judicial candidates shall appear on the ballot "without any political designation, circle or mark whatever." Laws, 1917, ch. 37, sec. 2210.

Section 2165, Rev. St. 1913, makes provision for filling a vacancy that occurs when the nominee of a political party declines a nomination or when a vacancy otherwise occurs. The nonpartisan act having no such provision, and its language seeming to contemplate that there may be but one candidate at the general election, we are convinced that it was the legislative

intent that the candidates whose names appear on the nonpartisan ballot at the general election must be restricted to such candidates as have been nominated under that act at the primary. Of course, this does not prevent the voter from writing on the ballot at the general election the name of any person for whom he wants to vote.

Sections 2140 and 2165, Rev. St. 1913, pertain to the subject of elections generally. The nonpartisan judiciary act with its amendments is a statute complete in itself and relates to an independent subject. It is an elementary rule of construction that special provisions in an act relating to particular subject-matter will prevail over general provisions in other statutes, so far as there is a conflict. *Williams v. Williams,* 101 Neb. 369. A proper observance of the rule will not permit any other conclusion than that at which we have arrived.

We deem it proper to suggest that relator's argument should be addressed to the legislature rather than to the courts.

The writ is denied, and the action dismissed.

WRIT DENIED.

MORRISSEY, C. J., not sitting.

SEDGWICK, J., concurring.

When one of the two candidates that have been nominated for the office of county judge at the primary election under the nonpartisan judiciary act of 1913 dies or declines the nomination before the general election, whether the vacancy so created upon the ticket for the general election can be filled by petition is a question of difficulty. The primary election law of 1907 (Rev. St. 1913, secs. 2134-2208, Laws 1907, ch. 52) contains a general provision for nominating officers by petition (section 2140), specifying the officers so to be nominated, and among them the judge of the district court: "Certificates for the nomination of the

judge of the district court shall be filed with the county clerk of each county embraced in such judicial district." This section has not been changed by the legislature, althought it is referred to with approval in chapter 33, Laws 1915, which amends section 2138, Rev. St. 1913. Thus we have one important judicial officer who may be nominated by petition, although his name has not been submitted to the electors at the primary election.

The primary election law of 1907, as it is still in force, contains general provisions for the filling of the vacancies on the ticket at the general election, which before the enactment of the nonpartisan act applied to all offices for which candidates might be nominated at the primary election, and contained ample provisions for filling any vacancy on the ticket at the general election that might occur by death or declination of a candidate nominated at the primary or which might occur for any other reason. The policy of the law plainly is, and has been through all this legislation, to fill such vacancies and to require that the ballot at the general election shall present to the voters the names of at least two candidates for every office that is to be filled, and we might safely say that the failure to do so, if there is such failure, in the case of the nonpartisan ballot at the general election, was merely an oversight of the legislature, and that, if the possibility of the contingency that has arisen in this case had been suggested to the attention of the legislature, a provision would have been inserted remedying the apparent defect in the present law. It is unfortunate if such vacancies on the judicial ballot cannot be filled before the general election. If, however, the court should hold that the policy of the law to be derived from all of the legislation upon this subject requires that this vacancy should be filled by petition, a contingency might arise which requires

further legislation, and which the court would be unable to meet. If, as in this case, more than one candidate is presented by petition to fill this vacancy, there is no method provided, or even indicated, in the statute by which it could be determined which one of these candidates should have a place upon the general ticket, and the court cannot find from the general policy of the law any means of determining that question. And the nonpartisan judiciary act expressly provides: "Said county clerk or other official shall place on said separate ballot, in each office division, twice as many names as there are places to be filled at the said general election. Said names shall be the names of the persons who received the highest number of votes for the office for which they were candidates in the primary." Rev. St. 1913, sec. 2211 (Laws 1917, ch. 37). If this language is construed literally, it excludes the possibility of filling a vacancy under such circumstances. I suppose we are compelled to adopt the conclusion reached in the majority opinion.

ALDEN MERCANTILE COMPANY, APPELLANT, v. JOHN A. RANDALL, RECEIVER, APPELLEE.

FILED NOVEMBER 16, 1918. No. 20443.

Judgment: PROCESS: WAIVER OF DEFECT. There is a well-marked distinction maintained between judgments rendered in which there has been no service of summons at all and those rendered where there has been service of summons irregularly made. In the former class the judgment may be collaterally impeached, but in the latter the defect is waived, unless directly assailed.

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

D. F. Osgood, for appellant.

Burkett, Wilson & Brown, contra.

Plaintiff is a policy-holder in a mutual insurance company whose principal place of business was in Lancaster county. This corporation became insolvent, and a receiver was appointed for it. The receiver began an action against the various policy-holders in the district court for Lancaster county. A summons was issued, sent to Grant county, the county of plaintiff's residence, and a copy served upon him by the deputy sheriff of that county. He made no appearance. Judgment by default was entered against him. A transcript of the judgment was filed in the district court for Grant county. The summons was regular in form, except that the dates of the answer day and the return day were erroneously made one week more remote than the law provides. The copy served on plaintiff was marked "copy" but was not properly certified. The indorsement recited that the sheriff served this summons on defendants by "reading and delivering a true copy of the within summons to each."

This action is brought to remove the cloud upon the title to plaintiff's real estate created by the filing of the transcript. The district court found for the defendant. Plaintiff appeals.

PER CURIAM.

The question is, whether the defects in the summons were mere irregularities, or were so grave as to render the attempted service void. In *Ley v. Pilger,* 59 Neb. 561, it was held that the insertion of an erroneous date of return day is merely an irregularity, and does not render the process void. In *Barker Co. v. Central West Investment Co.,* 75 Neb. 43, the summons was defective in form, both as to the date of the return day and the answer day. It was held that the summons was not void, merely irregular. *Muchmore v. Guest,* 2 Neb. (Unof.) 127. The fact that erroneous dates were

inserted for the return and answer days might have been taken advantage of by special appearance, but this not having been done, and judgment rendered, the judgment is not open to collateral attack. *Gandy v. Jolly*, 35 Neb. 711; *Campbell Printing Press & Mfg. Co. v. Marder, Luse & Co.*, 50 Neb. 283; *Jones v. Danforth*, 71 Neb. 722.

Complaint is made that the venue was erroneously stated. The venue of the summons was laid in Lancaster county, but it was directed to the sheriff of Grant county. This is in accordance with the statute. Rev. St. 1913, secs. 5653, 8549.

AFFIRMED.

HALLECK C. YOUNG ET AL., APPELLEES, V. JOHN R. BENNETT ET AL., APPELLANTS.

FILED NOVEMBER 16, 1918. No. 20141.

Highways: ASSESSMENT: JUDGMENT: CONCLUSIVENESS. Defendant board of county commissioners made a special paving assessment against real estate. In an action brought by the property owner the court entered a decree declaring void the levy and ordered the tax canceled upon the tax records. Subsequently defendant board undertook to make a reassessment against the property. Plaintiffs filed a petition, alleging the former assessment, the entry of the judgment in the former suit, and alleged that the judgment was still in full force and effect, and that the board was without authority to make a reassessment. *Held*, that the petition was not demurrable.

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

Frank A. Peterson, for appellants.

Field, Ricketts & Ricketts, contra.

MORRISSEY, C. J.

Plaintiffs brought this action to enjoin the board of county commissioners of Lancaster county from levy-

ing a special assessment against real estate owned by them, adjoining the city of Lincoln. From an order of the district court overruling a demurrer to plaintiffs' petition, defendants appeal.

In substance the allegations of the petition are: That plaintiffs are the owners of certain described premises; that in 1912 defendants caused the roadway along these premises to be paved; that later they levied a special assessment against this land, under the provisions of chapter 25, Laws 1911, to cover a portion of the cost of such improvement; that this special assessment was subsequently declared void, and the tax "was ordered canceled upon the tax records," upon action brought by plaintiffs; "that said judgment and decree of the district court * * * is still in full force and effect, and is not appealed from;" that the attempted reassessment is illegal, and, if carried out, will cast a cloud upon plaintiffs' title.

In their brief on appeal, defendants contend that this petition fails to state a cause of action, against a demurrer, "for the reason that the plea of prior adjudication in said petition is not sufficiently alleged," and, further, that the petition is without equity, "for the reason that the plaintiffs make no offer to pay for the benefits accruing to plaintiffs' property by reason of the grading and paving done on the street abutting the same."

Is the petition demurrable? Plaintiffs' purpose was merely to show that a prior assessment had been levied and declared void, and for this the decree in question was sufficiently pleaded. The position of plaintiffs is that, once a special assessment has been levied, the power of imposing such tax is exhausted, and, in the absence of express legislative authority, no right of reassessment exists. This view seems to be correct when the assessment, as in this case, has been adjudged absolutely void.

The claim that the petition is without equity, because no tender of the amount fairly due for the improvement was made, is not triable in this action. That question ought to have been presented in the former action, and presumably it was.

The demurrer was properly overruled, and the judgment is

AFFIRMED.

CORNISH, J., not sitting.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT, V. BOONE COUNTY, APPELLEE.

FILED NOVEMBER 16, 1918. No. 20176.

1. **Taxation:** PLACE OF. "The word 'property' includes every kind of property, tangible or intangible, subject to ownership." Rev. St. 1913, sec. 6291. Property of merchants, except as specifically provided in the statute, "shall be listed and taxed in the county, township, precinct, city, village, and school district where the business is done." Rev. St. 1913, sec. 6329.

2. ———: DOUBLE TAXATION. Double taxation is, under some circumstances, considered unavoidable; but it is the policy of our law to avoid double or unequal taxation when practicable.

3. ———: ———: CREDITS. To avoid double taxation, the word "credits," as used in the statute, is construed to mean net credits.

4. ———: PLACE: NET CREDITS. When a merchant operates, in several counties, stations for the purpose of selling lumber, fuel, grain and live stock, each station should be assessed as an independent business, and the net credits for taxation of each business is the excess of its assets, if any, over the indebtedness incurred in establishing and conducting that particular undertaking.

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

Courtright Sidner & Lee, for appellant.

W. J. Donahue, contra.

SEDGWICK, J.

The plaintiff appealed from the board of equalization of Boone county to the district court for that county, and in that court filed a petition alleging that the plaintiff, a corporation, "is now and for several years last past has been engaged in the business of operating stations for the purpose of selling lumber, building material and fuel, and for the purpose of buying grain and live stock and shipping the same," and, "for some years last past, has had one of such stations located at Albion, in Boone county, Nebraska, where the nature of plaintiff's business is that of selling lumber and other building material and purchasing and shipping grain. In the conduct of such business at said station of Albion, the plaintiff on April 1, 1916, had outstanding on its books as book accounts owing to it from its customs (customers) at said station, for lumber, building material and fuel sold by plaintiff to various parties upon credit as an open book account, the sum of $9,778.41. In the conduct and carrying on of plaintiff's said business at many stations in the state of Nebraska, it is at all times necessary for the plaintiff to purchase large quantities of said lumber, building material and fuel upon time, and it is indebted therefor, and at all times to borrow considerable sums of money for the purpose of carrying on said merchandising business. In the conduct of said business all purchasing for all of its stations of lumber, building material and fuel is made at plaintiff's chief office in Fremont, Nebraska, and all of said merchandise is paid for from the chief office at Fremont, Nebraska. On the 1st day of April, 1916, the total amount of all bills receivable and book accounts and debts owning (owing) to plaintiff, being the total of all amounts owing to it, was the sum of $778,597.66. At said time the plaintiff was indebted for money borrowed in the sum of $1,634,443.46, and was indebted for merchandise purchased for carrying

on its business in the sum of $33,365.84. At said time, on April 1, 1916, the plaintiff was owing for money borrowed to carry on the business at the said station of Albion, which amount was carried on the books as a debt item against and for the use of said station, $22,844.71. At no time in the last several years has the liability of the plaintiff for money borrowed to carry on the business at said station of Albion not been largely in excess of the amount owing to it at said station on book accounts." The county assessor assessed the credits of the Boone county business in the amount stated, and the plaintiff filed with the county assessor "a schedule of its debits for money borrowed to carry on the business at the station of Albion and carried on the books as a debit item against and for the use of said station $22,844.71.* * * Thereupon plaintiff filed an objection to said assessment with the board of equalization of Boone county, Nebraska, praying that proper deduction be made on account of said liabilities of the plaintiff, and asking that plaintiff be assessed nothing whatever for its book accounts. Said protest and objection was overruled by said board of equalization, and the assessment against the plaintiff in the sum of $9,778.41 was approved by said board of equalization of Boone county, Nebraska." There was a general demurrer filed to the petition, which was overruled by the district court, and judgment entered affirming the action of the board, from which the plaintiff appeals.

Upon appeal of this plaintiff from a former assessment in the same county, this court held: "Where a corporation operates, in several counties, stations for the purpose of selling lumber, fuel, grain and live stock, each station should be assessed as an independent business, and its net credits thereat should be ascertained by deducting the indebtedness incurred in conducting the business at such station from the gross

credits thereof." 99 Neb. 383. The plaintiff insists that the credits of the plaintiff company ought to be assessed at its principal place of business, and its entire liabilities should be deducted to ascertain the value of its net credits. The plaintiff's brief suggests many situations and conditions in which, it is contended, this rule of assessing credits in different locations would be difficult, if not impossible, of application, and result in injustice in many instances.

The question thus presented is very important, and is not without difficulty. But, as pointed out in the former case between these parties, section 6329, Rev. St. 1913, provides that the property of "merchants, except as hereinafter specifically provided, shall be listed and taxed in the county, township, precinct, city, village, and school district where the business is done." And section 6291 defines the term "property:" "The word 'property' includes every kind of property, tangible or intangible, subject to ownership." The letter of the statute is, therefore, plain upon this point, and the court must harmonize it with the general policy of the law if possible. We do not think it advisable to depart from the rule declared in that decision.

Double taxation sometimes occurs, and has been considered as, under some circumstances, unavoidable. If, for instance, a purchaser of a herd of cattle gives his note for a large portion of the purchase price, the property is assessed to the purchaser without deduction of the amount of the outstanding note, and the full amount of the note is assessed against the owner thereof. There are many similar instances of double taxation, and yet our revenue laws contain abundant evidence that it is the policy of our law to avoid double taxation when possible. Chapter 73, Laws 1903, provided a general system of public revenue, and repealed the former statute. The former act (Comp. St. 1901, ch. 77, art. I, sec. 27) contained a general pro-

vision that, "In making up the amount of credits which any person is required to list for himself or for any other person, company, or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all *bona fide* debts owing by such person, company, or corporation, to any other person, company, or corporation for a consideration received." In repealing that statute this provision was not retained, and the repealing statute required all "property" to be assessed for taxation. But this court held that, notwithstanding the repeal of that provision, "In making a return of his taxable property under the provisions of chapter 73 of the laws of 1903 the taxpayer may deduct from the credits due him all just debts by him owing at the time of such return." *State v. Fleming,* 70 Neb. 529. The court quotes from and adopts the reasoning of the supreme court of Indiana in *Florer v. Sheridan,* 137 Ind. 28: "Credits are, by the Constitution, property, and as such are to be taxed. Their just value is to be ascertained by subtracting the *bona fide* indebtedness from the gross amount of the notes, accounts and other choses in action, and the balance is to be returned as belonging to the individual. * * * Section 1, article 10, of the Constitution of Indiana, does not say the gross amount of all notes, accounts, and other choses in action shall be taxed, and we cannot so construe it without perverting its language and obvious meaning."

The word "credits," as used in the statute, is by that court, construed to mean net credits, and that construction was adopted by this court.

The allegations of the petition must be taken as true as against the general demurrer.

In the former case between these parties (99 Neb. 383), it was said: "If the credits are taxable in Boone county, the indebtedness to be deducted must arise out of the business in that county. * * * Whatever

debts may have been incurred in the purchase of grain, lumber, or for any other purpose legitimately connected with the conduct of the business in Boone county, are proper to be deducted from the credits in that county."

In the case at bar, it appears that the plaintiff has borrowed a large amount of money, and has invested it in tangible property, a small part of which has been sold upon credit. These credits are small, almost insignificant, in comparison with the money borrowed with which the tangible property was purchased and the credits made possible. The tangible property is assessed without regard to the indebtedness of plaintiff which was caused by its purchase, and, if the plaintiff's creditors are taxed upon their demands against plaintiff, it is impracticable to avoid this double taxation. But if we continue to apply the rule so well established, that "credits," as used in the statute, means net credits, double taxation is so far avoided.

It is alleged in the petition that the credits of the plaintiff in Boone county are $9,778.41, and the debts "incurred in the purchase of grain, lumber, or for any other purpose legitimately connected with the conduct of the business in Boone county," are $22,844.71. If this is true, these debts "are proper to be deducted from the credits in that county."

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

REVERSED.

IN RE ESTATE OF WILHELMINE THIEDE.
EMILIE PERLEBERG ET AL., APPELLANTS, V. H. D. DEILY ET AL., APPELLEES.

FILED NOVEMBER 16, 1918. No. 20140.

1. **Appeal:** DISMISSAL: NONRESIDENT ALIEN ENEMIES. An appeal taken from the district court to this court will not be dismissed because

the defendants or parties in the attitude of defendants, taking the appeal are nonresident alien enemies.

2. **Executors:** ATTORNEY'S FEES. Evidence examined, and *held*, that $3,000 allowed by the executors of an estate for services of attorneys, acting in behalf of the executors in the administration of the estate, was excessive and unreasonable.

APPEAL from the district court for Cuming county: ANDREW R. OLESON, JUDGE. *Reversed, with directions.*

S. L. Geisthardt, for appellants.

Hugo M. Nicholson, S. Laut and *Burkett, Wilson & Brown, contra.*

CORNISH, J.

We have first to rule upon defendants' (appellees') motion that the plaintiffs' appeal be dismissed for the reason that they are nonresident alien enemies. From the precedents in such cases, it appears that alien enemies are not permitted to resort to the courts of this country as plaintiffs. They may, however, be made defendants. In the instant case, in the trial court they were in the attitude of defendants. The contention is that in the act of appealing to this court their attitude changes; they become the moving party, like the plaintiff, in commencing an action. The rule does not go so far. If we give the alien enemy any we should give him all the rights of a defendant. To do less might be unjust as well as ungenerous. When he is required, as well as permitted, to enter the precincts of the tribunal of justice, the courts must, for their own honor, award him nothing short of a trial according to law, as finally decided. *McVeigh v. United States*, 11 Wall. (U. S.) 259; *Porter v. Freudenberg*, Ann. Cas. 1917C, 215, 223, 224, (1 K. B. Div. 1915 (Eng.) 857); *Taylor v. Albion Lumber Co., L. R. A.* 1918B (Cal.) 185, and note.

The executors of the will in their final report charged against the estate $3,000 for attorneys' fees, expended

in the course of the administration of the estate. The amount of the fee was objected to as excessive and unreasonable. The county judge fixed the amount at $1,000. An appeal was taken to the district court, where the amount was fixed at $3,000, from which judgment an appeal is taken by the legatees to this court. The estate consisted of $3,257.58 in cash; $4,000 in good notes; 360 acres of land, two lots and dwelling house, valued at $60,325.70. The executors were directed by the will to convert the property into cash, and so did. It appears that the attorneys advised with and represented the executors in all legal matters pertaining to the estate, covering a period of over three years. They prepared some 25 instruments and orders necessary in the administration; in connection with an attorney for the legatees, procured a reduction in claims from $2,210 to $1,105; drew contracts for the sale of land, and, when purchasers made objection showing defects in the title, they obtained quitclaims and affidavits, later bringing a suit to clear up the title. Failing in this action to make the title satisfactory to the purchaser, the matter was settled by allowing the purchaser $200. They frequently advised the administrator and wrote not less than 50 letters in the course of their work. No contested cases arose, nor were any difficult or important questions of law raised, involving considerable labor. A trip from Cuming county to South Dakota to procure affidavits in perfecting title was required. While the services of an attorney were unquestionably needed and considerable work was done, yet the administration of the estate ran its course without requiring any extraordinary services in behalf of the administrator.

Administrators have the right, in the exercise of a reasonable discretion, to employ attorneys when their services are needed. The liability for the services is a personal one until the probate court, finding that the

charge made is a reasonable one, allows it as a part of the executor's account with the estate for expenses incurred. In determining what is a reasonable fee, we should take into account the amount of the property involved; the responsibility involved; the questions of law raised, whether intricate and difficult; the time and labor required for performing the services; the result thereof; together with the testimony of experts as to value. When the estate is a large one, honest as well as efficient service is always needed, and something must be paid for it, aside from the amount of labor required. Attorneys testifying as experts placed the value at from $600 to $1,000, on one side, and from $3,000 to $3,500, on the other. We are of opinion that $3,000 was in excess of what would be a reasonable fee for the services performed, and that the sum should not be more than $2,000.

The county court allowed the executors $400 for their services. No appeal was taken from this order. The trial court, apparently upon its own motion, allowed the executors an additional sum of $250 for services pending the appeal. The court should allow no additional fee on account of the prosecution of this case by the executors.

The judgment is reversed and the cause remanded to the district court, with directions to enter judgment in the sum of $2,000, in accordance with this opinion.

REVERSED.

ARTHUR F. RHOADES V. STATE OF NEBRASKA.

FILED NOVEMBER 16, 1918. No. 20684.

1. **Criminal Law:** RAPE: CORROBORATION. In a prosecution for rape, it is competent to prove, in corroboration of the complaining witness's testimony as to the main fact, that recently after the alleged outrage she made complaint to those to whom a statement of such

an occurrence would naturally be made; but on direct examination such testimony should be confined to the bare fact that complaint was made, and details of the event, including the identity of the person accused, are not proper subjects of inquiry, unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the *res gestæ*.

2. ———: TRIAL: EXCLUSION OF PUBLIC. An order of the court in a criminal trial, excluding from the courtroom that portion of the general public present merely as listeners, is violative of section 11, art. I of the Constitution, guaranteeing to the defendant a public trial.

ERROR to the district court for Burt county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

E. W. Simeral and *B. C. Enyart,* for plaintiff in error.

Willis E. Reed, Attorney General, and *Orville L. Jones, contra.*

CORNISH, J.

Defendant, convicted of statutory rape upon a child under the age of 18 years, brings error to this court.

The defendant did not testify. The trial court, over his objection, permitted the mother of the complaining witness in her direct examination to give, in full, detailed statements of the complaining witness going to show sexual relations between her and the defendant, and also statements touching their general relations, not sexual. This was error, and, under the circumstances of this case, where, as shown by the record, evidence of the *corpus delicti* was slight was prejudicial to the rights of the defendant. The rule in such case is stated in the second paragraph of the syllabus in *Henderson v. State,* 85 Neb. 444.

When the complaining witness was called to testify, the court, after conferring with the witness, and because of the delicate nature of her testimony, ordered that those present merely as listeners retire from the courtroom until authorized to return. This was ob-

jected to as a denial to the defendant of his right to a public trial, guaranteed by section 11, art. I of the Constitution. We are of opinion that this objection should have been sustained. Under the constitutional provision, the general public, as such, cannot be excluded. The public is admitted so that it may know that the accused is fairly dealt with and so that his triers will be keenly alive to a sense of their responsibility. Reasonable restrictions, for want of space, upon the number admitted are permissible; also upon persons of immature years where the evidence relates to scandalous, indecent or immoral matters. When those present conduct themselves in a manner tending to obstruct justice, or tending to give either the state or the defendant an unfair trial, the courtroom may be cleared of them. Other occasions may arise when, in the discretion of the court, such order would be permissible. It is difficult to say that the court's order in this instance did not exclude the general public. 8 R. C. L. p. 75, secs. 29, 30,

The court properly refused defendant's requested instruction No 1, substantially to the effect that, if the evidence of any particular witness is reconcilable with innocence upon any reasonable hypothesis, it should not be given a criminal meaning. The rule invoked applies to the testimony as a whole, and is limited in its application to circumstantial evidence. *Casper v. State,* 100 Neb. 367.

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

REVERSED.

INTERNATIONAL HARVESTER COMPANY, APPELLEE, V. STEPHEN SCHULTZ, APPELLANT.

FILED NOVEMBER 16, 1918. No. 20142.

Guaranty: PAYMENT OF NOTE. A guaranty written on certain negotiable promissory notes was in the following form: "For value received, I hereby guarantee the payment of the within note, and all renewals, and extensions thereof, to the payee therein named, or any owner and holder thereof; and I hereby waive protest, due presentment, demand and notice of nonpayment thereof, and I hereby waive diligence on the part of any holder thereof in collecting said note and all defenses arising out of lack of diligence in enforcing payment thereof." *Held*, to be a contract to pay the notes in suit by the guarantor upon default by the respective makers at maturity.

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

J. W. James, for appellant.

T. J Doyle, contra.

DEAN, J.

This is a suit to recover on a guaranty of payment of 44 negotiable promissory notes. The makers were not made parties defendant. A jury was waived. Plaintiff recovered judgment for $1,927.39 and costs. Defendant appealed.

Defendant purchased farm machinery from plaintiff and sold it to his customers, taking the notes sued on in payment. Some were payable to defendant's order and some to plaintiff's order. All of the notes were delivered to plaintiff before maturity. The makers defaulted at maturity and defendant refused payment. The guaranty that was written on the notes appears in the syllabus.

Two questions are presented: First, is the guaranty an independent contract by defendant to pay to plain-

tiff the amount due on the respective notes on failure of makers to pay at maturity? second, are any of the costs taxable to plaintiff?

The law seems to be settled that the guaranty sued on is a contract to pay the notes on failure of the makers to pay at maturity. *Bloom & Co. v. Warder, Mitchell & Co.*, 13 Neb. 476; *Bickford v. Gibbs*, 8 Cush. (Mass.) 154. In view of the comprehensive terms of the guaranty, plaintiff was under no obligation to undertake the collection of the notes from the makers, nor to make them parties defendant.

Each of the 44 notes was separately stated as a cause of action. While the suit was pending 28 of the notes were paid to plaintiff by the respective makers, and as to such notes the causes of action were dismissed and judgment was rendered for plaintiff on the remaining notes. Defendant argues that, because the suit was dismissed as to the notes paid, a part of the costs should therefore be taxed to plaintiff. His contention cannot prevail. The power of courts to award and tax costs in legal proceedings was unknown at the common law. *Branson v. Branson*, 84 Neb. 288. We have no statute in this state authorizing the court to apportion any part of the costs against plaintiff in an action involving such facts as are presented by the record before us. It follows that, in the absence of such statute the prevailing party is entitled to recover costs. 15 C. J. p. 28, sec. 14.

Finding no reversible error, the judgment is

AFFIRMED.

SEDWICK, J., concurs in the conclusion.

FRANK M. STRATTON, APPELLANT, V. BANKERS LIFE COMPANY: MARY M. ALLEN, INTERVENER, APPELLEE.

FILED NOVEMBER 30, 1918. No. 20546.

1. **Insurance:** ASSIGNMENT OF POLICY: PAYMENT OF PREMIUMS. Where insured assigns his life insurance as collateral security, the duty to keep the collateral in force by payment of the premiums rests on him in absence of an agreement to the contrary.

2. **Appeal:** SECOND APPEAL: LAW OF THE CASE. A question once determined in the appellate court will not ordinarily be re-examined there on a second appeal in the same case; but there may be an exception, where such a determination was outside of the pleadings and proofs and was contrary to law and to the rules of equity.

APPEAL from the district court for Saunders county: EDWARD E. GOOD, JUDGE. *Judgment of reversal on former appeal and judgment on this appeal reversed, and original judgment of district court affirmed.*

Charles H. Slama, for appellant.

B. F. Good and *R. R. Rose, contra.*

PER CURIAM.

This is an action to recover $2,000 and interest on a policy of life insurance issued by the Bankers Life Company of Des Moines, March 27, 1885. John B. Allen was the insured, and his wife, Mary M. Allen, intervener, was named in the policy as the beneficiary. They owed a debt of $3,500. Frank M. Stratton became their surety therefor. September 5, 1892, they assigned the insurance policy to him as collateral for his suretyship. As surety, Stratton subsequently paid creditors of insured and wife over $4,000, and they have never reimbursed him. He is plaintiff herein, and the insurer is defendant. Insured died December 15, 1912. Mary M. Allen, intervener, pleaded that the

assignment of the insurance policy to plaintiff was void on the ground that it had been procured by the duress of her husband. She prayed for a judgment in her favor on the policy of insurance. The trial court found there had been no duress, sustained the assignment, and rendered judgment in favor of plaintiff for the amount due on the policy, $2,139.33. Intervener appealed to this court. Upon review, the trial court's finding on the issue of duress was sustained, but the judgment in favor of plaintiff was reversed and the cause was remanded, with instructions to the district court to ascertain the amount of premiums paid by insured and intervener after they made their assignment of the policy and to enter judgment therefor in favor of the intervener. Upon further proceedings in the district court, there was a literal compliance with the mandate of the supreme court, resulting in a judgment in favor of intervener for $948.28. Plaintiff has appealed.

On the present and second appeal, plaintiff takes the position that the judgment of this court on the former appeal was contrary to law and that there was no pleading or proof to support it. A re-examination of the record shows that his position is well taken. The judgment originally entered by the district court in favor of plaintiff for the full amount of insurance due under the policy was the only one which could have been properly rendered under the pleadings, the proofs and the law, and should have been affirmed. The reversal by this court for the purpose of allowing intervener to recover the amount of premiums paid after the assignment had been made was an obvious mistake in no wise attributable to plaintiff.

The law is that, where insured assigns his life insurance as collateral security, the duty to keep the collateral in force by payment of the premiums rests on him in absence of a contract to the contrary. *Grant*

v. Alabama Gold Life Ins. Co., 76 Ga. 575; *Bush v. Block,* 193 Mo. App. 704; *Killoran v. Sweet,* 25 N. Y. Supp. 295. In the present case there is no such contract. The assignment by its terms did not relieve the insured from the performance of his duty to pay premiums, nor require the assignee to refund premiums subsequently paid by the insured or the intervener. There is no pleading or proof that plaintiff relieved insured from his duty to pay premiums, or that plaintiff participated in any form of duress to procure the assignment, or that he obligated himself in any way to pay the premiums, or that he agreed to refund premiums if subsequently paid by insured or intervener. There is no rule of equity requiring plaintiff to refund such premiums as a condition of enforcing his rights under the insurance policy assigned to him. It is therefore manifest that the former order of this court, in reversing the original judgment of the district court and in permitting the intervener to recover premiums paid by her and her husband after they assigned the insurance to plaintiff, was outside of the pleadings and proofs and was contrary to law and to the rules of equity.

To sustain the judgment from which the present appeal is taken, however, intervener invokes the doctrine that questions once determined in the appellate court will not ordinarily be re-examined there on a second appeal in the same case. *Coburn v. Watson,* 48 Neb. 257. There are exceptions to this rule. *City of Hastings v. Foxworthy,* 45 Neb. 676. *State v. Farrington,* 86 Neb. 653, recognizes an exception and follows the general rule; but the decision was within the issues raised by the pleadings, and in that respect the case is different from the case at bar, The former decision in the present case, being manifestly outside of the pleadings and proofs, and being contrary to law and to the rules of equity, falls within the exceptions.

The judgment of reversal entered by this court on the former appeal and the judgment presented for review on the present appeal are therefore reversed, and the original judgment of the district court in favor of plaintiff for the amount due on the policy is affirmed, at the costs of intervener.

JUDGMENT ACCORDINGLY.

ALDRICH, J., not sitting.

SALINE COUNTY, APPELLEE, V. BLUE RIVER POWER COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 30, 1918. No. 20067.

1. **Electricity:** ESTABLISHMENT OF TRANSMISSION LINE ALONG HIGHWAY. Where the landowner in planting trees and erecting fences along the line of a public highway incloses and retains the possession and use of a part of the land lying within 33 feet of the section line, a corporation undertaking the erection of an electric transmission line along the road under the privileges granted to it under section 7420, Rev. St. 1913, may assume the line of such road to be where such trees and fences are found, until the line is otherwise definitely fixed and established.
2. ———: ———: STATUTE. Defendant undertook the construction of an electric transmission line along a public highway. The statute then in force provided: "Whenever practicable the poles shall be set upon the line of such highways." By the terms of an injunction order entered by the district court, defendant was required to set its poles "upon the line of such highways." An appeal was prosecuted to this court. While the appeal was pending, the statute was amended to read: "Whenever practicable the poles or towers shall be set in such highway and adjacent to and not more than six feet distant from the line thereof." *Held*, that the statute in force at the time of entering the judgment in this court will control.

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

J. J. Thomas and *Edwin Vail*, for appellants.

Charles F. Barth and *Glenn N. Venrick*, *contra.*

MORRISSEY, C. J.

Defendant undertook to construct an electric transmission line along a public highway, under the provisions of section 7420, Rev. St. 1913, which granted to such corporations as defendant "right of way for all necessary poles and wires along, within and across any of the public highways of this state: * * * Provided * * * all such wires shall be placed at least twenty feet above all road crossings, and all such poles and wires shall be so placed as not to interfere with the public use of any of such highways, and whenever practicable the poles shall be set upon the line of such highways." A dispute arose between plaintiff's officers and defendant's agents over the location of this line. It was alleged on behalf of plaintiff that defendant was not following the line of the road, but was erecting its poles at points within the public highway. A permanent injunction was granted, restraining defendant from erecting, placing or maintaining its poles within the highway, at any other place than on its boundary line. Defendant has appealed.

The highway runs east and west along the north side of sections 14, 15, 16 and 17. Defendant undertook to use the south side of the highway. In order to locate the south boundary of the highway, the county surveyor surveyed and located the line between the sections mentioned and the sections immediately north, assumed the highway to be the standard width, 66 feet, and fixed the south line of the highway on a line running parallel with, and 33 feet south of, the north line between the sections mentioned. Defendant denies that the road was regularly opened, and asserts that it is a highway only by prescription; that the fences and hedges along the south side of the highway are not placed at a uniform distance of 33 feet south of the north line of the respective sections; and that only so much of the ground as lies north of the fences

and hedges has ever been used by the public, or forms a part of the highway. It is further claimed that the transmission line is built as near as practicable to the south line of the highway, as indicated by the fences, hedges and trees.

The evidence shows that, pursuant to an act of the legislature of 1873, providing for the establishment of public roads along section lines in certain counties, the board of county commissioners of plaintiff county, in 1874, passed a resolution declaring all such section lines to be public highways. The county records do not show that any further proceedings were had, but the proof is conclusive that for more than 40 years before the commencement of this litigation the public had traveled over these section lines, and no dispute arose between the landowners and the county over the right of the public to treat them as public highways. The landowners planted trees and erected fences approximately on a line 33 feet from the section line, but at certain points deviated therefrom and encroached upon the 33-foot strip. The trial court found that the road was of the uniform width of 66 feet. The landowners are not parties, and we do not determine this question. Defendant's rights rest upon the statute; it is given a right to erect its line in the public roadway, and it may assume the line to be the line so long recognized by the public. It will not be required to litigate with landowners the right to the use and occupancy of the land occupied by them.

The trial court found that it was practicable to set the poles on the south line of the road. Since the entry of the decree the statute has been amended, and chapter 135, Laws 1917, now supersedes it. The latter statute is substantially the same as the former, except that it provides: "Whenever practicable the poles or towers shall be set in such highway and adjacent to and not more than six feet distant from the line there-

of." Our judgment is necessarily governed by this later statute. 3 Cyc. 407. We shall not attempt a review of the evidence, but we are convinced that it is not impracticable for defendant to place its poles within six feet of the highway line, as indicated by the trees and fences.

The decree is modified so as to require defendant to refrain from erecting or maintaining its line more than six feet from the south boundary line of the established highway as herein indicated; otherwise it is affirmed.

AFFIRMED AS MODIFIED.

WEST NEBRASKA LAND COMPANY, APPELLANT, V. WILLIAM ESLICK ET AL., APPELLEES.

FILED NOVEMBER 30, 1918. No. 20149.

Process: NONRESIDENT: CONSTRUCTIVE SERVICE. Chapter 161, Laws 1909, amending section 77 of the Code, now appearing as section 7640, Rev. St. 1913, construed, and *held*, that the former method of procuring service upon nonresidents was not affected thereby; that the purpose of the amendment was to provide a means of constructive service when it is unknown to the plaintiff and its attorney whether the defendant or defendants are residents or nonresidents of the state.

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

William J. Ballard, for appellant.

Gantt & Ellis and *James A. Rodman, contra.*

LETTON, J.

The petition and the verification in this case are in the ordinary form for the foreclosure of a mortgage. The usual affidavit for service by publication on account of the nonresidence of the defendants was filed. Evidently thinking it advisable to follow the amended law of 1909 relating to constructive service, which is

somewhat ambiguous, a motion and affidavit by the attorney for plaintiff was also filed, to the effect that, "At the time said mortgage was given, the defendants were residents of Elk Point, South Dakota; but that at the time said petition was filed plaintiff and its attorney did not know the residence or whereabouts of said defendants, and at this time said plaintiff and its attorney do not know the residence nor the whereabouts of said defendants; that said defendants cannot be found in this state, and that by reason thereof personal service of summons cannot be had upon said defendants."

An order was then made by the judge for service by publication. When the cause came on for hearing, the court found that due and legal notice of the pendency of the action had been given to each of the defendants, and rendered a decree of foreclosure. The land was sold at sheriff's sale, and the sale confirmed on February 4, 1913. On September 6, 1915, a motion was filed by one of the defendants to set aside the decree of foreclosure, for the reason that no service of summons was had in the action; that notice was had by publication, and that the court did not acquire jurisdiction of the person of said defendant, for the reasons that the petition failed to set out in the verification that the residence, or place of abode, of defendants was unknown to plaintiff; because the time fixed in the publication of notice for the defendants to answer did not comply with the provisions of the statute; and because the last day of publication was on July 4, which is a legal holiday.

At the hearing on the motion, the court found that the answer day named was four days later than the date fixed by law, and that "the verification to the petition does not set forth the fact that the residence or place of abode of the defendant is unknown to plaintiff and its attorney, as required by section 7640, Rev.

St. 1913. Because of the failure to verify the petition as by law required, and because the published notice fixed the answer day on a date other than that required by law, the court was without jurisdiction to render the judgment herein"—and the decree was set aside. Plaintiff appeals.

Prior to the passage of chapter 161, Laws 1909, amending section 77 of the Code (now section 7640, Rev. St. 1913), service upon nonresident defendants was made by filing the affidavit provided for in former section 78 of the Code (Rev. St. 1913, sec. 7641) and publishing the notice. No order of court was required. The amendment added the sixth subdivision, providing that in certain actions, where the residence, or place of abode, of any defendant, or defendants, are to the plaintiff and its attorney unknown, "whether said defendant or defendants may be residents or nonresidents of the state of Nebraska," such fact should be stated in the verification of the petition, and an application be made to the court, or judge, for an order authorizing service by publication.

The question is whether this amendment applies in all cases, or whether it only meant to meet the contingency that the defendants, or some of them, whose residence, or place of abode, was unknown, might be residents of this state.

Section 78 of the Code is not mentioned in the amending statute, and it is clear that it was not repealed by implication, because, if repealed, the anomalous condition would exist that, if the defendant was known to be a nonresident, and his place of residence was also known, there would be no provision in the statute for constructive service upon him. The amendment was designed to allow constructive service to be made upon residents of the state in certain actions *quasi in rem,* whenever the residence or place of abode of the defendant was unknown to the plaintiff and its attorney, and

service of summons could not be made upon them in the state.

Following the familiar rule that such a construction should be given as will harmonize apparently conflicting provisions of a statute, we hold that, in cases where it is known that the defendant, or defendants, are nonresidents of the state, service by publication may be had in the same manner as before the amendment; but where a defendant, or defendants, cannot be found in this state, and the pleader is in doubt as to whether he is, or they are, residents or nonresidents, the proper practice is to make the statutory averments in the verification to the petition, and then apply to the district court for an order for publication, as the amendment provides.

There is no bill of exceptions, and no finding that the defendants were residents of the state of Nebraska. It must be considered, therefore, that they were nonresidents, as alleged. All the requisites for constructive service on nonresidents had been complied with. The filing of the second affidavit and the procurement of the order were unnecessary and mere surplusage. The court had acquired jurisdiction by the first affidavit, and never lost it.

The complaints as to the date of answer day, and as to the last day of publication, came too late. These were mere errors, not affecting the jurisdiction, which should have been called to the attention of the court before the decree was rendered, or might have been taken advantage of on appeal, and, this not having been done, were cured by the decree.

The order setting aside the decree is reversed, and the proceeding dismissed.

REVERSED AND DISMISSED.

GREEN B. STORM, APPELLANT, v. JAMES C. STORY, APPELLEE.

FILED NOVEMBER 30, 1918. No. 20245.

1. **Vendor and Purchaser:** CONTRACT: TIME OF PERFORMANCE. Where a contract for the sale of real estate requires that an abstract of title to the land sold be brought down to date, and where the contract does not specify any time for its completion, there is an implied obligation that the abstract be completed and the transaction closed within a reasonable time.

2. ———: ———: RESCISSION: SPECIFIC PERFORMANCE. Where the delay in the completion of the abstract was occasioned by the failure of the seller to supply, with the abstract, a history of certain foreclosure proceedings through which the title was derived, he was not entitled to rescind the sale and refuse to convey before the abstract had been completed and brought down to date, and the buyer, upon fulfilling the terms of the contract, is entitled to specific performance.

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

J. L. Rice, for appellant.

Eldred, Cordeal & McCarl, contra.

LETTON, J.

The plaintiff, who then lived in Missouri, was the owner of a tract of land in Hitchcock county. In August and September, 1916, he had some correspondence with the defendant, who was a real estate dealer in that county, concerning the purchase of this land. After considerable correspondence, the plaintiff finally offered to sell the land for $4,250, to be paid as follows: The purchaser to assume an existing mortgage of $1,500 on the land, to pay $2,000 cash, and to give a note and mortgage for $750 payable in three years. In his letter of September 15, 1916, accepting the terms, the defendant said: "We will have deed brought down to date. Attend to this at once, as I want to put in wheat."

Defendant testified that he meant to say, "We will have the *abstract* brought down to date," and this was evidently the meaning plaintiff understood, for on September 18 the plaintiff wrote as follows: "Your letter and deed received and will go to town this a. m. and sign deed and forward it to the Commercial Banking Co. Now Mr. Story I am going to ask a little more cash from you as I intended my first offer to you should have said cash, but will only ask enough more to pay the 1915 taxes and whatever it costs to bring *abstract* down to date." The deed was signed and forwarded to the bank that day.

Plaintiff testifies that he did not hear from Mr. Story in reply to this letter; that a short time afterwards he wrote to the bank with respect to the matter, but received no reply; that the latter part of the month he sent a telegram to the bank as follows: "If nothing done yet return deed at once." Receiving no reply, he went to Nebraska, reaching Stratton on Tuesday, October 2. He called at the bank, asked for the deed, which was delivered to him. He denies that he had any conversation with Mr. Vennum, the banker, with respect to the abstract until after he received the deed, when he says Vennum told him the matter had been delayed because the abstract had been sent to Trenton, the county seat, to be brought down to date, but had not been returned yet.

He also testifies that he saw Mr. Story later in the day, who said he ought to have the land, but made no tender of any money or note. A few days afterwards Story placed upon the records of the county copies of the letters, with an affidavit, claiming an interest in the land. Plaintiff contracted to sell the land to a third person, received a part of the purchase money, and afterwards brought this action to remove the cloud created by the recording of the mentioned papers. The answer pleads a contract made by correspondence;

that Story has always been ready and willing to comply with its terms; and prays that the plaintiff be compelled to make specific performance. The court found for the defendant, and granted the affirmative relief prayed.

The deed was mailed in Missouri on September 18, and was taken up by the plaintiff on October 2. It will be seen that less than 14 days elapsed from the time the deed was signed until it was withdrawn. Story informed the banker he would take the land, and arranged with him to borrow part of the purchase money. The delay in procuring the abstract was occasioned by reason of the fact that the holder of the first mortgage, when he delivered the abstract to Mr. Vennum, failed to include the history of certain foreclosure proceedings affecting the land, which had accompanied it, and should have been delivered with it.

Vennum was interested to some extent in the title on account of his agreement to loan, and he wanted the abstract completed so as to show this history. This history was then prepared by an abstracter at the county seat. It covers 22 closely typewritten pages. These were not completed and certified until October 3, the day after plaintiff demanded and received the deed.

Plaintiff contends that the contract with Story was only conditional, and that, until fully executed, he had the right to rescind. The only condition implied was that the abstract should show a good title, and this of necessity required that it be completed and be brought down to date. Since no time was specified, it is clear that, if proper efforts were made within a reasonable time to have the abstract completed, and defendant was ready and willing to pay when this was done, he was fulfilling his part of the contract. He is not shown to be accountable for the delay.

While no money or note was actually tendered by him, he was not in default, for the reason that a

marketable title was not shown until the abstract was completed, as agreed.

Plaintiff also contends that the decree is not in accordance with the contract, since it requires the payment of cash instead of the giving of a note and mortgage. The correspondence, however, shows that the plaintiff was anxious to obtain money, and was ready to take the cash at any time.

The decree in favor of defendant is warranted by the evidence.

AFFIRMED.

SEDGWICK, J., not sitting.

STATE OF NEBRASKA, APPELLANT, V. EMPLOYERS OF LABOR ET AL., APPELLEES.

FILED NOVEMBER 30, 1918. No. 20451.

1. **Monopolies:** EMPLOYERS AND EMPLOYEES: RIGHT TO ORGANIZE. Employers of labor and workingmen have equal rights to form organizations for their own personal benefit, and, in the absence of a contract for a fixed term of employment, the employer may discharge the employee, or the employee may quit his employment at his own pleasure.
2. ———: EMPLOYEES: RIGHT TO ORGANIZE. There is no law to prevent employees from combining to improve their working conditions, or to raise their general standard of living, or to procure shorter hours of labor and higher wages, or for any other lawful or useful purpose.
3. **Torts:** REFUSAL TO WORK: RIGHTS OF EMPLOYEES. In the absence of a contract for a fixed term of employment, employees have a right to refuse to work, if they believe such refusal will aid them in accomplishing such objects, and for that purpose, in a legal and proper manner, they have a right to persuade other workmen to cease work, or to employ any other legal means which will aid them in attaining their end.
4. **Injunction:** LABOR DISTURBANCES. The relations between capital and labor, as the law now stands, cannot be controlled or regulated by injunction. The extraordinary writ of injunction, how-

ever, may properly be granted by a court of equity when property or personal rights are unlawfully assailed.

5. ———: ———: INTERVENTION BY STATE. Ordinarily the state will not interfere in private controversies between employers of labor and men in their employment.

6. ———: ———: ———. While the attorney general is not authorized to bring an action in the name of the state, in ordinary labor disputes, he may, under the present statute (sections 4045, 4066, Rev. St. 1913), bring an action in the name of the state to restrain wilful and illegal acts affecting the public generally, which directly operate in restraint of trade and commerce, and such an action may be maintained regardless of the motives of those who violate the law.

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

Willis E. Reed, Attorney General, Alfred C. Munger, Norris Brown and *D. M. Vinsonhaler,* for appellant.

Frank H. Gaines, Francis A. Brogan and *Anson H. Bigelow, contra.*

LETTON, J.

In May, 1917, certain industrial disturbances took place in Omaha, finally culminating in interference with the comfort and welfare of large classes of the community, and in lockouts, strikes, disorderly assemblages, assaults, and damage to property. Prior to that year it had been customary in that city for certain trades to make collective agreements through labor unions with associations of employers in such trades, but the practice was stopped by the employers, and it was sought by some of them to have their workers sign an agreement in part as follows:

"I agree to work under 'open shop' principle, under which employees are to be selected and retained regardless of whether they do or do not belong to any labor organization, and I will not leave my work on account of the employment of union or nonunion men, either in my line of work or trade, or in any other."

"I will not refuse to handle material of any kind, regardless by whom made or delivered, nor will I participate in any sympathetic or jurisdictional strike affecting your business."

A business men's association was formed in the city, which seems to have had some influence in preventing trade agreements such as had been formerly made, and in endeavoring by means of the pledge to make the "open shop" principle prevail in Omaha. Either before or after this —the evidence as to this is not quite clear, though the unions assert it was afterwards—the labor unions attempted to establish the "closed shop," and a number of strikes resulted on account of the failure of employers to discharge workers who refused to join a labor union. A strike of the teamsters in one of the building material and coal yards in the city led to a general teamsters' strike where nonunion men were employed. Some of the men were assaulted while delivering coal, a lockout followed in all the fuel and material yards, and the owners and managers refused to sell fuel and building material to the public generally, and thus interfered with the conduct of building operations and caused the idleness of building craftsmen. In fact, conditions were becoming chaotic, and disorders and breaches of the peace were occurring, when this action for an injunction was brought by the attorney general of the state against all employers of labor, both members and nonmembers of the business men's association of Omaha, and against a large number of labor unions and their officers within the city. A temporary, and afterwards permanent, injunction was granted against the owners of coal and building material yards in the city, enjoining the closing of yards. An injunction was also granted against Teamsters Union No. 211, enjoining it and its members from interfering with, assaulting, threatening or intimidating nonunion teamsters within the city. From the refusal

to enjoin the other defendants, the attorney general appeals. The teamsters union has filed a cross-appeal against the order allowing an injunction against it.

The prayer of the petition is lengthy. In substance it prays that the Omaha business men's association, and all employers of labor in the city, be enjoined from committing any acts in restraint of trade, transportation or commerce, or conspiring so to do, and from punishing any of its members for failure to continue to co-operate with it; that the owners of coal and building yards in the city be enjoined from refusing to sell their goods to any one who is willing to pay the price for same; that the labor unions and their officers be enjoined from agreeing to refuse to transport any commodity in the usual course of trade, from carrying on any unlawful business, from picketing, threatening, intimidating, or interfering with any individual in performing lawful work, or from seeking to require any individual to join a union, and "that the question of union or nonunion shops, whether advocated or contended for or against, by any of the defendants herein, be held in abeyance until the close of the present war."

The district court enjoined the owners of coal and building material yards from conspiring to close and closing their places of business, and refusing to sell coal and building material to the public. No complaint is made as to the justness of this decree, and it will not be further noticed.

The questions raised by the appeal of the attorney general are whether the district court was justified in refusing to grant an injunction against the business men's association, and the employers of labor generally, and also in refusing to grant an injunction against the defendant labor organizations and their officers, other than the teamsters union. The remaining questions are raised by the cross-appeal of the teamsters union.

In support of the appeal, the attorney general argues at length a number of sound legal propositions. The serious question in this case is whether the facts in evidence bring the case within these principles. One purpose of the suit seems to be to enjoin the employers from forming an association which was trying to compel an "open shop" condition in the city, and to enjoin the labor unions from striving to compel a "closed shop" condition.

Both employers of labor and working men may form organizations for their own personal benefit. Their right to form and organize associations is the same. That which is lawful for the employer is lawful for the employees. If there is no contract for any fixed term of employment, the employer may discharge, or the employee stop work, at his own pleasure. *National Protective Ass'n v. Cumming,* 170 N. Y. 315, 58 L. R. A. 135; Martin, Modern Law of Labor Unions, sec. 27.

In such a case there is no law which prevents workingmen from combining for the purpose of improving working conditions, raising their general standard of living, procuring shorter hours of labor and higher wages, or for any other lawful and useful purpose. They have a right to refuse to work if they believe this will aid them in accomplishing their object. They have a right also for that purpose to persuade other workmen to cease work, in a legal and proper manner, and to employ any other lawful means which will aid them in attaining their end.

On the other hand, employers may legally agree with each other that they will not adopt the "closed shop" principle, but will require any man employed to work upon the "open shop" principle, or may counsel and advise with each other for that purpose. They have as much legal right to refuse to employ members of labor unions as such members have to refuse to work in an "open shop," and the same legal right to adopt a

course of conduct in concert. *Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229; 38 Sup. Ct. Rep. 65; Martin, Modern Law of Labor Unions, sec. 270.

Of the moral aspect of the respective legal rights to combine, we cannot take note in such a proceeding. A better time may come, when a better understanding of the fact that, properly considered, the welfare of both laborer and employer is to the common interest of both, and when co-operation instead of conflict may reconcile the differences between capital and labor, so that each may have its fair and just share of the proceeds of their joint enterprise. As the law now stands, we can only administer it as we find it, and endeavor to protect the legal rights of each alike.

At common law it was an actionable wrong for one to attempt to entice away or interfere with the servant of another, and to induce such persons to leave their employment was actionable, if done maliciously and without justifiable cause. *Truax v. Raich,* 239 U. S. 33. Many cases may be found in books to this effect, but these principles do not apply in this case.

No direct evidence has been called to our attention where a deliberate effort was made maliciously to interfere with existing contracts of employment. A few instances of interference with electrical work performed by nonunion workers were shown, but the evidence is not sufficient to warrant an injunction against the electrical workers union on that account, and in fact such an injunction, it is said in the brief, was denied in a suit for that purpose. It may be that in the great mass of testimony some instance has escaped us where a contract relation existed, or malice was shown; but, if so, that fact, while perhaps affording an action for damages to the person whose rights were affected, would not warrant granting such an injunction as is asked for in this suit. While relief by injunction will be granted in proper cases by the courts, it is not their

function to attempt to regulate by such process the relations between capital and labor. It is only when property or personal rights are assailed that the courts interfere.

Viewed in the light of these legal principles, we conclude that the evidence as to the Omaha business men's association, and as to employers of labor generally, does not warrant the granting of an injunction against them.

The same considerations apply with respect to the injunction sought against the labor unions and their respective officers, with the exception of the teamsters union. In the main, the acts in evidence with respect to the action of these defendants show simply a refusal by members of these unions to work upon the same job with nonunion men, and peaceable efforts by union members to induce other workers to join the union in their respective crafts.

Taken as a whole, there is not sufficient evidence to sustain the sweeping and blanket injunctions sought by the attorney general in behalf of the state. These considerations dispose of the appeal of the state.

There remains to be considered the cross-appeal of the teamsters union. The appeal of the teamsters union is based upon four propositions, three of which merit consideration: (1) The conspiracies sought to be restrained are not within the purview of the statute under which the action is brought. (2) The evidence is not sufficient to sustain a finding of a conspiracy, or combination in restraint of trade. (3) The attorney general is without authority to bring such an action.

It is asserted by the teamsters union that this is an action under the provisions of sections 4045, and 4066, Rev. St. 1913, commonly known as the "Junkin Act;" that such act does not apply to labor organizations; and that the attorney general has no power or author-

ity under its provisions, or at common law, to maintain such an action.

The argument is that, since labor organizations or combination of labor were exempted from the operation of the Gondring Act (Laws 1897, ch. 79), as formerly held by this court, and since the Junkin Act (Laws 1905, ch. 162, which is the present statute), under the decision in *State v. Omaha Elevator Co.*, 75 Neb. 637, must be construed as a single statute with the Gondring Act, so far as not repealed by implication, it cannot apply to the facts in this case, and the attorney general is not authorized under its terms to maintain such an action. It was held in the case mentioned that, since a "trust" was not defined in the Junkin Act, and there was no expressed repeal of the Gondring Act, recourse might be had to the first section of that act for the legislative definition of a "trust." While this is so, it is not a "trust" that is complained of here, but a "conspiracy in restraint of trade or commerce," which requires no definition other than that furnished by the common law, and hence no reference to the former act is necessary, nor are its terms material in this respect.

It is also contended that the attorney general has no power to bring the action in the district court; that he can only act in such court through the county attorney; and that the supreme court is the only forum in which he can bring and maintain an action as the law officer of the state. The statute declares: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal." Rev. St. 1913, sec. 4045. By section 4066, Rev. St. 1913: "It is hereby made the duty of the attorney general and the county attorney of each county under the direction of the attorney general to institute and prosecute such proceedings as may be necessary to carry into effect all of the provisions of this article." This is sufficient

to confer power upon that officer to maintain a suit to enjoin such a conspiracy in restraint of trade or commerce, and if the evidence clearly shows unlawful acts directly affecting trade and commerce, grave in their nature, and to such an extent as to interfere with the public generally, to justify a decree. Under the present statute, unlike the statute under which the earlier cases in this state were decided, the prohibition applies to any and all persons who may create such unlawful conditions, regardless of the class to which they may belong, or the motive for the acts. This is in line with the federal cases construing the Sherman Act, of which this statute is a copy.

It is obvious that the state has no concern with the ordinary relations between employer and employee. It may, in the exercise of the police power and in the interests of the public health and safety, provide for special hours of labor as to certain classes of individuals and in certain callings, it may regulate safety appliances to be installed by the employer for the protection of the health or safety of the workers, but it cannot, unless as a part of its punitive functions, compel one man to work for another against his will. Nor has it, or its law officer, the right to interfere in ordinary labor disputes.

The proper limits of this opinion do not permit a detailed statement of the evidence, but it is clear that the transportation of fuel and other articles was so interfered with as to constitute a restraint of trade and commerce.

We are convinced that the evidence sustains the finding that the teamsters union and its members conspired together to prevent the transportation of goods and merchandise within the city by assaults, threats, and other disorderly conduct. The evidence as to this is in sharp conflict, but the circumstantial evidence and the general situation which the record discloses

with respect to the obstruction of commerce and interference with the attempted delivery of goods by nonunion teamsters is such as to convince an unprejudiced mind that the illegal acts occurred by reason of a concert of action instigated by the men directly connected with and in control of the organization.

On the whole case, we find no reason for interfering with the judgment of the district court, and it is therefore

AFFIRMED.

ALDRICH, J., not sitting.

CORNISH, J., dissenting.

Whether either labor unions or employers of labor are subject to injunction, at the suit of the other, for violation of the other's rights, is one question. Whether either is so subject in a suit, brought by the attorney general in behalf of the state, in Douglas county, is another question. For myself, I question the state's action as against either of these defendants. The opinion appears to base the state's right of action upon the provisions of the statute, relating to unlawful restraint of trade, which direct the attorney general to prosecute such proceedings as may be necessary to prevent violations of the act. Rev. St. 1913, secs. 4045, 4066.

The inquiry is whether the conduct of these defendants was in "restraint of trade or commerce." The employers' combination sought a riddance from union labor. To effect this design, when the strike was on, they all closed their places of business. This might amount to "restraint of trade," but I do not think so. The unions sought recognition—the privilege of collective bargaining. To accomplish this, they quit work, persuaded others not to work, and, it is claimed, resorted to violence in one or two instances. The

result was that the public had to suffer a temporary inconvenience.

Was this "restraint of trade?" I think not. What is "restraint of trade?" The lawyer, turning to 27 Cyc. 899, finds the whole definition given in these words: "All arrangements in whatever form which are designed to suppress competition are in restraint of trade both at common law and under statute." And this, too, is what the words mean to the man on the street. It is what we all have understood to be the meaning of these statutes against trusts, monopolies, and combinations in restraint of trade or commerce. Their context shows it. They affect dealers in commodities, and labor is not a commodity.

JUDGE SULLIVAN, in *Downing v. Lewis*, 56 Neb. 386, 389, in considering the question whether a laundry came under the anti-trust law, made the distinction with felicity, in these words: "The function of a laundry is to make clothes clean rather than to make clean clothes." In *Downing v. Lewis*, 59 Neb. 38, 43, speaking of contracts in "restraint of trade," this court say: "Any such contract must to some extent destroy competition." This is the meaning given to the words, "restraint of trade," so far as I know, in all state decisions. *State v. Duluth Board of Trade*, 107 Minn. 506, 23 L. R. A. n. s. 1260; 3 Bouvier's Law Dictionary, p. 2929.

But, it is insisted, did not the strike effectually prevent trade and commerce? The answer is: Yes; but only temporarily so. Laborers live on trade and commerce and suffer like the general public from all restrictions and monopolies. The difficulty with this argument lies in the fact that when unions declare a strike their first and immediate design, as their main weapon or instrument in the conflict, always is a complete stoppage of trade and commerce. To this end, they quit and persuade others not to take their places,

in the hope that their employer, unable to get men so as to resume business, will accept their terms. The opinion itself says this is permissible. Then it is not "restraint of trade." Does the fact that the striker's conduct is accompanied by violence change its character in this respect? It cannot be. The aim and the effect on trade remain the same. The effect is lessened. The constabulary rise against them. True, a conspiracy may be a lawful act by unlawful means. But here you have a conspiracy, not to interfere with trade (it already is interfered with and is permitted), but to do violence, a thing, in itself, having no relation to trade, but not permissible.

It is argued that this view is in conflict with certain federal decisions. This is doubtful. Cases involving traffic and commerce between the states are upon a different footing from the instant case, because of the limited powers of the federal government on the one hand, and the helplessness of the states on the other hand. If traffic on all roads running in and out of Chicago is stopped, Nebraska suffers. Her police powers do not extend to Illinois. She can do nothing. On the other hand, the federal authorities, too, are limited in their powers over lawbreaking in Illinois. The federal Constitution puts upon the United States the duty of preventing obstruction to the free flow of commerce, and, its powers being limited, it can well be argued that there is no adequate remedy except by injunction. The situation, too, is different. The United States has a property right in the mails which, being interfered with, may entitle it to an injunction, regardless of the Sherman anti-trust law. When cases have arisen in the federal courts, not involving railroads—traffic between the states—they have, so far as I know, given to the words "restraint of trade and commerce" the same meaning as is contended for here—an attempt

to overcome competition; to gain a monopoly; to fix prices.

As the two able trial judges said, the state's right of action, if it exists, arises under the "restraint of trade" statute. At common law the state had not this right of action, and the statute should be strictly construed. Outside the statute there would be no precedent for it except, possibly, in the language of some of the earlier federal decisions, which have not been followed in the states. What is sometimes denominated as government by injunction has not been popular. Congress in the Clayton Act practically overruled the earlier federal decisions, and later limited the federal courts in equity in the exercise of their ancient prerogative of summarily punishing, as for contempt, disobedience of its orders *in personam,* so as to permit a trial by jury. The foundation of courts of equity was the enforcement of the civil law. The state never sought injunctions of this character. If its corporations were doing *ultra vires* acts injurious to the public, this remedy might be used. So, too, in case of a public nuisance—a thing having a place, and more or less permanent in its nature. The state might, too, invoke this remedy for the protection of its property rights, the same as an individual. The rest it left to the criminal law.

The opinion, remarkably fair in stating the relations between capital and labor, almost seems to forget that neither capital nor labor is party plaintiff in the action.

It is the genius of the common law, not only that it stands for liberty, but, as a means to that end, opens the courts so that the parties themselves whose rights are invaded may go there for protection. The opinion wisely says that the courts will not attempt by injunction to regulate the differences between capital and labor; but, when we hold that the stoppage of trade amounts to restraint of trade, we come near

doing that very thing. The public inconvenience complained of must always happen. The unions are fighting, as they think, for the cause of labor. They wish to exist. They wish the privilege of collective bargaining. "If employers can and do act as a unit," they say, "then why may not we?" Of course, we will all agree with them, so long as their own methods of accomplishing these ends are not arbitrary and unfair. The common law, however, in its zeal for freedom of contract, can have no voice in this matter, but must leave both employer and employee free to work or not, to contract or not, as each may decide. The state should not be a party to the controversy. Its presence as a party may prejudice either side. If violence occurs, the state, with its courts, is here for justice. Either party injured can appeal to them for protection, and the whole constabulary of the state is armed in the name of the state to see that crime is punished according to law, and the highways of commerce kept open. Peace and quiet are desirable ends; so, too, probably, are agitation and change, with their resultant irritations and inconveniences. When the state goes into the courts in these matters, it should go prepared to do complete justice between the parties in all matters involved in the entire controversy.

Section 6, art. V of the Constitution, provides: "The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed." The attorney general, in commencing this action, was performing an executive function. I do not question his right to commence an action when directed to do so by legislative act. The statutes describe in detail the duties of the attorney general. Rev. St. 1913, secs. 1187, 5536, 5537, 5538. Heretofore, whenever the legislature has wished the attorney general to go into the counties to commence actions, it has so directed him. His duties, generally, are in the

supreme court. The "restraint of trade" statute makes it "the duty of the attorney general and the county attorney of each county under the direction of the attorney general" to institute these proceedings. Rev. St. 1913, sec. 4066. I do not believe that this statute intends to empower the attorney general to institute such proceedings in a local court until he has directed the county attorney to institute them.

IN RE APPRAISEMENT OF OMAHA GAS PLANT. NELSON B. UPDIKE, PETITIONER, V. CITY OF OMAHA ET AL., RESPONDENTS.

FILED NOVEMBER 30, 1918. No. 20757.

1. **Constitutional Law:** EMINENT DOMAIN: JUDICIAL FUNCTIONS. The ascertainment by appraisers, or commissioners, of the amount of damages to be awarded to one whose property has been taken, or damaged, for public use, in the exercise of eminent domain, is a function judicial in its nature. It is only a preliminary step in the ascertainment of damages, unless the parties interested agree to accept the award.
2. ———: JUDICIAL AND EXECUTIVE DEPARTMENTS. Under article II of the Constitution, providing for the separation of the executive, legislative and judicial departments of the government, the legislature has no power to compel the exercise of purely executive duties by the courts.
3. ———: COURTS: LEGISLATIVE POWER. The board of appraisers created by sections *4a-4f*, ch. 87, Laws 1917, though termed a "court of condemnation," does not constitute a court under the Constitution and laws of this state, although such board exercises functions judicial in their nature. The appointment of the members of such a "court of condemnation" by this court, or the chief justice thereof, under the statute referred to, pertains to a judicial proceeding and is within the power of the legislature to provide for.
4. **Eminent Domain:** APPRAISERS. The legislature may designate a class from which such appraisers may be chosen.
5. **Statutes:** AMENDMENT. Chapter 87, Laws 1917, so far as it provides for the appropriation of gas works for public uses, is sup-

plemental to chapter 46 (secs. 4067-4403), Rev. St. 1913, relating to municipal corporations, and is not invalid as a violation of the Constitution relating to the manner in which statutes may be amended.

Original application to vacate order directing appraisement by court of condemnation of the Omaha gas plant. *Petition denied.*

Noland & Woodland, for petitioner.

W. C. Lambert, W. D. McHugh and *W. H. Herdman,* for respondents.

The legislature of 1917 passed an act supplemental to chapter 46 of the Revised Statutes, relating to municipal corporations of the metropolitan class, and amending and repealing certain specified sections of that acts as amended in 1915. Laws 1917, ch. 87. After conferring upon such city additional powers to those theretofore granted, sections 4*a* to 4*f*, inclusive, provide a means for the condemnation and appropriation of certain public utilities. These sections provide that, after the voters of the city have at an election voted in favor of acquiring any "water-works, water-works system, gas plant, electric light plant, or electric light and power plant, or street railway," the city shall, by the power of eminent domain, have the right to acquire any such works, plant or system; that the result of the election shall be certified immediately to the supreme court, and that court, or the chief justice thereof, if the court is not in session, shall within 30 days appoint three district judges, one of whom shall be from the district in which the city is located, and said judges "shall constitute a court of condemnation for the ascertainment and finding of the value of any such plant, works, or system."

The supreme court is directed to make an order requiring the judges to attend as a court of condemnation at the county seat, at the time stated in the order.

Power is conferred upon that body to fix a time for hearing, to give notice thereof to all parties interested, to summon and swear witnesses, and to require the production of books and papers deemed necessary for the ascertainment of the value. It may appoint a reporter to report and preserve all evidence introduced before it. It is then provided: "Such court shall have all the powers and perform all the duties of commissioners in the condemnation and ascertainment of the value and in the making of an award of all property of any such works, plant or system."

It is also provided that the city shall have the right, after the finding of the value, to elect to abandon such condemnation proceedings, and, if it does not so elect, the owners of the property may appeal from the award to the district court, where the mater shall be heard upon the evidence taken before the commissioners.

The result of an election held upon a proposition for the purchase of the Omaha gas plant by the city of Omaha, showing that the proposition carried by a large majority, was duly certified to the chief justice, and three judges of the district court were appointed under the provisions of the statute. A petition to vacate the order was afterwards filed by Nelson B. Updike, a resident and taxpayer of the city of Omaha, and a hearing had thereupon. This petition sets forth that the statute is unconstitutional; that this court has no jurisdiction to make the order, and the judges appointed are without power to act, and, if allowed to proceed, their acts will be null and void; that the attempt to create a court is in violation of section 1, art. VI of the Constitution, limiting the power of the legislature to create courts other than those named therein; that, if the "court of condemnation" is not a court within the meaning of the Constitution, then under article II of the Constitution the supreme court is without power, and is "expressly forbidden to

exercise any power properly belonging to the legislative or executive departments of the state governments;" that the sections providing for the appropriation of gas plants and other public utilities are an amendment to sections 4329, and 4330, Rev. St. 1913; that the amending act does not contain or refer to said sections, and does not repeal them, and is therefore in violation of section 2, art. III of the Constitution; that the title to the act is defective because none of the sections enumerated therein pertain to the subject-matter of the act, and the words "supplemental to" in the title are a violation of the constitutional requirement that the subject of an act be clearly expressed in its title, and that no bill shall contain more than one subject; that the subject-matter of the amending act is different from the matters contained in the sections named in the title as being amended, and is not germane thereto; that the bill was never legally passed because, after being amended in a conference committee, no action was taken by the senate on the report of the committee, and the bill was not signed by the presiding officer of the senate while that body was in session and capable of transacting business.

The decision of the question so raised is now to be made.

LETTON, J.

The first questions raised are: Whether the so-called court of condemnation is a court, the creation of which is prohibited by the Constitution; and whether, if not a court, the members of the body may be appointed by this court, or by the chief justice.

The power to exercise the right of eminent domain must be exercised by, or conferred by, the legislature, and when it is granted to a municipal corporation, or to a public service corporation, that body must determine how far it will make use of the power thus conferred. This is an executive or administrative act.

When it comes to the stage of compensating the owner of the property by ascertaining the value of the property taken, or damaged, this requires the exercise of judicial functions. The preliminary steps in such proceedings are not always in the form of court proceedings. They are more often taken with less formality, but nevertheless with essential prerequisites prescribed in order to secure justice and impartiality in the finding. A record is required to be made in such form as to show definitely the amount of the award, and, if either party does not accept the award, to furnish the basis for an appeal to a regularly constituted court where rights may be determined by a jury.

These preliminary steps are a part of the procedure, and, while they may go no further than the making and acceptance of the award, they are judicial, and not legislative or executive, in character. It is pointed out in *State v. Neble,* 82 Neb. 267: "Many executive or administrative acts performed by judicial officers, and many judicial acts performed by ministerial officers, are and must be held valid. * * * The appointment of an officer might properly, we think, be classed as the exercise of an executive or administrative function, at least not judicial. Yet courts and judges frequently find it necessary to make such appointments in order that the judicial functions of the courts may be freely exercised. It often happens that the courts or judges are clothed with this appointing power where the appointee may not be required to discharge any duty which could be in any way ancillary to the exercise of the judicial functions of the court or judge making the appointment, and yet the validity of the appointment could not be successfully questioned, for the reason that the person appointed would exercise judicial functions in the discharge of the duties imposed under the appointment."

While the proceedings are judicial in their nature, it is unnecessary that they be conducted in their inception by a court, and in fact in every instance in which condemnation proceedings are carried on in this state, so far as to the writer known, they are not conducted in or by any regular judicial tribunal. While the appraisers required to be appointed by the statute under consideration are called a court of condemnation, the fact that this term is used is immaterial. Such bodies have been variously termed boards of assessment, of commissioners, of appraisers; but, whatever the nomenclature, they exercise practically the same functions, sometimes with, and sometimes without, the assistance of officers of regularly constituted courts.

The board thus constituted cannot be a "court" under the Constitution of the state, since the legislature has no power to constitute courts other than those named in that instrument, except "courts inferior to the district courts" for cities and incorporated towns, and we are convinced that it was not its intention to exceed its authority in this respect. The objections made would apply to the appointment of appraisers in condemnation proceedings by the county judge. Such proceedings are not in the county court. *Mattheis v. Fremont, E. & M. V. R. Co.*, 53 Neb. 681; *Brown v. Chicago, R. I. & P. R. Co.*, 64 Neb. 62.

We find no difficulty in holding, therefore, that no new court was created by the act in violation of article VI of the Constitution, and that the vesting of the power in this court, or in the chief justice, to appoint the members of the board of appraisers does not violate the constitutional requirements (article II) that the executive, legislative and judicial departments of the government be kept separate, "and no person or collection of persons being one of those departments, shall exercise any powers properly belonging to either of the others, except as hereafter expressly directed or permitted."

Another question raised is whether it is within the power of the legislature to impose the duties of making such appraisement upon district judges in the state. As we have seen, the act of appraising the value of property involves the exercise of judicial functions—facts must be collated and compared in the mind of the appraiser, a standard of value must be reached, and the property measured by that standard. It is competent for the legislature to select a class from which appraisers may be chosen, and men of judicial training and experience are no doubt well qualified for such duties. It is not absolutely clear that the law constitutes a violation of the Constitution in this respect. The benefit of the doubt in such cases must always be given to the legislature, and it is our duty to uphold the law, unless it is clearly void.

In this connection, we deem it advisable to point out that there is an increasing tendency, in this and other states, to call upon courts, or judges, to perform duties outside of their proper functions. This is a tendency which should be repressed rather than encouraged. The duties properly belonging to judicial tribunals are usually sufficiently onerous, and the work of the judges sufficiently arduous, to require their best efforts and occupy their full time, and they should not be subjected to the performance of other duties.

It is also argued that the sections of the act named constitute an amendment to sections 4329 and 4330, Rev. St. 1913. We think this contention is not well founded. These sections provide that the mayor and council may appropriate private property "for the use of the city for * * * gas works," but do not provide for the appropriation and taking over of existing gas works. We are convinced that the power formerly granted was only to appropriate real estate upon which the city might establish gas works, and that the present act is not subject to the objection

made upon this score. The act, furthermore, in this respect is clearly supplemental and germane to the general charter, since it supplies a method of appropriating gas works not theretofore provided for.

It is alleged that, after the act had been passed by the house, it was amended in the senate; that the bill went to a conference committee; that the house adopted the report of the conference committee; but there is no record of any action taken by the senate upon the committee's report. It is contended that the act was void because the legislative journals did not show that the senate concurred in the report of the conference committee. The bill is signed by the president of the senate, the speaker of the house, and the governor.

In *State v. Dean,* 84 Neb. 344, it was held that the enrollment, authentication, and approval of an act of the legislature are *prima facie* evidence of its due enactment; that the silence of the journals is not conclusive evidence of the nonexistence of a fact which ought to be recorded therein regarding the enactment of the law; and that the act attacked in that case was not invalidated because of the silence of the senate journals as to concurrence in the formal amendment by the house. These principles determine this contention adversely to the petitioner.

We conclude that the portion of the act assailed, in so far as it affects the matter under consideration, is valid. The petition to set aside the former order is

DENIED.

ROSE, J., dissents.

CORNISH and ALDRICH, JJ., not sitting.

BEATRICE MELCHER, APPELLEE, V. ABRAHAM MELCHER ET AL., APPELLANTS.

FILED NOVEMBER 30, 1918. No. 20209.

1. **Husband and Wife:** ALIENATION OF AFFECTIONS: PARENTAL ADVICE. The law presumes that the father and mother, in advising their minor child, acted in good faith and for what they supposed his best interest.

2. **Marriage:** VALIDITY. If a minor is of the age of consent (Rev. St. 1913, sec. 1541), the fact that there was no license, or that it was wrongfully obtained, does not invalidate his marriage.

3. ———: ANNULMENT. A marriage may be annulled when one of the parties is under the age of legal consent at the suit of the parent entitled to the custody of such minor. Rev. St. 1913, sec. 1596. But, that no license was obtained, or that the license was obtained fraudulently, is no ground for the annulment of a marriage.

4. **Husband and Wife:** ALIENATION OF AFFECTIONS: PARENTAL ADVICE. A parent may advise his son in good faith to leave his wife or to procure a divorce, if statutory grounds for separation and divorce exist or he has reasonable cause to believe and does believe that such grounds exist.

5. ———: ———: LIABILITY. If a parent breaks up, or assists in breaking up, a valid marriage of his son, solely "because he is displeased with the marriage, or because it is against his will, or because he wishes the marriage relation to continue no longer" (13 R. C. L. sec. 522, p. 1472), he will be liable in damages to the party injured.

6. ———: ———: EVIDENCE. In an action by the wife for alienation of her husband's affections, statements of her husband would not be competent evidence of affirmative hostile actions on the part of the defendants, but, so far as such conversation tends to show the condition of her husband's mind and feelings toward the plaintiff at the time, and the effect that the conduct of the defendants was having upon the affections of her husband for her and his conduct toward her, it is competent.

7. ———: ———: DAMAGES. Upon the evidence referred to in the opinion, it is *held* that a verdict for $4,750 damages, for the alienation of the husband's affections, is not so plainly excessive as to require this court to interfere.

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

Fawcett, Mockett & Walford and *Brown, Baxter & Van Dusen,* for appellants.

John O. Yeiser and *J. B. Randolph, contra.*

SEDGWICK, J.

The plaintiff and Reuben Melcher were married on the 21st day of November, 1914, and in July afterwards she began this action in the district court for Douglas county against Abraham Melcher and Pauline Melcher and several other parties to recover damages for an alleged conspiracy to alienate her husband's affections. The trial resulted in a judgment against Abraham Melcher and Pauline Melcher, from which they have appealed. The court instructed the jury to find in favor of one of the other defendants, and the remaining defendants were relieved from liability. At the time of the marriage the plaintiff was between 17 and 18 years of age, and her husband was a little more than 19 years of age.

The defendants complain that upon the trial the court allowed incompetent evidence, and that the court refused to submit proper instructions requested by the defendants, and that the evidence is not sufficient to support any verdict against the defendants, and that the verdict rendered is excessive.

The law presumes that the father and mother, in advising their minor child, acted in good faith and for what they supposed his best interest. *Trumbull v. Trumbull,* 71 Neb. 186.

If the evidence is that the parents' sole motive was to promote the welfare of their son, and the circumstances and conditions were such that they might reasonably believe that the advice given was justifiable and for the best interest of all parties concerned, they cannot be held liable in damages.

In considering the important question of the advice under such circumstances as justified, we must remember that the age of consent to marry is, by our statute, made 18 years or upwards for the male, and 16 years or upwards for the female (Rev. St. 1913, sec. 1541) and, although by section 1543, Rev. St. 1913, a license must be obtained before the marriage takes place, and by section 1544, Rev. St. 1913, no license can be issued to a minor without the consent of his parents, yet the want of a license does not affect the validity of the marriage. *Haggin v. Haggin,* 35 Neb. 375. These parties were both above the age of consent, and therefore, under these provisions of the statute, they were legally married. The fact that the license was wrongfully procured may destroy its effect and protection, and subject the parties at fault to penalties, but it does not affect the validity of the marriage itself. A marriage may be annulled when one of the parties is under the age of legal consent at the suit of the parent entitled to the custody of such minor. Rev. St. 1913, sec. 1596. But, that no license was obtained, or that the license was obtained fraudulently, is no ground for the annulment of a marriage.

A parent may "advise his daughter in good faith and for her good to leave her husband, if on reasonable grounds he believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving her husband," but "may not, with hostile, wicked or malicious intent, break up the marital relations between his daughter and her husband, simply because he is displeased with the marriage, or because it is against his will, or because he wishes the marriage relation to continue no longer." 13 R. C. L. sec. 522, p. 1472. If the "further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving

her husband," she has ground for divorce under our statute, and if her parent has reasonable ground to believe, and does believe, that these conditions exist, he may advise accordingly. The law in regard to advice given to a married daughter "is equally applicable in the case of advice given to a son." 13 R. C. L. sec. 522, p. 1472. It follows from the foregoing that it is unlawful to attempt to separate husband and wife, or to annul or dissolve the marriage relation between them, unless some statutory ground for annulment or divorce exists. If such ground exists, or the circumstances are such as would lead a reasonable mind to believe that it does exist, the parent who, in good faith, believes that the ground exists, may advise as he honestly believes is in the interest of his son. The evidence is sufficient to justify the finding that the husband and wife were strongly attached to each other, and that the husband, if left to himself, would not have abandoned his wife or have given her cause to complain of his affection and conduct, and that these defendants advised the parties to separate, and used, in many ways, earnest efforts to bring about such separation.

There is very little, if any, evidence tending to prove that any legal ground for divorce of these parties existed, or that the defendants had reason to believe, or even supposed, that such ground did exist. For some reasons of their own, because of religious differences, or differences in financial conditions, or matters of education, these defendants appear to have determined that this marriage should be annulled, without regard to the feelings of the parties most concerned, and without regard to whether legal grounds for separation did or did not exist.

The plaintiff testified to conversations that she had with her husband during the time they were living together. Statements of her husband would not be

competent evidence of affirmative hostile actions on the part of defendants. Such evidence would be subject to the ordinary objection to hearsay evidence. So far as such conversation tends to show the condition of her husband's mind and feelings toward the plaintiff at the time, and the effect that the conduct of the defendants was having upon the affection of her husband for her and his conduct toward her, it was competent and proper. The following testimony of plaintiff, which was objected to, illustrates this: "He (Reuben) told me he knew it was awful hard for me, and he told me he knew how it was, and he says, 'Only if I had not got sick, it would be all right,' and he says, 'I have to stay on the good side of my parents or who will pay my hospital bill.' " This tends to show that her husband was sympathizing with her at the time, had an interest in her feelings and her welfare, and that he was being coerced by his parents. It is not always an easy matter to distinguish between competent and incompetent evidence in this respect, and the trial court appears to have been very careful, and in some instances at least to have excluded competent evidence offered by the plaintiff. Also, the trial court frequently warned the jury that such evidence as had been held to be incompetent was not to be regarded by them and was not to be allowed to influence their judgment upon the facts in the case. In some instances, apparently, some evidence was allowed that might better have been excluded; but, upon the whole record, so far as our attention has been called to it, it would not seem that the jury could have been misled by this evidence to the prejudice of the defendants.

The defendants offered several instructions in regard to the right of parents to advise their children in matters of this kind. The first instruction offered was faulty, in that it would virtually instruct the jury that, if one of the parents acted in good faith, they

must find a verdict in favor of both. The other requests which were refused, while they contained a suggestion that such advice of parents must be given in good faith, did not contain any explanation of what was meant by good faith or what would be regarded as good faith under such circumstances, and were not, so far as they were proper instructions, more favorable to the defendants than the instruction given at the defendants' request, as follows: "When parents of a minor child are accused and charged, as in this case, of alienating the affections of their minor son from plaintiff his wife, the giving of advice to the minor son in that regard is presumed to be given in good faith, and, if so given, the parent is not liable for advice so given." An instruction given by the court on its own motion regarding this defense was pretty strongly stated in favor of the defendants, and we cannot find any reversible error in refusing the requested instructions.

The defendants insist that the verdict for $4,750 was excessive, and is not supported by the evidence. The court instructed the jury fully in regard to the various elements of plaintiff's damages, and concluded: "In no event can any sum be allowed by way of exemplary or punitive damages as a punishment of the defendants, but only such as, in the sound and honest judgment of the jury, would be a fair and just compensation for the injury, if any, which the evidence shows plaintiff has sustained as a direct and natural result of the defendants' wrongful acts." It is not urged in the brief that this instruction is erroneous. The difficult duty of determining these various elements of damage devolves upon the jury. There is no exact legal limitation that can be applied to the consideration of any of these elements of damage. We cannot say that from this evidence all reasonable minds must

agree that this plaintiff has suffered less damage than the amount of this verdict.

The judgment of the district court is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

WILLIAM H. LARNED ET AL., APPELLEES, V. CHARLES T. JENKINS, APPELLANT.

FILED NOVEMBER 30, 1918. No. 20714.

1. **Waters:** IRRIGATION: APPLICATION OF STATUTE. That portion of section 3439, Rev. St. 1913, which provides that "a multiplicity of outlets shall at all times be avoided so far as may be, and the same shall be under the control of a superintendent," etc., construed, and *held* not to apply to owners in common of a ditch for irrigation purposes who are not carriers of water for hire.
2. **Tenancy in Common:** IRRIGATION: USE OF WATER. Where the title to a water right is in tenants in common, their rights to the use of it, as among themselves, will be protected by the courts.
3. **Waters:** FAILURE TO APPLY: DETERMINATION OF RIGHT. The question whether the owner of a piece of land, to which water has been appropriated by order of the state board of irrigation, has lost his right to the use of it for failure to make useful application of the water within the time required, is a question primarily between the state and the owner, and should, ordinarily at least, be determined in the first instance on a hearing before said board.

APPEAL from the district court for Dundy county: ERNEST B. PERRY, JUDGE. *Judgment enjoining defendant reversed, and judgment in other respects affirmed.*

Charles T. Jenkins and *J. H. Broady,* for appellant.

Ratcliffe & Ratcliffe and *J. L. Rice, contra.*

CORNISH, J.

Defendant appeals from an order enjoining him from interfering with a canal without permission of the superintendent. Plaintiffs appeal from the judgment of

the court that defendant was entitled to waters from the canal for the irrigation of particular lands.

The irrigation canal was a private ditch, owned in common by defendant and the three plaintiffs, one-fourth each, for their own private use. When the defendant was about to take water from the canal to irrigate the land, the superintendent, or ditch-rider, objected on the ground that his proposed use of the water interfered with the use of the other owners. Whether the defendant, the owner of a one-fourth interest in the canal, would be subject to the directions of the superintendent in that respect depends on the construction of section 3439, Rev. St. 1913, which provides that the owners of ditches shall have them ready to receive water by April 15 of each year, shall furnish necessary outlets, maintain headgate and measuring weirs with plans approved by the secretary of the state board of irrigation, and provides further that "a multiplicity of outlets shall at all times be avoided so far as may be, and the same shall be under the control of a superintendent," etc. This provision appears to have been taken from the Colorado statute. In *White v. Farmers Highline Canal & Reservoir Co.*, 22 Colo. 191, the supreme court construed or assumed that this section applied only to irrigation companies which carry water for hire. See, also, *Downey v. Twin Lakes Land & Water Co.*, 41 Colo. 385, 392.

The provision giving superintendents control over outlets in its nature would hardly be applicable to owners in common of a private ditch. There may be only two. The statute does not intend to deprive owners of dominion over their property. The less cannot include the greater, and, as we say, the possession of one tenant in common is the possession of all. In any case, the agent or servant of the owners is subject to their orders, when not violative of the laws and regulations of the state, made in pursuance of its police

powers over carriers of water. Because disputes will arise and frauds be perpetrated as between users of water, the law provides certain rules and regulations touching its taking and distribution. It also provides that owners carrying water for hire shall have a superintendent to speak for them and to see that no wrong is done.

If tenants in common cannot agree, and one insists upon wrongly locating a lateral or causing an unreasonable multiplicity of outlets, or refuses proper measuring weirs or boxes, or does any other act which prevents or threatens the others in their use of the portion of the water going to them, the courts will protect the rights of all, by injunction or otherwise, and will, if necessary, appoint a commissioner to take charge for such protection. 3 Kinney, Irrigation and Water Rights (2d ed.) sec. 1455; Wiel, Water Rights (3d ed.) sec. 344; *Carnes v. Dalton,* 56 Or. 596.

Under the facts disclosed by the evidence, we are of opinion that the defendant was not seeking to take more than his share of the water. He was not proposing to locate his lateral at an improper place; nor was he subject in the matter to the direction of the superintendent. The owners ought to be able to agree on the proper place. This will not be difficult if they will take the opinion of the state or other competent engineer. On the evidence adduced, the injunction against the defendant should be dissolved.

The plaintiffs assign error in the court's holding that the defendant was entitled to water for the land to which the proposed lateral would carry it. It appears that this land was included in the original appropriation, and that water was carried to it for three years prior to this action. The contention is that the owner never made the proper proofs of use of the water, and did not use it within the time required for complying with the appropriation. The land gets more

or less benefit from the water by seepage. The question was taken up by the state engineer, who ruled that the lands "specified in the docket" were entitled to water "until some one asks for a hearing and shows cause why said land should not be watered." There is water enough for all. The evidence does not show that the use of water for this land would either deprive the others of their three-fourths, or cause a shortage of water. The state engineer found the contrary.

We are of opinion that this is a matter between the state and the owners, that the plaintiffs are not in a position to raise this question, and that the trial court was right in so holding.

The judgment of the district court enjoining the defendant is reversed and the cause remanded. In all other respects it is affirmed.

JUDGMENT ACCORDINGLY.

EDNA M. BARKLEY ET AL., APPELLEES, V. CHARLES W. POOL, SECRETARY OF STATE, APPELLEE: JOHN C. COWIN ET AL., INTERVENERS, APPELLANTS.

FILED NOVEMBER 30, 1918. No. 20866.

1. **Constitutional Provisions:** CONSTRUCTION. The general rule is that constitutional provisions are to be construed as mandatory, unless, by express provision or by necessary implication, a different intention is manifest.

2. **Statutes:** REFERENDUM: ACTION: LACHES. Both the Constitution and the statute relating to referendum contemplate that actions brought under the law shall be speedily commenced and terminated, so that elections may be had, if possible, at the time named in the Constitution. Laches upon the part of those commencing the action or resisting it will justify the court in dismissing the action or defense.

3. **Appeal:** FINAL ORDER: REFERENDUM: TEMPORARY INJUNCTION. The Constitution provides that elections upon referendum petitions "shall be had at the first regular state election held not less than

thirty days" (Const., art. III, sec. 1D) after the filing of the petition. The Constitution also provides for legislation to facilitate the operation of the referendum amendment and for legislation relating to the submission of petitions. A law was passed permitting mandamus and injunction proceedings, directed against the secretary of state, bringing in question the validity of the referendum petition or the manner of submission. *Held* that, pending an action seeking an injunction to prevent the submission of the proposition to the voters because of insufficiency of the petition, and in which a temporary injunction has issued therefor, the proposition should not be submitted, and that the constitutional provision, fixing the date of the election, is to that extent directory, and not mandatory. *Held*, further, that in such case the election, if not permanently enjoined, should be had at a regular election, and as soon as may be under the law, awaiting the final decision of the court. *Held*, further, that a temporary injunction made by the trial court, enjoining the secretary of state from submitting the proposition until the hearing and adjudication of the case upon its merits, is not a final order appealable to this court, even though it prevents a submission at the first regular election.

Appeal from the district court for Lancaster county: LEONARD C. FLANSBURG, JUDGE. *Appeal dismissed.*

Jacob Fawcett, John L. Webster, L. F. Crofoot and *B. G. Burbank,* for appellants.

Willis E Reed, Attorney General, F. A. Brogan and *T. J. Doyle, contra.*

CORNISH, J.

This is an appeal from an order of the district court, continuing the hearing of the cause to a date subsequent to general election day, November 5, 1918, and granting a temporary injunction restraining the secretary of state from submitting House Roll No. 222 to the electors of the state on said election day. House Roll No. 222 conferred upon women certain voting privileges, and is subject to the referendum provided for in our Constitution; the requirements relating thereto having been complied with.

A referendum petition had been filed. The plaintiffs brought this action, attacking the petition as invalid and spurious, seeking also an injunction forbidding the secretary of state from submitting the law to a vote of the people at the general election. Issues were framed and a large amount of testimony (not before us) was taken, when the court made the above order, finding, among other things, that the hearing could not be concluded before the general election, and that, in the opinion of the judge, if the petitions were finally adjudged valid, the proposition should be referred to the people at the next succeeding general election.

The first, and, if answered in the negative, the controlling, question for our consideration is whether the order appealed from, continuing the hearing to a time subsequent to November 5 and restraining the secretary of state from submitting the proposition in the meantime to the voters of the state, was a final order. If it was not, then this court has no jurisdiction to entertain the appeal. *Meng v. Coffee,* 52 Neb. 44. It is contended by defendant and interveners that it is a final order, because, in effect, it disposes of the case and finally determines the rights of the parties to the controversy. It is argued that the constitutional provision relating to referendum petitions, which provides that "elections thereon shall be had at the first regular state election held not less than thirty days after such filing," is mandatory, and that therefore such election must be had upon the day named or not at all.

If we admit the premises upon which the argument is based, it is very likely that the conclusion contended for would follow, and that, although, ordinarily, an appeal does not lie from a temporary injunction, it would in this case, inasmuch as the order, by making further proceedings in the case useless, "in effect determines the action and prevents a judgment." Rev. St. 1913, sec. 8176.

We are of opinion that the order appealed from is not a final order, and that the effect of it is not a final determination of the rights of the parties to the action. We agree with the rule, stated in 12 C. J. p. 740, sec. 145, as follows: "It is an established general rule that constitutional provisions are to be construed as mandatory, unless, by express provision or by necessary implication, a different intention is manifest."

It is reasonable to suppose that the makers of the Constitution would anticipate that petitions might be presented not in compliance with the requirements of the law—petitions invalid for fraud, and other reasons. They would anticipate that questions would arise which are judicial questions, not proper to be decided by a state official acting only in a ministerial capacity. In the absence of any provision in the Constitution, besides the one above quoted, touching the time of the referendum election, a difficult question might arise, however, as to just when and to what extent the courts might interfere by mandamus or injunction. In this case there are other provisions of the Constitution which need to be considered. Section 1D of the amendment (Const., art. III) contains this language: "This amendment shall be self-executing, but legislation may be enacted especially to facilitate its operation. In submitting petitions and orders for the initiative and the referendum, the secretary of state and all other officers shall be guided by this amendment and the general laws until additional legislation shall be especially provided therefor." The ordering of a referendum suspends the operation of a law until approved by the voters. Section 1C. Following the adoption of the amendment, a law was passed providing that "any citizen" could obtain a writ of mandamus to compel the secretary of state to file a petition if he wrongfully refused to do so; and also providing that, "on a showing that any petition filed is not legally sufficient,"

the secretary of state might be enjoined from submitting the proposition; and further providing: "Any person who is dissatisfied with the ballot title * * * may appeal * * * to the district court." Laws 1913, ch. 159, secs. 5, 6. It is not urged that these laws are invalid. A contention is made that the district court should not have entertained the suit, because of inexcusable delay in bringing it, and because the plaintiffs have not capacity to maintain the action as individuals.

These are questions, however, not relevant to our present inquiry, not proper to be considered until some judgment or order is made which finally determines them. For the purposes of the present discussion we must assume a lawsuit commenced in pursuance of the statutory enactment, without laches, as specially found by the trial judge, and the question is whether the order under consideration, inasmuch as it prevents a submission at the time named in the Constitution, is a final order determining the rights of the parties.

We are of opinion that injunction suits may be maintained, and that the enactment providing for them is constitutional. But, when we have gone this far, have we not already answered the question in dispute? Surely, if a lawsuit may be constitutionally commenced, it may be continued until final judgment. If a permanent injunction may be had, its necessary auxiliary, a temporary injunction, may also be had, and become the law for everybody until dissolved. Nor will it be contemplated that obedience to it can deprive any party of the legal rights that otherwise belong to him. Will the law harbor some opposing principle, in conflict with this rule of justice, which cuts off its processes in the middle of their course? This would be to bring unreason into the law, which is supposed to be harmonious —consistent with itself. The provision of the Constitution permitting this legislation must have the same

sanction and force as has the provision fixing the time of the election. If the position contended for will result in denying to either of the parties a trial of their legal rights in court, that amounts to a *reductio ad absurdum.* These are ancient maxims of the law: "An act of the court shall prejudice no man." "The law does not compel a man to do that which he cannot possibly perform." "That which was originally void does not by lapse of time become valid."

Of course, the rights of the petitioners are as much to be regarded as the rights of those objecting to the petition, but no more. We must avoid a rule under which those attacking a petition could, through the necessary delays of a lawsuit, defeat the rights of the petitioners; and we must also avoid a rule under which the rights of the public and those objecting to the petition may be defeated.

We are of opinion that, if the time required for determining the validity of the petition in court extends to a date beyond that of the next ensuing election, it must be held that, by necessary implication, it was not the intent of the Constitution that either those who petition for a referendum or the objectors to the petition should thereby be defeated of their rights, but that the referendum vote should be had as early as it can be had, awaiting the judgment of the court.

To hold otherwise would be, on the one hand, to hold that the constitutional right of the people to have referred to them a law may be denied them, or, on the other hand, to hold that a referendum petition, which may be spurious and wanting legal validity in every aspect, may effectually suspend the operation of a law which the legislature has passed.

If it be suggested that the vote should be had on the day named, permitting the action to be continued until final adjudication upon the merits, then it might come to pass that the petitioners would be sustained by

an overwhelming vote of the people, and yet the submission of the vote be set aside by a later decision of the court holding that the petition itself or the manner of its submission was insufficient. Constitution makers would never intend that. The Constitution of West Virginia provided: "Every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated." Const., W. Va., art. VIII, sec. 5. In order to prevent this provision from affecting the common-law rule of *res judicata,* it was held to be directory, and not mandatory. *Hall & Smith v. Bank of Virginia,* 15 W. Va. 323. The word "shall" in statutes, as in colloquial speech, is frequently interpreted to mean a direction, rather than a mandate. To the extent above indicated, we hold that the provision in our Constitution is directory, and not mandatory. The provision is, however, mandatory in the sense that a provision would be if it read that the election should be held upon a certain date, unless the legislature should fix another date, or unless, under the operation of laws passed in pursuance of the amendment, an election upon such date becomes impossible.

It is to be said, however, that both the Constitution and the statute contemplate a speedy hearing, to the end that judgment may be had in time for the next ensuing election, and that the courts would be justified in refusing to entertain an action or defense because of laches on the part of either of the parties.

APPEAL DISMISSED.

ROSE, J., dissents.

ALDRICH, J., not sitting.

DEAN, J., dissenting.

The legislature passed an act, House Roll 222, chapter 30, Laws 1917, that amended section 1940, Rev. St. 1913, so that, as amended, the act permitted women to

vote at the regular state election for officers and upon submitted questions, except such officers as are "specified and designated in the Constitution," and except upon questions "the manner of the submission of which is specified and designated in the Constitution of Nebraska." A referendum petition, numerously signed, was filed in the office of the secretary of state on July 23, 1917, to refer the suffrage act to the people for their approval or rejection at the regular state election on November 5, 1918. Plaintiffs began this action February 14, 1918, under section 2339, Rev. St. 1913, to enjoin the secretary of state from placing the act on the ballot, for the alleged reasons appearing in the main opinion. When the case was at issue, a mass of testimony was taken, and on October 18, 1918, a temporary injunction was issued, and interveners appealed.

Ten days before the election, namely, on October 26, 1918, the case was argued and submitted to this court for final determination, and on the same day the appeal was dismissed, as stated in the majority opinion, on two grounds, namely, that the constitutional language in question is merely directory, and because the order was not a final order, and hence was not appealable. It is to these propositions alone that this dissent is directed.

The act proposed to be referred is one of undoubted merit and is in harmony with the progressive spirit of the time. But it need hardly be said that these facts cannot properly enter into this discussion. The only question before us for decision is one of procedure under the terms of the Constitution, and a statute enacted directly in pursuance thereof, and as to whether the language of the organic law under discussion is mandatory or directory merely.

The only importance that now attaches to the present case is with respect to the construction of the constitutional provisions and the statute, both in question here.

The record before us, which does not contain any of the testimony, and on which the case was submitted, consists solely of the pleadings and the order or decree of the court. The decree does not on its face purport to be a final judgment, and it is shown that the taking of testimony was not concluded. Under the Constitution and the statute in this class of cases there appears to be no middle ground, but it is the imperative duty of the court to render a final judgment before the election and in apt time to permit an appeal. The party whose laches causes the delay, if any is shown, should be nonsuited.

Constitution, art. III, sec. 1B, among other things, provides: "Referendum petitions against measures passed by the legislature shall be filed with the secretary of state * * * and elections thereon shall be had at the first regular state election held not less than thirty days after such filing."

The court is not the master of the organic law, but is an interpreter of that law. Thou shalt! or thou shalt not! This is the imperative language of the law-giver. The language of the Constitution under consideration is severely plain. There does not seem to be room for interpretation, nor mistake as to meaning. The mandate of the people is imperative as to the time when the vote shall be had. If the court has power to read into section 1B language that will postpone the election beyond the "first regular state election" to the "second regular state election," then it has power to read into the same section language that will postpone the vote to any subsequent election; and if the court has power to substitute the directory or permissive "may" for the imperative "shall" in this section, then does it seem to have come to pass that the voice of the people has been radically changed respecting material matter in the fundamental law, and without authority, either express or implied.

Judge Cooley, who has been long recognized as one of our greatest interpreters of constitutional law, lays down this rule: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. * * * If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only. * * * There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application." Cooley, Constitutional Limitations (7th ed.) p. 114. The learned author, at p. 119, cites with approval this language from *People v. Lawrence,* 36 Barb. (N. Y.) 177: "It will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory and not imperative."

The initiative and referendum is a comparatively new principle of government in this country, and there are not many adjudicated cases bearing on its application to civic affairs. But there is perhaps not a single case where constitutional language respecting the time and manner of its operation has been held other than mandatory. Following is a brief review of recent authorities that seem to support this view.

In *Allen v. State,* 14 Ariz. 458, it is said: "All the qualified voters of the state being authorized to participate in the rejection or approval of referred laws, it may be conceded to be essential that they give expression to their wishes at a time fixed by the fundamental law."

In *Thompson v. Vaughan,* 159 N. W. 65 (192 Mich. 512) it is held: "Every provision of the constitution as to initiative and referendum is mandatory, and requires that every safeguard against irregular and fraudulent exercise be carefully maintained."

State v. Osborne, 14 Ariz. 185, in discussing the time for holding elections, says: "That time may be fixed by the people in the sovereign capacity of adopting their constitution; * * * if fixed by the people, the people alone can change it. The legislature cannot do it, and the courts cannot."

Capito v. Topping, 65 W. Va. 587, 22 L. R. A. n. s. 1089, is a late case from West Virginia that was decided in 1909 and seems to adhere to the rule. It is there said: "We are aware of no decision authorizing the view that a constitutional clause, dealing with matters so high and vital in character as the executive power of veto, and the making of laws, and having form and terms so emphatic, is merely directory."

In 12 C. J. p. 740, sec. 147, as relating to mandatory constitutional provisions, it is said: "As a general rule, all provisions that designate in express terms the time or manner of doing particular acts and that are silent as to performance in any other manner are mandatory and must be followed."

Section 1D, art. III of the Constitution, being a part of the initiative and referendum amendment, reads in part: "This amendment shall be self-executing, but legislation may be enacted especially to facilitate its operation."

Facilitate: "To make easy or less difficult; to free from difficulty or impediment"—is an accepted definition of a plain word in every day use, with which the legislative branch of government is apparently more nearly in touch than is the judicial branch. Clearly an act that would impede rather than facilitate the operation of the amendment would be unconstitutional.

Legislation in apparent conformity with the language of the Constitution was enacted in 1913 by the first legislature to convene after the adoption of the amendment. Section 2339, Rev. St. 1913, so far as applicable, follows: "On a showing that any petition filed is not legally sufficient, the court may enjoin the secretary of state and all other officers from certifying or printing on the official ballot for the ensuing election the ballot title and numbers of such measure." So mindful was the legislature of the duty imposed by the Constitution, especially to facilitate the operation of the amendment and to prevent the law's intolerable delays, that it is further provided in the same section that suits brought under the act "shall be advanced on the court docket and heard and decided by the court as quickly as possible. Either party may appeal to the supreme court within ten days after a decision is rendered."

Only mandamus and injunction may be invoked under this statute, and these extraordinary remedies must by the terms of the statute be speedily exercised, so that an aggrieved party may appeal in apt time, and this to the end that the act to be referred may be adopted or rejected at the time named in the Constitution. With respect to an application of this principle of government, neither the Constitution nor the statute contemplates that "the workings of the law shall move with a leaden heel."

It has been suggested that "the first regular state election" means the first election after a referred petition has been held valid by a court decree. But that could not have been the legislative intent, or this language would not have been used: "If it shall be decided by the court that such petition is legally sufficient, the secretary of state shall then file it, with a certified copy of the judgment attached thereto, as of the date on which it was originally offered for filing in his office." Rev. St. 1913, sec. 2339. The legislature did

not presume to attempt an abrogation of the constitutional mandate requiring the vote to be held at "the first regular state election" after the original filing of the referendum petition.

It is apparent that difficulties will be encountered in establishing finally and conclusively under the Constitution and the statute that any election is meant except that of November 5, 1918. It is said in the majority opinion that, if the constitutional language under consideration is mandatory, a referred act must be voted on at the first election, or it never can be lawfully voted on. The statute contemplates that the referendum petition shall designate the date of the election at which submission is sought, and it appears that the election of November 5, 1918, was designated in the present case. By the decision of the majority and on the face of the record it is clear that at least two years must elapse before the legislative act in question can be referred to the people for their adoption or rejection. Will it be said that the Constitution contemplates a situation that is so obviously repugnant to its language? When the people have reserved the right to have laws referred and have fixed the time for such reference, can the legislature or the courts lawfully fix any other time? To do so seems to be usurpation of power. If a mandatory provision of the Constitution may for reasons of expediency be construed to be merely directory, the fundamental law may become meaningless.

It seems that the district court was without jurisdiction to grant a temporary injunction and retain the case for further proceedings after the election in direct violation of the Constitution. It follows that its order was void, and therefore appealable. It is respectfully submitted that the cause should have been remanded, with directions to dissolve the injunction and dismiss the suit.

JOHN SHIMERDA, APPELLEE, V. NEBRASKA SERUM COMPANY, APPELLANT.

FILED NOVEMBER 30, 1918. No. 20168.

1. **Appeal:** CONFLICTING EVIDENCE. The finding of a jury on conflicting evidence will not be disturbed unless it is clearly wrong.
2. **Evidence** examined, and *held* to be amply sufficient to sustain the verdict.

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

Kirkpatrick, McCollum & Kirkpatrick and *E. J. Clements,* for appellant.

Bartos & Bartos, F. M. Hall, H. W. Baird and *F. D. Williams, contra.*

ALDRICH, J.

This is an action at law, where one John Shimerda, of Saline county, sues the Nebraska Serum Company to recover damages growing out of administering hog cholera serum, sold by the defendant, when the same was alleged to have been spoiled and poisonous. By administering said medicine, it is alleged to have caused his hogs to the number of 202 to sicken and die.

The evidence in support of the allegations in the petition herein was submitted to a jury, which found a verdict for plaintiff in the sum of $1,375. The issues in this case are comparatively simple. The sole question, as we view it, is: Was the verdict of the jury sustained by sufficient evidence? There is no controverted question of law here giving grounds for controversy.

This case is decided in accordance with the well-known and recognized rule of this court, to wit, the finding of a jury based on conflicting evidence will not be disturbed unless it is clearly wrong.

Defendant claims this verdict, if sustained, will work great injury to it in its manufacture of hog cholera serum. We answer that, if the serum manufacturers will take certain simple precautions, it will enable them to make, at least, a defense to actions of this kind. For instance, defendant in the case at bar could have met the contentions of plaintiff, had it simply shown that the serum was aseptically prepared, and could have further shown that there was no poisonous or deleterious ingredients in the serum at the time of its manufacture, sale and delivery.

Then, further, when parting with said medicine, a record or examination might have disclosed that certain tests had been made for the purpose of ascertaining whether any foreign substances were in the same, and that said medicine was not in a septic condition at the time of delivery.

Evidence shows that said medicine was administered in a clean, sanitary and scientific manner.

AFFIRMED.

SEDGWICK, J., dissenting.

The opinion says that the plaintiff alleges that the serum was "sold by the defendant, when the same was alleged to have been spoiled and poisonous." This the plaintiff must prove in order to recover damages.

The opinion says: "Defendant in the case at bar could have met the contentions of plaintiff, had it simply shown that the serum was aseptically prepared. * * * A record or examination might have disclosed that certain tests had been made for the purpose of ascertaining whether any foreign substances were in the same, and that said medicine was not in a septic condition at the time of delivery."

It is assumed that the defendant did not do these things, and so it is clear that there is no controversy, and it is unnecessary to refer to plaintiff's evidence. This places the burden of proof upon the wrong party.

The syllabus says that the evidence is "examined," but there is nothing in the opinion to indicate that it is at all material what the plaintiff's evidence might be. It is very doubtful to my mind that the evidence shows that the serum was poisonous.

MARSH-BURKE COMPANY, APPELLANT, v. JOHN H. YOST, APPELLEE.

FILED DECEMBER 14, 1918. No. 20214.

Judgment: RES JUDICATA. When a petition shows that recovery is sought on a matter adjudicated in a former suit between the same parties, it is subject to a general demurrer.

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

R. J. Greene, for appellant.

Stiner & Boslaugh, contra.

MORRISSEY, C. J.

Plaintiff brought this action to recover, as exemplary damages, under section 4062, Rev. St. 1913, twice the amount of compensatory damages awarded it in a previous suit. The trial court sustained a general demurrer to the petition, and plaintiff appeals.

In the former suit (*Marsh-Burke Co. v. Yost,* 98 Neb. 523) plaintiff obtained a verdict for $38,000 actual damages, resulting from a conspiracy to drive it out of business. The trial court reduced this verdict to $23,000, and plaintiff, rather than submit to a new trial, permitted judgment to be entered for that amount. Thereafter a motion was filed to have this judgment trebled, under section 4062, Rev. St. 1913, which provides that, in actions of the character involved, the plaintiff is entitled to recover threefold damages. The court denied this motion, and, when the case was brought to this court by defendant, plaintiff filed a

cross-appeal. This court, in its opinion, disposed of the cross-appeal in the following language:

"By its cross-appeal plaintiff contends that the district court erred in refusing to render a judgment in its favor for triple damages. It must be observed that the plaintiff, by its petition, prayed only for compensatory damages. No claim was made in any of the pleadings or proceedings at any time for triple damages, as provided by section 4062 of the Junkin act, until after the trial court had rendered its judgment on the verdict. The case appears to have been tried and submitted to the jury on the theory that plaintiff should recover only compensation for the injuries it had sustained by defendant's unlawful acts. It would also seem that plaintiff, by filing its remittitur of $15,000, and asking the court to render a judgment for $23,000, was not thereafter in a position to require the court to triple the amount of the judgment."

Plaintiff, by praying only for compensatory damages, by remitting a portion of the verdict to avoid a new trial, and by consenting to the entry of a judgment for the lesser amount, waived any right which it may have had under the statute to claim triple damages.

The demurrer was properly sustained, and the judgment is

AFFIRMED.

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

FARMERS CO-OPERATIVE COMPANY, APPELLEE, V. HILMA H. LOUIS, APPELLANT.

FILED DECEMBER 14, 1918. No. 20250.

Evidence examined, and found sufficient to sustain the verdict.

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

Charles H. Slama, for appellant.

Joe F. Berggren, contra.

MORRISSEY, C. J.

On trial to a jury, plaintiff recovered judgment for a bill of lumber used in the construction of a building on real estate owned by defendant, and defendant appeals.

Defendant is a married woman, but holds the real estate in her own right. C. O. Louis, the husband, ordered the lumber. Plaintiff made entry on its books in the following form:

"Sold C. O. Louis, Swedeburg, Nebr.
"For Hilma H. Louis property.'

Plaintiff alleges that the sale was made to defendant. Defendant denies that she ordered or purchased the lumber, although it is not denied that it was used in the erection of her building.

The court submitted the question to the jury, upon the evidence, whether the goods were in fact sold to the husband or to the wife, and the jury found for the plaintiff. The instruction is not objected to, and that is decisive of that question.

Defendant says in her brief that the only question for us to determine is: Was the charge, as made on the books of the company, made against her, or was it intended to be a charge against her husband? An inspection of the original entry, which is in evidence, may leave the question somewhat in doubt; but the manager of the company testified, without objection, that the goods were charged to defendant, "because I knew the property was in her name." This testimony is uncontradicted, and is sufficient to sustain the verdict on the point presented.

The judgment is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, v. KEITH NEVILLE, GOVERNOR, ET AL.: GRANT L. SHUMWAY, COMMISSIONER OF PUBLIC LANDS AND BUILDINGS, APPELLANT.

FILED DECEMBER 14, 1918. No. 20609.

1. **Public Lands:** EDUCATIONAL LANDS: ENABLING ACT. "Lands granted to the state of Nebraska by the United States, by virtue of the provisions of section 11 of the 'Enabling Act,' were not placed in the class of educational lands by the provisions of sections 3 and 4 of article VIII of the Constitution of the state, adopted in 1875." *McMurtry v. Engelhardt*, 5 Neb. (Unof.) 271.

2. ———: SALINE LANDS: CONTROL. "The board of educational lands and funds has no jurisdiction or control over the disposal of the lands granted to the state by said section 11, commonly known as saline lands." *McMurtry v. Engelhardt*, 5 Neb. (Unof.) 271.

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

Dexter T. Barrett, for appellant.

Bryon Clark, Jesse L. Root, Strode & Beghtol and *J. W. Weingarten*, *contra.*

MORRISSEY, C. J.,

Action by plaintiff against the members of the board of educational lands and funds, to quiet title under a lease covering a tract of saline land. Plaintiff set out its lease, and alleged that, for a long term of years, it paid annually to the superintendant of the Nebraska hospital for the insane the rental therein stipulated; that in May, 1917, the commissioner of public lands and buildings—a member of the board of educational lands and funds—demanded that plaintiff pay the rental through the county treasurer for the benefit of the school funds of the state, and had notified plaintiff that, unless such payments were so made, its lease

would be forfeited. All defendants, except the commissioner of public lands and buildings, by answer disclaimed any intention to disturb plaintiff in its holdings.

The court found that the land in controversy is not part of the school lands of the state of Nebraska, but that it is, and was at the time the lease was executed, set apart exclusively for the purposes of the hospital for the insane; that plaintiff is entitled to the peaceable and undisturbed possession thereof for the term of its lease; that defendants, other than the commissioner of public lands and buildings, have not threatened to disturb plaintiff, and it accordingly dismissed them from the case; that the commissioner of public lands and buildings "was acting without his authority as commissioner of public lands and buildings * * * or as a member of the board of educational lands and funds," and an injunction was issued against him and his successors in office. From this order, the commissioner appeals.

Each party has raised a number of questions not going to the merits of the controversy, some of them, perhaps, possessing merit, were we dealing with questions of procedure. But the land involved is the property of the state, and the officers of the state ought to be advised as to their duty in the premises. We shall therefore disregard all other questions presented, and proceed to a determination of the main question, namely: Is the land under the control of the board of educational lands and funds, with the rental to be devoted to the school fund, or has the land been dedicated to the use of the hospital for the insane?

It is agreed that the land in controversy falls within the class designated "saline lands," and forms a part of a section selected as prescribed by section 11 of the enabling act of congress relative to Nebraska, passed April 19, 1864. This section reads as follows:

"And be it further enacted, that all salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the said land to be selected by the governor thereof, within one year after the admission of the state, and when so selected to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct." 13 U. S. St. at Large, ch. 59, p. 47.

By act of the legislature, approved February 20, 1879, the land involved, together with other land, was set apart for the use and benefit of the hospital for the insane.

Appellant contends that this act is unconstitutional and void, as in conflict with section 3, art. VIII of the Constitution of Nebraska, which reads as follows: "The following are hereby declared to be perpetual funds for common school purposes of which the annual interest or income only can be appropriated, to wit: * * * Third. The proceeds of all lands that have been, or may hereafter be, granted to this state, where by the terms and conditions of such grant the same are not to be otherwise appropriated."

It is argued that, under this provision of the Constitution, the land became school or educational land, and that it was beyond the power of the legislature to dedicate it to any other purpose.

In *McMurtry v. Engelhardt,* 5 Neb. (Unof.) 271, the provision of the Constitution quoted was construed by this court, and it was expressly held:

"Lands granted to the state of Nebraska by the United States, by virtue of the provisions of section 11 of the 'Enabling Act,' were not placed in the class of educational lands by the provisions of sections 3 and 4 of article VIII of the Constitution of the state, adopted in 1875.

"The board of educational lands and funds has no jurisdiction or control over the disposal of the lands granted to the state by said section 11, commonly known as saline lands."

We are satisfied with the reasoning in that opinion and with the correctness of the rule therein announced. It follows that the judgment of the district court must be

AFFIRMED.

ALDRICH, J., not sitting.

ELIAS J. HERSHISER, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 14, 1918. No. 20009.

1. **Appeal:** PREJUDICIAL ERROR. Errors may, or may not, be prejudicial, according to the circumstances of a case. If it is evident that the party complaining has not been prejudiced, that justice has been done, and the verdict is the only one which should be reached, errors which might in some cases justify a reversal will be disregarded as not prejudicial; but in a doubtful case, where the evidence is conflicting, errors which in another case might properly be disregarded may be prejudicial, since in such cases the minds of the jurors may be in such a state of doubt that a slight circumstance would turn the scale.
2. **Trial:** INSTRUCTION: EVIDENCE BY DEPOSITION. An instruction that "evidence taken by depositions is entitled to the same weight and consideration by the jury as though the witnesses were present in court," criticized.
3. **Evidence:** BLOOD TEST. Where it is sought to prove the result of a blood test, the testimony should negative the possibility of any interference with, or substitution of other blood for, the object of the test.
4. **Damages:** LOSS OF EARNING CAPACITY: LOCALITY. Where it is sought to prove damages accruing by reason of loss of wages and earning capacity of a plaintiff, the inquiry should be as to what he was able to earn in or near the locality where he lived, or was reasonably liable to exercise his calling, and it is error to admit evidence as to his earning capacity at a distant point in another state where he is not likely to labor.

5. **Trial:** ARGUMENT OF COUNSEL: PREJUDICIAL ERROR. A reference by counsel for the plaintiff in an argument to the jury to the fact that defendant is a railroad company and "has millions of dollars in its treasury" is improper, and, though an objection to same was sustained by the court, in a doubtful case this with other errors may be sufficient to require that a new trial be granted.

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

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

Gerald F. Harrington, R. M. Johnson and *M. F. Harrington, contra.*

LETTON, J.

This is an action for personal injuries alleged to have been caused by the detention of the plaintiff in a freight car, whereby he became chilled and suffered a nervous shock and other injuries.

Plaintiff, who then lived at O'Neill, Nebraska, was about to remove to Mountain Grove, Missouri. He loaded his live stock and household goods into a box car, which was delivered by the Chicago & Northwestern Railway Company to the Chicago, Burlington & Quincy Railroad Company at Omaha, to be transported to Kansas City, there to be delivered to a connecting carrier. He accompanied the live stock as a caretaker. He testifies that while the train, of which the car was to form a part, was being made up in the yards of defendant, he was told by the conductor to get into the car and look after his live stock until the train was ready to leave the yards, when he would be notified, and permitted to ride in the caboose; that, after he entered the car, the door was pulled shut by himself and one of the trainmen; that it was fastened so that he could not get out, and he was not let out before the train left; that, though he tried repeatedly to attract attention, he was not released, and it was not until the next morning at a point in Missouri that he

succeeded in attracting the attention of the conductor, and was released and taken into the caboose; that the weather was very cold and damp; that he became chilled, caught a severe cold, and sustained a serious nervous shock. The petition charges that as a result he became partially blind, and has been unable to work since, or to walk, except by the aid of a cane, and his system has been permanently impaired and weakened.

The defendant admits the transportation of plaintiff as caretaker; alleges that he had the right to be transported either in a car containing his moveables, or in the caboose; that he exercised his right to ride in the freight car; and that whatever injuries he may have suffered were caused by his own negligence and by risks which he assumed. The plaintiff recovered a verdict for $12,000, and defendant appeals.

Defendant filed a petition and bond for removal of the case to the district court of the United States for the northern district of Illinois, on the ground of diverse citizenship, alleging that the plaintiff was a citizen and resident of the state of Missouri, and that the defendant is a corporation existing under the laws of Illinois, and with its office and principal place of business in Cook county in that state. The court found that plaintiff is a resident and citizen of Missouri, and that defendant is a resident and citizen of Illinois, and that therefore the case is not removable. This ruling is the first point assigned as error. The federal decisions do not seem to be entirely harmonious under such facts. *Ex parte Wisner,* 203 U. S. 449; *Park Square Automobile Station v. American Locomotive Co.,* 222 Fed. 979; *Ex parte Park Square Automobile Station,* 244 U. S. 412.

Having in view the fact that the final determination of this interesting question must of necessity be made by the supreme court of the United States, we are reluctant to hold that the trial court erred in refusing

to send the case to the federal court of Illinois, and therefore do not sustain the defendant's contention in this regard.

Much of the important testimony on behalf of plaintiff was given in the form of depositions, and some of that for defendant was taken in the same form. The court gave the following instruction: "The jury are instructed that, as to the depositions offered and received in evidence, it is the evidence of witnesses taken as by law required, and that evidence taken by depositions is entitled to the same weight and consideration by the jury as though the witnesses were present in court and testified to the facts contained in the depositions of the said witnesses." In addition to this, the ordinary instruction was given that, in determining the weight to be given to the testimony of the several witnesses, the jury should consider their conduct and demeanor while testifying, their opportunities for seeing or knowing the things about which they testify, etc.

Appellant insists that the above instruction is prejudicially erroneous. A jury may be somewhat prone to give less consideration to evidence read to them from depositions than to that of witnesses who appear in open court. In order to guard against this tendency, cautionary instructions of this nature are sometimes given, and it is generally held that they are not erroneous. *Coburn v. Moline, E. M. & W. R. Co.,* 243 Ill. 448, 134 Am. St. Rep. 377; *Olcese v. Mobile Fruit & Trading Co.,* 211 Ill. 539; *Hillis v. Kessinger,* 88 Wash. 15.

An early Indiana case, *Carver v. Louthain,* 38 Ind. 530, took a contrary view; but in *Voss v. Prier,* 71 Ind. 128, this case was practically overruled, the court saying: "We may know, as a matter of fact derived from common observation, that testimony communicated in the form of deposition does not generally make so decided an impression on a jury as that orally given

in open court, but the law does not as a rule recognize the inferiority of testimony embodied in depositions, to testimony given orally at the trial."

The weight of authority seems to justify an instruction of this general nature, but we think the statement that "evidence taken by depositions is entitled to the same weight and consideration by the jury as though the witnesses were present in court" is not strictly accurate. *State v. Howard,* 118 Mo. 127, 143; *Mann v. Darden,* 6 Ala. App. 555; *Thompson v. Collier,* 170 Ala. 469. The jury is deprived of all the indicia of truth or falsehood furnished by facial expression, demeanor, the look of the eye, hesitation or glibness of speech, and other criteria by which ordinary men are aided in determining the truth or falsity of statements made. Recognizing this defect in such evidence, the statute wisely provides that depositions can only be used when the attendance of witnesses cannot be procured.

This court has repeatedly pointed out the great advantage that a trial court has in the ascertainment of truth, when it has the witness before it, over a reviewing court, and always gives consideration to this advantage. It is only when the evidence before the trial court is in the form of depositions that it is considered that a reviewing court has an equal opportunity in this respect. Upon another trial the statement as to the "weight" to be given such testimony should be omitted, and the jury told in substance that testimony given in the form of depositions should receive the same fair and impartial consideration as if it had been given by witnesses in open court.

The wife of plaintiff was allowed to testify, over the objections of the defendant, when she was married, and to state the number of their children. In an action for personal injuries, it is immaterial whether a plaintiff is married or single, or whether he has any children or

not. The only purpose such an inquiry could have, would be to affect the sympathies of the jury. The matters inquired of were irrelevant to the issues, and the objections should have been sustained. *Pennsylvania Co. v. Roy,* 102 U. S. 451, 459.

A medical witness testified that the plaintiff was suffering from locomotor ataxia. Realizing that this condition may have resulted from a constitutional disease, plaintiff had procured the Wasserman test for the presence of syphilis to be applied to a quantity of his blood drawn for the purpose of the test. It appeared from the evidence of the doctor making the test that the blood, from the time it was drawn until the time the test was applied, was in the ice box of the laboratory, and that others besides himself has access to the laboratory, and that it would have been possible to have substituted another sample for Mr. Hershiser's blood.

On redirect examination the witness testified that the only persons who had access to the blood were men associated with him in his office; that he made no change in the blood himself; and that no one in his office did so to his knowledge. Defendant moved to strike the testimony as to the test, for the reason that the possibility of a substitution of blood was not precluded by the facts shown. The motion was overruled, and this is assigned as erroneous. As a general rule, the probability of any tampering with the objects of such tests should be negatived before evidence of this nature is admitted. The only persons who had access to the laboratory were those associated with the doctor. It would have been better to prove that the bottle and its contents had been absolutely undisturbed by any one except the witness; but since another blood test was made under proper conditions, with the same result, under the circumstances it was not prejudicial error to retain this testimony.

In testifying as to his earning capacity, the plaintiff was allowed, over the objections of the defendant, to testify to the wages he earned when he worked at O'Neill at carpenter work several years before. This is the only evidence as to the value of his work. His residence was at Mountain Grove, Missouri, 400 or 500 miles distant. In *Omaha & R. V. R. Co. v. Ryburn,* 40 Neb. 87, it was held that evidence of wages paid in a locality other than that of plaintiff's residence was erroneous. In that case, however, proof was given as to earning capacity of the plaintiff at his place of residence, and, since the result of the error could with reasonable certainty be estimated, the court required a remittitur of the excess. Plaintiff has pointed out no evidence in the record as to what an able-bodied man would earn at the plaintiff's trade in the locality of Mountain Grove, Missouri. If another trial is had, the inquiry should be as to wages in that locality.

In the argument to the jury, one of plaintiff's counsel said, among other things: "He does not ask you men to bring in a verdict for him against the railroad company just because it is a railroad company; he does not ask to have them pay him $60,000, or any other amount that you men think is right, just because it is the Chicago, Burlington & Quincy Railroad Company, and has millions of dollars in the treasury." This was objected to as not proper argument, and the objection was sustained. A number of other improper remarks made by the counsel for plaintiff were objected to. The objections were sustained by the court in the main. The quoted statement was grossly improper, and should not have been made. It is to be doubted whether the mere fact that the court sustained the objection to this and other improper statements removed the poison thus injected.

A number of affidavits as to newly discovered evidence were submitted in the motion for a new trial. We

think these alone were not sufficient to justify the setting aside of the verdict, and yet they are sufficient to indicate that more light may be thrown upon the issues if a new trial be had.

At the close of all the testimony, defendant requested the court to direct a verdict in its favor, which request was refused. This request was based upon the contention that the evidence is not sufficient to sustain a verdict. The instructions generally were as favorable to the defendant as it was entitled to ask, and seem in the main very fairly and impartially to present its theory of the case. The court gave the following instruction: "You are instructed that, upon the plaintiff's testimony, his sole right to recover is based upon his alleged statement that defendant's servants so closed and fastened the car door after plaintiff went into said vehicle that he could not depart therefrom, and upon this point the burden of proof is upon the plaintiff to satisfy you from a preponderance of the evidence that the door to said car was thus secured by defendant's servants after plaintiff went into said car, and, if he has failed to produce such preponderance of evidence, your verdict should be for the defendant."

We are not prepared to say that there is not sufficient evidence to sustain a verdict; but there are so many improbabilities in the testimony of the plaintiff, and it is so strongly contradicted by other testimony, that errors which might not under some conditions of evidence justify a reversal, may have been sufficient to turn the scale in plaintiff's favor, and to prejudicially affect the substantial rights of the defendant.

A brief résumé of a part of the testimony may be interesting in addition to that already set forth: Plaintiff testified that when, at Omaha, the door of the car was shut by himself and one of the trainmen, it rebounded and left a crack of about an inch or three-fourths, out of which he could see; that at the first

stop, which he thought was at Council Bluffs, he called out, shook the door, and tried to get it open, but could make no one hear, and that he did this whenever the train stopped; that when he loaded the car he fastened the other door securely, and left an open space of about four inches to furnish air to his stock; that about one or two hours before daylight the conductor heard his cries, took him out, and put him to bed in the caboose; that he was then shaking and shivering with cold; that he was sick from that time on; and that his physical disabilities resulted from this exposure.

On cross-examination he testified that his furniture and boxes were loaded in the ends of the car, and the live stock faced the center; that there were four head of horses, three on one side and one on the other, and five head of cattle; the horses were in stalls, and the cattle not tied, but penned in; there were two hogs and a large number of chickens.

He does not remember whether he complained to the conductor who went to St. Joseph or Kansas City about having been confined in the car. He made no complaint to the railroad company's agent at Mountain Grove, and never made any claim against the defendant on this account until about three years after the transaction. He denies getting out of the car at Pacific Junction, but admits that he had some intoxicating liquor with him on the trip. He says that he had the lantern lit at first, but it went out; that no conductor came to his car or put a punch mark into his contract until at St. Joseph. He denies specifically that the conductor came to him before the car crossed the bridge near Omaha, and that he exhibited his contract and had it punched; he testified that the chicken crates obstructed his view out of the other door of the car, but he could see by looking around them, that he could tell when they came to a city by the lights, if they came on that side, but there were no lights on that side. On

redirect, he testified that he had a pint bottle and half a pint bottle of whisky with him, but that he did not drink any of it during the trip.

On the part of the defendant it was shown that a live stock contract (Exhibit 1) was delivered to the plaintiff in Omaha; that he kept it until he reached Kansas City, when he delivered it to a clerk of the connecting carrier, who testifies he placed it in the original files, and took it from that repository to produce at the trial. The night yardman at Omaha testified that he saw plaintiff in the yards that night; that he was under the influence of liquor; that he went with him to his car and helped him in; that he then fastened the door, leaving an opening about one or two feet wide; and that plaintiff never mentioned wanting to ride in the caboose.

Another employee, not now in the employment of defendant, testified that he saw plaintiff and the preceding witness that evening, and at that time plaintiff looked as though he was under the influence of liquor. A conductor testified that this car was in his train; that the first stop out of Omaha was at Gibson, which is the end of the Omaha yards, and is on the west side of the Missouri river; that the train then continued on the west side of the river until it reached Plattsmouth, where it crossed the river, and that the end of the run was at Pacific Junction, Iowa; that at Gibson he spoke to the man in the emigrant car; that he procured exhibit 1, the live stock contract, from him, and made two punch marks in it in connection with the words, "Omaha Division;" that the door was open about a foot and a half or two feet, and there was a light in the car; that after he punched the contract he handed it back, and had not seen it again until he saw it in court. Exhibit 1 shows No. 28572 as a car of emigrant moveables in that train. The man who was night yardman at Pacific Junction in February, 1912, testified that train No. 14 comes into Pacific Junction as a mixed

train; that this train is usually left close to the depot until train No. 72 arrives from the north, when it is taken apart, and cars going south are attached to train No. 72; that he saw the occupant of car No. 28572 that evening, who asked where he was, and whether he had time to get out and get something to eat; that he told him they were at Pacific Junction, and that there was a lunch counter at the depot; that the man got out and went to the depot; that he was a little intoxicated; that witness asked him if he wanted to go to his car, or to the caboose; that he said, "No, I want to stay in the car, I have got a good place to lie down there, and I want to stay there;" that he took him to the car; that the door was fixed so as to remain open about fifteen or twenty inches, maybe two feet; that there was a kerosene lantern burning in the car.

It was shown by United States weather observers that the temperature at Omaha and St. Joseph that night varied from 29 to 31 degrees above zero. Three other witnesses testified to seeing plaintiff in the lunch counter at Pacific Junction, giving facts to corroborate their testimony as to time and identity. The testimony of one of these witnesses for defendant seems to us of very doubtful credibility.

It seems difficult to believe that a vigorous man could not have made himself heard out of a car with a door fastened open for a space of four inches, expecially when the car stood on a side track near a station for more than an hour.

The case was carefully tried in the main; but it is so doubtful whether the plaintiff should recover at all, that the verdict may well have been influenced by some of the errors pointed out. We are inclined to the view that the verdict was the result of passion and prejudice. Whether this is so or not, we believe that justice demands a new trial.

REVERSED.

ROSE, J., not sitting.

MAUDE R. HATFIELD, EXECUTRIX, ET AL., APPELLANTS, V. WILLIAM E. JAKWAY ET AL.: NIELS P. HANSEN, APPELLEE.

FILED DECEMBER 14, 1918. No. 20026.

1. **Appeal:** BILL OF EXCEPTIONS: CORRECTION. When counsel presents a bill of exceptions to the adverse party and the court for examination and settlement, he vouches for its correctness, and, when the court by allowance makes it a part of the record, it imports verity. After being filed in this court, it can only be corrected by being withdrawn by leave of court for correction in the district court.
2. ———: ———: ———. Such a motion ordinarily comes too late after the case has been argued and submitted and the opinion handed down, and this is especially so, when the portion of the bill which is sought to be corrected has been called to the attention of counsel presenting the same, before the cause was argued and submitted, by being set forth in the brief of the adverse party.
3. **Principal and Surety:** RELEASE OF SURETY. One who is not a party to a contract, by the terms of which the maturity of certain notes, which he afterwards signed, should be accelerated upon the nonpayment of any one of them within four months after due, cannot assert that he is released from his obligation upon the notes merely upon this account, since the contract in no wise affected his liability upon the notes, and he was only bound to pay at the dates specified therein.
4. **Bills and Notes:** DEFENSES. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable. Rev. St. 1913, sec. 5376.
5. ———: "HOLDER IN DUE COURSE." A payee who takes a negotiable instrument with knowledge that one of the signers is only signing as a surety, and who agrees that certain collateral pledged to secure the note shall first be applied before the surety shall be liable, is not a "holder in due course" as respects such agreement with the surety.

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

R. C. Roper and *S. S. Bishop,* for appellants.

Fawcett & Mockett and *C. M. Parker, contra.*

LETTON, J.

After this case had been argued and submitted to the commission and a memorandum opinion adopted by the court and handed down, plaintiffs filed a motion asking to withdraw the bill of exceptions for correction as to the testimony of Hansen with regard to a conversation with Hatfield. This was overruled, for the reason that it is the duty of one, who tenders a bill of exceptions to the adverse party, to present the evidence as he seeks to have it established. The responsibility is upon him to detect errors or mistakes in transcribing the reporter's notes. Before the days of official court reporters, the only method of obtaining a review was for each party to preserve the evidence and his exceptions, and, after submission to the adverse party, have the court settle them, and make the bill a part of the record. This responsibility still rests on the appealing party. When he presents his bill to the adverse party and the court, he vouches for its correctness, and, when the court makes it a part of the record, it imports verity, and can only be corrected by being withdrawn and corrected in the court from which it comes. Such a motion comes too late after the case has been decided. Otherwise, a reviewing court might spend time and labor upon a record, such as in this case, and, after it was decided, be compelled to review the whole case again.

Moreover, the brief of the appellee, Hansen, sets out at length, on page 13 thereof, the entire conversation as testified to by Mr. Hansen, so that, before the case was submitted and before a reply brief was filed, plaintiffs had full notice of the contention of the defendants in this regard. This, of itself, would have been sufficient reason to overrule the motion.

Coming, now, to the consideration of the case: Hatfield & Wagner, doing business as a partnership, were the owners of a stock of general merchandise, which they agreed to sell to Jakway & Parker for $15,500.

Jakway & Parker were to pay for the same in part by giving 12 promissory notes of $1,000 each, and one note of $500. The notes were to become due at intervals of six months, and were to be secured by collateral. A note for $4,000 to be signed by W. P. Parker, C. M. Parker and Niels P. Hansen was also to be given. The contract of sale, among other provisions, specified: "In the event that any of said notes shall remain unpaid for a period of four months after the same become due, the remainder of said notes shall become due and payable at the option of the first parties."

Hansen had no interest in the transaction. He was requested by Jakway & Parker to sign the $4,000 note mentioned in the contract, but refused. He finally agreed to sign the first four of the series of $1,000 notes. Hatfield & Wagner refused to accept notes so signed, but agreed to take the first, third, fifth and seventh with his signature. These he signed, the collateral and notes were delivered, and the stock of goods changed hands. Hansen, at the time this was done, had no knowledge of the provision of the contract whereby the notes were all to become due as soon as one of them was four months past due.

Default was made in the payment of several of the notes. Before the last of the four notes which Hansen signed was due, this action in equity was brought to wind up the business, to liquidate its affairs, and collect and apply on the notes all collateral and other securities. Plaintiffs had applied the proceeds of the collateral upon notes not signed by Hansen. A decree was rendered releasing Hansen from liability. From this judgment, the executrix of Hatfield, who had died in the interim, and Wagner appealed.

The first defense made by Hansen is that, by the concealment of the clause in the contract whereby the maturity of the notes was to be accelerated on the failure to pay any of them within four months after

maturity, he was released from his obligation. We cannot see why this result should follow. He was not a party to the contract, and could not be held liable upon any of the notes which he signed until after the date upon which they fell due according to their face. He was not affected by this provision. It makes no change in his relation to the paper; therefore he cannot contend that the holders of the note were estopped by it.

In his second defense he pleads, in his amended answer, that he signed the notes as surety, with the agreement that all the property and securities of every kind given to the plaintiffs should be applied on the notes in the order in which they came due. He alleges that, contrary to this agreement, and contrary to law, the plaintiffs have failed to make such application, and are now holding the money derived from the securities, and he prays that all the collateral securities and all other property given to secure the payment of the notes be reduced to cash and applied to the payment of the notes, in the order in which they became due, commencing with No. 1, and for such other and further relief as may be just and equitable.

The plaintiffs maintain that there never was any agreement between Hatfield, Wagner and Hansen as to the application of the proceeds of the securities. Mr. Hansen testified that, in a conversation between Jakway, Hatfield and himself, it was stated by Hatfield that the "notes would be paid long before maturity, owing to the sufficiency of the security, and applied as they came due," evidently meaning that the proceeds would be applied as the notes came due. This testimony was objected to as incompetent under the statute, since plaintiff was the representative of a deceased person. This objection was not good. Plaintiff Wagner was still alive, and, as one of the partners, was engaged in winding up the business.

Furthermore, the circumstances seem to corroborate Hansen. The objections he made to signing the $4,000 note, viz., that this would leave him liable after all the securities had been exhausted and applied upon the other notes, in all probability was communicated to Hatfield & Wagner by Jakway, since they recognized its force by consenting to the change in the contract whereby he signed the early maturing notes in the series.

It is contended that under sections 5344 and 5347, Rev. St. 1913, Hansen is unconditionally liable as a maker upon the notes, because he was an "accommodation party," and plaintiffs are "holders in due course." The terms "holder," "holder for value," and "holder in due course" are respectively defined in sections 5507, 5344, and 5370, Rev. St. 1913. By section 5507, "holder" means the "payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." Under these definitions, we are of the opinion that the plaintiff partnership was a "holder" of the Hansen note, but not a "holder in due course," and that section 5376 applies, which, so far as applicable, is as follows: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable." Since the payees were parties to and had notice of the collateral agreement as to the application of the proceeds of the collateral, and the note had not been negotiated, it was subject to the same defenses as if nonnegotiable.

This is a trial *de novo*. From a survey of all the evidence, we are convinced that the defense is sustained by the evidence. The district court should have ascertained the proceeds from all the securities and property pledged, applied them upon the series of notes in the order in which they became due, and adjudged Hansen to pay whatever balance remained unpaid on the notes he signed.

The judgment of the district court releasing Hansen absolutely is reversed, and the cause remanded, with directions to proceed as above.

REVERSED.

CORNISH and ALDRICH, JJ., not sitting.

THOMAS J. O'NEILL, APPELLANT, V. CITY OF SOUTH OMAHA, APPELLEE.

FILED DECEMBER 14, 1918. No. 20063.

Limitation of Actions. "An action to recover on an implied assumpsit is barred by the expiration of four years after the cause of action arose." *Markey v. School District*, 58 Neb. 479.

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

A. H. Murdock and *John P. Breen,* for appellant.

W. C. Lambert, John A. Rine and *F. L. Weaver, contra.*

LETTON, J.

This is an action to recover for partially grading a street in South Omaha, under a contract with the city. The first cause of action is based upon the contract. The second count seeks to recover the reasonable value of grading, alleging that the city accepted and appropriated to its use all of the earth and labor performed, but refused to pay for the same. A general demurrer was filed to the petition, which was sustained, and the action dismissed.

The petition alleges in substance that, following a petition filed by abutting property owners, the city council of South Omaha passed an ordinance creating an improvement district; that an estimate was made by the city engineer that it required 85,000 cubic yards of

earth to bring the street to the established grade, and estimated the cost of doing the grading at $14,450. Afterwards the plaintiff, by a communication addressed to the city council, offered to haul the dirt from certain lots and dump it on the street to be graded, "and when the contract is finally let for the grading of O street and said work completed, that the undersigned be refunded, for each yard of dirt so deposited on O street, a sum equivalent to the price per yard which the city has to pay for the grading of said O street." A resolution was passed by the council accepting this proposition, and instructing the mayor and city clerk to enter into a contract with the plaintiff in accordance with its terms.

More than sufficient funds were on hand and duly appropriated for that purpose to cover the costs and expenses of said undertaking. Plaintiff, in pursuance of the contract and under the direction of the city engineer, between June 18 and December 1, 1906, hauled from said lots and deposited in the street at the place directed 8,990.5 yards of dirt, which was accepted by the city. In January, 1910, after complying with all requirements as to advertising and competitive bidding, the city let the contract to one Hannon for the completion of the grading at 18.45 cents a cubic yard, and in November, 1910, the plaintiff demanded payment for the earth deposited by him in the street at this price, which defendant refused to pay.

As to the first count, the petition shows on its face that no valid contract was entered into. None of the statutory requirements for competitive bidding were carried out. The fact that the price was to be fixed at some indefinite time in the future, under a legal contract to be then made with another, could not legalize this transaction. The price depended upon a contingency liable to be affected by many elements. Under the statute the city council could not be bound by such

an uncertain and indefinite agreement. The demurrer to the first count was properly sustained.

Plaintiff seeks, by the second count, to recover the reasonable value of the grading. The city takes the position that the statute of limitations had run against any claim upon *quantum meruit,* or implied assumpsit, for the reason that the dirt was deposited in 1906, and the action was not begun, so far as this count is concerned, until more than four years thereafter. The city had power in good faith to enter into a contract of this nature. The right of recovery where the city, under a contract entered into in good faith, but which is void for the lack of statutory requirements, has accepted and still retains the benefit of it, has been established by *Lincoln Land Co. v. Village of Grant,* 57 Neb. 70, *Rogers v. City of Omaha,* 76 Neb. 187, *Nebraska Telephone Co. v. City of Red Cloud,* 94 Neb. 6, and other cases.

Defendant insists that this theory of the law is unsound. Probably the weight of authority in other states is that no recovery can be had in such cases; but the doctrine has been held in this state for many years, and no evil results, such as seem to be feared by courts holding to the contrary, have been manifested. The doctrine appeals to one's sense of justice and fair dealing, and we adhere to it. If the lawmakers deem the law thus laid down inimical to the public welfare, it may be changed by statute.

Plaintiff argues that, in order to recover in such an action, there must have been an attempt in good faith to enter into a contract, and that the terms of it must be considered by the court; that by the terms of the contract plaintiff could maintain no action against the city until the price has been fixed by a subsequent legal contract; that this event did not occur until 1910, and therefore his right of action did not accrue until that time.

A mere voluntary rendering of services, or of supplies, to the city, without more, could not give a right of action. It is only to show that the plaintiff was not a mere volunteer, but that the city was in a certain sense party to the transaction, that the contract which was attempted to be entered into was material in the case. The terms of the contract cannot govern either the price or the time of payment, if the recovery is not upon the contract, but upon an implied assumpsit.

In an action against a school district upon a contract for the erection of a steam-heating apparatus, it was held that the contract was invalid, and no recovery could be had upon it. Recovery was not permitted upon implied assumpsit, because the work was completed and accepted more than four years before the beginning of the action. *Pomerene v. School District,* 56 Neb. 126. A similar case was *Markey v. School District,* 58 Neb. 479, where it was shown that the action was not instituted for more than eight years after the acceptance of certain school furniture by the defendant.

The petition recites that the earth was deposited under the direction of the city engineer, "so as to immediately fill up large holes which had been washed by the rains in and across said street, so as to render that portion of it available for travel as soon as possible," and that between June 18, 1906, and December 1, 1906, the dirt was hauled and the city accepted the same.

Plaintiff's cause of action accrued when the city accepted the dirt and retained it. It is therefore barred by the four-year statute of limitations. Moreover, there was ample time, using due diligence, to prosecute the action after the price had been determined, and within four years. The judgment of the district court is

AFFIRMED.

JOHN M. BAKER, APPELLEE, V. SAMUEL A. WESTING, APPELLANT.

FILED DECEMBER 14, 1918. No. 20114.

1. **Husband and Wife:** CRIMINAL CONVERSATION: VERDICT: SUFFICIENCY OF EVIDENCE. Evidence described in the opinion *held* sufficient to sustain a verdict in favor of plaintiff for $2,500 in an action for criminal conversation.
2. ———: ———: EVIDENCE OF COLLUSION: EXCLUSION. In a suit by a husband for criminal conversation, proof by defendant of mere collusion between plaintiff and his wife to claim damages or to bring an action therefor may be excluded, where there is no evidence of connivance or collusion on the part of the husband in regard to the wrongs imputed to defendant.
3. ———: ———: DAMAGES. In a suit by a husband for criminal conversation, a jury properly finding in favor of plaintiff may, in assessing damages, consider the wrong to plaintiff "in his domestic and social relations" and the "stain and dishonor" suffered by him.
4. ———: ———: VARIANCE. In a suit by a husband for criminal conversation alleged by him to have occurred on or about a date mentioned and to have recurred at intervals for two years, plaintiff in making his case is not necessarily limited to proof of offenses committed within that period.

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

Tibbets, Morey, Fuller & Tibbets, for appellant.

J. E. Willits, contra.

ROSE, J.

This is an action for criminal conversation, and resulted in a verdict and a judgment in favor of plaintiff for $2,500. Defendant has appealed.

The principal assignment of error challenges the sufficiency of the evidence to sustain the verdict. Defendant testified to his innocence, and argued on appeal that the evidence adduced by plaintiff in support of his charges was too contradictory and improbable for

credence. From March, 1912, until July, 1916, plaintiff, with his wife and a number of children, lived on a farm owned by defendant and worked for him there. The wife of plaintiff testified that defendant had illicit relations with her at her home at intervals for two years or more between the dates mentioned. A daughter of plaintiff testified to noncriminal acts of familiarity on the part of defendant toward her mother at her house during her father's absence. Defendant admitted on the witness-stand that he had been at the home of plaintiff two nights while the wife of plaintiff was there and while her husband was absent with a shipment of stock. Defendant also admitted that he had been in plaintiff's house at different times settling accounts with the wife of plaintiff while the latter was at work on the farm. Independently of testimony of the wife of plaintiff, there is evidence to justify the inference that defendant had deliberately participated in the creation of opportunities to be with her during the absence of her husband. Without going further into details or adverting to explanations by defendant to show his innocence, it is found that the evidence is sufficient to sustain the verdict and to justify the conclusion that it was not the result of passion or prejudice.

There is complaint that the trial court excluded evidence tending to prove that plaintiff and his wife, Emillie M. Baker, had conspired together to extort money from defendant. In the attempt to show what the wife had said and done in this respect, the principal item of proof offered was a letter from her attorney to defendant. It was written before plaintiff brought this suit and is in the following language:

"Claim of Emillie M. Baker for damages against you has been placed in my hands for settlement or action. Thanking you for your prompt attention and that I may have answer from you immediately as to your position in this matter, I am, yours truly."

Proof like this is not of itself evidence of a conspiracy. The wife is not a party to the present action. There is no evidence whatever of connivance on the part of plaintiff at the wrongs imputed to defendant. In the absence of such evidence, mere collusion between plaintiff and his wife, after plaintiff discovered that his marital rights had been invaded by defendant, to claim damages or to bring a suit therefor, does not defeat plaintiff's action or prevent a recovery. *Rea v. Tucker,* 51 Ill. 110, 99 Am. Dec. 539. Error in excluding proof of this nature does not appear in the record.

Defendant criticises an instruction permitting the jury, in estimating damages in the event of a finding for plaintiff, to consider the wrong to him "in his domestic and social relations" and the "stain and dishonor" suffered by him, if any. These terms were evidently borrowed from an instruction approved in *Smith v. Meyers,* 52 Neb. 70. Damages of this nature, in absence of connivance or collusion, may be inferred from an invasion of the exclusive marital rights of plaintiff. This assignment is therefore overruled.

Another assignment of error is variance between the pleading and the proof, plaintiff having been allowed to adduce testimony of criminal acts in April, 1913, under a petition alleging that the wrongs were committed "on or about the month of September," 1913, and on "other days and dates between said time and the commencement of this action" and for a period "of more than two years." The supreme court of Michigan overruled a similar assignment of error, saying:

"The plaintiff was not confined to the exact time alleged in the declaration. It is not claimed that he attempted to prove but one offense, and under such circumstances, both in civil and criminal cases, the offense charged may be shown to have been committed upon any day within the period of the statute of

limitations, and the fact that the defendant may rely upon proving an alibi in his defense does not change the rule." *Johnston v. Disbrow*, 47 Mich. 59. See, also, *Yatter v. Miller*, 61 Vt. 147.

In the present case, the petition states that defendant came to the home of plaintiff, who lived on defendant's farm, and there committed the wrongful acts pleaded, and that this was plaintiff's home from March, 1912, until July, 1916. The proofs were confined to that period. In overruling the motion for a new trial, the court below found that defendant was not prejudiced by proof of criminal intercourse in April, 1913. The record does not show that the judgment should be reversed on this ground. Complaint is made of other rulings, but error prejudicial to defendant has not been found.

AFFIRMED.

SEDGWICK and ALDRICH, JJ., not sitting.

VIRGIL FALLOON, ADMINSTRATOR, APPELLANT, v. JOSEPH H. MILES, APPELLEE.

FILED DECEMBER 14, 1918. No. 20152.

1. **Attorney and Client:** CONTRACT: NEW TRIAL. A new trial on the ground of newly-discovered evidence is a statutory remedy which attorneys may reasonably contemplate in making a contract to protect, for specific fees, the interests of their client in pending litigation.

2. ———: ———: CONSTRUCTION. The general rule is that a doubtful or ambiguous contract for professional services and compensation of the attorney who drew it should be construed in favor of the client.

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

S. P. Davidson and *Virgil Falloon,* for appellant.

Mahoney, Kennedy, Holland & Horan and *John Wiltse, contra.*

ROSE, J.

This is an action by Edwin Falloon, plaintiff, to recover $16,647.60, alleged to be the reasonable value of professional services performed by him as attorney for Joseph H. Miles, defendant. The claim was resisted on the grounds that plaintiff had performed the services in controversy under a written contract and that he had received the stipulated compensation. At the trial plaintiff adduced evidence tending to prove that he performed the services pleaded in his petition and that the reasonable value thereof exceeded the amount claimed. At the close of his testimony, however, the trial court sustained a motion to direct a verdict in favor of defendant. The action was accordingly dismissed. Later plaintiff died, and the cause was revived in the name of Virgil Falloon, administrator, who has appealed to this court from the judgment of dismissal.

Edwin Falloon, plaintiff, with other attorneys, was employed by defendant to protect the latter's interests under what is called the "Rulo will" of Stephen B. Miles, deceased. The estimated value of testator's estate exceeded $1,000,000, and defendant, under the Rulo will, was entitled to all of it except $150,000. The Rulo will was executed in 1888 and was probated in the county court for Richardson county December 2, 1898. After the time to appeal from the order of the probate court had expired, Joseph Williams and others, heirs at law of Stephen B. Miles, deceased, commenced a proceeding March 29, 1899, in the county court for Richardson county to set aside the probate of the Rulo will, and to probate a will alleged to have been executed by Stephen B. Miles in 1897, described as the "St. Louis will." Twelve days after the St. Louis will had been offered for probate, Joseph H. Miles, defendant herein,

engaged attorneys, including Edwin Falloon, by written contract, in the following form:

"This agreement made this 10th day of April, 1899, between Joseph H. Miles, of the first part, and Clarence Gillespie, Francis Martin, and Edwin Falloon, of the second part, witnesseth:

"Said Joseph H. Miles hereby employs said Martin, Gillespie, and Falloon as his attorneys to defend his interests in certain litigation now pending in the county court of Richardson county, Nebraska, concerning the probate of the will of Stephen B. Miles, deceased, and, in consideration of the services of said parties of the second part, said party of the first part agrees to pay the sums and amounts following, to wit:

"For the trial of said cause in the county and district courts of said county the sum of six thousand dollars ($6,000) to be paid as follows, fifteen hundred dollars ($1,500) cash, and on the entry of the judgment of said county court fifteen hundred dollars ($1,500) additional. If said cause goes no further, then the additional sum of three thousand dollars ($3,000), making six thousand dollars in all. But if said cause is appealed or taken to the district court said second sum of three thousand dollars (3,000) shall be paid as follows: $1,500 upon the termination of said cause in the district court, and in the event of said cause being taken to the supreme court of Nebraska the remaining $1,500 at its termination. If said cause shall be taken by either party to the litigation to the supreme court of Nebraska, then said Miles shall pay said attorneys the further sum of $9,000, making in all $15,000, provided, however, if said Miles shall be eventually unsuccessful in said supreme court the fees for services in said supreme court shall be $1,500, or $7,500 in all of said courts. In case said cause shall be removed to the inferior federal courts and there terminated successfully in favor of Miles, the fees shall be $15,000, or if terminated there unsuccessfully the fees shall be $7,500. If said cause shall be taken to the

United States supreme court the fees shall be $5,000 additional, or $20,000 in all in the event of success, and in the event of failure $10,000 in all. In addition to the above the said Miles agrees to pay all costs and necessary expenses in any event.

"Said parties of the second part hereby accept said employment on said terms, agree to divide all fees equally and to give all matters connected with said litigation their best care, skill and ability, and at all times to protect the interests of said Miles.

"This contract also binds the parties to continue in the management of said matters to the end in all courts if the same shall be reversed by any superior court. This employment includes and comprehends without additional fees the litigation concerning the claim of Mead to the one-sixteenth of said estate.

"Witness our hands the day and year last above written.

"J. H. MILES.
"CLARENCE GILLESPIE.
"FRANCIS MARTIN.
"EDWIN FALLOON."

Were the services for which compensation is sought herein performed by Edwin Falloon, plaintiff, under the contract quoted? The St. Louis will was rejected in the county court, in the district court on appeal from the county court, and in the supreme court on appeal from the district court. The judgment of the district court for Richardson county in favor of defendant herein, rejecting the St. Louis will and refusing to set aside the order probating the Rulo will, was affirmed in the supreme court April 9, 1903. *Williams v. Miles,* 68 Neb. 463. The position of plaintiff herein is that his services under the written contract were then completed, that he had then earned one-third of the stipulated compensation, or $5,000, and that he is entitled to additional compensation for subsequent services performed by him for defendant in other proceedings described as follows:

While the appeal of the heirs at law was pending in the supreme court, they filed in the district court for Richardson county, from which the appeal last mentioned had been taken, a petition asking for a new trial on the ground of newly-discovered evidence, and renewed their prayer to set aside the probate of the Rulo will and to probate the St. Louis will. Compensation for services of plaintiff herein as attorney for defendant herein in resisting the second petition is the subject-matter of the present suit.

Plaintiff argues that the professional services performed in protecting the interests of defendant in the new proceeding were not within the contemplation of the parties to the written contract, when made, and that additional compensation is recoverable for the reasonable value of the additional services. The answer to this argument is found in the terms of the contract itself. Defendant herein is a layman. The contract was drawn by his attorneys. It speaks their language, describes the services to be performed, and fixes the terms of compensation for protecting the interests of defendant in a 1,000,000-dollar controversy already in court. The Rulo will, giving their client all of testator's estate except $150,000, had already been probated, and the time to appeal from the order of the probate court had expired. The undetermined course of litigation was in the minds of the attorneys, as shown by the language used in the contract drawn by them. Definite compensation for, and services of, lawyers to protect the client's interests under a probated will were in the minds of the parties. These interests had already been menaced by a proceeding to probate an alleged later will making a different disposition of decedent's estate. According to the literal terms of the contract, the attorneys were employed by defendant "to defend his interests in certain litigation now pending in the county court of Richardson county, Nebraska, concerning the probate of the will of Stephen B. Miles, deceased."

This employment is not limited to a case, or to a proceeding, or to a petition, but extends to "litigation" concerning the "probate of the will of Stephen B. Miles, deceased." Litigation concerning that subject fairly includes the application, on the ground of newly-discovered evidence, for a new trial in the proceeding which resulted in the rejection of the St. Louis will. A new trial on the ground of newly-discovered evidence is a statutory remedy which attorneys may reasonably contemplate in making a contract to protect, for specific fees, the interests of their client in pending litigation. In the first proceeding the district court's judgment rejecting the St. Louis will and refusing to set aside the Rulo will, when affirmed by the supreme court in *Williams v. Miles,* 68 Neb. 463, was not a "termination" entitling plaintiff herein to the remainder of his stipulated compensation within the meaning of the contract, since the application to set aside the district court's judgment, from which the appeal to the supreme court had been taken, was pending, and, if ultimately granted, would have destroyed the affirmed judgment.

The contract, according to its plain import, required plaintiff herein to perform the services for which he is seeking to recover; but, even if there were two reasonable constructions, the one most favorable to defendant should be adopted. The general rule is that a doubtful or ambiguous contract for professional services and compensation of the attorney who drew it should be construed in favor of the client. 6 C. J. p. 738, sec. 314; *Samuels v. Simpson,* 129 N. Y. Supp. 534; *Walsh v. Board of Trustees,* 17 Mont. 413; *Hawke v. Dorf,* 133 N. Y. Supp. 23, 204 N. Y. 671.

In this view of the contract and the law, plaintiff did not make a case. It follows that the judgment of the district court is

AFFIRMED.

LETTON and ALDRICH, JJ., not participating.

JOSEPH C. SEACREST ET AL., APPELLEES, V. BOARD OF COUNTY COMMISSIONERS OF LANCASTER COUNTY ET AL., APPELLEES: JOHN J. CONNIFF ET AL., INTERVENERS, APPELLANTS.

FILED DECEMBER 14, 1918. No. 20151.

1. **Highways:** PAVING ASSESSMENT: RELEVY. A county board may relevy an assessment of a paving district under section 3, ch. 200, Laws 1915, if there has been an "irregularity in the proceedings on any special assessment." An assessment made without the notice to property owners which the statute requires is such "irregularity."
2. ———: COST OF IMPROVEMENT: PAYMENT BY COUNTY. If the board, in its resolution creating the district, provides that the entire cost of the improvement shall be paid by the property owners of the district, and upon petition of the property owners the improvement is duly made, without objection of any property owner, and the cost of the improvement is not greater than the benefit to the property of the district, the cost of the improvement must be levied upon the property of the district, and the board will not be authorized to pay a substantial part of such cost with the money of the county.
3. ———: IMPROVEMENTS: ASSESSMENTS. Each tract in the district is to be assessed in proportion to its benefit by the improvement. If it is taxed in excess of the benefit, the remedy is provided by statute.

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

Stewart & Stewart and *Arthur W. Richardson,* for appellants.

F. M. Hall, J. A. Brown, H. W. Baird, F. D. Williams and *Frank A. Peterson, contra.*

SEDGWICK, J.

In June, 1915, a petition of property owners was filed with the county board of Lancaster county asking for the pavement of the highway lying between the city of Lincoln and the village of College View, known as

"Sheridan boulevard;" and, within a few days thereafter, the county board, acting upon said petition, after finding that it was in compliance with the statute, passed a resolution organizing the paving district known as "Paving District No. 7 of Lancaster county," making the district include "all of that portion of Sheridan boulevard lying upon each side of the right of way of the Citizens Interurban Railway Company from the corporate limits of the city of Lincoln, Nebraska, to the corporate limits of the village of College View, Nebraska," reciting the real estate that would be benefited thereby, and providing how the work should be done, and that "the cost of grading, guttering, curbing and paving of all intersections and returns, and all expenses incidental to all of said improvements, shall be assessed against the property benefited in said district as herein above mentioned in proportion to the benefits, not exceeding the actual cost thereof."

The paving was duly done in pursuance of these proceedings, and on the 17th day of July, 1916, the county board assessed against the property of the district the full cost of the improvement as specified in the order creating the district. This assessment afterwards was objected to by some of the property owners on the ground that they had protested against the assessment, and had not had notice thereof, and an opportunity to be heard, and the county board set aside the assessment under the provision of section 3 of the act of 1915 (Laws 1915, ch. 200): "In cases of omission, mistake, defect, or any other irregularity in the proceedings on any special assessment said board, sitting as a board of equalization, upon giving notice, as provided in the first instance for levying assessments, shall have power to correct such mistake, omission, defect or irregularity, and levy or relevy, as the case may be, a special assessment on any or all property in the district, in accordance with the net

special benefits to the property on account of such improvement." The board thereupon proceeded to make a reassessment pursuant to this provision of the statute, and in doing so provided that $7,000 of the cost of the improvement should be paid by the county, and directed the county treasurer to make certain payments toward the improvement out of the funds of the county.

These plaintiffs, as citizens and taxpayers of the county, began this action to enjoin these payments. Certain of the property owners of the district intervened, and contended in the trial court that this second assessment and these payments by the county were legal. The members of the county board, the original defendants, answered, alleging the regularity of the proceedings in the first assessment, and alleging their good faith in the matter, and asking the direction of the court in regard to their duties. The trial court found that the action of the board in setting aside the first assessment was valid; that the second assessment and proposed payments by the county were unlawful; enjoined the making of such payments; and directed a reassessment. The interveners have appealed. The county attorney has filed a brief in this court on behalf of the county board, maintaining that the judgment of the district court is correct.

The act of 1915, under which this action was brought (Laws 1915, ch. 200), was very properly amended by the act of 1917 (Laws 1917, ch. 152). As amended, it specifically provides: "Such districts shall be created by resolution of the county board, and said board shall in said resolution designate and fix the proportion of the total cost of such work and improvements which shall be paid out of said county paving fund. * * * Provided, however, no such work and improvements shall be finally ordered or constructed unless a petition shall be signed by the owners of a majority of the property chargeable with the cost of the improvement

or part thereof, * * * which petition shall be filed with said board." This requires that the board ascertain the cost of the proposed pavement and create the district, and state in advance the amount that will be taxed against the property owners, and if with that information the required number of property owners petition for the improvement, and those who do not sign the petition, if any, fail to object and show cause why the improvement should not be proceeded with, the board may proceed and tax the portion of the cost designated in their resolution forming the district against the property benefited.

The county board did not have such a plain and definite guide in this case. And the record shows that they acted in the utmost good faith, endeavoring to protect the rights of the property owners, and the interests of the county and the public generally, to the best of their ability. Their resolution was plain that the whole expense of the improvement would be taxed to the property owners. With this knowledge the property owners made no objection, and did not suggest to the board that the cost of the improvement would be more than their property would be benefited, and now, after the improvement has been made and the costs incurred, they seek to have the county pay a substantial part of the cost of the improvement. We have not seen in this record substantial proof that the property of the district generally will not be benefited as much as the total cost of the improvement. These interveners insist that their property is so located that it will not be benefited in the amount taxed against it by the first assessment. If so, that is to be remedied by the apportionment and assessment ordered by the decree of the trial court. If the assessment made by the board is "illegal, inequitable and unjust," if it should result in assessing against any lot more than the benefits thereto, section 4 of the act of 1915 affords a remedy.

The county board is of the opinion that they ought not now use the county's money for that purpose, and we think they are right. This improvement was made under the plain public record that the cost thereof would be paid by the property owners of the district; every one acquiesced therein.

The judgment of the district court is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

ROBERT J. JONES, APPELLANT, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED DECEMBER 14, 1918. No. 20217.

1. **Carriers:** CONVERSION: DELIVERY TO OWNER. When freight, in the possession of a railroad company for shipment, is claimed by different parties, it must be delivered to the true owner entitled thereto. It is a complete defense to an action of conversion against that company that it has so delivered it.

2. **Contracts:** MISTAKE: PASSING OF TITLE. When "a person contracts with another believing him to be one with whom he intends to contract, while as a matter of fact it is another person, there is no agreement." 35 Cyc. 60. The Washburn-Crosby Company, having a contract with one Furman to sell him flour at an agreed price, by mistake entered the contract as with Jones, and shipped the flour with draft on Jones, who paid the draft and demanded the flour. The Washburn-Crosby Company had discovered the mistake and stopped the delivery to Jones. *Held*, that this did not pass the title in the flour to Jones.

3. **Estoppel:** TENDER: WAIVER. In such case, if Jones pays the draft to the agent of Washburn-Crosby Company, it cannot retain the money and keep the flour; but, if the company duly offers to return the money, and keeps the offer good, and the offer is refused by Jones, it will amount to a waiver of a formal legal tender.

4. **Trial:** DIRECTION OF VERDICT. When there is no substantial conflict in the evidence, it is the duty of the trial court to direct a verdict.

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

O. B. Clark, for appellant.

Byron Clark, Jesse L. Root, W. Paul Moorhead and *Strode & Beghtol, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court for Lancaster county to recover the value of a car-load of flour alleged to have been converted by the defendant. The flour was shipped by the Washburn-Crosby Company of Minneapolis, and a controversy arose between that company and the plaintiff as to the right to the flour. It was the duty of the defendant railroad company to deliver the flour to the true owner, and it was delivered to the Minneapolis company. The question, then, is whether the Minneapolis company or this plaintiff was the owner of the flour and entitled to the delivery thereof. The court instructed the jury to find a verdict for the defendant, which was done, and judgment entered thereon, and the plaintiff has appealed.

The Minneapolis company had contracted the flour to one Furman, of York, some time before the shipment. In the meantime the price of flour had advanced to nearly double the contract price to Furman. By mistake of the company the Furman order had been entered as an order of this plaintiff, and it was by mistake shipped to Lincoln, consigned to the shipper's order, with instructions to notify the plaintiff. A draft for the price of the flour as contracted to Furman was attached to the bill of lading, and when this plaintiff was notified he paid the draft and demanded the flour. In the meantime the Minneapolis company had instructed the railroad company not to deliver the flour to the plaintiff, and to return the flour to the shipper at Omaha, which the railroad company did.

"Where a person contracts with another believing him to be one with whom he intends to contract, while as a matter of fact it is another person, there is no agreement, as where * * * a person obtains goods by fraudulently impersonating a third person to whom the owner supposes he is selling, or by pretending to be the agent of a third person to whom the owner supposes he is selling." 35 Cyc. 60. It appears that the Minneapolis company supposed it had contracted this flour to this plaintiff, when, as a matter of fact, it had contracted to Furman, and did not ship the flour as an offer to sell to the plaintiff, and had no intention of making a contract of sale with the plaintiff. The minds of the parties, therefore, never met so as to amount to a contract of sale. The plaintiff concedes that he had not ordered these goods, but testifies that he had instructed his son to order flour, and when he was notified of the shipment of this flour he supposed in good faith that it was in response to an order by his son. Thus it appears again that the minds of these parties had never met in the making of a contract of sale.

The draft, with the bill of lading, however, was drawn upon the plaintiff, and the price named was paid by him, and the draft and bill of lading delivered to him. The Minneapolis company could not retain the payment for the flour, and at the same time stop the delivery of the flour to the plaintiff. Upon this point, however, the plaintiff himself testifies that "Mr. Biddleton (cashier of the bank to which he had paid the money) came in a few days after the 27th, came to me and asked me if I would surrender the draft and the bill of lading, and I told him, 'No; I didn't think I would. I considered I had bought that car of flour, and was going to hold them to the contract.' " The evidence of the defendant that the money was placed to the credit of the plaintiff, and that he continually refused to receive it, is not contradicted by the plaintiff. This would amount to a

waiver of a formal tender of the money, and there seems to be no complaint in the briefs that the tender was insufficient, or that it had not been maintained. Under these circumstances, there was no question of fact in dispute, and the court was right in instructing a verdict for the defendant.

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

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3. The mother of an illegitimate child may, by making settlement with the putative father providing for its support, preclude herself from instituting bastardy proceedings against him. *State v. Weber* 103

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4. Ch. 187, Laws 1915, providing pensions for mothers and guardians, *held* constitutional. *Rumsey v. Saline County*. 302

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3. Where, in an action for professional services, there was proof of defendant's plea of failure of consideration, and of payment on account, the court should have instructed that, if there was no consideration, the verdict should be for defendant for the amount paid, with interest. *Kimball v. Lanning* 63

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5. A contract to purchase real estate in the name of one of the parties, and to sell it and divide net profits is analogous to a conveyance of title to secure payment of money. *American Security Co. v. Barker Co.* 515

Contracts—*Concluded.*

6. Where a contract fixed a time for sale of realty and it was not sold, *held* that either party could obtain a sale in equity, and that the expiration of the time for sale did not terminate the interest of either party in the property. *American Security Co. v. Barker Co.* 515
7. Under a contract for joint purchase and sale of realty, the party in possession *held* not entitled to a commission for caring for the property and collecting the rents. *American Security Co. v. Barker Co.* 515
8. Where a party to a contract for joint purchase of realty donated money for construction of a building near the property, *held* that such donation was not chargeable as part cost of the property. *American Security Co. v. Barker Co.* 515
9. Agreement in contract for purchase and sale of realty that interest shall be allowed on advance of purchase money until termination of contract requires allowance of interest until the property is sold by the parties or by decree of court. *American Security Co. v. Barker Co.* 515
10. In determining interest accruing on money advanced for purchase and improvement of property, the rule of partial payments should be applied. *American Security Co. v. Barker Co.* 515
11. When a person contracts with another, believing him to be one with whom he intends to contract, while in fact he is not, there is no agreement. *Jones v. Chicago, B. & Q. R. Co.* 853

Corporations. See STATUTES, 7.

1. Directors of a joint stock insurance company who withdraw its assets and use them for a purpose beyond their powers are personally liable for actual loss to the company, and their belief that their acts will benefit the company will not relieve them from liability. *Sheldon v. Bills* 93
2. Where a director of a joint stock insurance company was absent from the state, and had no notice of unlawful action of other directors, he is not estopped to complain of such action. *Sheldon v. Bills* 93
3. Action of stockholders in winding up the affairs of a joint stock insurance company after discovering that the directors had misappropriated the assets, *held* not a ratification of the directors' acts. *Sheldon v. Bills* 93
4. The fairness of contracts between corporations having directors in common must be shown by clear and convincing proof, and it must be shown that they are absolutely free from fraud. *City Trust Co. v. Bankers Mortgage Loan Co.* 532

Corporations—*Concluded.*

5. Under sec. 6273, Rev. St. 1913, foreign corporations are prohibited from taking or holding lands in Nebraska in trust. *Gould v. Board of Home Missions* 526

6. Power to question right of foreign corporation to take land in Nebraska is not confined to the state, but question may be raised by heir or next of kin in suit to quiet title. *Gould v. Board of Home Missions* 526

7. Ch. 174, Laws 1915, granting the right of cumulative voting to stockholders of corporations not having any equity in stock of competing corporations, *held* constitutional. *State v. Dorchester Farmers Co-operative G. & L. S. Co.* 625

Costs. See REPLEVIN.

Costs in an action for personal injuries cognizable under the employers' liability act should be taxed against plaintiff. *Beideck v. Acme Amusement Co.* 128

Counties and County Officers. See MANDAMUS, 2-4. PARTIES. STATES, 3-5.

1. Duties which are purely ministerial may be delegated to an agent by county commissioners. *Dunn v. Dixon County* .. 1

2. Where one has rendered services to a county under an agreement with the county attorney as agent of the county board, the authority of the county attorney and the agreement may be proved orally, though not entered on the minutes of the county board. *Dunn v. Dixon County* 1

3. The clerk of the district court is not required to account to the county for naturalization fees. *State v. Smith*..... 82

4. Counsel defending accused as a friend of the court is not entitled to pay from the county. *Kraus v. State* 690

5. Secs. 1104-1106, Rev. St. 1913, *held* not to include money paid to precinct assessors for official services. *Hiatt v. Tomlinson* 730

Courts.

1. The county court has exclusive original jurisdiction in matters of probate and in settlement and distribution of estates. *State v. O'Connor* 187

2. The board of appraisers created by secs. 4*a*-4*f*, ch. 87, Laws 1917, termed a "court of condemnation," is not a court under the Constitution and Laws, though it exercises functions judicial in nature. *In re Appraisement of Omaha Gas Plant*.. 782

Criminal Law. See HOMICIDE. INDICTMENT AND INFORMATION. INTOXICATING LIQUORS. RAPE.

1. Error cannot be predicated in misdemeanor case on ground that county attorney called to his assistance another lawyer without an order of court. *Fussell v. State* 117
2. Where, on a trial for incest charged as a single act on a specified date, there was evidence of acts of intercourse distinct from the one charged, it was the duty of the court, on defendant's motion, to require the state to elect on which act it intended to rely. *Guyle v. State* 668
3. An instruction authorizing conviction for a sale of liquor made within eighteen months prior to the filing of information, when the law had been in force only six months, though improper, was not prejudicial, where evidence was of a sale a month after the law was in force. *Malick v. State* 688
4. On a trial for murder in the first degree, the court should instruct regarding the inferior degrees of homicide to which the evidence is applicable, though such instructions are not requested. *Kraus v. State* 690
5. Where there is evidence that accused was intoxicated at the time of killing his wife, though the killing is admitted, the court should instruct the jury that, if accused was so intoxicated as to be incapable of deliberation or premeditation, it would be their duty to return a verdict of murder in the second degree, or manslaughter, or not guilty. *Kraus v. State* 690
6. The court's remark, after sustaining an objection to a ques- that, "if the counsel for defense objects to securing information, we want the objection sustained," *held* improper and prejudicial. *Kraus v. State* 690
7. Error cannot be predicated on a refusal to appoint counsel, under sec. 9081, Rev. St. 1913, to defend an indigent person accused of crime, when competent counsel announces that he will appear as a friend of the court. *Kraus v. State* 690
8. To make evidence of other acts available, some use for it must be found as evidencing a conspiracy, knowledge, design, disposition, plan, or scheme, or other quality, of itself evidence bearing upon the particular act charged. *Clark v. State* 728
9. In a prosecution for rape, it is competent to show, in corroboration of prosecutrix, that she presently made complaint; but on direct examination testimony should be confined to the bare fact that complaint was made, unless the complaint was a spontaneous, unpremeditated statement so closely connected with the act as to be part of the *res gestæ*. *Rhodes v. State* 750

Criminal Law—*Concluded.*

10. An order of court in a criminal trial excluding from the courtroom the general public is violative of sec. 11, art. I, Const., guaranteeing to accused a public trial. *Rhoades v. State* 750

11. The rule that, if the evidence of any particular witness is reconcilable with innocence upon any reasonable hypothesis, it should not be given a criminal meaning, applies to the testimony as a whole, and is limited to circumstantial evidence. *Rhoades v. State* 750

Damages.

1. Damages recoverable under sec. 1429, Rev. St. 1913, are limited to money loss or its equivalent, and exclude pain and anguish, loss of society and companionship. *Elliott v. City of University Place* 273

2. Measure of damage for perennial crop is difference between value of land with growing crop and its value after destruction of crop. *Anderson v. Chicago, B. & Q. R. Co.* 497

3. Measure of damage for growing annual crop is its value immediately before its destruction. *Anderson v. Chicago, B. & Q. R. Co.* 497

4. On a claim of damages for loss of wages and earning capacity, the inquiry is as to what plaintiff could earn in the locality, and not at a distant point. *Hershiser v. Chicago, B. & Q. R. Co.* 820

Death.

1. A presumption of death arises from the continued and unexplained absence of a person for seven years. *Masters v. Modern Woodmen of America* 672

2. The presumption of death from absence is that the absentee died during the first seven years, but there is no presumption that his death occurred at any particular time. *Masters v. Modern Woodmen of America* 672

Deeds.

In a suit to cancel a conveyance of a life estate to plaintiffs' father, evidence *held* to sustain decree for defendants. *Johnson v. Johnson* 643

Descent and Distribution. See ESTOPPEL.

Payment of $3,000 by father to son, *held* to be in full settlement of a lawsuit between them, and of all demands, including release of the son's interest in his father's estate. *Carr v. Carr* 158

Dismissal.

A plaintiff may dismiss his action without prejudice at any time before final submission. *Bancroft Drainage District v. Chicago, St. P., M. & O. R. Co.* 455

Divorce. See CONSTITUTIONAL LAW, 1, 2.

1. Custody of child awarded the wife in view of the evidence. *Nathan v. Nathan* 59
2. In awarding custody of a minor child, the court will look to its best interests. *Nathan v. Nathan* 59
3. Award of $50,000 alimony allowed, where husband was worth $155,000, and wife assisted in acquisition of property. *Nathan v. Nathan* 59
4. In a suit for divorce and alimony, all issues properly pleaded and supported by testimony are to be considered in arriving at the amount of award. *Nathan v. Nathan* 59
5. Where divorce is granted a wife on grounds other than adultery, the court is not warranted in placing allowance of alimony in trust, without proper showing of necessity therefor; sec. 1581, Rev. St. 1913, not being applicable. *Nathan v. Nathan* 59
6. A prosecution under ch. 186, Laws 1915, for husband's failure to pay decree for support of child is properly brought in district court of county in which decree of divorce was rendered. *Fussell v. State* 117
7. Application within six months after rendition of decree of divorce to vacate decree, *held* erroneously refused. *Blakely v. Blakely* 164
8. An order of court after the term at which decree of divorce was entered, but within six months from its date, vacating the decree for alleged fraud, would be within the court's jurisdiction. *Blakely v. Blakely* 164
9. Original motion and subsequent petitions to vacate decree of divorce will be considered as parts of the same application, the court having assumed jurisdiction within six months from date of decree. *Blakely v. Blakely* 164
10. Refusal of district court to allow suit money, alimony, and attorney's fees in a divorce suit, being discretionary, *held* not error. *Blakely v. Blakely* 164
11. An Iowa decree of divorce awarding the custody of minor children is not effective in Nebraska to enforce the father's continuing duty to support such children after they and their parents have become residents of Nebraska. *Geary v. Geary* 511
12. Divorce does not relieve the father of the duty to support his minor children. *Geary v. Geary* 511

Divorce—*Concluded.*

13. The district court has general jurisdiction to enforce paternal obligations to minors. *Geary v. Geary* 511

Drains. See INJUNCTION, 2. JUDGMENT, 7.

1. The grantor of a right of way who released a drainage district from all damages from use of the land could recover damages from negligent construction of the improvement, as release related only to damages from proper construction. *Boschulte v. Elkhorn River Drainage District* 451
2. Under sec. 1877, Rev. St. 1913, notice of meeting of directors of drainage district to apportion benefits must be published during entire week immediately before time specified for hearing. *Bancroft Drainage District v. Chicago, St. P., M. & O. R. Co.* 455
3. Sec. 1888, Rev. St. 1913, enables drainage district to fix a lien upon lands of the district generally, and provides a means of collecting the tax. *Bancroft Drainage District v. Chicago, St. P., M. & O. R. Co.* 455
4. In a suit to enjoin a drainage district board from reapportioning benefits because the state board had not approved plans for the improvement, the district court should allow the district board to submit its plans to the state board, but should not allow any contract let or work begun without application for approval of the state board. *Sandy v. Western Sarpy Drainage District* 713
5. Ch. 145, Laws 1911, does not apply to drainage districts organized before its enactment. *Sandy v. Western Sarpy Drainage District* 713
6. On a reapportionment of benefits by a drainage district board, the question is whether the proposed plans contemplate such changes as, in the board's discretion, may render the original apportionment unequal and unjust. *Sandy v. Western Sarpy Drainage District* 713
7. In a suit to enjoin a drainage district board from reapportioning benefits, *held* not necessary, under the evidence, to determine whether the original plans might have been so promptly executed as to accomplish the purpose of the improvement under the original apportionment. *Sandy v. Western Sarpy Drainage District* 713
8. In a suit to enjoin construction of a ditch on the ground that it will carry silt into plaintiff's ditch, evidence *held* insufficient to entitle plaintiff to an injunction. *Burt-Washington Drainage District v. Roberts-Rose Ranch Co.* 567

Elections. See INJUNCTION, 7, 8.

1. An elector of Nebraska entering military service of the United States under act of congress of May 18, 1917, is not in the regular army within sec. 3, art. VII, Const. Neb., and may exercise the elective franchise at such places and under such conditions as may be provided by law. *State v. Moorhead* 276
2. Mandamus will not lie to compel county clerk to place on the nonpartisan judiciary ballot the name of a person as candidate for county judge who is not one of the two candidates receiving the highest primary vote. *State v. Penrod* 734
3. Secs. 2140, 2165, Rev. St. 1913, pertain to elections generally, and the nonpartisan judiciary act, as amended, is complete in itself and relates to an independent subject. *State v. Penrod* 734
4. Both the Constitution and the statute relating to referendum contemplate that actions under the law shall be speedily commenced and terminated, so that elections may be had, if possible, at the time designated in the Constitution, and laches will justify dismissal of action or defense. *Barkley v. Pool* 799
5. Election under referendum should be had at a regular election, and as soon as may be under the law. *Barkley v. Pool* 799

Electricity.

1. Damages may be recovered for death of a person who, in volunteering to protect others, was killed while attempting to remove a charged electric wire dangling in a public street as the result of a telephone company's negligence, if he exercised reasonable precaution to protect himself. *Workman v. Lincoln Telephone & Telegraph Co.* 191
2. A corporation erecting an electric transmission line along a highway under sec. 7420, Rev. St. 1913, may assume the line to be where trees and fences are found. *Saline County v. Blue River Power Co.* 758
3. Where the statute was amended pending appeal, *held* that the statute in force at time of entering judgment on appeal would control as to location of a transmission line in a highway. *Saline County v. Blue River Power Co.* 758

Eminent Domain. See CONSTITUTIONAL LAW, 8.

1. Secs. 7118, 7120, Rev. St. 1913, relating to condemnation proceedings for extending campus of state unievrsity, *held* declaratory, and that measure of damages formerly applied prevails, and loss of time and cost of removal of buildings are not elements of damages. *Mohler v. Board of Regents of University* 12

Eminent Domain—*Concluded.*

2. Where there was conflict of evidence as to value of property condemned, the verdict will not be disturbed. *Mohler v. Board of Regents of University* 12

3. The legislature may designate a class from which appraisers authorized by secs. 4a-4f, ch. 87, Laws 1917, may be chosen. *In re Appraisment of Omaha Gas Plant* 782

Estoppel. See BANKS AND BANKING. EXECUTORS AND ADMINISTRATORS, 1. INSURANCE, 13.

An heir who participates in administration proceeding and permits final decree therein, without asserting claim to the entire estate, is estopped from afterwards asserting ownership of the entire estate. *Overlander v. Ware* 216

Evidence.

1. An alleged presumption in favor of the regularity of the proceedings of the court cannot be made to contradict the record itself. *Moran v. Catlett* 21

2. A certified copy of a treasurer's tax deed, bearing the word "seal" and reciting that it was "given under seal," is sufficient to show use of seal. *Opp v. Smith* 152

3. Evidence of declarations of decedent concerning a parol contract does not amount to direct proof of facts claimed to have been admitted by the declarations, and such evidence, if not supported by other evidence, is generally entitled to but little weight. *Overlander v. Ware* 216

4. Where prices of grain in open market with specific dates are properly shown by authentic publications or accepted trade bulletins, testimony of a dealer as to individual transactions on the board of trade is not admissible on the issue of market price. *Fahey v. Updike Elevator Co.* 249

5. Courts will take judicial notice that a state of war exists. *Marshall v. Bush* 279

6. Courts will take judicial notice that congress has placed with the government the operation of the railroads of the country. *Marshall v. Bush* 279

7. Where a nonexpert witness testifies to unsoundness of mind of a testatrix, he must relate the particular acts and conduct upon which his conclusion is based. *Carter v. Gahagan*.... 404

8. Collateral facts are not admissible in evidence, unless they throw light upon the issue, and it is not ordinarily allowable to prove collateral facts to explain other collateral facts. *Glatfelter v. Security Ins. Co.* 464

Evidence—*Concluded.*

9. A nonexpert cannot give his opinion as to mental capacity of testatrix, unless such opinion is based solely on facts relating to the conduct and action of testatrix as detailed in his evidence. *In re Estate of Gunderman* 590

10. Presumption against death by suicide is *prima facie* only and rebuttable, and it prevails when the cause of death is unknown, but not where facts are present bearing upon whether death is intentional or accidental. *Grosvenor v. Fidelity & Casualty Co.* 629

11. When there is evidence against a presumption of death by suicide or the presumption is met by conflicting presumptions, it disappears, although the fact upon which it rests may remain and be considered in arriving at a conclusion. *Grosvenor v. Fidelity & Casualty Co.* 629

12. The burden of proving a cause of action or defense is not sustained by evidence from which the jury can arrive at its conclusion only by conjecture. *Grosvenor v. Fidelity & Casualty Co.* 629

13. Where it is sought to prove the result of a blood test, the testimony should negative the possibility of any interference with, or substitution of other blood for, the object of the test. *Hershiser v. Chicago, B. & Q. R. Co.* 820

Executors and Administrators.

1. Where a son as administrator, with consent of the widow and heirs, paid the estate funds into a partnership formerly owned by deceased and the son, and made no report for 30 years, *held* that the widow's administrator was estopped to call on the son as administrator to account other than to show that all money received was paid to the partnership. *In re Estate of Dovey* 147

2. An administrator may take possession of lands of an estate during its settlement; but, unless it is necessary to collect rents or to sell land to pay debts, legacies or expenses, he is not compelled to do so. *In re Estate of Dovey* 147

3. Evidence *held* insufficient to establish plaintiff's claim of $3,000 against his father's estate, based on his father's oral promise. *Carr v. Carr* 158

4. Where the court, under sec. 743, Rev. St. 1913, appointed a resident trust company as administrator, such appointment will not be set aside on appeal because the appointee was not a natural person. *In re Estate of Anderson* 170

5. Where the person proposed as administrator by the heirs was unsuitable, the county court, under sec. 1339, Rev. St. 1913,

Executors and Administrators—Concluded.

had power to appoint a resident trust company as administrator. *In re Estate of Anderson* 170

6. Executors may employ attorneys, but liability for their services is personal until allowed by the probate court. *In re Estate of Thiede* 747
7. Allowance by executors of $3,000 for services of attorneys *held* excessive. *In re Estate of Thiede* 747

False Imprisonment.

One who merely states to an officer what he knows of a supposed offense, without making any charge or requesting an arrest, is not liable for false imprisonment. *Baker v. Coon* 243

False Pretenses.

1. In a prosecution for obtaining property under false pretenses, the jury on conviction must declare in their verdict the value of the property. *Hennig v. State* 271
2. Where, on conviction of obtaining property under false pretenses, the jury failed to declare in the verdict the value of the property, the court is without jurisdiction to pronounce sentence, and a judgment based thereon is erroneous. *Hennig v. State* 271
3. Upon conviction of obtaining property under false pretenses, the court should look to the verdict for the value of the property to determine the sentence to be imposed. *Hennig v. State* 271

Food.

Label *held* not misbranding under sec. 2551, Rev. St. 1913. *State v. Smith* 570

Fraud. See SALES, 2, 3.

1. In a vendor's action for damages for being induced to sell a lot for less than she would if she had known the facts, evidence *held* to show that defendant participated in the fraud. *Porter v. Packers Nat. Bank* 258
2. In an action for false representations in sale of note, evidence *held* to sustain judgment for plaintiff. *Wallace & Co. v. First Nat. Bank* 358
3. Petition in an action for deceit in exchange of notes *held* to state a cause of action. *Wallace & Co. v. First Nat. Bank* .. 358
4. Fraud is never presumed, but must be clearly established by competent proof. *Hanna v. Bergquist* 658

Frauds, Statute of.

1. An oral contract for services in consideration of payment when the promissor should receive his share of his father's

Frauds, Statute of—*Concluded.*

estate, *held* merely to fix time of payment, and not within the statute of frauds as creating an interest in land. *Macfarland v. Callahan* 54

2. The work constituting part performance required under the statute of frauds must be referable solely to the contract sought to be enforced, and not reasonably referable to some other contract. *Overlander v. Ware* 216
3. Nothing will be considered as part performance under the statute of frauds which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed. *Overlander v. Ware* 216

Fraudulent Conveyances.

1. The facts surrounding a conveyance of land between near relatives will be closely examined, where fraud is charged, to discover if the conveyance was made fraudulently or to hinder, delay, or defraud creditors. *Acom v. Ziegler* 410
2. The fraudulent character of a conveyance between near relatives may be proved by circumstantial evidence. *Acom v. Ziegler* 410
3. Where a grantee knows of his grantor's fraudulent intention or knows such facts as would put an ordinarily prudent person upon inquiry that would lead to a knowledge of the fraud, he has constructive notice of the fraud and is bound thereby. *Acom v. Ziegler* 410
4. A conveyance from husband to wife, preventing a creditor from realizing on his judgment, will be closely scrutinized, and, unless made in good faith, will be set aside. *Hanna v. Bergquist* 658

Gaming.

Delivery of grain to an elevator company to be paid for on demand at the price then prevailing is not violative of the anti-gambling statutes, nor prohibited by the warehouse law. *Dworak v. Dobson* 696

Guaranty.

1. Letter written by bank *held* not a guaranty of payment of bill of goods. *Chittenden & Eastman Co. v. Saunders County Nat. Bank* 557
2. Guaranty *held* to be a contract to pay certain notes upon default of makers at maturity. *International Harvester Co. v. Schultz* 753

Habeas Corpus.

1. The principle of *res judicata* does not apply in habeas corpus cases to a judgment discharging the prisoner, where such

Habeas Corpus—*Concluded.*

discharge was not upon the merits, but for defect of proof, or where a new state of facts warranting his restraint is shown. *State v. Sievers* 611

2. Where the testimony on a preliminary examination shows that an offense has been committed, and tends to show that accused committed it, the court will not discharge him on habeas corpus. *State v. Sievers* 611

Highways.

1. In action for damages from automobile accident, it is not error to instruct the jury by quoting so much of the statute as relates to evidence. *Lord v. Roberts* 49
2. A public highway in general use can only be vacated by the county board in the manner prescribed by law. *State v. County Commissioners* 199
3. To constitute implied dedication of land for a public highway, there must be an intent to appropriate the land for public use. *Burk v. Diers* 721
4. An intent to dedicate land for public use may be expressed in open conduct and acts, and if they are such as would lead ordinarily prudent men to infer an intent to dedicate, the owner cannot, after acceptance by the public, recall the appropriation. *Burk v. Diers* 721
5. Facts and circumstances to show intent to dedicate land to public use must be such as indicate an unequivocal intent to thus appropriate it. *Burk v. Diers* 721
6. Passive permission of use of land by the public is not alone evidence of an intent to dedicate it to such use. *Burk v. Diers* 721
7. If a road claimed as a highway is a mere neighborhood road, much stronger evidence of a dedication is required than if it were part of an acknowledged highway. *Burk v. Diers*.. 721
8. To establish a highway by prescription, it must appear that the general public, under claim of right, and not by permission, has used it without interruption for the statutory period of ten years. *Burk v. Diers* 721
9. Evidence *held* not to show such intent to dedicate land for a highway, or such acceptance, as constitutes a public highway by dedication. *Burk v. Diers* 721
10. Evidence *held* not to show adverse user such as to establish a highway by prescription. *Burk v. Diers* 721
11. Where a special assessment for a highway improvement has been adjudged void, no valid reassessment can be levied. *Young v. Bennett* 740

Highways—*Concluded.*

12. A county board may relevy a paving assessment under sec. 3, ch. 200, Laws 1915, where there was an irregularity in the first assessment; and an assessment made without notice to property owners is such an irregularity. *Seacrest v. Board of County Commissioners* 849
13. Where the proceedings are regular, the cost of an improvement must be levied on property in the district, and the county board cannot pay a substantial part thereof with county funds. *Seacrest v. Board of County Commissioners*.. 849
14. Each tract in an improvement district must be assessed in proportion to benefit, and, if taxed in excess of benefit, the remedy is provided by sec. 4, ch. 200, Laws 1915. *Seacrest v. Board of County Commissioners* 849

Homestead.

1. A contract in writing by the husband to convey the homestead occupied by himself and wife cannot be enforced. *Ambler v. Jones* 40
2. Where the wife was coerced to sign a deed to the homestead, occupied by herself and husband, *held* the person holding the deed in escrow had no authority to deliver it to the purchaser. *Ambler v. Jones* 40
3. Where the husband coerced his wife to sign deed to homestead, with knowledge of purchaser, the facts as to its execution may be inquired into, regardless of the certificate of acknowledgment. *Ambler v. Jones* 40
4. The husband cannot coerce his wife so as to take from her the homestead against her will. *Ambler v. Jones* 40
5. Where the husband coerced his wife to sign deed to homestead, and the acknowledgment was certified without inquiry as to whether her execution was voluntary, the question as to whether she acted voluntarily will be determined on evidence, regardless of the certificate, where plaintiff knew of the coercion. *Ambler v. Jones* 40
6. A homestead under sec. 3076, Rev. St. 1913, is limited to 160 acres of land. *Clare v. Fricke* 486

Homicide. See CRIMINAL LAW, 4, 5.

1. Evidence of an intention to commit suicide is not immaterial in a murder case, where deceased was found dead under circumstances not inconsistent with the theory of suicide. *Sutter v. State* 321
2. Evidence of declarations or of written statements of deceased's intention to commit suicide is admissible in a murder case, if introduced solely to show her intention when they were made. *Sutter v. State* 321

Husband and Wife.

1. An antenuptial conveyance may be voided by the wife if actually or constructively fraudulent as to her. *Stansberry v. Stansberry* 489
2. An antenuptial conveyance, if made with fraudulent intent, or if operating to defeat the wife's expectancy as fiancée, is fraudulent as to her. *Stansberry v. Stansberry* 489
3. Sec. 1269, Rev. St. 1913, providing that a nonresident husband or wife cannot inherit land in Nebraska, if conveyed by either as owner at time of conveyance, does not empower either to convey in fraud of the marital rights of the other. *Stansberry v. Stansberry* 489
4. The law presumes that parents in advising their married minor child acted in good faith and for what they supposed his best interest. *Melcher v. Melcher* 790
5. A parent may advise his son in good faith to leave his wife or to procure a divorce, if he has reasonable cause to believe and does believe that grounds therefor exist. *Melcher v. Melcher* 790
6. Where a parent breaks up a valid marriage of his son because he is displeased with it, he will be liable in damages to the party injured. *Melcher v. Melcher* 790
7. In a wife's action for alienation of her husband's affections, statements of her husband are incompetent to prove hostile actions of defendants, but are competent to show the effect such actions had upon the husband's affections. *Melcher v. Melcher* 790
8. In an action for alienation of affections, a verdict of $4,750 *held* not so excessive as to require a reversal. *Melcher v. Melcher* 790
9. Evidence in action against wife *held* to sustain judgment for plaintiff. *Farmers Co-operative Co. v. Louis* 815
10. Evidence in an action for criminal conversation *held* to sustain verdict of $2,500. *Baker v. Westing* 840
11. In an action by a husband for criminal conversation, proof by defendant of mere collusion between plaintiff and his wife to claim damages may be excluded, where there is no evidence of collusion on part of husband as to the wrongs imputed to defendant. *Baker v. Westing* 840
12. In an action for criminal conversation, a jury may, in assessing damages, consider the wrong to plaintiff "in his domestic and social relations" and the "stain and dishonor" suffered. *Baker v. Westing* 840
13. In an action for criminal conversation alleged to have occurred on or about a date mentioned, and to have recurred

Husband and Wife—*Concluded.*

at intervals for two years, plaintiff is not necessarily limited to proof of offenses committed within that period. *Baker v. Westing* 840

Incest. See CRIMINAL LAW, 2.

Indictment and Information.

1. Information *held* to allege venue with sufficient certainty. *Fussell v. State* 117
2. A variance between a descriptive averment of the information and the evidence in support thereof is not fatal, unless such variance is material to the merits of the case or prejudicial to accused. *Clark v. State* 728

Infants.

1. In a partition suit by a father against his minor children, service on the minors and on plaintiff, as their father and guardian, confers jurisdiction to appoint a guardian *ad litem*, and to decree partition and divest the minors' title. *Beadle v. Beadle* 73
2. In the appointment of a guardian *ad litem* for a minor, the court should guard his interests, and not select a guardian suggested by interested parties, but should act on his independent judgment. *Beadle v. Beadle* 73
3. Resident minors are wards of the state. *Geary v. Geary* .. 511

Injunction. See DRAINS, 4.

1. Equity will enjoin repeated acts of trespass. *Nattinger v. Howard* 175
2. In an action for damages from negligent construction of a drain, a mandatory injunction requiring radical and continual changes in the plan of construction will not be granted without clear proof of necessity therefor. *Boschulte v. Elkhorn River Drainage District* 451
3. Violation of contract not to practice law within a specified county for a term of years enjoined, though only nominal damages were shown. *Roper v. Pryor* 709
4. The relation between capital and labor cannot be controlled by injunction; but an injunction may issue when property or personal rights are unlawfully assailed. *State v. Employers of Labor* 768
5. Ordinarily the state will not interfere in private controversies between employers and employees. *State v. Employers of Labor* 768
6. While the attorney general cannot bring an action in the name of the state in ordinary labor disputes, he may, under

Injunction—*Concluded.*

secs. 4045, 4066, Rev. St. 1913, sue in the name of the state to restrain illegal acts affecting the public generally which operate in restraint of trade and commerce. *State v. Employers of Labor* 768

7. Pending a suit to prevent submission of a proposition to the voters, in which a temporary injunction has issued, the proposition should not be submitted. *Barkley v. Pool*.. 799

8. A temporary injunction enjoining the secretary of state from submitting a proposition under a referendum until the hearing on the merits is not a final order, appealable to the supreme court, though it prevents a subbmission at the first regular election. *Barkley v. Pool* 799

Insurance.

1. Under defendant's by-laws, *held* that the time within which a certificate holder must give notice of accident begins to run at the time he has reason to believe that the injury will constitute a claim under his certificate. *Kaneft v. Mutual Benefit, Health & Accident Ass'n* 87

2. Notice of accident *held* given within time required by by-laws of assurer. *Kaneft v. Mutual Benefit, Health & Accident Ass'n* 87

3. Under defendant's by-laws, plaintiff *held* entitled to recover full amount specified therein. *Kaneft v. Mutual Benefit, Health & Accident Ass'n* 87

4. Under a policy insuring against loss by larceny, mere disappearance of an article is not sufficient evidence, but, if other evidence indicates larceny, it may become a question for the jury. *Reed v. American Bonding Co.* 113

5. Estimate of results of insurance inconsistent with conditions of the policy, attached by agent to policy without insurer's knowledge, *held* not binding on insured. *Kaley v. Northwestern Mutual Life Ins. Co.* 135

6. An insurance agent whose authority was set out in the application and expressly called to the applicant's attention could not vary the terms of the policy by an estimate of results of the policy attached by him thereto. *Kaley v. Northwestern Mutual Life Ins. Co.* 135

7. Under a contract between insurance agent and owner to keep owner's property insured in companies to be selected by the agent, no contract of insurance would arise until the agent had selected the companies in which the insurance was to be written. *Bridges v. St. Paul Fire & Marine Ins. Co.* 316

Insurance—*Continued.*

8. An insurance agent, without express authority, is not authorized to make a contract so as to bind the company for renewal insurance for an indefinite period. *Bridges v. St. Paul Fire & Marine Ins. Co.* 316
9. An agreement for insurance to be valid must be certain as to time, amount, rate, property, and other material facts. *Bridges v. St. Paul Fire & Marine Ins. Co.* 316
10. A provision in an accident indemnity policy that the assured shall give immediate written notice of an accident is a reasonable requirement, but the word "immediately" is to be reasonably construed in connection with the circumstances. *Midland Glass & Paint Co. v. Ocean Accident & Guarantee Corporation* 349
11. Under an indemnity accident policy requiring immediate notice of an accident, notice given when injurious effects manifest themselves *held* given in due time. *Midland Glass & Paint Co. v. Ocean Accident & Guarantee Corporation* 349
12. An oral agreement to insure is enforceable, but it must be definite as to all material terms of the contract. *Glatfelter v. Security Ins. Co.* 464
13. A fraternal beneficiary society is not estopped from pleading *ultra vires* as to a contract beyond the powers conferred upon it by statute. *Haner v. Grand Lodge, A. O. U. W.* 563
14. A by-law of a fraternal beneficiary society contravening a statute is *ultra vires,* and, as between the society and a member chargeable with knowledge of its want of power to make a contract based thereon, it is wholly void. *Haner v. Grand Lodge, A. O. U. W.* 563
15. Under the pleading, *held* that the burden was on plaintiff to show that death was accidental and not suicidal. *Grosvenor v. Fidelity & Casualty Co.* 629
16. A trainman becoming color-blind *held* not entitled to recover under a benefit certificate as for total disability. *Kane v. Brotherhood of Railroad Trainmen* 645
17. An insurer cannot avoid its contract because of an alleged violation of a by-law adopted during an unexplained absence creating a presumption of the insured's death, where there is no evidence that insured was living when the by-law was adopted. *Masters v. Modern Woodmen of America* 672
18. A member of a mutual benefit society cannot complain of an increase of rates necessary to enable it to comply with its contract. *Funk v. Stevens* 681
19. The mutual promise of every member of a mutual benefit society is to pay the certificate of every other member, and

Insurance—*Concluded.*

a member has no vested right under his contract which is not controlled by his duty to pay the cost of his own insurance. *Funk v. Stevens* 681

20. The duly authorized representatives of a mutual benefit association are alone vested with the power of determining when a change in by-laws is demanded, and a court will interfere only when there is an abuse of discretion. *Funk v. Stevens* 681

21. A change in assessments of a beneficial association, so as to make them conform to the cost of insurance according to age, is a reasonable change. *Funk v. Stevens* 681

22. A provision in an insurance policy that the policy shall be of no effect so long as any portion of the premium is unpaid is valid. *Belk v. Capital Fire Ins. Co.* 702

23. Where insured assigns his life insurance as collateral security, the duty to pay the premiums rests on him, in absence of an agreement to the contrary. *Stratton v. Bankers Life Co.* 755

24. Where plaintiff recovers on a contract of insurance, the trial court may tax a reasonable attorney's fee as costs for services in the trial court, but not for services on appeal. *Kaneft v. Mutual Benefit Health & Accident Ass'n* 87

25. Attorney's fees may be allowed as costs in a judgment upon an insurance policy, though the contract was made before passage of the act authorizing same. *Reed v. American Bonding Co.* 113

26. Sec. 3212, Rev. St. 1913, as controlled by sec. 3299, Rev. St. 1913, precludes taxing as costs an attorney's fee in a suit on a certificate of a fraternal association. *Masters v. Modern Woodmen of America* 672

27. Ch. 234, Laws 1913, provides for attorney's fees in judgments on insurance policies in all classes of indemnity insurance not expressly exempted by law. *Belk v. Capital Fire Ins. Co.* 702

Interest. See CONTRACTS, 9, 10. STATES, 3.

Unsettled accounts do not draw interest until six months from the date of the last item, whether debit or credit. *Woodbury Granite Co. v. Miller* 304

Intoxicating Liquors. See CRIMINAL LAW, 3.

1. Information under ch. 187, Laws 1917, for having possession of intoxicating liquor need not negative the exceptions under which its possession may be lawful, they being available in defense. *Fitch v. State* 361

Intoxicating Liquors—*Concluded.*

2. Under ch. 187, Laws 1917, enacted pursuant to constitutional amendment, the sale of intoxicating liquors is absolutely prohibited within this state. *Fitch v. State* 361
3. Sec. 11, ch. 187, Laws 1917, forbidding possession of intoxicating liquors, *held* constitutional. *Fitch v. State* 361
4. Whether liquor described in an information was intoxicating *held* a question for the jury. *Malick v. State* 688

Judgment.

1. A decree rendered by a court having jurisdiction of the subject-matter and parties cannot be assailed collaterally, and is binding on the parties and those claiming under them until reversed, modified or set aside. *Gwynne v. Goldware* 260
2. The decision of a special tribunal, where it has jurisdiction of the subject-matter and parties, is conclusive, unless reversed or modified in the mode provided by law. *Burkley v. City of Omaha* 308
3. Where a case was removed to the federal court, and judgment for plaintiff was reversed by the circuit court of appeals and the cause remanded, dismissal by the federal trial court without prejudice would not bar a new action. *Bancroft Drainage District v. Chicago St. P., M. & O. R. Co.* 455
4. Nebraska courts are required to give to an Iowa judgment the effect only to which it is entitled in Iowa. *Geary v. Geary* 511
5. Mere procedure resulting in a judgment or in the modification thereof is not protected by the full faith and credit clause of the federal Constitution. *Geary v. Geary* 511
6. A judgment is not *res judicata* of a matter not involved in the action. *Bowker v. Drainage District* 571
7. Where assessment for cost of construction of a drain was tried, and the original assessment of benefits was not involved, the judgment was not *res judicata* as to benefits. *Bowker v. Drainage District* 571
8. Where there was a good defense, and failure to defend was due to miscalculation of attorneys as to time to plead, an application to open a default judgment made at the same term should be sustained. *Coates v. O'Connor* 602
9. Judgment vacated on ground of unavoidable casualty. *Poeggler v. Supreme Council, C. M. B. A.* 608
10. A judgment in which there has been no service of summons may be collaterally attacked. *Alden Mercantile Co. v. Randall* 738

Judgment—*Concluded.*

11. Where service of summons is irregularly made, the defect is waived, unless directly assailed. *Alden Mercantile Co. v. Randall* 738
12. Where a petition shows that recovery is sought on a matter adjudicated in a former suit between the same parties, it is subject to a general demurrer. *Marsh-Burke Co. v. Yost* 814

Jury.

Though a juror on *voir dire* in a criminal case states that it will take evidence to remove an opinion formed as to the guilt of accused, it will not disqualify him as an impartial juror, required by sec. 11, art. I, Const., if he is otherwise qualified under subd. 2, sec. 9109, Rev. St. 1913. *Whitcomb v. State* 236

Justices of the Peace.

1. Sec. 8406, Rev. St. 1913, does not authorize a justice of the peace to adjourn trial, without consent of parties, for more than eight days, at a time subsequent to the return day. *In re Estate of Green* 306
2. An unauthorized continuance of a case will oust a justice of the peace of jurisdiction. *In re Estate of Green* 306

Landlord and Tenant.

1. Where a landlord maintained two stairways, the tenant could use either, and if one was so negligently maintained that the tenant fell and was injured, without her fault, the landlord was liable in damages. *Randall v. First Nat. Bank* 475
2. In an action by a tenant for personal injuries, evidence *held* to sustain verdict for plaintiff. *Randall v. First Nat. Bank* 475

Larceny.

The use of the generic name "hog" is a sufficient description under sec. 8640, Rev. St. 1913, providing punishment for stealing a "sow, barrow, boar or pig." *Clark v. State* 728

Libel and Slander.

Language, attributing to another an uncontrollable sexual desire that caused her to commit an unmannerly and unwomanly act, is slanderous. *Macke v. Jungels* 123

Life Estates.

Rule stated to determine amount of contribution from remainderman to life tenant who pays off a past-due incumbrance upon the entire estate. *Krause v. Naiman* 341

Limitation of Actions. See TAXATION, 5.

1. Action on contract for attorney's services, payable out of share of estate of one not then deceased, *held* not barred by limitations until four years from testator's death. *Macfarland v. Callahan* 54
2. Limitations do not run against claim of damages for slander during pendency of suit to enjoin collection of a note given in settlement of the damages. *Macke v. Jungels* 123
3. Where a debtor comes into the state openly and stays the requisite time for service of summons upon him, he has "come into the state" within sec. 7577, Rev. St. 1913, even though his coming is temporary, and not such as to give him a domicile or residence. *Fort Collins Nat. Bank v. Strachan* 233
4. Where, in an action under the federal employers' liability act, the petition was filed and summons served within two years from the date of the injury, the action was not barred by amendment of petition more than two years after the injury. *Martinson v. Chicago, B. & Q. R. Co.* 238
5. Amendment of petition for damages under federal employers' liability act *held* not to state a new cause of action, barred by the federal statute of limitations. *Eskelsen v. Union P. R. Co.* 423
6. An action to recover on an implied assumpsit is barred in four years. *O'Neill v. City of South Omaha* 836

Lis Pendens.

Filing of *lis pendens* under sec. 7651, Rev. St. 1913, at commencement of suit to quiet title gives constructive notice of plaintiff's claims. *Gwynne v. Goldware* 260

Malicious Prosecution.

In a prosecution by a private individual before a justice of the peace, the discharge of defendant without participation of a public prosecutor, or trial or finding on the merits, is no evidence of want or probable cause for filing complaint. *Snide v. Smith* 448

Mandamus. See ELECTIONS, 2.

1. Under sec. 3438, Rev. St. 1913, the owner of an irrigation ditch running through land of a person having no interest in the ditch may, on refusal, be compelled by mandamus to erect bridges across such ditch necessary for the use of such owner. *State v. Dawson County Irrigation Co.* 67
2. The duty of a county board to repair or restore a bridge which is part of a public highway in general use may be enforced by mandamus. *State v. County Commissioners* ... 199

Mandamus—*Concluded.*

3. Generally when a duty is at the proper time asked to be done, and improperly refused, the right to compel it to be done is fixed. *State v. County Commissioners* 199

4. A county board may be required by mandamus to restore a bridge on a public highway, where their only defense is their discretion to abandon the highway and open a new one, where the answer and evidence showed that they had arbitrarily decided not to rebuild the bridge on the existing highway. *State v. County Commissioners* 199

5. In deciding on an application for a fireman's pension under sec. 2518, Rev. St. 1913, the governing body of a city exercises judicial discretion that will not be controlled by mandamus. *State v. Bryan* 506

6. Where regents of a county high school district without sufficient cause refuse to perform a statutory duty, mandamus will lie. *State v. Berryman* 553

Marriage.

1. If a minor is of the age of consent, the fact that there was no license, or that it was wrongfully obtained, does not invalidate his marriage. *Melcher v. Melcher* 790

2. A marriage of a minor under the age of consent may be annulled at the suit of the parent entitled to his custody; but, that no license was obtained, or that it was obtained fraudulently, is no ground for annulment. *Melcher v. Melcher* 790

Master and Servant. See INJUNCTION, 4-6. MONOPOLIES.

1. Under the workmen's compensation act, compensation is not recoverable for disease unless it is traceable to an "accident" as defined in sec. 3693, Rev. St. 1913. *Blair v. Omaha Ice & Cold Storage Co.* 16

2. Under sec. 3693, Rev. St. 1913, no recovery can be had for disability occasioned by disease arising from the ordinary incidents of an occupation. *Blair v. Omaha Ice & Cold Storage Co.* 16

3. In cases brought under the federal employers' liability act of April 22, 1908, defense of assumption of risk is abolished only when the carrier's negligence is in violation of some statute enacted for the safety of employees. *Carnahan v. Chicago, B. & Q. R. Co.* 76

4. An employee who uses a defective appliance for a reasonable time after his employer has promised to repair it does not, as a matter of law, assume the risk. *Carnahan v. Chicago, B. & Q. R. Co.* 76

Master and Servant—*Continued.*

5. A section foreman who has power to hire and discharge men and to direct their labor is not a fellow servant of such laborers as to condition and safety of tools and appliances under his care. *Carnahan v. Chicago, B. & Q. R. Co.* 76
6. Notice to section foreman of defective condition of handcar *held* notice to the employer. *Carnahan v. Chicago, B. & Q. R. Co.* 76
7. Instruction as to employer's liability for negligence *held* not erroneous. *Carnahan v. Chicago, B. & Q. R. Co.* 76
8. In an action under workmen's compensation act, *held* that decedent's death did not result from "accident arising out of and in the course of employment." *Feda v. Cudahy Packing Co.* 110
9. Where defendant in action for injuries pleaded that its liability, if any, was determinable under the employers' liability act, there was no error prejudicial to defendant in discharging the jury and retaining the case for trial to the court, though some testimony had been adduced. *Beideck v. Acme Amusement Co.* 128
10. A petition alleging that defendant employer was operating railroads through several states, not attacked by demurrer or motion, *held* to sufficiently allege defendant's interstate character to bring the case within the federal employers' liability act. *Martinson v. Chicago, B. & Q. R. Co.* 238
11. A boilermaker's helper *held* to assume ordinary risks, but not risk of injury from remaining in a tank for an unusual length of time under direction of his superior. *Martinson v. Chicago, B. & Q. R. Co.* 238
12. Evidence in action for partial loss of hearing *held* to sustain verdict for plaintiff. *Martinson v. Chicago, B. & Q. R. Co.* 238
13. Under the workmen's compensation act fixing compensation for loss of a leg, and providing that permanent loss of use of a leg shall be equivalent to loss of leg, compensation cannot exceed the amount specified. *Hull v. United States Fidelity & Guaranty Co.* 246
14. Petition *held* to state a cause of action under the federal employers' liability act. *Eskelsen v. Union P. R. Co.* 423
15. An employee of a carrier engaged in interstate commerce does not assume risk of injury resulting from negligence of a fellow employee. *Eskelsen v. Union P. R. Co.* 423
16. An action for death under the workmen's compensation act may be brought by a dependent, the legal guardian or trustee

Master and Servant—*Concluded.*

of a minor dependent, or by the executor or administrator of the deceased. *Coster v. Thompson Hotel Co.* 585

17. A workman injured by a street car while procuring materials to be used in his work *held* injured "by accident arising out of and in the course of employment." *Coster v. Thompson Hotel Co.* 585

18. In an action by an employee for personal injuries, evidence *held* to sustain verdict for plaintiff. *Cernik v. McKeen Motor-Car Co.* 588

19. The employer's knowledge that an employee has received injury will not dispense with the necessity of a claim for compensation, as provided by sec. 3674, Rev. St. 1913. *Good v. City of Omaha* 654

20. A master may be liable for the act of a servant, if within the scope of his employment and with a view to the service. *Allertz v. Hankins* 202

21. Whether a servant, for whose act the master is sought to be held liable, had some purpose of his own not connected with his employment in doing the act is a question for the jury. *Allertz v. Hankins* 202

22. Proprietor of restaurant *held* not liable for tort of his foreman. *Allertz v. Hankins* 202

23. Master *held* liable for injury to inexperienced laborer employed in digging a trench, where the master failed to shore the walls to prevent caving. *Moore v. Village of Naponee* .. 211

24. The master must exercise reasonable care to provide his servant with a reasonably safe place for work, and failure to perform such duty renders the master liable for injuries resulting therefrom. *Moore v. Village of Naponee* 211

25. A servant does not assume a risk of which he has no knowledge or warning, unless it is open and obvious to an ordinary person. *Moore v. Village of Naponee* 211

26. An employer is not liable for negligence of a volunteer assistant to its employee, unless the employee had express or implied authority to avail himself of such assistance; but such authority may be implied from the nature of the work or from the course of conducting business so long that employer's knowledge and consent may be inferred. *Levin v. City of Omaha* 328

27. In absence of contract for a fixed term, employees may refuse to work, if they believe such refusal will aid in accomplishing their object, and they have a right to persuade other workmen to cease work, or to employ any other legal means to obtain their object. *State v. Employers of Labor* 768

Mechanics' Liens.

A subcontractor's lien under secs. 3823, 3824, Rev. St. 1913, does not depend on the terms of the contract between the owner and the contractor. *Coates Lumber & Coal Co. v. Klaas* 660

Monopolies.

1. Employers of labor and workingmen have equal rights to form organizations for their own benefit, and, in absence of a contract for a fixed term, the employer may discharge the employee, or the employee may quit at his own pleasure. *State v. Employers of Labor* 768
2. There is no law to prevent employees from combining to improve their working conditions, or to raise their general standard of living, or to procure shorter hours of labor and higher wages, or for any other lawful purpose. *State v. Employers of Labor* 768

Mortgages.

1. A note taken for a pre-existing debt which is secured by a mortgage, the original note not being surrendered or canceled, does not operate to discharge the lien of the mortgage. *Byers v. Chase* 386
2. When property is subject to a mortgage at the inception of a mechanic's lien, such mortgage retains its priority. *Byers v. Chase* 386
3. Priority of a mortgage is not lost by a renewal thereof, when the debt is the same, and the property is not released from the lien. *Byers v. Chase* 386
4. A mortgage imposes upon the mortgagor the obligation to pay the debt thereby secured, and gives the mortgagee the right to sell the property mortaged if he fails to do so. *Norris v. Tower* 434
5. Either party to a mortgage has a right to a legal remedy not more prejudicial to his interest than the law in force when the contract was made. *Norris v. Tower.* 434

Municipal Corporations.

1. In action from collision of defendant's motor truck with plaintiff's bicycle, that the truck was driven at greater speed than that prescribed by statute, or that plaintiff in turning into another street violated an ordinance, did not establish negligence of either party as a matter of law, but violation of the statute and ordinance may be considered by the jury as evidence of negligence by either party. *Rule v. Claar Transfer & Storage Co.* 4

Municipal Corporations—*Continued.*

2. Sec. 4089, Rev. St. 1913, empowers the mayor and council of Omaha to provide by ordinance for notice to property owners of hearing of claims for damages from grading of a street. *Burkley v. City of Omaha* 308

3. Sec. 115 of the Omaha Charter (Rev. St. 1913, sec. 4309), providing that the committee to appraise damages for vacation of street shall make its report within ten days after its appointment, is directory. *Burkley v. City of Omaha* 308

4. A property owner, by filing claim for damages from vacation of street and bond for appeal, waived all irregularities in the proceedings not objected to. *Burkley v. City of Omaha* .. 308

5. A resolution, declaring it "expedient and necessary" to grade a street, is a sufficient compliance with sec. 4306, Rev. St. 1913. *Burkley v. City of Omaha* 308

6. Where a property owner appeared before a special tribunal and the hearing was adjourned, and afterwards the tribunal, without giving him further opportunity to be heard, awarded him damages, from which he had a right of appeal, *held* that the proceedings were not void as denying due process of law. *Burkley v. City of Omaha* 308

7. Property owners objecting to a proposed special assessment, and not appealing from the action of the city council, are estopped to question the assessment, unless the council was without jurisdiction. *Burkley v. City of Omaha* 308

8. Property owners cut off from access to their property by a vacation of a street are entitled to damages. *Burkley v. City of Omaha* 308

9. Owner of property left in a cul-de-sac by vacation of a street *held* not entitled to damages. *Burkley v. City of Omaha* .. 308

10. A policeman of a city assigned to work within the city's corporate functions is a servant of the city in its corporate capacity. *Levin v. City of Omaha* 328

11. A municipal corporation is liable for the negligence of one whom it sends on an errand in connection with its corporate functions to the same extent as an individual. *Levin v. City of Omaha* 328

12. Under sec. 5110, Rev. St. 1913, a city of the second class, by a vote of three-fourths of the council, may create a paving district and levy a special assessment, without a petition of property owners. *Fitzgerald v. Sattler* 665

13. Incidental powers necessary to effect the object of a legislative act are impliedly granted. *Fitzgerald v. Sattler* 665

Municipal Corporations—*Concluded.*

14. Sec. 5110, Rev. St. 1913, *held* not violative of sec. 6, art. IX, Const. *Fitzgerald v. Sattler* 665

Negligence.

1. Whether a child 11 years of age is of sufficient knowledge, discretion and appreciation of danger so that it may be held guilty of contributory negligence is a question for the jury. *Rule v. Claar Transfer & Storage Co.* 4
2. Evidence, in an action for injury from collision, *held* to justify submission to jury of question as to negligence of defendant's employees. *Rule v. Claar Transfer & Storage Co.* 4
3. Where different minds may reasonably arrive at different conclusions as to whether the facts proved establish negligence, the question of negligence is for the jury. *Leon v. Chicago, B. & Q. R. Co.* 537
4. In an action based on negligence, plaintiff must prove both negligence and that such negligence was the proximate cause of the injury. *Sippel v. Missouri P. R. Co.* 597
5. When there is no evidence of negligence of person injured, the presumption of due care arising from instinct of self-preservation generally obtains. *Sippel v. Missouri P. R. Co.* 597

New Trial.

In a suit for a new trial for unavoidable casualty, evidence *held* to sustain judgment for defendant. *Hodder v. Olson* ... 429

Parent and Child. See DIVORCE. HUSBAND AND WIFE, 4-7.

Parties.

An action against a county for damages for death of an individual, caused by negligence in failing to maintain a highway, must be brought by the administrator of his estate. *Swift v. Sarpy County* 378

Pleading. See FRAUD, 3.

1. Where a petition under the federal employers' liability act erroneously stated the date of the injury, *held* proper to permit an amendment alleging the correct date. *Martinson v. Chicago, B. & Q. R. Co.* 238
2. Plaintiff may amend his petition to conform to facts proved. *Briggs v. Kemp* 354
3. It is proper to submit testimony on a material issue that has been pleaded generally, though not specifically. *Anderson v. Chicago, B. & Q. R. Co.* 497

Principal and Agent. See MUNICIPAL CORPORATIONS, 10, 11.

1. The ratification of an unauthorized contract can take place only where the person or body assuming to perform the act had the power either to do it or to authorize the doing of it in the first instance. *City Trust Co. v. Bankers Mortgage Loan Co.* 532
2. An undisclosed principal is liable for property obtained through the contract of his agent, though made by the agent in his own name, even though the owner understood that he was selling to the agent. *Dworak v. Dobson* 696

Principal and Surety.

One not a party to a contract whereby maturity of notes, which he afterwards signed, is accelerated upon the nonpayment of any note within four months after due, is not released from his obligation to pay the notes at the dates specified therein. *Hatfield v. Jakway* 831

Process.

1. An affidavit for constructive service upon unknown heirs, under sec. 83 of the Code, must be made by the plaintiff, if an individual, and not by his attorney, and must be verified positively. *Moran v. Catlett* 21
2. When a sheriff's return of summons is attacked, and there is conflict of evidence as to the fact of service, the issue must be determined from a preponderance of evidence. *Racine-Sattley Co. v. Popken* 635
3. Service of summons on defendant in another county upheld. *Alden Mercantile Co. v. Randall* 738
4. Ch. 161, Laws 1909, amending sec. 77 of the Code, now sec. 7640, Rev. St. 1913, *held* not to affect the former method of procuring service upon nonresidents; the purpose being to provide a means of constructive service when plaintiff and his attorney do not know whether the defendant is a resident or nonresident. *West Nebraska Land Co. v. Eslick* 761

Public Lands.

1. The power of the board of educational lands and funds to lease, sell or dispose of school lands exists only as directed or permitted by the legislature. *Fawn Lake Ranch Co. v. Cumbow* 288
2. Under sec. 1, art. VIII, Const., the board of educational lands and funds is vested with power to sell, lease, and manage school lands in the manner prescribed by law. *Fawn Lake Ranch Co. v. Cumbow* 288

Public Lands—*Concluded.*

3. Under sec. 5855, Rev. St. 1913, as amended by ch. 103, Laws 1915, the sale of educational lands is prohibited except in specified instances. *Fawn Lake Ranch Co. v. Cumbow* 288
4. Except as to instances mentioned in sec. 5855, Rev. St. 1913, as amended by ch. 103, Laws 1915, and as to sale of sand and gravel, there is no legislative provision for the sale and disposition of school lands. *Fawn Lake Ranch Co. v. Cumbow* 288
5. Where entryman's widow furnished final proofs under a timber culture entry and patent issued to his heirs, the heirs took the entire estate in fee simple. *Clare v. Fricke* 486
6. Lands granted to state by United States under sec. 11 of the Enabling Act were not placed in the class of educational lands by secs. 3, 4, art. VIII, Const. 1875. *Chicago, B. & Q. R. Co. v. Neville* 817
7. The board of educational lands and funds has no jurisdiction over lands granted the state by sec. 11 of the Enabling Act, commonly known as "saline lands." *Chicago, B. & Q. R. Co. v. Neville* 817

Railroads. See CARRIERS. CONSTITUTIONAL LAW, 3. STATES, 1, 2. TRIAL, 3. WATERS, 2-4.

1. Failure to discover an approaching train, *held* no defense to an action for damages to cattle killed by defendant's train, where earlier discovery of the train would not have prevented the accident. *Sullwald v. Union P. R. Co.* 126
2. In order to furnish proper service, a railroad company may be required to operate a branch line at a loss. *Marshall v. Bush* 279
3. An order of a railway commission requiring a railroad company to furnish separate trains for freight and passenger service is not *prima facie* unreasonable. *Marshall v. Bush* 279
4. A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train. *Watson v. Chicago, B. & Q. R. Co.* 546
5. Pushing cars before an engine without a guard on the foremost car may be negligence *per se*, but in most cases it is a question for the jury. *Sippel v. Missouri P. R. Co.* 597
6. Evidence *held* not to support finding that defendant's negligence was the proximate cause of injury. *Sippel v. Missouri P. R. Co.* 597

Rape. See CRIMINAL LAW, 8, 9.

1. Evidence *held* to sustain conviction. *Day v. State* 707
2. Instruction as to corroborative testimony *held* not erroneous. *Day v. State* 707

Removal of Causes.

Where the federal court dismisses without prejudice a case removed to it from a state court, plaintiff may reduce the amount of his claim and prevent another removal. *Bancroft Drainage District v. Chicago, St. P., M. & O. R. Co.* ... 455

Replevin.

A defendant in replevin who unsuccessfully seeks to establish a right of possession in himself is liable for costs, although no demand was pleaded or proved. *Jordan v. Allen* 639

Sales.

1. A buyer of grain for future shipment may refuse to recognize the seller's cancelation of the contract, and after the shipping period has expired may purchase in open market and recover the difference between the contract price and the market price at the stipulated time and place of delivery. *Fahey v. Updike Elevator Co.* 249
2. One fraudulently induced to enter into a sale contract may repudiate it, and, on tendering back what he has received, may recover what he has parted with or its value; or he may affirm it, keeping what he has derived under it, and recover damages in an action for deceit caused by the fraud. *Baker v. Thomas* 401
3. As a rule, one fraudulently induced to enter into a sale contract cannot treat the sale as void, in order to recover the price, and as valid, in order to recover damages; the remedies being inconsistent. *Baker v. Thomas* 401
4. In a suit for rescission and to recover price, evidence *held* to sustain judgment for defendant. *Otto v. Gunnarson Bros.* 613
5. Where a milling company sold flour to F., and by mistake entered the contract as with J., and shipped the flour with draft on J., who paid the draft and demanded the flour, and the company discovering the mistake stopped delivery, *held* that the title did not pass to J. *Jones v. Chicago, B. & Q. R. Co.* 853

Schools and School Districts. See PUBLIC LANDS. STATUTES, 5, 6.

Under ch. 120, Laws 1915, requiring each county in which there is no twelfth grade high school accredited to the state university to maintain a county high school, the establishment of a precinct high school will not cause an established high school to be discontinued. *State v. Berryman* 553

Specific Performance.

1. In a suit for specific performance of an oral contract with a decedent to convey land, the terms of the contract must be established by evidence that is clear, satisfactory and unequivocal. *Overlander v. Ware* 216

Specific Performance—*Concluded.*

2. In a suit for specific performance of agreement making plaintiff an heir, evidence *held* to sustain decree for plaintiff. *Briggs v. Kemp* 354
3. In a suit to foreclose a contract between plaintiff and defendant by which plaintiff sold a contract between third parties for the sale of land, evidence *held* to sustain decree for plaintiff. *Fisher v. Lawson* 398
4. Specific performance denied of a contract of sale executed by a broker in the name of his principal. *Miles v. Lampe*. 619

States.

1. Where the war department, in control of a military reservation, jurisdiction over which has been ceded by the state, determines that a statute relating to railroad fencing in existence at time of cession would impair use of the reservation, the statute is not operative within the reservation. *Anderson v. Chicago & N. W. R. Co.* 578
2. Refusal of war department to permit railroad to fence its right of way within a military reservation *held* a defense to action against the railroad for the value of cattle killed, though a statute of the state made the railroad liable if it failed to fence its tracks. *Anderson v. Chicago & N. W. R. Co.* 578
3. A county treasurer must fully state to the auditor his account with the state, and when the auditor has stated the amount due the state the account is due, and under sec. 6509, Rev. St. 1913, the treasurer is chargeable with interest thereon until it is paid. *State v. Ure* 648
4. If the auditor fails to furnish "suitable blanks" for settlements of county treasurer, as required by sec. 6520, Rev. St. 1913, or refuses to countersign the state treasurer's receipt, as required by sec. 6508, money in hands of county treasurer is not "due the state" under sec. 6509. *State v. Ure* 648
5. When money is voluntarily transferred to the state treasurer by the county treasurer, no formal settlement with the county treasurer is necessary. *State v. Ure* 648

Statutes. See CONSTITUTIONAL LAW.

1. Where a statute specifies the time at or within which an act is to be done, it is usually directory, unless time is of the essence of the thing to be done, or the language shows that the designation of time was intended as a limitation of the power or right. *Burkley v. City of Omaha* 308
2. Ch. 121, Laws 1915, which amends sec. 6942, Rev. St. 1913, relating to change of school district boundaries, *held* constitutional. *Johnson v. School District* 347

Statutes—*Concluded.*

3. Sec. 1, ch. 121, Laws 1915, relating to change of school district boundaries, *held* germane to sec. 6942, Rev. St. 1913, amended by ch. 121, and valid. *Johnson v. School District*.. 347
4. That which is implied is as much a part of the statute as that which is expressed. *Kearney County v. Hapeman*... 550
5. Ch. 120, Laws 1915, amending and repealing sec. 6833, Rev. St. 1913, *held* to comply with sec. 11, art. III, Const. *State v. Berryman* 553
6. Ch. 120, Laws 1915, in terms relating alike to all counties not having a duly accredited high school is not class legislation; such act by its terms including all counties in that class. *State v. Berryman* 553
7. Ch. 174, Laws 1915, providing for cumulative voting by stockholders who are not also stockholders in competing corporations, *held* valid, though the proviso thereto is void. *State v. Dorchester Farmers Co-operative G. & L. S. Co.* 625
8. Special provisions in an act relating to particular subject-matter will prevail over general provisions in other statutes. *State v. Penrod* 734

Taxation.

1. Recital, in decree foreclosing a tax lien against a non-resident, that the court finds that legal notice of the filing and pendency of suit was given defendants, will not supply lack of facts necessary to confer jurisdiction. *Moran v. Catlett* 21
2. Under the revenue law of 1879, suit to redeem land from tax sale must be brought within three years from making of deed, which period was extended to five years by the revenue law of 1903. *Opp v. Smith* 152
3. A county treasurer could make a valid tax sale under the revenue law of 1879, and he could execute a valid tax deed under the revenue law of 1903, which preserved to purchaser all rights acquired under the old law. *Opp v. Smith* 152
4. A tax deed issued under ch. 73, Laws 1903, upon a private tax sale made under ch. 276, Laws 1879, not containing the statement that the land was first offered at public sale, is not sufficient proof that the sale was in that respect in compliance with the law under which it was made. *Opp v. Smith* 155
5. A tax deed which does not comply with the statute will not start the running of the statute of limitations against an action to redeem. *Opp v. Smith* 155

Taxation—*Concluded.*

6. Under a mandatory, unambiguous statute making actual value the standard for purposes of taxation, an owner cannot require a board of equalization to value his property at 75 per cent. of its actual value on plea of custom. *Lincoln Telephone & Telegraph Co. v. Johnson County* 254
7. Ch. 113, Laws 1915, gives a county the right of appeal from county court for alleged inadequacy of assessment of an inheritance tax. *Kearney County v. Hapeman* 550
8. Double taxation is, under some circumstances, unavoidable; but it is the policy of the state to avoid double or unequal taxation. *Nye-Schneider-Fowler Co. v. Boone County* 742
9. To avoid double taxation, the word "credits," as used in ch. 73, Laws 1903, is construed to mean net credits. *Nye-Schneider-Fowler Co. v. Boone County* 742
10. Where a merchant operates in several counties, each station should be assessed as an independent business, and the net credits for taxation of each business is the excess of its assets, if any, over the indebtedness for each station. *Nye-Schneider-Fowler Co. v. Boone County* 742

Tender.

Where an offer to return money is made and kept good, and the offer is refused, it will amount to a waiver of a formal legal tender. *Jones v. Chicago, B. & Q. R. Co.* 853

Torts.

1. A fiancée cannot maintain an action for damages against a third party, not based on slander, but solely because her betrothed was induced by defendant to break his engagement. *Homan v. Hall* 70
2. One whose property has been wrongfully converted cannot maintain an action as upon an implied contract and in tort at the same time. *Shonkweiler v. Harrington* 710

Trial. See APPEAL AND ERROR. CONTRACTS, 3, 4. HIGHWAYS, 1. MASTER AND SERVANT, 9. NEGLIGENCE, 1-3. WILLS, 9.

1. In a suit to enjoin collection of a note, given in settlement of a claim of damages for slander, because procured by undue influence, the payee defending in good faith might prosecute her claim of damages. *Macke v. Jungels* 123
2. Where the jury find the facts upon which their verdict will depend, it is for them to determine the "fair inference" from the facts so established. *Plath v. Brunken* 467
3. In an action for damages, reference by plaintiff's counsel in argument to the fact that defendant is a railroad company and "has millions of dollars in its treasury" was improper. *Hershiser v. Chicago, B. & Q. R. Co.* 820

Trial—*Concluded.*

4. The trial court should not direct a verdict unless the evidence is so clear upon every point upon which the verdict must depend that reasonable minds could not come to any other conclusion. *Bank of Cortland v. Maxey* 20
5. All disputed questions of law need not be embodied in one instruction; it is sufficient if the instructions, considered together, properly submit all disputed questions. *Lord v. Roberts* 49
6. In a personal injury case, where there is no evidence to support a plea of contributory negligence, it is the court's duty to eliminate that question by proper instructions. *Lord v. Roberts* 49
7. Where the prevailing party is entitled to interest, it is error to fail to instruct respecting the rate that may be assessed. *Kimball v. Lanning* 63
8. It is reversible error to fail to instruct respecting the law applicable to material issues pleaded and supported by proof. *Kimball v. Lanning* 63
9. The trial court had jurisdiction to set aside its order permitting plaintiff's rest to be withdrawn, and to direct a verdict, where plaintiff offered no evidence after withdrawal of rest but sought a dismissal. *Hall v. Ballard* 286
10. Where the evidence is insufficient to sustain a verdict for plaintiff, it is error to overrule a motion for a peremptory instruction in favor of defendant. *Hoxie v. Chicago & N. W. R. Co.* 442
11. An instruction explaining the application of a principle of law stated in a previous instruction is not erroneous. *Glatfelter v. Security Ins. Co.* 464
12. The trial court should submit to the jury a plain statement of the issues, and copying pleadings in full in instructions is generally objectionable, and, if misleading, may require a reversal. *Plath v. Brunken* 467
13. Where the facts in evidence would not sustain a verdict for plaintiff, a trial court is justified in directing a verdict for defendant. *Dramse v. Modern Woodmen of America* 615
14. Where evidence is unreasonable, the court should so direct the jury. *Sippel v. Missouri P. R. Co.* 597
15. Instruction as to evidence by depositions criticised. *Hershiser v. Chicago, B. & Q. R. Co.* 820
16. Where there is no substantial conflict in the evidence, the trial court should direct a verdict. *Jones v. Chicago, B. & Q. R. Co.* 853

Vendor and Purchaser.

1. The assignee of an executory contract to purchase land ordinarily takes only the rights of his assignor. *Gwynne v. Goldware* 260
2. An agreement to assign a land contract between third parties *held* not a contract for the sale of land, and that the assignee takes only the rights of the assignor. *Fisher v. Lawson* 398
3. A clause in a contract for sale of land providing that an assignment thereof must be approved by the owner, *held* to have been made for protection of the vendor, and that third parties without equitable claims of ownership could not take advantage of it. *Gwynne v. Goldware* 260
4. In an action on a contract for the sale of real estate, to declare a lien in favor of vendor's heirs and to foreclose it, evidence *held* to sustain judgment of dismissal. *Shaul v. Mann* 265
5. Open, notorious possession of land by a tenant is notice to the world of the landlord's title. *Ostergard v. Norker*..... 675
6. Where a contract for sale of land requires an abstract, but does not specify time for its completion, there is an implication that it be completed and the transaction closed within a reasonable time. *Storm v. Story* 765
7. Where delay in completion of an abstract was occasioned by the seller, he could not rescind the sale and refuse to convey before the abstract was completed. *Storm v. Story*.. 765
8. A purchaser, fulfilling the terms of his contract, is entitled to specific performance. *Storm v. Story* 765

Venue. See DIVORCE, 6.

Waste.

Removal of mineral from land lessens value of inheritance, and constitutes waste forbidden by school land lease and by statute. *Fawn Lake Ranch Co. v. Cumbow* 288

Waters. See MANDAMUS, 1.

1. Under written contract granting a water right for irrigation, *held* that defendant was not liable for maintenance fees before he commenced using water. *South Side Irrigation Co. v. Brooks* 57
2. Where a railroad company builds a bridge over a stream, it must construct an outlet sufficient to carry flood waters. *Anderson v. Chicago, B. & Q. R. Co.* 497
3. A railroad company is liable for damages to crops from flooding caused by negligent construction of outlet for creek under its bridge. *Anderson v. Chicago, B. & Q. R. Co.* ... 497

Waters—*Concluded.*

4. Overflow water from a stream that does not return to its banks nor find its way to another water-course is surface water. *Anderson v. Chicago, B. & Q. R. Co.* 497
5. Sec. 3439, Rev. St. 1913, providing for outlets, *held* not to apply to owners in common of an irrigation ditch who are not carriers of water for hire. *Larned v. Jenkins* 796
6. Where the title to a water right is in tenants in common, their rights as among themselves will be protected by the courts. *Larned v. Jenkins* 796
7. The question whether a landowner has lost his right to use water for irrigation by failure to make application of it within the time required should be determined in the first instance by the state board of irrigation. *Larned v. Jenkins* 796

Wills. See EVIDENCE, 9.

1. In a will contest based on ground of mental incompetency, admission of guardianship proceedings based on testatrix' competency *held* error. *Carter v. Gahagan* 404
2. Testatrix *held* to be mentally competent to make a will. *Carter v. Gahagan* 404
3. Will construed, and *held* to create a charitable trust, the beneficiaries of which were uncertain and indefinite until selected or appointed as particular beneficiaries. *Gould v. Board of Home Missions* 526
4. A valid charitable trust created by will will not be permitted to fail because the trustee named therein is incompetent to take title to real estate, but the court will appoint a trustee. *Gould v. Board of Home Missions* 526
5. In an action to set aside a will because of undue influence, the burden of proof is ordinarily upon contestant. *In re Estate of Fenstermacher* 560
6. In a will contest based on intoxication and undue influence, admission of opinion of witness familiar with his condition at the time, as to his competency, will not require a reversal, where the witness testified solely as to his intoxication. *In re Estate of Gunderman* 590
7. The executor named in the will is a proper party proponent, and, if defeated upon appeal to district court, he may appeal to the supreme court. *In re Estate of Gunderman* 590
8. On appeal from judgment denying probate of will, evidence *held* not so clear and conclusive as to require interference with province of the jury. *In re Estate of Gunderman* ... 590

Wills—*Concluded.*

9. An instruction that, in determining testator's mental capacity, the jury may consider provisions of the will, whether just, reasonable, or natural, is not erroneous, if the jury are told that such matters alone will not warrant the presumption of mental incapacity, but are to be considered with other facts in evidence. *In re Estate of Gunderman* .. 590

Work and Labor.

1. When an incompetent unable to support herself is taken into a family, the presumption is that services rendered by her are fully paid for by the support furnished. *Plath v. Brunken* 467
2. If an incompetent taken into a family performs labor of much greater value than her care and support, the presumption is that she will be paid the reasonable value of her services over and above her support and care. *Plath v. Brunken* 467
3. When a young girl is taken into a family and supported until majority, the law implies that services rendered during her minority were compensated by her care and support; but as to services rendered after her majority, the law, in absence of an express contract, might imply an agreement for reasonable compensation. *Plath v. Brunken* 467
4. Where the evidence is conflicting as to condition under which a girl was taken into a family and supported, and as to the value of services rendered, whether she is entitled to compensation is a question for the jury. *Plath v. Brunken* .. 467