IN RE ESTATE OF LESTER S. POLLARD.
AMANDA FORSYTHE MURRAY, APPELLANT, V. JOHN C. POLLARD, APPELLEE.

FILED DECEMBER 23, 1920. No. 21081.

1. **Executors and Administrators: APPOINTMENT OF ADMINISTRATOR: PETITON.** "In a petition to the county court for administration on the estate of a deceased person, the only averments essential to the jurisdiction of the court are, that such person died intestate, and was at the time of his death a resident or inhabitant of the county where the petition is filed; or, in case he was at the time of his death a nonresident of the state, that he left an estate in such county to be administered." *Larson v. Union P. R. Co.*, 70 Neb. 261, followed.
2. ———: ———: PETITIONER. In such case, no objection to the jurisdiction of the court to appoint an administrator can be predicated upon the fact that the petitioner has no beneficial interest in the estate.
3. ———: ———. Under the provisions of section 1339, Rev. St. 1913, the preference given by the statute to the classes of persons named therein to be appointed as administrators is obligatory upon the court, and it is error to appoint a stranger to the estate where some one falling within the preferential class asks to be appointed, and is competent to discharge the trust.
4. ———: ———: EVIDENCE. It is incumbent upon one who applies to be appointed as administrator to produce satisfactory testimony as to his fitness to discharge the trust.
5. **Evidence** examined, and *held* sufficient to sustain the findings and judgment of the lower court.

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

Hainer, Craft & Edgerton, for appellant.

McKillip & Barth, contra.

Lester S. Pollard, a resident of Deuel county, Nebraska, died intestate on November 14, 1918, leaving surviving him

DAY, J.

as his only heirs at law his two minor children, Thelma and Esther, aged, respectively, 8 and 6 years. His wife had died a few days previous. He left an estate consisting of real and personal property of the alleged value of $48,250 to be administered. On November 27, 1918, John C. Pollard, a brother of the deceased, filed a petition in the county court of Deuel county, alleging in substance that Lester S. Pollard died intestate on November 14, 1918; that immediately prior to his death he was an inhabitant of Deuel county; that he left as his only heirs at law the two minor children; and that he left real and personal property to be administered. He prayed for his own appointment as administrator. The county court gave notice of the pendency of the petition, and fixed December 23, 1918, as a day for hearing. On December 20, 1918, Amanda Forsythe Murray, the maternal grandmother of the minor children, filed objections to the petition and to the appointment of John C. Pollard. The objections to the petition, in so far as they relate to the main question discussed by appellant's counsel, challenge the jurisdiction of the court to appoint an administrator on the petition filed by John C. Pollard, for the reason that he was not the next of kin or a creditor, and that his petition was filed within 30 days next following the death of deceased. Together with her objections, Mrs. Murray filed a "counter petition," setting forth that she was a creditor, and praying for her own appointment as administratrix. Upon the hearing the county court found that John C. Pollard was entitled to be appointed, and issued letters of administration to him. Mrs. Murray appealed from this order to the district court, where upon a trial the court found generally in favor of John C. Pollard and against Mrs. Murray, and directed the issuance of letters of administration to John C. Pollard. From this judgment Mrs. Murray has appealed to this court.

Counsel for appellant in their brief say that the question raised is this: "Can one who is not beneficially interested in an estate file a petition in the county court within the

first 30 days after the death of the intestate and confer upon the county court jurisdiction to appoint an administrator?" Upon the authority of *Larson v. Union P. R. Co.*, 70 Neb. 261, we think the question should be answered in the affirmative. In that case the petition of Mary Westlund, a sister of the deceased, was filed in the county court of Dawson county on April 27, 1899, in which she alleged that Christine Anderson died intestate on April 18, 1899; that immediately preceding her death she was a resident and inhabitant of said county, and was possessed of personal property to be administered; that she left surviving her two minor children, Esther and Ezekiel, aged, respectively, 7 and 5 years. The petition alleged that the petitioner is the next of kin and the only relative of the deceased within the state of Nebraska, and prayed that letters of administration be granted to Lawrence Larson. Administration was granted to said Larson, who later commenced a suit against the Union Pacific Railroad Company for damages for negligently causing the death of Christine Anderson. It was the contention of the defendant in that case that the petition upon its face shows that the petitioner was not the next of kin, and as it was filed less than 30 days from the death of the intestate, the petitioner was not a proper party to apply for administration under the provisions of section 1339, Rev. St. 1913, and for that reason the county court acquired no jurisdiction to make the appointment. The court held that the recital in the petition that the petitioner was the next of kin was an erroneous conclusion, and that the petition must be regarded as an application for administration by one who was not the next of kin. The court said:

"We have, then, a case where the record affirmatively shows that administration was granted on an application made within 30 days of the death of the intestate, by one not the next of kin, and which fails to show that the petitioner was a creditor of the estate, or that the next of kin or the creditors had renounced their right to administer. The question presented, then, and the only question in this

case, is whether the appointment of an administrator based upon an application of that character, and made under such circumstanecs, should be held void when assailed in a collateral proceeding."

The provisions of the statute then under consideration were exactly the same as section 1339, Rev. St. 1913, which provides:

"Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled to the same in the following order: First—The widow, or next of kin, or both, as the judge of probate may think proper, or such person as the widow or next of kin may request to have appointed, if suitable and competent to discharge the trust; second—If the widow, or next of kin, or the persons selected by them, shall be unsuitable or incompetent, or if the widow or next of kin shall neglect, for thirty days after the death of the intestate, to apply for administration, or to request that administration be granted to some other person, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it; third—If there be no such creditor competent and willing to take administration, the same may be committed to such other person or persons as the judge of probate may think proper."

It was held that the provisions of the statute above quoted do not go to the jurisdiction of the county court, but rather to the manner of its exercise, and the rule was announced that, "in a petition to the county court for administration on the estate of a deceased person, the only averments essential to the jurisdiction of the court are, that such person died intestate, and was at the time of his death a resident or inhabitant of the county where the petition is filed; or, in case he was at the time of his death a nonresident of the state, that he left an estate in such county to be administered."

While it is true that in the *Larson* case the appointment of the administrator was assailed collaterally, and the

precise holding was that it could not be attacked in a collateral proceeding, still if the petition filed conferred no jurisdiction on the county court to act, all proceedings thereunder would have been an absolute nullity, and subject to attack at any time in a direct or collateral proceeding. The judgment having been sustained, it logically follows that the court must have determined that the petitioner was a proper person to call the jurisdictional facts to the attention of the court. In that case, as in the case at bar, the petitioner had no beneficial interest in the estate. While the authorities are not entirely uniform upon the question as to who is a proper person to call to the attention of the county court the jurisdictional facts, it has been held in some jurisdictions that it is immaterial in what manner the jurisdictional facts are brought to the attention of the court. In *Brubaker v. Jones,* 23 Kan. 411, under a statute substantially like our own, the court said:

"The statute does not anywhere prescribe how the jurisdictional facts shall be ascertained; hence the probate court may ascertain them as best it can; and if it ascertain them correctly, that is all that is required. All that is really necessary is, that the jurisdictional facts shall exist as facts; and how the court ascertains them is wholly immaterial."

In this state the uniform practice has been to officially call the county court's attention to the existence of the jurisdictional facts by a petition. It has not been the uniform practice, however, that the petitioner be a person beneficially interested in the estate. Any person who knows the facts is a qualified person to do so.

Counsel for appellant cites *In re Estate of Glover,* 104 Neb. 151, and *In re Estate of Anderson,* 102 Neb. 170. There is nothing in these cases, however, which runs counter to our holding in the *Larson* case. We are then confronted with the question whether the doctrine as announced in the *Larson* case should be modified or overruled. The rule there announced has stood as the law of the state for over 17 years. Courts, attorneys, and parties interest-

ed have relied upon its correctness, as they had the right to do. Numerous estates have been settled under it, and titles to real estate rest upon it. To overthrow it now on jurisdictional grounds would likely result in great hardship in the disturbing of property rights. This we are not inclined to do. The mischief which may arise from a stranger invoking the power of the court for his own appointment can readily be controlled by the county court. Under the provisions of section 1339, Rev. St. 1913, heretofore quoted, certain designated classes of persons have a preferential right of administration, and as between strangers the matter of selection rests within the discretion of the court. But it may be urged that a stranger who thus invoked the jurisdiction of the court may, in case of defeat, attempt to appeal and thus delay the due administration of the estate. While this question is not now before us, and hence not decided, it would seem that a sufficient answer would be that, having no interest in the estate, the right of appeal would not lie.

From what has been said, it would seem to follow that no objections to the jurisdiction of the county court can successfully be predicated upon the mere fact that the petitioner has no beneficial interest in the estate.

Having determined that the court had jurisdiction of the subject-matter the question arises, Did the court err in failing to appoint the appellant?

Under the plain provisions of section 1339, Rev. St. 1913, Mrs. Murray, being a creditor and having filed her application for appointment as administratrix, was, as against Mr. Pollard, entitled to be named, if competent to discharge the trust. The preferential right given by the statute to the classes of persons named therein to be appointed administrators is obligatory upon the court, and it is error to appoint a stranger to the estate where some one falling within the preferential class asks to be appointed, and is competent to discharge the trust. Two things were necessary to make Mrs. Murray's right absolute. She must have been a creditor, and she must have been competent.

To her petition for appointment, John C. Pollard had filed an answer in which he specifically charged that Mrs. Murray on account of her lack of business experience was not competent to discharge the trust. Under this state of the record, it was incumbent upon Mrs. Murray to satisfy the court that she was capable of handling the estate. Upon the trial in the district court testimony was offered in behalf of Mr. Pollard tending to show that he was a man of some business experience, and that he could discharge the trust. No testimony whatever was taken with respect to Mrs. Murray. Under this state of the record, we think the trial court was amply justified in its general finding in favor of Mr. Pollard and against Mrs. Murray. Other questions have been suggested in the briefs of counsel, but we think what has been said disposes of the case.

For the reasons announced, the judgment of the district court is

AFFIRMED.

MAMIE PETERSON, APPELLEE, V. MAYME HEDRICK CLEAVER ET AL., APPELLANTS.

FILED DECEMBER 23, 1920. No. 21090.

1. **Libel:** PRIVILEGED COMMUNICATIONS. When a publication is made by a chief officer of a fraternal insurance association, addressed to the members of the association, concerning a subject-matter which affects the general welfare of the association, such communication, although containing words which are libelous *per se*, is qualifiedly privileged, and is a complete defense unless it is shown by plaintiff by a preponderance of the evidence that the publication was made with express malice.
2. **Insurance:** FRATERNAL ASSOCIATIONS: LIABILITY FOR LIBEL. A fraternal beneficiary association, organized under the laws of this state without capital stock, is liable to a member of such association for libel published by its officers, acting within the scope of their authority and in the discharge of its business.
3. **Libel:** LIBELOUS PUBLICATION: LIABILITY OF AUTHOR. The author of an article which is libelous, and which is published at his instance,

is liable with the publisher in an action brought by the person defamed.

4. ———: INSTRUCTIONS. Instructions examined, and *held* to be without error to the appellant.

5. ———: EXPRESS MALICE: EVIDENCE. Evidence examined, and *held* sufficient to submit to the jury the question of express malice.

6. **Evidence** examined, and *held* to sustain the verdict.

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

Matthew Gering, William J. Hotz and *Stiner & Boslaugh,* for appellants.

Anson H. Bigelow and *Weaver & Giller, contra.*

DAY, J.

The plaintiff recovered a judgment in the district court for Douglas county for $1,500 against the defendants in an action for libel. Defendants have appealed.

The defendant, the Degree of Honor of the state of Nebraska, is a fraternal organization doing a fraternal insurance business, having also social features, and composed of a grand lodge with subordinate lodges. It is a corporation organized under the special provisions of our statute relating to fraternal benefit societies.

At the time in question the defendant, Mayme Hedrick Cleaver, held the post of Grand Chief of Honor, which was the chief executive office of the society. The Degree of Honor owned and controlled a paper known as the Degree of Honor Journal, which was the official organ of the society, in which were published communications from the officers to the members, as well as news items of special interest to the membership. This paper circulated only among the members and a few of its advertisers.

Among the subordinate lodges of the association was Washington Lodge No. 27, located at Omaha, in which the plaintiff held the position of financier. As such officer it was the duty of the plaintiff to collect dues and assessments from the several members of lodge No. 27, and turn

the money so collected over to the treasurer of such lodge, for which service she was paid four cents *per capita*.

As the outgrowth of some difficulties in the affairs of lodge No. 27, reference to which will be hereinafter made, Mrs. Cleaver, as Grand Chief of Honor, prepared and had published in the Degree of Honor Journal the article which forms the basis of this action. The communication is quite lengthy, and we set out only that portion of which complaint is made, ommitting innuendoes: "The financial affairs of the order were placed in the hands of John M. Gilchrist, certified public accountant, who found the treasurer's books $1,266 short, and the financier's not only short, but in such condition that more than 140 members were suspended during the time between December 28th and March 7th, who did not know of nor suspect their suspension. The former treasurer of the lodge has assisted in every way possible to straighten out the affairs of the order, and has promised to make good her shortage, but the former financier has not only refused to assist in straightening out her books, but has persisted in communicating with and collecting assessments and dues from the members, and has also tacitly refused to make good her shortage. I have issued three official letters. In my last I explained that from and after May 13th any member who paid assessments to any one excepting those whom I had designated would be suspended individually. According to the expert accountant's report, Washington Lodge No. 27, suspended, was paying a salary to the financier computed on a basis of 739 members, while in fact they actually had only 569 members. If the plaintiffs in this case had met with the overtures of the grand lodge officers this might all have been amicably settled by April 1st, and it is earnestly to be hoped that better judgment will prevail very soon."

The petition avers that the article charges that plaintiff was short in her accounts as financier of her lodge, and also that she was receiving a salary based upon a *per capita* membership of 739, while in fact the lodge had but

569 members. The petition also contained the usual averments in actions for libel.

The answers of the defendants admitted the preparation and publication of the article in the Degree of Honor Journal, the official organ of the order, and by way of defense pleaded that it was a privileged communication, and made without malice or ill will, and made only for the purpose of informing all of the members of the conditions existing in the order. The answers also pleaded that the article was true and published with good motives and for justifiable ends. The reply denied the affirmative allegations of the answers.

In this state of the record the trial court, correctly we think, ruled that the article was libelous *per se,* and permitted evidence to be introduced as to the damages the plaintiff had sustained. There being no dispute in the testimony as to the occasion of the publication, the court ruled that it was qualifiedly privileged, and that the qualified privilege was a complete defense unless the plaintiff established by a preponderance of the testimony that the publication was made with express malice.

We think the theory upon which the case was tried was the proper one, in harmony with the evidence and supported by the law.

In the brief for defendants it is urged that the publication was privileged, and hence a complete defense. The word "privileged," as applied to libel, is a general term. For the sake of clearness of application it is often divided into two classes, viz., absolute privilege and conditional or qualified privilege. Townsend, in his work on Slander and Libel (4th ed.) sec. 209, says:

"By an absolutely privileged publication is not to be understood a publication for which the publisher is in no wise responsible, but it means a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action for slander or libel. A conditionally privileged publication is a publication made on an occasion which furnishes a *prima facie* legal excuse

for the making of it; and which is privileged, unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse. The additional fact which, in the majority of cases, is required to be shown to destroy this conditional privilege is malice, meaning bad intent in the publisher, *i. e.*, an intent to injure the person whom or whose affairs the language concerns."

Newell, Slander and Libel (3d ed.) sec. 496, states the rule as follows: "A communication made in good faith upon any subject-matter in which the party communicating has interest or in reference to which he has a duty, either legal, moral, or social, if made to a person having a corresponding interest or duty, is qualifiedly privileged, and the burden of proving the existence of malice is cast upon the person claiming to have been defamed." *Wise v. Brotherhood, L. F. & E.*, 252 Fed. 961; *Finley v. Steele*, 159 Mo. 299. Tested by this rule, it is clear that the defendants would be protected in making the publication, provided that in so doing they did not act maliciously.

But it is urged on behalf of defendant the Degree of Honor that an action for libel will not lie against it at the instance of one of its members. It is pointed out that it is a corporation organized under special provisions of our statute authorizing fraternal societies to be created without capital stock, and privileged to insure its members, and to conduct its business for the sole benefit of the members. It is argued that such organizations can hardly be classed as corporations or copartnerships. We are not willing to assent to this proposition.

Notwithstanding the fact that it is organized under special provisions of the statute, without capital stock, it is none the less a corporation, having a distinct entity, apart from its members. It is an artificial person created by statute, in which capacity it may sue and be sued. The mere fact that it does not make dividends for its members, or that there may not be funds out of which a judgment could be paid, does not, in our judgment, exempt it from

being sued. A libel is a wrongful act, a tort, and there seems to be no good reason why a corporation of this character should not respond in an action for libel brought by one of its members, the same as in any other tort.

The cases cited by counsel for either side are hardly to the point now being considered. Neither has our considerable research been rewarded in finding one. In *Gilbert v. Crystal Fountain Lodge,* 80 Ga. 284, it was held that a member of a mutual aid association cannot maintain an action against the association, sued as a partnership, for slanderous words spoken of and concerning him by the association while a member of it. In discussing the question the court said:

"After diligent search, we have been unable to discover any authority supporting the theory that a man can slander himself, either when he speaks directly as an individual, or when he speaks indirectly through a partnership of which he is a member. Upon principle, we do not see how he could charge the partnership assets with the damages that might be recovered, he having an interest in the assets as a part owner of the same."

In *De Sénacour v. Société La Prévoyance,* 146 Mass. 616, the case was decided upon the point that there was no evidence of publication by the society. In *Holmes v. Royal Fraternal Union,* 222 Mo. 556, 26 L. R. A. n. s. 1080, a communication containing libelous matter was written by the president of a fraternal order to members at a certain place concerning the plaintiff who was also a member. The case was decided upon the point that the communication was qualifiedly privileged, and that there was not sufficient evidence to show express malice. In *Wise v. Brotherhood, L. F. & E.,* 252 Fed. 961, the plaintiff was a member of the brotherhood. The secretary of the defendant organization wrote the libelous letter which formed the basis of the suit, in which the plaintiff was nonsuited. The defense was that the communication was privileged. The judgment was reversed for the reason that the court failed to submit the question of malice to the jury. In *Kirkpatrick*

v. Eagle Lodge, 26 Kan. 384, it was held that the sustaining of a demurrer on the ground that the petition did not state a cause of action was error. In these cases, as well as others which might be cited, it was assumed rather than decided that an action by a member would lie against the association, when the association was a corporation.

We do not understand counsel for the defendant to challenge the general rule that a corporation is liable in an action for libel committed by its authorized agents while acting within the scope of their employment. Numerous cases are readily found supporting this general proposition. Newell, Slander and Libel (3d ed.) 436; *Evening Journal Ass'n v. McDermott,* 44 N. J. Law, 430; 17 R. C. L. 382, sec. 134; Odgers, Libel and Slander, p. 592; *Johnson v. St. Louis Dispatch Co.,* 65 Mo. 539; *Aldrich v. Press Printing Co.,* 9 Minn. 123.

This court, while not passing in terms upon the question, has recognized the liability of corporations in actions for libel. *Bee Publishing Co. v. Shields,* 68 Neb. 750, 759; *Bee Publishing Co. v. World Publishing Co.,* 59 Neb. 713; *Estelle v. Daily News Publishing Co.,* 101 Neb. 610.

In the case at bar it is clear that in making the publication Mrs. Cleaver was acting as the chief officer of the Degree or Honor. Her acts were within the scope of her powers as such officer. She was acting for it in its affairs, and for its benefit. The Degree of Honor cannot be excused upon the ground that she exceeded her authority. Perhaps in no case do corporations or individuals authorize their agents to commit torts, and yet they are held answerable for the acts of their agents while acting within the scope of their employment, and while engaged in the furtherance of the master's business.

The questions then arise whether there was sufficient evidence of malice to be submitted to the jury, and whether the evidence is sufficient to support the verdict. The record shows that dissensions of a serious nature had arisen in the affairs of Washington Lodge No. 27, which became so acute as to threaten disruption of the lodge. At this

stage of the disorder, Mrs. Cleaver appeared at a meeting of the lodge, and, in the exercise of her power as Grand Chief of Honor, placed herself in the presiding officer's chair and announced that she suspended lodge No. 27 "for insubordination on the part of your financier for not sending out those cards." She ordered the charter taken from the wall, and appointed temporary officers to take the place of the regularly elected officers of the lodge, and directed that the books, records, and funds be turned over to the newly appointed officers. Plaintiff, who was present with her books and records, refused to turn her books over until they were audited. There is a dispute in the testimony as to what occurred. The plaintiff's testimony was to the effect that, upon plaintiff's refusal to give up her books, Mrs. Cleaver "run across from the station and shook her fist at me," and said, "Mrs. Peterson, I have put up with you for six years, turn those books over or I will have a policeman accompany you home." Another witness testified, "She (Mrs Cleaver) was shaking her fist at her, and said, 'Well, we will get you.'" Other testimony of a similar import was offered. Following this episode, the plaintiff surrendered her books, records, and cash. Later plaintiff and other members of the lodge joined in court action to prevent interference on the part of defendant Mrs. Cleaver in the affairs of lodge No. 27. While the transactions occurring in the lodge, just alluded to, were denied on the part of the defendants, we think the testimony on the question of malice was clearly within the province of the jury to determine. Following these several difficulties the article in question was prepared by Mrs. Cleaver, signed by her in her official capacity, and ordered published in the official organ as a communication to the members.

Under all the circumstances, we think the testimony on the question of express malice was properly submitted to the jury, and that the verdict of the jury is sustained by the evidence.

The defendants urge that there was error in the giving of instructions Nos. 2, 3, 4, and 7. Instructions Nos. 4 and 7 are in identical language, respectively, as instructions 9 and 7 requested by the defendants. Having requested these instructions, they are in no position to now complain.

Instruction No. 2 is as follows: "Unless you find from the evidence that the libelous matter was true and published with good motives and for justifiable ends, or you fail to find that the libelous matter was a privileged communication, as hereinafter defined, then your verdict should be for the plaintiff; but, if you find the libelous matter was true, or find that it was a privileged communication, then your verdict should be for the defendants." There is nothing in this instruction which gives the defendants ground to complain. The first part is based upon section 5, art. I of our Constitution, which provides: "In all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." The latter part of the instruction, "but, if you find the libelous matter was true, * * * then your verdict should be for the defendants," is perhaps faulty in not adding, following the word "true," "and was published with good motives, and for justifiable ends." The instruction given affords the defendants no ground for complaint, for it was more favorable to them than they were entitled to receive.

The defendants also complain of the giving of instruction No. 3. This instruction in substance charged that the members of the order had the right to know how the affairs of each lodge were being conducted, and that defendant, through its official organ, had the right to give such information to the several members, and that if, when the article was published, the defendants believed, or had reasonable ground to believe, that the statements therein were true, then and in such event the defendant would not be liable to the plaintiff in any sum whatsoever, unless the plaintiff has established by a preponderance of the testimony that the publication was made with express malice.

This instruction is responsive to the facts, and is in no wise prejudicial to the defendants.

There are other errors complained of in the briefs which will not be considered further than to say that we have examined them carefully, and do not find any prejudicial error to the appellants.

The judgment of the district court is accordingly

AFFIRMED.

ROSE, J., not sitting.

MAY ROONEY, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED DECEMBER 23, 1920. No. 21352.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: "TERM OF OFFICE." A regular term of office, as the term is applied to government employees in the workmen's compensation law (Rev. St. 1913, sec. 3656), means such term of office as has a fixed and definite duration and a date of termination known and fixed by law or other general regulation. Former opinion, 104 Neb. 260, modified.
2. ———: ———: POLICEMEN. A policeman, in the regular service of the Omaha police department, is not employed for the "gain or profit" of the city, as those terms are used in the workmen's compensation law, and is, therefore, not within the operation of the act.

Opinion on motion for rehearing of case reported in 104 Neb. 260. *Former opinion modified and rehearing denied.*

FLANSBURG, J.

The former opinion in this case is reported in 104 Neb. 260.

The matter comes up on rehearing.

Plaintiff makes a claim for compensation under the workmen's compensation law, for the death of her husband, who was killed while performing his duties as a policeman for the city of Omaha. She recovered judgment, and defendant, city of Omaha, appeals.

The workmen's compensation law, aside from the exceptions hereinafter referred to, covers "every person in the service of the state or of any governmental agency created by it," but excludes from its operation any official in the service of the state "who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term." Rev. St. 1913, sec. 3656, as amended by section 4, ch. 85, Laws 1917.

We adhere to our former opinion that a member of the police department of the city of Omaha is an officer and in the service of a governmental agency of the state, and take up for consideration now the question, only, of whether or not such police officer holds for a "regular term of office."

The charter of the city of Omaha (Rev. St. 1913, sec. 5300) provides that no member of the police department shall be discharged for political reasons, nor except in case a complaint is filed against him, a hearing had, and opportunity given him to defend against the charges made. It is further provided (Rev. St. 1913, sec. 5301) that the city authorities "shall have power to discontinue any employment or abolish any office at any time when, in the judgment of the council, such employment or office is no longer necessary."

A police officer, then, holds indefinitely during good behavior and cannot be discharged for cause without a hearing and opportunity to defend. *State v. City of Lincoln,* 101 Neb. 57. But when, for reasons of economy or lack of public necessity for his services, the city authorities see fit to terminate his employment, he has no right to a statutory hearing upon the question of whether or not the public welfare requires a continuance of a full police force, or of whether or not the revenues available are adequate for the payment of his salary. *Moores v. State,* 54 Neb. 486; note 4, A. L. R. 205 (*State v. City of Seattle,* 74 Wash. 199).

The fact that the tenure of office may be interrupted by the discontinuance of the service or abolition of the office

does not directly bear upon the question of whether or not the period of incumbency resulting from the appointment is for "a regular term," but it is, however, a statutory recognition of the necessity, peculiar in employments of this kind, and of the right of the city to reduce or increase the police force from time to time, and does to that extent indicate one element of uncertainty as to the actual period of tenure of office in the police department. To this, however, we attach little importance, for the general right to abolish an office may be exercised at any time during the incumbency of that office, even though the term is of a fixed and definite duration, and regardless of whether or not the officer holds for a regular term.

Whether or not a member of the police department holds for a "regular term of office" depends upon whether or not the period of time for which he is appointed shall be called a "regular term." A police officer of the city of Omaha is appointed to serve during good behavior. That means an indefinite period. No two officers will hold for the same duration of time. The law has fixed no limitation on the tenure of office. One may hold for life or as long as he desires, unless, through his own misconduct, he is discharged for cause. With such irregularity of duration, the period of tenure can hardly be denominated a "regular term" of office, within the meaning of the statute.

The word "term" implies a period of time with some definite termination. A "regular term" must contemplate that those terminations must come at regular intervals of time. The wording of the statute bears out this construction. It speaks of appointments "for a regular term of office, or *to complete the unexpired portion of any regular term.*" The regular term contemplated, therefore, was one of definite duration and one which might continue, though the incumbent does not serve out the entire period. In order that there ever exist an "unexpired portion of any regular term," that term must have some regularly fixed terminus in point of time.

This court, in the case of *State v. Galusha,* 74 Neb. 188, in the opinion said: "Ordinarily, say the authorities, the word 'term' or 'term of office,' when used in reference to the tenure of office, means a fixed and definite period of time. *Crovatt v. Mason,* 101 Ga. 246, 28 S. E. 891; *State v. Breidenthal,* 55 Kan. 308, 40 Pac. 651; *State v. Tallman,* 25 Wash. 295, 64 Pac. 759; *People v. Brundage,* 78 N. Y. 403; *State v. Stonestreet,* 99 Mo. 361, 12 S. W. 895."

The question of the meaning of the phrase "term of office" has frequently arisen where an appointment has been made and the officer to hold at the pleasure of the appointing power. In those cases, since no definitely fixed date for termination of the office can be ascertained in advance of its actual termination, it has been universally held that such an officer does not hold for a "term of office." *State v. Gordon,* 238 Mo. 168; *State v. Oklahoma City,* 38 Okla. 349; *Somers v. State,* 5 S. Dak. 321; *City of Lexington v. Rennick,* 105 Ky. 779; *State v. Boughner,* 55 N. J. Law, 380.

In these cases, it is considered that the period of tenure does not constitute a term, since the continuance of the incumbency is uncertain and unfixed, until, by the order of the appointing power, the service is terminated. An appointment, then, to hold, not for any specific duration of time, but during the pleasure of the incumbent, unless sooner removed for cause, can hardly be said to be more definite as to period of tenure than an appointment to hold during the pleasure of the appointing power.

In Minnesota the supreme court has passed upon the identical question under consideration here, in the case of *State v. District Court,* 134 Minn. 26. The workmen's compensation act in that state, like our own, excepted from its operation a city official appointed for a "regular term of office." The court, holding that a member of the police department was not excluded from the operation of the act, said: "Under the Duluth charter policemen receive their office by appointment under civil service rules. They hold office during good behavior. There is no term at all.

Manifestly this is not an appointment for 'a regular term of office.'"

The defendant has raised a further question that a policeman in the city of Omaha is an employee of a governmental agency of the state, and is employed in the governmental capacity of the state, and not for the gain or profit of the employer, and that, under section 3656, Rev. St. 1913, he is expressly exempted from the operation of the compensation law. It is manifest that such a policeman, in the general service of the city as a policeman, is not employed for the pecuniary gain or profit of the city. This case is controlled by the decision in *Ray v. School District of Lincoln,* p. 456, *post,* and, for the reasons therein set out, plaintiff is not entitled, as we view it, to a recovery in this case.

The former opinion of this court is therefore modified to the extent above stated, and the motion for rehearing is

OVERRULED.

DAY, J., not sitting.

ROSE, J., dissenting.

I adhere to the former opinion, 104 Neb. 260, that a qualified and acting policeman of the city of Omaha is an officer appointed for a "regular term" within the meaning of the workmen's compensation act. The appointment of a policeman for the city of Omaha is an appointment for life or during good behavior. The term of office under such an appointment is for a regular term. A term of office for life or during good behavior has been understood generally from the foundation of the Republic to be a regular term of office. Judges of the supreme court of the United States have a "regular term of office," though appointed for life, and the reserved power of the people to put an end to their judicial tenure or to abolish their offices by constitutional amendment does not change the meaning of those words. There is no reason why the term of an officer appointed for life or during good behavior is not as regular a term as the term of another officer whose official tenure

terminates by statute at a fixed period of two years. For the purposes of language in expressing the legislative will, one term is as regular as the other. By the true test of regularity there is no room for distinction. The statute does not say that a "regular term" has "a fixed and definite duration." Those expressions are not in the statute; nor are they proper definitions of words used or any part of any reasonable interpretation of a legislative enactment. The expression "fixed and definite duration" or the equivalent thereof would have been used had the lawmakers intended to make "a date of termination" a part of a regular term.

A city free from negligence is not pecuniarily liable for the death of a policeman killed in the performance of a governmental duty and can only be made so by the legislature under the present Constitution. The power to create such a liability was not committed to the courts. In law, courts are as powerless to create such a liability by interpretation as by direct legislation. Those who assert against a city not guilty of negligence claims for compensation on account of the death of a policeman killed in the line of his duty should find the city's liability in the written language of a statute. That liability of the city of Omaha is not in the workmen's compensation act, and I dissent from the opinion so holding.

FRANK CENTOAMORE V. STATE OF NEBRASKA.

FILED DECEMBER 23, 1920. NO. 21473.

1. **Witnesses: PRIVILEGED COMMUNICATIONS: COMMUNICATION TO PROSECUTOR.** Though communications to a prosecuting officer by a complaining witness are privileged, the rule is subject to certain limited exceptions, when invoked in a criminal proceeding based upon the facts so communicated.

2. ———: ———: ———. In a case of statutory rape, *held* that the accused was entitled to show that the prosecuting witness made statements to the county attorney, denying that the accused had

committed the act charged. The testimony of the county attorney showing such statements cannot be excluded on the ground that the communication was privileged.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

C. W. Britt, for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

FLANSBURG, J.

Defendant was convicted of statutory rape.

Error is predicated upon a ruling of the court excluding evidence offered by defendant of statements made by the prosecuting witness to the deputy county attorney to the effect that the defendant had not committed an assault upon her.

Testimony had been introduced showing that the prosecuting witness was an Italian girl, 14 years of age, that her father had betrothed her to defendant, and that the offense complained of was committed about the last week of August, 1919. The exact date of the offense charged was never definitely fixed. The information filed in the case gave the time as September 25. Testimony was introduced of a physical examination made on September 13, and this examination, the doctor testified, indicated that intercourse had taken place within the previous 24 or 48 hours.

About this time the father of the prosecuting witness was arrested, on the complaint of the defendant here, upon a charge of incest committed upon his daughter. At that time both the father and the defendant were held by the county attorney. The prosecuting witness consulted with the deputy county attorney, and following the interview the father was held on the charge, and this defendant allowed to go. On September 25 the father was kicked by a horse and died, and afterwards this prosecution was commenced against the defendant here.

During the trial of this case the defendant offered to show by the testimony of the deputy county attorney that the prosecuting witness, at the interview just above mentioned, informed that official that the father was guilty, and that the defendant had not committed an assault upon her. This testimony was material as bearing upon the credibility of the complaining witness and as bearing directly upon the question of the guilt of the accused. The objection to the offer was sustained upon the ground that the statements, having been made by the complaining witness to the deputy county attorney, were privileged communications.

It is the general rule, especially applicable in proceedings collateral to the pending criminal action, that such communications, made to the prosecuting officer, are privileged. 40 Cyc. 2369. Though the relation of attorney and client can hardly be said to exist between the prosecuting witness and the officer, since such officer is acting as the attorney for the state, and the witness is not, literally speaking, his client, the rule is based, rather, upon the broad ground of public policy and is established as a means of fostering and promoting a free and unimpeded administration of the criminal law. It is a matter of public concern that every citizen should be allowed, and that it be his duty, to freely communicate to such officers any and all information which he may have of violations of criminal law, and, as an encouragement to the unembarrassed exercise of that duty, as well as for the protection of the informant, the law throws about the information given an enforced secrecy.

The rule has been rigidly enforced in cases such as malicious prosecution and slander, brought against the informant, and based on alleged false statements made to the prosecuting officer. *Vogel v. Gruaz,* 110 U. S. 311; *Oliver v. Pate,* 43 Ind. 132; *Gabriel v. McMullin,* 127 Ia. 426; *Michael v. Matson,* 81 Kan. 360; *Worthington v. Scribner,* 109 Mass. 487.

Though communications are generally protected as privileged even in the criminal proceeding, based directly upon the information given by the informant, still it would seem to us that in such cases it should not, in every instance, be followed absolutely and without qualification.

Somewhat analogous is the relaxation of the rule relating to the privilege accorded the members of the grand jury. As stated in Jones, Evidence (2d ed.) sec. 765: "At common law and in most of the states the oath administered to grand jurors binds them to preserve inviolate the secrets of the jury-room; and on this ground, as well as on other grounds of public policy, it was the common-law rule, quite strictly enforced, that the *proceedings of grand jurors* were *privileged,* and could not be made public. Accordingly, it was formerly held that grand jurors could not be asked to state the testimony of a witness given before them, for the purpose of impeaching him at the trial. But it is now generally held in this country that a grand juror may be called to show that the *statements of a witness* on the trial are in contradiction to those made by him before the grand jury."

Criminal proceedings are instituted with the object, not alone of securing convictions, but of getting as near to the truth as possible on the question of the guilt or innocence of the accused. A case of the kind under consideration depends very largely, if not almost entirely, upon the testimony of the prosecuting witness. The weight to be given her testimony is the paramount issue. If she has made statements denying the guilt of the accused, even though the statements have been made to the prosecuting attorney, it would seem to be in the interests of justice that these statements should be made known to the jury.

The determination of the question of guilt or innocence of the accused is of so great importance that the accused should not be denied the right to produce such material testimony, available and within his reach, merely from the fact that there are reasons of public policy why the communication, which has become the very basis of the

charge made against him, should not be disclosed. The importance of the question of guilt or innocence, on the one hand, must in such an instance outweigh the question of policy, on the other. This testimony was not offered against the prosecuting witness, it was not offered in a case where she was in need of the protection that the law might then have afforded her, and we cannot say that there are reasons of public policy still existing which are so great as to override the right of the accused to a fair and impartial trial. The right to show those statements and to develop that testimony was in this case, it seems to us, essential to such a trial.

Though a privilege may be claimed generally as to communications made to the county attorney by the complaining witness, we believe that the rule should be subjected to the exception that the accused may be allowed to inquire specifically as to whether the prosecuting witness did not make certain statements in denial of the guilt of the accused, and, if so made, to develop what those statements were. *Riggins v. State,* 125 Md. 165; *People v. Davis,* 52 Mich. 569; *King v. United States,* 112 Fed. 988.

For the reasons given, the judgment of the district court is reversed and a new trial ordered.

REVERSED AND REMANDED.

JOHN P. RAY, APPELLEE, V. SCHOOL DISTRICT OF LINCOLN, APPELLANT.

FILED DECEMBER 23, 1920. No. 21562.

1. **Master and Servant: WORKMEN'S COMPENSATION ACT: "GAIN OR PROFIT."** The term "gain or profit," as used in the workmen's compensation law, *held* to mean pecuniary gain or profit.
2. **———: ———: STATE EMPLOYEES.** Employees of the state and of its governmental agencies, when not engaged in an enterprise carried on for pecuniary gain or profit, are not within the operation of the workmen's compensation law.

3. ———: ———: SCHOOL JANITOR. A janitor in the employ of a school district of the city of Lincoln *held* not covered by the act.
4. ———: ———: CONSTRUCTION. It is not for the court to say, where the language of a statute leads to logical conclusions, that the literal meaning will not be followed, simply because by its wording it does not embrace cases which, as to questions of policy, seem, for no good reason, to have been excluded.

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

R. O. Williams, for appellant.

Holmes, Chambers & Mann, contra.

FLANSBURG, J.

Action, based upon the workmen's compensation law, in which the plaintiff, an employee of the school district of the City of Lincoln, a municipal corporation, seeks to recover compensation for injuries sustained by him in the course of and growing out of that employment.

The question for decision is whether or not employees of the school district come within the compensation law. It is contended by the defendant that no employees of the state, or of any subdivision thereof, are within the law, except in those instances where they are employed in some enterprise carried on for pecuniary gain or profit.

The sections of the statute, particularly involved, are as follows:

Section 3647: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it, and to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer." Rev. St. 1913, as amended by Laws 1917, ch. 85.

Section 3655: "The following shall constitute 'employers' subject to the provisions of this article:

"(1) The state and every governmental agency created by it.

"(2) Every person, firm or corporation * * * who is engaged in any trade, occupation, business or profession."

Section 3656: "The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this article, the said terms include the plural and all ages and both sexes, and shall be construed to mean:

"(1) Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written, but shall not include any official of the state or any governmental agency created by it, who shall have been elected or appointed for a regular term of office, or to complete the unexpired portion of any regular term.

"(2) Every person in the service of an employer who is engaged in any trade, occupation, business or profession.

"(3) It shall not be construed to include any person whose employment is casual, *or not for the purpose of gain or profit by the employer,* or which is not in the usual course of the trade, business, profession or occupation of his employer." Rev. St. 1913, as amended by Laws 1917, ch. 85.

It is urged that the term "gain or profit" should not be construed in the ordinary sense of pecuniary gain or profit, but that the phrase should be held to designate any employment which should be found to be carried on for the benefit or advantage of the employer. We do not believe the statute capable of that construction. The original conception of workmen's compensation laws seems to have been based upon the principle that the servant should no longer be required to bear loss in consequence of personal injuries, sustained in and growing out of the service rendered his employer, since the benefit of that service, based in part upon the personal hazard and risk of loss to the servant, was received by the employer. It was not, however, intended that such loss should simply be shifted from the employee and saddled upon the employer, and he made to carry the burden alone, but that such loss through injuries, sustained by the employee, should be treated as a part of the cost of service to the employer, and he, in fixing the price of his product, could reimburse himself by pass-

ing it on to the consumer, who received the ultimate benefit. An employer, through the instrumentality of the enterprise carried on by him was declared to be the cause of all accidents directly growing out of such enterprise, and such laws prevented him from gaining pecuniary advantage through such instrumentality, and required him to pay those losses as a part of the expense cost of his undertaking. It seems to have been for these reasons that workmen's compensation laws, originally applied to industrial accidents only, have been, in some instances, limited in their operation to those enterprises which are carried on for pecuniary gain.

Though it is true, as argued, that, in the case of employment by the state, the cost of service, including the payment of compensation for injuries, is equitably passed on to society through the process of taxation, still, it seems clear to us, that fact does not affect nor alter the meaning to be given to the terms now under consideration. Were we to interpret the words "gain or profit" to mean benefit or advantage, pecuniary or otherwise, that an employer might receive through an employment carried on by him, such meaning must apply not only to state employments but also to all other employments covered by the statute. That interpretation would only lead to uncertainty and confusion, which, under the plain wording of the statute, does not now exist.

That the phrase was intended to mean pecuniary gain or profit finds some support in the following cases: *Allen v. State,* 160 N. Y. Supp. 85; *Redfern v. Eby,* 102 Kan. 484; *Gray v. Board of Commissioners of Sedgwick County,* 101 Kan. 195; *Sexton v. Public Service Commission,* 167 N. Y. Supp. 493.

In this light and by reason of the common and ordinary meaning of the words used, we believe the statute, on that question, is not open to construction.

By a literal reading of the provisions of the statute in connection with subdivision "(3)," last above quoted, the term "employee" covers only such employees, whether in

the service of private enterprises or in that of the state, or of its subdivisions, as are employed for "gain or profit."

It is quite apparent that the "casual" employee in the service of the state, covered by subdivision "(3)" of the statute, just as in the case of other employment, was intended to be excluded from the act; also that any employee, who was not engaged in the regular business and activities carried on by the state and its subdivisions, was to be excluded. The term "employer" is expressly defined to include "the state and every governmental agency created by it," and, by reading that definition into the clause in question, the express language, as employed and interpreted by the legislature, would exclude from the operation of the law every employee of the state and of its subdivisions who is not employed "for the purpose of gain or profit by the state, or by any governmental agency created by it."

The plaintiff contends that, should the literal wording of the act confine the act, in its operation, to those employees only who are employed for pecuniary gain or profit of the state and its subdivisions, then the literal wording must be found to be in conflict with the express purpose and intent of the act, and that such intent must be allowed to prevail. By the earlier provision of the act, every person in the service of the state, except officers holding for a regular term of office, is mentioned as being included within its operation. That provision, however, is not more general in its terms than the like provison covering private employments. It is necessary for the court, then, first to determine, from the language used, whether there can be any logical reason for the exception, as applied to state employees, or whether the exception is out of harmony with the act and opposed to a clearly expressed intent to the contrary.

It is no doubt the rule, as stated in *State v. Drexel,* 75 Neb. 614, that the object of the court, when it construes an act of the legislature, is to ascertain the intention of the lawmakers and to follow that intention when clearly as-

certained, though it may conflict with the literal sense of the words used. When the literal wording leads to absurdity or to illogical or unjust conclusions, the intention of the legislature, as gathered from the entire act, will prevail. *Kearney County v. Hapeman,* 102 Neb. 550; *Cram v. Chicago, B. & Q. R. Co.,* 84 Neb. 607.

We conclude, however, that those rules are no aid to the court in the present case. It is not for the court to say, where the language of the statute leads to logical conclusions, that its literal wording will not be followed, simply because it does not embrace cases which seem, for no good reason, to have been excluded. It is true that the workmen's compensation law is broad in its application. It is not confined to hazardous employments and covers a great mass of employees, engaged in private enterprises, whose duties are similar to the duties of the great majority of state employees. Clerical and office service is within the broad comprehension of the act. If the legislature, however, has not done so, the court cannot provide that the beneficent purposes of the act shall be extended to state employees who are not employed for gain or profit, though they may be found to be engaged in the same character of work, subjected to the same exposures, and whose loss through injury enters as much, in principle, into the actual cost of service as if the service were performed for a private enterprise, carried on for profit. We have repeatedly given the act, as to the classes of workers brought within it, a liberal construction, but the rule, allowing a liberal construction of a statute, does not warrant us in overriding its terms in order to widen the remedy or bring about objects or results not within its expressed intent.

It must be remembered that the state and its governmental agencies could not be held liable under the common law for personal injuries sustained by its servants in line of employment, though due to its own negligence, nor could such a recovery be had under the law as it existed in this state at the time of the enactment of the workmen's compensation act. The state could, however, be held for

injuries to its employees resulting from its negligence, when such employees were engaged in corporate enterprises carried on for profit. City water-works and lighting plants, which furnish service to individuals generally, are carried on for profit, and have been in the past subjected to the same duties and liabilities toward their employees as if they were privately owned enterprises of like nature. *Henry v. City of Lincoln,* 93 Neb. 331. There are many employees of such establishments distributed throughout the state in the various cities and towns. From the language of the statute, an intention may reasonably be inferred that that class of governmental employees, who had no right of recovery at common law against the state and its agencies for injuries sustained in the course of employment, have been excluded, and that the remedial features of the act have been extended to that class of cases only, employments carried on for profit, to which the common-law liability attached.

The primary object of compensation acts was to do away with the inadequacies and defects of the common-law remedies, to destroy the common-law defenses, and, in the employments affected, to give compensation, regardless of the fault of the employer. These remedies did not apply to state employees, not engaged in business enterprises carried on for profit, and the state employments, not within the common-law remedies, do not seem to have been expressly brought within the scope of our compensation law.

A statute in the state of Kansas specifically provides that municipal and county employees, who are not engaged for business gain or profit, shall not come within the act. We cannot say that the Kansas law is either absurd or unreasonable, for it follows the line of demarcation between those classes of cases where recovery could be had at common law, and those classes where such recovery was not allowed. The language of our statute is in accord with an intent and purpose, on the part of the legislature, to follow that line of demarcation.

A case very similar to the one under consideration is that of *Allen v. State,* 160 N. Y. Supp. 85, in which the court said (p. 87): "The theory of the law, and of the underlying constitutional authorization, is that the accidents growing out of the operation of industrial enterprises become a legitimate part of what is known in commercial life as the 'overhead' cost, the same as the breakage, wear, and tear of machinery and equipment, and it is only in those industries which are carried on for pecuniary gain that 'the cost of operating the business' can be taken care of in the fixing of the price of the product." The court then referred to that provision of the law which provided that no employee should be within the act unless he were engaged in an employment for pecuniary gain, and held that such provision applied to government service, saying (p. 88): "The amendment simply placed the state and its local political divisions upon the same footing as individuals and corporations, and the fact that the state may not conduct any business for pecuniary gain has no more bearing on the proper construction of the law than the fact that many individuals and corporations do things of a hazardous character without the purpose of pecuniary gain. The state has the power to engage in business undertakings for the purpose of securing pecuniary gain; the fact that it does not do so does not tend to show that the legislature intended to increase the liability of the state beyond that of corporations and individuals, and it is not the province of the courts to enlarge upon the clearly expressed or necessarily implied scope of statutes changing the rules of the common law."

The compensation act of the state of California was under consideration by the supreme court of that state and a question of statutory construction, very similar to that in the case here, was there presented. The court held in *Miller v. Pillsbury,* 164 Cal. 199, that, since by the wording of the statute it was doubtful whether or not the state, under certain circumstances, should or should not be included within the act, the statute, therefore, would be con-

strued in favor of the state and the state employees held to be excluded. In the concurring opinion in that case it is said (p. 204): "It is apparent that this statute raises a doubt whether or not it was contemplated by its framers that the state should be subject to its provisions. Under fundamental and familiar principles of construction of statutes such as this the existence of the doubt is the solution of the inquiry. Wherever such a doubt does exist the construction favors the sovereign. The sovereign is not brought within the scope of its own laws unless the intent that this should be done is made plainly to appear. This general rule of construction favoring the sovereign in case of doubt is applied to grants by the state, to statutes of limitation, to rights of action, and, indeed, to all laws and contracts concerning which it may be thought that the state is included or is a party. If, in truth, the state desires to subject itself to the law here in question it could and should do so in language of clear and unmistakable import."

For the reasons given, it is our opinion that the act does not cover the plaintiff in this case, and the judgment of the lower court is therefore reversed and the case dismissed.

REVERSED AND DISMISSED.

NETTIE MECOMBER, APPELLANT, V. CITY OF NORTH PLATTE, APPELLEE.

MARY ROGERS, APPELLANT, V. CITY OF NORTH PLATTE, APPELLEE.

FILED DECEMBER 23, 1920. No. 21608.

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

George N. Gibbs and *W. E. Shuman,* for appellants.

Beeler, Crosby & Baskins, contra.

FLANSBURG, J.

Claim for recovery is made in these cases based upon the workmen's compensation law. The cases were considered together and the question presented is whether or not police officers of the city of North Platte are within the compensation act. The district court denied the right of recovery and dismissed the case. Plaintiffs appeal.

These cases are controlled by the decisions in *Ray v. School District of Lincoln, ante,* p. 456, and *Rooney v. City of Omaha, ante,* p. 447, just decided by this court, and for the reasons therein stated the judgments of the lower court in the cases here presented are

AFFIRMED.

ALDRICH, J., not sitting.

B. L. MILLS, APPELLEE, V. MAXWELL MOTOR SALES CORPORATION, APPELLANT.

FILED DECEMBER 23, 1920. No. 21108.

1. **Sales: WARRANTY: EVIDENCE.** A dealer in automobiles was authorized by written contract with the manufacturer to warrant each car sold as free from defects in material and workmanship under normal use and service, if not subjected to misuse, negligence, or accident; the liability of the manufacturer being limited by the terms of the warranty to making good any defective parts returned to the latter for examination within a certain period. In an action by the dealer to be reimbursed for replacing defective parts in several cars thus sold, which the manufacturer refused to make good, particular and definite proof must be adduced with respect to each such car, as to its use, the nature of the defect, the circumstances under which the need for repairs arose and the amount expended therefor; and it must affirmatively appear that the conditions of the warranty were complied with.

2. ———: ———: **SUFFICIENCY OF EVIDENCE.** Evidence examined, and *held* insufficient to satisfy the above requirements, and too general and indefinite to support a verdict in favor of the dealer.

3. Contracts: WARRANTY: CONSTRUCTION. A provision that liability under the warranty of an automobile against defects shall be limited to making good any parts "which our examination shall disclose to our satisfaction to have been thus defective" will not subject the matter to the uncontrolled judgment of the seller, nor deprive the courts of the right to pronounce upon the question of fact involved.

APPEAL from the district court for Thomas county: BAYARD H. PAINE, JUDGE. *Reversed.*

Sutton, McKenzie, Cox & Harris, for appellant.

John H. Evans, contra.

DORSEY, C.

B. L. Mills, the appellee, entered into a written "Distributor's Agreement" with the appellant, Maxwell Motor Sales Corporation, to act as local dealer in the sale of automobiles and repairs for a certain territory centering at Thedford, Nebraska, and, under the terms of the contract, he purchased a certain number of cars, which he resold to parties in the vicinity. This action was brought to recover the amounts expended by the appellee in replacing broken and defective parts in the cars thus sold, and also for the sum of $110 deposited by him with the appellant at the time the contract was first entered into. There was a verdict and judgment for the appellee.

The written contract contained the following provision: "We warrant each new motor vehicle manufactured by us, whether passenger car or commercial vehicle, to be free from defects in material or workmanship under normal use and service, our obligation under this warranty being limited to making good at our factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser, be returned to us with transportation charges prepaid, and which our examination shall disclose to our satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties express or implied and of all other obligations or liabilities on our part, and we neither assume

nor authorize any other person to assume for us any other liability in connection with the sale of our vehicles. This warranty will not apply to any vehicle, which shall have been repaired or altered outside of our factory in any way so as, in our judgment, to affect its stability or reliability, nor which has been subject to misuse, negligence, or accident, nor to any commercial vehicle made by us which shall have been operated at a speed exceeding the factory rated speed, or loaded beyond the factory rated load capacity."

The appellee set up the foregoing provision of the contract in his petition, and alleged that the cars which he sold thereunder nearly all proved to be defective and failed to comply with the warranty, and that the appellant refused to replace the defective parts when they were returned as provided in the contract, or to reimburse the appellee for the parts supplied by him in replacing such defective parts. He also averred that the appellant canceled the contract and converted to its own use the deposit of $110 aforesaid. The prayer was for damages in the sum of $445.75.

The appellant's answer was a general denial, coupled with the admission that when their transactions terminated there was the sum of $4.37 owing to the appellee, for which the appellant offered to confess judgment.

The principal complaint upon this appeal is that there was a failure of evidence to bring the appellee's case within the conditions of the written warranty upon which it was founded. It was necessary to prove that there were defects in the material or workmanship of the automobiles in question, that such defects did not develop because the automobiles were subjected to more than normal use or service or because of misuse, negligence or accident, and that the parts claimed to be defective were returned as provided in the contract.

The evidence in the record upon those points is meager, and leaves much to inference. It consisted of general statements in the appellee's testimony, not referable to

any particular car, but to all the cars sold. "As soon as they were delivered and put out, I began to have trouble with the cars. * * * The drive-gears seemed to be the weakest part of the car, and I replaced a number of those pinions and drive-gears. * * * One man did not have the right housing with his cars * * * a number had bolts or burrs loose; * * * and I had to replace many of these parts," etc. As to one car, he said he repaired the ball-bearing races, but did not know what the expense was; the ring gear on another had to be repaired at a cost of $16; he remembered that he made some repairs on a car sold to Higgins, but could not tell their nature; he put a new differential, costing $65, in another car. These were the only details as to defects in, or repairs placed upon, any particular cars. The amounts expended by him for repairs were not itemized, but the appellee testified that they amounted, in all, to $355.

Each automobile was sold under a separate warranty that it was free from defects in material or workmanship under normal use and service, in case it was not subjected to misuse, negligence, or accident. In an action for the breach of such warranty with respect to several cars, the proof, in our opinion, must be specific and definite enough to identify each car claimed to be defective; to enable the jury to know the circumstances from which a defect or need for repairs arose in each case, in order to determine whether it was due to structural defect or some other cause; and to inform the jury as to how much was expended in repairs on each car separately. Not only was the evidence insufficient in those respects, but it conveyed no information as to the use to which any one of the cars had been put after it was sold, and the jury had no basis on which to find that they had been subjected to only normal use and service, or that they had not been subjected to misuse, negligence, or accident. Neither was there any evidence from which the jury could find that the defects had developed within 90 days after the sale of any car. We are satisfied that the proof fell short of what, in

justice to the appellant, should be required before a finding of breach of warranty on its part would be justified.

The form of warranty contained in the contract attempted to limit the appellant's liability thereunder to the replacement of defective parts, upon condition that such parts be returned to it within 90 days, and that it be satisfied, upon examination, that the parts were actually defective, as claimed. Conversely, it attempted to limit the remedy of the appellee for breach of the warranty to the right to return defective parts and demand that they be replaced. The appellant claims that there is no evidence that the appellee did actually return these parts. While his testimony is open to the charge of indefiniteness and want of detail upon that point, as upon others, we think it sufficiently established the fact of the return of the defective parts.

It is further contended by the appellant, however, that it had a right under the terms of the warranty, not only to examine the parts claimed to be defective, but also to exercise its own judgment as to whether the defects were such as to require replacements to be made. The provision that the appellant's obligation was limited to making good at the factory any parts "which our examination shall disclose to our satisfaction to have been thus defective" expresses that meaning, to be sure. It would, nevertheless, be repugnant to every conception of justice to hold that if the parts thus returned for examination were, in point of fact, so defective as to constitute a breach of the warranty, the appellee's right of action could be defeated by the appellant's arbitrary refusal to recognize that fact. Such an interpretation would substitute the appellant for the courts in passing upon the question of fact, and would be unreasonable. The provision in question should not be so construed upon a retrial of this cause.

Because of the insufficiency of the evidence, as hereinbefore pointed out, we recommend that the judgment be reversed and the cause remanded.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded, and this opinion is adopted by and made the opinion of the court.

REVERSED.

CORWINA R. MILLS, APPELLANT, V. JOHN H. BUNDY ET AL., APPELLEES.

FILED DECEMBER 23, 1920. No. 21184.

Taxation: SCAVENGER ACT: DEED: LIMITATIONS. Under section 6615, Rev. St. 1913, where one holds possession of real estate for a period of five years, claiming title thereto under a treasurer's deed issued under proceedings had under the scavenger act, no action can be maintained against said person to recover the title to said land, even though the deed is void for jurisdictional defects.

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

William J. Hotz, for appellant.

Davis & Davis, contra.

TIBBETS, C.

This is an action in equity by the plaintiff against the defendants to recover possession of the southwest quarter of section 12, township 24 north, range 13 west of the sixth principal meridian, in the county of Garfield, state of Nebraska, and to redeem from a treasurer's deed based upon the so-called scavenger tax proceedings. Judgment for defendants, and plaintiff appeals.

The above-described premises were sold at tax sale November 12, 1906, under the scavenger act. The tax sale certificate was assigned to R. I. Holson. The final notice of confirmation of sale was dated June 15, 1908, and directed to C. R. Mills, as owner. The affidavit for service by publication designated the owner as C. R. Mills. The

county assessment roll designated the owner as C. R. Mills, and in all the proceedings to final confirmation the owner was so designated, while the record title to the premises stood in the name of Corwina R. Mills. On the 10th day of December, 1908, the sale was confirmed and the county treasurer of Garfield county ordered to execute and deliver to Rose I. Holson a deed to the above premises, she being the owner of the tax sale certificate. Deed was duly issued, and Rose I. Holson and husband conveyed the said premises to defendant John H. Bundy on the 18th day of September, 1909, who, with his wife, defendant Mossie Bundy, mortgaged the same to defendant W. S. Bundy on March 29, 1914, to secure the payment of the sum of $800. The petition in this case sets out numerous grounds on which plaintiff predicates her right of recovery, but in the trial and her brief filed in this court plaintiff has abandoned all but one ground, *i. e.,* the final notice directed to, and service had on, C. R. Mills, as owner, was insufficient to meet the requirements of section 6605, Rev. St. 1913. At all times mentioned the title stood in the name of Corwina R. Mills on the records in the office of the register of deeds, and in the name of C. R. Mills on the county assessment roll, while said section provides that service of final notice shall be on the owner.

The record discloses that plaintiff obtained a deed to the land in question on the 22d day of November, 1899; that for some time previous to 1906 the plaintiff had failed and neglected to pay the taxes on the same as they became due, and they were sold for taxes in 1906, and that plaintiff continued to disregard her obligations as a taxpayer, and has at no time offered to redeem said premises from the tax sale until commencement of this action, December 20, 1917. If plaintiff's contention be correct, for years she in substance had a speculative interest in said land. If the same decreased in value, the payment of accrued taxes and interest might be more than its value, and she could allow the purchaser of the land to obtain title by adverse possession to that which had become valueless to her; if

it increased in value within the ten-year period she could redeem. The record is silent as to the relative value of this land, but the action of the plaintiff, as gained from the record, would lead us to the belief that her sudden interest in the same might have been quickened by its increased value. She is not entitled to and cannot appeal to the equity side of this court; her rights, if any, are purely of a legal nature. The contention of plaintiff is that, as the record title of said premises at the time of the service of the final notice stood in the name of Corwina R. Mills, the notice should designate the owner as Corwina R. Mills, and service should have been had upon her under that name, and that the deed was void, and she was in no wise bound by the decree of confirmation.

That portion of said section 6605, Rev. St. 1913, applying to the matter under consideration reads as follows: "It shall be the duty of the holder of every tax certificate, other than the state, county or city, to cause a notice, which shall be termed 'Final Notice,' to be served upon the owner as well as every person in actual occupancy of the lands or lots purchased, not less than three months nor more than six months from the expiration of the period or redemption. Such final notice shall be in the nature of process issuing out of the court having jurisdiction over the action wherein the decree was rendered. It shall be the duty of the sheriff of such county, whenever a certificate of tax sale is presented to him on which not more than six months remain of the period of redemption, to issue a final notice to the owner and occupants of the real estate described in such certificate, which notice shall be entitled in the cause and shall notify the persons therein named, and the occupants of the land, that such land was sold on a day named, under a decree of court, and that the time of redemption from such sale will expire on a certain day therein named. * * * If the true and full name of the owner or occupant is not known, it shall be sufficient to designate such person by any name or discription; or he may be designated as 'unknown.'"

Section 6579, Rev. St. 1913, as to notice of commencement of suit, contains, among others, the following provision: "There shall likewise be published in connection with such notice a complete list of the lands and lots as shown in the county treasurer's statement of delinquent taxes, and opposite each description the name of the owner as shown by the county assessment roll of the preceding year."

The final notice as cited in said section 6605 is that the notice shall issue "to the owner and occupants of the real estate described in such certificate, which notice shall be entitled in the cause."

From reading the entire act and construing its entire provisions together, we can only arrive at the following conclusions: That the assessment roll is conclusive, as far as all proceedings are concerned leading up to the deed, as to the name of the owner; that the case is to be entitled in the final notice for confirmation as the original case; and that, in order that the different sections of the act should harmonize and be consistent, the name of the owner of the premises should be designated in all of the proceedings as provided in section 6579.

"In construing a statute, an imperative rule is that effect, if possible, must be given to every clause and part of the statute." *State v. Fink,* 74 Neb. 641. *McIntosh v. Johnson,* 51 Neb. 33; *McCann v. McLennan,* 2 Neb. 286. If in one part the proceedings and parties are definitely defined and designated, while in another part of the same proceedings a different requirement is provided, it would constitute an inconsistency that could not be reconciled, and if the contention of plaintiff be correct, this condition exists in the instant case. There is no greater sanctity thrown around the final notice and no greater necessity of naming the record owner of the land than in the proceedings leading up to the certificate of sale. Furthermore, the act defines who is owner and how designated. From a critical examination of the entire act under which the title to the land was acquired by defendants, we are con-

vinced that the requirements of the statutes were complied with in regard to final notice and service thereof.

The contention of the plaintiff is that the misnomer in the notice and affidavit in which service was made gave the court no jurisdiction to render a decree of confirmation. However this may be, and however defective our reasoning is as contained in the foregoing discussion, the court did confirm the sale; deed was issued, and from 1909 until the commencement of this action, a space of over seven years, defendant Bundy has been in possession of said premises as owner, under a title based upon the decree of the court confirming said sale. Whether the decree is valid or not, during all of said time plaintiff has remained quiescent, and has not until the commencement of this action attempted to assert her rights as owner. Undoubtedly it was to meet such contingencies that section 6615, Rev. St. 1913, was enacted, which reads as follows: "No action shall be maintained against a person in possession of real estate under a recorded treasurer's deed until such person has been tendered the full amount paid at the tax sale with interest and costs and all subsequent taxes paid with interest to the date of the tender; and no action shall be maintained against a person in possession of real estate under such deed who has been in possession thereunder for a period of five years."

The case of *Delatour v. Wendt*, 93 Neb. 175, is cited by plaintiff to sustain her contention that the tax deed is void. She says in her brief: "A tax deed based thereon was void for all purposes." The above case does not so hold. What this court did say was "that the notice was insufficient, and that the deed issued in such suit was void as against the owner." The questions in the *Delatour* case did not involve the statutes of limitation involved in the instant case, and the facts in the cited case are shown in the second paragraph of the syllabus, which reads as follows: "Where one, claiming title to real estate by adverse possession, entered originally without color of title or claim of right, and the acts relied upon to show entry and occupation were con-

sistent with a mere intention to trespass from time to time until interfered with by the true owner, his testimony that he intended to take possession and hold and occupy as owner, uncorroborated by acts necessarily indicating such intention, is not sufficient to require a finding in his favor. *Knight v. Denman,* 64 Neb. 814."

Plaintiff also cites us to the cases of *Clarence v. Cunningham,* 86 Neb. 434, *Humphrey v. Hays,* 85 Neb. 239, and *Smith v. Potter,* 92 Neb. 39. We have examined the above-cited cases, and the general principles therein declared are unquestionably the law of this jurisdiction; but, granting that the deed is void for jurisdictional defects, it is not the deed alone that gives the grantee title, but the deed coupled with possession. Where title is obtained by adverse possession for ten years, it makes no difference how defective the title may have been under which the party invoking its protection gained possession; his rights are definitely settled by statute. There was no fraud committed or attempted in the instant case. If there was a defect in the name of the owner, it was a pure mistake as to the requirements of the statutes, and not a question of fraud.

It is apparent that the intention of the legislature was to fix a definite period after which, notwithstanding any defects that might arise in the proceedings, lack of jurisdiction included, if the owner of property was so neglectful of his interest in the same as to allow it to be sold for taxes, sale confirmed, deed issued, and possession of the same held under the deed so issued for the space of five years, he was absolutely barred from maintaining an action for redemption or possession. It is not only the deed of the treasurer, but possession, that forms the basis of the defendant's right. These conditions existing are just as effective to bar the owner as that open, notorious, adverse, and hostile possession of premises for ten years perfects title in the claimant. Plaintiff has cited us to numerous holdings of this court, as to the necessity of proper service, and also of the lack of jurisdiction of the district court

to confirm the sale made under the tax certificate, but that is not the question. Conceding that the court had no jurisdiction to confirm the sale, and that the deed issued to the purchaser was void, but also conceding that the deed was, on its face, valid, and that the defendant entered upon the possession of the premises and retained the possession continuously for over five years immediately previous to the commencement of the action, is the plaintiff barred from maintaining this action by said section 6615, Rev. St. 1913? In our search we have been unable to find that this court has decided this precise question.

In the case of *Buty v. Goldfinch,* 74 Wash. 532, 46 L. R. A. n. s. 1065, in the notes at page 1068, the writer says:

"The courts agree upon the proposition that where the holder of a tax title valid upon its face takes possession legally, and holds adversely during the limitation period, his title cannot thereafter be attacked on the ground of illegality by the former owner, even as a defense." The writer also states as a conclusive proposition the following: "Also they agree that a tax deed to vacant land, valid upon its face, when recorded, gives the holder thereof constructive possession as long as the land remains vacant, and that, if such constructive possession is uninterrupted by the actual possession of the former owner during the whole limitation period and up to the time of bringing the action, the tax title cannot be attacked by the former owner, even as a defense."

In the instant case, however, there was evidence introduced to show that the party whose title depended upon the tax deed was in possession of the said premises during the five-year period immediately prior to the commencement of the action, and had actual, rather than constructive, possession.

The supreme court, in the case of *Walker v. Boh,* 32 Kan. 354, in construing the statute of Kansas, which provides that "any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of land sold for taxes, * * * except in cases where the taxes have been paid

or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter," recognized the rule as above stated with reference to constructive possession, but, on account of the fact that the plaintiff who held the tax title had been out of the state practically all of the limitation period, refused to apply the rule, and allowed the former owner to plead the illegality of the tax deed as a defense. This case was approved in *Coale v. Campbell,* 58 Kan. 480, *Harris v. Curran,* 32 Kan. 580, and *Stump v. Burnett,* 67 Kan. 589.

In the case of *Shawler v. Johnson,* 52 Ia. 472, it was held that the former owner is barred by the five-year statute of limitations from attacking the validity of a tax deed not void upon its face as a defense in an action by the holder of the deed, who was in possession during the limitation period. This was approved in *Bullis v. Marsh,* 56 Ia. 747, and *Monk v. Corbin,* 58 Ia. 503. The same in substance was held in the case of *Brunette v. Norber,* 130 Wis. 632.

In the case of *Jackson v. Neal,* 136 Ind. 173, the court in the opinion say: "In order to make the statute available as a bar, it is not essential that the tax title be a valid one. Its object was not to protect valid tax sales, but invalid ones; valid tax sales, if there are any such, need no such protection. *Smith v. Bryan,* 74 Ind. 515; *Second Nat. Bank v. Corey,* 94 Ind. 457; *Wright v. Wright,* 97 Ind. 444; *Brown v. Maher,* 68 Ind. 14; *Hatfield v. Jackson,* 50 Ind. 507; *Gray v. Stiver,* 24 Ind. 174; *White v. Clawson,* 79 Ind. 188; *Davidson v. Bates,* 111 Ind. 391; *Walker v. Hill,* 111 Ind. 223."

It is also held in North Carolina that a tax deed, although invalid for reasons which appeared upon its face, will nevertheless, under the seven-year statute of limitations, protect its holder from an action of trespass by the former owner, after he has held continuously for the limitation period the land described, in good faith, claiming title by such deed. *Greenleaf v. Bartlett,* 146 N. Car. 495.

In Michigan it is also held that, where exclusive possession has been held for five years, title is obtained thereby, although it might be conceded that the deed under which the party held was for jurisdictional reasons void, because the possessor's title is perfected by prescription under a statute which provides that no tax deeds shall be set aside or annulled after his purchaser or his successors in interest have been in possession for five years. *Pence v. Miller*, 140 Mich. 205.

The concensus of authorities is that, where one holds possession of real estate under a void tax deed, issued under judicial proceedings, for the statutory limitation period, the statute begins to run from the time possession was taken and the deed recorded, and an action cannot be maintained to set aside the title of the pretended owner.

The plaintiff is barred by the statute; she has slept on such rights as she might presume she was invested with. As stated in the well-considered opinion in the case of *Florida Finance Co. v. Sheffield*, 56 Fla. 285: "Much more may be said in support of the policy of a statute that bars the former owner's right to recover by proof of adverse possession for four years by the holder of a void tax deed than may be said in behalf of the statute that bars the former owner's right to recover by proof of adverse possession for seven years under any other color of title. When the state sells lands at tax sale, gives the purchaser a deed regular on its face, takes his money and requires him to go into the actual possession of the land so purchased for four years, causing the purchaser thereby to improve the land at his expense, before he can claim the protection of the statute of limitations, and the purchaser has complied with all the requirements of the law, the former owner who is in default should not be permitted to oust the purchaser because of the dereliction of the officials of the state. The lawmakers have declared this should not be done, good policy proclaims its wisdom, and the courts should give effect to this legislation."

We are of the opinion that under said section 6615, alone, the title to the property in question was vested in the defendant, John H. Bundy, at the commencement of this action, and that the plaintiff had no right, title or interest in the same, and therefore recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

CHARLES W. SANFORD, APPELLANT, V. CLARENCE SCOTT ET AL., APPELLEES.

FILED DECEMBER 23, 1920. No. 21162.

1. **Taxation:** TITLE: MERGER. No merger of a tax with a title subsequently acquired by quitclaim deed takes place where the evidence shows that the possessor of both titles did not so intend.
2. ———: APPLICATION FOR TAX DEED: NOTICE. Under section 6543, Rev. St. 1913, publication of a notice of application for a tax deed by the purchaser of real estate at a public sale thereof for delinquent taxes is not required, unless there is no person in actual occupancy of the premises, and, also, the person in whose name the title to the land appears of record cannot, upon diligent inquiry, be found in the county.
3. ———: TAX DEED: WITNESS. It is not essential to the validity of a tax deed that it be witnessed.

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

Reese & Stout, for appellant.

Lincoln Frost and *Herman Rosenthal, contra.*

CAIN, C.

The plaintiff, Charles W. Sanford, brought this suit to foreclose a mortgage of $500 on lot 10, in block 1, East

Lincoln, and to cancel a county treasurer's tax deed purporting to convey the same to the defendant, Herman Rosenthal, on January 13, 1915. The case was tried on plaintiff's second amended petition, the answer of the defendant Rosenthal thereto, and the reply. Various interlocutory orders were made with reference to previous pleadings, but, as such orders do not affect the merits of the controversy, they will be disregarded. The decree of the district court was that the defendant Rosenthal had acquired good title to the premises by virtue of his tax deed free and clear of the lien of plaintiff's mortgage, and that plaintiff's suit be dismissed without prejudice, however, to certain tax certificates held by him which had not matured at the time of the trial. The plaintiff appeals, assigning the following errors, viz.: (a) The court erred in striking from the petition the allegation of merger of the tax title with the title acquired by a later quitclaim deed. (b) That the publication of the notice under which the tax deed was issued was insufficient and fraudulent, and that, therefore, the tax deed was void, and plaintiff's mortgage was a valid lien. (c) That the tax deed is void because the same was not witnessed. We take up these assignments in their order.

Appellant contends that when the defendant Rosenthal obtained a quitclaim deed from the heirs of the mortgagor on August 24, 1916, the tax title he had acquired on January 13, 1915, became merged into it, and that, therefore, Rosenthal holds the premises subject to plaintiff's mortgage. Of course, if Rosenthal holds under a valid tax deed, he owns the premises free of plaintiff's mortgage, under the authority of *Topliff v. Richardson,* 76 Neb. 114. But, if he holds under the quitclaim deed, the mortgage, if valid, would still subsist, and the court erred in striking the allegations of merger. We do not think, however, under the admitted facts, that there was any merger. In *Longfellow v. Barnard,* 58 Neb. 612, this court said: "Whether a merger results from the possession by the same person at the same time of two estates of different rank

in the same property depends generally on the intention of the owner." On rehearing, this decision was adhered to in 59 Neb. 455. In *Rand v. Fort Scott, W. & W. R. Co.*, 50 Kan. 114, the court said: "Merger is very largely a question of intention, and the court will always presume against it whenever it will operate to the disadvantage of a party." And this doctrine was reaffirmed by the Kansas court in *Zuege v. Nebraska Mortgage Co.*, 92 Kan. 272, 52 L. R. A. n. s. 877, where the precise question here involved was decided adversely to appellant's contention. It seems clear that the holder of the tax title in this case could not have intended a merger of that title into the title conveyed by the quitclaim deed, since by so doing he would have subjected the property to the lien of plaintiff's mortgage to his disadvantage. Not having intended it, we must hold that no merger took place, and that there was no error in the court's ruling.

Appellant's next contention is that the tax deed is void because the published notice of the expiration of the time for redemption and of the applicaton for a tax deed under section 6543, Rev. St. 1913, is fraudulent upon its face. To make appellant's position clear, it is necessary to state some of the undisputed facts. The mortgage sought to be foreclosed was given by Emily C. Stone and her husband, George W. Stone, on October 3, 1901, to Woodward Brothers, and acquired by plaintiff by assignment, which, though challenged, will be treated as valid for the purpose of this opinion. On February 25, 1902, Emily C. Stone died, and on April 3, 1902, her will was admitted to probate in the county court of Lancaster county, Nebraska. On the 5th day of November, 1912, the lot in question was sold at public sale to the defendant Rosenthal for delinquent taxes thereon for the year 1911. On the 10th, 17th and 24th days of July, 1914, the purchaser published a notice in the Firth Echo, setting forth that he had purchased the lot at public tax sale on November 5, 1912, and that at the expiration of three months from the service of the notice and after November 5, 1914, he would apply to

the county treasurer of Lancaster county, Nebraska, for a tax deed. Proof of publication of this notice was made by the publisher of the paper in the usual form, setting forth that it was a legal newspaper published and of general circulation in said county. On January 13, 1915, the tax deed was issued to Rosenthal by the county treasurer. Appellant's argument is that the Firth Echo is an obscure village paper, publication in which tended to conceal rather than impart notice, and that, as there are many newspapers published in the city of Lincoln in which publication might have been made at the same cost, which is fixed by statute, the publication in the paper at Firth bears on its face the stamp of fraud. There is no evidence of the circulation of the Firth Echo outside the publisher's affidavit referred to, and, while we might take judicial notice of the population of the village, we could scarcely take such notice of the extent of the paper's circulation. However, this point becomes immaterial for the reason that we have reached the conclusion that, under the circumstances of this case, no publication of notice was required at all. Section 6542, Rev. St. 1913, provides, among other things, that the purchaser at the tax sale, before he shall be entitled to a deed to the land purchased, shall serve a notice "on every person in actual possession or occupancy of such land or lot and also upon the person in whose name the title to said land appears of record in the office of the register of deeds of the county, if upon diligent inquiry he can be found in the county." It is admitted in this case that due notice was served upon the actual occupant of the lot. It is also admitted that the person in whose name title to the lot appeared in the office of the register of deeds of the county was Emily C. Stone, and that she had been dead over 12 years at the time of the publication referred to. It is obvious that "diligent inquiry" would not have discovered her presence in the county, and that, therefore, the statute did not require the purchaser to serve any notice upon her. It is to be noted that section 6542 relates only to actual personal service of no-

tice. The section relating to publication of notice in a newspaper is section 6543, Rev. St. 1913, and that portion thereof relating to the subject under discussion is as follows: "If no person is in actual possession or occupancy of such land or lot, *and* the person in whose name the title to the land appears of record in the office of the register of deeds in the county cannot, upon diligent inquiry, be found in the county, then such purchaser or his assignee shall publish the notice in some newspaper published in the county and having a general circulation therein." It will be observed in the foregoing that two things must concur before publication of notice in a newspaper is required, viz., that the premises are unoccupied, and that the record owner cannot, upon diligent inquiry, be found in the county. The statute is in the copulative. In the instant case, there was a party in actual occupancy of the lot upon whom due notice was actually served, and, hence, there was no requirement of the statute for publication. It is only where there is both vacancy of the premises and practical impossibility of finding the record owner in the county that publication of notice in a newspaper is required. It seems to have been the legislative intent that, where there is either an actual occupant of the premises or a record owner thereof in the county upon whom actual personal service of the notice can be and is had, then publication of notice in a newspaper is not necessary. Having arrived at this conclusion, it follows that whether the published notice in his case was fraudulent or otherwise becomes immaterial.

It is finally argued by appellant that the tax deed was void for want of a witness. Section 6546, Rev. St. 1913, prescribes the form of the tax deed and it requires no witness. The section then provides: "The deed so made by the county treasurer shall be under his official seal of office and acknowledged by him before some officer authorized to take the acknowledgment of deeds, and when so executed and acknowledged shall be recorded in the same manner as other conveyances of real estate, and when so recorded

shall vest in the grantee, his heirs and assigns, the title of the property therein described." This provision clearly dispenses with any witness, and as the deed in this case was executed in conformity to this section of the statute, it is sufficient. *Bowers v. Chambers*, 53 Miss. 259. But appellant cites section 6196, Rev. St. 1913, requiring that deeds must be executed in the presence of at least one competent subscribing witness, and also cites *Child v. Baker*, 24 Neb. 188, as holding that an unwitnessed deed in this state is insufficient to convey title except as between the parties to the deed. Section 6546 prescribing the form of a tax deed was a special statute enacted subsequently to section 6196, the general statute cited by appellant, and, hence, if there is any conflict between them, the former general enactment must yield to the latter special enactment of the legislature. *Williams v. Williams*, 101 Neb. 369; *State v. Penrod*, 102 Neb. 734. It seems obvious to us that authentication of the execution of an instrument by a public official need not be attended with as great formality as that of a private person, and that it is not essential to the validity of a tax deed that it be witnessed.

Our conclusion is that the tax deed conveyed the title to the defendant Rosenthal free from the lien of plaintiff's mortgage, and that the judgment of the district court is right, and we recommend that it be affirmed.

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

AFFIRMED.

LEW PIXLEY, APPELLANT, V. MAYME HEDRICK CLEAVER ET AL., APPELLEES.

FILED DECEMBER 31, 1920. No. 21049.

1. **Insurance: FRATERNAL ASSOCIATION: INJUNCTION.** A member of a subordinate lodge of a fraternal beneficiary association is not entitled, before exhausting his remedies within the society, to an injunction preventing the officers of the supreme lodge from interfering with the internal affairs of another local lodge by revoking the latter's charter, by taking charge of its funds, by removing its officers and appointing others to fill their places, and by paying the resulting expenses from the funds of the supreme lodge.

2. ———: ———: ———. Postponement of a meeting of a supreme lodge of a fraternal beneficiary association on account of an epidemic, *held* not to destroy a member's remedy by appeal to that body, nor to justify a resort to equity.

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

Weaver & Giller and *Anson H. Bigelow,* for appellant.

Steiner & Boslaugh, W. M. Whelan and *William J. Hotz, contra.*

ROSE, J.

Plaintiff commenced this suit by filing a petition in equity for an injunction. The principal defendant, Mayme Hedrick Cleaver, is Chief of Honor of the Grand Lodge, Degree of Honor, A. O. U. W. of Nebraska. The other defendants are members of the finance and the executive committees of the grand lodge. The society is a fraternal beneficiary association incorporated under the laws of Nebraska. It has a representative form of government. The members of the corporation are affiliated in subordinate lodges with the grand lodge, which is the supreme legislative and governing body. The latter is composed of members elected by the subordinate lodges and defendants are its officers. In 1918 the Grand Chief of Honor,

defendant, suspended Washington Lodge, a subordinate one, took its charter from the wall of its lodge room, removed its officers and appointed others to fill their places, and took charge of its funds. Plaintiff is not a member of Washington Lodge, but belongs to another subordinate lodge. The equitable relief sought by him as plaintiff may be summarized as follows:

Injunction to prevent defendants from allowing or paying grand lodge funds for unauthorized purposes; from allowing or paying grand lodge funds to defray expenses incurred by defendants in defending themselves against litigation growing out of the suspension of Washington Lodge; from allowing or paying grand lodge funds to defend defendants against suits resulting from their illegal or unauthorized acts. There is also a prayer for an order on defendants to restore to the grand lodge the funds expended by them in consequence of the suspension of Washington Lodge.

The grand lodge funds alleged by plaintiff to have been expended by defendants without authority may be itemized as follows:

Expenses and compensation of defendants in connection with the suspension of Washington Lodge, $242.55; funeral benefits on account of deceased members of Washington Lodge, $250; funeral expenses incident to funerals of deceased members of Washington Lodge, $42.40; auditing books, $358.45; expenses in defense of grand lodge officers in suits brought against them by Washington Lodge by reason of its suspension, $761; compensation of officers appointed by defendants for Washington Lodge during the period of suspension, $155.50; total $1,809.90.

Defendants, among other defenses, denied that they had abused their powers as officers of the grand lodge, denied they had misapplied its funds, and pleaded that plaintiff had a remedy for his alleged grievances by appeal to the grand lodge at its annual meeting. Upon a trial of the issues the suit was dismissed. Plaintiff has appealed.

The last of the defenses mentioned is urged to justify the dismissal on the ground that plaintiff should have exhausted his appellate remedies within the association before resorting to a court of equity. This point seems to be well taken. Plaintiff is not seeking to obtain relief under his own beneficiary certificate or to vindicate the subordinate lodge to which he belongs or to redress any grievance not common to other members of the society as a whole. His prayer is based on interference by defendants with the internal affairs of another subordinate lodge and on the payment of resulting expenses out of the funds of the grand lodge. The primary wrongful act pleaded is the illegal suspension of Washington Lodge and incidental thereto are the other acts of which complaint is made. To the Chief of Honor of the grand lodge has been committed the power, when the grand lodge is not in session, to suspend subordinate lodges for cause and to interpret and enforce the charter and the by-laws of the society. Grounds for the suspension of Washington Lodge and authority for using the funds of the grand lodge to pay the resulting expenses were matters of internal management for the consideration of the Chief of Honor of the grand lodge in the first instance. If these powers were wrongfully exercised, there was a remedy within the association by appeal to the grand lodge. Plaintiff did not avail himself of this remedy, and without an effort to exhaust it he has no standing in a court of equity. Courts should hesitate before announcing the rule that each member of fraternal beneficiary associations composed, as some are, of perhaps a million members in subordinate lodges throughout the country, may rush into a court of equity, without regard to his remedy within the society, whenever he can verify a petition alleging that officers of the supreme lodge have wrongfully suspended a subordinate lodge and misapplied funds of the supreme lodge to pay the resulting expenses. Plaintiff, in common with other members, agreed to conform to the laws of the society, including those relating to remedies, and should have ap-

pealed to the grand lodge before resorting to equity. As said by the supreme court of Wisconsin:

"It is certainly not the business of courts of equity to supervise the management and control of fraternal and benevolent associations and incorporations." *Loeffler v. Modern Woodmen of America,* 100 Wis. 79.

The rule adopted by the supreme court of Massachusetts follows:

"The members of an unincorporated beneficiary association, organized by charter from a state council, which is subordinate to a national council, cannot maintain a bill in equity against the officers of the state council, after the charter of the association has been declared forfeited by the state council, to recover possession of property formerly belonging to the association, upon the ground that the charter was illegally declared forfeited, until they have exhausted the remedies prescribed in the constitution and laws of the national council, which give a right of appeal from the action of a state council." *Oliver v. Hopkins,* 144 Mass. 175.

This court is committed to the same doctrine. *Wilber v. Lincoln Ærie, F. O. E.,* 99 Neb. 428; *Parish of the Immaculate Conception v. Murphy,* 89 Neb. 524.

To prevent the application of the rule stated, it is argued that plaintiff was without a remedy within the society because an epidemic prevented the grand lodge from meeting at the appointed time. This was a mere postponement which did not oust the grand lodge of jurisdiction to hear and determine an appeal nor destroy plaintiff's remedy. Courts of equity themselves cannot always avoid the delays incident to quarantine regulations, and in this particular case plaintiff has been seeking equitable relief for more than two years without success. Plaintiff's position seems to be untenable.

It is also contended that there were no available funds to defray the expenses of a meeting of the grand lodge, and that therefore appeal was not an adequate remedy. On

this issue of fact the finding is in favor of defendants. The suit was properly dismissed.

AFFIRMED.

DAY, J., not sitting.

VAN B. LADY, ADMINISTRATOR, APPELLANT, V. GEORGE W. DOUGLASS, APPELLEE.

FILED DECEMBER 31, 1920. No. 20799.

1. **Negligence:** MOTOR VEHICLES: UNLAWFUL RATE OF SPEED. When a driver of a motor vehicle exceeds the speed limit provided by statute, such driving is not negligence *per se*, but is to be considered by the jury with all of the evidence and circumstances of the case in passing on the question of negligence.
2. ———: ———: ———. "If a driver of a motor vehicle runs it at a rate of speed 'forbidden by ordinances enacted for the safety of the general public, and injuries result, these facts afford reasonable grounds for inferring negligence prejudicial to the rights of those in whose interests and for whose protection such municipal regulations were adopted.' *Omaha Street R. Co. v. Duvall*, 40 Neb. 29." *Stevens v. Luther*, *ante*, p. 184.

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

T. W. Blackburn, for appellant.

H. H. Baldrige, contra.

DEAN, J.

Mrs. Catherine Zweifel, 69 years of age, was struck by an automobile driven by the defendant in Omaha and from the resulting injuries she died within a few hours. Van B. Lady, administrator of her estate, sued to recover damages alleged to have been sustained by the next of kin on account of her death. The jury returned a verdict for defendant, the suit was dismissed, and plaintiff appealed. On appeal the case was heard by the supreme court commission and on its recommendation the judgment

was reversed. Subsequently, on defendant's application, a rehearing was allowed and the case has been reargued and submitted to the court.

Mr. C. M. Buck is a postal employee, and he and his wife were the only eye-witnesses called by plaintiff. Mr. Buck testified that they were out walking on the Sunday evening of the accident; that he saw Mrs. Zweifel just before the accident about two blocks away. He further testified: "Q. Did she walk these two blocks as rapidly as you did? A. She must have, about as rapidly as we did. Q. And you were going pretty fast? A. We were going in a hurry to get home on account of the rain; yes, sir." In his testimony he said in detail that Mrs. Zweifel continued her walk, and that she walked rapidly from the southeast corner of Twenty-fifth avenue and Fort street to the northeast corner of the intersection, and that she was looking straight ahead to the northwest and did not at any time look toward the east, the point from whence defendant's car was approaching; that the car was lighted, and there was no obstruction between it and Mrs. Zweifel as it approached from the east, nor was there any machine or wagon moving in that immediate vicinity; that she stepped in front of the car, and that as nearly as he could tell she was looking toward the northwest while the car at the time was moving toward the west; that when she was struck she was possibly 3 or 4 feet north of the north rail of the street car tracks; that in his opinion the car was going 10 or 12 miles an hour; that the scene of the accident was in a resident district about 4½ miles away from the business center of the city. Mrs. Buck on the cross-examination corroborated the material testimony of her husband. She said that Mrs. Zweifel walked rapidly across the intersection and was looking toward the northwest and did not look toward the east from whence the automobile was approaching; that there was no obstruction between Mrs. Zweifel and the machine, nor did she see any other machines on the street nor any street cars passing at the time; that the night was dark and rainy; that she

and her husband walked rapidly on account of the rain; that Mrs. Zweifel likewise walked at a rapid pace apparently to get out of the rain; that it seemed to her that she stepped immediately in front of the automobile.

Mr. Ennis, his wife, and Mrs. Griffith, who were eyewitnesses, were called by defendant. Mr. Ennis testified that the defendant's car at the time was running at a rate of 8 to 10 miles an hour; that he was walking with his wife and Mrs. Griffith, and that while they were walking a block the car ran about a block and a half; that the car was lighted and the top was up; that a light rain was falling; that he, his wife, and Mrs. Griffith "were walking at a fair rate." Mrs. Ennis testified that she saw the defendant as he approached the scene of the accident, and that "he was not going much faster than we were walking, but we were walking as fast as we could walk on account of the mist, we wanted to get home on account of the rain;" that her party walked a little more than one-half block while defendant drove a block; that when Mrs Zweifel was picked up her clothing was not soiled, and that she did not look as though she had been dragged over the street. Mrs. Griffith lived four blocks from the intersection in question. She testified that her party was walking west on Fort street; that defendant's car passed them, but was not going much faster than they walked; that the car ran a block while they walked a half block; that when Mrs. Zweifel was assisted to her feet her clothing was not apparently disarranged.

Defendant testified that on the night of the accident he and his wife were returning from church services; that the car was a five-passenger Allen equipped, and lighted at the time, with 16 or 18-candle power Westinghouse lights; that as he approached the intersection he had the car under control; that it was running from 6 to 8 miles an hour while in the intersection; that he drove cautiously because of the falling rain; that the first intimation that he had of Mrs Zweifel's presence was when she appeared as a dark object immediately in front of the radia-

tor; that he did not know at the time what the object was; that he saw no person in front of the car within the radius of the lights; that he did not know from what direction she came nor from which side of the car and he did not have time to stop until after the impact; that the wind shield was down and he could see clearly because the lights extended 10 or 12 feet in front of the car and 2 or 3 feet on each side and the dimmers were on; that the light on the street corner did not throw as much light as his car; that as soon as he saw the object in front he immediately pulled into the curb and stopped; that after the impact the car moved not more than 25 feet; that he could have stopped it in less than that distance, but that he wanted to clear the object before stopping; that he did not see her at any time before the car struck her; that he immediately went back and found Mr. and Mrs. Buck and Mr. and Mrs. Ennis assisting her to her feet; that he circled the car around where Mrs. Zweifel was and with the others assisted her into the car and took her home; that Mrs. Zweifel was picked up at the place where she fell; that her clothing did not indicate that she had been dragged on the street; that after they took her home he immediately took his car and returned with Doctor Ross to attend the injured woman. Doctor Ross, who was the only physician to testify described her condition and said that there was no ing about her person or clothing to indicate that she had been dragged over the street.

Substantial conflict does not appear in the material evidence of those who witnessed the accident. But in any case the jury passed on the weight of the evidence submitted. It seems clear that decedent in her haste to escape the rain did not take precaution for her safety. This material fact seems to have been established by plaintiff's and defendant's witnesses. It appears too that the part of the city where the accident occurred was not thickly settled and that few persons were on the street at an hour so late as 9 o'clock. It is argued by plaintiff that the court erred in that it did not instruct the jury on compara-

tive negligence (Rev. St. 1913, sec. 7892), but plaintiff tendered no instruction on either comparative or contributory negligence, and as we find that negligence on the part of defendant was not established by the evidence, it follows that error cannot be predicated upon this assignment.

Plaintiff argues that defendant exceeded the speed limit in violation of the law, then in force but since repealed (Laws 1919, ch. 222), which provided that the driver of a motor vehicle, "when crossing an interesection of streets within any city or village," should not run such vehicle at a rate of speed exceeding six miles an hour. Rev. St. 1913, sec. 3049. He insists that defendant, exceeded a speed of six miles an hour as shown by his own evidence and that of other witnesses, and that his act in so doing constituted negligence *per se,* and he argues that the jury should have been so instructed. We do not think so. The correct rule is determined in *Stevens v. Luther, ante,* p. 184, wherein our former decisions on this question are reviewed and the rule laid down in *Omaha Street R. Co. v. Duvall,* 40 Neb. 29, is adhered to. It is there held in substance that the violation of such a statute as that under consideration here is evidence for the jury to consider in connection with all the other facts and circumstances in evidence. Under the facts in the record the jury were properly instructed on this point.

In view of our conclusion, we find it unnecessary to discuss the question of damages presented in the record. We do not find reversible error. Our former judgment is therefore vacated, and the judgment of the district court is

AFFIRMED.

APPEL MERCANTILE COMPANY, APPELLEE, V. EDWIN S. KIRTLAND, APPELLEE: BANK OF ORLEANS, APPELLANT.

FILED DECEMBER 31, 1920. No. 21168.

1. **Chattel Mortgages.** A chattel mortgage in this state merely creates a lien and does not pass title to the mortgagee. It is in the nature of a pledge to secure payment of the debt.
2. **Fraudulent Conveyances: BULK SALES LAW: CHATTEL MORTGAGE.** Section 2651, Rev. St. 1913, known as the "Bulk Sales Law," was enacted to regulate the business of merchandising, and a chattel mortgage given in good faith upon a stock of merchandise is not within the inhibition of that statute.

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

Fawcett & Mockett, for appellant.

Hainer, Craft & Lane, contra.

ALDRICH, J.

This is an action in equity brought in the district court for Lancaster county against Edwin S. Kirtland and the Bank of Orleans, defendants, by the Appel Mercantile Company, a corporation, growing out of an alleged fraudulent disposition of a stock of goods and other property owned by Charles W. Pierson and Orilla Pierson to the defendant bank and Edwin S. Kirtland.

In 1905, the Piersons, who were husband and wife, residents of Orleans, Nebraska, filed their certificate of partnership according to law in Harlan county and commenced the business of the Orleans Watch Company, which comprised a general repair, jewelry and mail order business. The wife conducted a millinery business in the same room of the building. The husband had no interest in the millinery business. Pierson and his wife each separately maintained an account with the Bank of Orleans. The Piersons checked on their own individual account in this bank to

meet their respective obligations. This was continued until July 31, 1907, when the bank took possession of both stocks of goods, their books and accounts, fixtures and household furniture. At the close of this business no creditors except the Bank of Orleans and Mr. Kirtland were pressing the Piersons. Kirtland, president of the Bank of Orleans, acted as attorney for Pierson and wife.

On July 30, 1907, a note and mortgage for $660.88 were made by Pierson and wife to the bank. This mortgage covered both stocks of goods as well as the fixtures and furniture hereinbefore mentioned. A short time prior to the execution of the $660.88 note and mortgage, Mrs. Pierson had gone on a visit to Ohio, leaving Mr. Pierson in charge. Other chattel mortgages were given, and, with the exception of one for $300, none of them was filed as required by law until July 31, 1907. On the day following the delivery of the note and mortgage for $660.88, Mr. Kirtland, as president of the bank, came to Mr. Pierson, demanded the keys to the building, the same were delivered to him, and he took possession for the bank.

Mrs. Pierson testified that she began her millinery business on credit obtaining her stock from the Appel Mercantile Company; that she practically did all her buying from the appellee, and that she conducted her business for three reasons.

The question of jurisdiction was raised growing out of the alleged insufficiency of the service. There is nothing of merit in the question, for the defendants each submitted to the jurisdiction of the court. They waived any defect there might have been in the service when they submitted to the court's jurisdiction.

It is claimed that the chattel mortgage given by Mrs. Orilla Pierson on the stock of millinery goods was fraudulent and given for the purpose of hindering and delaying creditors. This is not correct in our opinion. The defendant bank advanced money in payment of the running expenses and other items until Mrs. Pierson owed the bank as per one certain note and chattel mortgage the sum of

$660.88. Other chattel mortgages and notes were given, but this appeal actually involves only the note given by Mrs. Pierson. All the other mortgages and transactions were merely incidental to this transaction.

The appellees seek to fix liability for this transaction upon Mr. Kirtland, one of the defendants, who was president of the defendant bank at the time of the transaction. We have carefully examined the record and hold that there is not sufficient evidence to fix any joint or several liability against defendant Kirtland as joined with the defendant bank, and that he was properly dismissed out of the case.

The next question which presents itself for our consideration on this appeal is: Was the giving of such chattel mortgage a nullity? Under section 2651, Rev. St. 1913, it is provided, among other things, that: "The sale, trade or other disposition in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the sellers.'

Thus the plaintiff seeks to invoke a law to nullify this chattel mortgage. This proposition might be well taken if this state had not already held: "In this state the title to mortgaged chattels remains in the mortgagor until foreclosure of the mortgage." *Drummond Carriage Co. v. Miller,* 54 Neb. 417. It has also been held by this court that a chattel mortgage in this state merely creates a lien and does not pass title to the mortgagee. *Omaha Fire Ins. Co. v. Thompson,* 50 Neb. 580. It is plain that it is the law of this state that a chattel mortgage only creates a lien on the property securing the payee for the payment of the debt. It in no sense passes title. The legal title at all times remains in the mortgagor until he is divested by foreclosure proceedings and sale in pursuance of the statute. Until the title of the mortgagor is disturbed by sale as provided by statute the mortgagee merely has a lien on the property for purposes of security. *Musser & Co. v. King,* 40 Neb. 892.

Then it is plain that in the instant case the bulk sales law has no application, and is not invalid merely because of the limited number of persons who will be affected by it. The act applies to all the people of the state. In reality it is merely the regulation of the business of merchandising. It cannot be considered as class legislation because of the limitations of the act to merchants. The act in question here applies equally to all the merchants of the state. It does not take away property of the citizen, but only regulates in such a manner as to prevent fraud, and that was the real intent and purpose of its enactment.

The record establishes that Mrs. Pierson was the sole owner of the stock. She did business individually for herself and had no relation with her husband in this millinery stock. She deposited, checked out and had a separate account. This bulk sales law, then, is not in violation of any of the provisions of our state Constitution.

The defendant bank had a perfect right to secure payment for the money advanced to Mrs. Pierson, and when it took a chattel mortgage upon this millinery stock it did what any prudent business man had a perfect right to do. We hold the mortgage was a legal and valid lien and the foreclosure was regular and in accordance with the statute. The mortgage, in our opinion, was made in good faith and was an honest transaction.

Other items are discussed and brought up in this action, but the validity of the $660.88 note and mortgage last given and the nonapplication of the bulk sales law really determine the issues in this case. The defendant bank could not be held for more than has been determined the note and mortgage were given for. It appears in the record that in the Harlan county district court plaintiff obtained a judgment for $640. This finding still stands, has never been modified or appealed from. Hence plaintiff has the full force and benefit of it. Under the facts as appear of record in this case we hold this action must be reversed and dismissed.

REVERSED AND DISMISSED.

ROBERT A. PICKENS ET AL., EXECUTORS, APPELLEES, V. ALEXANDER PICKENS, JR., APPELLANT.

FILED DECEMBER 31, 1920. No. 21230.

1. Wills: CONSTRUCTION. "In the construction of a will the intention of the testator, if it can be ascertained, must govern. Such intention should be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will." *Worley v. Wimberly*, 99 Neb. 20.
2. ———: ———: INTEREST. Under the provisions of the will set out in the opinion, *held*, that the testator intended the interest in question should be paid to his widow during her lifetime.

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

James & Danly, for appellant.

Tibbets, Morey & Fuller, contra.

ALDRICH, J.

The plaintiffs, executors of the will of Alexander Pickens, Sr., brought this action to recover from defendant interest alleged to be due on two promissory notes, one for $1,000, dated October 1, 1914, due two years after date, and the other for $12,500, dated October 6, 1914, due September 1, 1924, both notes being payable to deceased and drawing 6 per cent. interest per annum payable semi-annually. The notes were given as part of the consideration paid by defendant for the greater part of his father's interest in the dry goods business of Pickens & Bratton in Hastings. As a further ground of recovery plaintiffs allege that, a dispute having arisen between the plaintiffs and defendant as to the construction of the will, in connection with the transfer by the plaintiffs of the interest of the estate in the firm of Pickens & Bratton, as a compromise and final settlement of the dispute and in consideration of the sale of the interest of the estate in the dry goods business at

a certain price, defendant agreed in writing to pay interest on the above mentioned notes. Defendant admitted the execution and delivery of the notes and also the signing of the contract to pay interest. He alleges that under and by virtue of the will of Alexander Pickens, Sr., now deceased, which was duly probated in county court, the debt is changed to an advancement, upon which no interest can be collected. The signing of the alleged agreement to pay interest, he alleges, was without consideration. Defendant filed a cross-petition to recover $534.53, alleged to be interest paid on these notes under a mistaken idea of his liability. A jury was waived and the court rendered judgment in plaintiffs' favor for $421, and interest. Defendant appeals.

The principal question for us to determine is the meaning of section eight of the will of Alexander Pickens, Sr., now deceased. Defendant contends that this section changes the debt to an advancement, and that no interest is due thereon after the death of the testator.

Section eight of the will reads as follows: "I direct that the amount of indebtedness to me of any of my said children as may be shown by my papers shall be treated as an advancement and as reducing by the amount of such debt the share of such child in my estate." This section is limited and qualified by other provisions of the will.

In construing a will the intention of the testator is the controlling circumstance, and to ascertain this intention the entire will must be considered, not any single provision thereof. First, the testator bequeathed and devised his entire estate to his executors, plaintiffs herein, in trust. After providing for the payment of debts and the erection of a monument, he gave certain directions which are instructive in arriving at his intention as to advancements. We quote some of the provisions:

"2. It is my desire that the principal of my estate be kept unimpaired, so long as my beloved wife, Margaret, shall survive me, and for a further period of three (3)

years thereafter, the income thereof to be applied as hereinafter provided.

"3. During the lifetime of my wife, I direct that the whole income of my estate, after the payment of such sums as may be necessary for the preservation thereof, be paid to her, the same together with furniture, household effects and family conveniences, to be subject to her absolute control and use so long as she may live.

"4. For a period of three (3) years after the death of my wife, or after my own death, if I should survive her, the net income from all my estate shall be divided, share and share alike except as reduced by advancements as hereinafter mentioned among all my children on or about January and July first, in each year.'

It is apparent that the testator intended that his "estate be kept unimpaired" so long as his wife survived him, and that the "whole income" of the unimpaired principal of his estate was to be paid to her during her lifetime. The "whole income" included the interest on the indebtedness evidenced by the two notes. It was the intention of deceased to amply provide for his widow. He gave her no part of the principal of the estate, but did give her the entire income therefrom for her maintenance and support.

From a liberal interpretation of all the provisions of the will, we think that the testator must have intended that the defendant pay the interest on the notes in question until the death of Mrs. Margaret Pickens, the widow of deceased. At her death, and not until then, is defendant released from liability to pay this interest.

It also appears that in paying this interest defendant will be doing nothing that he did not agree in writing to do. After the death of testator, the defendant and his partner wished to buy from the executors the interest of the estate in the dry goods business. A dispute arose as to the construction of the will and the parties made certain concessions to each other to effect a settlement of their differences. At that time defendant signed the following agreement:

"Whereas, I am indebted to the estate of A. Pickens, deceased, in the sum of twelve thousand, five hundred dollars ($12,500), evidenced by one promissory note dated October 6th, 1914, bearing interest at six per cent. per annum, payable semi-annually, and

"Whereas, I am also indebted to said estate in the further amount of one thousand dollars ($1,000), evidenced by a certain other note bearing interest at six per cent. per annum, payable semi-annually.

"Now therefore, as part of the transaction involving the sale and transfer of the interest of the A. Pickens estate in the Pickens & Bratton dry goods business, I agree with R. A. Pickens and W. J. Hynes, executors, that I will pay such interest thereon as may become due from time to time as the same matures, and that at the time of final distribution of said estate, in accordance with the will of said A. Pickens, deceased, there shall be deducted from my share of said estate whatever balance, if any, may be found due from me to said estate according to the tenor and effect of said notes and said will.

"Witness my hand this 18th day of December, 1917.

"A. Pickens, Jr."

"In the presence of C. F. Morey."

Defendant contends there was no consideration for the signing of this agreement, but there is competent evidence in the record tending to show that this agreement was entered into by the parties in consideration of the settlement of their differences, and also that the interest of the estate in the business was sold for less than its actual value. We think there was sufficient consideration.

The defendant in signing this agreement and agreeing to pay the interest gave his interpretation of the will. In view of all the circumstances we are constrained to adopt this interpretation.

The findings and judgment of the trial court were supported by sufficient and competent evidence. Substantial justice has been done between the parties and the intention of the testator carried out. The judgment is

AFFIRMED.

THERON C. HECHT, APPELLEE, V. ALBERT F. MARSH, APPELLANT.

FILED DECEMBER 31, 1920. No. 21142.

1. **Statute of Frauds:** ESTOPPEL. Equity will not allow the statute of frauds to be used as an instrument of fraud, and where a party to a written contract within the statute induces the other to waive some provision thereof upon which he is entitled to insist, and to change his position to his disadvantage with respect thereto, by himself promising to modify it with respect to some provision for his benefit, he will be estopped to claim that such subsequent oral modification is invalid because not in writing.

2. **Evidence:** ADMISSIBILITY. In defense to a broker's action for the commission stipulated in his written authority to sell land, the principal alleged, and offered parol evidence to prove, that negotiations with the purchaser were about to fail because the latter could not meet the terms upon which the broker was authorized to sell, when the broker, in order to induce the principal to sell on other terms, orally proposed that, if he would conclude the sale on those terms, he would claim no commissions unless the purchaser performed his contract, and that he consented to the sale upon modified terms in reliance upon that condition. The purchaser refused to perform. *Held*, error to refuse to receive the offered evidence.

3. **Vendor and Purchaser:** EXECUTORY CONTRACTS: VALIDITY. An erroneous recital in an executory contract for the sale of land as to the valuation fixed upon a certain tract in the transaction will not invalidate it for uncertainty or prevent its enforcement, where the ambiguity is explained and the real valuation intended by the parties is disclosed by the other provisions of the contract.

4. ———: ———: ESTOPPEL. The vendor in an executory land contract, who covenants to accept the conveyance of a certain tract therein described in part payment of the purchase price of his land, will not be heard to say that the contract was void because of an erroneous recital therein of the valuation placed upon said tract, where it appears that he intended to accept it at its true valuation nowithstanding the error, and was not misled or injured thereby.

Hecht v. Marsh.

APPEAL from the district court for Arthur county: RALPH W. HOBART, JUDGE. *Reversed.*

Beeler, Crosby & Baskins, for appellant.

Hastings & Hastings and *Scott & Scott, contra.*

DORSEY, C.

The plaintiff, Theron C. Hecht, recovered judgment upon a directed verdict against the defendant, Albert F. Marsh, upon a real estate broker's written contract for the sale of the defendant's land in Arthur county, which provided for the payment of a stipulated cash commission "if a sale is made, or a purchaser therefor found, at the price and upon the terms specified herein, or at any other price or terms which I may hereafter authorize or accept." The terms specified were that the land might be sold for $9,600, of which $2,920 was to be paid in cash, $2,100 by the purchaser assuming incumbrances in that amount, and the remainder to be arranged "to suit purchaser."

The plaintiff brought the defendant and one Jack Baker together, and on April 25, 1917, a written sale contract was executed whereby Baker agreed to purchase the land at $9,600, to be paid by his deeding to the defendant a quarter section in Perkins county, assuming existing mortgages on defendant's land in the sum of $2,100, and giving a new mortgage back to the defendant on the land conveyed to Baker in the sum of $3,500. This contract called for the furnishing of good and sufficient deeds and abstracts of title mutually by the parties not later than May 10, 1917. But about May 1, 1917, Baker notified the defendant by letter that he would not fulfil the contract, and it was never carried out, the defendant taking no steps to enforce it.

In his petition the plaintiff set out the broker's contract and alleged that the sale contract above mentioned was entered into through his efforts pursuant thereto; that he had fully performed and was entitled to the stipulated commission, for which he prayed judgment.

The answer set up Baker's failure to comply with the terms of the sale contract, and averred that at the time of the negotiations with Baker the defendant insisted that a forfeit be deposited and stated that he would not sign a contract without such forfeit; and that, in order to secure his signature to the contract, the plaintiff orally agreed with the defendant to waive any claim to commissions unless the sale should be completed in accordance with the terms of the contract. These allegations were put in issue by reply.

The defendant offered parol evidence at the trial to prove, in substance, that after the negotiations between Baker and himself were about to fail because of Baker's inability to post forfeit money, the plaintiff, in order to prevent a failure of negotiations and to induce the execution of a contract of sale, orally agreed to make his claim for commissions in the transaction contingent upon the purchaser's compliance with the contract. The offered evidence was excluded, and an issue of law is thus squarely presented as to whether a contract between a landowner and a broker required by the statute to be in writing is susceptible of subsequent parol modification with respect to the compensation provided for therein.

It has been held by this court that the general rule prohibiting the subsequent oral modification of contracts required by the statute to be in writing applies only with respect to those provisions which the statute expressly requires to be contained in the writing in order to make it valid. *Hetzel v. Lyon,* 87 Neb. 261; *Rank v. Garvey,* 66 Neb. 767. Two provisions only are specifically mentioned in section 2628, Rev. St. 1913, as essential to contracts employing brokers to sell land, namely, that the land be described and the compensation set forth. The modification which the defendant set up in his answer and offered to prove in the instant case relates to the compensation; the plea is that the defendant's agreement under the written contract to pay the stipulated commission, in case the plaintiff made a sale on terms satisfactory to the

defendant, was changed by subsequent oral agreement into a promise to pay it only in the event that the purchaser should perform his contract. If, therefore, the rule of the cases last cited is to be rigorously applied, there was no error in the exclusion of the offered evidence.

If there is any factor in the instant case which removes it from the operation of that rule, it must be found in the fact that when, according to the defendant's offered proof, the negotiations were about to fail because of Baker's inability to meet the defendant's terms, the plaintiff interposed between the parties, and offered the defendant an inducement to waive his right to insist upon those terms by promising not to claim commissions if Baker did not perform. Taking the defendant's offer of proof as true, the situation was that Baker was not ready to deal upon the terms upon which the defendant had authorized the plaintiff to sell his land. Instead of $2,920 in cash, he proposed to pay no cash at all, but to put in his land in Perkins county as the equivalent of $4,000 of the purchase price. Not only was Baker's proposition a material departure from the terms upon which the defendant had authorized his land to be sold, but Baker was unwilling or unable to comply with the custom in such transactions and to put up forfeit money as an evidence of good faith. Under those conditions it would not be unlikely that the defendant was reluctant to approve the proposition and to enter into a contract for the sale of his land, thus subjecting himself to the payment of commissions, without adequate assurance that Baker would perform on his part.

It was, moreover, the defendant's absolute right to stand upon the terms embodied in his authority to the plaintiff to sell the land, and to refuse to negotiate with Baker upon other terms. According to the defendant's offered proof, that was his attitude until the plaintiff intervened with his offer to claim no commissions if Baker should fail to carry out his contract.

If the defendant had persisted in his refusal to deal with Baker on the altered terms, it will not be contended

that the plaintiff would have been entitled to commissions, because the latter would have failed in the primary condition of his right to commissions, which was to produce a purchaser able, ready and willing to buy upon the terms of the contract or upon any others that the defendant might approve. And if the defendant had consented to the altered terms without any inducement being held out to him by the plaintiff, his liability for commissions would be unquestionable. But in the instant case we have the additional element of persuasion or inducement utilized by the plaintiff to overcome the defendant's objections to the altered terms, in the form of an express promise to relieve the defendant of any liability to him if Baker did not perform. The question is whether such a waiver, not in writing, under the accompanying circumstances of influence exerted upon the defendant to overcome his resistance and induce him to execute a contract that he would not otherwise have entered into, will operate to modify the plaintiff's right to commissions under the written broker's contract.

Aside from the special circumstance that the writing was one within the statute of frauds, we should instantly say that the situation presented was such as general considerations of equity ought to preclude the plaintiff from taking advantage of. Yielding to the influence of the plaintiff's offer to waive commissions if the purchaser failed to perform, the defendant waived the terms upon which he had the right to insist and entered into a contract which, within a week, the purchaser expressly repudiated and refused to fulfil. Will the fact that the contract was within the statute of frauds prevent its subsequent oral modification under circumstances which, in the case of a contract not within the statute, would estop a party to it from denying the modification?

In *Simonton, Jones & Hatcher v. Liverpool, London & Globe Ins. Co.*, 51 Ga. 76, the following rule is announced: "Equity will not allow the statute of frauds to be used as an instrument of fraud, and will decree specific

performance or hold the maker of a parol contract estopped from denying it when the other party, by virtue of it, and under and in pursuance of it, has so far acted as that it would be aiding in a fraud to permit the contract to be repudiated. And what equity would do, our courts of law, under proper allegations, will also do." When applied to this case, the rule would mean that if the plaintiff, by his conduct in assuring the defendant that he would be out nothing in commissions if Baker failed to perform, lulled the defendant into a sense of security, induced him to abandon objections upon which he had the right to insist, and persuaded him to make a contract that he would not otherwise have entered into, equity would not permit the plaintiff to repudiate his oral agreement on the ground of the statute of frauds.

Gerard-Fillio Co. v. McNair, 68 Wash. 321, is a case in which the facts bear considerable similarity to those in the instant case. There the broker, in order to overcome the objections of his principal to a certain proposed exchange which was not according to the terms prescribed in his written authority, consented, in lieu of the agreed commission, to accept a sum of money and the conveyance of certain lots. The principal thereupon entered into the exchange, the properties changed hands, and the principal paid the sum of money and tendered conveyance of the lots to the broker. The latter accepted the money but refused the lots, and sued for the remainder of his commissions under the original contract, claiming, as does the plaintiff in the instant case, that the oral modification as to his commissions was invalid with respect to a contract within the statute of frauds. The court held the oral modification binding because the broker "not only induced the appellants to pay it the sum of $200, but it induced the appellants to enter into an exchange of properties which it would not have entered into had the modified agreement not been made." In that case the decision was based partly upon the fact that the exchange of properties had been effected and part of the commission paid and accepted and

the remainder tendered under the contract as modified, and partly upon the rule that the broker was estopped by his conduct; but the existence of the latter rule was recognized.

It has been held in some cases that the subsequent oral modification of a contract required by the statute to be in writing is invalid unless it appears that the parties afterwards executed and performed the contract as modified. In such cases they would have estopped themselves from questioning the modification by their subsequent conduct in acquiescing in and accepting the contract as modified, evidenced by their performance of it. Such was the holding of this court with reference to the oral modification of the rental stipulated in a written lease, whereby a decreased rental was paid and accepted. *Bowman v. Wright*, 65 Neb. 661.

In the instant case, however, the contract as orally modified does not, under the defendant's pleading and offered proof, rest upon estoppel arising from the subsequent acquiescence of the parties in it, but upon estoppel arising from the precedent conduct of one of the parties in inducing the other to change his position in reliance upon it. According to his theory, the defendant was acting upon the commission contract as orally modified, when he signed the contract with Baker; under the plaintiff's theory, on the contrary, in signing that contract, the defendant was acting upon the original unmodified commission contract. The making of the contract with Baker was not, therefore, an act so distinctly referable to the modified commission contract as clearly to mark it as an act of performance of that contract, as distinguished from an act in performance of the original contract. Thus, the alleged oral modification cannot be held valid on the theory of subsequent performance, unequivocally recognizing and executing the contract as modified, but only, if at all, upon the theory of estoppel arising from the precedent conduct of the plaintiff.

There is no reason, in our opinion, why a party to a contract within the statute of frauds may not be estopped by his conduct from disputing a subsequent oral modification of it to the same extent as a party to any other contract. It is a principle of equity, superior to any technical or artificial legal rules, which takes effect whenever the assertion of such a rule would result in perpetrating or ratifying a fraud. We therefore conclude that the defendant was entitled to introduce evidence in support of the averments of his answer, and that there was, in his pleading as well as in the preliminary questions propounded to his witnesses, a sufficient foundation for his offered proof.

Another contention of the defendant is that the contract with Baker was so ambiguous with regard to the value at which the land in Perkins county was to be taken in the transaction as to indicate a mutual mistake which would render that contract unenforceable. The defendant covenanted to take this land at $3,350 and to assume a mortgage on it for $650. He contends that the figures should have been $4,000, as the amount at which the land was to be valued. We are convinced by our examination of the contract, however, that the value intended was $4,000, and this is disclosed by reading all the provisions of the contract together.

The defendant, moreover, cannot be heard to say that the contract was void because of an erroneous recital therein, since it appears from the record, independently of the contract, that he intended to take the land at $4,000, and that the alleged error in the contract did not mislead or injure him.

Because of error in the rejection of offered evidence, as aforesaid, we recommend that the judgment of the court below be reversed and the cause remanded.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, and this opinion is adopted by and made the opinion of the court.

REVERSED.

HARRY W. EKBERG, ADMINISTRATOR, APPELLEE, V. FRED C. LANCASTER, APPELLANT.

FILED DECEMBER 31, 1920. No. 21223.

1. **Partnership**: DEATH OF PARTNER: RIGHT OF SURVIVOR TO ASSETS. On the death of a partner, the partnership assets, both real and personal, pass to the surviving partner, and he is entitled to the possession thereof, and to hold the same for the purpose of paying the firm debts and the residue for the benefit of himself and the estate of the deceased partner.
2. ———: ———: CONVERSION OF ASSETS BY SURVIVOR: REMEDIES: If, however, instead of gathering the assets, paying the debts, winding up the business and distributing the surplus, he converts the assets to his own use and mingles the proceeds with his own funds or commits such acts in relation to the same that they are wasted or dissipated, a court of equity may give appropriate relief. The partnership creditors or the administrator of the deceased partner may, in such case, obtain the appointment of a receiver and an accounting of the partnership affairs.

APPEAL from the district court for Adams county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

J. E. Willits, for appellant.

Stiner & Boslaugh, S. A. Dravo and *W. M. Whelan, contra.*

TIBBETS, C.

Action by plaintiff as administrator of the estate of a deceased partner against the defendant, the surviving partner, for an accounting and for the appointment of a receiver of the partnership assets. Decree and judgment for plaintiff. Defendant appeals.

The plaintiff is the administrator of the estate of Nels H. Kronquest who, prior to his death on the 31st day of October, 1918, was a resident of Phelps county, Nebraska, and who at the time of his death was the senior member of the copartnership doing business under the firm name and style of Kronquest & Lancaster Auto Company, the junior

member of said copartnership being the defendant herein. The partnership was formed for the purpose of dealing in automobiles and automobile accessories, and their places of business were located in the city of Hastings, Nebraska, and the city of Holdrege, Nebraska. The petition in this action was filed on the 8th day of March, 1919.

The grounds on which the plaintiff seeks relief are: That at the time of the death of Kronquest the assets of the firm amounted to about $40,000 and the liabilities about $50,000; that defendant refused the plaintiff access to and examination of the books of the firm kept at Hastings, or any statement of the transactions of the firm at Hastings, which was under the special care and management of defendant; that the total assets of the firm were less than its liabilities; that the estate of the deceased partner is liable for the debts of the firm and that claims of the creditors of the copartnership have been filed against the estate; that the said defendant is insolvent; that defendant has neglected and refused to make an accounting to the plaintiff as administrator, though requested so to do; that defendant has converted the good will and the assets of the firm at Hastings to his own use, and is conducting the business at Hastings in his own name and for his own benefit, and has commingled and intermingled his own property and business with that of the copartnership; that he has not paid nor made any provision for paying the debts of the firm; that defendant is charging the said firm $150 a month for his services; that an advantageous offer has been made to the defendant for the assets of said firm, which he refuses; that defendant has sold and disposed of some of the assets of said firm and converted the proceeds to his own use; that defendant devotes his entire time and efforts to his individual business, and disregards and neglects to settle up the partnership business. Plaintiff prays for an accounting and the appointment of a receiver.

To this petition the defendant makes a special appearance, and therein insists that the plaintiff does not come in with clean hands, in that the plaintiff has taken and keeps

the defendant out of the possession of the assets of the copartnership, thereby preventing defendant from closing up said copartnership. This special appearance was overruled, and upon hearing a receiver was appointed. Defendant then filed objections to the bond of the receiver and motion to vacate the order appointing a receiver, both of which were overruled by the court.

The first question that presents itself to us is: Did the court have the power under the statutes of this state to appoint the receiver for the assets of the copartnership upon the death of one of the partners? Upon the solution of this question will determine the controversy whether or not the petition stated facts sufficient to warrant the court in overruling the defendant's appearance.

The following propositions are supported by ample and well-considered authorities: First, a partnership is dissolved by the death of one of the partners, under ordinary circumstances; second, the administrator of the estate of a deceased partner has no immediate right of possession in the assets of the firm; third, it is the duty of the surviving partner to wind up the business of the firm as soon as the circumstances will permit, and in so doing has the power to sell and transfer the assets of the partnership, including choses in action. In fact, the surviving partner, for the protection of such interest as he may have in the partnership and to secure himself from future liability for the payment of the partnership indebtedness, acts as a trustee for the interest of the estate of the deceased partner himself, and the creditors of the copartnership, and will be held to an accounting to the executor or administrator of the estate of the deceased partner, and as such trustee will, by the trust imposed, be held to a strict accountability. In view of the foregoing, can the surviving partner be deprived of this trust and the right of possession over the assets of the copartnership, and their disposition, for the purpose of closing up the partnership business? The possession and control of the partnership assets and business has been universally recognized to be

vested in the surviving partner. *Clark v. Fleischmann,* 81 Neb. 445. And the rule is based upon sound reason and a desire to maintain the rights of all interested parties, including creditors, and unless there has been committed some flagrant act on the part of the surviving partner in violation of his trust, the extraordinary remedy of the appointment of a receiver should not be resorted to. We are of the opinion that where the surviving partner, within a reasonable time, fails to settle the copartnership affairs, misappropriates partnership assets and converts them to his own use, a court of equity may interpose and give such relief as may seem necessary in the premises.

In the case of *Russell v. McCall,* 141 N. Y. 437, the court of appeals of that state held: "While, upon the death of one of two copartners, the successor has the legal title to the firm assets, he does not become the full and absolute owner thereof, but holds them charged with a duty to pay the firm debts and to dispose of the residue for the benefit of himself and the estate of the deceased partner, and when, instead of gathering the assets, paying the debts, winding up the business and distributing the surplus, he misappropriates them and converts them to the use of himself and others, he is so far guilty of a breach of trust that a court of equity may give appropriate relief." This rule is supported by a long line of decisions. 30 Cyc. 623; *Emerson v. Senter,* 118 U. S. 3; 4 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1503; *Miller v. Jones,* 39 Ill. 54. It is not necessary to multiply authorities on this branch of the case to the effect that equity may interpose in cases of this character, and defendant has not cited us to any authorities holding the contrary. The fact that the surviving partner is entitled to the possession of the assets and to settle up the partnership business surely does not give him authority to convert the assets to his own use and benefit, or to squander the same. The creditors and parties interested in the deceased's estate have some rights; if their legal rights are inadequate, a court of equity can alone afford them relief. The challenge of

the defendant to the jurisdiction of the court as to the sufficiency of the petition was, in our opinion, without merit.

We now come to the question of the facts in the case. Plaintiff had, as we have indicated, filed a petition alleging facts which, being duly confirmed by proof, would entitle him to the relief prayed for. The principal grounds on which plaintiff relies to sustain his contention are: First, the defendant is insolvent; second, that he is engaged in conducting his own business and neglects that of the partnership; third, that the defendant made no effort for five months after the death of Kronquest to close up the business although he was offered the full purchase price for the goods; fourth, defendant converted funds of the partnership to his own use and benefit; fifth, for the refusal to allow the plaintiff, as administrator, access to and examination of the books of the firm. There were other allegations of the same nature, but they were incidental and embraced in the above. Evidence was presented to support plaintiff's allegations. We have examined the record and in the main we find that the contentions were substantiated by the testimony. The defendant offered no evidence in denial, but apparently relied on his objections to the petition. Defendant has raised the question that the position taken by the plaintiff does not put him in the category of those "who seek equity must do equity, and come into court with clean hands." This, no doubt, refers to the action of the plaintiff in refusing possession of the cars at Holdrege. We find no such violation of the maxim that the application of it would deprive plaintiff of his remedy herein. At the time the demand was made the Holdrege place of business was the principal place of business of the company; at their Hastings house they had no storage facilities. Further, it was manifest at that time that defendant was not trying to do what the law contemplates he should have done—closed up the business as soon as consistent. And it became the duty of plaintiff as trustee of the estate to prevent the copartner-

ship assets from being wasted. Finally, the placing of the assets in the hands of a receiver is, in effect, placing them in the hands of the court, and the plaintiff receives no personal benefit therefrom, but simply acts to preserve the property.

We find that the court did not abuse his discretion in his order appointing the receiver, and that the record shows no reversible error, and therefore recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

DORSEY, C., not participating.

FULTON MOTOR TRUCK COMPANY, APPELLANT, V. GORDON FIRE-PROOF WAREHOUSE AND VAN COMPANY, DEFENDANT: WALSH BROTHERS ET AL., INTEVENERS, APPELLEES.

FILED DECEMBER 31, 1920. No. 21159.

Sales. "When goods are transferred by one person to another for sale and disposition by the latter, the question whether the relation of the parties is that of principal and agent, or of vendor and vendee, is determined by the nature of the transaction, and not by the name which they give to it. If in such case the transferee upon delivery to him acquires absolute dominion over the goods, with the right to sell and dispose of them at such prices and upon such terms as he shall see fit, and becomes bound to pay a stipulated sum for them, either at a specified time or upon the happening of any future event, as, for instance, when he shall have sold them, he becomes the purchaser of the same and the title thereto at once passes to him." *Buffum v. Descher*, 1 Neb. (Unof.) 736, followed.

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

Stout, Rose, Wells & Martin, for appellant.

J. O. Detweiler, Sutton, McKenzie, Cox & Harris and *Gaines & Van Orsdel, contra.*

CAIN, C.

This was a replevin action to recover two motor trucks of which plaintiff claimed to be the absolute owner. At the time the suit was begun the trucks were in storage in the warehouse of the Gordon Fire-Proof Warehouse and Van Company, which is the nominal defendant, but claims no interest in the trucks. The real defendants are the interveners, Walsh Brothers, who claim one truck, and Ethel J. Cannon, as administratrix of the estate of Harry H. Cannon, deceased, who claims the other truck. The Gordon Fire-Proof Warehouse and Van Company is therefore eliminated from the case. Verdict and judgment for interveners, and plaintiff appeals.

The plaintiff, Fulton Motor Truck Company, was a manufacturer of motor trucks at Farmingdale, Long Island, New York, and Harry H. Cannon was the "distributor" of its trucks at Omaha. On February 28, 1918, Daniel P. Walsh, a member of the copartnership of Walsh Brothers, came to Omaha and paid Cannon $500 in cash and $3,421.99 by check to cover the cost of two cars and three trucks. The trucks which Walsh Brothers then expected to get from Cannon were three 1918 model Fulton trucks, but they never got any of that model. On August 23, 1918, however, Cannon gave Walsh a warehouse receipt for a 1917 model of this truck, which is the one in controversy between this intervener and the plaintiff. Previous to that Cannon had repaid Walsh part of the money. This 1917 model truck which Walsh received was one described in the following instrument: "May 27, 1918. It is understood and agreed that the four Fulton chassis which I now have in my possession, Nos. 815, 822, 776, 910, and 911, are the exclusive property of the Fulton Motor Truck Company, and are held by me on consignment. I agree to remit to said Fulton Motor Truck Company $3,914 on the

sale of said trucks. (Signed) H. H. Cannon." When Cannon signed the foregoing instrument, the truck in controversy, together with the others, was delivered to him at Omaha.

The only assignments of error relate to the giving and refusing of instructions to the jury. The complaint is that the court should have submitted to the jury the question of whether Walsh Brothers had actual notice of the instrument above set out. It is conceded that they had no constructive notice thereof. Appellant's position is that by this instrument it retained title to the truck, but the trial court refused to adopt that theory. The construction of the contract was, of course, for the court, and if the trial court's construction of this instrument was correct, it disposes of appellant's assignments of error on this branch of the case.

The contract should be construed as a whole, of course, giving meaning to its several parts in an effort to arrive at the intention of the parties. In this connection it is to be observed that the contract under consideration contemplates a sale by Cannon of the trucks therein described. The idea is not to be entertained that the sale contemplated was to be other than a valid sale conveying good title to the vendee. Possession of the trucks went to Cannon, then, with full power to sell the same. The sale of the trucks was the very purpose to be accomplished, and if Cannon did not have power to sell them, then this purpose would be defeated and the whole transaction an empty thing. Possession and power to sell the trucks having gone to Cannon under the instrument above quoted, it cannot be thought that the parties intended that the title should remain in the plaintiff. Our conclusion is supported by the following decisions of this court: *Yoder v. Haworth,* 57 Neb. 150; *Buffum v. Descher,* 1 Neb. (Unof.) 736; and by the recent case of *Maurer v. Featherstone, ante,* p. 72. In the case of *Buffum v. Descher, supra,* this court made use of language which we think peculiarly applicable to the case at bar. It is as follows: "If the goods are de-

livered to the 'consignee' under such circumstances as to confer upon him absolute dominion over them and he becomes bound to pay a stipulated price for them at a certain time or upon the happening of any future event, the transaction amounts to a sale and delivery, and the title passes to him." We hold that, under the contract quoted herein and the delivery to Cannon of the trucks therein described, he became the absolute owner thereof. It follows that he had full power to sell the same to Walsh Brothers. We think the conclusion to which we have arrived disposes of all of the appellant's contentions on this branch of the case. Appellant suggests that Cannon transferred the trucks to Walsh for an antecedent debt and therefore there was no valid consideration. As we have held that Cannon had power to transfer title to the trucks to Walsh, the consideration becomes immaterial.

As to the controversy between plaintiff and the intervening administratrix of the Cannon estate there is no question of the identity of the truck replevied being one of these covered either by the instrument first herein quoted or by one identical thereto. It seems that Walsh died in October, 1918; that before his death he had arranged with a firm in Sundance, Wyoming, to sell it to them for $1,830.25 by putting a body and cab upon it. This he did at an expense of $141.92, and as it was still in Cannon's possession at the time of the beginning of this action, he or his estate had a lien upon it under section 3841, Rev. St. 1913. Plaintiff made no tender of any amount to satisfy this lien, and so the intervening administratrix had a special interest in the truck at the time the action was commenced. We do not think, however, that the question of the lien is material, for the reason that we think title to the truck passed to Cannon, and thereafter the relation between him and the plaintiff was that of debtor and creditor.

We find no error in the record, and we recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

MAUDE M. SMOKE, SPECIAL ADMINISTRATRIX, APPELLEE, V. LAFE H. CARTER, APPELLANT.

FILED JANUARY 19, 1921. No. 21125.

1. **Evidence:** ADMISSIBILITY: EVIDENCE ON CORONER'S INQUEST. On the trial of a suit based on section 1428, Rev. St. 1913, for the wrongful killing of plaintiff's husband, it is not error to permit plaintiff to read in evidence part of the testimony given by defendant at the coroner's inquest held upon the body of deceased, where defendant is permitted to read in evidence so much of the remainder of such testimony as relates to the subject covered by the testimony read in evidence by plaintiff.
2. **Trial:** INSTRUCTIONS. The rulings of the trial court on the instructions outlined in the opinion *held* free from error.

APPEAL from the district court for Lancaster county: LEONARD A. FLANSBURG, JUDGE. *Affirmed.*

Holmes, Chambers & Mann, for appellant.

Wilmer B. Comstock, contra.

MORRISSEY, C. J.

Plaintiff, as administratrix, in behalf of herself and her two minor children, recovered a judgment for $5,000 against defendant for the negligent and wrongful act of defendant in causing the death of her husband, Walter D. Smoke. The action was based on section 1428, Rev. St. 1913, which reads:

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default, of any person, company or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in

respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Plaintiff alleged that defendant unlawfully and wrongfully shot and killed the deceased. Defendant by his answer alleged that, after he had retired, on the evening of the shooting, his wife heard a noise outside their house, and in looking out of the window she discovered a man; that she became frightened and screamed; that in response to her cry of alarm defendant arose from his bed, procured an automatic revolver, and going to an open window observed a man close to the side of the house and approaching the window; that defendant fired at the man for the purpose of driving him away; that defendant did not know the purpose of the man in being upon defendant's premises; and denied that he used more force than necessary to expel him therefrom, and to prevent him from entering the home; that deceased in entering upon defendant's premises was a trespasser, and "acted in a manner unlawful, wilful, and malicious, and by so doing caused defendant and his wife great fear and greatly excited and terrorized them; and that defendant in his excitement and through fear, caused by deceased's presence, believed that deceased had evil designs upon some one of his family, or wilful, malicious, and felonious designs." Defendant denied that he entertained malice toward deceased, and alleged that he was fully warranted and justified in what he did.

The evidence shows that deceased was a man of good reputation, 39 years of age, engaged in the United States railway mail service, residing with his wife and two children in the same general neighborhood where defendant resided. No trouble between the families is shown to have existed, if, in fact, it appears they were even acquainted. On May 15, 1918, after defendant had retired,

he was aroused by his wife's screams, she stating that there was a man outside the bedroom window, which was open. Defendant arose from his bed, procured his revolver, went to the window, and seeing deceased outside of the house fired at him through the window. Deceased at once turned and ran toward the alley. Defendant jumped through the open window and pursued deceased toward the alley, shooting at deceased as he fled. Deceased ran up the alley for some distance, followed by defendant. Defendant says: "He turned out of the alley and then went north and stumbled over a fence there. * * * I stumbled over the fence, too. * * * I shot twice after I got out of the window, and I hollered 'stop' just the minute I hit the ground. * * * He kept on running, and I fired two more shots, and then I chased him up the alley as fast as I could go. * * * I hollered again after him to stop, going up the alley, but he never stopped, and we possibly ran 50 yards up the alley, and he turned to his left, and just after he turned to his left he fell. I thought possibly he just stumbled, but he got up and ran again; but I followed and fell over the chicken fence. * * * But I gained my feet again and started after him again. He possibly ran, I should judge, 12 or 15 yards, and he fell again, and there was another fence there, and I shot twice as he hit the fence, and when he fell over the fence he said, 'Don't shoot any more,' he said, 'You've got me,' he said, 'I am dying; call a doctor.' And I said, 'Don't you move; if you move I will shoot again; I am holding the gun right on you,' and he said, 'I will not move; you have got me.'"

Defendant was armed with a five-chamber automatic revolver. Every chamber was discharged; four bullets took effect in deceased's body, and from these wounds he died. Aside from the amount of the verdict, in case of recovery, the only question for the jury to determine was: Did the death of deceased result from the wrongful act, neglect or default of defendant?

Appellant first complains of the ruling of the trial court in permitting counsel for plaintiff to read in evidence part of the testimony given by defendant at the coroner's inquest held over the body of the deceased, and in this connection contends that defendant was denied the privilege of reading the remainder of defendant's testimony given on that hearing. This contention is not supported by the record. When plaintiff offered to read in evidence part of defendant's testimony given at the coroner's inquest, counsel for defendant objected to the reading of part of it, but stated that he did not object to having it all read. Whereupon the court ruled that the admissions which were against interest might be read, and that defendant might read any part of the testimony that pertained to what plaintiff read. The bill of exceptions shows that counsel for defendant was permitted to read, and did read, so much of that testimony as pertained to the statements read on behalf of plaintiff. This being true, there was no error in the ruling of the court on the admission of the evidence.

Instructions given by the court are criticised, especially instruction No. 6. By this instruction the court told the jury that the killing of deceased was such a wrongful act on the part of defendant as would entitle plaintiff to recover damages, unless the act might be justified or excused; that, should the jury find defendant justified, the finding should be in his favor; but, if they found he was not justified, the verdict should be for the plaintiff. By instruction No. 4 the court had already told the jury that the burden of proof was upon plaintiff to prove that deceased was killed by the wrongful or unlawful act of defendant, and that defendant was not justified in killing the deceased. It is claimed that these instructions are in conflict. We do not find it so. The rule is well established that instructions must be construed together, and when this rule is applied there is neither conflict nor confusion in the instructions. It is said that instruction No. 5 is in conflict with instruction No. 6. Instruction No. 5 merely applies the law as laid down in the section of the statutes here-

tofore quoted to the facts in this case. Finally, appellant claims that the court erred in refusing to give instruction No. 10 requested by defendant. This instruction would have told the jury that, if defendant fired the fatal shots, believing his action to be necessary to prevent burglary or some other offense against himself, his family or his property, he would not be civilly liable for the death of deceased, although the attempt to commit burglary or other offense did not exist, and deceased was upon defendant's premises for some other purpose, providing the circumstances were such that other reasonable men would have been likely to be mistaken as to the purpose of deceased. First, it may be said that there is total lack of evidence tending to show a felonious intent on the part of deceased, unless it is to be said that the mere fact that he walked upon defendant's uninclosed lot in the nightime is to be accepted as some evidence of an intent to commit an unlawful act. But by instructions 7, 8, and 9, given by the court on its own motion, the court properly defined the right of defendant to protect his home and his family against assault. By these instructions defendant was given the benefit of the substance of the instruction offered so far as it was applicable to the issues.

In addition to the foregoing assignments, appellant complains of the opening statement of counsel for plaintiff to the jury. This statement is set out in full in the bill of exceptions, but we are unable to find where counsel transgressed the rules of propriety. Finally, it is said that the court erred in denying a new trial on the ground of newly discovered evidence, but the showing is not in the bill of exceptions, and is therefore not before us. There is no substantial contradiction in the evidence; the rulings of the court are free from error, and the judgment is

AFFIRMED.

FLANSBURG, J., not sitting.

WILLIAM SCHREINER, APPELLEE, V. TED J. SHANAHAN ET AL., APPELLANTS.

FILED JANUARY 19, 1921. No. 21187.

1. **Sales:** CONTRACT: INDEFINITENESS. An alleged contract of sale of cattle in which the purchaser agrees to pay for the cattle "the best price obtainable" is so indefinite and uncertain as to be unenforceable.
2. **Chattel Mortgages:** CONVERSION: LIMITATIONS. If a mortgagee wrongfully takes possession of mortgaged chattels before maturity of the mortgage and without consent of the mortgagor, the latter is under no present obligation to seek to repossess himself of the chattels or to take other steps affirmatively indicating nonconsent, and he is entitled to bring his action for the reasonable value of the property unlawfully taken within the four years allowed by the statute of limitations in such cases.
3. ———: ———: CONSENT: INSTRUCTIONS. Defendant, mortgagee, relied upon certain written instruments as showing consent of the plaintiff, mortgagor, to take and sell the mortgaged property at private sale before maturity of the mortgage. Plaintiff testified that if he signed such instruments it was done while he was mentally incompetent by reason of excessive intoxication produced and induced by defendant. The court instructed the jury, in substance, that, if this was found to be the fact, then plaintiff would not be bound by such instruments. *Held*, not erroneous.
4. **Evidence:** HANDWRITING EXPERT: CROSS-EXAMINATION. It is not erroneous to refuse to allow an expert upon handwriting to be cross-examined as to the genuineness of the signatures of another than the witness as to whose signatures he was examined in chief, where the genuineness of such other signatures is an element which was required to be established by the cross-examining party in order to sustain his defense, and as to which he might have made the witness his own.

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

Murphy & Winter, for appellants.

Benjamin S. Baker and *William R. Patrick, contra.*

LETTON, J.

This is an action for conversion. In the first count the plaintiff alleges the execution of a chattel mortgage to the defendant bank on 26 head of heifers, 100 tons of hay, and 150 tons of ensilage, to secure the sum of $1,500 due February 1, 1916, and that defendants before the mortgage was due, and without default on his part, or any reason for the same wrongfully took possession of and converted to their own use 26 head of cattle covered by the mortgage, and certain other property described in the petition not covered by the mortgage.

The second count alleges that the defendants purchased a note payable to one Wiley secured by a chattle mortgage upon property described in the petition, which note was due December 29, 1915; that about December 10, 1915, without cause and without default in the condition of the mortgage, the defendants took possession and converted the property described in the mortgage, and in addition thereto took 29 head of pigs and 29 tons of alfalfa hay belonging to plaintiff.

The defense to the first count is that the defendant Shanahan, who is the president of the defendant bank, was informed that plaintiff was trying to sell some of the mortgaged property; that he went to the farm with one Cohn, and that plaintiff on December 8, 1915, sold the cattle covered by the mortgage to Cohn, with instructions to pay the proceeds to the bank to apply on the debt; that the contract was in writing; and that the cattle were taken away under the contract, and with the knowledge and consent of plaintiff; and that the proceeds of the sale were applied on the indebtedness as directed.

The defense to the second cause of action, in substance, is that defendants learned of some suspicious circumstances with reference to the killing of certain hogs described in the Wiley mortgage, and of the selling of others without the consent of the mortgagee, and it was then agreed by plaintiff that he would sell to Cohn 50 tons of hay, the proceeds to be applied on the mortgage debt, and that 29

tons were delivered and so applied, and, further, that plaintiff authorized the defendant in writing to take possession of the property described in the Wiley mortgage and to sell the same at private sale at the best price obtainable, waiving notice, foreclosure, or public sale, and credit the amount upon the indebtedness to the bank; and that this was done.

The reply sets up that on December 8, 1915, Shanahan came to plaintiff's farm with Cohn, brought liquor with him and plied him with it until he became so drunk that he was incapable of doing business or entering into a valid contract; that he did not knowingly sign a contract with respect to the cattle, or any other property, nor consent to the cattle being taken away. He makes the same allegations with respect to the contract and sale of hay to Cohn, and explains that one of the hogs described in the second mortgage was butchered because it had been injured and had to be killed, and he so advised Shanahan and offered to pay for the hog. He denies that he ever waived notice, foreclosure, or public sale, denies the other allegations of the answer, and says that, if any such writing exists and bears his signature, it was obtained while he was wholly deprived of his reason and understanding by intoxication. The jury found for the plaintiff in the sum of $1,358.81. Defendants appeal.

The evidence is very voluminous and is in conflict on almost every material point. It is evident that the transactions between the parties were very loosely conducted, and it is also evident that there are some circumstances shown by the defense which tend to cast much doubt upon some parts of Schreiner's testimony. It is unnecessary and impracticable to make a detailed statement of the evidence. It is sufficient that the evidence on behalf of the plaintiff tends to support the allegations of his petition and reply, and that on behalf of defendants to sustain the allegations of the answer. The jury, however, gave the greater credence to that on behalf of plaintiff, and we must accept their finding in this respect.

The first assignment of error is that the court erred in its instruction to the effect that, if Schreiner was so drunk that he did not understand the various instruments he signed and had not sufficient mental capacity to reasonably understand the nature of the transaction, this was a defense. It is argued that the court should have gone further and instructed that the contract was voidable only, and if Schreiner, when he became sober, acquiesced expressly or impliedly in the transactions, and did not repudiate them, he would be bound by whatever agreement he made. The facts are undisputed that the defendants took possession of the mortgaged property before the mortgages were due. They contend that they took the property with the consent of Schreiner, and that part of it was sold to Cohn by Schreiner himself.

Three papers have been introduced in evidence to establish the existence of such a sale. These bear date December 8, 1915. The first one recites that William Schreiner and S. L. Wiley have sold to Louis Cohn 44 tons of alfalfa hay, described as second cutting, at $10 a ton, and 6 tons of alfalfa hay, described as third cutting, at $12 a ton. Apparently written with a different pencil appears on the face of this instrument: "The above described hay to be accepted and sold on a commission basis of 50 cents per ton." This instrument is signed by Cohn and Schreiner in presence of Shanahan, but is not signed by Wiley.

The second instrument recites that Schreiner agrees "to sell and deliver to the said Louis Cohn twenty-six (26) head of heifers branded O in left ear, and ten (10) head of steers branded O in left ear, and the said party of the first part covenants and agrees to pay to said party of the second part for the same, the sum of for the best price obtainable." This is also signed by Schreiner and Cohn, with Shanahan as a witness. It will be observed that this instrument lacks definiteness as a contract. If understood literally, it means that Schreiner sells to Cohn for whatever Cohn is willing to pay. We think such a contract is unenforceable. It is entirely indefinite and uncertain as to

price, or, if it can be considered as referring to the price at some market, it fails to fix either time or place. With respect to the 26 head of heifers described in this instrument, defendants can assert no rights thereunder, and unless the evidence established to the satisfaction of the jury that Schreiner actually sold and delivered this property to Cohn for an agreed price, and that Cohn paid the proceeds to the mortgagee, defendants must account for the actual value of this property. But even if Schreiner consented to the taking of the property described in the first mortgage, it is not shown that he waived foreclosure under the statute, and, since the statute was not followed as to notice or public sale, the defendants are liable to account to him for the reasonable value of the property taken. Of course, this does not refer to the hay which he admits was actually sold to Cohn. Mere silence or inaction of a mortgagor of chattels until after property taken from him has been unlawfully sold does not operate to make the price which it brings at such unauthorized sale binding upon him. The unauthorized sale of the property is a tort and the cases cited relating to disaffirmance do not apply. The owner of the property has the right to bring his action for the reasonable value of the property at any time within the statute of limitations, and there was no error in the instruction complained of. *Brashier v. Tolleth,* 31 Neb. 622.

As to the Wiley mortgage, there is a written waiver of foreclosure and consent to private sale in evidence, but the defense to this is intoxication to the extent of incompetency when it was executed, and the jury evidently so found.

The second assignment is that the court erred in allowing expert testimony for the purpose of proving that exhibits 15 and 21 were forgeries, as an attempt to impeach upon immaterial matter and injecting a collateral issue. An examination of the bill of exceptions shows that this testimony was admitted without objection. A great deal of it was brought out by the cross-examination. The assignment is not well taken.

The next assignment is that the court erred in refusing to permit an expert upon handwriting to be cross-examined as to the genuineness of the signature of a different party than the writer of the signature as to which he testified in chief. The witness had testified as to certain signatures of the witness Larsen. He was sought to be cross-examined as to the signature of Schreiner to exhibits 11, 12 and 13, and an objection on the ground that this was not proper cross-examination was sustained. Comparison can only be made under section 7912, Rev. St. 1913, with writing of the same person which is proved to be genuine. If the defendants had desired the expert opinion of this witness as to the genuineness of the signature of Schreiner to these exhibits, he should have produced him as his own witness at the proper stage of the trial, and it was not erroneous to refuse to permit this testimony upon cross-examination. Furthermore, we have not found that Schreiner admitted that he signed exhibit 12; and, even if this ruling had been erroneous, no such prejudice is shown as to justify a reversal.

The fourth assignment is that the court erred in allowing the witnesses Hunt and Wiley to contradict Cohn as to the date of sale of the Hunt cattle, being an attempt to impeach upon a collateral issue. Cohn testified that he went to Schreiner's farm with Wiley on December 7, looked at Hunt's cattle, and bought them, giving him a check payable to A. B. Hunt; that he had no dealings with Hunt with reference to the cattle. Hunt testified that he dealt with Cohn personally over the telephone with respect to the sale of the cattle, and that Cohn gave him the check in payment at his house in Florence. This check is dated December 7, and if Hunt's testimony was believed, it corroborates Schreiner's, and, since the date and the place it was given were material, it was not erroneous to admit this evidence.

The next assignment of error is that the court erred in not sustaining defendant's motion to take away all hay transactions from the jury, for the reason that the evidence

showed that Schreiner consented that the hay be taken. The court did take away consideration of the 17½ tons of hay that Schreiner delivered to Cohn, but allowed consideration of that hauled by Larsen for Shanahan. Under the principles hereinbefore stated, the jury were entitled to consider whether the hay hauled by Larsen was taken and sold with Schreiner's consent, no foreclosure proceedings having been had.

In conclusion, it is seldom that a case comes up for review in which so much immaterial and irrelevant testimony was offered and received without objection. The instructions of the court state the law as to the issues in the case with scrupulous impartiality and with admirable clearness and perspicuity. The jury might well have found for defendants upon the facts, but the evidence is sufficient to sustain the verdict. It is charitable to say that mistakes were made in the testimony on each side. We find no reversible error.

AFFIRMED.

PAUL FOERSTER, APPELLANT, V. CHARLES G. HELMING ET AL., APPELLEES.

FILED JANUARY 19, 1921. No. 21458.

1. **Infants:** JUDGMENT: CONCLUSIVENESS. An infant defendant may appeal by his guardian *ad litem* from a judgment against him, and if his defense and appeal have been made in good faith, and without fraud or collusion, such an appeal determines the question whether errors occurred in the proceedings, and the judgment cannot, after he attains his majority, be opened up under section 8010, Rev. St. 1913, on the grounds that the district and supreme courts erred in their decision.

2. ———: ———: ———. The grounds upon which a judgment may be opened up under section 8010 are those existing at the time of the trial and rendition of the judgment, and not matters occurring thereafter.

Foerster v. Helming.

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

Cook & Cook, for appellant.

Henry Silwold and *George C. Gillan, contra.*

LETTON, J.

This is an aftermath of the case of *Helming v. Forrester*, opinions in which case are reported in 87 Neb. 438, and 92 Neb. 284. The facts are fully set forth in the respective opinions. Paul Foerster, or Forrester, the infant defendant, has now reached his majority, and has begun this action within one year thereafter, under section 8010, Rev. St. 1913, which is as follows: "It shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining full age; but in any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such order or judgment."

In the former case plaintiff was represented by Mr. E. A. Cook, his guardian *ad litem*, a member of the bar, who made a vigorous defense, and appealed to this court from the final judgment, and who is his counsel in this suit.

The petition alleges that defendants are in possession of the land, claiming title under the former judgment; that both the supreme court and the district court erred with respect to the law; that the guardian *ad litem* did not plead as a defense that the defendant Charles G. Helming, as administrator of the estate of William F. Helming, deceased, in 1890 brought proceedings in the district court to obtain a license to sell the real estate to pay debts; that in that proceeding Minnie C. Helming, the mother of plaintiff, claimed title under decree of the county court awarding her the homestead, and that the district court found that she was the owner of the homestead, and that it was not subject to be sold for the debts of the deceased, and dismissed the action. He further alleges that the defend-

ants Otto B. Helming and Minnie Sill, by reason of their interest in the real estate, were then charged with notice that Minnie C. Helming was claiming to own the land in fee simple. He prays that the former judgment be set aside and the title be quieted in him.

The answer pleads the former adjudication; that an answer was filed by the guardian *ad litem,* which alleged the decree of the county court under the void Baker act (Laws 1889, ch. 57), and adverse possession for more than ten years; that the action is barred by the judgment of the supreme court; that defendants never appeared or authorized an appearance in the proceedings to sell the real estate to pay debts; that the county court had no jurisdiction in the matter of title; and that substantially the same defense was made in the former answer. The reply was a general denial. The court found for defendants and dismissed the suit.

On the former trial the answer of Emil Forrester, plaintiff's father, set up substantially the same defense as to the decree of the county court that it is now said should have been asserted by the guardian *ad litem,* except as to the proceedings to sell land to pay debts. At the trial the record of the proceedings by the administrator to sell real estate was excluded on the objection that the controversy was not between the same parties; the same issues were not involved; the county court had no jurisdiction to determine title, and its decree was void; and that the proceedings in the district court did not involve the issue of title as between the parties. We think this ruling was correct.

We have never departed from the view that decrees of the county court in proceedings under the Baker act are absolutely void; that such a decree conferred no right or title in the homestead to a widow; and that she became possessed only of a life estate in the homestead at her husband's death. *Draper v. Clayton,* 87 Neb. 443; *McFarland v. Flack,* 87 Neb. 452.

For what reasons may a judgment against an infant rendered in proceedings where he appeared by guardian *ad litem* duly appointed, and made a vigorous defense, be set aside under section 8010?

In *Manfull v. Graham,* 55 Neb. 645, it is said that section 442 of the Code (now section 8010, Rev. St. 1913) recognized the old chancery rule based on the theory that the infant was not bound by the answer of the guardian *ad litem,* and might show cause against a decree by showing either substantial error or a defense which had not been interposed, and that it was not in all cases that the infant was accorded his day in court after reaching his majority: "The statute does not extend his former rights in that respect, but merely makes it unnecessary to expressly reserve the right in the decree, and allows the right to be asserted only in such cases as, according to the old practice, such express reservations would be proper." Under the former practice, where the decree directed the sale of the infant's lands, it was binding on the infant and he had no day in court to show cause against it; this of necessity to avoid the chilling of bids and insecurity of titles derived under such a sale.

The practice of giving an infant a day in court after majority arose in feudal times, and was designed to preserve the continuity of title and possession of estates. Though in this country the field has been widened, the power to set aside should not be exercised unless necessary to prevent injustice. In this case it is to be noted that the former infant is claiming under the alleged adverse possession of his mother against the heirs of the intestate, and cases evidencing the concern of a court of chancery to preserve the inheritance are not strictly applicable. The defendant heirs are of the blood of the intestate, while plaintiff is a stranger to that blood. No question of *bona fide* purchaser is involved.

In *Joyce v. McAvoy,* 31 Cal., 273, 89 Am. Dec. 172, in which state at that time there appeared to be no statute reserving a day to show cause against a decree, it was

held that a judgment against an infant, which is merely erroneous, and not void, may be corrected on appeal; if fraudulent or obtained by collusion, it must be attacked in a direct proceeding, and not collaterally; and also that, where a court has jurisdiction of the subject-matter and of the parties in interest, its judgment, though erroneous, is valid until reversed on appeal, or vacated in some direct proceeding.

In *Webster v. Page,* 54 Ia. 461, in a similar proceeding it was held that "the errors which may be considered in this proceeding, and which will authorize the court to vacate the judgment, are such as would be a ground of reversal upon appeal. *Bickel v. Erskine,* 43 Ia. 213."

In a Virginia case, *Walker's Exr. v. Page,* 21 Grat. (Va.) 636, 645, the rule, that the privilege accorded to an infant to show cause against a decree disposing of his real estate is limited to a cause existing *at the time the decree was announced,* was adhered to. In the same case, where it was sought to set aside a sale of real estate after the war because the sale was made for Confederate money and the proceeds invested by the court for him in Confederate securities, the court said: "Certainly the infant, upon arriving at age, can show no such cause as this, to entitle him to vacate a decree made against him while an infant. He may show error upon the face of the record; or he may show that the court had no jurisdiction to enter the decree; or, if it had jurisdiction, that the proceedings were irregular and not binding upon the parties; or he may show that the case made by the record did not warrant the decree."

In Kentucky the Code provided that an appeal should not be granted except within two years after the right accrued, unless the party was an infant, in which case an appeal might be granted within one year after the removal of disability. In *Moss v. Hall,* 79 Ky. 40, the facts were that the parties representing infant defendants failed to prosecute an appeal within two years, but afterwards appealed before majority. The court said: "Having the right to

an appeal before their arriving at age, we see no reason why the appeal should not be allowed at any time during their minority. * * * It is to the interest of all parties, if there is an error in the judgment, that it should be ascertained, and their rights finally determined. The appeal by the infant would be a complete bar to any appeal after arriving at age, and it was never contemplated that such a construction should be given the statute as would postpone the settlement, not only of the rights of infants, but of those litigating with them, for years after the judgment has been rendered, when the infants appear in court by those entitled to be heard for them, asking a final adjudication so important to the interest of all concerned."

If the right of an infant to show cause against a merely erroneous judgment is accorded by allowing him the right to appeal, and it is only in cases where there is fraud, collusion, or lack of jurisdiction that the judgment may be attacked by proceedings in the court in which it was rendered, then much of the uncertainty as to titles, which would otherwise result, would be obviated. Any judgment may be set aside within certain limitations as to time, if obtained by fraud or collusion, or rendered by a court without jurisdiction. A judgment against an infant is no different in this respect, save that in some cases the duration of the infant's minority exceeds the time limited by statute for opening judgments by other parties. There is nothing in our statute to prevent an appeal by an infant who is properly represented by guardian *ad litem* and counsel during his minority; in fact, it is not unusual; and if the alleged errors in the judgment of the lower court are fully and fairly presented to the reviewing tribunal and there determined, the infant has obtained all the rights to which he would be entitled under his right to a day in chancery, or under the statute. It is essential to public welfare that there be an end to litigation, and that the validity of titles be settled and established. The distinction made in *Joyce v. McAvoy, supra,* between erroneous judgments and those rendered by fraud or collusion, is

obvious, and if this principle is observed by the courts this will afford the minor all rights to which he is entitled, and at the same time preserve the stability of titles. This seems to have been the view taken by this court in *Sutphen v. Joslyn,* 93 Neb. 34. This was an action to set aside a decree of specific performance rendered in an action in which the plaintiff, while an infant defendant, had appeared by a guardian *ad litem.* The matter in controversy involved the title to a valuable tract of land in Omaha. It was alleged that there was fraud in procuring the original decree, but the court found that neither actual nor constructive fraud had been established by the evidence, and refused to open the decree.

In *McCreary v. Creighton,* 76 Neb. 179, it is said that a judgment against a minor may be set aside on a slight showing of defense, where the application is made for that purpose within one year of the time he reaches 21 years of age; but that point was not directly involved, and in that case no appeal had been taken by the guardian *ad litem.*

The views expressed seem to be in harmony with decisions in other states, although it may be said that in some states the language of the opinions seems to indicate that a judgment may be opened up in the trial court for errors which would require its reversal upon appeal. In most of such cases, however, judgments were not opened on account of mere errors, and this language is used *arguendo.* The purpose of the statute is to extend the time within which an infant who has been fraudulently or collusively defrauded of his estate, or his rights by a judgment, may apply to the court for relief. It is not to render every judgment in a case where an infant is a party merely interlocutory, and not final, until one year after attaining his majority. Nor is its purpose to apply to cases where the property has passed into the hands of a *bona fide* purchaser.

The plaintiff, by appeal to this court during his minority, raised every matter of defense then available, except the defense of administrator's proceedings to sell, which counsel testifies had slipped his mind at that time, and

which we hold did not constitute *res adjudicata* as against these heirs. He has had all the rights which the law accords him, and is not entitled to have the former judgment set aside.

Other citations bearing on the points involved are: *Walsh v. Walsh,* 116 Mass. 377; *Harris v. Bigley,* 136 Ia. 307; *Walkenhorst v. Lewis,* 24 Kan. 420; *Harrison v. Wallton,* 95 Va. 721, 64 Am. St. Rep. 830; *Kingsbury v. Buckner,* 134 U. S. 650, 10 Sup. Ct. Rep. 638; 14 R. C. L. 295, 296, secs. 61, 62; 22 Cyc. 703.

AFFIRMED.

PETER J. LONG ET AL., APPELLEES, V. JOHN H. KRAUSE ET AL., APPELLANTS.

FILED JANUARY 19, 1921. No. 21214.

1. **Fraud: MATERIALITY.** Where a purchaser, having secret knowledge of valuable mineral deposits in the waters of a private lake on land purchased from a vendor who considered the waters of no value, is sued by the latter for fraud resulting in the sale of the land, the materiality of the deception charged does not depend on its effect on the purchase price, but upon its influence on the mind of the vendor in entering into the contract of sale.
2. ———: **VENDOR AND PURCHASER: MISREPRESENTATIONS.** A stranger, having secret knowledge of valuable mineral deposits in the waters of a private lake on land, may purchase the land without disclosing his superior knowledge, but a slight imposition on his part may terminate his privilege of silence; and, if he speaks falsely on matters relating to his secret knowledge and to the purpose of his purchase and thus deceives the owner into making a sale, he may be held liable for resulting damages.

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

John J. Sullivan, John M. Macfarland, George B. Thummel and *Lee Basye,* for appellants.

Thomas Lynch and *Byron G. Burbank, contra.*

ROSE, J.

This is an action to recover damages in the sum of $992,000 on account of the fraud of defendants in inducing plaintiffs to sell and transfer to them a 640-acre ranch in Sherdian county for $8,000. The difference between the damages and the sale price is based on the value of potash in the water of a private lake covering about 240 acres of the land. Plaintiffs allege that, without knowledge of the potash in the water, they regarded the lake as a detriment, and were induced by the fraud of defendants, who knew the facts, to sell and transfer to them the ranch, including the lake, without any consideration for the potash. Defendants denied the fraud charged and pleaded good faith in the negotiations and purchase. Upon a trial of the issues the jury rendered a verdict in favor of plaintiffs for $75,000. From a judgment thereon defendants have appealed.

The controlling question on appeal is the sufficiency of the evidence to sustain the verdict. Defendants contend that there is no evidence of actionable fraud; that plaintiffs fixed their own price, which was paid; that there was no concealment; that there was no misstatement of any material fact; that defendants did not know the contents of the water; that it had no commercial value; that plaintiffs and defendants had the same means of acquiring knowledge; and that clear and satisfactory evidence of the fraud charged is wanting. The evidence and the argument from the standpoint of defendants have not escaped attention, nor have precedents and divergent views of the law been overlooked. The position of defendants would be unassailable, if the testimony in their behalf could be accepted on appeal without question; but the sufficiency of the evidence to sustain the verdict must be determined by the proofs tending to make a case in favor of plaintiffs, since the jury found the issues of fact in their favor.

The circumstances surrounding the negotiations are material to the inquiry. Plaintiffs were husband and wife, and with two small children lived on the ranch in contro-

versy. They were without practical knowledge of chemistry. They lived in a sparsely settled country and were engaged chiefly in stock-raising. Their nearest neighbor was more than two miles away. They were 12 miles from a railroad and 40 miles from the county seat. They had no telephone and no rural mail service. The snow was a foot deep and the weather was cold. Travel by automobile was suspended. Peter J. Long, plaintiff, had been on a saddle-horse looking after his stock. Chilled by the cold, he came home in the evening and found defendant John H. Krause there. The two men had met before, but were practically unacquainted, though their ranches were only five miles apart. There is believable testimony from which the following facts and conclusions may be inferred:

Peter J. Long, plaintiff, managed three sections of contiguous land, but two of the sections were owned by his father, who resided in California. A small portion of the lake was on a section owned by the latter. Krause said he heard the land was for sale, and was told that plaintiffs had never so stated to any one. Krause said he wanted the land for grazing and other stock-raising purposes and asked Long to put a price on the three sections. After some reflection Long said he would take $17,000. Krause insisted that was too much, owing to the amount of water—240 acres of lake—and offered $13,000. This was refused. An offer of $15,000 followed and was likewise rejected. Krause finally said he would pay $17,000. Long, in the event of a sale, wanted a lease permitting him to retain possession for a year to dispose of his live stock. This was agreeable to both. Long started to ask about a potash plant at Hoffland, about 14 miles away, and Krause intimated that the promoters were not doing very much there "except having a little smoke." Long accepted a check for $300, and agreed to transfer to defendants the title to the three sections for $17,000, with the understanding that the latter would lease the lands to plaintiffs for a year for $700. These negotiations occurred late in Decem-

ber, 1915, and the deeds and the lease were delivered February 3, 1916. The lease contains the provision that defendants "reserve full rights to all the lakes on said lands for any purpose for which they may desire to use them, during the life of this lease, together with full rights to sublet their rights to said lakes." Plaintiffs had no knowledge of this reservation when the lease and the deeds were delivered. Of the purchase price plaintiffs received $8,000 for their section and Long's father received $9,000 for his two sections. Defendants knew that the lake contained valuable deposits of potash, and plaintiffs did not. Plaintiffs believed the statements of John H. Krause and relied on them. Otherwise the sale for $17,000 would not have been made. Within a short time defendants sold the lands in the three sections for $15,000, but retained the lake, which is now connected by a pipeline with a potash plant at Antioch, where there is a railroad station. Defendants have an interest in the plant mentioned. When plaintiffs executed and delivered their deed the value of the lake for potash, if the potash were free on board the cars at Antioch, would aggregate $480,000. The jury believed testimony from which the facts and conclusions narrated are inferable.

The question is: Did plaintiffs prove actionable fraud? This is not the case of an owner of land trying to sell it. It is the case of a stranger, with secret knowledge of valuable mineral deposits in the waters of a private lake on land, inducing the owner, without such knowledge, to sell the water for little or nothing. From the standpoint of inducing a sale under the circumstances outlined, Krause employed the artifices of fraud in at least three material respects. (1) He pretended that he wanted the land for grazing and other stock-raising purposes. Had he told the truth, namely, that he wanted the three sections of land to get control of the 240-acre lake, he would have aroused the interest of plaintiffs in the water which had been considered by them to be a detriment. Having of his own volition spoken when speech was not required, he

should have confined himself to the truth. His passive privilege of remaining silent for the purpose of availing himself of the fruits of superior knowledge did not include affirmative aid amounting to deceit. (2) He intimated that the ranch would be more valuable, if it were not for the lake, whereas the great value of the lake, on account of the deposits of potash therein, was the real object of his negotiations. Since he voluntarily spoke on that subject, without any legal obligation to do so, it was incumbent on him to be truthful and to say nothing to deceive plaintiffs. (3) By a false insinuation he led plaintiffs to believe that the plant in course of construction for the evaporation of valuable lake waters on a commercial scale at Hoffland amounted to little or nothing. That the truth would have prevented a sale for $17,000 is fairly inferable.

In cases like this the materiality of the deception does not depend on its effect on the purchase price, but upon its influence on the minds of the vendors in entering into contracts of sale. *Masterton v. Beers,* 29 N. Y. Super. Ct. 368; *Stewart v. Wyoming Cattle Ranche Co.,* 128 U. S. 383.

The controlling principle, applicable to the evidence accepted by the jury as revealing the truth, was stated by Lord Chancellor Eldon a century ago, as follows:

"The court, in many cases, has been in the habit of saying, that where parties deal for an estate, they may put each other at arm's length; the purchaser may use his own knowledge, and is not bound to give the vendor information of the value of his property. * * * If an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." *Turner v. Harvey,* 1 Jac. (Eng.) *169, *178.

A few years later the same principle was adopted by the supreme court of the United States. A purchaser, in negotiating for a large quantity of tobacco, was asked by the seller if he had received any news to enhance the price. The purchaser had just heard such news, having learned of the signing of the Treaty of Ghent, a fact of which the seller was ignorant. Whether fraud had been practiced by the purchaser was held to be a question for the jury. In an opinion by Chief Justice Marshall it was held:

"The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do any thing tending to impose upon the other." *Laidlaw v. Organ,* 2 Wheat. (U. S.) 178.

While the latter case arose in Louisiana under the civil law, a principle of the common law is stated in the opinion. The same doctrine has been adopted in many of the states. *Bench v. Sheldon,* 14 Barb. (N. Y.) 66; *Prescott v. Wright,* 4 Gray (Mass.) 461; *Crompton v. Beedle,* 83 Vt. 287; *Brager v. Friedenwald,* 128 Md. 8; *Bowman v. Bates,* 2 Bibb (Ky.) 47; *Akers v. Martin,* 110 Ky. 335; *Smith v. Beatty,* 2 Ired. Eq. (N. Car.) 456; *Stackpole v. Hancock,* 40 Fla. 362. Taking these views of the facts and the law, no error has been found in the record.

AFFIRMED.

SAMUEL DITTO, APPELLANT, V. INTERNATIONAL HARVESTER COMPANY, APPELLEE.

FILED JANUARY 19, 1921. No. 21148.

1. Sales: WARRANTY: NOTICE OF BREACH: WAIVER. "The fact that notice of failure of a machine to fulfil the requirements of a printed warranty is not given in the manner provided by the contract is no defense against an alleged breach of warranty where the vendor under such notice as is given him by the vendee undertakes to remedy the defects complained of by the latter." *Advance Thresher Co. v. Vinckel*, 84 Neb. 429.
2. ———: CONTRACT: WAIVER. "Where a contract for the sale of a machine provides that a retention thereof by the vendee beyond a given period will operate as a waiver of defects, *held* to be inapplicable where the vendor induced the vendee to retain the machine under a promise that the defects would be remedied." *Advance Thresher Co. v. Vinckel*, 84 Neb. 429.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Reversed.*

P. A. Wells and *John G. Kuhn*, for appellant.

Arthur F. Mullen and *David A. Orebaugh, contra.*

DEAN, J.

Plaintiff sued to recover damages from defendant that he alleged arose out of the fraudulent sale to him by defendant's agents of a defective stationary engine that was intended to be used for pumping water for irrigation purposes on plaintiff's farm near Gillette, Wyoming. At the close of the testimony, when both parties had rested, the court directed a verdict against plaintiff and in favor of defendant for $1,305 on its cross-petition for an alleged remainder of the unpaid purchase price. The plaintiff appealed from a judgment on the verdict.

Plaintiff alleged generally that in April, 1913, he was induced by the false and fraudulent representations of defendant's agents to purchase the defective engine in

question; that he explained in detail to defendant, through its agents, the use to which the engine was to be put, and also described the engine then in use and the pump that was to be operated; that he informed them of the acreage to be irrigated, the kind of soil, the kind of crops to be raised, the amount of water necessary, and the height to which it must be raised to irrigate the land. He alleged that he was a farmer and had no knowledge of machinery and engines, "especially of the type and kind of engine" in question, which defendant's agents well knew; that defendant, knowing well the use to which plaintiff intended to put the engine, falsely and fraudulently represented to plaintiff and warranted that its giant model 50-horse power 1913 type engine was of sufficient capacity and power to do the required work; that plaintiff relied on the representations and warranties so made and in reliance thereon was thereby induced to purchase the engine; that he hauled it to his farm and with the assistance and under the supervision of E. A. Thorsen, one of defendant's agents, it was attached to the pump; that Thorsen started the engine, but it failed to operate the pump and was unfit to do the work for which it was intended and which the agents falsely and fraudulently represented and warranted that it would do; that he insisted that defendant take the engine back and return the consideration; that Thorsen refused to do so, and in order to induce plaintiff to keep the engine falsely represented that a larger pulley wheel, which he attached to the engine, would remedy the defect; that it failed to do so and the engine failed to pump the amount of water required by defendant's warranty; that defendant again refused, on plaintiff's demand, to take the engine and return the consideration, but he assured plaintiff that "it would work all right after 'it got well limbered up,'" that he made complaint at the general office of defendant at Chicago and expert mechanics were sent from there to his farm, and they all failed, after considerable effort, to remedy the defect or to cause the engine to do the work for which it was intended; that

the engine has never done "the work as represented and warranted by the defendant;" that it was not the "giant model 1913 type as represented by the defendant, but was in fact an earlier model which had been manufactured by the defendant in 1909 or 1910, and from which the model number and name plate had been removed and defaced so that it was impossible to identify the model and make;" that the engine that was in fact purchased was up-to-date and reasonably worth $1,800, while the engine delivered was old and of no value, "by reason whereof plaintiff suffered damages in the sum of $1,800;" that he paid defendant $450 in cash when the engine was purchased; that he gave two notes of $675 each; that the cost of hauling and installing the engine and other incidental expenses directly connected therewith caused an outlay by plaintiff of $950; "that by reason of the above-mentioned fraudulent representations and false warranties the plaintiff sufferd damages," not only with respect to the foregoing items, but he was also damaged in the years 1913 and 1914 by a decrease in the yield of his potato, hay, beet and grain crops in the sum of $11,933.50, and that the crop loss complained of was the immediate and the direct result of the incapacity and the inability of the engine to pump approximately the amount of water that was pumped by the engine formerly used by plaintiff on his farm, and that was necessary to properly irrigate the land, all of which defendant's agents represented and warranted the engine so purchased by plaintiff would do, and that because of such lack of water, so occasioned by defendant's fraud, approximately 175 acres of his farm land in 1913 and 1914 yielded only about one-third of the crop theretofore yielded by it; that his total damage aggregates $13,772 in the premises.

Defendant in its amended answer and cross-petition denied every material allegation in the petition; alleged that it sold "to the plaintiff through its agent, J. T. Morgan," of Gillette, Wyoming, the engine "referred to in plaintiff's

petition," under the terms of a written contract and written warranty; that it delivered, "installed, tested and operated" the engine on plaintiff's farm, and that he at the time "expressed satisfaction with said engine and the way it operated and did its work;" that he then paid to defendant's agent $450 in cash and delivered to the agent two notes for $675 each; that the engine "was well made, of good materials, and was durable if used with proper care. * * * Defendant states that said engine worked excellently until about August 1, 1913, when, because of the careless and negligent manner in which plaintiff and his agents took said engine apart and endeavored to put it together again, several important parts were broken. Defendant states that about August 29, 1913, its agents, though not bound by law so to do, repaired said engine as well as it was possible, and it avers on information and belief that the said engine since said date has run in a satisfactory way."

Defendant denied that any of its agents represented or warranted that the engine "was of sufficient capacity to pump enough water to irrigate the crops plaintiff proposed to raise or that the plaintiff explained to said agents * * * the crops he proposed to raise. Defendant avers that it was beyond the power and authority of the said E. A. Thorsen, mentioned as defendant's agent in the plaintiff's petition, or of J. A. Peterson, who with said Thorsen took said order, or J. T. Morgan, to make any representation or warranty whatsoever in respect to the said engine; that the authority of said agents and each of them was confined to soliciting the said written contract heretofore referred to, * * * and that the only warranty or representation made by defendant or binding upon it is the said warranty contained in said written contract. * * * * Defendant denies that plaintiff is entitled to any damages whatsoever, but alleges that under the written contract plaintiff's damages, if any, are limited to the purchase price of said engine." Defendant alleged that no part of a $675 note given as a part of the purchase price, or the

interest thereon, has been paid by plaintiff, and prays that his petition be dismissed and for judgment on the note with interest and costs.

Defendant pleads as an exhibit a copy of the instrument under which the sale was made. So far as it is material here the copy follows: "Order for gas and gasoline engine. To J. T. Morgan. Town, Gillette. State, Wyo. The undersigned * * * hereby orders, subject to your approval and to all conditions of agreement and warranty printed on back of this order and made a part hereof, to be shipped * * * to J. T. Morgan * * * one International 50 H. P. Giant Double Opposed Cylinder Engine. * * * In consideration whereof, the undersigned will receive same on arrival, will pay to your order $450 cash, and execute approved notes payable to your order as follows: $675 due February 1st, 1914. $675 due February 1st, 1915. * * * It is expressly agreed that this order shall not be countermanded. * * * Taken by —— E. A. Thorsen and J. A. Peterson. * * * Signatures: Saml. D. Ditto." The instrument was signed by Mr. Ditto only. The instrument obligated defendant to furnish the engine "complete, including necessary fixtures" and "regular size of pulley."

On the back of the above instrument the following is indorsed as disclosed by defendant's exhibit: "Warranty and agreement. The seller warrants the within described engine to do good work, to be well made, of good materials, and durable if used with proper care. If upon one day's trial, with proper care, the engine fails to work well, the purchaser shall immediately give written notice to the seller, stating wherein the engine fails, shall allow a reasonable time for a competent man to be sent to put it in good order, and render necessary and friendly assistance to operate it. If the engine cannot then be made to work well, the purchaser shall immediately return it to the said seller, and the price paid shall be refunded, which shall constitute a settlement in full of the transaction. Use of the engine after three days, or failure to give writ-

ten notice to said seller or failure to return the engine as above specified, shall operate as an acceptance of it and a fulfilment of this warranty. * * * This express warranty excludes all implied warranties, and said seller shall in no event be liable for breach of warranty in an amount exceeding the purchase price of the engine. If within ninety days' time any part proves defective, a new part will be furnished on receipt of part showing defect."

Defendant further pleads: "By way of objection defendant states that plaintiff's petition is double, in that it seeks both to rescind the contract and to recover for breach of warranty under said contract."

It is argued by defendant that the sole question involved here is whether the court erred in directing a verdict for defendant over plaintiff's objection. The contention on this point seems to revolve, in large part, about an amended reply of plaintiff's that appears in the record, and upon this feature of the case there seems to be a deeply rooted divergence of opinion between the parties. It therefore becomes necessary briefly to review the record to discover the time when the original pleadings were filed and when and under what circumstances the amended pleadings of the respective parties, by leave of court, were filed or properly, by such leave, became a part of the record.

Plaintiff's petition was filed March 28, 1917, to which defendant filed an answer April 30, 1917. This answer is not in the record, but it appears that a reply was filed by plaintiff April 5, 1918, in response to defendant's answer of April 30. An amended reply consisting of 9 or 10 paragraphs is in the record, and the first paragraph recites, with respect to its filing, that plaintiff "first obtained leave therefor." With the exception of paragraph No. 9, which is added, the amended reply is the same as the original reply. The added paragraph follows: "Plaintiff specifically denies that he knew he signed any contract, as is set out in defendant's amended answer, but all this plaintiff signed was what was represented to him to be an

order for the said engine, without giving him any opportunity to read the same."

That permission was given plaintiff to file a reply to defendant's amended answer, "before the trial began," appears in an affidavit filed by defendant in support of a motion, filed in this court two days after the oral argument and submission of the case, to strike plaintiff's amended reply from the record. It is therein averred generally that "before said trial began" defendant asked and was given leave "to file an amended answer," and that plaintiff was given "permission to file a reply instanter; that immediately thereafter the case was tried upon the petition," the amended answer, and the reply of plaintiff "which was filed April 5, 1918; that said original reply was considered by both sides as being the reply to the amended answer."

Plaintiff's counsel does not concede defendant's position on this point. In a lengthy affidavit filed by him he denied in substance that plaintiff's reply of April 5, 1918, "was considered by both sides as being the reply to the amended answer," and avers that the amended reply was prepared, presented and ordered filed after the amended answer was filed, and that the trial then proceeded, but, by an oversight, the amended reply, which was in response to defendant's amended answer, was not actually noted in the records of the court as being filed until the date alleged by defendant; that the bill of exceptions, including the transcript which contained the pleadings, and among them the amended reply, was presented to and retained (the record shows 7 days), and then returned by defendant's counsel, settled and filed in the supreme court without objection.

It is apparent from the respective statements of the parties that the court was impartially indulgent as to both in permitting amended pleadings to be filed on the eve of the trial. The contest was warm throughout. The trial occupied six days and during that time there does not appear to have been a dull nor an idle moment either

for the court or counsel. Small wonder if some misunderstanding crept into the proceedings and was reflected by the record.

Notwithstanding the apparent confusion that the record discloses on this feature of the case, we hold that it sufficiently appears that the amended reply to defendant's amended answer was a part of the record at the time the case was tried, even though it may have lacked the formality of a file mark and entry on the appearance docket.

Respecting the merits: The nature of a written instrument is ordinarily, of course, to be determined by its language, subject however at times to the meaning placed thereon by the parties. The instrument in question in large type on its face, at the top of the page, is denominated: "Order for gas and gasoline engine." And it is referred to as an order four or five times in the body of the instrument. So that it is reasonable to believe that defendant's agents may have referred to it as an order and that plaintiff was thereby deceived.

Defendant contends that, under the provisions of the warranty, "it was beyond the power and the authority" of the agents who took the order "to make any representation or warranty whatsoever in respect to the said engine," and their authority was confined to soliciting the contract. Defendant also contends that plaintiff by his conduct waived the provisions of the warranty on which he now relies, in that he violated the provision that the "use of the engine after three days, or failure to give written notice to said seller or failure to return the engine as above specified, shall operate as an acceptance of it and a fulfilment of this warranty."

Defendant's argument is not tenable. The rule that is applicable to the present case on this point is discussed at some length in *Advance Thresher Co. v. Vinckel,* 84 Neb. 429, and therefore need not here be detailed at length. We may say, however, in brief that we there held:

"The fact that notice of failure of a machine to fulfil the requirements of a printed warranty is not given in the

manner provided by the contract is no defense against an alleged breach of warranty where the vendor under such notice as is given him by the vendee undertakes to remedy the defects complained of by the latter.

"Where a contract for the sale of a machine provides that a retention thereof by the vendee beyond a given period will operate as a waiver of defects, *held* to be inapplicable where the vendor induced the vendee to retain the machine under a promise that the defects would be remedied."

To substantially the same effect is *Fairbanks, Morse & Co. v. Nelson,* 217 Fed. 218.

Some evidence was introduced by the parties, and for the most part controverted, that in the present state of the record need not be here reviewed, tending to establish some at least of the material allegations of their respective pleadings. Such evidence should have been submitted to the jury. But with respect to plaintiff's offer to prove the damages that he contends he sustained from loss of crops because of failure of the engine in question to pump the required amount of water to irrigate and to mature such crops, we conclude that the court did not err in excluding his offer of proof on this point. The damages so claimed are uncertain, contingent, speculative, and remote, and cannot ordinarily, in an action of this nature, be made the basis of a recovery. 17 C. J. 753, sec. 86.

Upon a review of the entire record, consisting of almost 1,000 pages, we conclude that justice will be best served by a new trial. The judgment is therefore reversed and the cause remanded for a new trial in conformity with the views herein expressed, with permission to the respective parties, or either of them, to amend their pleadings if so advised.

REVERSED.

ISAAC N. MCDOUGAL V. STATE OF NEBRASKA.

FILED JANUARY 19, 1921. No. 21402.

Criminal Law: REFUSAL OF INSTRUCTION. When in a criminal case the accused has introduced evidence tending to prove good character, and the court has not instructed the jury thereon, it is reversible error to refuse a tendered instruction that correctly states the law on that question.

ERROR to the district court for Red Willow county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Walter D. James, Somerville & Kiplinger and *Lambe & Butler,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *Mason Wheeler, contra,*

DEAN, J.

Isaac N. McDougal, aged 63, was charged with the crime of committing a rape upon the person of a female child under the age of statutory consent. The jury found him guilty of an assault with intent to commit the crime with which he was charged and he was sentenced to serve an indeterminate term of from two to fifteen years in the penitentiary. From a judgment on the verdict he prosecutes error.

Defendant denied his guilt and introduced witnesses tending to prove that he was a man of good reputation and of good repute for virtue and chastity. Matt Stewart is a county commissioner and has been a resident of M Cook and of the county more than 20 years. He has known defendant 14 or 15 years, and testified that his reputation "for virtue and chastity" in the community in which he lived was good. Mrs. Rink, who for 12 years has resided on a farm about one mile from the home of the prosecutrix and who was acquainted with defendant 15 or 20 years, testified that his reputation in the community was good

as to "good moral character" and with respect to "virtue and chastity." John E. Kelly is a lawyer who has resided at McCook 35 or 40 years and has known defendant 10 years. He testified that he never heard defendant's reputation for virtue and chastity questioned "up to that time," meaning until he was charged with the crime in question. The state did not cross-examine the character witnesses nor offer any evidence on that subject.

The court of its own motion gave eleven instructions, but did not instruct on character. Three instructions on that subject were separately tendered by defendant and all were refused. As to one of them the refusal was without error. Two of the requested instructions correctly state the law and either one of them should have been given as requested. The two instructions so tendered and refused follow:

"You are instructed by the court that, while previous good character does not constitute an excuse or justification for the commission of a crime, still evidence of good character is allowed by law as substantive proof, and either of itself or in connection with other evidence may be sufficient to produce an acquittal by the creation of a reasonable doubt in the minds of the jurors. It is to be considered by you with all the other evidence in the case in determining the general question of guilt or innocence, and is to be given by you such weight as, under all the facts and circumstances, it is entitled to in the sound judgment of the jury."

The other reads: "You are instructed by the court that the defendant has called witnesses to prove his good character. Such evidence is admissible under the law as a circumstance favorable to the accused to be considered by you as jurors, in connection with all the other evidence bearing upon the question of guilt or innocence, and to be given such weight as the jury believe it fairly entitled to, and, when so considered, it may be sufficient to create a reasonable doubt, when, without it, none would exist; but your verdict is to be drawn from the whole evidence,

and when, after giving evidence of good character due weight, the proof still shows the accused to be guilty beyond a reasonable doubt, such evidence of good character is unavailing."

Whether the court erred in refusing to give either of the above instructions is the only error alleged and is the only point to be decided here. The question involved here is well settled in this state. "Previous good character of the accused in a criminal prosecution is a fact which he is entitled to have submitted for the consideration of the jury precisely as any other circumstance favorable to him, without disparagement by the court." *Johnson v. State,* 34 Neb. 257. To the same effect is *Sweet v. State,* 75 Neb. 263.

The same question arose in a criminal case in Michigan. In *People v. Garbutt,* 17 Mich. 8, the trial court refused to give an instruction that was tendered as to good character. This was held to be error. Judge Cooley wrote the opinion of the court and said: "Good character is an important fact with every man; and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistant with any such crime. There are cases where it becomes a man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and convincing cases are sometimes satisfactorily rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against the most skilful web of suspicion and falsehood which conspirators have been able to weave. Good character may not only raise a doubt of guilt which would not otherwise exist, but it may bring conviction of innocence. In every criminal trial it is a fact which the defendant is at liberty to put in evidence; and, being in, the jury have a right to give it such weight as they think it entitled to." 16 C. J. p. 584, sec. 1129, p. 979, sec. 2380; *People v. Jackson,* 182 N. Y. 66; *People v. Bonier,* 179 N. Y. 315; *United*

States v. Gunnell, 16 Mackey (D. C.) 196; *Bishop v. State,* 72 Tex. Cr. Rep. 1.

In *Sweet v. State,* 75 Neb. 263, at page 270 the court say: "While the giving of an instruction respecting evidence of good character may have been proper, noninstruction alone on that point, in the absence of a proffered instruction correctly stating the law, is not prejudicial error." But that is not the case here. Noninstruction alone is not the basis of the complaint in the present case, but refusal to give a tendered instruction on character that correctly stated the law on that subject.

It seems to be the universal rule that, when in a criminal case the accused has introduced evidence tending to prove good character and the court has not instructed the jury thereon, it is reversible error for the court to refuse to give the tendered instruction that correctly states the law on that question.

The judgment is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

LETTON, J., dissenting.

The proof of defendant's guilt is clear and convincing, not only from the mouths of witnesses, but from the physical facts in evidence. The defendant is a farm laborer without a fixed place of abode except when employed, although he appears to have lived in and about McCook most of the time for a good many years. Five witnesses were called as to character, but only two fully qualified themselves and gave positive testimony in defendant's favor. The jury had the benefit of this evidence, and it was fully instructed as to the presumption of innocence. The defendant requested twenty-one instructions in all, four of them on the question of character. Some of the latter were erroneous as applied to the facts. Considering all the circumstances in this case, while the court should have given an instruction on this subject, I am of the opinion that the defendant would and should have been convict-

ed in any event, and that the refusal to give one of the four instructions tendered on this point does not justify a reversal and a retrial of the case.

ROSE, J., concurs in this dissent.

WILLIAM B. SHURTLEFF, APPELLANT, V. OCCIDENTAL BUILDING & LOAN ASSOCIATION, APPELLEE.

FILED JANUARY 19, 1921. NO. 21113.

1. **Damages:** CONTRACT TO LEND MONEY: BREACH: MEASURE OF DAMAGES. The measure of damages for a breach of contract to lend money is usually the difference between the contract interest rate and the increased interest rate the borrower is obliged to pay in procuring a new loan. Where, however, the specific purpose for which the loan was made was communicated to the lender, and it appears that the borrower has suffered special damages by the breach, which are pleaded and proved, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of both parties at the time of making the contract, as the probable result of a breach of it.
2. ———: ———: QUESTION FOR JURY. Whether certain claimed damages, not too remote and speculative, arising out of the increased cost of constructing a building, can be recovered in an action for damages for a breach of a contract to lend money to aid in its construction depends upon whether such damages were fairly and reasonably within the contemplation of the parties at the time of making the contract, as a probable consequence of a breach of it, and is a question of fact to be determined by the jury.
3. ———: ———: SPECULATIVE DAMAGES. Damages claimed for the loss of anticipated rents of a building during a period of delay in its construction, claimed to have been occasioned by a breach of contract to lend money for its construction, are, under the circumstances proved, too remote and speculative to be recoverable.
4. ———: ———: ATTORNEY'S FEES: COSTS. Under the circumstances proved, claimed damages for attorney fees and costs in perfecting the title in order to procure a loan are not recoverable.

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

C. C. Flansburg, for appellant.

Max V. Beghtol and *Gaines & Van Orsdel, contra.*

DAY, J.

This action was brought by William B. Shurtleff, in the district court for Lancaster county, against the Occidental Building & Loan Association to recover special damages claimed to have been sustained by him for an alleged breach of contract on the part of the defendant to lend the plaintiff $16,000.

The petition alleges in apt terms the making of the contract for the loan, the unwarranted breach thereof by the defendant, and the items going to make up his claim for special damages, which may be epitomized as damages arising out of the increased cost of the building; the loss of prospective rents; and the court costs and attorney fees incurred in perfecting his abstract to meet the requirements of the defendant, a more detailed statement of which will hereinafter appear.

At the close of the testimony, on motion of the defendant, the court directed the jury to return a verdict for the defendant, which was accordingly done, and judgment rendered thereon for the defendant. The plaintiff has appealed.

The only question presented by the appeal is whether the court erred in instructing a verdict for the defendant.

It was the theory of the trial court, as disclosed by its remarks in ruling on the defendant's motion for a directed verdict in its favor, that, conceding that the plaintiff had established the making of the contract for the loan, and conceding the unwarranted breach thereof by the defendant, still the plaintiff must fail for the reason that no damages such as the law recognizes for a breach of a contract to lend money had been shown. The trial court took the view that the measure of damages in such cases is the difference between the contract rate of interest and the rate the borrower would have been required to pay in procuring the money elsewhere; and, there being no

testimony that a greater rate of interest would have been required, that therefore no damages would lie. It was also the view of the trial court that the damages claimed were too remote and speculative to form the basis of recovery.

In passing upon the correctness of the ruling of the court, we must consider the testimony tending to support the plaintiff's theory of the case in its most favorable aspect. In support of the plaintiff's theory, the testimony tends to show that on October 5, 1916, the plaintiff made an application to the defendant for a loan of $25,000 upon an apartment house which the plaintiff contemplated building upon a lot then owned by him in the city of Lincoln, Nebraska. At the time of the application the plaintiff exhibited to the defendant the plans of the proposed building, which the defendant examined, figured the cost of the building, and informed the planitiff that his estimates were too high, but finally agreed to make a loan of $16,000 upon the premises, the money to be advanced from time to time as the building progressed toward completion. This proposition was accepted by the plaintiff, and in furtherance of the agreement on October 23, 1916, he signed a note for $16,000 payable to the defendant, and plaintiff and his wife duly executed a mortgage upon the premises to secure the payment of said note. The mortgage and note were delivered to the defendant and accepted by it, and the mortgage was duly filed for record the following day. The testimony also shows that plaintiff, relying upon his contract, commenced the erection of the building in November, 1916, in accordance with the plans exhibited to the defendant; that plaintiff submitted to the defendant an abstract of his title, to which objections were made, and, in order to satisfy the requirements of the defendant, plaintiff commenced two suits to clear the cloud upon his title, and in the end, about March 1, 1917, submitted an abstract which met all the requirements of the defendant; that meanwhile the plaintiff had proceeded with the construction of the building, and had expended thereon about $12,000; that he had

let contracts for the heating and the plumbing, and the building had progressed to the stage that it was ready for plastering; the roughing in on the contracts for heating and plumbing had been done, and the radiation delivered on the premises; that on several occasions the defendant had examined the building, and made no complaint or objections to the manner of its construction; that on March 5, 1917, the defendant again examined the building, and then, for the first time, informed the plaintiff that the building would not stand a loan of $16,000, and offered to make a new loan of $12,000, which the plaintiff refused; that thereupon the defendant returned to plaintiff the note, marked canceled, the mortgage, a release of the mortgage, and the abstract, and refused to carry out the contract for the loan; that the plaintiff made efforts to borrow the money elsewhere, and used due diligence in that behalf, but did not succeed in making a new loan until September or October, 1917, and then was able to borrow but $11, 000; that, by reason of the failure of the defendant to advance the money, the plaintiff was unable to meet the payments on the contracts for heating and plumbing, so that his contractors ceased work and refused to carry out their contracts, and the materials on the ground which were not in place in the building were removed by the contractors; that in completing the building in accordance with the plans, after procuring the money to do so, the plaintiff was obliged to pay for the plumbing the sum of $150 above the original contract price; that he was required to pay the sum of $250 above the original contract price for the heating, and, to even do this, reduced the amount of radiation called for in the original contract; that if the same amount of radiation had been put in as called for by the original contract, the increased cost would have been from $800 to $1,000 more; that there was a delay of several months in the completion of the building occasioned by the breach of the contract, and that by reason thereof the plaintiff lost prospective rents; that the gross rental was $375 a month, and that there was a great

demand for houses, and that the building could have been rented; that he paid out in costs and attorney fees in perfecting his title to meet the requirements of the defendant the sum of $150.

The measure of damages for a branch of a contract to lend money is usually, as announced by the trial court, the difference between the contract interest rate and the increased interest rate the borrower is obliged to pay in procuring a new loan. There are certain exceptions to this rule, one of which is that, where it appears that the specific purpose for which the loan was made was communicated to the lender at the time the contract was entered into, and where it further appears that the borrower has suffered special damages by the breach, which are pleaded and proved, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time of making the contract, as the probable result of a breach of it. The leading case upon this general subject, and one frequently cited by the courts, is *Hadley v. Baxendale,* 9 Exch. (Eng.) *341, *354, in which it is said:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

In 8 R. C. L. 464, sec. 31, it is said: "As a general rule the measure of damages for breach of an agreement to loan money is the difference, if any, between the interest that the borrower contracted to pay and what he was compelled to pay to procure the money; not exceeding, perhaps the highest rate allowed by law. * * * While the recovery is often limited to nominal damages, special damages may be recovered where the money is to be used for a particular purpose which is known at the time to the party agreeing to make the loan, provided, of course, that such damages are not speculative or remote." In *Murphy v. Hanna*, 37 N. Dak. 156, it is said: "The measure of damages for the breach of a contract obligation to loan money is not necessarily restricted to nominal damages, and where it appears that special circumstances were known by both parties, from which it must have been apparent that special damages would be suffered in case of failure to fulfil the obligation, such special damages as may appear to have been reasonably contemplated by the parties are recoverable." For cases supporting the general view see *Holt v. United Security Life Ins. & Trust Co.*, 76 N. J. Law, 585, 21 L. R. A. *n. s.* 691; *Levinski v. Middlesex Banking Co.*, 92 Fed. 449.

In the case before us it must be borne in mind that the plaintiff in contracting for the loan did so with the special purpose in view of constructing the building and paying for it in part at least, out of the money to be advanced on the loan from time to time as the building progressed, this fact was made known to the defendant at the time. That the plaintiff in carrying out the project might enter into contracts with contractors for various parts of the work would seem to be within the fair and reasonable contemplation of the parties at the time the contract for the loan was made, and that, if the contract were breached, the plaintiff might suffer damages. Whether such facts were reasonably within the contemplation of the parties, and whether it must have been reasonably contemplated that special damages would be suffered by a failure to carry

out the agreement, were questions which, under the evidence, in our opinion should have been submitted to the jury. As to whether the damages claimed were too remote and speculative to form the basis of recovery is for the court to determine.

As we view the record, the item of special damages arising out of the increased cost of the heating and plumbing, above the cost in the original contracts, are not too remote and speculative to form the basis of recovery. Here the plaintiff had made contracts for the performance of this work, presumably with parties who were able to fulfil their agreements. That the work was not completed was due to the plaintiff's inability to pay for it, which in turn was brought about by the defendant's default. Such damages appear to be the direct and immediate result of the breach of the contract.

As to the element of special damages arising from the loss of rents of the building for the period of delay in the completion thereof, occasioned as the plaintiff claims by a breach of the contract, we are of the view that such damages are too remote and speculative to form the basis of recovery. Too many independent circumstances followed the breach of the contract to say that the loss of rents was the direct and immediate result of such breach. So, with respect to the costs and attorney fees paid by the plaintiff to perfect his title to meet the requirements of the defendant, we are of the view that they are not proper elements of damage. The demands made by the defendant may have been somewhat technical, as claimed by the plaintiff, and yet in our view they are not beyond the reasonable requirements of a careful and prudent person engaged in loaning money. As before stated, the plaintiff procured a loan elsewhere. Had he not previously perfected his title, he would in all probability have been required to do so, paying therefor approximately the same amount.

In this discussion we have ommitted any reference to the argument of defendant's counsel, for the reason that it is based upon the theory of defendant of the evidence, and

overlooks in a large measure the plaintiff's testimony. But, inasmuch as there was a directed verdict for the defendant, it is incumbent upon us to consider the testimony as to the plaintiff's claims in its most favorable aspect.

From what has been said, it follows that the judgment of the trial court should be reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FLANSBURG, J., not sitting.

JOHN SULLIVAN, APPELLANT, V. FURNAS COUNTY, APPELLEE.

FILED JANUARY 19, 1921. No. 21597.

1. **Recognizance: FORFEITURE: LIABILITY.** Where a recognizance in a penal sum named is entered into for the appearance of the principal in court on a day certain, and the principal fails to appear, the mere entry of the default and the declaration of forfeiture of the recognizance does not fix and determine the extent of the penalty to be exacted,

2. ———: ———: ———. In an action upon a forfeited recognizance, the court, in fixing the amount of penalty to be exacted, may, under section 9017, Rev. St. 1913, remit or reduce any part of the whole of such penalty, and may render judgment therein according to the circumstances of the case and the situation of the parties, and upon such terms and conditions as to the court shall seem just and reasonable.

3. ———: ———: ———. When the surety upon a forfeited recognizance pays into court the amount of the penalty named therein, under the mistaken belief that the amount of the penalty is fixed by the forfeiture, there is no consideration for the payment, and the county is not entitled to hold the money as against the rightful claimant.

APPEAL from the district court for Furnas county: CHARLES E. ELDRED, JUDGE. *Affirmed.*

Lambe & Butler and *Walter D. James,* for appellant.

John Stevens, contra.

DAY, J.

The district court for Furnas county sustained a demurrer to plaintiff's petition, and, plaintiff declining to plead further, his action was dismissed. Plaintiff has appealed.

The grounds of the demurrer were: That there is a defect of parties plaintiff; that there is a defect of parties defendant; and that the petition does not state facts sufficient to constitute a cause of action against the defendant.

The facts alleged in the petition, in so far as necessary to an understanding of the questions raised by the demurrer, are substantially as follows: On November 17, 1917, one Otis Sullivan, a son of the plaintiff, as principal, together with C. E. V. Smith, as surety, entered into a recognizance to the state of Nebraska, in the district court for Furnas county, in the penal sum of $500, conditioned that the said Otis Sullivan would be and appear before said district court on March 11, 1918, to answer to the charge of perjury, pending therein against him. A copy of the recognizance, which is in the usual form, is set out in the petition. On March 11, 1918, the said Otis Sullivan failed to appear in court as required by the terms of the recognizance, and on March 12, 1918, the court duly and regularly entered an order forfeiting the recognizance. It is alleged that before C. E. V. Smith entered into the recognizance as surety, the plaintiff deposited with him the sum of $500, the property of the plaintiff, for the purpose of indemnifying and holding the said C. E. V. Smith harmless from all liability, by reason of entering into the recognizance; that on April 25, 1918, the county attorney of Furnas county represented to said Smith that the district court had fully settled and determined his liability as surety on the recognizance, and had ordered and directed the said surety to pay to the clerk of the district court for Furnas county the sum of $500 in full settlement of such liability; that Smith, believing and relying upon the representations of the county attorney, and without the knowledge or consent of the plaintiff, paid to the clerk

of the district court for Furnas county the sum of $500, the property of the plaintiff; that said sum was paid without consideration and without authority of law, and is now held and retained by the defendant; that at the time Smith made the payment the district court for Furnas county had not fully settled and determined the liability of said Smith as surety, neither had it directed and ordered the said Smith to pay into the court the sum of $500, or any other amount, in satisfaction of such liability; that the only order which had been made in said cause was the order forfeiting the recognizance; that, had Smith known of the falsity of the representations of the county attorney, he would not have made the payment; that Otis Sullivan, the principal in said recognizance, died on October 11, 1918; that, after the death of Otis Sullivan, the district court for Furnas county refused to modify or vacate its order forfeiting said recognizance, and the order or forfeiture is in full force and effect.

It will be noted that the $500 in question was deposited by the plaintiff with Smith for the purpose of indemnifying and holding him harmless from all liability by reason of his suretyship. Up to this time the extent of Smith's liability has not been determined. The mere forfeiture of the recognizance is not a finding or determination of the extent of Smith's liability. At most, it is but a judicial determination of the failure of Otis Sullivan to appear in court as required by the terms of the recognizance. There may be circumstances which would amply justify the court in reducing the amount of the penalty to be exacted below the amount named in the bond. Section 9017, Rev. St. 1913, provides: "The court in which the action for the penalty of any forfeited recognizance is brought may remit or reduce any part of the whole of such penalty, and may render judgment therein according to the circumstances of the case and the situation of the party, and upon such terms and conditions as to such court shall seem just and reasonable."

The forfeiture of the recognizance is but one of the preliminary steps as a basis for an action, and is not a

judicial determination of the amount of penalty to be paid. It would seem, therefore, that at the time Smith paid the money into court neither Otis Sullivan nor Smith nor the plaintiff owed any amount to the county arising out of the forfeiture, and that there is no consideration which would give the county any claim on the money at this time.

As before stated, this money was deposited with Smith to hold him harmless against all liability by reason of his signing the recognizance. Until the extent of Smith's liability is determined, he has the right to have this sum held for his protection. He has not consented that the money be withdrawn, which was placed as security against his own liability. It may yet happen that Smith is held to respond for the penalty in the recognizance. If the plaintiff were successful in this action, and later Smith should be held to respond for the penalty in whole or in part, a situation would be presented in which, by action of the court, Smith has lost his security and the benefits of his contract of indemnity in an action in which he was not a party.

As we view it, the plaintiff has no greater rights against the county to the possession of this fund than he would have against Smith, and against the latter an action will not lie until the extent of Smith's liability has been determined, and the purpose for which the money was deposited has been fulfiled. Until then the plaintiff has no legal right to the fund.

It would seem, therefore, that the demurrer was rightly sustained. To straighten out this tangle, we deem it not out of place to suggest that the extent of any penalty to be exacted on the forfeited recognizance should first be determined by the court, and an action then brought, if necessary, in which all of the parties are brought in and their respective rights determined.

Under the state of the record, the plaintiff is not entitled to a return of the money at this time. The demurrer was, therefore, rightly sustained, and the judgment is

AFFIRMED.

ANTONIO VENUTO, APPELLEE, V. CARTER LAKE CLUB ET AL., APPELLANTS.

FILED JANUARY 19, 1921. No. 21766.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed on condition.*

Carl E. Herring and *Brome & Ramsey,* for appellants.

Anson H. Bigelow, contra.

DAY, J.

This case was before this court upon a former occasion, being reported in 104 Neb. 782, wherein the facts out of which the action arose may be found.

Upon the first trial in the district court, evidence was taken bearing upon the issues tendered, and the court found that under the evidence the claimant was not a dependent within the meaning of the compensation act, and reserved its decision upon the other issues. The plaintiff appealed from the finding and judgment. Upon a review of the record, this court held that the evidence was sufficient to sustain a holding that the mother is a dependent, and set aside the finding of the district court upon the issues of support and dependency. In the opinion the court anticipated the other issues in the case for the guidance of the trial court, and remanded the case for further proceedings. The plaintiff thereupon filed a motion for finding and judgment upon the pleadings, the evidence upon the former trial, and the rules of law governing the case as determined by the supreme court. The defendants also filed a motion for a rehearing of the entire case, and, among other things, asked that defendants be given an opportunity to take testimony in Italy showing that the claimant was not a dependent, and the extent, if any, of the contributions made to the claimant by the deceased. The trial court sustained the plaintiff's motion and overruled the defendants' motion.

The overruling of defendants' motion is the principal error now relied upon. We think the court did not err in its ruling. The decision of this court was decisive of the issues in the case. Whether the defendants should have been given time to investigate further, with the possible view of taking testimony in Italy upon the issue of the dependency of the claimant, was a matter largely resting within the discretion of the trial court. The showing made went only to the effect that the defendants desired to make an investigation of the condition of claimant, and take the testimony of the claimant, "and such other witnesses as may be able to furnish competent testimony material to the issues joined, and present the same to the court upon such rehearing." We are unable to say that there was an abuse of discretion in overruling the defendants' motion.

It is the policy of the law that cases arising under the provisions of the compensation act should be speedily determined. With that end in view, the usual time for making up the issues is not given. The law specially provides that such cases shall be advanced on the docket and determined as soon as possible. Under all the circumstances before us, as presented by the record, we are of the opinion that there was no error in the ruling of the court.

It now appears, however, that the trial court, through an oversight of counsel, computed the amount to be paid under the provisions of section 8, ch. 85, Laws 1917, whereas, it should have been computed under the provisions of section 3663, Rev. St. 1913, in force at the time the cause of action arose. By so doing the court made a weekly award in a greater sum than it should have done. If plaintiff files a remittitur of $2.50 a week in the judgment rendered, within ten days, the judgment and order of the district court will stand affirmed; otherwise, the case will be reversed and remanded, with directions to reduce the award $2.50 a week.

AFFIRMED ON CONDITION.

FLANSBURG, J., dissents.

STATE, EX REL. NEBRASKA BUILDING & INVESTMENT COMPANY, APPELLEE, V. BOARD OF COMMISSIONERS OF STATE INSTITUTIONS ET AL., APPELLANTS.

FILED JANUARY 19, 1921. No. 21759.

1. **States: BOARD OF COMMISSIONERS OF STATE INSTITUTIONS: CONTRACTS: DISCRETION.** Under our statute (Laws 1915, ch. 129) requiring the board of commissioners of state institutions to award a contract to the "lowest responsible bidder," the board, in passing upon the question of the responsibility of the bidders, exercises a discretionary power, and its action on that question is judicial in its nature.
2. ———: ———: ———: ———. The board cannot, however, act arbitrarily or capriciously in the matter, and before it can reject a bid on the ground that the bidder is not "responsible," as that term of the statute is understood, the board must have before it information, or evidence, sufficient to show a rational and reasonable basis for its decision.
3. ———: ———: ———: ———. The term "responsible" as used in the statute is not limited in its meaning to mere financial responsibility, but includes within its purview the general ability and capacity of the bidder to perform the work, his facilities and suitability for the task, and those qualities which he must necessarily have in order that he be able to perform the contract strictly in accordance with its terms.
4. ———: ———: ———: ———. When the state board has made a decision, in the exercise of a *bona fide* judgment, that a certain bidder is not responsible, and when its decision is rational and based on facts and not actuated by favoritism, ill will, or fraud, the court cannot set aside the decision.
5. **Mandamus: INFERIOR TRIBUNALS: CONTROL OF DISCRETION.** The court has no power by mandamus to control the decision of those matters which are left by statute to the discretion of inferior tribunals.

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

Clarence A. Davis, Attorney General, and *C L. Dort,* for appellants.

Doyle & Halligan, contra.

FLANSBURG, J.

Mandamus action against the members of the board of commissioners of state institutions to compel cancelation of an award of a contract made by the board, and to order that the contract be awarded to the relator, the Nebraska Building & Investment Company, which company claims to have been the lowest responsible bidder. Judgment was entered in favor of relator, canceling the prior award, as prayed, and ordering an award of the contract to relator. From this judgment respondents appealed.

The board of commissioners of state institutions has charge of the erection of state buildings. Contracts for the construction of buildings costing more than $1,000 can be made only through public competition, after giving advertised notice, and must be awarded to the "lowest responsible bidder." Laws 1915, ch. 129.

Plans and specifications were prepared and notice to bidders given for the construction of a hospital building at the Soldiers Home at Milford, Nebraska. In the proposal to bidders certain items of the work to be let were submitted in the alternative. At the time of the opening of the bids, the board decided upon those items which were to be considered as the basis for the letting of the contract, and announced such conclusion. Upon the work, based upon the items so decided upon, the bid of the relator was $77,353.30, while that of E. Rokahr was $77,969, and other bids ranged higher. Relator's status thus became fixed as the lowest bidder in point of money amount. The board, however, awarded the contract to Rokahr. This award the district court ordered canceled, upon the ground, evidently, that relator, and not Rokahr, was found by the court to be the lowest responsible bidder.

The sole question is, how far can the court by a mandamus proceeding control the board of state institutions in a determination as to who are lowest responsible bidders in such a case.

The testimony of Mr. Oberlies, chairman of the board, was that relator at the time of the awarding of the contract had under construction for the state two buildings of which the state was in immediate need, and that the work on these buildings had been delayed; that the board had no criticism as to the financial responsibility of the relator company, but was governed in rejecting the bid of the company by the opinion that relator, being a relatively new contractor, and having all the work that it could handle with its equipment and facilities, lacked the capacity, at that particular time, to carry out a strict performance of the contract then to be awarded.

Relator takes the position, since the board did not question its financial responsibility, and since the relator was ready and able to give a bond required by the statute to insure the faithful performance of the work, that the question of responsibility is out of the case, and that there remains only the ministerial duty on the part of the board to award the contract to relator upon its bid.

The term "responsible," as used in the statute, has a broader meaning than a mere reference to pecuniary ability. It was the intention of the statute that a bidder should be a responsible party aside from the giving of the bond. "Though a person may be able to give security to his employer, yet his ability to do and perform with promptness a heavy contract, involving large expenditures, must depend greatly upon his own resources. For this reason, it is assumed that the statute required the successful bidder to be a 'responsible' one, that is to say, 'able to respond or to answer in accordance with what is expected or demanded' (see Webster's Dictionary), in addition to the giving of the bond for the specific performance of the contract." *People v. Dorsheimer*, 55 How. Pr. (N. Y.) 118.

The term "responsible" is not, however, limited to pecuniary ability, as may have been intimated in the New York case just cited, but pertains to many other characteristics of the bidder, such as his general ability and capacity to

carry on the work, his equipment and facilities, his promptness, and the quality of work previously done by him, his suitability to the particular task, and such other qualities as are found necessary to consider in order to determine whether or not, if awarded the contract, he could perform it strictly in accordance with its terms. *Kelling v. Edwards,* 116 Minn. 484; *Inge v. Board of Public Works,* 135 Ala. 187; 36 Cyc. 876. See note, 38 L. R. A. n. s. 672, and note, 26 L. R. A. 710.

As said by Mr. Freeman in his note in 50 Am. St. Rep. 489: "It is clear that if officers and administrative boards, having the power of awarding contracts for public work, were required to act ministerially, or in a particular way, the public interests would suffer at the hands of designing and unscrupulous men. On the other hand, it sometimes happens that public officers and administrative boards are oblivious to the interests of the public, and that, if there were no checks upon them, the door of fraud, corruption, and official extravagance would be thrown wide open. The law, therefore, has wisely provided that contracts for public work shall be let to the lowest responsible bidder giving adequate security."

The tribunals having charge of the letting of these contracts for public work in passing upon the question of the responsibility of bidders, as determined from all those elements entering into that question, do not act ministerially only, but exercise an official discretion. The action of the board in that respect is judicial in its nature, and the exercise of that discretion is vested in the board, and not in the courts.

When the board has made a decision that a certain bidder is not "responsible," and this decision has such support from evidence, or information, then at hand, as to show that the board did not act arbitrarily, or from favoritism, ill will, or fraud, but from an honest conviction, based upon facts, that its action was, in its judgment, for the best interests of the state, it is not the province of the courts to interfere by mandamus, and direct the action

of the board, even though the court should believe that the conclusion of the board was erroneous. For the court to take evidence and upon that evidence to determine that the bidder was in fact "responsible" in such a case would be to substitute the opinion and judgment of the court for that which, by the statute, belongs to the board, and would, under well-recognized rules of law, be unwarranted. *State v. City of Lincoln,* 68 Neb. 597; *State v. Kendall,* 15 Neb. 262; *Johnson v. Sanitary District of Chicago,* 163 Ill. 285; *Kelly v. City of Chicago,* 62 Ill. 279; note, 50 Am. St. Rep. 489; note, 38 L. R. A. n. s. 654.

It is insisted that, under previous decisions of this court, the relator has the right to a review and control of the decision of the board in a mandamus action.

In *State v. York County,* 13 Neb. 57, a writ of mandamus issued to review the action of the county board. The board had awarded a contract under a statute which required that such contract be let to the "lowest bidder competent under the provisions" of the statute. The competency or responsibility of the bidders was, however, not considered in the case. The action of the board was treated by the court, under its construction of the statute, as purely ministerial, and it was assumed without argument in the decision that relator was entitled to a writ if he was shown to be the lowest bidder.

In *People v. Commissioners of Buffalo County,* 4 Neb. 150, 161, the question of responsibility of the bidder was not involved. The court denied a writ on the ground that none of the bids was valid, since certain essential preliminary steps, required by the statute, had not been followed. The statement of the court in that case, that the "lowest responsible bidder" could maintain an action in mandamus to protect his rights, is dictum only, and that statement of the law cannot be approved, at least where the court is asked to pass on some matter upon which the board has acted in the exercise of its discretionary powers.

Relator further relies on the decision in *State v. Cornell,* 52 Neb. 25, 35. In that case the state printing board had

awarded a contract for furnishing to the state, printing, stationery, and supplies. The provisions of the statute involved required the letting of the contract to the "lowest bidder." The court in construing that statute said: "In regard to the character of the work to be performed, its quality, or any details, they were not committed by the law to the discretion or judgment of the board, * * * hence there is in the awarding of the contracts under this law no discretion to be exercised as to any of the particulars to which we have alluded, which would preclude the issuance of a writ of mandamus, which will not, as a rule, be issued to control discretion. * * * The question of the *responsibility* of the bidder was not left for the general judgment and discretion of the board."

The case of *Marsh v. State,* 2 Neb. (Unof.) 372, is based upon the same statute as that involved in *State v. Cornell, supra,* though the statute had since been amended. No question of the discretionary power of the board was considered, and the case was decided upon the authority and reasoning of *State v. Cornell.*

In those cases, on the other hand, where this court has been called upon to review by mandamus acts of such a tribunal done in the exercise of a discretion, and where the question has been raised, the court has refused to interfere. *State v. City of Lincoln, supra; State v. Kendall, supra.*

The evidence, in our opinion, shows that the board of state institutions in this case exercised its best judgment, and on information sufficient to show that its action was not merely arbitrary or capricious, nor in wilful disregard to the rights of bidders, and the writ of mandamus should, in our opinion, have been denied.

REVERSED AND DISMISSED.

LETTON, DEAN and DAY, JJ., not sitting.

DAVID F. KILE, ADMINISTRATOR, APPELLEE, V. JULIA ZIMMERMAN ET AL., APPELLANTS.

FILED JANUARY 19, 1921. No. 21221.

Principal and Agent: COLLECTION OF NOTE: AUTHORITY OF AGENT. Where one not in possession of a note assumes to collect both principal and interest as agent of the holder, proof of his authority to receive payment of principal may be implied from facts and circumstances arising in the course of the relations between the holder and the alleged agent with regard to the note, justifying the inference that it was intended that the latter should be empowered to collect both principal and interest, and such inference will be aided by the fact that the note contains an option to the maker to pay part or all of the principal on any interest paying date.

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

Hazlett, Jack & Laughlin and *Frank A. Peterson,* for appellants.

Sam B. Iams, contra.

DORSEY, C.

This is a suit to foreclose a mortgage upon a residence property in the city of Lincoln given to secure a promissory note for $500, executed May 5, 1910, by Effie L. Ayers, who appears in the suit as the defendant and appellant Effie L. Grace. The payee of the note was Stella Kile, whose husband brings this suit as administrator for his deceased wife. Miss Ayers procured the money for which the note and mortgage in suit were given from Mrs. Kile, through John S. Reed, who had previously been instrumental, as a real estate agent, in selling Miss Ayers the property which she mortgaged to secure the loan. In 1913 Miss Ayers, or Mrs. Grace, as she then was, conveyed the property to her mother, the defendant and appellant Julia Zimmerman, who assumed the payment of the note and mort-

gage. The defense was that the note had been paid in full to John S. Reed, who, the appellants averred, was the agent of Mrs. Kile duly authorized to receive payment. It is undisputed that the full amount of the note, both principal and interest, was in fact paid to Reed, and that he never accounted for it to Mrs. Kile. His agency and authority were controverted. The court below found for the administrator upon this issue, and from its decree foreclosing the mortgage this appeal is taken.

The appellants never came into contact with Mrs. Kile, either personally or by letter, and the business relative to the note and mortgage was transacted wholly through John S. Reed. The note originally had ten coupons attached to it, each for $15, representing the semi-annual interest for the period of five years which the note had to run before it matured on May 5, 1915. The first two payments of interest were made to Reed by Mrs. Grace in person, and she testified that he clipped a coupon each time from the note and handed it to her, after marking it "paid." After that Mrs. Grace removed from Lincoln and remitted Reed for the interest and received the canceled coupons by mail until she conveyed the property to her mother in 1913. Mrs. Zimmerman made three payments to Reed; the first on November 5, 1913, for 273, being $250 on principal, $15 on interest, and $8 to apply on insurance upon the mortgaged property; the second on April 15, 1914, for $132.50, including $125 on principal and $7.50 on interest; the third on October 26, 1914, for $128, in payment of the remainder of principal and interest on the loan. For each of these payments Reed gave her a receipt, specifying the items included and the fact that they were paid upon the note and mortgage in suit. Mrs. Zimmerman received none of the coupons and never saw the note. She did not demand the note or mortgage or a release when the loan was paid off, but did ask for the abstract of title, which she thought would be sufficient evidence of payment. Reed claimed he did not have the abstract when she first asked him for it, but sent it to her later.

Mrs. Zimmerman received no notices from Mrs. Kile and heard nothing more of the matter until several months after Mrs. Kile's death. This is explained by the fact that, after the note fell due according to its terms in May, 1915, Reed procured from Mrs. Kile an extension of it for three years, and thereafter continued to pay her the interest on its due dates, as if he had collected it from Mrs. Zimmerman. He made the last payment of interest in November, 1917, shortly after Mrs. Kile's death, but on May 5, 1918, the three years' extension expired, and later, after notice was given by the administrator to Mrs. Zimmerman that the loan was due and unpaid, the facts developed.

It is undisputed that Reed was the agent of Mrs. Kile at least for the collection of interest; but it is well settled that proof of that fact alone will not afford a sufficient basis for the inference that he was also her agent for the collection of the principal, if he did not have the note in his possession. *Richards v. Walter,* 49 Neb. 639. The only direct evidence to the effect that Reed was in possession of the note at any time after it was originally executed was the testimony of Mrs. Grace that, when she made the first two interest payments, she saw Reed clip the coupons. In his testimony Reed denied that he was entrusted with the possession of the note, and stated that Mrs. Kile gave him the coupon representing each interest instalment after payment had been made. While the record does not, in our opinion, warrant the conclusion that the note was in Reed's possession when the payments of principal were received by him, the fact that he did not have possession of the note is only a circumstance bearing upon the question of his authority to collect the principal, and is not conclusive of that question. *Thomson v. Shelton,* 49 Neb. 644. Are there any other facts or circumstances in the record from which that authority may be inferred?

The evidence reveals an unusually close and confidential business relation between Reed and Mrs. Kile with reference to the note and mortgage in suit. The loan was nego-

tiated by Reed, and he drew the papers and took the acknowledgment of the mortgage. Mrs. Kile told him at that time that she desired it to be kept a secret that she had invested this money, and arranged with Reed to pay her the money collected as interest at his office, and not to remit it to her at her home. She always received the interest money at his office, and her husband was ignorant of the fact that she had this investment until long afterwards. The note contained an option to the borrower to pay $100 or any multiple thereof on any interest paying date, and Mrs. Kile was, therefore, chargeable with notice that the maker might elect to avail herself of the option and pay part or all of the principal whenever the interest fell due. She had evinced the desire to have no personal dealings with regard to the note, from motives of concealment which applied with equal force to the collection of the principal. If she did not want payments of interest coming to her at her home which would reveal the fact that she had this money invested, neither would she want the principal paid directly to her, for the same reason. Counsel for the appellants argue that it is reasonable to infer from these facts that Mrs. Kile authorized and expected Reed to collect the principal as well as the interest.

As indicating the complete reliance which Mrs. Kile placed upon Reed throughout this transaction and the control which she permitted him to exercise over the collection of the note, attention is called by counsel to the circumstances relative to the three years' extension of the time of payment. On May 11, 1915, six days after the note fell due according to its terms, at Reed's instance and in his office, she signed the extension for that period written by him upon the back of the note. Without independent inquiry, and with nothing but the assurance of her own agent from which to reach the conclusion that Mrs. Zimmerman had not paid or did not wish to pay the note and desired an extension of it, she suffered herself to be hoodwinked into signing an extension, the effect of which was, not only to deceive herself, but to make it impossible for

the fact of the agent's defalcation to come to the knowledge of the appellants.

Mrs. Kile did not come into personal contact with the appellants with regard to the extension any more than with regard to the preceding incidents of the transaction. Neither did she have any written evidence of their application for extension, in the form of a renewal note or coupons for the additional three years' interest, such as it is not unusual for prudent lenders to require under like circumstances. She was content to take her agent's word for it. It is contended that the fact that Reed was thus permitted to represent her in negotiating what she took to be an extension of the note is, in view of the unlimited confidence that she displayed toward him in the matter, evidence of precedent unrestricted authority on his part to deal as well with the collection of the principal as of the interest.

We are of the opinion that the facts hereinbefore narrated preclude any other theory except that Reed was duly authorized, as Mrs. Kile's agent, to receive the several payments of principal paid to him by the appellants, and we therefore recommend that the decree of the court below be reversed and the action dismissed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the action dismissed, and this opinion is adopted by and made the opinion of the court.

REVERSED AND DISMISSED.

J. FRANK CORRY, APPELLEE, v. WALDRON SEED COMPANY, APPELLANT.

FILED JANUARY 19, 1921. No. 21226.

1. **Sales: SEEDS: ACCEPTANCE.** Where an executory contract to grow and deliver seed provides that it shall have a certain percentage of germinating vitality, the buyer has the right to test the seed

within a reasonable time after delivery as a condition to acceptance, and acceptance will not be presumed from the mere fact that seed was delivered to and received into the possession of the buyer, if such test be practicable, customary or contemplated by the parties.

2. ———: ———: TESTING: PLEADING AND PROOF. If, in the case of an executory contract to deliver seed of a certain germinating vitality, the contract is silent as to whether a test to determine its vitality is practicable, customary or contemplated, those facts become the subject of pleading and proof, and the court will not assume them or take judicial notice thereof.

3. ———: ———: ———: DEFENSE. Where a contract to deliver seed of a certain germinating vitality is silent as to whether a test to determine its vitality was practicable within a reasonable time after delivery, or was customary or contemplated, it is sufficient for the seller, who has delivered seed thereunder to the buyer, in his petition in an action for the price, to set forth the contract and allege delivery pursuant thereto. If such test was practicable, customary or contemplated, and the buyer desires to avail himself thereof, it is, in such case, matter of affirmative defense.

4. ———: ———: ———: ———. In such case, an answer which consists only of an admission of the receipt of the seed and an allegation that it was inferior in germinating vitality to the contract requirement, but fails to affirmatively plead that such test was practicable, customary or contemplated, does not state a defense.

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

Byron G. Burbank, for appellant.

Alvin F. Johnson, contra.

DORSEY, C.

The plaintiff, J. Frank Corry, a seed grower and dealer, brought this action against the defendant, Waldron Seed Company, to recover the contract price of 1,098 pounds of muskmelon seed grown by the plaintiff for the defendant and delivered to the latter pursuant to its written order for such seed, which provided that the seed should "show a germinating vitality of 85 per cent." The plaintiff accepted the order a few days later by letter, and in

due time grew and delivered to the defendant the quantity of seed sued for, which the defendant received into its possession.

The plaintiff set up the written order and the acceptance thereof in his petition, and alleged that, "in pursuance of said contract and at the special instance and request of said defendant, plaintiff did grow for said defendant, and did, on or about the 2d day of November, 1912, deliver to said defendant" the quantity of seed sued for, praying for the recovery of the price at the stipulated rate of 22½ cents a pound. The defendant, in its answer, admitted receiving the quantity of seed alleged in the petition under the order set forth therein, denied every other allegation of the petition, and averred that the seed in question did not possess a germinating vitality of 85 per cent. The latter averment was denied in plaintiff's reply.

At the trial the plaintiff proved that he shipped and delivered to the defendant 1,098 pounds of the particular variety of muskmelon seed called for by the contract, but made no effort to prove that it had the prescribed percentage of vitality. The trial court took the view that the burden upon the plaintiff was satisfied by proof of delivery and receipt of the quantity of seed sued for, and that the answer failed to state facts sufficient to constitute a defense. The court accordingly refused to permit the defendant to introduce any evidence as to the result of tests which it had made after the shipment of seed was received, tending to prove that its vitality was inferior to the contract requirement, and directed a verdict for the plaintiff. From the judgment thereon the defendant appeals.

In order to determine whether the court was in error in thus summarily disposing of the case, it becomes necessary to determine the precise attitude of the parties with reference to the contract of sale at the time the seed was delivered to and received by the defendant. It was an executory contract to grow and deliver to the defendant a quantity of a certain variety of seed of a certain germinat-

ing vitality. Thus there was an express condition incorporated into the executory contract, which related to a quality or attribute which the seed must possess, namely, that it should have a certain germinating vitality. That was a fact which could not be ascertained by ordinary inspection at the time of delivery, and could be ascertained only, if at all, by a test which would require some time thereafter to apply. The question, then, is whether it was the intention of the parties, to be gathered from the contract and from the nature of the commodity with which it dealt, that the delivery should be subject to such test, or whether, on the contrary, the delivery was intended to be absolute, consummating the sale and vesting title in the purchaser, subject to the defendant's remedy for breach of an express warranty of quality, if upon later test or use the seed should prove deficient in germinating vitality.

The plaintiff having contracted to deliver seed of a specified germinating vitality, we think a fair construction of the contract demanded that he deliver seed corresponding to that description, and that he should not be held to have discharged his primary obligation under the contract unless he did deliver such seed, if there was any practicable method by which the seed could be tested and its vitality determined at the time of delivery or within a reasonable time thereafter. If such a test was practicable, the delivery should be held to be conditional only, and the contract to remain executory, until the defendant had been afforded a fair opportunity to make it. In such case, the mere fact that certain seed had been delivered to and received by the defendant under the contract would not be equivalent to acceptance, in the sense that the stipulation of the contract with reference to the vitality of the seed would thereby cease to be a condition precedent and be transformed into a warranty or condition subsequent.

Was it practicable to determine the vitality of the seed by a test within a reasonable time after delivery? The contract says nothing about such test, and there is nothing

in its language from which it can be inferred either that such a test was practicable or that it was within the contemplation of the parties. Whether it was practicable or a custom of the trade (the plaintiff being a grower and the defendant a wholesaler of seeds) was, therefore, a matter of pleading and proof extraneous to the contract. We have reason to believe, from evidence offered by the defendant, that it was both practicable and customary, but the question is whether evidence to that effect was admissible under the pleadings; the court would not be warranted in taking judicial notice of those facts. Assuming that if a test of the seed for germinating vitality, within a reasonable time after delivery, was practicable and customary, the delivery of the seed by the plaintiff and its receipt by the defendant were subject to that test, and did not constitute acceptance until a fair opportunity to make the test had been afforded, the fact remains that the contract neither expressly nor impliedly provided for such test and contains nothing from which we can infer that it was either practicable or a custom of the trade.

If the contract had affirmatively provided for such test, or if it were possible to infer from its provisions that it was practicable, customary or within the contemplation of the parties that the seed be tested within a reasonable time after delivery, then we should say that the burden would rest upon the plaintiff, in his petition and evidence in chief, to show affirmatively, not only that he delivered the seed pursuant to the contract, but that there was an unqualified and absolute acceptance of it, or that the defendant, by retaining it without objection for defect of quality for an unreasonable time after delivery, had waived the right to reject it on that ground. But where, as in the instant case, there is an executory contract of sale which provides that the subject thereof shall possess some attribute or quality not ascertainable by ordinary inspection, and contains nothing to warrant the inference that it could be ascertained by practicable test within a reasonable time after delivery, or that such test was customary or contem-

plated, it is sufficient for the seller, in his petition in an action for the price, to set up the contract and allege delivery pursuant thereto. If such test be, in fact, practicable, customary or contemplated, it becomes matter of defense.

Having determined that the plaintiff's pleading and proof were *prima facie* sufficient under the circumstances of this case, we shall next inquire whether the trial court was right in holding that the defendant's answer failed to state a defense, and in excluding the defendant's evidence upon that ground. The answer consisted of an admission of the receipt of the seed, a general denial of all other allegations of the petition, and an allegation that the seed did not have a germinating vitality of 85 per cent. As indicated by the preceding discussion, if it was a fact that a test of the seed within a reasonable time after delivery was practicable, customary or contemplated by the parties as a condition precedent to acceptance, it went directly to the issue raised by the plaintiff's allegation of delivery and, if properly pleaded, would have put the fact of acceptance in issue. It was possible for the defendant to have pleaded that such a test was practicable or a custom of the trade, that it had received the seed upon that condition, and that it had within a reasonable time subjected it to test, found it inferior to the contract requirements, and refused to accept it. Thus the defendant might have treated the stipulation as to the germinating vitality of the seed as a condition precedent to the plaintiff's right to recover for the price, but the answer contains no such averments. It did, to be sure, aver that the seed did not have the specified germinating vitality, but, as we have seen, that fact could be put in issue only as dependent upon a test within a reasonable time, which, in turn, was dependent upon whether such a test was practicable or customary, and we are not entitled to assume, as a matter of law, either of those facts.

The answer put in issue neither the fact of acceptance, which it might have done by alleging that it was received

subject to a test which showed good grounds for refusing it, and that it was refused, nor the fact, if the defendant desired to so treat it, that there was a breach of warranty of quality and rescission upon that ground. Whether the stipulation as to the vitality of the seed is viewed as a condition precedent to the obligation of the defendant to accept it or as a warranty or condition subsequent, the answer was insufficient to state a defense, and there was no error in directing a verdict for the plaintiff.

We recommend that the judgment be affirmed.

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

AFFIRMED.

OLIVE B. HAYS, APPELLEE, V. CARRIE S. CHRISTIANSEN ET AL., APPELLANTS.

FILED JANUARY 19, 1921. No. 21157.

1. **Mortgages:** MORTGAGEE IN POSSESSION: ACCOUNTING. Where, before foreclosure, a mortgagee takes possession of the mortgaged premises, under an agreement with the mortgagor that he will manage the same and apply the net rents and profits toward the payment of the mortgaged debt, he must account, not only for the rents and profits he actually receives, but for such as, with diligence, he could have received. Evidence examined, and *held* not to show that the mortgagee, with diligence, could have received more than he actually received.

2. ———: ———: IMPROVEMENTS. While, as a general rule, a mortgagee in possession of the mortgaged premises with the consent of the mortgagor cannot recover for permanent improvements made by him thereon, yet, if the improvement was absolutely necessary for the preservation and management of the property and was made in good faith, the mere fact that it was permanent in character will not deprive the mortgagee of the right to credit therefor in an accounting between them.

3. **Appeal:** ACCOUNTING: ADMISSION OF EVIDENCE. In a suit for an accounting, plaintiff produced a witness having personal knowledge of the facts, who testified to various items of the receipt and disbursement of trust funds and identified canceled checks drawn by her showing the items of disbursement, verifying each. *Held*, that the admission in evidence of receipts signed by the persons to whom such payments were made was not prejudicial, there being sufficient competent evidence, if believed, to establish plaintiff's account.

4. **Mortgages:** MORTGAGEE IN POSSESSION: APPOINTMENT OF RECEIVER. A mortgagee, who takes possession of the mortgaged premises under an agreement with the mortgagor to manage the same and apply the net rents and profits toward the payment of the mortgage debt, cannot renounce the trust thus voluntarily assumed and successfully apply for the appointment of a receiver to do what was his duty and within his power to do. *Held*, that the court erred in appointing a receiver.

APPEAL from the district court for Lancaster county: WILLIAM M. MORNING, JUDGE. *Affirmed in part, and reversed in part, with directions.*

C. C. Flansburg, for appellants.

W. S. McCoy, Fred C. Foster and *O. K. Perrin, contra.*

CAIN, C.

On April 1, 1915, one W. A. McLaughlin was the owner and in possession of lots C, D, E, and F, in Bigelow's subdivison of lots 11 and 12, block 27, in the city of Lincoln, together with the four-story brick hotel, with about 90 rooms, thereon, which is sometimes known as the Woman's Building, or the Grand Hotel. On that date McLaughlin executed to the Lincoln Safe Deposit Company a mortgage on this property to secure 19 promissory notes of $1,000 each, falling due at intervals of six months thereafter, and bearing interest at 10 per cent. after maturity, and another principal note of $16,000 payable April 1, 1925, aggregating an indebtedness of $35,000. After making this mortgage McLaughlin sold the premises to Carrie S. Christiansen, wife of Neils Christiansen, and they are defendants. The Lincoln Safe Deposit Company sold these notes

and assigned the mortgage to Olive B. Hays, the plaintiff in this suit. Default was made in the payment of the first mortgage notes maturing October 1, 1915, and April 1, 1916. On August 18, 1916, plaintiff brought suit to foreclose. No answer was filed, but by agreement of the parties possession of the premises was taken over, almost immediately after the filing of the petition for foreclosure, by the Lincoln Trust Company as agent for plaintiff. On September 24, 1917, decree of foreclosure was entered finding amount due plaintiff to be $39,806.81. On June 25, 1918, an order of sale was issued and the premises sold to the plaintiff for the sum of $40,000. Defendants objected to the confirmation of the sale and demanded an accounting. The plaintiff, through her agent, the Lincoln Trust Company, made an accounting of the rents and profits derived from the building during her occupancy as mortgagee in possession, and on May 10, 1919, the trial court found the amount due plaintiff to be $44,593.24. This appeal is taken by the defendants from the order of the district court confirming the sale under foreclosure and approving the account of the plaintiff, and also from the order of the district court appointing the Lincoln Trust Company as receiver to take possession of the property pending appeal. Appellants' assignments of error are: (a) That the court erred in considering the account rendered by plaintiff in the operation of the building and in not requiring plaintiff to credit on the indebtedness the reasonable rental value of the premises, claiming that the amount found due plaintiff on the date of the last decree should have been only $31,903.30. (b) That, though the account was immaterial, yet, if considered, then permanent improvements and cost of collection of rents could not be allowed. (c) That the court erred in appointing a receiver after the confirmation of the sale, for the reason that the mortgagee was already in possession of the mortgaged premises by consent of the mortgagor.

A large amount of evidence was taken in the court below and the bill of exceptions consists of two large volumes.

By appellants' assignments of error, however, the field of inquiry is very much limited. A great deal of testimony was taken upon the question of the character of the possession of the premises after the foreclosure suit was commenced, but we think it establishes that the plaintiff mortgagee, through her agent, the Lincoln Trust Company, was in possession of the property under an agreement to manage the same and to account for the rents and profits and apply them toward extinguishment of the mortgage debt. There is no dispute on this point, though the plaintiff claims that the agreement was that the building should be operated as it had been for years, as a woman's dormitory, while the defendants denied that this was a part of the agreement. For reasons that will appear later on, we do not think this difference material.

In support of appellants' first assignment of error, they contend that a mortgagee in possession of productive real property before foreclosure must account, not only for what rents and profits of the property he actually receives, but also with what he could with reasonable diligence have received. This is no doubt the rule in this state. *Comstock v. Michael,* 17 Neb. 288; *Kemp v. Small,* 32 Neb. 318; *White v. Atlas Lumber Co.,* 49 Neb. 82; *Hatch v. Falconer,* 67 Neb. 249; *Attwood v. Warner,* 92 Neb. 370. While the earlier cases above cited hold that the mortgagee in possession must account for net rents and profits received by him, yet the later ones, especially *Attwood v. Warner, supra,* fully sustain appellants' contention. But when we apply this rule to the facts in this case we encounter difficulty, for there is no evidence of what the reasonable rental value of the premises was during the occupancy of the mortgagee, unless it be inferred from what appellants contend were two offers by third parties to rent the building, and an offer to rent the lower floor as a bakery, which were brought to the attention of plaintiff's agent. We will now consider these offers. The first came from a man named Poore, who was conducting a rooming house on R street, and worked at the Central National Bank. He offered to

pay $310 a month for the building, except the dining room and kitchen and the northeast room on the first floor. But the record shows that Mr. Poore's offer was conditional upon his getting the building for at least three years; he wanted five years. This is the testimony of defendant Neils Christiansen. Mr. W. E. Barkley, of the Lincoln Trust Company, claimed that Poore was not financially responsible, and there is no substantial evidence to establish or disprove the claim, and on this important point we are left in doubt. In addition to the suggestion of his lack of financial responsibility, it will be observed that his offer was conditional on securing a lease for at least three years, which under the circumstances was probably sufficient to justify its rejection. The next offer came from Christian Rocke, who had operated the Woman's Building for several years, had bought it from plaintiff after the confirmation of the foreclosure sale, and was admittedly responsible for his financial undertakings. His offer was that he would pay $300 a month for the building if it was put in repair, and he testified that it was in very poor repair. Other evidence is that the building is over 30 years old and needs repairs. From all the evidence on this subject, we have reached the conclusion that the condition of Mr. Rocke's offer that the building be put in repair might have involved such an extensive outlay as to very largely consume the rent that would have been received from him. It was testified that there was another offer by Mr. Seely to rent the west room on the lower floor for a bakery for $150 a month for a term of five years, but the evidence of Mr. Barkley was that he feared the running of a bakery would interfere with the occupancy of the building as a dormitory. This offer, too, was conditioned on a lease for a term of five years, which under the circumstances would have been, in our opinion, a sufficient reason for its rejection. On the whole record, we have reached the conclusion that the evidence would not warrant a finding that the plaintiff could, by due diligence, have secured greater rental than she did.

Miss Elizabeth Irwin was put in sole charge of the building, and hired all the help, made all the purchases, and paid all bills. She had charge of the elevator and telephone service, general supervision of the building, looked after the roomers there and collected the room rents, and was paid a salary of about $75 a month. Appellants contend, citing many authorities, that plaintiff was not entitled to an allowance for services in the collection of rents. As pointed out, Miss Irwin's services included a great deal more than the mere collection of the rents, and it cannot justly be said that the salary she received was for the collection of rents, which was only a small part of her general duties in the management of the business. In the case of *White v. Atlas Lumber Co., supra,* this court approved an allowance of a commission of 10 per cent. for the collection of rents by a mortgagee in possession. We accordingly must find that there was no error in the payment of the salary to Miss Irwin. In fact, the character of the mortgaged premises was such as to absolutely require some one to superintend the running of the building.

Appellants further claim that a mortgagee in possession cannot recover for permanent improvements made without the consent of the mortgagor, and this is undoubtedly the general rule. Where, however, an improvement is absolutely necessary to the preservation of the mortgaged premises, the fact that it is a permanent one does not necessarily deprive the mortgagee in possession of the right to be allowed a credit therefor. 2 Jones, Mortgages (7th ed.) sec. 1129. The appellants' complaint on this score is with reference to the purchase and installation by the mortgagee of a boiler to operate the heating plant of the Woman's Building, together with another building adjoining which the owner was obliged to heat. The evidence shows that the boiler was over 30 years old, and that it was in very bad repair; that $200 or $300 had been spent in a vain effort to repair it; that on account of the defects in the boiler it was costing an excessive amount to buy coal with which to heat the building; that several

experts had examined it and were of the opinion that it was useless to attempt to repair it. The evidence further shows that this situation was discussed between Mr. Barkley of the trust company and the defendant Neils Christainsen. And the evidence of Mr. Barkley is that Mr. Christiansen acquiesced in the purchase of a new boiler; and, while Christiansen denies this, he admitted he was made aware of the necessity of it. The record seems to show that the new boiler cost about $1,700, but we cannot say that the plaintiff's agent in possession did not act prudently in its purchase. Under this state of the record, we cannot think the defendants were prejudiced by the allowance of this item, even though Mr. Christiansen denied that he expressly authorized it. Mr. Barkley testified that he did so authorize, and, while Mr. Barkley's evidence is somewhat inconsistent, the fact remains that the necessity for the new boiler undoubtedly existed, and we think the improvement was made in good faith. 27 Cyc. 1266.

Many receipts of third persons were admitted in evidence over defendants' objections, and this, too, was assigned as error, citing *Ellison v. Albright,* 41 Neb. 93, holding that such receipts are incompetent evidence of the payments thereby acknowledged. We do not doubt the soundness of the rule of evidence contended for, but an examination of the record convinces us that there was other competent evidence of the expenditures by the plaintiff's agent, and that the receipts introduced were merely incidental in the making of the proof. Plaintiff undertook to account for all the rents and profits earned by the building while she was in possession, through her agent, the Lincoln Trust Company, of which Mr. Barkley was an officer. In the course of this accounting plaintiff produced Miss Irwin as a witness, and her deposition was taken with reference to all the receipts and expenditures, of which she disclosed a very exact knowledge, as they were made under her personal supervision. In the course of her testimony she verified all these items. She produced the canceled checks she had given in payment of the

different items and the receipts by the different persons to whom payments were made. Her deposition was very comprehensive, and we think that her testimony is sufficient competent evidence to sustain plaintiff's account, even without the receipts.

Finally, appellants complain of the appointment of a receiver after the confirmation of the sale and pending appeal. Their argument is that, inasmuch as the plaintiff mortgagee was already in possession of the mortgaged premises with full control over the rents and profits, the appointment of a receiver was an unnecessary and unjustifiable burden upon the appellants, and that, when the mortgagee once takes possession of mortgaged premises for the purpose of collecting the rents and profits and accounting to the mortgagor therefor, he cannot at will surrender a trust he has thus voluntarily assumed—citing in support of his contention the case of *Prytherch v. Williams,* 42 L. R. Ch. Div. (Eng.) 590, while the appellee cites the case of *Beer v. Haas,* 40 La. Ann. 413, to the contrary. The Louisiana case is based on a local statute. The evidence on behalf of plaintiff shows that plaintiff was to be let into possession of the mortgaged premises "in lieu of a receiver." Our statute contemplates a receiver after judgment only to carry the same into effect or to preserve the property during pendency of the appeal. Rev. St. 1913, sec. 7810. Plaintiff was in possession and control of the premises at the time of the confirmation of the sale. There was no danger of any diminution in its value through lack of a receiver, and we think the appointment unnecessary. In our judgment there was no occasion for changing the name of plaintiff's possession from that of mortgagee in possession to that of receiver and thereby adding to the expense to be borne by the mortgagor.

Upon the whole record, we think the decree of the lower court confirming the sale and approving the account of the plaintiff mortgagee was correct, and that the order appointing a receiver was erroneous. We therefore recom-

mend that the judgment of the district court confirming the sale and approving the account of the plaintiff be affirmed, and that the court's further order appointing a receiver be reversed, and with instructions not to allow any fees or costs for the receivership.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court confirming the sale and approving the account of plaintiff is affirmed, and its order appointing a receiver is reversed, with instructions to allow no costs for the receivership, and this opinion is adopted by and made the opinion of the court.

JUDGMENT ACCORDINGLY.

HELEN C. MARBLE ET AL., APPELLANTS, V. CITY OF TECUMSEH, APPELLEE.

FILED FEBRUARY 2, 1921. No. 21643.

Wills: LAPSED LEGACIES AND DEVISES. When a will contains an effective residuary provision, a lapsed legacy or devise will go to the residuary legatee or devisee, and not to the heirs or next of kin of the testator.

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

S. P. Davidson, for appellants.

L. C. Chapman, contra.

MORRISSEY, C. J.

This is the second appeal in an action brought by the heirs of Sarah B. Brandon to recover title to four town lots and $500 in money bequeathed by the will of Mrs. Brandon to defendant. Our first opinion is reported in 103 Neb. 625. It was there held that plaintiffs' petition stated a cause of action, and the case was sent back for a new trial. On the second trial the court held that defendant,

by failure to use the property for the purposes for which it had been dedicated, had forfeited all right and title thereto, but further found and decreed that by virtue of the following provision of the will, which defendant set up in an amended answer, to wit:

"24th. I give and bequeath to The Tinley Rescue Christian Home of Omaha, Nebraska, all the residue of my estate, after the debts, legacies, and expense of administering have been paid. I also give and bequeath the land, or the proceeds thereof, to said Tinley Rescue Christian Home of Omaha, Nebraska, that I have heretofore set apart for the support of my said sister, Helen Marble, after her death. The intention of this 24th item is to give all my estate after the death of my said sister, Helen Marble, to said Home"—plaintiffs have no claim, right or title to the property, and plaintiffs' petition was dismissed.

In presenting their appeal appellants say:

"The sole question now presented to this court is: Does a lapsed devise pass to the heirs at law of the testatrix, or to the residuary devisee, in cases where there is a general residuary clause in the will in controversy?"

At common law the rule is that a lapsed or void devise will go to the heirs at law of the testator, notwithstanding the fact that the will contains a residuary clause, unless the will indicates an intention on the part of the testator to have the residuary devise carry such property. But in modern times the common-law rule has been generally departed from or abrogated by statute, and the general rule now is that lapsed, void, or otherwise ineffective devises will pass to a general residuary devisee, unless the will shows the intention of the testator to have been otherwise. 40 Cyc. 1949.

The foregoing rule of law being so well settled, the attorney for appellants having so tersely stated the issue, and the rule in this state being established that the court will examine the whole will and, where possible, give effect to the intent of the testator, the only task before us is to make an examination of this will and determine

the meaning of its residuary clause. It will be noted that the residuary clause in its opening sentence speaks of "all the residue," and the concluding sentence is couched in language which no doubt testatrix thought so clear and sweeping that no question as to her intention could ever arise. To one not versed in the technical refinements of the law, what can be more plain and definite than this concluding sentence: "The intention of this 24th item is to give all my estate after the death of my said sister, Helen Marble, to said Home." We conclude that the testatrix, who had already made such bequests to her heirs at law as she thought proper, and had made liberal provision for the support and maintenance of one of the sisters, who is here as one of the plaintiffs, desired that after the provisions of the will were executed by the payment of the amounts specified, and when her sister, Helen, had departed this life and was no longer in need of her bounty, whatever then remained of the estate should be given to the charitable association named as the residuary legatee.

We are constrained to hold that under the terms of the will the property involved did not pass to the heirs at law, and the judgment of the district court is

AFFIRMED.

OMAHA STRUCTURAL STEEL WORKS, APPELLEE, V. MORRIS MINKIN, APPELLANT.

FILED FEBRUARY 2, 1921. No. 20983.

Appeal: CONFLICTING EVIDENCE. Where there is evidence on both sides of an issue of fact in an action at law, the finding in the trial court on that issue will not be disturbed in the supreme court on appeal unless clearly wrong.

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

J. E. Von Dorn, for appellant.

Switzler & Switzler and *Claudio Delitala, contra.*

ROSE, J.

This is an action on a promissory note of which the following is a copy:

"250 Omaha, Neb., Jan. 2, 1915.

"One year after date I promise to pay to the order of Omaha Iron Works Co. two hundred fifty no/100 dollars. Fifty per cent. due on demand. Value received with interest at 6 per cent. per annum.

"Morris Minkin."

On the back the note is indorsed as follows:

"Omaha Iron Works Co. By Ray Vierling, Treas."

Thus indorsed, plaintiff procured the note directly from the payee. The action was begun in the county court, where there was a judgment in favor of plaintiff for $275.75. Upon an appeal by defendant to the district court, plaintiff recovered a judgment for $260.40, and defendant has appealed therefrom to this court. Upon a review here, the judgment of the district court was reversed. Later a reargument was granted. The record has been reexamined in the light of further arguments.

Plaintiff pleads that the note is complete and regular on its face, and that it was purchased in good faith from the payee for value before maturity without notice of any infirmity therein. Among other defenses, defendant pleads that the note was fraudulently procured from him for stock in the Omaha Iron Works Company, payee, that under the name mentioned articles of incorporation were filed, but that the corporation was never organized and never issued any stock, that the note was without consideration, and that plaintiff is not a holder thereof in due course.

As between defendant and the payee a defense is conclusively established, but the controlling issue of fact, which the trial court resolved against defendant, is whether plaintiff became the holder of the note in due course before it matured January 2, 1916. The burden of proving the affirmative was on plaintiff. That defendant signed

the note and allowed it to fall into the hands of Ray Vierling, doing business as the Omaha Iron Works Company, payee, thus putting into his hands the means to indorse and transfer it to an innocent purchaser, are clearly established facts. It is equally clear that the Omaha Iron Works Company, payee, through Vierling, was indebted to plaintiff for building materials, and that plaintiff is the holder of the note for a valuable consideration. The secretary of plaintiff and also its assistant auditor testified that the note was acquired by purchase before it was due, but they were uncertain as to the date of the transfer. In their testimony April, May, July, August, September, and December, 1915, were mentioned as months during which the transfer occurred, but after they had been cross-examined on dates and had been interrogated in regard to plaintiff's books, records, and correspondence, which did not disclose the date of the purchase but tended to cast suspicion on their testimony, they said that the note was indorsed and delivered to plaintiff during the summer of 1915, before it was due. The testimony of Vierling, who perpetrated the fraud on defendant, tends to prove that plaintiff procured the note in January, 1916, after it was due. It thus appears that there is testimony on both sides of the controlling issue of fact, with evidence sufficient to sustain a finding either way, and that in the final analysis the conclusion depends on the credibility of witnesses, a question for the trial judge, who took the place of a jury. There does not appear to be a substantial reason for holding that the trial court was clearly wrong in determining the vital issue in favor of plaintiff. In this view of the evidence the judgment below should not be reversed.

It follows that the judgment of reversal is vacated, and the judgment of the district court

AFFIRMED.

LETTON, J., not sitting.

JOE KATES, APPELLEE, V. E. M. SPENCER, APPELLANT.

FILED FEBRUARY 2, 1921. NO. 21254.

Justice of the Peace: APPEAL: NEGLECT OF JUSTICE. A party who is free from fault and laches should not be deprived of his right to an appeal solely by the negligent failure of a justice of the peace to prepare a transcript in time for such party to have it filed in the district court within 30 days.

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

McDonald & Irwin, for appellant.

H. M. Marquis and *Roy H. Walford, contra.*

ROSE, J.

This action was commenced before a justice of the peace to recover $200 on the claim that defendant orally leased to plaintiff a five-acre tract of irrigated land, violated the contract and dispossessed plaintiff after the latter had partially performed it. From a judgment in favor of plaintiff for the full amount of his claim, defendant appealed to the district court, where the appeal was dismissed on the ground that the transcript of the justice of the peace had not been filed within the statutory period of 30 days. Defendant has appealed to this court from the judgment of dismissal.

The question presented here is whether the district court, by the filing of the transcript a day too late, acquired jurisdiction to determine the case on its merits. It is conceded by defendant that the transcript was filed in the district court 31 days after the justice of the peace rendered the judgment, but it is contended nevertheless that the delay of one day was due solely to the fault of the justice of the peace, and that therefore the district court should not have dismissed the appeal. The judgment of the justice of the peace was rendered March 18, 1919. Within eight days,

March 26, 1919, defendant filed an approved appeal bond, ordered a transcript, and paid the necessary fee. Again on April 16, 1919, one day before the statutory period expired, an attorney for defendant demanded the transcript by telephone in time to have it filed in the district court by April 17, 1919. Though the time required for the making of the transcript did not exceed 45 minutes, the justice of the peace failed to make the transcript until after the statutory period had expired, but he did mail it to the district court, where it arrived a day too late. When defendant gave an approved appeal bond, ordered a transcript, and paid the necessary fee March 26, 1919, it was the duty of the justice of the peace, without any further demand or a personal call, to have the transcript ready in ample time to be transmitted to the district court within 30 days from the rendition of the judgment. He cannot excuse his official neglect, as he attempted to do in this case, by saying that the transcript would have been ready within the statutory period, had defendant in person or by attorney called in due time and made another demand. The case seems to fall within the rule that a party who is free from fault and laches should not be deprived of his right to an appeal solely by the negligent failure of a justice of the peace to prepare a transcript in time for such party to have it filed in the district court within 30 days. It follows that the judgment of the district court is reversed, the appeal reinstated, and the cause remanded for a trial on the merits.

REVERSED.

LETTON, J., not being a member of the divison which heard this case, did not participate.

WILLIAM HUTTER V. STATE OF NEBRASKA.

FILED FEBRUARY 2, 1921. No. 21657.

1. **Criminal Law**: UNCORROBORATED EVIDENCE OF ACCOMPLICE. "A conviction may rest upon the uncorroborated evidence of an accomplice when sufficient, in connection with the other evidence, to satisfy the jury beyond a reasonable doubt of the guilt of the accused." *Lawhead v. State*, 46 Neb. 607.
2. ———: ERROR. Error, to be available on review, must affirmatively appear on the face of the record.
3. ———: INDORSEMENT OF WITNESSES DURING TRIAL. A conviction should not be reversed on the ground that the trial court permitted the state to indorse on the information during the trial the name of a witness, where there is no showing that accused was thus prejudiced, or that he asked for a postponement. Laws 1915, ch. 164; *Sheppard v. State*, 104 Neb. 709.

ERROR to the district court for Sarpy county: JAMES T. BEGLEY, JUDGE. *Affirmed.*

Edmund H. McCarthy, for plaintiff in error.

Clarence A. Davis, Attorney General, Mason Wheeler and *E. S. Nickerson, contra.*

ROSE, J.

In a prosecution by the state in the district court for Sarpy county, William Hutter, defendant, was convicted of burglary; the substance of the charge against him being that he feloniously entered the garage of Herman Uhe, at Papillion, and stole automobile tires and blow-out patches of the value of $505. Upon a verdict of guilty he was sentenced to the penitentiary for a term of 1 to 20 years. As plaintiff in error defendant presents for review the record of his conviction.

The first assignment of error presented is the insufficiency of the evidence to sustain the conviction. This is based largely on the proposition that defendant's participation in the burglary is shown only by the testimony of two

accomplices. It is a well-established rule of the criminal law of this state that "a conviction may rest upon the uncorroborated evidence of an accomplice when sufficient, in connection with the other evidence, to satisfy the jury beyond a reasonable doubt of the guilt of the accused." *Lawhead v. State,* 46 Neb. 607. Under this rule it is clear that the evidence of defendant's guilt is sufficient.

There is also a complaint that the county attorney in his closing argument erroneously accused counsel for defendant of misstating testimony, but the record does not disclose such an incident nor error in that respect.

The principal argument is directed to the assignment that the trial court erred in permitting the county attorney to indorse on the information the name of a witness during the trial. The granting of such permission is within the discretion of the trial court under a recent statute. Laws 1915, ch. 164. To make error available under this assignment, the record should show that defendant was prejudiced, or that he asked for a postponement or for a continuance. *Sheppard v. State,* 104 Neb. 709. In these respects the record is silent.

AFFIRMED.

JOHN W. SUND, SR., ADMINISTRATOR, APPELLANT, V. SMISEK & HRDLICKA ET AL., APPELLEES.

FILED FEBRUARY 2, 1921. No. 20978.

1. **Negligence:** DIRECTION OF VERDICT. A boy of 9 years, in coasting on a hill in an alley that intersected a public street, collided with the rear wheel of defendant's passing automobile and from the resulting injuries to his person he died the following day. At the close of plaintiff's evidence in chief the court instructed the jury to return a verdict for defendant. *Held,* that the father, as administrator of the estate of the decedent, cannot predicate error on the court's ruling, in view of the fact that negligence on the part of defendant was not shown.

2. ———: CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS. The question of contributory or comparative negligence cannot properly be sub-

mitted to the jury unless there is evidence to support the charge that defendant has been guilty of negligence.

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

James C. Kinsler and *Myers & Mecham,* for appellant.

William R. Patrick, contra.

DEAN, J.

John W. Sund, Sr., as administrator of his minor son's estate, sued to recover from defendant $10,000 damages for the death of his son Johnnie, aged 9 years, that resulted from a motor truck accident. He alleged generally that an auto delivery truck owned by the defendant partnership, while engaged in the firm's business, was so wrongfully, negligently and recklessly driven by a member of the firm that it collided with his son and caused his death. When plaintiff's testimony in chief was concluded the court sustained defendant's motion for a directed verdict. From the judgment rendered thereon plaintiff appealed.

Defendant is a copartnership engaged in the retail grocery business on the south side in Omaha. On February 11, 1916, Charles Hrdlicka, a junior member of the firm, was delivering groceries about town with the truck. On the afternoon of that day plaintiff's decedent was coasting on a sled down a hill in an alley that runs north and south and intersects K street between Twenty-fifth and Twenty-sixth streets. Four or five neighbor children whose ages ranged from 9 to 14 years were coasting with him. When Johnnie's sled reached the bottom of the hill at K street, and had crossed over to the north side of K street, it collided with a rear wheel of defendant's truck. From the injuries that he sustained from the impact he died the following day.

There was testimony tending to show that Hrdlicka knew that the alley in question was used as a coasting place by the children; that he was well acquainted with the neighborhood and had driven daily along K street and

across the alley intersection for many years delivering groceries; that about a week before the accident he said to one of the children who was a witness, respecting the use of the alley for coasting, "that if they were not careful somebody would get hurt." It was admitted that Hrdlicka had lost the use of his left eye and, the sled having approached the truck from the left side, it is argued from this that he should have used more than ordinary care.

The only witnesses of the accident were the four or five children who were coasting. They testified in substance that at the top of the hill Johnnie picked up his sled and running forward threw himself at full length on top of it and coasted down the hill; that Hrdlicka at the time was driving his truck along the north side of K street, and when the sled reached the bottom of the hill it collided with the rear wheel of the truck. One witness testified that the sled struck the rear part of the wheel and veered off to one side, while others testified that it collided with the front part of the rear wheel. It does not appear that the car ran over the boy or his sled. Some of the children who witnessed the accident testified that they did not hear the automobile horn sounded, nor did they see or hear any signal of approach by Hrdlicka as he neared the alley. The hill was shown to be steep and icy, and several houses obstructed the view of the alley from the driver. The mouth of the alley where it runs into K street has banks on each side that are between five and six feet high. That Johnnie's was the fleetest sled on the hill and that he made a rapid descent seems to be fairly established by plaintiff's witnesses.

The evidence does not disclose the speed of the car at the time of the accident. Two witnesses testified that it ran about 12 or 13 yards after the collision. Another said that it ran about five yards, and on the cross-examination he thought it was about two yards. Another, a girl of 16, on the cross-examination testified that the automobile stopped within two yards. Some testified the truck

was going at an ordinary rate of speed and some that it was going rapidly.

The Sund residence is the second house from the alley on the north side of K street. Mrs. Sund, the boy's mother, testified that they lived there 14 years and during that time the hill was used for coasting by the children in the neighborhood; that she could see the hill from her house; that it was "rather a steep hill," and that "in a way" it was dangerous. She further testified: "Q. The momentum or the force gained by coming down this steep hill was such that it would shoot them clear across K street sometimes and beyond K street before they would stop? A. Well, yes; I seen that. * * * Q. And is it not true that it was rather difficult for boys to stop before crossing K street when the ground was covered with snow and it was as it was at that time? A. Well, they did sometimes. Q. And sometimes they couldn't? A. Yes, sir." She testified that after the accident Mr. Hrdlicka carried the boy into her house, and that when she asked him how it happened he replied that he did not know; that he did not see the boy.

Plaintiff argues that the case should have been submitted to the jury under instructions on the question of contributory negligence. In view of the record we think his position is not tenable. The question of contributory or comparative negligence cannot properly be submitted to the jury unless there is evidence to support the charge that defendant has been guilty of negligence. In the present case the evidence shows that the hill was steep, icy and dangerous for coasting, and that the sled descended so rapidly that it was beyond the control of the coaster, and so fast, as one witness testified, that Johnnie could not get off or, as another testified, so fast that he could not be seen. In brief it clearly appears that the sled dashed out so swiftly from between the banks of the alley that the driver of a car running at a moderate rate of speed, in the exercise of such care as an ordinarily prudent person would exercise under like circumstances, could not have

prevented the collison and the consequent tragedy. In view of all the evidence it seems to us that reasonable minds could come to no other conclusion. We are unable to find evidence that will support plaintiff's allegation of negligence. It follows that, there being no triable question of fact to submit to the jury, the court did not err in directing a verdict for defendant.

The judgment is

AFFIRMED.

ANTHONY WEBER, APPELLEE, V. THOMPSON-BELDEN & COMPANY, APPELLANT.

FILED FEBRUARY 2, 1921. No. 21262.

1. **Master and Servant:** NEGLIGENCE OF SERVANT: LIABILITY OF MASTER. "To sustain a recovery for injuries caused by being run down by an autuomobile owned by the defendant, the plaintiff must show by a preponderance of the evidence that the person in charge of the machine was the defendant's servant, and was, at the time of the accident, engaged in the master's business or pleasure with the master's knowledge and direction." *Neff v. Brandeis*, 91 Neb. 11.

2. **Evidence:** INFERENCES. "In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and circumstances proved, it may be taken as established." *Chicago, B. & Q. R. Co. v. Hildebrand*, 42 Neb. 33.

3. Quære. When defendant's name is painted on a motor vehicle which caused an accident, there is a presumption of ownership, but whether this sign raises a presumption that the driver was defendant's servant or agent, and whether it is presumed he was engaged in his master's or principal's business or pleasure, *quære*.

4. Evidence examined, and *held* sufficient to sustain the verdict.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

Kennedy, Holland, DeLacy & McLaughlin, for appellant.

Alvin F. Johnson, contra.

ALDRICH, J.

This action was brought by Anthony Weber in the court below to recover damages for personal injuries received in a collision with an automobile truck which is alleged to be owned by appellant. This truck it is alleged negligently collided with him at the intersection of Twenty-ninth and Leavenworth streets, in Omaha, while he was walking across the crossing used by pedestrians at the intersection of these streets on December 19, 1917. By reason of such collision plaintiff received serious injuries. On June 7, 1919, the jury returned a verdict for $11,000, from which defendant appeals to this court.

On May 5, 1920, while this appeal was pending, plaintiff died. Upon suggestion of death and a motion for revivor being filed herein, this court revived the action and the judgment rendered therein in the name of Lucy M. Weber, executrix of appellee's estate, who now appears herein as appellee.

To entitle the plaintiff to recovery of damages he must meet the requirements of *Neff v. Brandeis,* 91 Neb. 11. In the beginning of this discussion we note that where one is run down by an automobile, among other things, (1) it must be shown by a preponderance of the evidence that the car was owned by defendant; (2) it must also be shown by a preponderance of the evidence that the person in charge of the machine was defendant's servant, and (3) at the time of the accident was acting with his master's knowledge and direction. The analysis and demonstration which we hope to be able to make will successfully, clearly and justly determine whether the plaintiff should recover, or whether defendant should be entitled to reversal. The above propositions state the true philosophy of the issues and the things of achievement necessary to a correct decision. This record plainly shows that defendant and the truck driver sustained the relation of master and servant. If that is true plaintiff must recover.

It is often impossible to prove the existence of certain situations by positive and direct evidence. When one

faces that situation, he may resort to the doctrine announced in *Union P. R. Co. v. Erickson,* 41 Neb. 1. It is there held in a situation similar to this: "While the facts justifying an inference of negligence must be established by the evidence and their existence, must not be left to the conjecture of a jury, and while ordinarily negligence cannot be presumed merely from the happening of an accident, still facts may be established by circumstances, and the same facts which prove the accident may be circumstances from which the facts justifying an inference of negligence may be found to exist."

In this discussion we also find this court has said: "In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and circumstances proved, it may be taken as established." *Chicago, B. & Q. R. Co. v. Hildebrand,* 42 Neb. 33. In our discussion we propose to follow these rules as laid down by this court.

On the issue of negligence there can be but little doubt. The truck which caused this accident was being driven recklessly at a speed of between 20 and 25 miles an hour, without either head or tail lights burning, no signal of a horn or otherwise was given, and after running over plaintiff the truck and driver proceeded west on Leavenworth street without stopping. Thus it is clear that the truck driver was negligent; in fact, his running away makes him almost criminally negligent.

The evidence was conflicting in the main, but it is our opinion that the judgment of the court rendered upon the verdict as returned by the jury should not be disturbed. There is ample law and evidence, to sustain the judgment as announced by the district court. The only remaining proposition then is to give sufficient reason for this conclusion.

Is there sufficient evidence of plaintiff to demonstrate that the motor truck causing the injury belonged to the defendant? Was it in charge of his servant acting in the course of his employment at the time of the accident? One thing is undisputed about the ownership of this truck,

namely, that defendant is engaged in general merchandising in the city of Omaha, owns a large and extensive store, employs four motor trucks and truck drivers to deliver its parcels to its customers. Three trucks were used in delivering goods on the day of the accident. These were covered trucks and on the side of each was painted the names of the owners thereof, to wit, "Thompson-Belden & Co.," in plain, large, legible letters. One of the employees driving one of these trucks was named Volz. It was his custom to purchase gasoline for his engine at the filling station located near the southwest corner of Twenty-ninth and Leavenworth streets. There was printed in gold letters in a semicircle on this delivery truck the name Thompson-Belden & Co. These letters on this truck could be plainly seen from the reflected light at the oil station. The delivery truck in question was a dark-colored delivery truck and in general answered the description of the trucks used by defendant. The first person that the witness Clarence Busse talked with the next morning after the accident was Mr. Volz, a servant of defendant company. There seems to be no dispute but what the driver, Volz, was in the employ of defendant, and that on or about the time of the accident he was delivering parcels from defendant's store and was in charge of one of defendant's trucks at the time of the accident. The truck was within sight of several witnesses at the time the accident happened; and, as the truck belonged to defendant and was in charge of the witness Volz, he must have been riding in the truck and guiding and controlling it at the time of the accident. That proposition under all the facts and the circumstances must have made it plain to the jury that Volz was the defendant's driver of this truck at the time of the accident.

It also appears by several witnesses that the defendant's truck, driven by Volz, was in the vicinity of the accident when plaintiff met with his injury. Other witnesses who were near the scene of the accident corroborate and identify other propositions important to learn about this inter-

section. Several witnesses corroborate this witness at the oil station, and his evidence is uncontradicted that he saw plaintiff fall to the ground as the truck passed over him, and said in substance that the delivery truck was dark-colored, with a top on it, and that the intersection was well lighted. The record also discloses further witnesses driving along this particular street who saw this defendant's truck strike plaintiff at the regular crossing of Twenty-ninth and Leavenworth streets. It also appears that the witness Volz did the ignominious thing of running away and seeking to avoid identity after he had run over plaintiff with the delivery truck, but the evidence on the whole is sufficient to identify him as being the genuine party driving the truck at the time of the accident.

The superintendent of defendant's delivery department gave evidence in this case that on the 19th day of December, 1917, defendant was operating only three delivery trucks, that they were covered having a top with doors in the back, and that their trucks and each of them had the name of Thompson-Belden & Co. painted in gold letters about four inches high. The witness Thomas Volz, defendant's truck driver, at the time of the accident was on his route delivering goods. The intersection of Twenty-ninth and Leavenworth streets, where the accident occurred, was in the same general direction from defendant's place of business as the point where one of his deliveries was made, but was a few blocks west.

As to the truth, accuracy and trustworthiness of Volz's testimony, the jury alone had the opportunity to note his general appearance for apparent fairness and candor, his general dependability and credibility under the circumstances. At any rate it seems the jury heard the testimony of several eyewitnesses as to what motor truck struck the plaintiff, and at what particular street intersection it was, and when it was, and who was in charge; the amount and extent of the injuries were afterwards demonstrated. The jury believed this evidence, and though being to some extent in conflict and uncertain as to the identity of the

person or driver operating the truck, nevertheless, under all the evidence and all the circumstances, they believed that the accident was caused by the collision of defendant's truck while it was employed in the delivery of parcels and goods by Thomas Volz in the employment of defendant. It appears in the evidence of Volz that he often filled his car at the Nicholas Oil Company station, that often he filled it in the morning instead of at night, but filled it at night whenever it was low, in order to have it in proper shape for first deliveries next morning. It certainly is significant that the witness Volz, within sight of the accident, hurried from this station almost immediately after the accident happened. The evidence connecting and establishing Volz as the driver in charge of this truck may be determined by circumstances as well as direct testimony, and these circumstances often have the potency to establish facts which import undeniable negligence, evident in this case. It is plain, from all the facts and circumstances, that the truck driver, Thomas Volz, was acting within the scope of his employment at the time of the accident. It is indisputable that at the time Volz was at the Nicholas Oil Company station, and the next morning he was in continuation of the same service as at the time of the accident. It is plain that Volz, if in the automobile truck at the time of the accident, was there as an employee under the authority of defendant, either express or implied. Then it was a *prima facie* case of negligence, and hence the jury were justified in their verdict.

We admit the burden is upon plaintiff to prove agency. The record shows that the witness Volz nearly every day called at the Nicholas oil station to fill his gasoline tank, that it was generally known by the people in charge of the oil station that he was delivering goods for defendant and was driver of the truck that participated in the accident that injured plaintiff. Then if he was engaged in such occupation and was in good health, as it was known, and was in the vicinity of the accident delivering goods, is it not a fair inference when he departed and soon thereafter

collided with plaintiff that he was in the same employment as usual when the accident occurred? If not, why did he try to run away and hide? If he was not in this serious accident, why did he deem it necessary to cover up his identity? and, if he was innocent, why would it have been desirable to conceal his identity? His whole attitude and conduct has been that of some one who had something to hide.

Appellant has cited many authorities and discussed the law, but it is unnecessary for us to review them in detail, because this case is governed by the law of this court, and there are ample authorities cited by plaintiff to dispose of the issues herein. For instance, *Colwell v. Ætna Bottle & Stopper Co.*, 33 R. I. 531, is not decisive of any issue in this case, for in the Rhode Island case it was held that the servant was not acting within the scope of his employment, and defendant was not liable for damages caused by his servant's negligence, while acting for himself. This is foreign to the application herein. There is no evidence or circumstance that imports any such situation. The record proves that the injury was caused by the negligence of the driver, acting as defendant's agent or servant. We admit in this discussion that one who has been injured by an automobile belonging to defendant while being driven by his agent has the burden of proving that the injury was caused by the negligence of defendant's agent while acting in the line of his duty. Is it not true that defendant's agent was driving on this occasion without a light, recklessly, and at the time sought to run away and hide his identity? In *Dearholt Motor Sales Co. v. Merritt*, 133 Md. 323, we find this citation contains the law, but we fail, however, to see how it can be of any benefit to appellant. This case proceeded on the theory that in an automobile accident it was the uncontradicted evidence that the driver of the automobile had never been employed and had taken defendant's car without permission. The situation on that proposition is diametrically opposite to the instant case, and it is of no benefit to appellant, but

rather is against him, and so we might pursue the analysis *ad infinitum* on the citations and still remain in a chaotic unsatisfactory condition as to the real truth.

The amount of damages found by the jury was reasonable, consistent with the evidence, the circumstances, and the facts. Plaintiff, prior to the injury, applied himself very closely, and for many years had not lost any time, and during several years last past he had increased his earnings to something better than $25 a week. Taking that in connection with his expectancy, he would have earned as much or more than the jury gave him.

Defendant complains of the instructions objected to by him and overruled and given by the court. This position is governed by well-known rules of this court. Instructions to be held erroneous must be construed as a whole. Then if they correctly announce the issue and the evidence and correctly state the law, they are properly considered as correct. The omissions complained of by appellant are completely covered by paragraph 2 of the instructions given by the court. At any rate appellant is not in a position to claim anything for omission. The only instruction tendered and requested by defendant was one for a directed verdict. We have examined the evidence of the physicians and experts who examined plaintiff during his lifetime and have gone over the evidence and all the law propositions raised, and from a survey of all the facts, circumstances and issues presented and discussed, and the instructions of the court, we can conservatively say that the verdict of the jury was justifiable and correct, and taking all the instructions of the court as a whole they are free from errors.

The judgment, then, is

AFFIRMED.

LETTON, J., not being a member of the division which heard this case, did not participate.

CLARA E. BALDWIN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 2, 1921. No. 21690.

1. **Evidence**: CONCLUSIONS OF WITNESS. Where the issue of negligence is to be determined by the method and manner of operating a street car while going into and around a certain curve, testimony that the speed was fast, terrible, frightful, greater than ever before, are mere conclusions and form no basis from which the jury may determine the issue of negligence.
2. **Evidence** examined, and *held* sufficient to show negligence on the part of defendant.

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

John L. Webster and *William M. Burton,* for appellant.

Gaines, Ziegler, Van Orsdel & Gaines, contra.

ALDRICH, J.

This is an action for personal injuries brought by appellee against the Omaha & Council Bluffs Street Railway Company, appellant. The verdict and judgment below was for $8,500.

On November 10, 1916, about 5:30 in the evening, plaintiff was a passenger on one of defendant's cars. The car was crowded, and plaintiff was compelled to stand up, steadying herself by clinging to a strap. There was standing room only, yet the car was not so crowded as to cause people to jostle against plaintiff. Plaintiff stood in the aisle about two-thirds of the way home. She was accompanied by her friend, Miss Cahow, with whom she stood in the aisle. They engaged in general conversation, and did not pay close attention as to how rapidly the car was running, but plaintiff testified that she had a general impression and believed that the car was running at a high rate of speed. At the corner it gave a violent lurch, throwing plaintiff, twisting her right knee. There was no notice-

able slackening of speed as the car approached the curve. This frightened the passengers, causing confusion. When straightened up and righted around, she was still holding to the strap, by means of which she maintained her standing position. This was corroborated by Miss Cahow's testimony. She was moved and swayed around in the car the same as plaintiff.

The only essential difference between plaintiff's and Miss Cahow's testimony is that in the instant case plaintiff specified the number of miles an hour the car was going at the time of the accident from her observation and experience in judging miles an hour which a street car, automobile, or wagon might be going. Plaintiff stated the car, in her judgment, was moving from 14 to 16 miles an hour. This is definite and certain, and supplements her testimony as given at the former trial. At this particular juncture of the case the evidence, as specified at this particular trial, was sufficient to give the jury an opportunity to pass judgment on the rate of speed which the car traveled at the time of the accident, and whether the car was operated negligently.

In some jurisdictions the rule is adhered to that a description of the speed of a car as being at a high rate of speed, going extraordinarily fast, is held to be proper and sufficient description to entitle the jury to form a verdict, but the rule is otherwise in this state. It has been held in the majority of jurisdictions that this kind of evidence is incompetent and possesses no probative force, and that is the rule of this court. On this proposition, in the body of the opinion in *Lindgren v. Omaha Street R. Co.*, 73 Neb. 628, it was said: "If the witness, in his opinion, had been asked to state whether the car was running 5, 10, or 15 miles an hour, the answer would have given the jury a standard to compare its rate of speed with the rate prescribed by the ordinance for the running of cars at the place of the injury." It is apparent that this indefiniteness and uncertainty that existed in the evidence at the former trial is now cured, and the jury were given a def-

inite and specific rate of speed as measured in miles an hour from which to determine whether defendant was driving its car at a negligent rate of speed. The verdict of the jury indicates that it used this standard rate of speed as fixed by plaintiff and corroborated by other evidence. This way of measuring speed of cars is the rule laid down by this court in many cases under similar circumstances.

The cases cited by appellant are to the effect that the law of the case and the testimony of witnesses is established for the instant case to be the same as in the former case brought here. This statement is in part inaccurate. The statement of fact as testified to by plaintiff in the description of the speed of the car can be supplemented by the facts as she remembered them when she testified in the instant case. The description of the speed of the car, that it was greater than ever before, that it was terrible, frightful, very unusual and extraordinary, that it would seem as though the car would leave the track, "is a mere accumulation of declamatory adjectives, and is not evidence of the defendant's negligence to be submitted to the jury." This language was used in *Hunt v. Boston Elevated R. Co.*, 201 Mass. 182. This quotation is merely given as illustrative of the rule adopted by this state, and the testimony as given in the instant case cures the former defect upon which the opinion was rendered at that time. The record discloses that the evidence preponderates in favor of plaintiff, and that the car went into the curve at an unusual and extraordinary rate of speed, to wit, at the rate of from 14 to 16 miles an hour, and that this speed was inconsistent with the passenger's safety in the street car, and that this negligence produced a severe lurch. The motorman, Bushousen, who was in charge of the car, testified that the speed was as high as 12 miles an hour before he reached the curve, which corroborates plaintiff's evidence on that point and shows it was approximately accurate.

The plaintiff received a painful injury, and suffered the loss of much time after the accident, and the record discloses general impairment of health caused by this acci-

dent, and we base our decision, not upon technicalites, but plain reason, sufficiency of evidence, and the demand of ordinary justice. Estimated by this standard, we say that the compensation accorded by the jury was fair, reasonable, and consistent with the evidence, and therefore the judgment handed down by the court should be

AFFIRMED.

LETTON, J., not being a member of the division which heard this case, did not participate.

STATE OF NEBRASKA, APPELLANT, V. BURRET W. WRIGHT, APPELLEE.

STATE OF NEBRASKA, APPELLANT, V. WALTER A. HUNTER, APPELLEE.

FILED FEBRUARY 2, 1921. No. 21228.

1. **Eminent Domain:** EVIDENCE OF VALUE. In a condemnation proceeding, evidence as to the price paid by the state for lots purchased from other property owners, and which form a part of the tract openly intended to be acquired by condemnation in case purchases could not be made, is not competent on the question of the value of the lots of the defendant.
2. ———: ———. Recitals of consideration in deeds covering lots not in controversy are incompetent as evidence of the actual price paid for those lots, though our statute requires the parties to such deeds, under penalty, to set forth the true consideration.
3. **Evidence** examined, and *held* to support the verdict.

APPEAL from the district court for Wayne county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

H. E. Simon, for appellant.

A. R. Davis, contra.

FLANSBURG, J.

Condemnation proceedings brought to acquire additional ground for the state normal at Wayne, Nebraska. The

properties of one Burret W. Wright and Walter A. Hunter were taken under condemnation. The two proceedings were tried together on the appeal in the district court and are presented here, on the appeal of the state, as consolidated cases.

The property condemned consisted of town lots. The appraisers fixed the value of defendant Wright's property at $850, and the value of Hunter's property at $2,150. The verdict of the jury on the appeal in the district court, in the Wright case, was $2,000, and, in the Hunter case, $4,200. The court ordered a remittitur of $200 in the Hunter case, which order has been complied with.

One contention made in behalf of the state is that the evidence is insufficient to support the verdict. In regard to the Wright property, four witnesses testified on the question of value. The average of the estimates of value of these four witnesses was $2,525. Five witnesses testified in regard to the Hunter property, and the average of their estimates of value was $4,267. The state's witnesses, as to the Wright property, placed the value at varying amounts from $700 to $1,200, and, as to the Hunter property, from $1,000 to $2,500. The worth of the opinions of these various witnesses was passed upon by the jury. The question of the value of this property is peculiarly of local nature. Though the testimony is conflicting, the verdict is amply supported by competent testimony in behalf of the defendants, and, since we cannot say that the verdict is against the great weight of the evidence, nor manifestly wrong, we would not be warranted in disturbing it. *Mohler v. Board of Regents of University of Nebraska*, 102 Neb. 12; *Grimm v. Elkhorn Valley Drainage District*, 98 Neb. 260; *Northeastern N. R. Co. v. Frazier*, 25 Neb. 42; *Omaha B. R. Co. v. Johnson*, 24 Neb. 707; *Clark v. Chicago, K. & N. R. Co.*, 23 Neb. 613.

It is further insisted that the trial court erred in refusing to allow the state to introduce in evidence certain deeds of property, made to the state, covering lots similarly situated and of like character to those in question, and

which the state had recently bought from property owners as a part of the tract sought to be acquired. In a proceeding of this kind, where the parties to the deeds are not the same as those involved in the pending proceeding, and where the statement of consideration cannot therefore be considered in the nature of an admission or declaration of a party, which, under certain circumstances, might be admissible, we cannot see how the recitals of considerations in these deeds would have been of any probative force upon the question of what the actual considerations were.

The statute (Laws 1917, ch. 224), it is true, requires, under penalty, that the parties to a deed set out the true consideration in the body of the deed, but the statute does not say that such statements, of the consideration paid, shall be considered as evidence in all cases. By virtue of this statute, such a statement has become no more a sworn statement than before. The right of cross-examination has not been preserved, and such expressions, as we view it, are nothing more than unsworn statements by third persons and of no evidential value. *City of New Orleans v. Manfre,* 111 La. 927; *Rose v. Taunton,* 119 Mass. 99; *Spaulding v. Knight,* 116 Mass. 148; *Esch v. Chicago, M. & St. P. R. Co.,* 72 Wis. 229; Abbott, Proof of Facts (3d. ed.) p. 876.

It would have been, in our opinion, improper, in any event, to show the sale price of other lots, which the state had then acquired by purchase, and which were a part of the tract which the state was openly intending to condemn in case purchases could not be made.

Upon the general proposition of whether or not sales of similar land may be shown as evidence of the value of the particular land in controversy, the courts are not in accord. 16 Cyc. 1138. Our court has, however, become committed to the doctrine that such sales cannot be shown. *Union P. R. Co. v. Stanwood,* 71 Neb. 158. Proof of sales of other lands would give to the prices paid the effect of evidence, when there would be no opportunity for cross-examination of the parties to the deeds to show whether

or not the prices paid were inadequate or excessive, nor to show all the particular conditions under which the sales were made, and, as said in the case of *Union P. R. Co. v. Stanwood, supra,* were proof of other sales allowed, "the cause would soon branch into a series of disconnected controversies as to the facts and surrounding circumstances of an indefinite number of particular sales of other tracts."

Moreover, it is the universal rule that sales of similar lands cannot be shown where such sales have not been entirely voluntary. Sales made to the state as a part of a tract, which is sought to be acquired by condemnation in case purchases cannot be made, are not considered of such a voluntary character as will truly reflect the reasonable or market value of the land sold and, therefore, cannot, upon any theory, be shown in evidence as having a bearing upon the value of the land under condemnation. *Oregon R. & N. Co. v. Eastlack,* 54 Or. 196; *United States v. Beaty,* 198 Fed. 284; *Spring Valley Water Works, v. Drinkhouse,* 92 Cal. 528; *City of San Luis Obispo v. Brizzolara,* 100 Cal. 434; *South Park Commissioners v. Ayer,* 237 Ill. 211; *State v. Superior Court,* 55 Wash. 64; *Coate v. Memphis R. T. Co.,* 120 Tenn. 525; note, 43 L. R. A. n. s. 985. Individual sales throw no light on market values if in any sense compulsory, or when the vendor is not given opportunity to indefinitely hold his property and invite competition among all who should desire to become purchasers.

Mr. Lewis, in his treatise on Eminent Domain (3d ed.) sec. 667, says: "What the party condemning has paid for other property is incompetent. Such sales are not a fair criterion of value, for the reason that they are in the nature of a compromise. They are affected by an element which does not enter into similar transactions made in the ordinary course of business. The one party may force a sale at such a price as may be fixed by the tribunal appointed by law. In most cases the same party must have the particular property, even if it costs more than its true value. The fear of one party or the other to take the

risk of legal proceedings ordinarily results in the one party paying more or the other taking less than is considered to be the fair market value of the property. For these reasons such sales would not seem to be competent evidence of value in any case, whether in a proceeding by the same condemning party or otherwise."

We find no ground for reversal, and the judgment is

AFFIRMED.

LETTON, J., not being a member of the division hearing this case, did not participate.

JOHN H. PFEIFER, APPELLANT, V. SCOTTSBLUFF MORTGAGE LOAN COMPANY, APPELLEE.

FILED FEBRUARY 2, 1921. No. 21263.

Adverse Possession. When a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own.

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

L. L. Raymond, for appellant.

Morrow & Morrow, contra.

FLANSBURG, J.

This action arose out of a dispute as to the boundary line between the northeast quarter and the southeast quarter of section 3, township 22, range 55, Scotts Bluff county, Nebraska. Plaintiff is the owner of the northeast quarter, and brought this action in ejectment to oust the defendant from a portion of the northeast quarter which had been inclosed by a fence with the southeast quarter. Defendant asserts, as a defense, adverse possession and estoppel. The verdict and judgment was in favor of the defendant, and the plaintiff appeals.

Plaintiff acquired the northeast quarter by purchase from John Fink in 1906. Fink had entered upon the land in 1886, or 1887. In 1890 he built a fence as a boundary line fence, lining it up with fences which were supposed to be the half-section line fences to the east and to the west of his land. The owner of the southeast quarter also recognized this as a division line fence and attached his north and south fences to it. In 1903 one Bouton purchased the southeast quarter, and at that time Fink pointed out to him the fence as being the division line between the two properties, and Bouton relied upon and purchased the southeast quarter upon the strength of that representation. The southeast quarter was not cultivated, but the northeast quarter was broken out and cultivated to this fence only, so that the line of division between the two properties was quite apparent. The north and south fences on the southeast quarter were maintained a few years only, but the division line fence remained until in 1905, about a year before Fink sold to the plaintiff. At the time of the sale to plaintiff, however, the division line fence had also been removed. The line between the two quarters was apparent at this time, and there were evidences as to where the fence had been standing. There is no evidence that Mr. Fink ever told plaintiff that this was a division line fence, nor is there evidence that plaintiff was ever informed of the representations that Fink had made to Bouton. In 1911 plaintiff rebuilt the fence upon the same line upon which it had been originally constructed, and the owner of the southeast quarter at that time agreed to pay one-half of the cost of construction. Plaintiff claims that, as the parties were uncertain of the true line of division, it was agreed that the fence, as then reconstructed, should be moved to the correct line when that should be ascertained. Plaintiff's testimony, that the parties so agreed to move the fence, is directly disputed.

It is quite clear from the testimony that, during the period of time that the property was held by Fink, the fence was maintained and recognized both by him and by

the owners of the southeast quarter as a division line fence. This continued for more than ten years—a sufficient time for the statute of limitations to run. And so far the testimony is not disputed. It is true that the southeast quarter was not cultivated to the fence, and no affirmative acts of ownership, aside from a general recognition of the boundary, are shown, but it is the established rule in this state that, when a fence is constructed as a boundary line fence between two properties, and where the parties claim ownership of the land up to the fence for the full statutory period and are not interrupted in their possession or control during that time, they will, by adverse possession, gain title to such land as may have been improperly inclosed with their own. *Carnahan v. Cummings, ante,* p. 337; *Krumm v. Pillard,* 104 Neb. 335; *Zweiner v. Vest,* 96 Neb. 399; *Andrews v. Hastings,* 85 Neb. 548.

It is further argued that the question of estoppel was improperly submitted to the jury. It is unnecessary to discuss that question, since, by undisputed testimony, the defendant was entitled to prevail upon the ground of adverse possession, and no prejudice could, in any event, have resulted through the instruction complained of.

For the reasons given, the judgment is

AFFIRMED.

LETTON, J., not having sat in the division hearing this case, did not participate.

SAMUEL CARR ET AL., APPELLEES, V. MATT MILLER, APPELLANT.

FILED FEBRUARY 2, 1921. No. 21133.

1. **Deeds: CONSTRUCTION.** In the construction of every instrument for the conveyance of real estate or any interest therein, it is the duty of the courts to carry into effect the true intent of the parties, so far as such intent can be ascertained from the whole instrument and is consistent with the rules of law. Rev. St. 1913, sec. 6195; *Benedict v. Minton,* 83 Neb. 782.

2. ———: INTEREST CONVEYED. "Every conveyance of real estate shall pass all the interest of the grantor therein unless a contrary intent can be reasonably inferred from the terms used." Rev. St. 1913, sec. 6192.

3. ———: CONSTRUCTION. An instrument, duly executed, contained the following language: "The East Omaha Land Company does hereby grant, bargain, sell and convey unto the said Omaha Bridge and Terminal Railway Company, its successors and assigns, for terminal and railway purposes and uses, the following described real estate:" *Held*, that the phrase, "for terminal and railway purposes and uses," did not of itself limit the estate conveyed, or operate as an implied reversion in case the lands conveyed were devoted to a different use.

4. **Estoppel**: GRANTORS. A grantor is estopped by his deed to question the capacity of his grantee to take the estate conveyed by the deed.

5. **Deeds**: DEED TO RAILROAD COMPANY: CONSTRUCTION. Instrument and evidence examined, and the instrument *held* to convey an absolute title in fee.

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

Helsell & Helsell, Matt Miller and *William Baird & Sons*, for appellant.

Morsman & Maxwell, contra.

CAIN, C.

This is an action in ejectment to recover a strip of land 100 feet in width and 970 feet in length, described in the petition, and located in the eastern edge of the city of Omaha on the west bank of the Missouri river. The case was tried upon the amended petition, the answer thereto, and plaintiffs' demurrer to divisions II, III, IV, V, VI, VII, VIII, and IX of the answer, and upon a stipulation between the parties that the allegations of fact contained in the amended petition and the answer thereto, subject to proper objections on the ground of immateriality, irrelevancy, and incompetency, should be taken as true. The district court sustained plaintiffs' demurrer to the divisions of answer named, to which the defendant excepted and stood

upon his answer. The cause then came on for decision by the court, a jury having been waived, and the court found that plaintiffs were the owners of the lands described in the amended petition and entitled to the immediate possession thereof. After the overruling of his motion for a new trial, defendant appealed to this court.

Under the stipulation of the parties, the amended petition and the answer thereto were settled as a bill of exceptions. There is therefore no disputed question of fact, and the question presented to us for decision is the construction of a certain instrument in writing executed on the 21st day of November, 1899, between the East Omaha Land Company and the Omaha Bridge & Terminal Railway Company, which the appellant claims constitutes a conveyance of the lands in controversy in fee simple, and the appellees contend conveyed only as easement or a right of way in said lands, which was abandoned by the grantee upon its subsequent conveyance of the land to a private person.

Both parties hereto claim title to the premises in controversy through the East Omaha Land Company, which is conceded to have held the title in fee on November 21, 1899, and for many years prior thereto. On that date the land company executed the deed or instrument under consideration to the terminal company. On March 31, 1902, the land company mortgaged the premises, with other lands, to the Old Colony Trust Company, however, "subject to said agreement and deed dated November 21, 1899." On January 16, 1903, in the United States district court at Omaha, a decree was entered foreclosing this mortgage, but the terminal company was not a party to the suit, and hence was not affected thereby. On June 10, 1903, the master sold the lands to Grafton St. L. Abbott, who purchased in trust for the benefit of the bondholders, and he received a deed. On May 9, 1903, the land company conveyed to Abbott by deed. Abbott conveyed to himself and two associate trustees, and plaintiffs in this action are their successors. As the mortgage was expressly made subject

to the deed of November 21, 1899, and the terminal company was not a party to the foreclosure proceedings, the legal situation is the same as if the land company had executed a deed direct to plaintiffs on May 9, 1903. On June 6, 1917, the terminal company conveyed the land in controversy to Samuel P. Elliott, who on October 3, 1917, by ordinary deed, conveyed it to the defendant herein.

The instrument of November 21, 1899, consists of eight typewritten pages. As the recitations of the instrument down to and including the granting clause are necessary to an understanding of the situation, as well as to the construction of the instrument, we set that part out in full, as follows:

"This indenture, made this 21st day of November, A. D. 1899, between the East Omaha Land Company, hereinafter called the Land Company, party of the first part, and the Omaha Bridge and Terminal Railway Company, hereinafter called the Terminal Company, party of the second part, corporations organized and existing under the laws of the state of Nebraska, Witnesseth:

"Whereas, the Land Company owns a tract of land comprising seventeen hundred (1,700) acres, more or less, located along the Missouri river between one and three miles northeasterly from the post office in the city of Omaha in the state aforesaid, which is more particularly shown upon the map hereto attached and made a part hereof; and,

"Whereas, the Land Company has expended several hundred thousand dollars, in improving said lands, by clearing the same, and laying out, grading and paving certain streets, and locating certain manufacturing establishments thereon, and preparing generally for the location of future industrial establishments; and,

"Whereas, the success of the plans of the Land Company depend largely upon adequate trackage facilities and connections for present and future industries and enterprises, which may be established upon its lands aforesaid; and,

"Whereas, to secure a proper system of trackage, the Land Company on the 1st of June, 1889, entered into a contract with the Union Pacific Railway Company for the construction and operation of a system of trackage upon said lands, under which that company did construct several miles of tracks thereon; and,

"Whereas on the 23d day of July, 1892, a contract was executed between the Interstate Bridge and Street Railway Company, predecessor of the Terminal Company, of the first part, the Land Company, of the second part, and Drexel & Company and John Lowber Welsh, bankers, of the third part, by the terms of which the Bridge Company agreed to construct and maintain a bridge across the Missouri river, and terminal tracks, in accordance with the schedule attached to said contract, which contract contained certain provisions requiring the Terminal Company 'to purchase of the Union Pacific Company all the tracks, franchises and rights of way, built on the land of the East Omaha Land Company, or duplicate them,' and which contract also contained certain provisions by which the Land Company agreed to make to the Bridge Company a conveyance 'of certain railway rights of way on and over the land of said Land Company, which said rights of way are to be the same as those heretofore contracted to be conveyed by the said Land Company to the Union Pacific Railway Company;' and,

" Whereas, in carrying out said contract the Terminal Company has constructed a bridge across the Missouri river, and also established certain extensive tracks and terminal facilities in connection therewith on both sides of the Missouri river and in the cities of Council Bluffs, Iowa, and Omaha, Neb., and has also purchased from the Union Pacific Railway Company the tracks built by that company upon the lands of the Land Company; and,

"Whereas, it is deemed best that the system of trackage for the lands of the Land Company shall consist of a belt line surrounding said lands, from which spur or side tracks shall extend north and south to and along the intersecting alleys, the same to be located along what is known as

Avenue G, East Omaha, from the Nebraska meander line of the Missouri river, surveyed in 1856, to near the west approach of the Terminal Company's Missouri river bridge, thence northerly by suitable curves to what is known as Avenue M, East Omaha, thence west along Avenue M to the western limits of the lands of the Land Company. That from said belt line side tracks shall turn out north and south on suitable curves to the alleys which the Land Company may hereafter establish on its lands in accordance with its general plans:

"Now, therefore, in consideration of the premises and the building by the Terminal Company of the bridge over the Missouri river, as aforesaid, and the purchase of said tracks from the Union Pacific Railway Company, and the construction of other tracks, the said East Omaha Land Company does hereby grant, bargain, sell, and convey unto the said Omaha Bridge and Terminal Railway Company, its successors and assigns, for terminal and railway purposes and uses, the following described real estate, situated in the county of Pottawattamie, Iowa, and in the county of Douglas, Neb."

There are other provisions in the instrument which we shall consider later on, in so far as they are discussed in the briefs or appear material.

Appellant contends that the instrument conveyed an absolute title in fee simple, while the appellees contend that the instrument taken together and considered as a whole, conveyed only a right of way, and that the words, "for terminal and railway purposes and uses," indicate an implied reversion or forfeiture for abandonment. It will be observed from that portion of the instrument above quoted that the full consideration for the execution of the deed had passed to the grantor therein. The land company had about 1,700 acres of land located along the Missouri river, in the city of Omaha, which it was engaged in developing, improving and placing upon the market. In the course of the work of development the land company considered it necessary to have a proper system of trackage for taking care of the then present and future business

enterprises and industries located in that vicinity. The land company had on June 1, 1889, entered into a contract with the Union Pacific Railway Company for this purpose and part of the construction work was done by that company. Again, on the 23d day of July, 1892, the land Company entered into another contract with the Interstate Bridge & Street Railway Company, the predecessor of the terminal company, for the construction and maintenance of a bridge across the Missouri river, and terminal tracks, which was also in furtherance of the land company's purpose of development. A significant thing to be observed from the recitals of the instrument preceding the granting clause is that all of the things that the land company had stipulated to be done had been done at the time of the execution of the instrument. The bridge across the Missouri river had been built by the terminal company, and there had been established the extensive tracks and terminal facilities in connection therewith on both sides of the Missouri river, and there had also been purchased from the Union Pacific Railway Company the tracks built by that company upon the lands of the land company. As far as anything appears from the recitals in this instrument, all the consideration for the execution of the deed of conveyance from the land company to the terminal company had passed. And the language of the granting clause is the language usually employed in making an absolute conveyance of land, with the exception that there are added thereto the words, "for terminal and railway purposes and uses." The instrument contains no provision for a reversion of the title or possession of the real estate or for its forfeiture in case the land is used for any other purpose, or any other event.

The appellees make several contentions which will be noticed in the course of this opinion. Their first contention is that a railway company in this state is not competent to acquire any higher title to real estate than an easement or right of way therein, which is subject to be divested for nonuser or abandonment, citing in support of the con-

tention the following Nebraska cases: *Myers v. McGavock*, 39 Neb. 843; *Blakely v. Chicago, K. & N. R. Co.* 34 Neb. 284; same case, 46 Neb. 272; *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8; *George v. Pracheil*, 92 Neb. 81. Of course, if this contention is true, it disposes of the case in the appellees' favor without further discussion, for the reason that the defendant appellant claims title through a grantee of the Omaha Bridge & Terminal Railway company.

As to the case of *Myers v. McGavock*, 39 Neb. 843, 870, this court said: "The Union Pacific Railway Company is, and was at that time, a corporation organized under the laws of the United States, and by reason of the constitutional provision just quoted was incompetent to take title to the real estate by the conveyance from McGavock; but this conveyance is not therefore void. It is, at most, voidable. Its title is valid against every one but the state, and can be divested only by proceedings brought by the state for that purpose. *Carlow v. Aultman*, 28 Neb. 672." Under this case the plaintiffs could not raise the question of the competency of the terminal company to take a fee title to the land, as they hold, through mesne conveyances from the land company, which is the common source from which the parties claim title, and the land company is estopped by its deed of November 21, 1899, from raising the question. 16 Cyc. 688; 10 R. C. L. 676, sec. 5. In *Blakely v. Chicago, K. & N. R. Co., supra*, the conveyance was for "right of way and for operating its railroad *only*," and the court based its decision upon that ground in the following language: "In the case at bar there is a limitation in the grant to a particular purpose, and that does not contemplate a transfer to another company of a part of the right of way. Such conveyance is unauthorized under the deed from the plaintiff. Whether such conveyance could be made in case the deed had been absolute in form, does not arise in this case, and therefore will not be determined." *Roberts v. Sioux City & P. R. Co., supra*, was a case involving the question of whether an individual could obtain, by adverse possession, title to right of way of a

railway company obtained by condemnation proceedings, and it was decided in that case that the plaintiff had not established adverse possession, and the court expressly stated in the fifth section of the syllabus that "the question whether in any case a railroad company can be deprived of its right of way by adverse possession is not involved in this case, and is not decided." The point upon which the court based its decision was that use of the land made by the adverse claimant was not inconsistent with, or adverse to, the railway company's enjoyment of the easement.

In the case of *George v. Pracheil, supra,* the deed to the railway company, and which was decisive of the case, contained after the granting clause an express provision for reversion, as follows: "Provided that in case said railroad company do not construct their road through said tract, or shall after construction permanently abandon the route through said tract of land, then the same shall revert to and become reinvested in the said grantors, heirs and assigns." It is obvious from the language just quoted that the case cited could not by any possibility be held to sustain the appellees' contention.

It will appear from the foregoing review of the cases cited on this subject in appellees' brief that this court has not heretofore held that a railway company is incompetent to take title in fee to real estate to the extent that any one except the state can question the title. *Myers v. McGavock,* 39 Neb. 843; *Carlow v. Aultman,* 28 Neb. 672. We hold on this point that the land company and all its grantees and subsequent grantees, including plaintiffs, have no right to question the competency of the terminal company to hold title in fee to the premises.

The second contention of appellees is that the instrument of November 21, 1899, should be read as a whole and construed according to the intent of the parties as disclosed thereby, citing section 6195, Rev. St. 1913; *Benedict v. Minton,* 83 Neb. 782; *Jackson v. Phillips,* 57 Neb. 189; *Rupert v. Penner,* 35 Neb. 587. We readily concede the soundness of appellees' contention in this respect, and in

the construction of the instrument under consideration have observed the rule he invokes.

Appellees further contend that the words, "for terminal and railway purposes and uses," show that the intent of the parties was that the terminal company was to have a right of way only, citing nine cases in support of the contention. We have examined all these cases, and, in our opinion, none of them support this contention. We think that the words quoted amount at most only to a description of the use to which the land was to be put, or at most a covenant for the violation of which a suit for damages might be maintained. As has been stated before, there was no provision whatever in the instrument under consideration providing for a reversion to the grantor or for a forfeiture of the grant in case the land was devoted to any other use. We cannot ignore the fact that, if the grantor in the instrument under consideration had intended the words quoted to be a condition subsequent, the nonperformance of which would result in a reversion of the fee to the grantor, the land company could have used language to express that intent. In considering this point, too, we should take into consideration section 6192, Rev. St. 1913, which provides: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." We find nothing in the words, "for terminal and railway purposes and uses," which indicates that the grantor intended to reserve in itself any interest whatsoever in the land granted, or even that the language constituted a restriction of the use of the land to the railway tracks and facilities. Before such a construction could be approved, it would be necessary to find some language in the instrument indicating such an intent. Indeed, as far as anything that can be gathered from the instrument is concerned, the sale of this particular strip of ground by the terminal company might have been for "terminal and railway purposes and uses." 8 R. C. L. 1109, sec. 170, on this point is as follows: "While no precise form of words is necessary

to create a condition subsequent, still it must be created by express terms or by clear implication, so as to leave no doubt of the grantor's intention." To the same substantial effect is 13 Cyc. 645. In *Fitzgerald v. Modoc County,* (164 Cal. 493) 44 L. R. A. n. s. 1229, it was held: "A provision in a deed of land to a county, that it is 'to be used as and for a county high school and premises,' does not create a condition subsequent which will entitle the grantor to reenter if the county attempts to sell the property." To the same substantial effect are the following cases: *Stuart v. Easton,* 170 U. S. 383; *Bald v. Nuernberger,* 267 Ill. 616; *Downen v. Rayburn,* 214 Ill. 342; *Supervisors of Warren County v. Patterson,* 56 Ill. 111; *City of Huron v. Wilcox,* 17 S. Dak. 625; *Killgore v. Cabell County Court,* 80 W. Va. 283, L. R. A. 1918B, 692. From the authorities cited and from the absence of words in the instrument providing for a reversion or forfeiture, we must hold that the words, "for terminal and railway purposes and uses," did not create any condition subsequent, or imply a reversion, or provide for a forfeiture.

It is finally contended by the appellees that the recitations of the instrument itself evidenced the intention of the grantors to convey only a right of way or easement, or an estate upon condition subsequent, upon the nonperformance of which title reverted to the plaintiffs in this suit. Passing the obvious question much discussed in the authorities, the benefit from the things referred to in these recitals and the general rule that only the original grantor or its heirs can take advantage of the nonperformance of a condition subsequent, we nevertheless proceed to examine the whole instrument and apply to it the liberal rule of construction established by our statute and the decisions of this court and contended for by the appellees. We have set out the recitals up to the granting clause in the instrument under consideration, and we agree with the contention of the appellees that these recitals challenge our attention. But we are unable to agree that the instrument was made as contended for by appellees, "primarily for the benefit

of the large tract of land, nearly three sections, owned by the land company," for the reason that it appears from these recitals that the land company had already received the benefit from the things referred to in these recitals preceding the granting clause. We agree with appellees that the contract must be read in the light of these recitals, but we are unable to agree to the conclusion that they evidence that the terminal company was to have only a right of way over the lands. We think it a more reasonable conclusion that both parties intended that the land should be conveyed in fee simple to the terminal company "in consideration of the premises," as the instrument recites, which premises are shown to have been things already performed, a consideration already executed. A large amount of valuable work had been done by the terminal company and its predecessors, and it seems reasonable to conclude that the lands conveyed by the instrument under consideration were in payment for this work.

Appellees contend that there are certain provisions in the recitals succeeding the granting clause of the instrument which evidence an intent to convey only a limited estate. One of these provisions is that the description of the land defines the limits of the 100-foot strip by the belt line, of which the lands in suit are, it is said, a part. In paragraph C of the description this is specifically referred to as "the belt line right of way as herein described." We think, however, that the quoted words were merely descriptive, and did not relate to the lands in controversy.

It is next contended by appellees that, as the instrument expressly reserves to the land company the accretions accruing to the two tracts described in paragraphs C and D, fronting on the river, excepting a portion thereof, it was the intention that the land company should have the fee, claiming that the accreted lands go with the fee, and not to the holder of an easement. The general rule that accreted lands go with the fee is undoubtedly correct. But it may well have been that the land company desired to change the general rule by this agreement, and we see no reason

for inferring from the provision under consideration that the title to the terminal company was intended to be less than a fee.

Appellees have suggested to us the question of what is the significance of the provision that the land company shall not without the consent of the terminal company convey "to any other railroad company free right of way over or upon its lands" except on failure of the terminal company to build tracks to serve industries on these lands as required by the agreement. Their argument is that, as the instrument refers to "rights of way" only in this clause, the same should be true of the grant made by the instrument. We do not think that this logically follows at all. The land company may as well have bound itself to any other thing as well as not to grant free right of way over its other lands to any other railway company. It was apparently a provision to insure the terminal company against a competitor in its field except on its failure to build tracks, and was a separate undertaking entirely from the conveyance contained in the instrument. Even if the terminal company had made a complete failure to build any tracks and the land company had granted to another railway company free right of way over its other lands, it would not have affected the construction of the instrument in any way whatever.

Again appellees' counsel contends that it would be absurd to hold that it was the intention of the parties to convey a fee, because, if that were true, then the terminal company could convey away all the land received under the instrument, and thus defeat the very purpose of the land company entirely. The obvious answer to this objection is that, from the recitals of the instrument itself, the purpose of the land company, as far as any act on the part of the terminal company was concerned, had been fully accomplished and secured at the time the instrument was executed. Under the circumstances then existing as disclosed by the instrument itself, the contingency suggested by counsel could not possibly have arisen.

We have examined this whole instrument with care and find nothing in it indicating that the parties intended that any estate less than a fee should be conveyed by it. The language of the instrument convinces us that the intent was to convey absolute title in fee simple. The land company expressly acknowledges receipt of all benefits which induced it to make such a conveyance, and there is no claim that the terminal company was in default of any of its engagements either at the time of the conveyance or at any other time. It follows that, in our opinion, the defendant was entitled to the title and possession of the premises, and that the judgment of the district court is erroneous.

We recommend that the judgment of the district court be reversed and the action dismissed.

PER CURIAM. For the reasons stated in the forgoing opinion, the judgment of the district court is reversed and the action dismissed, and this opinion is adopted by and made the opinion of the court.

REVERSED AND DISMISSED.

CHESTER R. HILLYER, APPELLEE, V. WILLIAM P. STANSBERY, APPELLANT.

FILED FEBRUARY 2, 1921. No. 21316.

1. **Brokers:** COMMISSIONS. Where the undisputed evidence shows that a real estate broker, without the knowledge of his principal, was acting in the interest of the purchaser of the land instead of in the interest of his principal, the broker is not entitled to any commission. *Campbell v. Baxter*, 41 Neb. 729, and *Strawbridge v. Swan*, 43 Neb. 781, followed.

2. ———: ———. If, in case of a claim of a real estate broker for commission on the sale of land, the undisputed evidence shows that neither the broker nor any one for him effected the sale or contributed to that result, the broker cannot recover any commission.

3. ———: ———: EVIDENCE. Evidence examined, and *held* that the broker was acting in the interest of the purchaser, and that the broker did not effect the sale or contribute to that result, and was entitled to no compensation.

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

Halligan, Beatty & Halligan, for appellant.

H. A. Dano, contra.

CAIN, C.

The plaintiff, Chester R. Hillyer, brought this action against the defendant, William P. Stansbery, to recover the sum of $2,000 as commission for the sale of defendant's 2,400-acre ranch in Keith county, Nebraska. The action was based upon a letter or contract as follows:

"948 E. 3d Street, Long Beach, Cal. Feb. 12-18.

"Mr. Hillyer, Sir: Received your letter in regard to selling the ranch, if you can find anybody who is willing to pay fourteen dollars per acre for the 24 hundred acres north of Lemoyne, you may sell it & I will give you two thousand dollars commission. Yours truly, W. P. Stansbery."

In his petition plaintiff alleged, among other things, that he had accepted the terms of sale and commission as set out in the above letter and proceeded to find a purchaser for the ranch. He also alleged in his petition that the Boyd Land Company of Ogalalla, Nebraska, composed of R. W. Boyd and A. R. Thompson, exchanged lists of real estate held for sale by said parties, and had an oral agreement for the equal division of commissions earned on the sale of the land in the lists exchanged, and that said A. R. Thompson found a purchaser for defendant's lands on or about June 7, 1918, in the person of Frank Harris. The answer admitted the writing of the letter above set out, denied that there was any agreement between plaintiff and the Boyd Land Company, denied that defendant ever authorized plaintiff to employ said Boyd Land Company as

defendant's agent, and denied that plaintiff ever procured a purchaser for defendant's land, or was instrumental in the sale thereof, and otherwise denied generally the allegations of the petition.

Trial was had to the court and jury, which resulted in a verdict and judgment in plaintiff's favor for $1,500. Defendant appeals, assigning as error that the verdict is contrary to and is not supported by any evidence, and that it is contrary to the instructions of the court and to law.

The errors assigned require an examination of the evidence, and in doing so we shall observe the settled rule in this state that on conflicting evidence the verdict of a jury cannot be set aside unless it is manifestly wrong, and that all reasonable inferences from the evidence are to be resolved in favor of the plaintiff.

At the time of writing the letter on February 12, 1918, the defendant Stansbery was in Long Beach, California, where he remained until his return to Keith county, Nebraska, about the first of April, 1918. It is stipulated that Harris Brothers, referred to in the testimony in the case, purchased the ranch from the defendant for $33,000, and there is no other purchaser referred to in the case. No question is made of the validity of the written contract, and the chief question is whether plaintiff procured the purchaser and thereby earned the commission. At the outset it should be stated that A. R. Thompson testified that he was the agent of the purchasers, and not of the owner. Defendant's evidence tended to show that Charles Richards, and not the plaintiff, procured the purchaser.

Plaintiff himself testified that "along the first of June" (1918) he and A. R. Thompson went to Harris Brothers to show them defendant's ranch, and were informed by Harris Brothers that they had seen the ranch and that it pleased them; that they thought it could be bought cheaper, and that plaintiff told them he did not think it could; that Thompson said, "How about $12.50 per acre?" ($30,000), and plaintiff then said that if they wanted to put up the money he would see defendant, but that he

knew it would not do any good; that Harris Brothers then gave Thompson a check ($500) for payment on the ranch, and that then he and Thompson started to see defendant and met him on the road; that, before they started, he had asked Harris Brothers if they could not buy it for $12.50 if they would give $14 ($33,600), and that Harris Brothers then held a conference and said they would; that plaintiff and Thompson met defendant at the bridge, and plaintiff offered him the $500 check, and said to him, "Will you take $12.50 for your ranch this morning?" and that defendant answered, "No," and then plaintiff said, "Well, you don't have to. I can get $14 for it. I have sold it for $14;" that defendant replied that he did not have time then, but would meet them at Lemoyne at 2 o'clock and would talk deal then; that, just when plaintiff and Thompson got to Lemoyne, Frank Harris came and told them that defendant had been there and would not deal with plaintiff or Thompson; that plaintiff also saw defendant in Lemoyne that afternoon, and that defendant told plaintiff that Charlie Richards had brought the purchaser there, and that plaintiff had not, and that defendant did not owe plaintiff anything and would not pay him anything. Plaintiff further testified that neither he nor Thompson had ever taken Harris Brothers to the land; that he had said to them that he would try to get them the ranch for $12.50 an acre; and that he had tried to do so; that he was then working for Harris Brothers "in a way." Nowhere in plaintiff's testimony does he state or claim that he or any one for him ever had any conversation or communication with Harris Brothers at all about the land until the day "along the first of June" above referred to. Thompson's testimony corroborates this, and the undisputed evidence of the defendant shows that, before then, Charles Richards, defendant's son-in-law, had taken the Harris Brothers and their wives to see the ranch and had introduced them to the defendant, Stansbery; that they were pleased with the ranch, and that the price was agreeable, and that the deal was hanging for a day or two only on the point of whether

the cash payment was to be $10,000 or $12,000. The activities of Richards were the effective cause of producing the purchaser, and the sale was practically completed before either plaintiff or Thompson ever said anything to Harris Brothers on the subject; and defendant offered to prove on the trial that he had paid Richards $1,200 as commission for selling the place. As plaintiff's evidence showed that neither he nor any one for him effected the sale or even contributed to that result, he is entitled to no commission. *Stewart v. Smith,* 50 Neb. 631; *Langhorst v. Coon,* 53 Neb. 765; *Higinbotham v. McKenzie,* 88 Neb. 323; *Starbird v. McShane Timber Co.,* 94 Neb. 79; *Goodwin v. Haller,* 97 Neb. 209; *Hodgman v. Thomas,* 37 Neb. 568.

There is another reason, that plaintiff cannot recover in this case. Plaintiff's own testimony shows that, unknown to defendant, he was acting in the interest of the purchaser. It shows that, knowing that Harris Brothers would pay $14 an acre for the ranch, he tried to get the defendant to sell it to them for $12.50 an acre. This dual service is alone sufficient to defeat plaintiff's right to any commission or compensation. *Campbell v. Baxter,* 41 Neb. 729; *Strawbridge v. Swan,* 43 Neb. 781. As the evidence of plaintiff conclusively shows both that he did not procure the purchaser and that he was rendering double service without the knowledge of his principal, he cannot recover in any event.

We therefore recommend that the judgment of the district court be reversed and the action dismissed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the action dismissed, and this opinion is adopted by and made the opinion of the court.

REVERSED AND DISMISSED.

IN RE ESTATE OF WILLIAM A. STUCKEY.
ROYAL S. STUCKEY ET AL., APPELLANTS, V. WILLIAM A. STUCKEY, JR., APPELLEE.

FILED FEBRUARY 10, 1921. No. 21138.

1. **Wills:** UNDUE INFLUENCE. An unequal distribution of property among the children of testator, of itself, raises no presumption of the exercise of undue influence. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.
2. **Appeal:** HARMLESS ERROR. A judgment will not be reversed because of the exclusion of evidence, when it clearly appears that its exclusion, if error, was without prejudice to appellant.
3. **Rulings** of the court on instructions to the jury approved.
4. **Evidence** *held* sufficient to sustain the verdict.

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

Claude S. Wilson and *John K. Waring,* for appellants.

Charles H. Sloan, F. W. Sloan and *T. J. Keenan, contra.*

MORRISSEY, C. J.

Appellants, Royal S. Stuckey and Lucy Virginia Barrett, filed objections in the county court for Fillmore county to the probate of the last will and testament of their father, William A. Stuckey, Sr. Their objections were overruled and an appeal was taken to the district court. A number of objections to the probate of the will had originally been made, but at the beginning of the trial in the district court counsel for contestants stated that contestant's sole contention was that the will had been executed by testator while laboring under undue influence. On this narrow issue the cause was submitted to a jury, which returned a verdict in favor of proponent, and contestants have appealed.

The will was executed November 12, 1915. Testator died August 1, 1917, being 75 years of age at the time of his death. Throughout his life testator had been a strong, robust man, and was a farmer by occupation. He had twice married. Contestants are the children of the first marriage, while proponent is the sole surviving child of the second marriage. When the will was drawn, each child was married and was maintaining a home separate and apart from the parents. Royal S. Stuckey was about 45 years of age, Mrs. Barrett was about 47, and proponent about 33. Testator was a man of large means for a man in his occupation. He had given each of his children good school advantages, and had also given each property, the exact amount of which is not shown, but it was a considerable amount, and the family, including the second wife and her step-children, had from the date of his second marriage until the time of his fatal sickness lived in apparent harmony.

In June, 1915, testator was suddenly stricken with bowel trouble. Miss Wessenburg, a trained nurse, was immediately engaged, and she took charge of the case and remained as the nurse in charge until his death. Following the bowel trouble other complications arose and he never was a well man after June, 1915. It is claimed by contestants that testator's mind was affected, and his power of resistance reduced by his suffering, and also by the brandy and opiates administered; that, while he was sick and suffering, his wife, taking advantage of his condition, coerced him into making the will, under the terms of which Royal S. Stuckey received property of approximately the value of $43,000, Mrs. Barrett received property of approximately the value of $46,000, proponent, William A. Stuckey, Jr., received property of approximately the value of $105,000, while the widow, proponent's mother, received property of approximately the value of $52,000. As William A. Stuckey, Jr., was the only heir of his mother, who is now deceased, he and his mother were granted under the terms of the will $65,000 or $75,000 more than was

given to the contestants. This discrimination, it is claimed, was due to the importunities of the wife. Testimony was offered to show that before testator was stricken with his fatal sickness his wife had from time to time urged him to make a will, insisting that a man with "two families" and possessed of so much property ought to make provision for the disposition of the property after his death. It is said that while in good health he resisted her entreaties, but that after he was weakened by disease, and after she had alternately threatened and prayed, she overcame his better judgment. In support of this there is the testimony of witnesses who recite conversations they overheard between Mr. and Mrs. Stuckey, and the testimony of a witness or two who saw Mrs. Stuckey at his bedside with the Bible open before her, and who say that she told testator that he could not expect repose in the life to come if he refused her request. On the other hand, the deposition of Mrs. Stuckey was taken, and she denied having exercised any undue influence upon her husband. She admitted having asked him if he left the "home place" to her son, but further than that she denied knowledge of the contents of the will. It is not claimed that proponent exercised any undue influence.

In order to fully appreciate the issues, it is necessary to consider still another question presented by this appeal. From the time Miss Wessenburg was called in attendance upon Mr. Stuckey she kept history sheets of the case. These sheets are so prepared that the nurse makes a record of the day and year, the hour of the day,the pulse, temperature, respiration, medicine administered, and entries of such general remarks as to her seem warranted. Some time after these history sheets were made, and when to the nurse they appeared to have no value, she put them into the stove, intending to destroy them, but there was no fire in the stove at the time and the history sheets were taken therefrom by one of the contestants, and delivered to contestants' attorney. The deposition of the nurse was taken on behalf of proponent, and contestants' attorney appeared

and cross-examined her at length. He produced these history sheets, which the witness identified as the ones she had made, and he cross-examined her in relation to the record thus made. She nowhere contradicted the history sheets, but in some instances explained the entries made. Counsel indulged the fullest latitude in the cross-examination. The history sheets were marked as an exhibit; but, in place of having this bundle of sheets attached to and made a part of the deposition and transmitted in the usual way to the clerk of the district court, counsel for contestants had it sealed in an envelope, properly marked so as to indentify it, and left it with the notary public, who kept the exhibit until counsel was about to depart for Fillmore county to engage in the trial of this case, when the notary delivered this envelope to him. He carried it to Fillmore county, and when proponent offered the deposition contestants offered this exhibit as part of the deposition. On objection by proponent it was excluded, and this ruling is now urged as error. The statute, section 7947, Rev. St. 1913, provides that a deposition "shall be sealed up and indorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the clerk of the court where the action or proceeding is pending." It also provides that it shall there remain under seal until opened by the clerk, by order of the court, or at the request of one of the parties or his attorney. Counsel for contestants maintain that this statute does not include an exhibit. He also says that, the exhibit having been properly indentified, he was free to offer it as independent evidence.

We prefer to dispose of the case on its merits, rather than on some technical rule of evidence, and, as these history sheets were made a part of contestants' bill of exceptions, we have examined them to ascertain if their exclusion militated against contestants. We fail to find anything in them that contradicts or discredits the testimony of Miss Wessenburg, or that strengthens the case of contestants. Early in testator's sickness many opiates

were administered and some brandy, much diluted, was given. The witness was cross-examined in relation to this period and her testimony corresponds with the history sheets. July 23, 1915, after testator had been sick about one month, he executed a will. He underwent an operation shortly thereafter, and both prior to and shortly after the making of this will several opiates were administered. Apparently the operation brought him some temporary relief, for thereafter, until December, the history sheets show no opiates administered. The second will, the one in controversy, was executed November 12, 1915. The terms of the second will are, generally speaking, the same as those of the first will, except that contestants receive a slightly greater allowance, the widow is given a greater share of the personal property, and proponent receives a correspondingly lesser share under the second will than under the first, and some other minor changes were made. The will was witnessed by the nurse, Miss Wessenburg, by the cashier of a local bank, in which bank testator was a stockholder, and by testator's personal attorney who drafted the second will. Each of these witnesses testified to testator's mental capacity and ability to execute the document, and he lived for many months after its execution. The mere inequality of the legacies is not sufficient, of itself, to raise a presumption of undue influence. The testimony offered does not show that the wife dictated the terms of the will, or in fact that she knew its terms. Judges may regret that a parent makes unequal disposition of his property among the natural objects of his bounty, but it is not always given to judges to know the reasons for the action taken, and, were courts to set aside wills because property was not distributed in equal shares, the statute which expressly confers the right to make bequests and devises by will would be nullified.

There is one further matter presented in the brief, where it is argued that testator did not read the will, that it was not read in his presence, and that he did not know its contents. This is perhaps beside the real issue, but it is

just as well to dispose of it now. While there appears to be some basis for the argument in the brief, the testimony shows to the contrary. At any rate the testimony on this point is sufficient to sustain the verdict.

A number of assignments deal with instructions, some given, others refused. These assignments have been considered; but, when the whole charge given by the court to the jury is considered in the light of the issues raised and the evidence given, we find the record free from error, and the judgment is

AFFIRMED.

DEAN S. EFNER ET AL., APPELLANTS, V. FLORENCE E. REYNOLDS, APPELLEE.

FILED FEBRUARY 10, 1921. No. 21456.

1. **Partnership:** COMPENSATION. In commercial partnerships the right of a partner to compensation for individual services depends on contract, and in absence of an agreement for such compensation a claim therefor is tested by the laws governing partnerships.
2. ———: ———. In a commercial partnership engaged in a business with capital invested jointly by the partners, a managing partner is not entitled to a salary for individual services, or to an increase of authorized compensation, unless it is allowed by contract.
3. ———: ———: EDITORS. The principle that compensation for individual services of a partner depends on contract applies to a partner who edits and manages a newspaper.
4. ———: ———. The law that a partner is only entitled to such compensation for individual services as is authorizel by contract applies to a managing partner while he is engaged in winding up partnership affairs.

APPEAL from the district court for Kearney county: WILLIAM A. DILWORTH, JUDGE. *Reversed, with directions.*

C. P. Anderbery and *J. H. Robb*, for appellants.

F. L. Carrico and J. L. McPheely, contra

ROSE, J.

This is a suit in equity for a partnership accounting, for a judicial sale of partnership property and for a distribution of the proceeds of the sale. The name of the firm is the Minden News Publishing Company and its business is the publication of a weekly newspaper, called "The Minden News," in connection with job-printing. There are three partners—Dean S. Efner and his wife, plaintiffs, and Florence E. Reynolds, defendant. Plaintiffs reside in Long Beach, California. Defendant resides in Minden and is the editress of the Minden News and the manager of the partnership. The litigation grew out of a controversy over the claim of defendant for compensation for services. In her answer she joined plaintiffs in a demand for an accounting and for the closing of the partnership affairs. The material issues are the proportionate shares of the partners in the partnership property and defendant's claim for compensation. On these issues the findings of the trial court were in favor of defendant. From a decree in her favor plaintiffs have appealed.

The facts which determine the issues are shown without dispute. Dean S. Efner, plaintiff, was sole owner of the newspaper and job-printing plant March 1, 1908, when his investments therein were at least $3,800. At that time the enterprise was incorporated in the name it now bears and, ever since, its business has been conducted without interruption or substantial change. Capital stock to the extent of $5,000 in shares of $100 each was issued. When Dean S. Efner and defendant were both experienced in the newspaper and job-printing business, when they were familiar with the plant, and when they were capable of entering into contracts, they mutually agreed that the actual value of the corporate property was $4,000, or $80 a share. On that basis Dean S. Efner became the owner of 36 shares, and thereafter his investment in the corporate property was $2,880. On the same basis defendant bought 14 shares of the stock, and thereafter her investment was $1,120. Dean S. Efner, therefore, owned 2,880/4,000, or 18/25, of

the corporate property and defendant owned 1,120/4,000 of it, or 7/25. Dean S. Efner became president and defendant became secretary of the corporation. By-laws fixed the salary of the president at $5 a week and that of the secretary at $20 a week. For seven years, during the entire existence of the corporation, defendant was manager, and as such entered on the books of the corporation and paid the salaries mentioned.

By mutual consent the corporation was dissolved March 1, 1915, but the same business, with defendant as manager, was carried on as a partnership with the same property at the same place under the same name. The holders of the stock became partners with the proportionate shares of the capital invested unchanged. The partnership agreement was never reduced to formal articles, but in the firm name the salary of Dean S. Efner, $5 a week, and the salary of defendant, $20 a week, were entered on the partnership books by defendant and paid by her the same as before. This practice was continued without interruption from March 1, 1915, to April 21, 1919. Shortly after the partnership was formed plaintiffs moved to Long Beach, California, and to them defendant reported regularly the condition of the partnership affairs as shown by the partnership books kept by her. Prior to April 21, 1919, she never made any complaint to her partners that her salary was too low. She never asked for nor demanded an increase and never intimated that she had charged the firm with any item for extra compensation. Plaintiffs had no knowledge of any purpose on her part to claim an increase of salary, and never consented thereto, nor to any charge against the partnership therefor.

Under date of April 21, 1919, however, defendant notified Dean S. Efner by letter that she had kept a separate account of her salary and had charged the partnership $30 a week for 1915, 1916, and 1917, and $40 a week for 1918. She also made a demand for this extra compensation. Plaintiffs objected to any increase, and Dean S. Efner in a letter to her denounced the charges against th

partnership for extra compensation, or increase of salary, as unauthorized. An acrimonious controversy thus arose and this suit followed. In the meantime defendant has been in continuous control of the plant and is still managing the partnership property and business the same as formerly. Defendant made no charges for extra compensation in any partnership book, but testified that she made the charges on a book of her own. Plaintiffs knew nothing about this book or its contents. At the trial defendant was permitted to prove the value of her services and it was thus shown that her charges for extra compensation were reasonable. The facts narrated are necessary deductions from the evidence.

In a commercial partnership the right of a partner to compensation for individual services depends on contract, and in absence of an agreement for such compensation a claim therefor is tested by the laws governing partnerships.

In a commercial partnership engaged in a business with capital invested jointly by the partners, a managing partner is not entitled to a salary for his individual services, or to an increase of authorized compensation, unless it is allowed by contract. *Williams v. Pedersen,* 47 Wash. 472, and cases cited in note in 17 L. R. A. n. s. 394, and in note in L. R. A. 1917F, 575. The principle stated applies to a partner who edits and manages a newspaper. *Pierce v. Scott,* 37 Ark. 308.

The rule that a partner is only entitled to such compensation for individual services as is authorized by contract applies to the services of a managing partner while he is engaged in winding up partnership affairs. See cases cited in note 1, 17 L. R. A. n. s. 396, and in note in L. R. A. 1917F, 576.

Exceptions to these rules are sometimes recognized in law partnerships, where the profits depend on professional services of a personal nature, rather than on the income from investments of capital in partnership property, but there is nothing in the record in the present case to create an exception to general rules.

A managing partner in control of partnership property conducts his own business as well as that of the other partners. His advantage, his exposure to temptation in such a relation, and the duties of all partners toward the joint enterprise forbid compensation for personal services, or for the increase of a salary formerly allowed, unless authorized by contract. Hardships sometimes result from the enforcement of these rules of law, but they are founded on the protection of property rights, business integrity, confidential relations, and the inducements to unite individual capital in a joint enterprise, and should not be relaxed in the present case.

What, then, are the rights of the litigants? For a number of years after the partnership was formed defendant, with the knowledge and the consent of the other partners, entered upon the books of the partnership and paid to herself $20 a week and to Dean S. Efner $5 a week. These were the salaries fixed by the by-laws of the corporation. From the course of dealings among the partners with the assent of all, from the entries made by defendant on the partnership books in charging and paying items for salaries, from the regular reports sent by defendant to plaintiffs, thus disclosing the partnership accounts, and from the acquiescence by all partners in what was done in these respects, with full knowledge of the facts, the law implies that the salaries fixed by the by-laws of the corporation were by contract adopted by the partners. There never was any agreement for any other compensation for the individual services of a partner. Defendant's only valid claim to compensation for personal services rests on this implied contract. From the same source Dean S. Efner has a similar claim. Ever since the controversy over the salary of defendant arose, she has been in continuous control of the partnership property and business the same as before, and is managing the plant while the partnership affairs are being wound up. On the undisputed facts and the law applicable thereto, therefore, the implied agreement which allows defendant $20 a week and Dean S.

Efner $5 a week must be respected by both of them until the final decree stating the account and directing a judicial sale of the partnership property is rendered. Plaintiffs' proportionate share will be 18/25 and defendant's 7/25 of the net proceeds. In conformity with these findings of fact and conclusions of law the district court, on the record as it now stands, is directed to enter a decree. For that purpose the judgment below is reversed at the costs of defendant and the cause remanded for further proceedings.

REVERSED, WITH DIRECTIONS.

STATE, EX REL. DAVID W. COX ET AL., APPELLANTS, V. FRANK D. MCILRAVY ET AL., APPELLEES.

FILED FEBRUARY 10, 1921. No. 21255.

1. **Estoppel:** MUNICIPAL CORPORATIONS. The doctrine of estoppel *in pais* has application to municipal corporations, and city councils or public authorities will be estopped or not as justice and right may require.
2. ———: ———. When the intervening railroad company acted in good faith under affirmative acts of the city council and made permanent and expensive improvements, it would be inequitable and unjust to destroy the rights so acquired. Then, in that situation, the doctrine of equitable estoppel will be applied.
3. **Mandamus:** DISCRETION. The issuance of a writ of mandamus is not a matter of strict legal right, but is discretionary with the court.
4. ———: ———. "While the courts, in the exercise of a sound discretion, will not issue the writ of mandamus, even to vindicate a technical right, where more harm than good will result through its interference with municipal administration, such considerations are addressed to the trial court. Only in a clear case of abuse of discretion would the granting of a mandamus be reversed for such a cause." *Moores v. State*, 71 Neb. 522.

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

W. T. Thompson, for appellants.

Jesse L. Root, Byron Clark, L. C. Chapman and *S. P. Davidson, contra.*

ALDRICH, J.

This is an action in mandamus commenced by one David W. Cox and wife against the city council of Tecumseh and the Chicago, Burlington & Quincy Railroad Company, as intervener, to compel the removal of certain obstructions at certain street intersections. The city of Tecumseh is one of the second class with a population of between 2,000 and 3,000. Its streets run north and south and east and west. The railroad tracks and depot of defendant railroad company are located upon Webster street, which runs east and west. The depot is situated between Third and Fourth streets, which run north and south. Approximately 25 families live south of Webster street. The public schools are located north of Webster street. Sixth and Seventh streets, running north and south and crossing Webster street, have been closed for many years by reason of the tracks of the railroad company.

On July 12, 1916, the city of Tecumseh undertook by ordinance to grant and convey to the defendant railroad company the intersections of Fourth and Fifth streets where they intersect with Webster street. Thereafter the defendant constructed coal chutes and extensive brick unloading platforms in these intersections, completely obstructing public travel on Fourth street at its intersection with Webster street, and obstructed all travel on Fifth street at its intersection with Webster street, except foot travel.

This is an application for a writ of mandamus against the defendant city council of Tecumseh and the Chicago, Burlington & Quincy Railroad Company, intervener, whom we will hereafter denominate as defendants, and the relators as plaintiffs. Section 5141, Rev. St. 1913, provides: "The city council or board of trustees shall have

the care, supervision and control of all public highways, bridges, streets, alleys, public squares and commons within the city or village, and shall cause the same to be kept open and in repair, and free from nuisances." The petition alleges that Fourth and Fifth streets in the city of Tecumseh are the principal streets, duly platted and dedicated to the public, and that the plaintiffs are citizens, property owners and taxpayers residing within this city. The defendants, as a reason or justification for their refusal to perform the duty enjoined upon them by section 5141, Rev. St. 1913, allege that the refusal is in accordance with the passage of ordinance No. 138, and a plea of estoppel. The defendant railroad bases its defense to plaintiffs' cause of action upon ordinance No. 138, which is in words and figures as follows:

"ORDINANCE NO. 138.

"An Ordinance granting portions of Fourth and Fifth streets, where same intersect with Webster street, to the Chicago, Burlington & Quincy Railroad Company and their successors.

"Be it Ordained by the Mayor and Council of the City of Tecumseh: Section 1. That, whereas the Chicago, Burlington & Quincy Railroad Company have signified their intention and are about to erect a new depot in Tecumseh, and as a matter of safety for its patrons, and the necessity and convenience of said company, it becomes necessary to change the present location of buildings, tracks and yards, there is hereby granted to the Chicago, Burlington & Quincy Railroad Company, its successors and assigns, for railroad and depot grounds and purposes all that part of Fourth street between blocks 41, 42, 60 and 61; also all that part of Fifth street between blocks 42, 43, 59 and 60, being that portion of ground where said Fourth and Fifth streets intersect with Webster street, heretofore vacated; this privilege is granted in consideration that said railroad company will build and maintain between Third and Fourth streets on its property in or south of block 41, a modern depot at a

cost of approximately $20,000, and will further keep said Fifth street open for travel and keep and maintain a good sidewalk of brick or concrete over its property on said street for such purposes and will also keep open for travel with vehicles a strip of ground owned by said company, being described as the south 35 feet of the north half of the north half of blocks 60 and 61; and provided that, by the acceptance of the privileges hereby granted, the said railroad company agrees to save and keep the city of Tecumseh harmless from the payment of any costs, damages or expenses growing out of the exercise of the right hereby conferred in favor on any person whomsoever.

"This ordinance shall be in force after its passage, approval and publication according to law.

"Presented and regularly passed under suspension of the rules on July 12, 1916. Published July 15, 1916.

"(SEAL) W. H. Taylor, Mayor.

"Attest: W. J. Devenney, City Clerk."

After carefully looking through the law propositions as involved in appellants' contentions and perusing with equal care the contentions of appellees, we are of the opinion that the propositions of law numbered 9 and 10 of appellees' brief are decisive of the issues in this case. We choose to decide the issues and determine the rights of the parties involved on the doctrine of estoppel, and show wherein it has application to issues herein, and show why the doctrine of mandamus does not apply in enforcing rights which are in substantial dispute or when a substantial doubt exists. Then it is true that a writ of mandamus is only granted as a matter of sound judicial discretion. It is only a legal remedy based on equitable principles.

A city does not lose its rights in a public street by mere nonuser, but if there are other circumstances in connection with the case which are sufficient, together with the nonuser, to raise a presumption of abandonment, such rights are deemed to be lost.

The defendant entered into a contract by way of an ordinance to vacate, abandon and turn over to defendant railroad company certain of its streets, and alleges in consideration of which the defendant railroad company expended, approximately, $20,000 or $25,000 in building a new depot, coal chutes, switches and approaches to its railroad grounds in the city of Tecumseh. The doctrine of estoppel *in pais* is applicable to municipal corporations, and it is equally true that city councils or public authorities will be estopped or not as justice and right may require. There may be cases where to assert a public right would be an encouragement and promotion of fraud, but where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights so acquired, then the doctrine of equitable estoppel will be applied. *People v. City of Rock Island,* 215 Ill. 488, 106 Am. St. Rep. 179. If the defendant railroad company acted in good faith under the affirmative acts of the city council and made many expensive and permanent improvements, it would be highly inequitable and unjust to destroy the rights acquired and entail a vast expenditure of time and money.

Permanent improvements and great expenditures were made under and by virtue of the contract entered into between the public and defendant railroad company, which would not have been made but for the positive action of the city and its officials, and to compel the abandonment of the premises for use as depot grounds would be contrary to natural justice. The relators cannot demand the writ of mandamus in this case as an absolute right, but it is granted or withheld in the exercise of sound judicial discretion, in view of all the facts and circumstances. The relators are citizens of this community. Therefore their inconvenience or annoyance is no different from that of the rest of the community. They suffer no greater inconvenience possibly than the rest of the public, and to receive the benefit of an organized

city government one may occasionally be obliged to forego some minor right or inconvenience to the great and general benefit of the entire community. The doctrine of cost and compensation applies to the citizenship of a city or common community. It is the general doctrine that every cost and privation has its compensation. So in building these buildings and constructing these grounds there is a general compensation for every cost and a blessing and convenience for every inconvenience or annoyance that might incidentally result. This depot and grounds are a matter of civic pride to the citizens of the city of Tecumseh and should not be marred by reason of the slight inconvenience to 25 of its families. It is a circumstance properly to be considered by the court in the exercise of its discretion.

We think the trial judge in rendering his decision acted justly and equitably in behalf of all parties concerned and conferred a lasting benefit upon a thrifty and prosperous city. This in substance states the general doctrine of the law of equitable estoppel. It steps in and overrides the more or less harsh legal remedy of the writ of mandamus. These plaintiffs in their acquiescence import knowledge and assent to what happened.

It has been suggested that this ordinance may invoke the question of *ultra vires*. This question or any defects that might be mentioned by virtue of the ordinance are not involved in this case. All this agreement amounts to is that it creates a contract between the defendant, the city of Tecumseh, and the intervening railroad company. It was a just and equitable contract, because all the people participated in its benefits and advantages, and as a result the defendant city received the benefits and conveniences of a splendid new depot and all accouterments pertaining to it. To order the intersections of some of the streets and alleys involved in this new structure to be vacated and abandoned by the defendant railroad company would be an act of bad faith. The defendants had a right to enter into the contract which they did and

which the city got the benefit of. This doctrine has been announced in substance by this court in *State v. Wallichs*, 12 Neb. 234.

After receiving the benefit of this expensive permanent improvement, it seems to us the city should be estopped from nullifying it by destroying its usefulness for the benefit of a few families. The doctrine of estoppel affords a complete and adequate remedy to the issues presented. *State v. Stearns*, 11 Neb. 104. It may be said in this connection that a writ of mandamus is not a writ of right.

The doctrine of estoppel *in pais* is applicable, and simply used to promote justice, equity and fair dealing between the parties involved. It resolves itself into a question of justice and equity to prohibit fraud and inequity, and as a general rule, when equitable estopple is once established by the evidence or the facts in a case, it operates as effectively as a deed or a record. It is the law that estoppel is commensurate with the thing represented and operates to put the party entitled to its benefits in the same position as if the thing represented were true. It is a fundamental part of the doctrine of equitable estoppel that the estoppel extends only so far as may be necessary to protect from loss the party entitled to assail it. The estoppel can neither be extended beyond nor cut below the natural reasonableness of the representation. As a general rule the doctrine of equitable estoppel applies to rights and liabilities under contracts.

The history of the railroad and its occupancy in the city of Tecumseh shows that a writ of mandamus at the suit of a private relator suing as a citizen was properly denied by the court in the exercise of its discretion. *People v. City of Rock Island*, 215 Ill. 488. Mandamus is a discretionary writ, and will only be allowed in furtherance of justice upon a proper showing. *Donahue v. State*, 70 Neb. 72; *Moores v. State*, 71 Neb. 522; *State v. Hendee*, 74 Neb. 847. The writ of mandamus in this instance is not a mere writ of right. It is a legal remedy granted along equitable principles. We must conclude from this entire discussion that mandamus only will be resorted to under conditions of

necessity or exceptional circumstances. We do not believe that the court in exercising its discretion in refusing this writ did anything other than justice, and substantially served a worthy, popular demand of the overwhelming majority of the city of Tecumseh.

There are many other propositions of law earnestly mentioned and discussed by the parties to this action, but we believe we have made it plain that in upholding the finding of the lower court we have rendered to the citizens of the city of Tecumseh and invaluable and beneficent service, and therefore it is our duty, and in accordance with the doctrine of equitable estoppel, to do substantial and plain justice to the greatest good according to the greatest number. The judgment of the lower court is

AFFIRMED.

LETTON, J., not sitting.

DEWEY BARRETT, APPELLANT, V. ALAMITO DAIRY COMPANY, APPELLEE.

FILED FEBRUARY 10, 1921. No. 21043.

1. **Municipal Corporations**: STREET INTERSECTIONS: LAW OF THE ROAD. In the absence of some regulation to the contrary, the rule of the road with respect to vehicles approaching a street crossing at intersecting points is that the first to enter upon the crossing has the right of way.

2. ———: ———: ———. In such case, the law of the road does not require that a wagon should stop and allow an automobile to pass in front simply because it is a faster-moving vehicle.

3. ———: ———: ———. In such case, the law requires of both users of the street intersection the exercise of reasonable and ordinary care.

4. ———: ———: ———. Where a wagon-driver, having the right of way, has entered upon a crossing at a street intersection, he may assume that the driver of an automobile approaching the crossing at right angles will not negligently operate the car so as to place the occupants in danger of a collision; and he may

safely act upon this assumption until a situation is presented which, to the mind of a reasonable person, places the occupants of the car in a position of peril. It then becomes the duty of the wagon-driver to exercise every reasonable precaution to avoid injury.

5. ———: COLLISION: LAST CLEAR CHANCE. Evidence examined, and *held* not to present a case for the application of the "last clear chance" doctrine.

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

Anson H. Bigelow, for appellant.

Raymond T. Coffey, contra.

DAY, J.

Dewey Barrett, a minor, by his next friend, brought this action against the defendant to recover damages for personal injuries received by him in a collision between an automobile in which he was riding and a milk wagon driven by an employee of the defendant. His cause of action is based upon the alleged negligence of the defendant. At the close of the plaintiff's testimony the trial court, on motion of the defendant, directed a verdict in its favor, and dismissed the plaintiff's action. The plaintiff has appealed.

Counsel for plaintiff correctly, we think, states that the main question to be determined is whether the facts present a case to be submitted to the jury under the doctrine of the last clear chance. This involves an examination of the evidence.

The record shows that Twenty-fourth street in the city of Omaha extends north and south, and is intersected at right angles by K street. Both streets are paved. From curb to curb, Twenty-fourth street is 60 feet wide and K street 44 feet wide. Between the curbs and the lot line of the respective streets is a sidewalk space of 18 feet and 6 inches. On July 23, 1916, at about 2 a. m., an employee of the defendant, driving a team of horses attached to one of defendant's milk wagons, was proceeding eastward

upon K street, driving slowly upon the right-hand side of the street. The team was walking slowly, and did not accelerate or slacken its speed in attempting to cross the intersection. On the morning in question the plaintiff, a boy of about 18 years of age, in company with one Sidney Miller, about one year older, were riding in a Moline-Knight touring car. These young men had been out riding, the plaintiff paying in part at least for the gasoline. The car was being driven by Miller. The plaintiff was sitting on Miller's right on the the front seat, resting his right arm on the top edge of the front door. As the car approached K street, proceeding south on the right-hand side of the street, a man was seen by the driver of the car crossing Twenty-fourth street from the west side, some 15 feet north of the usual crossing place. To avoid injury to the pedestrian, the driver of the car swung it to the right over near the west curb of Twenty-fourth street. At this juncture the driver of the car gave a hasty glance back to see whether he had cleared the man. The car was then running at about 20 miles an hour. While the driver was in the position of glancing back, the plaintiff gave an exclamation, "Look out," and at the same time grabbed the wheel and gave the car a turn to the left. The driver of the car looked up, and, for the first time, saw the team about 45 feet away just entering K street. In describing what then occurred the driver of the car says: "I gave the wheel an additional turn to the left; * * * I speeded up to get across before the wagon would be out far enough to reach me." He says he did not have time to stop; that the car was running 20 miles an hour. The plaintiff's estimate of the speed of the car was about 18 miles an hour. In attempting to swing around in front of the wagon, and just as the car was passing in front of the horses' heads, the wagon driver suddenly reined them in, causing the wagon tongue to be elevated in such a manner that it escaped the front end of the car, but caught plaintiff's right arm, injuring it so badly that amputation was necessary. The point of collision, as fixed by the witnesses, was on the

south side of the intersection, and about 17 feet east of the west curb line of Twenty-fourth street. The driver of the wagon saw the lights of the car as his team was crossing the gutter line about along the west curb line of Twenty-fourth street.

Do the facts, as above outlined, present a case for the application of the "last clear chance" doctrine? We are of the opinion that they do not. That rule of law is based upon the idea that, where a person is placed in a position of danger, whether negligently or not, and where such peril is known to another, or where the situation and surroundings are such that he ought to have known of the danger, it then becomes the duty of the latter person to exercise every reasonable precaution to avoid injury to the party so in peril, and the failure to do so is actionable negligence. *Johnston v. Delano*, 100 Neb. 192.

Under the rule of the road, the defendant's driver having first entered upon the intersection of the two streets, in the absence of some regulation to the contrary, had the right of way. In the use of the street he was of course bound to exercise ordinary care, but he was not obliged to stop or slacken his speed simply because an automobile was approaching at right angles at a rapid rate of speed. He was not bound to anticipate that the driver of the car would do some negligent act and thus expose the occupants of the car to danger. Under the circumstances then present, he had the right to presume that the driver of the car would stop, or turn to the left into K street, or if he attempted to pass in front that he would swing out far enough to the left to clear the wagon, especially in view of the fact that there was a clear space in front of approximately 43 feet between the point of collision and the east curb line of Twenty-fourth street. The wagon-driver had the right to act on this assumption until a situation was presented which would suggest to a reasonable person that the occupants of the car were being placed in a position of danger. It then became the

duty of the wagon-driver to exercise all reasonable precaution to avoid a collision.

For cases sustaining the propositions discussed, see: *Rupp v. Keebler,* 175 Ill. App. 619; *Elgin Dairy Co. v. Shepherd,* 183 Ind. 466; *Jahn & Co. v. Paynter,* 99 Wash. 614; *Brown v. Chambers,* 65 Pa. Super. Ct. 373; *Knox v. North Jersey Street R. Co.,* 70 N. J. Law, 347; *Lawrence v. Goodwill,* 186 Pac. (Cal. App.) 781.

As we view the testimony, the period of time elapsing between the time the occupants of the car were placed in a position of danger and the instant of the collision was so brief as to be scarcely appreciable. The driver of the car estimated his speed at 20 miles an hour, which would be approximately 29⅓ feet a second. The plaintiff's estimate of the speed was 18 miles an hour, or approximately 26 feet a second. There is no testimony as to the speed of the milk wagon except that the horses were walking slowly. We can, however, take judicial notice that under the facts shown the wagon was not proceeding in excess of 5 miles an hour, in all probability less. It seems entirely safe to say that the car was moving four times as fast as the team. This relative speed would indicate that, when the driver of the car saw the team 45 feet away, the team was well into the street and approximately 7 feet from the point of collision. The car would cover this distance in about 1½ seconds. At this distance there was nothing in the situation to suggest that the occupants of the car were being placed in a position of peril. Not until the driver of the car drove directly in front of the team, or was so close that it was apparent that he intended to do so, were the occupants of the car in a position of peril.

Under all of the circumstances it is quite apparent to us that the danger did not arise until almost the instant of the collision. It was so small a fraction of time that there was no reasonable opportunity of avoiding the collision after the occupants of the car were in a place of danger. In view of all of the circumstances we are convinced that reasonable minds could not say that the wagon-driver

was negligent in not sooner anticipating the danger of a collision.

We find no error in the ruling of the trial court, and the judgment is

AFFIRMED.

MARY RUHS, APPELLEE, V. ALBERT RUHS, APPELLANT.

FILED FEBRUARY 10, 1921. No. 21147.

1. **Husband and Wife:** ALIENATION OF AFFECTIONS: INSTRUCTIONS. In an action for damages by a wife against her father-in-law for alienating the affections of her husband, it is not error to fail to instruct the jury that parental advice, honestly given, without malice, and with the intention of benefiting the son, is a defense, when parental advice is not pleaded as a defense nor proved on the trial.
2. **Instructions** which, when construed as a whole, correctly state the law, and are not misleading, will be held sufficient, even though a single paragraph thereof standing alone may not be entirely accurate.
3. **Evidence** examined, the substance of which is set out in the opinion and *held* sufficient to support the verdict.

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

C. R. Stasenka and *A. H. Byrum,* for appellant.

W. P. Cowan and *W. H. Miller, contra.*

DAY, J.

The plaintiff recovered a judgment for $8,000 against the defendant, her father-in-law, in an action for damages for alienating the affections of the plaintiff's husband, Ernest Ruhs. Defendant has appealed.

The petition is in the usual form of such actions, and charges in substance that, soon after the marriage of the plaintiff and Ernest Ruhs, the defendant, with the intention of causing a separation between the plaintiff and her

husband, knowingly and falsely upon various occasions represented to the said Ernest Ruhs that the plaintiff had been guilty of illicit conduct with other men; that by his oft-repeated reference to the misconduct of the plaintiff he finally induced the said Ernest Ruhs to abandon the plaintiff and to commence an action for divorce against her, alleging adultery as a ground therefor. The petition avers that, prior to the unwarranted interference of the defendant, the plaintiff enjoyed the love, confidence and respect of her husband, and that he provided a suitable home and maintenance for herself and two children, the issue of the marriage. The answer is a general denial.

A number of errors are relied upon as a basis for a reversal of the judgment, the principal ones of which will be noted. The principal error assigned is that the evidence does not support the verdict. We cannot, within the limits which should be given to an opinion, review the entire testimony, and must content ourselves with a very brief summary of the outstanding facts. At the outset we may say that there was a flat contradiction between the plaintiff's and defendant's testimony upon every material fact.

On behalf of the plaintiff the testimony tended to show that plaintiff and Ernest Ruhs were married on February 6, 1909, and that immediately thereafter the young couple commenced living on a farm belonging to the defendant, the son working the farm on shares; that defendant and his wife were often at the home of the young people; that soon after the marriage the defendant stated to the plaintiff, in the presence of her husband, that the plaintiff was in "trouble" by another man, and later, when the child was born, stated that he did not want his son to support other men's kids; that defendant persisted in telling that she was with child before her marriage, notwithstanding the child was born more than 10 months after the marriage; that after living for about six years on the farm, during which time two children were born, the plaintiff and her husband removed to Stanton county, and

later to Norfolk, Nebraska, where the plaintiff's husband secured employment on the railroad; that plaintiff and her husband lived happily together and that the husband provided suitable maintenance for the plaintiff and her children and had a genuine affection and regard for them; that, with the consent of her husband, the plaintiff and her children made a trip to Franklin county to vist her relatives and friends, the husband securing round-trip transportation for them; that at the instance of her husband the plaintiff and the children visited the defendant's family; that while in Franklin county she also visited the family of Jurgen's, a son-in-law of the defendant; that while the plaintiff was at Jurgen's the defendant, in company with another son-in-law, went to Norfolk and told his son, Ernest, that it was rumored that the plaintiff was carrying on with other men. The testimony with respect to what the defendant told his son is brought out on the examination of the defendant, his son, and his son-in-law. In this behalf the defendant says: I went up after him and "told him what was the reports that was going on around here, and I wanted him to come out and investigate for himself;" that she was going around with other men; I went up and told him, but did not assume to advise him in any way.

Ernest Ruhs' testimony in behalf of the defendant stated that at the time his wife left she expected to return, and that the relationship between them was pleasant. He stated: My father "told me about this trouble." He asked me if "we were parted or divorced, and it just liked to knock me down at first." He said: "You can come up here and look the thing over for yourself." George Grotfeld was present, and "he said the same thing, that I didn't have to take their word for it at all; that I could come over here and see for myself."

On the same day the parties started from Norfolk. Arriving at Kearney they at once took an automobile for Hildreth, arriving there in the evening. They then drove to the home of Henry Wessel, an uncle of plaintiff, where

the plaintiff's husband was told of what was reported to be going on. They then drove to Bloomington, the county-seat of Franklin county, Wessel accompanying the defendant and his son. Arriving there at 2 o'clock in the morning, they called at the sheriff's house. The sheriff said he first talked with the son; that later the defendant came up on the porch and stated that plaintiff had been running around with that Louis Vannier late of nights; that they planned to take the train the next morning early, and that they wanted to arrest her before they got out on the early morning train. The sheriff stated that he did not want to go without a complaint, but finally told Albert, the defendant, that, "I would go if he would file a complaint after I got them," and he said he would file a criminal complaint against them. The parties then went to the house of Vannier and took him into custody, and from there drove to Jurgen's, where the plaintiff was staying, arriving there just at sunrise. The sheriff called the plaintiff out and told her what his errand was. The plaintiff saw her husband out near the car, and called him to come to her, and he replied: "I am done with you." The parties were taken to town and released from custody late in the afternoon of the same day. A few weeks later the plaintiff's husband commenced an action for divorce, charging the plaintiff with adultery.

The defendant denied practically all of the charges made against him. He admitted going to Norfolk and telling his son of the rumors of his wife's conduct. He denied having anything to do with the arrest of the plaintiff, except that he was along as the driver of the car, and that the action taken by his son was upon the son's own initiative; that the son got the information upon which he acted from Wessel.

Under this state of the record it seems to us that the question presented was one for the jury to pass upon, and that the evidence and the fair inferences therefrom are sufficient to support the verdict.

Complaint is made of the giving of the instruction No. 4, which reads as follows:

"The court instructs you, gentlemen of the jury, that if you find from the evidence that Ernest Ruhs has abandoned the plaintiff, his wife, and you find that the conduct of the defendant, Albert Ruhs, was the controlling cause which induced Ernest Ruhs, plaintiff's husband, to leave the plaintiff, and if you are satisfied from the evidence that but for the conduct of the defendant Ernest Ruhs would not have left the plaintiff, his wife, then the plaintiff is entitled to recover in this action, although you may find from the evidence that there might have been causes contributing to the same result."

The argument is made that the instruction is misleading, in that it fails to state that the facts to be found by the jury must be established by a "preponderance of the evidence." Were this the only instruction given, it might well be subject to the criticism directed against it. But it is well established that in passing upon the correctness of instructions they must be considered, as a whole, and if, when so considered, the law is correctly stated it is all that is required.

By another instruction the jury were told that before the plaintiff "would be entitled to recover a verdict at your hands, she must convince you by a preponderance of the evidence of the truth of the material allegations of her petition," and among the material allegations to be found by the jury was: "That the defendant, Albert Ruhs, charged the plaintiff in the presence of her husband with being a bad woman, and having improper relations with other men, and by such charges induced Ernest Ruhs, the husband of plaintiff, to abandon her and her said children and to apply for a divorce." Considering the instructions as a whole, we do not believe the jury were misled in the matter complained of. We have examined the whole charge, and it is as favorable to the defendant as he had the right to ask.

It is argued that there is no proof that Ernest Ruhs has abandoned the plaintiff. We are unable to agree with this contention. His first words in response to her appeal for help at the time the sheriff was placing her under arrest, "I am done with you," followed by action for divorce and his failure to voluntarily contribute to her support is sufficient proof of abandonment.

But it is urged that the court erred in failing to incorporate in its instructions the idea that it was the privilege of the father to in good faith advise his son with respect to his domestic happiness—citing *Melcher v. Melcher,* 102 Neb. 790, and *Trumbull v. Trumbull,* 71 Neb. 186. Undoubtedly it is a good defense on the part of a parent or guardian, in an action of this nature, to show that advice given was with honest motives and a sincere belief that it was for the moral and social welfare of the child, or ward; but, to be available, both the relationship as well as the good motives must be pleaded as a defense. In *Rath v. Rath,* 2 Neb. (Unof.) 600, it is said: "In an action by a wife, against her father-in-law for alienating the affections of her husband and causing him to abandon her, parental advice, honestly given, without malice, and with the intention of benefiting the son, is a defense; but, where such advice is not pleaded nor proven at the trial, the court did not err in refusing to give instructions based on that theory." To the same effect, *Harvey v. Harvey,* 75 Neb. 557. In the case at bar the plea was a general denial, and the defendant's proof tended to show that he took no part in influencing his son in the action taken by him.

Numerous errors are complained of in the ruling of the court in limiting the cross-examination on the part of the defendant. In some of the instances related we are inclined to the view that the line was too tightly drawn; on the other hand, we do not believe there was any substantial error to the prejudice of the defendant's rights in the rulings of the court.

It is argued that the plaintiff has not sustained her case by the preponderance of the testimony. It is quite true that on some of the material matters the plaintiff stands alone against the denial of her father-in-law, her mother-in-law, and her husband; but it must be remembered that preponderance of the testimony does not necessarily mean the greater number of witnesses testifying to a given statement of facts, but rather to the weight of the evidence; that which, upon the whole, produces the stronger impression upon the mind of the trier of fact, and is more convincing as to its truth when weighed against the evidence in opposition thereto.

Other errors are discussed in the brief, which need not be considered further than to say that they have been examined and in our view are not sufficient to a reversal of the case.

There is no prejudicial error in the record which we have been able to discover. The judgment is therefore

AFFIRMED.

MARY J. DRESSLER, APPELLANT, V. COMMONWEALTH LIFE INSURANCE COMPANY, APPELLEE.

FILED FEBRUARY 10, 1921. No. 21217.

1. **Insurance:** NONPAYMENT OF PREMIUMS: FORFEITURE. Where the terms of a life insurance contract provide that, upon failure of the insured to pay the stipulated premium on a day named, the "policy shall be *ipso facto* null and void and all premiums forfeited to the company, except as herein provided," such provision is not illegal or against public policy, and, there being no condition creating a waiver or estoppel, the contract will be enforced as made.
2. ———: ———: ———. In such case, the failure to make the payments as provided in the contract works a forfeiture.
3. ———: ———: ———: NOTICE. In such case, no notice or declaration of forfeiture is necessary on the part of the insurer, in the absence of a statute requiring such notice, or some stipulation in the contract that notice should be given.

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

Wymer Dressler, for appellant.

T. W. Blackburn and *Clark O'Hanlon, contra.*

DAY, J.

This action is based upon a policy of insurance upon the life of Samuel H. Dressler, in which the plaintiff is named as beneficiary. The case was tried to the court upon an agreed statement of facts, a jury being waived by the parties. The court found the issues in favor of the defendant and entered a judgment of dismissal.

The record shows that on July 8, 1914, the defendant issued its policy of insurance upon the life of Samuel H. Dressler, in which his mother, the plaintiff herein, was named as beneficiary. At the time the policy was issued, the premium for the first year was paid, but the second premium, due and payable by the terms of the policy on July 8, 1915, was never paid. By the terms of the policy, the payment of the first premium automatically extended the insurance for a period of two months beyond July 8, 1915. The insured came to his death by drowning on July 2, 1916. The ultimate question to be determined is whether the life insurance contract was in force at the time of the death of the insured.

The policy contained a stipulation as follows: "If any premium is not paid when due, this policy shall be *ipso facto* null and void and all premiums forfeited to the company, except as herein provided." The exception referred to by the proviso, in so far as it relates to policies upon which but one premium has been paid, relates to the automatic extension of the insurance for a period of two months beyond the expiration of the first year's insurance. This proviso does not aid the plaintiff in any way, for it will be noted that the insured came to his death some months after the period of automatic extension of the policy had elapsed.

While it is undoubtedly the rule in this state that forfeitures are looked upon with ill favor by the court, and that when an insurance contract is susceptible of two constructions, one of which will work a forfeiture and the other will not, the court will incline to adopt the construction which will prevent a forfeiture. Still, it is equally well established that, when there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, and when there is no situation presented which would create a waiver of its terms or work an estoppel, it will be enforced as made.

In the case of *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, it was said: "A clause stipulating for the forfeiture of a contract should not be aided or given effect by construction in a case where the plain meaning of the langauge used does not require it." See, also, *Jensen v. Palatine Ins. Co.*, 81 Neb. 523.

By plain and unmistakable terms the policy provided that the failure to pay the premium on the day appointed should work a forfeiture. The parties had the right to make such a contract; it is not illegal or against public policy; there is no situation suggested which could be regarded as a waiver of its time or to create an estoppel. Under such circumstances it is the plain duty of the courts to enforce the contract as made.

In *Rye v. New York Life Ins. Co.*, 88 Neb. 707, the policy under consideration contained a clause of similar import to the case at bar. It was said: "When there is no uncertainty as to the meaning of an insurance contract, and the same is legal and not against public policy, it will be enforced as made." To the same general effect see: *Sharpe v. New York Life Ins. Co.*, 5 Neb. (Unof.) 278; *Rustin v. Ætna Life Ins. Co.*, 98 Neb. 426; *Bogue v. New York Life Ins. Co.*, 103 Neb. 568; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335.

2 Joyce, Law of Insurance (2 ed.) sec. 1103, states the rule, which is supported by numerous authorities, as

follows: "If the policy provides that the premium shall be paid on or before a stipulated day or the policy shall become forfeited and void, or that the company shall be released from all liability, time becomes of the very essence of the contract, and a failure to pay as agreed determines the contract, unless there be a waiver or estoppel."

But it is urged that there can be no forfeiture of the contract for a failure to pay the premium, without some affirmative action taken by the company declaring a forfeiture. Cases are readily to be found in which the necessity of action on the part of the company, as a condition precedent to the right to claim a forfeiture, is considered. In some of the states notice of an intention to claim a forfeiture is required by statute. Some of the contracts specifically require that notice to the insurer of intended forfeiture shall be given. The generally accepted rule is that, in the absence of a statute requiring notice to the insured, or some stipulation in the contract requiring it, no notice or declaration of forfeiture is required where the policy stipulates for forfeiture for nonpayment of premium. 2 Joyce, Law of Insurance (2d ed.) sec. 1106; *Ohio Farmers Ins. Co. v. Wilson,* 70 Ohio St. 354; *Knights of Columbus v. Burroughs,* 107 Va. 671, 17 L. R. A. n. s. 246.

We find no error in the ruling of the trial court, and its judgment is

AFFIRMED.

STATE OF NEBRASKA V. WILLIAM G. CROUNSE.

FILED FEBRUARY 10, 1921. NO. 21695.

Master and Servant: STATUTE REGULATING HOURS OF LABOR: NEWSPAPER COMPANY. A newspaper publishing company, engaged exclusively in printing and publishing a daily newspaper, though it employs machinery and mechanical labor in its operation, is not a manu-

facturing nor a mechanical establishment, as such terms are used in the statute regulating the hours of labor for women. Laws 1919, ch. 190, tit. 4, art. II, sec. 5.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Exception overruled.*

Clarence A. Davis, Attorney General, Mason Wheeler and *A. V. Shotwell,* for plaintiff in error.

Stout, Rose, Wells & Martin, contra.

FLANSBURG, J.

Defendant, as superintendent of employees of the World Publishing Company, was charged with a violation of the statute prohibiting the employment of women in "manufacturing, mechanical or mercantile establishments" for more than nine hours a day or in the nighttime after 10 p. m. (Laws 1919, ch. 190, tit. 4, art. II, sec.5). The complaint filed alleged that the World Publishing Company was a "manufacturing, mechanical or mercantile establishment." The case was tried upon a stipulation of facts, by which it is shown that the said company is a corporation engaged exclusively in publishing and printing a daily newspaper, with morning, evening and Sunday editions, and that the corporation does no job printing or contract work of any kind; that eight women are employed in the mailing room, and they affix the names of subscribers to newspapers by means of a device which moistens a printed name slip, detaches it from a roll, and glues it to the particular paper in question. These women were employed after 10 o'clock p. m. and before 6 o'clock a. m., which, if the company is found to be within the provisions of the act, is a time when such employment is prohibited. The district court found that the company was not within the act and dismissed the case. To this ruling the county attorney took exception, and now presents here the sole question of whether or not the newspaper publishing company, in this case, is a manufacturing or mechanical establishment within the meaning of the law.

The courts are not in entire accord on the question of whether or not such a publishing company is a manufacturing establishment within the commonly understood meaning of that term. In *State v. Dupré & Hearsey,* 42 La. Ann. 561, and by dictum in *In re Kenyon & Fenton,* 1 Utah, 47, the view is taken that a newspaper is a manufactured product and the publishing house a manufacturing establishment. In its literal sense, it seems to us, the term is hardly capable of that interpretation. Webster's New International Dictionary defines "manufacture" as "The process or operation of making wares or any material products by hand, by machinery, or by other agency; often, such process or operation carried on systematically with division of labor and with the use of machinery." The work which characterizes the business of publishing a newspaper is the gathering and disseminating of news, the furnishing to subscribers of various kinds of information, the carrying of advertisements, and the writing of editorials and articles on matters of public interest. Machinery and mechanical labor are indispensable, but are only incidental to the carrying on of the main purpose of the business. A newspaper is the product of intellectual effort, not of mechanical labor. That such business is not manufacturing is supported by the following decisions: *Oswald v. St. Paul Globe Publishing Co.,* 60 Minn. 82; *In re Capital Publishing Co.,* 10 MacArthur (D. C.) 405; *Evening Journal Ass'n v. State Board of Assessors,* 47 N. J. Law, 36; *Press Printing Co. v. State Board of Assessors,* 51 N. J. Law, 75.

In the case of *Evening Journal Ass'n v. State Board of Assessors, supra,* the court said (page 41): "It is true that in the production of his papers, which he sells, he employs manual labor and mechanical skill. But so does the sculptor who produces, as the result of his handiwork and genius, the statue; so does the painter who executes his painting with his palette and his brush; so does the lawyer who prepares his brief, or the author who writes a book. But neither the sculptor nor the painter

is classified as a manufacturer by reason of his works; nor would the lawyer or the author be regarded as a manufacturer though they employed a printer—the former to print his brief, and the latter his book. In the ordinary and general use of the word 'manufacturer,' the publishing of a newspaper does not come within the popular meaning of the term. As was said by the court in the case * * * (*In re Capital Publishing Co.*, 10 MacArthur (D. C.) 405), 'no definition of the word "manufacturer" has ever included the publisher of a newspaper, and the common understanding of mankind excludes it. * * * It gives employment to printing-presses, types, and editors, and yet, in the whole history of newspapers from the close of the seventeenth century, this word "manufacturer" has never been applied to them or appropriated by them in the whole range of English literature.' "

A newspaper publishing house not being, then, a manufacturing establishment, can it be said to be a mechanical establishment, within the purview of the law?

The definition of mechanical as given by Webster's New International Dictionary is: "(1) Of, pretaining to, or concerned with, manual labor; engaged in manual labor; of the artisan class. (2) Of, pertaining to, or concerned with, machinery or mechanism; made or formed by a machine or with tools."

The statute is not directed specifically at mechanical labor wherever the same may be performed, but at all labor performed by women in those institutions only which are to be classed as mechanical establishments. For the general purpose of the law, it was evidently deemed best by the lawmakers to describe in what establishments female labor should be regulated, rather than to attempt to regulate certain kinds of labor in all establishments. Almost all business establishments employ some mechanical element in their operation. The mere fact that machinery or mechanical appliances, or mechanical or manual labor, is used, or found to be employed, does

not necessarily characterize the establishment as a mechanical establishment. It seems to us that before the establishment can be said to be a mechanical establishment the mechanical element must predominate. In such operations as mining, or in water-works, where water is pumped and distributed to consumers, or in laundries or repair shops, the mechanical element clearly does predominate, and the product of those enterprises can be readily said to be the products of mechanical effort. Such enterprises, though not manufacturing, would clearly be mechanical in their nature. *Cowling v. Zenith Iron Co.*, 65 Minn. 263; *Ward v. City of Norton*, 86 Kan. 906.

On the other hand, in *Mullinnix v. State*, 42 Tex. Cr. Rep. 526, the court held that the business of photography is not mechanical, the court saying: "In our opinion, this clause of the Constitution does not embrace the calling of a photographer or artist, but more properly refers to mechanics; that is, builders and carpenters. True, a photographer may do some work with tools of a mechanical character; that is, his business may be partly mechanical. In its broadest sense, a mechanic is any one who is a skilled worker with tools, but one may have a business which is partly mechanical, such as a farmer, a surgeon, or an artist, and the like, and not be a mechanic."

In the case of *City of New Orleans v. Robira*, 42 La. Ann. 1098, the court said that photography was not a mechanical pursuit, since the mind of the party engaged in the business was chiefly concerned, the hands and body being less so.

What has been said with regard to manufacturing has also some bearing in the interpretation of the word "mechanical," as applied to establishments. A newspaper cannot be said to be the product of mechanical effort any more than it can be said to be a manufactured article, nor can it be said that a newspaper publishing house, taken as an entirety, is a mechanical establishment within the meaning of the law.

It is our opinion, therefore, that a newspaper publishing house, such as the one here before us, is not one of the institutions where the legislature intended to regulate the hours of employment of women.

The exception taken by the county attorney to the ruling of the district court is, therefore,

OVERRULED.

ROSE, J., not sitting.

LEW J. TRAYNOR, APPELLANT, V. AUTOMOBILE MUTUAL INSURANCE COMPANY, APPELLEE.

FILED FEBRUARY 10, 1921. No. 21072.

1. **Insurance:** AUTOMOBILE INSURANCE: IMMATERIAL REPRESENTATIONS. The age of an automobile upon which insurance is sought is material only in so far as it affects its value and thereby the moral hazard to be assumed by the insurer; and an order directing a verdict for a defendant insurance company based solely upon a misrepresentation of the age of the automobile is not warranted.

2. ———: ———: ———. Where an applicant for insurance upon a second-hand rebuilt automobile in his application incorrectly states the year in which the car was originally built, but also in his application states other facts from which the insurer, by ordinary diligence, could have ascertained the correct year, it cannot be said as a matter of law that the insurer was "deceived * * * to its injury" within the meaning of section 3187, Rev. St. 1913.

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

Field, Ricketts & Ricketts, for appellant.

Stocker & Foster, contra.

CAIN, C.

The plaintiff, Lew J. Traynor, brought this action to recover $1,150 upon an insurance policy issued to him by the defendant company insuring his automobile against loss by fire. Trial was had to a jury. At the conclusion of the testimony, and on motion of the defendant, the

court directed a verdict in its favor. The plaintiff appeals, assigning as error the court's order in directing the verdict against him. This is a rehearing of this appeal in this court..

On June 19, 1920, the judgment of the district court was reversed and the cause remanded, a memorandum opinion being written by Mr. Commissioner Tibbets. On appellee's motion a rehearing was granted, and the cause has been again submitted upon additional briefs and oral argument.

On the 23d day of December, 1914, the defendant, in consideration of the sum of $20.12, issued its policy to the plaintiff, insuring him against loss by reason of fire on a Stearns automobile in the sum of $1,150. The policy was to be in force until the 22d day of December, 1915. On the 23d day of March, 1915, the automobile was totally destroyed by fire, and due proofs of loss were furnished.

In its second amended answer the defendant pleaded three defenses, consisting of alleged false representations by the plaintiff in his application for the insurance, as follows: (a) That the plaintiff represented that the automobile was free from incumbrance, when, in fact, it was incumbered by a chattel mortgage for $285 both at the time of the issuance of the policy and at the time of the fire. (b) That the plaintiff represented in his application that the automobile was built in 1913, when, in fact, it was built in 1910. (c) That the plaintiff falsely represented the cost to him of the automobile.

The first defense, regarding the incumbrance, may be dismissed from consideration, for the reason that the undisputed proof shows that the debt secured by the chattel mortgage was paid in full about six months before the issuance of the policy, though the mortgage itself was not formally released of record. As the defenses are based solely upon the representations made in the application, and as the secretary of the defendant company testified that the company relied upon these representations in issuing the policy, we set out the same here in full:

Description of automobile.	Model, 30-60.
Made by Stearns.	Motor No. 2020.
No. of cylinders, 4.	Horse power, 40.
Car No. A-251.	Extra parts, —
State license No. Bibe.	Type, Roadster.
Motive power, Gasoline	Year built, 1913.

Usual place of storage, Public garage, 2512-14 Farnam, Omaha, Nebraska.

Kind of work for which used,	From whom purchased,
Private pleasure.	J. W. Hill.
Amount paid for automobile, including equipment,	Date of purchase, August 1, 1914
$4,300.	Was the consideration cash or trade?
Was the automobile new or second-hand?	Trade.
Second-hand.	If trade, describe fully what was given in exchange.
If second-hand, state cost to present owner,	National car in trade.
$1,800.	

Is it fully paid for? Yes. Is it mortgaged or incumbered? No.

In the foregoing application it is admitted that there was an error in stating the date of the purchase as August 1, 1914, as it should have been August 21, 1913. The evidence shows that the defendant's agent, John Bryant, wrote this application at plaintiff's place of business, and after a personal inspection by the agent of the automobile. The plaintiff testified that the agent got all the information contained in the application from his personal inspection of the car, except the numbers, the date when plaintiff obtained it, and the amount allowed Mr. J. W. Hill, Jr., for the car.

The evidence shows without dispute that the answer "1913" to the question "year built" was incorrect, and that the car was originally built in the year 1910. The evidence also shows without dispute that the Stearns Company turned out no Model 30-60 cars after July 1,

1911. The car itself bore no evidence of when it was built. The evidence further shows that the Traynor Automobile Company, a copartnership of which plaintiff was then a member, got the car on August 21, 1913, from John W. Hill, Jr., allowing $1,872.59 therefor in trade; that the automobile was practically destroyed by fire on September 11, 1913, and that the Traynor Automobile Company received $1,700 insurance money for the loss from the Providence-Washington Insurance Company; that on September 24, 1913, J. F. Traynor, plaintiff's brother at Omaha, made sworn proof of loss by the first fire, in which he stated that the car was a "Stearns Touring Car 1910," but that plaintiff knew nothing of such proof of loss; that, after the first fire, about $500 was spent in repairing it, and that in March, 1914, it was completely rebuilt and changed from a four-passenger touring car to a two-passenger roadster. The car was insured by the defendant in its reconstructed form, and was totally destroyed by fire on March 23, 1915. In sustaining defendant's motion for a directed verdict, the court used the following language:

"Gentlemen of the jury, I have heard counsel in this matter on a motion to direct a verdict for the defendant, and I have concluded that the motion ought to be sustained. It is my opinion that under the evidence in the case plaintiff is not entitled to recover. I think the misrepresentation in regard to the age of the car was one that was material to the risk, one that the company had a right to rely upon in issuing this policy, and that it misled the company to its detriment and injury, and I have, therefore, concluded to direct you to return a verdict in favor of the defendant, and I will appoint Mr. Levi as your foreman to sign the verdict under the direction of the court." Plaintiff took exception.

It will be seen from the foregoing remarks of the trial judge that he deemed the misrepresentation as to the year in which the car was built as such a representation as deceived the company to its injury, and thus avoided the policy, as a matter of law.

Considerable testimony was taken as to the cost and condition of the reconstructed car, but it is not argued at length in the briefs and is not sufficient to affect our decision, and we therefore dismiss it from further consideration. In any event, it would have been for the jury.

The chief argument is with reference to the misstatement of the age of the automobile; the plaintiff admitting that the statement in the application that it was built in the year 1913 is technically incorrect, but insisting that it did not deceive the company to its injury, since the admittedly correct information given by the plaintiff in the application that the car was a "Model 30-60" gave the defendant the means of ascertaining the true, approximate date when the car was built. The appellee, on the other hand, contends that the representation in the application that the car was built in 1913, when, in fact, it was built in 1910, was alone such a misrepresentation as avoided the policy. The question therefore is whether this misrepresentation contained in the application is sufficient to avoid the policy and justify the trial court in directing a verdict for the defendant, under section 3187, Rev. St. 1913, which reads as follows:

"No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent it attaching unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty, or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding."

Of course, if reasonable men might honestly draw different inferences from the facts in evidence, it was error to take the case from the jury. *Habig & Spiler v. Layne,* 38 Neb. 743; *Thomson v. Shelton,* 49 Neb. 644; *Langan v. Whalen,* 67 Neb. 299; *Continental Lumber Co. v. Mun-*

shaw & Co., 77 Neb. 456; *Schwanenfeldt v. Chicago, B. & Q. R. Co.*, 80 Neb. 790.

Plaintiff testified that he knew that the answer of 1913 was in the application when he signed it, and that he then believed it to be true, but at the time of the trial he knew that it was incorrect. We are rather inclined to take the view urged by the appellee, however, that under the decisions of this court the good faith of the plaintiff in making these representations is not material. *Seal v. Farmers & Merchants Ins. Co.*, 59 Neb. 253; *Madsen v. Farmers & Merchants Ins. Co.*, 87 Neb. 107; *Foley v. Holtry*, 43 Neb. 133.

As we regard this case, the view taken by the trial court was too circumscribed and was erroneous. The defendant company was informed by the application that the car was second-hand, secured by the applicant in trade. The only materiality of the year when the car was originally built was as it affected its value and thereby the moral hazard of the risk assumed by the company. As the automobile in this case had been partially rebuilt in 1913 and completely rebuilt in 1914, the year when it was originally built was not much of an index to its real value. Originally it was a four-passenger touring car, and it was almost entirely changed. It might well have been that, after having been rebuilt in 1914, it was more valuable than a new car built in 1913. Hence, we do not consider that the erroneous statement in the application that the car was built in 1913 was, under the circumstances, very material, and certainly it was not sufficiently material under our statute to warrant the court in holding as a matter of law that it deceived the insurer to its injury. For this reason, we believe that the order directing a verdict for defendant was erroneous.

There is another view to be taken in this case. It is that, while the application erroneously stated 1913 as the year when the car was built, the application correctly stated the Model "30-60," and thus the applicant put in possession of the company the means of learning that no

Stearns automobiles of the Model 30-60 were built after the year 1910, or early in 1911. Was it the duty of the company to pursue this clue furnished by the applicant toward discovering the fact? We think so. Berry, Automobiles (2d ed.) sec. 940, is as follows:

"But an insurance company is regarded as knowing what it ought to know, and it cannot set up a material misrepresentation in defense of an action on a policy, if with proper attention to its own business it could have been apprised of the truth of the subject of the representation. And if it knows that such statement was false and proceeds as if it were true, it will be estopped to set it up in defense." See *British & Foreign Marine Ins. Co. v. Cummings,* 113 Md. 350.

With this information furnished in the application, it cannot be said as a matter of law that the company was deceived by the misstatement of the year in which the car was built.

There is still another view of this case that we think tenable. It is that, even assuming that the company was deceived by the misstatement of the year in which the automobile was originally built, and even assuming that it was under no obligation to learn that no Model 30-60 cars were built by the Stearns company after 1910, still it does not appear that such deception was "to its injury," as required by the statute, for the simple reason that there is no evidence that the car as completely rebuilt was less valuable at the time the policy issued than a car built in 1913 by the Stearns company would have been.

In our opinion the court was not warranted in directing a verdict for the defendant, and we therefore recommend that the judgment of the district court be reversed and the cause remanded.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, and this opinion is adopted by and made the opinion of the court.

REVERSED.

THOMAS B. STOCKER, APPELLANT, V. NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE.

FILED FEBRUARY 23, 1921. No. 21239.

Judgment: RES JUDICATA. Issues once determined by a judgment cannot be relitigated in a subsequent action between the same parties.

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

Stocker & Foster, for appellant.

Kelligar & Ferneau, contra.

PER CURIAM.

This is a suit in equity to require defendant, a public drainage district, to pay for and to maintain bridges across drainage ditches severing different parts of plaintiff's farm. The ditches and the severances are parts of a public drainage improvement. Other equitable relief sought by plaintiff is the ordering of a levy on each acre of land in the drainage district to pay the necessary expenses of building and maintaining these bridges. One of the defenses pleaded is former adjudication. In this plea defendant sets up the pleadings, proofs and judgment in *Stocker v. Nemaha Valley Drainage District,* 99 Neb. 38. The trial court sustained the plea of *res judicata* herein and dismissed the suit. Plaintiff has appealed.

The position of plaintiff in reply to the plea of *res judicata,* if correctly understood, may be summarized thus: The trial court in determining the former case, which was a condemnation proceeding, and the supreme court on appeal from the former judgment of the district court, adjudicated merely the inconvenience of plaintiff's access to his severed lands, and set off such mere inconvenience against the incidental benefits, while in the present case it is shown that there is, in the absence of a bridge, a total destruction of plaintiff's access to a large

tract of his severed land, and this amounts to a taking of his severed land, and this taking of severed land not required for drainage purposes was not, and cannot be, offset by incidental benefits. In other words, it is insisted that the trial court, in the present suit, did not distinguish between a total or partial denial of access and a mere inconvenience of access in the matter of offsetting benefits.

The power to organize drainage districts and to condemn land for that public purpose was granted by statute. The legislature evidently meant to allow the remedies of the landowners in condemnation proceedings to extend to compensation for all damages, including inconvenience to access, partial destruction of access, and total destruction of access. All of these elements, as we understand the condemnation proceedings in the former action and the judgment therein, were pleaded, litigated, and determined. *Stocker v. Nemaha Valley Drainage District,* 99 Neb. 38. If this is a correct view of the facts and the law, the present action was properly dismissed by the trial court on the plea of *res judicata.*

AFFIRMED.

LETTON, J., not sitting.

WILLIAM C. STEWART ET AL., APPELLANTS, V. CONSOLIDATED SCHOOL DISTRICT, APPELLEE.

FILED FEBRUARY 23, 1921. No. 21247.

Schools and School Districts: INJUNCTION: PROOF. When, in an action against a school district to enjoin the removal of school property, plaintiff fails to sustain the allegations of his petition that "he is a resident, elector, and taxpayer" of the district, which is put in issue by a general denial, the writ will be denied.

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

McKillip & Barth, for appellants.

Radcliffe & Tewell and *Halligan, Beatty & Halligan, contra.*

MORRISSEY, C. J.

This action was brought to enjoin the officers of defendant school district from removing the schoolhouse and other school property of what was formerly school district No. 35 of Cheyenne and Deuel counties and appropriating it to the use of defendant district. There was judgment for defendant, and plaintiffs appeal.

On and prior to May 14, 1919, school district No. 35 of Cheyenne and Deuel counties was comprised of territory in these counties; school district No. 6 of Deuel and Garden counties was comprised of territory lying within these two counties; and school district No 14 of Garden county lay wholly within that county. The three districts were contiguous. May 14, 1919, the board of trustees of each of the districts mentioned met in joint conference and agreed to submit a proposition to the voters of each district for the consolidation of the three districts. Notices were posted in each of the districts, and May 27, 1919, an election was held in each district and a majority of the votes cast in each district was in favor of consolidation. The county superintendent of each county having territory within the boundaries of the new district was notified of the result of the elections held, and each took steps to perfect an organization of the new district under chapter 121, Laws 1915. An election was held June 9, 1919, and a board of trustees elected for the new district. Appellants' petition alleges that appellants are residents, electors, and taxpayers of the original school district No. 35, but the proof does not sustain these allegations. In *Hess v. Dodge,* 82 Neb. 35, it was held, in an action very similar to the one at bar, that the allegations just mentioned are material and necessary, and that without them a petition is demurrable. Being necessary and material to the petition, it follows that the allegations must be proved upon the trial when put in issue by the answer, as was done in the instant case. Proof being lacking on these material

allegations of the petition, we must decline to examine further into the record, and the judgment is

AFFIRMED.

PEARL EISELE ET AL., APPELLEES, V. L. A. MEEKER ET AL., APPELLANTS.

FILED FEBRUARY 23, 1921. No. 21251.

Appeal. In the absence of a bill of exceptions, when the sufficiency of the pleadings is not questioned, the judgment of the trial court will be affirmed.

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

Charles W. Haller, for appellants.

R. J. Madden and *W. W. Hoye, contra.*

MORRISSEY, C. J.

Plaintiffs brought this action to recover for damages to plaintiffs' automobile caused by the negligent driving of a team and wagon owned by defendant Meeker. A jury was waived and the cause submitted to the court on a stipulation of facts. The court entered judgment in favor of plaintiffs and against defendant Harney Street Stables, a partnership, and defendants Meeker and Davis, and dismissed the cause of action against defendants Jackson. Defendants Harney Street Stables and Meeker have appealed.

A purported stipulation of facts is set out in appellants' brief, but is not incorporated in a bill of exceptions, and no such bill has been filed. The sufficiency of the pleadings is not questioned, and it follows that the judgment must be affirmed. A consideration of the stipulation set out in the brief would not, however, result in a reversal.

AFFIRMED.

IN RE ESTATE OF JOHN MORAN.
MARGARET SCHWARZ ET AL., APPELLANTS, V. THOMAS MORAN ET AL., APPELLEES.

FILED FEBRUARY 23, 1921. No. 21278.

Wills: PROBATE: SUIT TO SET ASIDE. In this, a proceeding to set aside the probate of a will, brought about 14 years after the decree of probate was rendered, the evidence is examined, and it is *held* that there was not sufficient proof of undue influence to make a *prima facie* case, or to justify a refusal of probate on that account; that concealment and fraud have not been shown sufficient to justify the opening of the decree; and that the plaintiffs have been guilty of such laches and delay that they are not entitled to equitable relief.

APPEAL from the district court for Cuming county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

W. T. Thompson and *A. R. Oleson,* for appellants.

P. M. Moodie and *John J. Gross, contra.*

LETTON, J.

John Moran died at his home in Wisner on March 4, 1904. After due and proper notice by publication, his will was probated in the county court of Cuming county on April 14, 1904. He left surviving him a widow, Catherine Moran, two sons, Thomas and John, and four daughters, Margaret, Mary, Catherine, and Minnie. All of the children were of full age, Catherine McGonigal, the oldest daughter, was 30 years of age and had been married about 10 years; Margaret, the youngest, being 24 years of age at that time. She married in 1905. Mary married in 1910. The children all lived in Cuming county. The testator owned 500 acres of land in that county, and a house and lot in Wisner, where he and his wife and the unmarried daughters had lived since 1901, when they removed to town from the farm. The Wisner property was left to his widow in fee; 160 acres of the land, which had been farmed by him, was

devised to Thomas. A life estate in the remaining 340 acres was given the widow, with a provision that at her death a life estate in a 160-acre portion of this tract was left to John, with remainder to his children. The remainder to the other 180 acres was devised to Thomas, subject to the payment by him of $1,000 to each of the daughters, within six months after his mother's death. If he failed to pay, the 180-acre tract went to the girls, share and share alike, and, if he died before the mother, the 180 acres went to the daughters. If John died without issue, the 160 devised to him for life also went to the daughters. The widow was named executrix, and she settled the estate.

During the life of the mother, the daughter Minnie died. The widow died in October, 1918. Within six months after her death, Thomas tendered to the surviving daughters the money due them as provided by the will. This they refused to accept. Soon afterwards this action was begun by them on the equity side of the county court to set aside the probate of the will, alleging fraud in procuring the probate, and undue influence. The county court refused to set aside the decree of probate. Error proceedings were taken to the district court, which affirmed the action of the county court, and the case is now here on appeal.

The sole question is whether the facts are sufficient to justify setting aside the decree of probate. There is nothing in the evidence to show any fraudulent concealment of the time and place set for the hearing on the probate of the will. Margaret, now Mrs. Schwarz, testified that before her father's death the mother and Thomas were quarreling over what kind of a will should be made, and the mother asked the daughter if 40 acres was enough for each of the girls, and 160 for each of the boys; that after the will had been made she told them they had 40 acres; that this was at the first part of the father's sickness; that soon after his death the mother was going to West Point to settle up the father's debts, taking Thomas with her; that they asked to go along, and Tom said, "No damn kids will go," and that they were afraid of Thomas on account of his domineering dis-

position, and because of an incident when he had threatened them with a pistol when they lived on the farm several years before. Mary testified that at one time the mother wanted the father to have a will, and that she stayed out of the father's room for three days until he made up his mind to do as she wanted him to, but she does not testify as to what this was.

The evidence of other witnesses tends to prove that, at various times after the death of the father, Mrs. Moran told the girls and others that they were each to get 40 acres of land after her death; that they relied upon these statements, and knew no different until the tender was made by Thomas of the amount due them under the will. The only other evidence with respect to undue induence is that a local banker, who drew the will, had drawn a will the same in all respects as the later one, except that it gave the girls $3,000 apiece instead of $1,000; that Mrs. Moran told the father in his presence that $1,000 apiece was enough for the girls, and that upon this suggestion he was directed by the father to change the amount from $3,000 to $1,000, which he did in the final draft.

The provisions of the will seem unfair to the daughters, but it is not unusual for parents, especially of foreign birth, to desire their land to descend in the male line. There is no proof as to the value of the 180 acres in 1904, so we cannot say how much it was then worth more than the $4,000 which Thomas was obligated to pay if they accepted the devise. The mother is not here to tell her side of the story. She may have been confused by the language of of the will, which provides that in certain contingencies the 180 acres of land would go to the daughters, and also the 160 acres in which John had a life estate. There is nothing to show that the plaintiffs or their husbands were not fully competent in all respects at the time the will was probated, or during the lifetime of Mrs. Moran.

Upon the whole case, we are satisfied, first, that there was not sufficient proof of undue influence to make a *prima facie* case, or to justify a refusal of probate on that ac-

count; second, that concealment and fraud have not been shown to sufficiently justify the opening of the decree; and, third, that the plaintiffs have been guilty of such laches and delay that they are not entitled to equitable relief. No evidence was offered on behalf of the defendants, and we think none was necessary.

AFFIRMED.

JULIA SOCHA, APPELLEE, V. CUDAHY PACKING COMPANY, APPELLANT.

FILED FEBRUARY 23, 1921. No. 21810.

1. **Master and Servant:** INJURY TO EMPLOYEE: ACT "ARISING OUT OF THE EMPLOYMENT." Where the nature of the employment is such as to expose a worker to a wrongful act by another worker, which may reasonably be said to have been induced by the peculiar conditions of the employment, the manner in which it was carried on, and the appliances required, such an act may reasonably be said to "arise out of the employment."
2. ———: WORKMEN'S COMPENSATION ACT: LIABILITY OF EMPLOYER. While the fact that an employer may have anticipated such an accident as liable to happen is not a ground of liability under the workmens' compensation act, since negligence is not an element in the determination of the award, it affords some light upon the question whether the injury may reasonably be said to "arise out of the employment."
3. **Case Overruled.** The case of *Pierce v. Boyer-Van Kuran Lumber Co.*, 99 Neb. 321, in so far as it conflicts with the principles announced in this case, is overruled.

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

C. W. Sears, for appellant.

Edward F. Leary and *George H. Merten, contra.*

LETTON, J.

APPEAL from judgment in favor of a dependent widow under the workmens' compensation act.

Albert Socha was in the employment of the Cudahy Packing Company. In the room in which he was employed were vats in which meat was cooked. When sufficiently cooled, the meat, in metal baskets or crates, was lifted from the vats by means of a compressed air lift attached to an overhead trolley by which the crates were rolled to and emptied upon and at one side of a table about six feet wide. Socha's work was to push the cooked meat across so that the trimmers, who stood upon the other side of the table, could reach it. This at times required a stooping position over the table. The evidence sustains the finding of the trial court that, while Socha was actually engaged in performing this service, and was not engaged in any playful or sportive acts, he sustained accidental injuries, from which he died, as a result of the playful application of a compressed air hose against his person by a fellow workman. The assault caused a rupture of the intestines resulting in septicemia.

It was shown that a printed placard warning against the danger of such use of compressed air was on a bulletin board at the gate to the plant, through which the men entered. A photograph shows that 17 placards on other subjects were upon this board. The two men concerned in the act were Polish, and barely understood the English language enough to testify. The placard is printed in English. There is no proof that their attention had ever been called to the placard, or to the danger of such use of compressed air, or that they had any knowledge of the consequences which might ensue from such an act.

It is admitted that the injury occurred in the course of the employment, and the question presented is whether it arose "out of" the employment. The argument of appellant is that the employer is not liable because the injury did not arise "out of the employment," and that, when the statute of another jurisdiction is adopted, the construction given there is also adopted, unless a contrary intention is expressed by the adopting legislature.

Reliance is placed mainly upon the holding in *Pierce v. Boyer-Van Kuran Lumber Co.*, 99 Neb. 321. In that case it is not quite clear from the opinion how far the injured workman had participated in the skylarking. The decision is based upon *Hulley v. Moosbrugger*, 88 N. J. Law, 161; but the facts in that case are quite different from those before us; and, while the general principle that wilful or sportive acts of a fellow employee causing injury to a workman, not arising out of the employment, do not afford a basis for compensation is sound, yet the courts are not uniform in their decisions as to what acts "arise out of the employment." The opinion in the *Hulley* case quotes with approval from *McNicol's Case*, 215 Mass. 497, as follows: "It arises 'out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. * * * The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Some courts go much farther than others in extending the scope of the term "arising out of" the employment, as shown by the following cases, in which compensation was allowed: *Markell v. Green Felt Shoe Co.*, 221 N. Y. 493. Claimant, while employed as foreman of the shoe company, received injuries resulting in the loss of an eye through the act of an employee of a machinery company who had been repairing machines in defendant's plant, and

who, approaching claimant in a dark room, placed his arms about claimant's neck, and drew his head forward on to a lead pencil in his pocket in such a manner that the lead penetrated the eyeball.

In *In re Heitz v. Ruppert,* 218 N. Y. 148, horses, of which the claimant was the driver, were sprinkled with water by another employee, who intentionally sprinkled some water on claimant. Shortly afterwards claimant touched the other workman on the shoulder saying, "George don't do that again." The other man slapped claimant on the shoulder, and, as claimant turned around, his finger struck claimant's left eye, causing the injury. In *Leonbruno v. Champlain Silk Mills,* 229 N. Y. 470, an employee, while devoting his time to his work, was struck in the eye by an apple thrown by a fellow servant engaged in horse-play. *Verschleiser v. Stern & Son,* 229 N. Y. 192. In *Pekin Cooperage Co. v. Industrial Board,* 277 Ill. 53, a workman was injured by being thrown or falling upon a cement floor, while waiting in line for his pay, by the jostling of fellow workmen, in which he did not engage. In *Pekin Cooperage Co. v. Industrial Commission,* 285 Ill. 31, a worker was injured in a quarrel with another over interference with his work. In *Marchiatello v. Lynch Reality Co.,* 94 Conn. 260, an office boy carelessly picked up and discharged an automatic pistol, the ball passing through a partition and striking a watchman while performing his duties. *In re Loper,* 64 Ind. App. 571, is an air hose case very similar to this one.

Other courts adhere to a stricter construction of the statute. Cases collected in note on page 47, L. R. A. 1916A; *Coronado Beach Co. v. Pillsbury,* 172 Cal. 682, L. R. A. 1916F, 1164; *Federal Rubber Mfg. Co. v. Havolic,* 162 Wis. 341, L. R. A. 1916D, 968; *Tarpper v. Weston-Mott Co.,* 200 Mich. 275; *Payne v. Industrial Commission,* 295 Ill. 388. The three latter cases are air hose cases, but there are additional facts in evidence in this case which to us are important and justify a distinction, such as is made in *In re Loper, supra.*

In England it has been held that liability attached, where an assault is likely to happen from the nature of the work being performed, such as a schoolmaster in an industrial school, assaulted by several of the boys in pursuance of a plan; a cashier carrying money, who was assaulted and robbed, or a foreman of a moving company assaulted by a man whom he had declined to employ. *Trim Joint District School Board v. Kelly,* App. Cas. 1914 (Eng.) 667; *Nisbet v. Rayne & Burn,* 2 K. B. Div. 1910 (Eng.) 689; *Weekes v. Stead & Co.,* W. N. 1914 (Eng.) 263.

In *Challis v. London & S. W. R. Co.,* 2 K. B. Div. (Eng.) 154, it was held that, where the workman was injured by a stone thrown by a boy intentionally, compensation might be had. This is in conflict with the earlier case of *Armitage v. Lancashire & Y. R. Co.,* 2 K. B. Div. (Eng.) 178, cited and relied upon in the *Hulley* case.

In *Dennis v. White & Co.,* App. Cas. 1917 (Eng.) 479, it is said by Lord Finlay: "If the injury is the result of an assault it is material to show that the employment is such as to involve liability to such mishaps; as in the case of a gamekeeper or watchman; see *Mitchinson v. Day Bros.* and *Weekes v. Stead & Co.* Where the risk is one shared by all men, whether in or out of employment, in order to show that the accident arose out of the employment it must be established that special exposure to it is involved."

In a Scotch case, *Shaw v. Macfarlane,* 52 S. L. R. (1914) 236, a workman in a foundry, stooping in proximity to molten metal, was struck by an intoxicated stranger, fell, and was burned by the metal. It was held the accident arose out of the employment, and it was stated that an earlier case holding to the contrary could not, "looking to the subsequent march of judicial decision, now be supported as sound law."

In this country, in *McNicol's Case,* 215 Mass. 497, a workman was killed by an intoxicated fellow servant,

who, "when intoxicated, was quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employees, all of which was known to the superintendent." Compensation was allowed.

In *Stuart v. City of Kansas City,* 102 Kan. 307, a workman in the habit of playing jokes on the other workmen, which habit was known to his immediate superior, threw some mortar in the eye of a workman who was engaged in his regular work. It was held that the injury arose out of the employment. But the court also took the view that the mere fact that an injury is occasioned by the sportive or malicious act of a fellow employee does not of itself establish that the injury arose out of the employment. In *Polar Ice & Fuel Co. v. Mulray,* 67 Ind. App. 270, the same principle is applied.

In *State v. District Court,* 140 Minn. 75, a worker in a factory, where it was customary for some of the workmen to throw missiles at one another while engaged in work, was struck and injured by such a missile. The employer knew, or should have known, of this custom. It was held that the injury "arose out of the employment." The court cites the *Pierce* case, but holds that the facts were so different that that case was not applicable.

The very fact that injuries of this nature, resulting from the sportive use of compressed air under like circumstances, have been before the courts in a number of cases is worthy of note. Such a combination of elements seems to present a situation attractive and suggestive to a youthful, or to a rude and untutored, mind having no knowledge of the serious or fatal consequences liable to result. This combination of elements may arise out of the nature of the occupation. The liability to perform such acts by the employees was known to the employer, since, as we have seen, warning notices in a language foreign to that of the workmen had been placed upon the bulletin board; and the fact that the men had previously played with the air hose, but not in this manner, was known to the foreman, Schultze, Socha's immediate supe-

rior. Though negligence is not a necessary element in an award under the act, such knowledge affords light upon the question whether the injury may reasonably be said to arise out of the employment. If a person familiar with the whole situation could reasonably contemplate that such an accident might result from the peculiar nature and circumstances of the employment, and the nature of the place where the injured man was required to work, then it may reasonably be said to arise out of it. The principles quoted from the *McNicol's Case, supra,* seem to us to be sound.

We are of the opinion that, under all the facts, such a happening might reasonably have been foreseen, and, in fact, was anticipated by the employer in this case, and that the accident arose out of the employment. So far as the case of *Pierce v. Boyer-Van Kuran Lumber Co., supra,* is in conflict with the principles herein announced, it is overruled.

The decision of each case rests upon the facts proved, and, since no English case is similar to this in its facts, the contention as to the adoption of the English construction of the statute does not seem convincing. The general principle of the English rule is not departed from.

AFFIRMED.

NATIONAL NOVELTY IMPORT COMPANY, APPELLANT, V. FRED REED ET AL., APPELLEES.

FILED FEBRUARY 23, 1921. No. 21258.

Sales: RESCISSION. A merchant who was induced to sign an order for unnecessary goods by the false representation that his competitors had signed identical orders and by the exhibiting of such orders as genuine, when in fact spurious, may rescind his order and reject the goods upon discovering the imposition, if he relied on the false representation under circumstances that justify such reliance.

APPEAL from the district court for Adams county: WILLIAM C. DORSEY, JUDGE. *Affirmed.*

J. E. Willits, for appellant.

F. P. Olmstead, contra.

ROSE, J.

This is an action to recover $296, the aggregate price of jewelry and other merchandise sold and delivered by plaintiff to defendants. Under a written order plaintiff delivered the goods to a carrier at St. Louis, Missouri, consigned to defendants at Trumbull, Nebraska. Four or five days after the order was given, defendants notified plaintiff not to ship the goods, but the latter contends that the delivery antedated the notice. The consignment reached Trumbull, but defendants did not accept it, and never took it from the possession of the carrier, but notified plaintiff that it was rejected. One of the defenses is fraud practiced by the agent who induced defendants to sign the order. The action was dismissed, and plaintiff has appealed.

On the issue of fraud there is evidence from which the following inferences may be drawn: Defendants are partners and are retail merchants. While Thomas Mullady, a partner, was waiting on customers in defendants' store, he was solicited for the order and signed it; plaintiff's agent at the time being anxious to make a train. In procuring Mullady's signature the agent falsely stated that two competitors of defendants in different towns had signed an identical order. To deceive Mullady into believing the falsehood, the agent exhibited purported identical orders of the competitors. The orders were spurious, but were declared to be genuine. The competing merchants had not signed the orders exhibited to Mulladay, nor purchased the goods described therein. Mulladay had no time to investigate, did not know the facts, and relied on the false representations of plaintiff's agent. Otherwise, the order would not have been given. Defendants gave the order only because they wanted to

put in force the scheme under which they understood their competitors handled the goods in controversy. These facts and conclusions are fairly deducible from the evidence.

The controlling question on appeal is the sufficiency of the evidence to sustain the defense of fraud. Assuming facts of which there is proof, the agent was guilty of fraud. In conducting the business of a retail merchant, purchases of goods by competitors, if known, may be material in ordering identical goods to meet competition. The circumstances under which the fraud was perpetrated justify a finding that defendants were entitled to rely on the representation of plaintiff's agent. The competitors of defendants were in different towns and were under no obligation to answer inquiries if made by defendants in regard to purchases. The fraud operated on the mind of Mullady and he was thus induced to sign the order. As the issue of fraud was tried, price, value and quality were not involved. The deceit culminated in the signing of the order for goods not needed, and ordered only to meet a species of competition having no existence, and in the incurring of an unnecessary indebtedness. From deceit of this nature the law implies nominal damages, and the purchaser had a legal right to rescind the order and reject the goods upon discovering the fraud. In this action plaintiff is affirmatively seeking the fruits of its agent's rascality. Defendants demand relief from the order fraudulently procured, but do not pray for damages. Consequently proof of actual damages is unnecessary in determining the sufficiency of the evidence to sustain the dismissal of the action. All of the elements necessary to the defense outlined, therefore, are shown by evidence accepted by the trial court as disclosing the truth. *Roebuck v. Wick,* 98 Minn. 130; *Higbee v. Trumbauer,* 112 Ia. 74. Plaintiff relies on the case of *First Nat. Bank v. Yocum,* 11 Neb. 328, but it differs from the case at bar in material respect outlined in the statement of the facts herein.

The defense of fraud being supported by sufficient evidence, the dismissal below is

AFFIRMED.

ABEL CONSTRUCTION COMPANY, APPELLANT, V. WILLIAM K. GOODMAN, APPELLEE.

FILED FEBRUARY 23, 1921. No. 21816.

1. **Master and Servant:** WORKMEN'S COMPENSATION: AWARD. An employer appealed from an award of the compensation commissioner, who had allowed its employee 100 weeks' compensation for the loss of the sight of an eye, notwithstanding compensation for 25 weeks had previously been paid by the employer. On appeal the district court deducted the 25 week's compensation, formerly paid, and rendered a judgment against the employer for the remaining 75 weeks' compensation, as provided by the act, and for statutory "waiting time" from the date of the award by the commissioner. *Held*, that the court did not err. Rev. St. 1913, sec. 3666, as amended, Laws 1917, ch. 85, sec. 9½.

2. ———: ———: APPEAL: "WAITING TIME." When an employer appeals from a judgment of the district court in favor of his employee and it is affirmed in this court, such employer is liable for the statutory "waiting time," from the date of such judgment, for the full period of time allowed by the employers' liability act, until it is paid under the mandate issued by this court, when the appeal taken to this court is not based on such a reasonable controversy as would justify an appeal.

3. ———: ———: IGNORANCE OF LAW. Ignorance of the law is not a shield from liability for its infraction.

4. ———: ———: ATTORNEY'S FEES. In an action under the employers' liability act, even though a recovery is had, an attorney's fee cannot be taxed as a part of the costs under section 3212, Rev. St. 1913, as amended, Laws 1919, ch. 103, sec. 2, which applies only to an action at law on an insurance policy against an insurance company.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed in part, and reversed in part, with directions.*

Hall, Baird & Williams, for appellant.

R. J. Greene, contra.

DEAN, J.

While employed by the Abel Construction Company, and earning $24 a week, William K. Goodman, defendant, sustained an injury, November 6, 1918, that caused him to lose the sight of his left eye while he was cleaning cement sacks. Thereupon plaintiff paid him $12 a week for 25 weeks, as compensation, and $50 for medical treatment. Thereafter plaintiff refused to make further weekly payments, but offered to pay $350 or $400, presumably in full settlement, which defendant refused. On June 25, 1919, the employer filed a petition in the compensation commissioner's office asking that officer to order a discontinuance of further payments. The commissioner denied the application and made an award to defendant of $12 a week for 100 weeks as compensation on account of the injury. The award was in addition to the $300, or $12 a week for 25 weeks, that plaintiff formerly paid the defendant in this behalf. The award, however, excepted $32 from the total amount to be paid; the commissioner holding that this sum was paid by plaintiff "after temporary disability ended." From the award plaintiff appealed to the district court.

On appeal the court held that defendant was entitled to compensation for 100 weeks only, and that, compensation for 25 weeks having already been paid, there remained only 75 weeks for which payment could lawfully be demanded at $12 a week. The payments being then delinquent, judgment was rendered against the plaintiff for $900 and interest, or a total of $912. The court also held that defendant was entitled to recover $414 for statutory waiting time, making a sum total of $1,326 and costs, for which, on October 23, 1920, judgment was rendered. In addition thereto the court taxed an attorney's fee of $200 as costs. Plaintiff contends that the court erred in permitting defendant to recover either for an

attorney's fee or for statutory "waiting time." From the judgment plaintiff appealed to this court.

The record shows clearly enough that the sight of defendant's left eye was destroyed while he was in the employ of plaintiff and that the accident arose out of and in the course of his employment.

The circumstances attending the casualty bring it within section 3662, Rev. St. 1913, as amended by Laws 1917, ch. 85, sec. 7, which classifies certain injuries and establishes a schedule of compensation. The act as amended is separated into three parts. Subdivision 3 provides, *inter alia*: "For all disability resulting from permanent injury of the following classes," i. e., for the loss of a hand, arm, foot, leg, or eye, "the compensation shall be exclusively as follows: * * * For the loss of an eye, sixty-six and two-thirds *per centum* of daily wages during 100 weeks," but "shall not be more than twelve dollars per week, nor less than six dollars per week: Provided, that if at the time of injury the employee receives wages of less than six dollars per week, then he shall receive the full amount of such wages per week as compensation." Subdivision 3 also provides: "Permanent loss of the use of a hand, arm, foot, leg, or eye shall be considered as the equivalent of the loss of such hand, arm, foot, leg, or eye."

The legislature having provided that "for all disability resulting" from the loss of an eye "the compensation shall be exclusively" as provided in subdivision 3 of the act, defendant comes clearly within its meaning. It follows that defendant, earning a weekly wage of $24, was, under the act, entitled to $12 a week as compensation for 100 weeks, namely, $1,200. In making the reduction of $300 from the commissioner's award the district court applied the plain and unambiguous language of the law to the facts. *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246.

Plaintiff contends that, because the commissioner rendered an excessive award of compensation in the sum

of $300, it should not be bound to pay the statutory waiting time penalty, and argues, but erroneously, that it comes within the rule announced in *Updike Grain Co. v. Swanson,* 104 Neb. 661. It was there held that to excuse the employer from such liability there must be a reasonable controversy between the parties as to liability for certain instalments of compensation. In the present case reasonable grounds do not appear for controversy respecting the duty of the employer to pay the remaining 75 instalments. It is clear that the award of the commissioner was excessive as to 25 weekly instalments of $12 each. It is equally clear that the employee had been blinded in one eye, and that he was then entitled, under the facts and the law, to 75 additional weekly instalments of compensation in the sum of $12 each. And it just as clearly appears that it was plaintiff's duty to have continued making the payments required by law until the end of the 100-week period instead of applying to the commissioner for an order to have the payments discontinued. But, having sought to have the commissioner's award reviewed, the appeal at most should have been directed to seeking a reduction of the award to a payment of compensation for 75 weeks. To say that the employer ignored or that it misconstrued the clear provisions of the law is no answer to the employee's demand for payment for "waiting time," under the act, which he cites and sets out in his brief, and which plainly provides that "fifty *per centum* shall be added for waiting time for all delinquent payments after 30 days' notice has been given" of disability. Rev. St. 1913, sec. 3666, as amended, Laws 1917, ch. 85, sec. 9½.

The employer, in extenuation, points out that, within two weeks after completing the $300 payment to its employee, it, as plaintiff, began this proceeding June 25, 1919, before the compensation commissioner to have further payments discontinued, and that through no fault of plaintiff the matter was not heard and disposed of until September 9, 1920, more than 14 months after the

commencement of the proceedings, and that in the exercise of its statutory right it appealed to the district court. Even so, it does not follow that the employee, who did not cause the delay, should be denied a lawful right merely because the employer failed in the performance of a plain legal duty. Ignorance of the law is not a shield from liability for its infraction.

We think the court erred in the taxation of an attorney's fee as costs, notwithstanding the Ocean Accident & Guarantee Corporation, Limited, the insurer of the employer, by some means that it is not necessary to discuss here, seems to have become a party plaintiff after the case reached the district court. In support of his argument on this point defendant invokes section 3212, Rev. St. 1913, as amended, Laws 1919, ch. 103, sec. 2. For the purpose of this discussion the amendment is not material. The act as amended reads: "In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association, doing business in this state, the court upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and if such cause is appealed the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings."

It is sufficient answer to say that the present case is not "an action at law upon any policy of life, accident, liability, * * * or other insurance." It follows that section 3212 has no application to a cause brought under the employers' liability act. The statute under which this action is brought provides a special proceeding for the purpose of effecting a speedy settlement between an employer and his employee when they come within its

provisions. *United States Fidelity & Guaranty Company v. Wickline,* 103 Neb. 21, 6 A. L. R. 1267; *Hull v. United States Fidelity & Guaranty Co.,* 102 Neb. 246.

There is some question, as plaintiff points out, with respect to the regularity of defendant's cross-appeal, but we have treated it as though it had been regularly made, and conclude that he is not entitled to recover thereon.

With respect to the taxation of an attorney's fee as costs the judgment is reversed. In all else the judgment is affirmed, except that as to the statutory waiting time penalty it is ordered that the district court modify its judgment so that the total amount of defendant's recovery for waiting time shall be the sum of $6 a week for 75 weeks.

AFFIRMED IN PART, AND REVERSED IN PART AND REMANDED, WITH DIRECTIONS.

ROSE, J., not sitting.

SEWARD COUNTY, APPELLANT, V. HARRY T. JONES, APPELLEE.

FILED FEBRUARY 23, 1921. No. 21292.

1. **Taxation:** DATE OF ASSESSMENT. The revenue laws of the state, with respect to the taxation of personal property, contemplate that such property shall be listed and assessed with reference to ownership and value as of the date of April 1 in the year for which the property is required to be listed.
2. ———: TORTS. A mere cause of action sounding in tort is not a right in "property" within the meaning of the revenue laws, so as to subject the right therein to be taxed as "property."
3. ———: DATE OF ASSESSMENT: JUDGMENT. Where a cause of action sounding in tort has been reduced to judgment in favor of plaintiff, and where on error to this court such judgment is reversed, and on error to the supreme court of the United States such judgment is reversed and the judgment of the district court reinstated on April 3, 1916, the rights of the plaintiff therein are not taxable as of date April 1, 1916.

Seward County v. Jones.

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

McKillip & Barth and *Norval Bros., Colman, Landis & Mastin,* for appellant.

Thomas, Vail & Stoner, contra.

DAY, J.

The question presented by this appeal is whether certain legal rights of the appellee should be designated as "property" within the meaning of the revenue laws, so as to require the same to be listed for taxation for the year 1916. The district court found the issues in favor of the appellee, dismissed the petition of appellant, and granted appellee an injunction as prayed. To review this judgment, appellant has brought the record here.

A brief statement of the facts will serve to make clear the point in controversy. On May 8, 1911, certain creditors of the defunct Capital National Bank of Lincoln, Nebraska, obtained judgments upon their several causes of action, in the district court for Seward county, against certain of the directors of that bank, upon causes of action sounding in tort. The defendants therein brought error to this court, where, on January 31, 1913, the several judgments were reversed and the actions dismissed. *Jones Nat. Bank v. Yates,* 93 Neb. 121. Thereupon the several plaintiffs took error to the supreme court of the United States, where, on April 3, 1916, the judgments of reversal and dismissal of this court were set aside. Pursuant to the mandate of the supreme court of the United States, and upon its direction, this court, on May 13, 1916, entered an order vacating and setting aside its judgment of January 31, 1913, and reinstating and affirming the judgment of the district court of May 8, 1911. On May 17, 1916, the mandate of this court was entered in the district court for Seward county.

Pending this litigation, Harry T. Jones, the appellee herein, became the owner by purchase of some of the

judgments. Soon after the final mandate, Jones received as his share of the proceeds of a sale of the judgments $28,050. In his tax schedule, as of date April 1, 1916, Jones made no mention of his interest in the judgments or of the status of the litigation. On June 13, 1916, the county assessor of Seward county, having learned that the judgments had been paid, and that Jones had received $28,050, made out and returned an additional tax schedule in the name of Jones, in which he listed, under the item of "Judgments and allowances in my favor entered in any court," $28,050.

The question presented is whether, upon the facts stated, the item as returned by the assessor was subject to taxation for the year 1916. Section 6300, Rev. St. 1913, in so far as it applies to the present inquiry, provides:

"All property in this state * * * shall be subject to taxation, and shall be valued at its actual value * * * and shall be assessed at twenty per cent. of such actual value. * * * Actual value as used in this chapter shall mean its value in the market in the ordinary course of trade."

For the purpose of taxation of personal property, the revenue law requires that such property shall be listed and assessed with reference to ownership and value as of the date of April 1 in the year for which the property is required to be listed. *Wood v. McCook Water-Works Co.*, 97 Neb. 215. It will be noted that the actions in the district court were founded upon causes sounding in tort, and that the judgments rendered therein on May 8, 1911, had been set aside and the causes dismissed by the judgment of this court. True, a writ of error had been taken to the supreme court of the United States, but the effect of the proceeding did not set aside the final judgment of this court. At most, it but suspended the final carrying into effect of that judgment until the matters in issue were determined by the supreme court of the United States. Until the supreme court, by its judgment on April 3, 1916, breathed into these judgments

the breath of life, the status of these cases was no better than pending causes of action founded upon tort waiting to be stricken from the docket.

A cause of action sounding in tort is not "property" as that term is understood in the revenue law of the state. Such rights are not taxable, for the obvious reason that until the matter is determined by an appropriate tribunal there is no means of knowing whether a liability in fact exists. But if it were conceded that the judgments were valid, and that the error proceedings simply held them in suspension, there is still another reason, under this record, why the rights of the appellee to the judgments are not taxable, and that is that on April 1 the status of the litigation was such that no value could be placed upon the right. The record is overwhelming that, before the supreme court passed upon the question on April 3, it had no actual value. As one of the witnesses expressed it: "It was simply a gambler's chance." The assessor, in testifying upon the question of value, said it was impossible to ascertain the value as of April 1, because no one knew what the decision of the supreme court would be. During his examination he was asked: "Well, if it had not been for the decision of the United States supreme court, you wouldn't have attempted to assess it, would you?" To which he answered: "Certainly not."

For the reasons that the causes of action as they stood on April 1, 1916, were not "property" within the meaning of the revenue law, and also that there was no value which could be attached to the status of the litigation, we are of the view that on April 1, 1916, the appellee's rights in the litigation were not a proper subject of taxation.

The judgment of the district court is, therefore,

AFFIRMED.

ROBERT G. HALL, APPELLEE, V. GERMANTOWN STATE BANK ET AL., APPELLANTS.

FILED FEBRUARY 23, 1921. No. 21815.

1. **Master and Servant:** WORKMEN'S COMPENSATION ACT: PENALTIES. "Under the workmen's compensation act periodical instalments of compensation for an injury to an employee do not become due, in the sense that they carry the statutory penalties for nonpayment, until the obligation of the employer is definitely ascertained or, settled in the exercise of proper diligence on his part, where there is a reasonable controversy over the extent of the injury as a basis for the number of periodical payments and the amount of each." *Osborn v. Omaha Structural Steel Co., ante*, p. 216.
2. ———: ———: ———. Where in such action the controversy is over the percentage of loss of the use of an injured arm, and where the testimony in behalf of the employer admits a given percentage of permanent partial disability, such employer, to be relieved of the penalty provided in the act for nonpayment, must pay or tender to the employee the amount admittedly due.
3. **Evidence** examined, and *held*, in part to present a reasonable controversy as to the extent of the injury.

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

Hall, Baird & Williams, for appellants.

R. J. Greene, contra.

DAY, J.

This is an appeal by the defendants from a judgment of the district court for Lancaster county awarding plaintiff compensation, together with a penalty for waiting time and an attorney's fee, in an action arising under the provisions of the workmen's compensation act.

On December 18, 1919, the plaintiff, while employed as a brick-mason by the defendant Germantown State Bank suffered a fracture of the head of the radius at the right elbow joint. It is conceded that the injury arose out of and in the course of the employment, and also that

defendant Ocean Accident & Guarantee Corporation carried the risk and was properly made a party defendant. At the time of the accident the plaintiff was earning $67.50 a week, which would entitle him to recover $15 a week compensation.

Following the accident the defendant insurance company voluntarily paid the plaintiff $15 a week for a period of 17 weeks, or up to April 13, 1920, at which time its agent informed the plaintiff that he was able to resume his work, that the company would pay no further sums on account of the injury, and that if he received any more he would have to get it though an award of the compensation commissioner. The plaintiff, thereupon, resumed his work at the former wages, performing it, however, with great pain and considerable disadvantage on account of the limitations in the use of his arm. He was not able to keep up the speed required in working for contractors and was finally obliged to forego that class of work.

A complaint was filed before the compensation commissioner by the plaintiff, and upon a hearing on September 10, 1920, an award was made that the plaintiff have and recover from the defendants the sum of $15 a week for a period of 22½ weeks, commencing April 15, 1920, together with medical and hospital expenses. From this award defendants appealed to the district court, where, upon a trial on October 25, 1920, it was adjudged that the plaintiff have and recover compensation from the defendants for a period of 22½ weeks at the rate of $15 a week, with interest thereon, and for waiting time—in all $480—together with an attorney's fee of $100.

It is argued by the defendants that the judgment allowing compensation for 22½ weeks is excessive and not supported by the evidence, and also that the court erred in allowing any sum as a penalty for waiting time. The testimony is clear that for a period of 17 weeks immediately following the accident the plaintiff was wholly incapacitated from performing his usual labor. At the ex-

piration of that period there existed a stiffness of the elbow joint and some limitation in the free movement of the arm. The case was tried upon the theory that the plaintiff had suffered a permanent partial loss of the use of his arm. The physician called on behalf of the defendants admitted that there was a slight limitation of the use of the arm, that there was a limitation of flexion of between one and three degrees, and gave his opinion that in terms of percentage the disability of the arm was "5 per cent. at most."

The plaintiff, in his own behalf, stated his inability to do the work as he had formerly done. He exhibited his arm to the court, and demonstrated, by going through various movements, the limitation of the natural movements of the arm. A letter was also received in evidence, without objection, from a physician who had examined the plaintiff's arm on August 14, 1920, which stated that the plaintiff had "joint irritation and strickening of right elbow; pronaton and supernation of right radius, about 10 to 15 per cent."

While the testimony may not be entirely free from doubt, we are fairly satisfied that the finding of the trial court that plaintiff was entitled to compensation for 22½ weeks is supported by the testimony. We are of the opinion, however, that the court misapplied the law to the facts in allowing a penalty for waiting time for the entire period of 22½ weeks. The controversy was over the extent of plaintiff's permanent partial loss of the use of his arm.

Under the provisions of the compensation act, an employee, for the loss of an arm, is entitled to receive compensation, at the rate designated, for a period of 225 weeks, and for the permanent partial loss of the use of an arm the compensation allowed is such proportion of the entire loss as the disability produced bears to the whole. Rev. St. 1913, sec. 3662, as amended by section 2, ch. 91, Laws 1919.

As we construe the testimony, the defendants' evidence is a practical admission that the plaintiff had suffered a 5 per cent. disability, which would entitle him to compensation for 11¼ weeks. The mere fact that the plaintiff was claiming a greater percentage of disability was no legal justification for the defendants withholding the payments admittedly due. In order to relieve themselves from the penalty, the defendants should have at least made tender of the amount admittedly due. The plaintiff, on the other hand, was claiming that his disability was more than 5 per cent. of the loss of the use of his arm, and in this contention the court agreed with him and found that his disability was equal to 10 per cent., or for a period of 22½ weeks. Rev. St. 1913, sec. 3666, as amended by section 4, ch. 91, Laws 1919, provides in part:

"Except as hereinafter provided, all amounts of compensation payable under the provisions of this article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of the injury or death. Provided, fifty *per centum* shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability."

Construing this provision in *Updike Grain Co. v. Swanson,* 104 Neb. 661, and *Osborn v. Omaha Structural Steel Co., ante,* p. 216, it was held that the periodical instalments of compensation for an injury to an employee do not become due, in the sense that they carry the statutory penalties for nonpayment, until the obligation of the employer is definitely ascertained or settled in the exercise of proper diligence on his part, where there is a reasonable controversy over the extent of the injury as a basis for the number of periodical payments and the amount of each. As we view the testimony, there was a reasonable controversy as to whether the plaintiff's disability exceeded 5 per cent. of the loss of use of his arm. Upon the whole record we are of the opinion that plaintiff is entitled to recover compensation for 22½ weeks at the rate

of $15 a week, together with the 50 per cent. penalty for one-half of that period, with interest thereon, and the attorney's fee allowed by the court. The defendants having succeeded in reducing the judgment of the trial court, no attorney's fee will be allowed in this court.

Although proper notice was not given by the plaintiff in his cross-appeal, we have considered it as though properly made, and conclude that the judgment of the district court is all that the plaintiff is entitled to recover under the record as made.

From what has been said, it follows that the judgment is excessive to the amount of $58.13. If plaintiff files a remittitur of $58.13 within 10 days, the judgment will be affirmed; otherwise, it will be reversed and remanded.

AFFIRMED ON CONDITION.

LEWIS H. BLACKLEDGE ET AL., APPELLEES, V. FARMERS INDEPENDENT TELEPHONE COMPANY, APPELLANT.

FILED FEBRUARY 23, 1921. No. 21176.

1. **Telegraphs and Telephones:** PHYSICAL CONNECTIONS OF TELEPHONE LINES. The statute requiring physical connections to be made between telephone companies (Rev. St. 1913, secs. 7414, 7417) applies to companies operating "trunk and toll" lines, and contemplates only the forwarding of messages when such lines are used.
2. ———: ———: POWERS OF STATE RAILWAY COMMISSION. The railway commission is, by the Constitution, given plenary power to regulate and control telephone companies which are operated as public utilities, but such powers are subject to the general constitutional limitations and subject to whatever specific legislation is enacted providing the manner and limit and extent that the power shall be exercised.
3. ———: ———: ———. Though at common law such public utilities could not be required to make physical connections of their telephone systems, the legislature or the railway commission may order such connections when public convenience and necessity require, provided that the company required to render the service

will receive proper compensation for the additional service which it renders, and that such conditions are imposed as will protect such company in its individual management and control of its own property, and that the order does not so operate as to create or allow of such discriminatory conditions as will cause injury to the company concerned.

4. ———: ———: ———: DUE PROCESS OF LAW. Where the railway commission, as a condition of an order requiring the physical connection of two companies, directs that the two companies shall divide all new business, in such proportions that the relation in size of the one company to the other shall not change but shall be continuously maintained so long as the order of exchange of service shall operate, the right of either company to accept as subscribers all who shall apply in the territory covered by their system is denied, and the effect of such order is to take the company's property without due process of law.

5. ———: ———: POWER OF COURTS. A regulation requiring the exchange of service between telephone companies is legislative in character and cannot be modified, but must be either approved or set aside by the courts, except, however, such portions as are distinctly separable may be sustained or annulled as separate and independent regulations.

APPEAL from the State Railway Commission. *Reversed.*

Howard S. Foe, Stiner & Boslaugh and *W. M. Whelan,* for appellant.

Lewis H. Blackledge and *Bernard McNeny, contra.*

FLANSBURG, J.

Appeal from an order of the Nebraska State Railway Commission, requiring physical connection between telephone companies for the exchange of local service, as well as for the transmission of long-distance messages.

The Farmers Independent Telephone Company and the Lincoln Telephone & Telegraph Company, both Nebraska corporations, are engaged in the telephone business at Red Cloud, Nebraska. Each operates a local exchange, and in that business they are direct competitors. The Farmers company has, also, farm lines extending into the country, and has switching exchanges with certain other independent companies which operate small telephone

exchanges in neighboring towns. The Lincoln company has an extended business over the entire state and operates long-distance lines in connection with and as a part of the Bell system throughout the United States and Canada.

For some years prior to October 1, 1917, a physical connection had been maintained between the exchanges of the two companies at Red Cloud, and the subscribers of the Farmers company had been given the privilege of directly transmitting telephone messages over the Lincoln company's long-distance lines. By reason of the duplication of telephones, found necessary by many subscribers, and the other inconveniences incident to the division of the local business at Red Cloud between the two companies, a movement began among certain telephone users for the elimination of one or the other of these companies from the field. Meetings were held and an agreement reached by a number of citizens, to the effect that they would patronize the Farmers company exclusively. As a result, 84 of the Lincoln subscribers immediately transferred to the Farmers company. The Lincoln company, in the protection of its own interests, promptly discontinued the long-distance service formerly rendered the subscribers of the Farmers company. The Farmers company then made application to the railway commission for an order requiring the reestablishment of the long-distance service. In that proceeding the two complainants, who are citizens of Red Cloud, and telephone users, intervened; the one praying for an order to require the two companies to mutually exchange all telephone service, local as well as long-distance, and the other that the two companies be required to consolidate their telephone systems in Red Cloud.

The railway commission, after a hearing, entered an order requiring the Lincoln company to furnish long-distance service to subscribers of the Farmers company and to reestablish physical connection between the two plants for that purpose. It also ordered that the two companies make necessary physical connection, and that each be

required to receive and transmit all local calls, originating on the lines of the other, where destined to a subscriber on its own local lines. As compensation for the exchange of local service, the rates to all local subscribers of each of the companies were increased. All business subscribers were increased 75 cents a month, residence subscribers 20 cents a month, and farm and switching subscribers 10 cents a month. The railway commission then made a specific finding, to the effect that the above orders, if granted without other conditions, would work injuriously to the Lincoln company and would result in a practical confiscation of its properties at Red Cloud, since all of its subscribers would eventually, under the circumstances created, transfer to the Farmers' lines. It was therefore further ordered, avowedly as a protection to the interests of the Lincoln company, that the future local telephone business should be divided, and that neither company should accept new or additional local subscribers in numbers sufficient to change the proportion in size that one company bore to the other on October 1, 1917. The Farmers company appeals, complaining of all those provisions, except the order covering the long-distance service.

It is insisted that the statute, Laws 1913, ch. 79 (Rev. St. 1913, secs. 7414, 7417), requires only connections with trunk and toll lines, and not a general exchange of local business. The title and body of the act, we think, confirm this contention. The title of the act refers only to "trunk and toll" lines, and the body of the act also refers specifically to such lines and provides for the division of tolls for long-distance service only. It is also provided that the tolls for the transmission of each particular message shall be divided, in part, upon the basis of the number of miles of line furnished by the respective companies. We find nothing in the act, however, which attempts to limit the general power of the railway commission over telephone companies in so far as its action may go beyond and not be in conflict with the mandatory provisions of this act.

By the Constitution (article V, sec. 19*a*) the railway commission is given general power to regulate and control such companies according to its own judgment and discretion, subject to the general constitutional limitations, and except in so far as the legislature shall, by specific legislation, provide how, and limit to what extent, that power shall be exercised.

The railway commission has, then, full and plenary power, legislative in character, to control these companies, and to pass reasonable rules and regulations for the conduct of their business. It is authorized, in that regard, to exercise the police power of the state and that power of regulation and control which is impliedly reserved by the state in the grant of charters to such public utilities.

It is the contention of the Farmers company that a physical connection can be required between telephone companies only through a legislative enactment or by virtue of contract, and that the order of the railway commission goes beyond the provisions of the statute, above mentioned. It is true that, by the common law, public utilities owed no duty beyond their existing lines, and, therefore, no obligation to make physical connections or exchange service with each other. Each had the right to operate independently. Where the common law is not changed by legislation, a court would, therefore, find no authority upon which to base an order for such physical connections or exchange of service. *Home Telephone Co. v. People's Telephone & Telegraph Co.,* 125 Tenn. 270; *Pacific Telephone & Telegraph Co. v. Anderson,* 196 Fed. 699; *Home Telephone Co. v. Sarcoxie Light & Telephone Co.,* 236 Mo. 114, 36 L. R. A. n. s. 124; *State v. Cadwallader,* 172 Ind. 619, 87 N. E. 644 (on rehearing) 89 N. E. 319; *Pacific Telephone & Telegraph Co. v. Eshleman,* 166 Cal. 640, 50 L. R. A. n. s. 652.

The railway commission is, by the Constitution, delegated authority which is, in its nature, legislative, and the common law is not a limitation upon that power. Its orders, as well as the statutory enactments of the legisla-

ture, must meet constitutional requirements, and must not be oppressive nor arbitrary, nor disregard substantial property rights.

The question arises whether or not the order of the railway commission in this case, based in part upon the statute mentioned, and in part a direct exercise of its own power, can be justified as a reasonable regulation of the business and service of these companies, or does it offend against those constitutional inhibitions, prohibiting the taking of property without due process of law, or without just compensation?

Although it has been held (*Pacific Telephone & Telegraph Co. v. Eshleman, supra*) that, to require physical connection between different telephone systems and to compel one company to furnish the service of its lines to the patrons of the other company, cannot, under any conditions, be justified as a regulation, but must be considered a taking of property, and that it can only be accomplished through the exercise of the power of eminent domain, it is now quite universally recognized that the state, or its delegated authorities, may, in the exercise of its police power or its power to regulate public service corporations, compel such physical connections and compel the one company to furnish its wires for the transmission of messages originating on the other company's lines, provided that an arrangement is made so that the company required to render the service will receive proper compensation for the additional service which it renders, and that such conditions are imposed as will protect such company in its individual management and control of its own property, and that the order does not so operate as to create or allow of such discriminatory conditions as will cause injury to the company concerned. *Pacific Telephone & Telegraph Co. v. Wright-Dickinson Hotel Co.*, 214 Fed. 666; *Pioneer Telephone & Telegraph Co. v. State*, 177 Pac. (Okla.) 580; *Pioneer Telephone & Telegraph Co. v. State*, 77 Okla. 216; *Pioneer Telephone & Telegraph Co. v. State*, 78 Okla. 38; *Wisconsin Telephone Co. v. Railroad Commission*, 162 Wis. 383; *Michigan*

State Telephone Co. v. Michigan Railroad Commission, 193 Mich. 515; *State v. Skagit River Telephone & Telegraph Co.,* 85 Wash. 29; *Southwestern Telegraph & Telephone Co. v. State,* 150 S. W. (Tex. Civ. App.) 604; *Idem,* 109 Tex. 337; *City of Milbank v. Dakota Central Telephone Co.,* 37 S. Dak. 504.

Whether the regulation is made by the order of the railway commission, or by legislative enactment, it can, in either event, be upheld only after providing an equitable adjustment of the rights involved.

The principle of requiring such physical connection of lines in furtherance of public service and for the public convenience was first recognized as applied to railroads. *Michigan Central R. Co. v. Michigan Railroad Commission,* 236 U. S. 615; *Wisconsin, M. & P. R. Co. v. Jacobson,* 179 U. S. 287; *State of Washington v. Fairchild,* 224 U. S. 510.

When a telephone company procures a connection, so as to be allowed the use of long-distance wires of another, or where two companies are required to connect their long-distance toll lines, the toll charges, being based on distance of transmission of messages, may be so apportioned that each company will get compensation for just such part of the services that it renders in the transmission of each individual message. To that extent there is a clear analogy in principle to the rule as applied to railroad companies, where the transportation charges are automatically apportioned between the two companies, one company receiving compensation for that part of the service rendered up to, and the other beyond, the connecting point.

Where two telephone companies are competing for local business and one of them has long-distance lines which it has been compelled, by regulatory order, to furnish to the patrons of the other company, it has, in some instances, been found necessary, in order to maintain an equality between the companies and to insure a proper compensation to the company furnishing additional service, to

provide a switching charge against patrons of the other company, to be collected in addition to the regular toll rates charged to the subscribers of the company having the long-distance lines. *Wisconsin Telephone Co. v. Railroad Commission, supra; Southwestern Telegraph & Telephone Co. v. State, supra; Pacific Telephone & Telegraph Co. v. Wright-Dickinson Hotel Co., supra.*

The order of the railway commission, in the case here before us, requires an exchange of all local service, and provides a flat rate, instead of an individual switching charge, as compensation for the additional service to be rendered by the respective companies. The local service of these companies as to their own subscribers is also not based upon toll rates, but on a flat rate per month, so that there is not the same opportunity for apportioning the compensation between the companies for the transmission of a message from the lines of one over the lines of the other, as there is where the two companies are operating their lines on toll charges. No complaint is made that a flat rate cannot be justified in place of a toll rate, and we do not now see any reason why a flat rate would prevent a possibility of proper apportionment of compensation between the companies, where the service, upon which the flat rate is to be based, is of such a uniform character that such a rate would work reasonably and equitably as to all concerned, and would result in no discrimination.

The order under consideration gives to each of the companies, alike, an increase of 75 cents for business telephones, 20 cents for residence telephones, and 10 cents for farm telephones, but the telephone rates of these two companies, to which these increases are to be added, are not the same. The Lincoln company's rates are from $2 to $2.50 a month for business service, and from $1 to $1.50 for residence service, while the Farmers company's rates are $1.50 for business service and $1 for residence service. By the order entered, there is an effectual consolidation of the service of these two companies by which a subscriber of the one company appears to receive practically the same

service as a subscriber of the other company. The rates to the subscribers of the Farmers company are, however, under this arrangement, considerably lower. Furthermore, it would appear that the use of the Lincoln company's higher rate lines would be more valuable than the use of the Farmers' lines. It is the service of these lines that the two companies are required to exchange, and yet the one company receives no more for the service than the other.

The matter of the fixation and adjustment of the conditions and of rates, where an exchange of service is ordered, is one exclusively for the railway commission, and not for the courts. The one function of the court is to determine whether such an order as has been made can be legally justified. The commission has apparently not attempted to work out a system of rates and charges which would work as an equitable foundation for an exchange of service, and this may have been for the reason that it considered such could not be done. However that may be, the findings of the commission show that the Lincoln company has sustained a considerable loss of patronage by reason of the Farmers company's competition, which has the advantage of local ownership; and the commission further finds that the requirement for an exchange of local and long-distance service, as covered by those portions of the order that we have just discussed, will in practical effect work a confiscation of the Lincoln company's property through the process of a complete loss of its local subscribers to the other company, unless some provision is made in the order which will afford protection. Such an order, to be sustained, must be one that will operate reasonably, and not be arbitrary, nor violate constitutional inhibitions. Unless a reasonable adjustment can be made where the Lincoln company can be protected against such a detriment and substantial loss as the railway commission's findings show that it will otherwise suffer, it seems clear to us that this company cannot legally be forced to furnish either long-distance or local service

to the patrons of its competitor. *Pioneer Telephone & Telegraph Co. v. State,* 177 Pac. (Okla.) 580, *supra.* For, as said in the case just cited: "A connection, under rules and regulations that amount to the destruction of property, or that works a discrimination against the subscribers of either exchange, would amount to the taking of property without due process of law. The state, of course, has the power to take private property for public use under its rights of eminent domain; but this can only be done for a fair consideration. The section of the constitution contemplates the physical connection and the regulation of such union under the police powers of the state."

The order of the railway commission contains a provision calculated to protect the Lincoln company; it is that all new business shall be divided in such proportions between the companies that the relation in size of the one company to the other shall not change but shall be continuously maintained throughout all future growth, or so long as the order for exchange of service shall operate.

Serious inconvenience is a necessary result of having two local telephone companies in operation side by side, and, though such duplication cannot be justified from an economic standpoint, it must be remembered that these companies each received a franchise to operate in the same locality and that they have built plants and extended their lines throughout the territory granted. Their expenditures and investments have been based upon the public grant and their rights have become vested. It must be remembered also that these companies owe a duty to the public. They not only have the right to seek subscribers in the territory where they are operating, but all persons wishing to become subscribers have the reciprocal right to demand that they shall become such subscribers and that the service of that public utility which they choose shall be rendered to them. To grant to such a company the right to construct a telephone line, and then later to deny it the right to have all persons along that line connect with it as subscribers, is to take away the very grant that has been

given. It is to deny the company the very use of the property for which the property was especially constructed. Statutes have been passed in some states providing that a public utility shall not extend its lines into new territory unless it shall have procured a certificate from a regulatory commission, showing that the territory is not already adequately served and that public necessity and convenience require additional service. The order here cannot be justified on the principles underlying those regulations. Those regulations, when within reasonable limits, do not affect vested rights, but deal only with an extension of grants to such companies into territory not theretofore served by them. We do not hesitate to say that the order of the railway commission, requiring the division of new business, cannot be legally justified, and is the taking of property rights without due process of law.

The provision as to the division of such new business is so correlated and interdependent with the other provisions of the order that it cannot be separated from them. The order of the railway commission in this case is an entirety. It cannot be divided into separate and independent orders. It is, furthermore, a regulation, legislative in character, and cannot be modified or changed by this court. The order, as found, must, so far as the power of this court goes, be either approved or set aside. *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission,* 103 Neb. 695; *Nebraska Telephone Co. v. State,* 55 Neb. 627; *People v. McCall,* 245 U. S. 345; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 136 Wis. 146; *Hooper Telephone Co. v. Nebraska Telephone Co.,* 96 Neb. 245.

For the reasons given, the order of the railway commission is annulled and set aside, without prejudice to the rights of any of the parties concerned to further proceedings before the commission, for the purpose of arriving at some reasonable regulation for the exchange of service, under such conditions, if they can be found in this case, as will be legally justifiable and within constitutional limits.

REVERSED.

EDWIN D. GOULD, APPELLEE, V. DANIEL G. ROCKWELL ET AL., APPELLANTS.

FILED FEBRUARY 23, 1921. No. 21309.

1. **Brokers: CONTRACT: CONSTRUCTION.** When an owner of land enters into a written contract, whereby he lists his land with a broker "for sale," though the description of the land and the terms of sale are set out therein, the broker's authority to enter into a contract of sale for his principal will not be inferred from the words "for sale," used in the contract, and, in order that such authority exists, it must affirmatively and unequivocally appear from the writing, or, at least, must be so indicated from other terms used, that the contract, in the light of surrounding circumstances or the construction placed upon it by the parties, or other proper evidence to explain ambiguity, will clearly show that such authority was intended.
2. **Case Disapproved.** Paragraph 1 of *Weaver v. Snively*, 73 Neb. 35, disapproved to the extent that it differs from the rule as stated herein.

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

Sullivan, Squires & Johnson, for appellants.

Pratt & Hamer, contra.

FLANSBURG, J.

Action for specific performance, based upon a contract purporting to bind the defendant Rockwell to a sale of farm land to the plaintiff. The defense was that the contract was made by the defendant's real estate agent, who was employed only to find a purchaser, but who had no written authority to bind the defendant by a contract of the sale of his land. The court found in favor of the plaintiff, decreed specific performance of the contract, and the defendant appeals.

The record shows that the defendant listed his land with Houghton & Perkins, real estate agents, and signed the following agreement:

"LAND LIST.

"Owner D. G. Rockwell, Address-Hysham, Mont. Acres-320. Sec. 31, Twp. ....., Range ..... Custer county, State-Nebr. Under cultivation-240 acres; grass land-80 acres; orchard .... acres: land .... acres. House-size ..... Barn-size ..... Granary-size ..... Shed-size .... fenced. No, wells ..... Distance to town-8 miles. Shipping point .... miles. Post office-8. School-1½ miles. Church .... miles. $56.50 per acre; when due ....; rate of interest .....; lowest price and terms of sale-$1,000 to cinch bargain. $4,000. Mar. 1st. Bal. 5 yr. at 6%.

"This is to certify that I have listed the above described land with Houghton & Perkins for sale or trade for a period of ..... months, and I agree to pay $465 commission out of first money received on sale. Good till Feb. 1st. Dated 8-22-1918.

"(Signed) D. G. Rockwell, Hysham, Mont."

The question is whether or not this agreement was a mere listing agreement, whereby Houghton & Perkins were to procure a purchaser and receive compensation for that service, or whether the writing was sufficient authority to them to bind the defendant to a contract for the sale of the land without any further written authority from him. The contract recites that the land is listed for sale or trade. If the agents were authorized to bind the defendant to a sale of the land without further consulting him, they were also, under the contract, authorized to trade his land. It is most unreasonable that any owner of land would enter into such an agreement.

It is generally conceded that the only duty of a real estate broker is to find a purchaser who is ready, willing and able to enter into a contract according to the terms that have been fixed by his principal, and that such a broker does not have authority to proceed further and to enter into the contract as agent for the principal or in the principal's stead, but that the contract, listing the property with him, in order to authorize him to enter into a

contract for the sale of the land, must by its terms indicate unequivocally that the owner of the land intended that the broker should have that authority. Such authority will never be inferred nor presumed, and the burden is upon the party seeking the benefit of the contract of sale of the land to prove that the written authority of the agent did affirmatively authorize the agent to make the contract. *Whitehouse v. Gerdis,* 95 Neb. 228; *Miles v. Lampe,* 102 Neb. 619; *Ross v. Craven,* 84 Neb. 520; *O'Shea v. Rice,* 49 Neb. 893.

When an owner lists his property with a real estate broker for sale, it is generally understood that the broker's duties are merely to find a purchaser. No good reason exists why the owner should be required, when he uses the ordinary expressions employed in such contracts, to hedge it about with conditions limiting the authority of such a broker and preventing him from entering into a contract of sale without further consultation with the owner; but there is good reason why the broker should see that his authority to enter into a contract should affirmatively appear, if he desires his authority to extend beyond what is, as an almost universal rule, given to such brokers in the relation between a real estate agent and his principal. No wider authority than the mere privilege and duty of finding a purchaser is to be inferred from the use of the words, that the broker is employed "to sell" or "to make a sale," when such expressions are not supplemented by express terms in the contract indicating that the broker shall be allowed to bind his principal by a contract entered into by the broker as the agent of his principal. Such is the overwhelming weight of authority. Notes, 17 L. R. A. n. s. 210; 23 L. R. A. n. s. 982,

In the case of *Whitehouse v. Gerdis, supra,* the court stated that the writing "must show that the owner intended to authorize the agent to make and enter into a valid contract of sale of the land for the owner in his name," but also said that perhaps it was stating the rule too emphatically to say that such authority must "clearly, speci-

fically, and positively" appear. As said in *Bacon v. Davis*, 9 Cal. App. 83: "No one could reasonably contend that any particular formula of words is required to convey such authority, that the owner must say, for instance, *in hæc verba*, 'I authorize you as my agent to enter into an executory contract of sale,'" still, in order that the contract show the authority at all, it must show it affirmatively and positively, even though no specific reference need be made in the exact language as mentioned in the California case.

Where the contract is not clear as to such authority, but is ambiguous and capable of construction, then, of course, extrinsic matters and the circumstances surrounding the making of the contract may be resorted to as an aid to determine the intention of the parties. In such event, the construction placed by the parties upon the contract is of most persuasive force in ascertaining what the contract really means. In the case before us, however, the contract is not open to construction. There are no terms in the contract indicating in any way that it was intended the agent should be authorized to enter into a contract of sale for his principal.

It may be further said that the construction placed upon this contract by the defendant and by Houghton & Perkins clearly shows that they did not interpret their agreement as authorizing Houghton & Perkins to make a contract as agents of the defendant for the sale of the land, but, on the other hand, the record shows that, when they found a purchaser, a contract was drawn up by them and forwarded to the defendant for signature. This he refused to sign, but drew up a contract and sent it back to them. This the purchaser refused to sign, and thereupon, without further authority, Houghton & Perkins entered into the contract in question. By the action of the parties in exchanging what they proposed as the contract to be entered into by the defendant, it is clearly shown that they considered it necessary that the defendant execute a contract for the sale of the land, and that Houghton & Perkins were not authorized to do that for him.

The plaintiff lays particular stress upon the case of *Weaver v. Snively,* 73 Neb. 35, relying upon the statement of the court in the first paragraph of the syllabus. The rule, as there set out, is based upon a statement by the court in the case which was unnecessary to the decision, and was, therefore, mere dictum. It, furthermore, appears to be inconsistent with the former opinions of this court, above referred to, and, to the extent that it differs from the rule as stated herein, it is disapproved.

The plaintiff also relies upon a statement by the court in the case of *Spanogle v. Maple Grove Land & Live Stock Co.,* 104 Neb. 342. It will be noticed, however, both that the contract involved in that case differs from the one now under consideration, and that the statement of the court, that the contract there might have been authority to make a contract of sale, was only a dictum and unnecessary to the decision, and, therefore, not controlling here.

For the reasons given, the judgment of the lower court is reversed and the case dismissed.

REVERSED AND DISMISSED.

ALONZO L. KRAUSE, APPELLEE, V. FRANK COX ET AL., APPELLANTS.

FILED FEBRUARY 23, 1921. No. 21360.

1. **Principal and Agent:** PROMISSORY NOTE: PAYMENT TO THIRD PARTY. Where the holder of a past-due note is insisting upon payment in full and procures a third party to bring pressure upon the debtor to persuade him to pay, the circumstances attributable to the holder's acts being such as to give the debtor reasonable ground to infer that such party, although not in possession of the note, is authorized to receive payment as agent for the holder, the debtor, in the absence of notice to the contrary, is entitled to assume that such authority exists, and payment to such third party will be binding upon the holder.
2. **Mortgages:** PAYMENT TO THIRD PARTY: BURDEN OF PROOF. If, in defense to a foreclosure suit, an amount sufficient to discharge the mortgage debt is shown to have been paid to one authorized to

receive it as the plaintiff's agent, but the plaintiff relies upon the testimony of such agent that the money was to be applied upon a debt due to himself and not upon the mortgage debt, and the defendant denies that any such debt existed, the burden is upon plaintiff to establish the existence and validity thereof.

3. ———: ———: EVIDENCE. Evidence examined, and *held* not to establish with sufficient certainty the existence of any other debt than the one in suit upon which the payment could have been applied, and that it should be credited upon the mortgage debt in suit.

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

Ringer, Bednar & King, for appellants.

O. C. Anderson, contra.

DORSEY, C.

The defendant, Frank Cox, borrowed $800 of the plaintiff, and on September 5, 1911, he and his wife and codefendant executed a note therefor and a mortgage covering a house and lots in Walthill, Nebraska. This appeal is from a decree foreclosing said mortgage. The defense was that the mortgage had been satisfied by the payment of the debt to Farley Brothers, real estate agents at Walthill, who were alleged to have been agents of the plaintiff to receive payment.

The defendants are Indians of the Omaha tribe and had built a house on the lots in question. There were mechanics' liens pressing for payment, and Farley Brothers had advanced the defendant several small loans, and he applied to them for a loan on the property. They, in turn, applied to the plaintiff, who was in the loan business at West Point, and he examined the premises and consented to loan $800 thereon. The mortgage and note sued upon, after being executed by the defendants, were forwarded to the plaintiff through Farley Brothers, and the plaintiff sent them the $800, out of which they paid off the mechanics' liens, deducted what was owing to themselves, and paid the remainder to the defendant Frank Cox. The

latter neglected the interest and taxes until February, 1914, when the accumulated interest was collected from him by Farley Brothers, who remitted it to the plaintiff.

Later on, the interest and taxes again fell into arrears and the loan ran on in that condition until the summer of 1917. The plaintiff called the attention of Farley Brothers to the default and enlisted their services to induce the defendants to pay up. Unpaid interest, taxes and insurance premiums, together with the principal of the loan, amounted in 1917 to about $1,200. The note was payable on demand, and the plaintiff had the option to declare the whole amount due in case of default. The plaintiff considered the whole amount due and urged Farley Brothers to see the defendant about it.

Farley Brothers held a note for $770, signed by the defendant as surety, and, besides that, they testified upon the trial that the defendant was indebted to them for about $600 more upon other obligations, making in all about $1,400. The defendant denied that he owed them anything except his surety obligation on the $770 note.

The defendant Frank Cox had an interest in certain Indian land, and Caryl Farley, one of the firm, persuaded him to sell this, for which he realized $3,000, which sum was to his credit in the hands of the Indian agent. They had several interviews in which Caryl Farley tried to induce the defendant to draw $2,700, which would have been enough to cover the indebtedness claimed by his firm, as well as the amount due on the plaintiff's loan. Farley, however, was unable to persuade the plaintiff to draw and pay him more than $1,200, and in August, 1917, they drove over to the agency and the defendant drew that sum and paid it to Farley.

The defendant testified that he intended and directed it to be applied in payment of the plaintiff's note and mortgage; that he mentioned the mortgage at the time, and Farley said he did not have it there, but it was at his house in Walthill. Farley denied that the note and mortgage were mentioned, and testified that the payment was made on the indebtedness owing to Farley Brothers; that

he asked the defendant to go right down to his office and have the money applied thereon, but that the defendant said there was no hurry and he would be over later. According to the defendant's testimony, the understanding was that they would go over to Walthill and fix the papers, which he understood to be the plaintiff's note and mortgage, but that later on, when he did go to Farley Brothers to get the papers, they would not give them to him. Farley testified that he made settlement with the defendant at Walthill and turned over to him the notes representing his indebtedness to their firm; but the defendant denied any such settlement or that he received any such papers.

It is argued on the part of the plaintiff that, although he expected and invited Farley Brothers to cooperate in bringing pressure upon the defendants to pay, it must not be taken as if he thereby authorized them to receive the money for him. They were not to assume to collect the money, but to confine themselves simply to inducing the defendants to remit the money to the plaintiff direct. If, as a result of their persuasion, the defendants were prevailed on to entrust money to Farley Brothers for transmission to plaintiff, it must be presumed that they received it, not as his agents, but as agents of the defendant to remit it. If it failed to reach its destination, the plaintiff would not be bound; he could be bound only if the money actually reached him. We think, however, that when a creditor, in order to secure payment of his debt, authorizes a third party to approach the debtor and employ persuasion to induce him to pay, the debtor is entitled to assume that the party so authorized is likewise authorized to receive the money. "The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has." *Cooper & Cole Bros. v. Cooper,* 90 Neb. 209.

That such ostensible authority is sufficient to establish agency to receive money in payment of negotiable paper,

though such paper is not in the possession of the alleged agent, has been held in numerous cases in this jurisdiction: *Thomson v. Shelton,* 49 Neb. 644; *Holt v. Schneider,* 57 Neb. 523; *Faulkner v. Simms,* 68 Neb. 295; *Walker v. Hale,* 92 Neb. 829. The question in the instant case is whether the circumstances were such as to justify the defendant in inferring that it would be safe to pay the mortgage debt to Farley Brothers, as agents, instead of paying it to the plaintiff direct. The circumstances that operated upon the defendant's mind to convince him that it was safe and proper to do so were attributable to the plaintiff himself, and he set them in motion. He invoked the aid of Farley Brothers to "dun" the defendant for the full amount of the debt, both principal and interest. He was present in person at one time when Caryl Farley, at his instance, demanded payment of the mortgage debt. These circumstances, coupled with the fact that Farley Brothers had previously dealt with the defendant as the plaintiff's agents in all matters regarding the loan, reassured the defendant as to their authority, and combined to produce, in his eyes, that appearance of authority which the law treats as equivalent to expressly authorized agency, when brought about by the acts of the principal himself.

The evidence is clear that the plaintiff, when he appealed to Farley Brothers to assist him in collecting the debt in 1917, did not intend to keep the collection of interest distinct from the collection of principal, or to retain the latter in his own hands while authorizing Farley Brothers to collect the former. No other inference can rationally be drawn from the admitted facts except that he expected Farley Brothers to collect both. It was not a question of collecting the past due interest and letting the principal stand. Without doubt the plaintiff considered the whole amount due and was insisting upon payment of principal and interest in full. The plaintiff testified as follows: "Q. You wanted them to collect the interest? A. Yes; if they could. Q. And it was agreeable to you that they should collect the principal, wasn't it? A. Yes,

sir; I believe it was." On redirect examination by his own counsel, the plaintiff testified: "Q. Now, Mr. Krause, what do you mean when you state that you wrote Mr. Farley that the interest was due, what do you mean that you were willing that he collect the money, what do you mean by that, that he was to go out and remind Cox about it, or did you mean that you authorized Farley to collect that as your agent? A. Not as our agent." Notwithstanding the plaintiff's concluding statement that he did not constitute Farley Brothers his agents to receive the money, we think this was a conclusion at variance with the plain import of his acts, and that the evidence clearly establishes the agency of Farley Brothers to receive payment for the plaintiff.

Although such agency is established by the record, the question nevertheless arises whether the payment of $1,200 by the defendant was to be applied upon the mortgage debt or upon the alleged indebtedness to Farley Brothers. In favor of the theory that the money was to be applied upon the mortgage debt is the fact that it was approximately the amount due the plaintiff at that time; the fact that Caryl Farley had been "dunning" the defendant for this debt for some time before he persuaded the latter to sell his land, and the payment of the mortgage debt must have figured as part, at least, of the inducement to sell it; and the further fact that Caryl Farley had been trying to induce the defendant to pay him $2,700, which would have been sufficient to cover the alleged indebtedness to Farley Brothers as well as the plaintiff's debt; but the defendant could not be persuaded to draw and pay over to Farley more than $1,200. These facts are corroborative of the testimony of the defendants that the mortgage debt was specifically mentioned when the money was paid over, and that it was understood that it was to be applied upon that. Further corroboration is furnished in the testimony of Harry L. Keefe that he overheard something said about a mortgage on the defendant's place in the conversation between Caryl Farley and the defendant at the agency. An-

other fact bearing upon the question of the application of the money is that Caryl Farley testified that he had with him at the agency the notes representing the indebtedness which he claimed the defendants owed Farley Brothers. If that were true, there seems to be no reason why, if the $1,200 was to be applied upon that indebtedness, it should not have been credited thereon at that time and the notes then turned over to the defendants, instead of deferring the settlement until a later day.

We have, on the other hand, the positive testimony of Caryl Farley that the note and mortgage in suit were not mentioned, but that the money was to be paid on alleged indebtedness owing to his firm, and that he afterwards settled with the defendant by applying the money upon that indebtedness and returning him notes representing the same.

Assuming, in accordance with the conclusion hereinbefore reached, that Farley Brothers were agents of the plaintiff to receive payment, the situation then is that the money was admittedly paid to the plaintiff's agents; but the agents claim that it was paid upon a debt owing to themselves and not upon the obligation held by their principal. In order to sustain the plaintiff's contention that his agents received the money upon a debt owing to themselves, it is necessary to find from the evidence that such a debt existed in the amount which the defendant paid. There was, it seems clear, a $770 note, although it was primarily some one else's obligation, and the defendant was liable thereon only as a surety. But Farley claimed about $1,400 against the defendant, including the note last mentioned. It is thus necessary to account for about $600 more. The defendant denied any such indebtedness, and we have nothing to support a finding that it did exist except the bare assertion of Caryl Farley. There were no papers, book entries, or other corroborative evidence. The burden was upon the plaintiff, under the circumstances of this case, to prove the existence, validity and amount of the claimed indebtedness to Farley Brothers. *Henderson*

v. Maysville Guano Co., 15 Ga. App. 69; *Davis v. Hall*, 70 Neb. 678.

The defendants were unable to read English and had only a limited acquaintance and experience with business forms and usages. The case was one of equitable cognizance, and the defendants were entitled to have their rights scrupulously guarded. This is a trial *de novo*, and it is the duty of this court to scrutinize the record and arrive at an independent conclusion, giving full weight, however, to the findings of the trial court. After full reflection, we find the evidence insufficient to establish either that the indebtedness claimed by Farley Brothers existed, or that the payment in question was intended or directed by the defendants to be applied thereon; and we are of the opinion that the $1,200 paid by the defendants should be credited upon the mortgage indebtedness.

We accordingly recommend that the decree of the court below be reversed and the cause remanded, with directions to credit such payment as of the date when made, and to enter a new decree in conformity with this opinion.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to credit such payment as of the date when made, and to enter a new decree in conformity with this opinion, and this opinion is adopted by and made the opinion of the court.

REVERSED.

ADAM J. BLAIR, APPELLEE, V. ESTATE OF JOHN M. WILLMAN ET AL., APPELLANTS.

FILED FEBRUARY 23, 1921. No. 21343.

1. **Limitation of Actions:** PART PAYMENT. Voluntary part payment of an existing debt arising upon contract will toll the statute of limitations, and, if the debt is barred by the statute, will revive it. Rev. St. 1913, sec. 7579; *Rolfe v. Pilloud*, 16 Neb. 21; *Ebersole v. Omaha Nat. Bank*, 71 Neb. 778.

2. ———: ———. Where there is an uninterrupted continuity of employment extending over many years, under an oral contract which fixes the rate of compensation per year, but not the time of payment or the duration of the employment, and the employer admits a total sum due on the contract, any payment made by him to the employee, in the absence of evidence to the contrary, will be presumed to have been made upon the gross sum due, and not upon the compensation for any of the several years.
3. **Executors and Administrators:** CLAIMS: OBJECTIONS: WITHDRAWAL. Where objections are filed by the heirs to a claim against an estate and other objections are filed thereto by the executrix, it is not prejudicial error for the executrix to withdraw her objections during the trial, the objections of the heirs still remaining.
4. **Appeal:** INCOMPETENT EVIDENCE. A party cannot predicate error on the admission of incompetent evidence elicited upon his own cross-examination, where he makes no objection or motion to strike.

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

L. F. Jackson, D. W. Livingston and *J. J. Ledwith,* for appellants.

W. F. Moran, contra.

CAIN, C.

On April 6, 1917, Adam J. Blair, the appellee, filed his claim against the estate of John M. Willman, deceased, for a balance of $7,200, and interest, due for work and labor performed by him for the deceased from January 1, 1881, to January 1, 1917, a period of 36 years, under an oral contract stipulating that he was to receive wages therefor at the rate of $300 a year, or $25 a month. In his claim he acknowledged the payment of $100 a year for the entire period and asked judgment for the remaining $200 a year, and interest, amounting in all to $15,920. There were two other items in the claim, relating to moneys belonging to the claimant and received by the deceased; but, as they were disallowed and are not complained of here, they are immaterial.

The claim here involved relates solely to compensation for work and labor. To this claim three of the adult chil-

dren of the deceased filed objections, setting forth with great particularity that the claim for all wages accruing before January 1, 1913, was barred by the statute of limitations. Though the claim filed was for a single amount covering the total of all the years of labor, the answer pleaded the bar of the statute of limitations to each of the years severally. Elizabeth A. Willman, widow of the deceased and sister of the claimant, was the executrix of the estate, and merely filed a general objection, which she withdrew upon the trial in the district court. On appeal to the district court, a trial was had to a jury, which resulted in a verdict in plaintiff's favor for $18,837.36. Upon the hearing of the motion for a new trial, the court overruled the motion on condition that plaintiff file a remittitur of $5,837.36, which was done, and judgment was then entered on the verdict for $13,000. The defendants appeal.

There are 27 separate assignments of error. Of these, assignments 1 to 12, inclusive, relate to the statute of limitations, upon which appellants chiefly relied. Assignments 21 to 25, inclusive, are that the evidence is insufficient to sustain the verdict. The other assignments are with reference to instructions also involving the question of limitations, and that the court erred in permitting the executrix to withdraw her objections to the claim and to testify that it should be allowed, and in the court instructing the jury orally.

With reference to the assignment relating to the oral instruction of the jury, the record shows that, upon appellants' objection to that method of instruction, the court reduced the instruction to writing and read it to the jury. And we perceive no error in this.

It is true that the executrix withdrew her objections to the claim during the trial, and that she testified that the claim should be allowed in the sum of $18,000, at least. We know of no rule preventing the executrix from withdrawing her objections to the claim, and it could have had no prejudicial effect, for the reason that the objections of the three heirs still remained and the trial proceeded.

An examination of the record discloses that the testimony of the executrix that the claim should be allowed was elicited upon appellants' own cross-examination, without objection or motion to strike. It is obvious that appellants cannot avail themselves of an error of their own.

We now come to the chief question in the case: It is whether the claim for all the years next before January 1, 1913, is barred by the statute of limitations. Appellants urge this claim with persistence and vigor. Appellee contends that a partial payment of the indebtedness was made by the deceased in each of the 36 years, and that thereby the statute was tolled, and that, if the bar of the statute was ever complete, the debt was revived by partial payments thereof proved to have been made after January 10, 1912. Decision of this question requires an examination of the evidence, which is without substantial dispute. The evidence shows that Adam J. Blair, the plaintiff, was the brother of the widow of the deceased, and was 64 years of age at the time of the trial, and was never married; that he had lived nearly all of his life in the family of the deceased; that about January 1, 1881, plaintiff and the deceased entered into an oral contract of employment by which the plaintiff was to receive wages for his work at the rate of $300 a year, or $25 a month. No term of employment or time of payment was provided by the contract, and it related solely to the fact of employment and the wages to be paid. From the time of making the contract until the first of January, 1917, the plaintiff worked for the deceased at farm labor, and lived in his home continuously, with the exception of two visits to Oklahoma of one week each, and a visit of three weeks in the east. With the exception of these five weeks the plaintiff worked continuously for the deceased at the same kind of labor for 36 successive years. There was no change in the kind of employment and no interruption of its continuity. About 1866 John M. Willman, the deceased, bought 80 acres of land one and one-half miles from Nebraska City, which continued to be his home from that time until his

death. During that period he acquired additional tracts of land until he had over 800 acres. Complaint is made of the admission of the evidence of these successive purchases of land, but, as it was chiefly introduced to show that plaintiff was not paid in full because the deceased was short of funds on account of these purchases, we think it was proper. Mr. Willman was chiefly occupied by his business transactions, and the management and operation of the farm was in the hands of the plaintiff. The deceased never denied the validity of plaintiff's claim, but, on the contrary, admitted it. Miss Edna Willman, a daughter of the deceased, about 49 years of age, who had lived in her father's family all her life, and who assisted him in his business, testified to a conversation she had with her father, in the presence of her mother, on May 30, 1908, when her father was trying to borrow money from her on his note. The witness testified: "He offered me a note, and I says I didn't want to receive it for what he gave it to me. I said, 'Why don't you pay Ad (meaning plaintiff) before making any more debts?' 'Well,' he said, 'Ad has been here for over 26 years and $25 a month amounts up like hell.' He said, 'I owe Ad close to $7,000. I have to sell a piece of land to pay him.'" This testimony of Miss Willman is corroborated by that of her mother, and is undisputed. Miss Willman further testified that, after that date, plaintiff continued to work there and got about one-half of his wages from 1908 to 1912, which was paid by check. The evidence also shows that John M. Willman consulted a lawyer about the means to prevent plaintiff's claim from becoming outlawed, and was advised that part payments would prevent it. On January 10, 1912, the house of deceased burned, and all canceled checks issued previous to that time were destroyed. Before that time, Miss Willman testified that her father would pay plaintiff money when plaintiff would strike him for a settlement; and also testified that her father said one reason he did not settle with plaintiff was that the plaintiff might leave if he did so, and that he was hard up for money and did

not have the money. Several checks were produced that were given to the plaintiff by the deceased after 1912 and up to January, 1917. The evidence of part payments previous to 1912 is not as satisfactory as it might be, but it nevertheless shows payments made at intervals by the deceased; and from 1912 to 1917 the evidence is much clearer of such payments. It is altogether probable that small payments were made several times each year, since it was necessary that the plaintiff have some money with which to buy clothing. In view of the uninterrupted continuity of the employment, the relation of the plaintiff to the deceased, and the measures taken by the deceased to prevent the plaintiff's claim from becoming barred, and the unqualified admission of the deceased of a debt amounting to $7,000 on May 30, 1908, we are convinced that whatever payments were made were upon the entire indebtedness. Both plaintiff and the deceased considered it a single debt arising from a single employment.

We do not think that any part of the indebtedness became barred; but, even if it were, the undisputed and substantial payments made revived the debt. Rev. St. 1913, sec. 7579; *Rolfe v. Pilloud,* 16 Neb. 21; *Ebersole v. Omaha Nat. Bank,* 71 Neb. 778; 25 Cyc. 1368. The question of whether voluntary part payments upon the debt had been made was submitted to the jury by the court under instruction No. 6, which is assailed by appellants. We have examined this instruction and think it fairly submitted the question to the jury. We also think that the finding of the jury is amply sustained by the evidence.

Careful examination of the entire record leads us to the conclusion that there is no error. On December 3, 1920, this court made an order staying all other proceedings in the county court until the further order of this court.

We recommend that the judgment of the district court be affirmed, and that the order of this court of December 3, 1920, be vacated.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and the order of this court herein of December 3, 1920, is vacated, and this opinion is adopted by and made the opinion of the court.

AFFIRMED.

THOMAS CAIN, APPELLANT, V. ANN DOWLING ET AL., APPELLEES.

FILED MARCH 11, 1921. No. 21367.

Specific Performance: ADOPTION: PAROL CONTRACT. In an action for specific performance of an oral agreement alleged to have been made with a deceased person to adopt a child and make him an heir, the contract must be proved by evidence that is clear, convincing and satisfactory, and the party seeking to enforce it must show such performance on his part that a failure to enforce it would be a fraud upon his rights.

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

Baker & Ready and *Barnhart & Stewart,* for appellant.

M. F. Harrington and *J. F. Green, contra.*

MORRISSEY, C. J.

Plaintiff prayed for specific performance of an oral contract alleged to have been entered into between Daniel Dowling, now deceased, and James Cain, father of plaintiff, in 1891. It is alleged that it was agreed between plaintiff's father and Dowling that plaintiff, then about ten years of age, should be surrendered by his father, his only surviving parent, to Dowling, and that Dowling then and there agreed that, in consideration of the services, society and companionship of the boy, Dowling agreed to adopt plaintiff as a son, and that, upon Dowling's death, he would leave to plaintiff a share of his estate equal to a child's share therein; that he would treat him as a son, pro-

vide for his wants, educate and care for him. From a finding and judgment in favor of defendants, who are the widow and adopted daughter of Dowling, plaintiff appeals.

Plaintiff's mother was a sister of Daniel Dowling. She died in February, 1891, leaving seven children, viz.: Mary, James, Thomas, Will, Frank, Celestine, and a newly born babe, in destitute circumstances. The newly born babe was taken to Mr. Dowling's home to be cared for before the death of its mother, and a few days after her death Thomas, Will, Frank and Celestine were also received into the home. Some time later in the same year James also found a home with his uncle. The baby died within a few months, while the other boys grew to manhood. A short time after Thomas, Will, Frank and Celestine had been received into their uncle's home, their father, who appears to have been a shiftless character, went there, as he says, for the purpose of bidding them good-bye, as he intended to go to South Dakota. He testified that when he was preparing to leave the Dowling home:

"I took the little baby and kissed him, and got in my buggy and wanted to bid them all good-bye, and I said: 'Good-bye, Tommy.' Tommy was off a short distance from uncle, and about the same distance from me, and I said 'Good-bye, Tommy,' and reached out my hand to him, and, instead of coming to me, Tommy walked up to uncle. He didn't go right up close to him; then I took the bold way that I used to have of talking cross, and I said 'Come here, Tommy, and bid me good-bye,' and he sided up closer to uncle. Then uncle said to Tommy to go and bid me good-bye, and Tommy came up then and bid me good-bye. Just as Tommy was turning away uncle said, said he, 'Jim,' they called me Jim; he said, 'Give me Tommy.' He says, 'I'll do as well by him as I will for Annie,' and I stopped a minute, and then I said, 'Well, you can have Tommy.' * * * He said whatever he done he would do just as well for him as Annie. Well, he did say 'I will raise Tommy well, and I will do as well for him as I will for Annie.' "

He then drove away and never again exercised any control over the boy. Plaintiff testified:

"We weren't quite to the barn, close to the barn, and he said that he came down to bid the children good-bye, so they all shook hands with him, and I wouldn't shake hands with him. I was standing close to uncle, and I walked on over close to the corner of the barn where uncle was and stood close to him, and father reached out his hand and wanted to know if I wasn't going to shake hands with him, and I didn't say, and uncle told me to go and shake hands with him, and I did, and walked right back to uncle, and uncle says to father, 'Give me Tom,' and father stopped for a few minutes, and then said, 'All right, you may have Tom,' and uncle and I went up to the house. * * *. He said he would take me and raise me and give me an education and I should share in his property equal with Annie, * * * when he died."

Plaintiff also testified that some time subsequent to the conversation just related, a friend of his uncle was visiting at the home, and Mr. Dowling put his hand upon plaintiff's shoulder and said: "This is my boy." That the friend asked Mr. Dowling if the other boys were not his, and Mr. Dowling said: "They were staying there, but 'this was my boy;'" that plaintiff was then 15 or 16 years of age. Plaintiff's sister was a witness for plaintiff, and testified to a conversation had with her uncle in relation to plaintiff's inability to write a letter, and she quotes Mr. Dowling as saying, "Now, don't be too hard on Tom. I have deprived Tom of the schooling. He was the only one of the boys I could depend on to herd my cattle and take care of my stock. * * * He said he would have to do by Tom as he would by Annie when he died. * * * We would talk about all the boys, and he was always mentioning Tom as his 'stay-by,' as he called him—the one he depended on." She further stated that her uncle once remarked to her that "he had a notion to adopt Tom, but he would have to have my signature, and I told him he could have my signature. * * * He would always

speak of Tom as the favorite—as 'his boy.' He had always spoken of him as 'his boy.' " It is claimed by plaintiff that he was deprived of educational advantages and kept closely at work, and that he remained with his uncle, working and assisting upon the uncle's farm and caring for the uncle's live stock, until he had reached his majority.

Defendants testified that plaintiff was in school at the time the contract is alleged to have been made, and that he did not even see his father on that occasion. They offered testimony to show that plaintiff was given the school privileges usually accorded farm boys in that neighborhood at that time. They also deny that plaintiff did more than is usually done by a boy upon a farm, and it is claimed that, in place of remaining with his uncle until he had reached the age of 21, when he was 17 or 18 years of age he and his oldest brother had a slight disagreement with their uncle and left home; that, after three or four days, plaintiff returned and then entered the employ of his uncle for wages, and that he never thereafter worked for his uncle except in the capacity of a hired man. After this incident the oldest brother returned from time to time to the Dowling home, was always cordially received, and called the place his home, but does not appear to have entered the employ of his uncle. The younger brothers continued to make their home with their uncle, and all the children since entering the Dowling household have referred to the place as home and appear to have been kindly and generously treated there. A check issued by Mr. Dowling, payable to plaintiff, and showing upon its face that it was for wages, is in the record to contradict the claim of plaintiff that he continued to serve his uncle until he reached his majority, and it corroborates the testimony of defendants that, whenever plaintiff worked for his uncle, after reaching the age of 17 or 18, he was paid wages. Plaintiff never took the name of Dowling, but, like his brothers, was known by his father's name. Aside from whatever may be gathered from the testimony set out, there is nothing to show that he was treated any differently in

the Dowling household than were his brothers. No reason is pointed out why he should be singled out as a special favorite of the uncle. He never asserted any claim to an interest in his uncle's property until after the uncle's death. No witness testified, except as hereinbefore recited, to any statement by Mr. Dowling relating to the adoption of plaintiff, or any agreement that he might have made to treat him in any different way from the way he treated his other nephews. The father drifted away, leaving not only this boy but his other boys to be cared for by Mr. and Mrs. Dowling. He did not return to his children until after the lapse of 20 years, when apparently he needed their protection and support. It is a most remarkable circumstance that it is not even claimed that Mrs. Dowling, the woman who cared for these neglected children, had any knowledge that her husband had entered into a contract of adoption. She was never called mamma by plaintiff. Her husband was never called papa by him. Annie Dowling, the adopted daughter, had no knowledge of it. The brother, James Cain, with whom plaintiff seems to be on friendly terms, corroborates the testimony of defendants in relation to plaintiff having worked for wages for his uncle after the disagreement mentioned when the two boys left home. He also corroborates their story as to the uncle having given plaintiff a team of mules when he left the uncle's place while still a minor.

Parol agreements for the adoption of children are frequently enforced, but it is uniformly held that the contract of adoption must be definite, and that substantial performance must be proved. In *Tuttle v. Winchell,* 104 Neb. 750, it is said: "The parents' sacrifice in giving up the child to those who promise to adopt it, and the subsequent society, companionship, and filial obedience of the child, constitute the consideration for a parol contract of adoption." Plaintiff's father made no sacrifice in surrendering plaintiff. On the other hand, he shifted the responsibility of caring for his minor boys to their uncle and aunt, and they furnished each child a good home until he reached man's estate.

The making of the contract is not proved with definiteness and certainty, and, if made, plaintiff has not shown such performance on his part as would justify a court of equity in decreeing its specific performance. Indeed, a preponderance of the evidence shows that, however faithful and industrious plaintiff may have been as a small boy, when he reached the age of 17 or 18 years, he absolved himself from all responsibility to his uncle and started out in the world a free agent to do for himself. The evidence sustains the judgment of the district court, and it is

AFFIRMED.

JOHANNA HANEY ET AL., APPELLANTS, V. WILLIAM E. HEWITT, APPELLEE.

FILED MARCH 11, 1921. No. 21295.

Waters: RIGHTS OF RIPARIAN OWNERS. An owner of land on the shore of an unnavigable river, in the absence of restrictions in his grant, owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands.

APPEAL from the district court for Colfax county: FREDERICK W. BUTTON, JUDGE. *Reversed, with directions.*

Albert & Wagner and *B. F. Farrell,* for appellants.

Hastings & Coufal and *W. I. Allen, contra.*

ROSE, J.

This is a suit in equity to quiet in plaintiffs the title to a tract of unplatted land, called "Haney Island," in the Platte river south of the shore-line of platted lots 2, 4, and 9, owned by plaintiffs in sections 5, and 6, township 16, range 2, Colfax county. These lots were surveyed by the government and the title of plaintiffs thereto is unquestioned. Haney Island, however, was not thus surveyed, but plaintiffs claim that, as riparian owners, their title to the lots includes also title to Haney Island, because, as they assert, it was, by the action of the water, formed as

a separate body of land in the unnavigable Platte river between the thread of the main channel and their shore-line. Plaintiffs also claim Haney Island by adverse possession for 30 years.

Plaintiffs' allegations of ownership, of adverse possession, and of title by riparian right are denied by defendant, who insists that he is himself the owner of what plaintiffs call "Haney Island;" that it is by accretion a part of Hewitt Island, a tract of land owned by him, and that he also acquired by adverse possession title to the land in controversy. Hewitt Island was included in the government survey and, as originally platted, it was east of and further down the river than Haney Island. Hewitt Island is a large tract in the Platte river, and defendant's title thereto, as the land was originally surveyed, is conceded. At present the two islands are practically united, though at times, during high water, the river separates them. In a cross-petition defendant prays for a dismissal of plaintiffs' action and for a decree quieting in him title to the land in controversy.

The trial court found that what plaintiffs claim as Haney Island had been in the actual, open, notorious, adverse, continuous possession of defendant for the statutory period of 10 years, and that the lands in controversy were accretions to the west end of Hewitt Island. Plaintiffs' action was consequently dismissed and the title quieted in defendant. Plaintiffs have appealed.

On the issue of adverse possession the evidence shows conclusively that the possession pleaded by defendant was interrupted by the exclusive possession of plaintiffs for at least several months during the year 1912. In this respect, therefore, defendant cannot prevail.

On the issue that Haney Island is, by accretion, a part of Hewitt Island, and therefore owned by defendant, the more convincing evidence and the testimony of the greater number of witnesses lead to the following conclusions: During the time that Haney Island was a separate body of land in the Platte river, it was between the thread of

the main channel and the shore-line of the platted lots owned by plaintiffs. Before the river closed the gap between the two islands, Haney Island belonged to plaintiffs, the riparian proprietors of the north bank of the river. They owned the unplatted land in the river south of their shore-line to the thread of the main channel of the river, and this includes what was Haney Island as far east as the line running north and south through the center of section 5, township 16, range 2, Colfax county.

It is earnestly argued that the findings of the trial judge should not be disturbed because he viewed the premises before rendering his decision. The usual advantage obtained by a view of the premises is partially lost in this case on the trial *de novo* in the appellate court, because the findings below show that the trial judge was influenced largely in his decision by evidence on the issue of adverse possession—evidence wholly insufficient to sustain a finding in favor of defendant.

The judgment is reversed and the cause remanded to the district court, with instructions to enter a decree in favor of plaintiffs according to the prayer of their petition.

REVERSED.

FRANK SELLERS, V. STATE OF NEBRASKA.

FILED MARCH 11, 1921. NO. 21499.

1. **Criminal Law**: PAROLES: DISCRETIONARY POWER OF COURT. In a prosecution for grand larceny, the district court has discretionary power, on a verdict or plea of guilty, before pronouncing sentence, to suspend further proceedings, to put defendant on probation, to determine probationary conditions, and, for a violation thereof, to revoke the parole and impose upon defendant any penalty which might have been imposed upon the verdict or plea of guilty. Rev. St. 1913, secs. 9148-9150.

2. ———: ———: REVOCATION: PROCEDURE. In a proceeding to vacate a parole granted by the district court, the correct practice requires a verified information stating specifically the conduct con-

stituting a violation of probationary conditions, but a proceeding by motion, stating that defendant violated his parole, may be sustained, if defendant had timely notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial.

3. ———: ———: ———: EVIDENCE. Any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of a parole.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Jamieson & O'Sullivan, Burkett, Wilson & Brown and *J. L. Brown,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

ROSE, J.

In the district court for Douglas county Frank Sellers, defendant, was charged with grand larceny, the property stolen being an automobile. Defendant pleaded guilty, but the district court, instead of imposing the sentence prescribed by the Criminal Code, put him on probation March 16, 1919, in charge of the adult probation officer for a two-year period, on the condition of good behavior, with permission to apply for and to reside on a soldier's homestead. Before the period of probation had expired the county attorney filed a motion to revoke the parole on the ground that the probationary condition had been violated by defendant. The district court sustained the motion March 27, 1920, and, on the former plea of guilty, sentenced defendant to serve in the penitentiary a term not less than one nor more than seven years. As plaintiff in error defendant presents for review the revocation of his parole.

The legality of the motion, the regularity of the proceedings thereon, and the sufficiency of the evidence to sustain the revocation of the parole are challenged by defendant.

Can the procedure by motion be sustained? In the criminal prosecution the district court, in its discretion, upon the plea of guilty, was empowered by statute, before pronouncing sentence, to enter an order suspending further proceedings, to put defendant on probation under the charge of a probation officer, to determine the conditions and the period of probation, and, for a violation of probationary conditions, to revoke the parole and impose upon defendant any penalty which might have been imposed upon his plea of guilty. Rev. St. 1913, secs. 9148-9150.

The statutes do not prescribe forms or methods of procedure to be observed in revoking a parole. The condition on which defendant was permitted to escape the penalty for grand larceny with an opportunity to become a law-abiding citizen was "good behavior." The term "good behavior" was sufficiently definite for the freedom enjoyed by defendant under it. In the motion the county attorney informed the court that defendant had been guilty of conduct amounting to a violation of his parole, and asked that a time be fixed for a hearing on the motion, and that defendant be ordered to show cause why his parole should not be revoked and sentence imposed upon his former plea of guilty. This course was pursued. In the motion defendant was not charged with a criminal offense. Though not in prison while in charge of the probation officer, he was nevertheless in the constructive custody of the district court with restrictions on his liberty. He was called to account for violating the conditions of his parole, a question involving an abuse of the confidence reposed in him by the district court in the hope that he would develop into a law-abiding citizen without punishment. A formal information and an arraignment conforming to criminal procedure were unnecessary. On the motion charging that defendant violated the probationary conditions of his parole, he had timely notice of a hearing, the assistance of counsel, the testimony of witnesses, and a fair and impartial trial. After the county attorney had adduced his evidence in support of the charge that the parole

had been violated, defendant was allowed time and opportunity to justify his conduct by evidence in his own behalf and to give his own explanations of the testimony of the witnesses for the state. While the proper practice requires a verified information stating specifically the conduct constituting a violation of probationary conditions, the course pursued in this case did not deprive defendant of any right protected by law.

The questions relating to the sufficiency of the evidence to sustain the revocation of the parole are more difficult. The granting of a parole, instead of imposing a sentence upon a verdict or a plea of guilty, is the exercise of a discretionary power of the district court. The statutory inquiry extends to the age of defendant, to his former course of life, to his disposition, habits and inclinations, to former offenses, and to all other obtainable information. Rev. St. 1913, sec. 9149. On such information the discretion to grant a parole may be exercised, if the trial judge "be of the opinion that the accused would refrain from engaging in or committing further criminal acts in the future." Rev. St. 1913, sec. 9149. The opportunity to become a law-abiding citizen without undergoing penal servitude seems to be the ultimate aim of the legislation authorizing a parole by the district court upon a verdict or plea of guilty before sentence has been pronounced. It seems to follow that any probative evidence showing a violation of probationary conditions by conduct sufficient to convince the district court that defendant will not refrain from criminal acts in the future without punishment will sustain the revocation of a parole. Evidence that a new crime has been committed is unnecessary. While on probation defendant ignored his permission to apply for and to reside on a soldier's homestead. Without reason he was unemployed for a considerable time. He had and used a valuable automobile and also a truck, but was unable to give a satisfactory explanation as to how he acquired funds to pay for them. He had been in the company of a law-breaker who trafficked in intoxicating liquors and

had listened intently to plans for the violation of law. Instead of giving a satisfactory account of himself according to the terms of his probation, he insisted on strict proof that he had violated his parole as a condition of revocation. On inferences drawn from evidence of the character outlined, the trial court, in the exercise of a statutory discretion, vacated the parole. The evidence seems to be sufficient to meet the requirements of the law. No prejudicial error has been found in the record, and the judgment is

AFFIRMED.

RICHARD WILKINSON ET AL., APPELLEES, V. CITY OF LINCOLN, APPELLANT.

FILED MARCH 11, 1921. No. 21735.

Municipal Corporations: STREET IMPROVEMENTS: PETITIONERS: WITHDRAWAL OF NAMES. In the absence of fraud or of statutory or municipal authority, a petitioner for a city pavement cannot withdraw his name after the petition has been duly approved and the paving legally ordered by the city council.

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

C. Petrus Peterson, Charles R. Wilke, R. A. Bochmer and *Sterling F. Mutz,* for appellant.

Burr & Brown, contra.

ROSE, J.

This is a suit in equity to prevent the city of Lincoln from entering into a contract to pave Holdrege street between Twenty-seventh street and the alley west of Nineteenth street. Property of each plaintiff will be subject to assessment to pay a proportionate share of the cost of the improvement, if made. Insufficiency of the paving petition is pleaded, on the ground that some of the peti-

tioning property owners withdrew their names before the paving contract was let, leaving the property owned by the remaining petitioners insufficient to authorize the paving. This was the controlling issue in the case. The trial court held that the withdrawing petitioners acted within their rights and granted an injunction against further proceedings under the petition. The city has appealed.

Under authority conferred by the city charter, the council passed a valid resolution approving the petition and ordering the paving. The petition was then legal and sufficient in every respect. It was after the improvement had been thus ordered that plaintiffs withdrew their names. Within the meaning of the city charter, the action of the city council in ordering the paving was final as to the right of a petitioner to withdraw his name from the paving petition. The right to withdraw the name of a petitioner, in the absence of fraud or of statutory or municipal authority, ended with the resolution. In passing it the city council not only acted for all of the petitioners but for all other citizens of the municipality. The validity of municipal acts is not left to the changing attitude of private petitioners. Public policy does not permit a petitioner to invoke municipal power for the public welfare and, by withdrawing his name without specific statutory or municipal authority, destroy the power invoked by him after it has been legally exercised by the city council. This principle of municipal law is sound and is well established by precedent.

On the part of city officers, there was no fraud to justify a withdrawal of names from the paving petition, nor was such authority granted by state statute or municipal ordinance.

For the purpose of granting an injunction, it will not be presumed that assessing officers will cast an unlawful burden on property in the paving district. A remedy in such an improbable contingency will not be wanting, but it has no place under the issues and the proofs in the present case.

The injunction was erroneously allowed. The judgment of the district court is therefore reversed and the suit dismissed at the costs of plaintiffs in both courts.

REVERSED AND DISMISSED.

EARL BOYD SMITH, APPELLEE, V. J. H. BAILEY ET AL., APPELLANTS.

FILED MARCH 11, 1921. No. 21320.

1. **Evidence:** WRITTEN CONTRACT: PAROL EVIDENCE. Where a written contract is not uncertain, indefinite or ambiguous, and where the terms used have an apparent intent, which cannot reasonably be taken to have other meaning than as used, the statute (Rev. St. 1913, sec. 7909) has no application, and evidence, extrinsic to the writing, cannot be admitted to show an oral agreement during the negotiations leading up to the signing of the written instrument.
2. ———: ———: ———. Even though a written contract, in the light of its purpose and subject-matter and the circumstances under which it was executed, may have been determined to be incomplete, extrinsic evidence cannot be admitted for the purpose of proving a supplemental provision, inconsistent or in conflict with the expressed intention of the parties, as embodied in the writing.

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

L. H. Blackledge, Bernard McNeny, T. S. Allen and *E. G. Maggi*, for appellants.

Wilmer B. Comstock, contra.

FLANSBURG, J.

This action seems to have been for damages, as well as to recover $3,000 as the agreed price for certain wells constructed by the plaintiff. The case was submitted to the jury as an action to recover the contract price, and the jury returned a verdict of $2,500 against defendants. Defendants appeal.

The record shows that there had existed a shortage of water in the municipal wells of the city of Red Cloud. The city council had ordered tests made for other wells and had endeavored to increase the water supply, but without success. Plaintiff was confident that he could furnish a sufficient amount of water by constructing shallow wells at certain points and by siphoning water from them into the deeper city wells. The plaintiff's plan required no pumps. The city pumps were sufficient to draw the air from the siphon, which would commence the flow of water, after which, it was considered, the siphon would be self-operating and provide a continuous stream of water, with little cost of operation or maintenance.

For some reason, the city made no direct agreement with plaintiff, but a number of citizens of Red Cloud, the defendants in this case, did enter into a written agreement with him, and it appears that they had some sort of an understanding with the city that they would be reimbursed for what expenditures they should make. The written contract was drawn up and circulated among the citizens of the town, 54 of whom signed.

It provided that the plaintiff, and one Nelson, to whose rights the plaintiff has now succeeded, should construct certain wells, ditches and conduits within 60 days from the signing of the contract, and thereafter should receive $1 for every day that they should be able to conduct into the city wells 250,000 gallons of water. The contract further recited that it was to be "subject to the *privilege* on the part of the * * * (citizens) to purchase the well or wells and system by which * * * (plaintiff and Nelson) supply said water for $3,000, in which event the obligation to pay $1 a day ceases. The said Smith and Nelson agree to sell to the first parties *at any time* for $3,000 all their rights and interests in any well or wells, ditches, pipes, conduits, and other means of supplying and conducting said water."

The testimony in behalf of the plaintiff is to the effect that the plant was constructed, as agreed, at a cost to

him of from $2,000 to $2,500, and that 250,000 gallons of water, or as much thereof as the city was able to use, was conducted into the city wells daily for the period of three years, during which time the plaintiff received from the defendants $1 a day. After the three years, however, the defendants refused to make any further payments, though the plaintiff claimed to be able and willing to continue in the performance of his contract. The defendants justify their action in refusing to make further payments on the ground that the wells constructed by the plaintiff fell far short of supplying the amount of water specified in the contract.

Error is predicated upon the admission of evidence and upon instructions given by the court, based upon the evidence so introduced. The evidence complained of was admitted upon the theory that the contract was ambiguous, indefinite and incomplete, and that oral testimony and extrinsic evidence could be resorted to, to supplement the written contract and to establish the real and entire agreement between the parties.

By the plaintiff's testimony, which is corroborated to some extent by the minutes of the city council, there is evidence tending to show that the plaintiff had an understanding with certain signers of the contract that, if the wells produced the amount of water represented, and that if the project proved to be successful for the period of one year, it should then be obligatory upon the citizens signing the contract to purchase the plant from the plaintiff at the price of $3,000. It is upon such verbal agreement that the judgment of the lower court is based.

The vital question in the case before us is whether such an understanding and agreement may be allowed to be shown by evidence extrinsic to the written instrument.

Though generally held that contracts for the performance of services or for the continuous furnishing of commodities are, when the contract itself specifies no period of duration, terminable, upon reasonable notice, at the will of either party to the contract (*McCullough-Dalzell Cruci-*

ble Co. v. Philadelphia Co., 223 Pa. St. 336; *Stonega Coal & Coke Co. v. Louisville & N. R. Co.*, 106 Va. 223, 9 L. R. A. n. s. 1184; *Echols v. New Orleans, J. & G. N. R. Co.*, 52 Miss. 610; *Bailey v. Stafford, Inc.*, 166 N. Y. Supp. 79; 13 C. J. 604, sec. 630), the case here hardly comes within that rule. The plaintiff's contract in this case was to build an adjunct to the city water plant, and his wells, by automatic operation, were expected to increase the flow of the city wells 250,000 gallons a day. His contract was more than the furnishing of a commodity, it was, as well, to build a structure and to make the necessary expenditures to that end. It is apparent from the contract that it was not contemplated by the parties that, the structure being complete and in successful operation, the citizens obligated could, at will, declare the duration of the contract at an end within a few days or in one or two years after the performance of the contract had begun. The plaintiff had made an investment, had constructed an addition to the city water plant, and these properties would obviously be rendered absolutely worthless to him, should his contract be terminated. Provision was made so that he might derive an income from his investment and have his capital protected. He was to receive $1 a day for every day that his apparatus should perform and for every day that he should be able to conduct into the city wells the required amount of water. The rate he was to receive—$365 a year—was a sufficient income on a $2,000 or $2,500 investment, when there was to be no cost of operation, and little expense for maintenance. With the object, however, of allowing the citizens obligated to put an end to the daily-payment provision of the contract, it is apparent that the privilege of the purchase of the plant at $3,000 was inserted.

The contract has a definite legal meaning as to its duration. The citizens who signed this contract could not have been heard to say that they had a parol understanding and were to be relieved from the daily payments at any time they desired, even though the plaintiff's plan should prove successful and he be able to deliver the amount of

water agreed upon. Such an understanding would have been directly repugnant to the written instrument, just as much so as the understanding that the plaintiff has sought to prove by his extrinsic evidence.

But the evidence introduced, and now complained of, had a bearing, not alone upon the duration of the contract, but was offered for the purpose of showing that, at the end of one year, the citizens signing the contract were expressly bound to purchase the plant at $3,000. Such an oral agreement would have been in direct contradiction to the express terms of the written instrument, for the written provision is that these parties shall have the "privilege" of purchasing the plant, and that the plaintiff shall sell to them "at any time." The contract gives them the privilege of purchasing, and the very grant of that privilege negatives any affirmative obligation on their part to purchase. Extrinsic evidence can never be admitted to prove a supplementary provision, inconsistent or in conflict with the expressed intention of the parties, as embodied in the written instrument. 22 C. J. 1290, sec. 1720.

Furthermore, we can see nothing ambiguous in the contract, providing that these citizens should have the privilege of purchasing. On the other hand, such a provision was entirely consistent with the idea that the citizens should thus be given the opportunity of bringing the performance of the contract to a close before its term would otherwise actually expire. It is only when there is uncertainty, indefiniteness, or ambiguity in a contract that it is open to construction, and it is only in such cases that the statute (Rev. St. 1913, sec. 7909) has been held to apply. *Campbell v. Hobbs,* 97 Neb. 833; *Hamilton v. North American Accident Ins. Co.,* 99 Neb. 579; *Richey v. Omaha & Lincoln Railway & Light Co.,* 100 Neb. 847; *Bank of Waverly v. Daily,* 103 Neb. 7.

Another reason would prevent the court from enforcing an oral agreement against all those citizens signing the contract. No attempt was made to show that more than a very few of the signers were aware of the alleged parol agree-

ment, upon which plaintiff relies. The written contract was circulated and signed by all of the other 54 citizens, who, so far as the evidence shows, were informed of nothing but what was contained in the written instrument, and they, of course, would not be bound by an understanding or verbal agreement, unknown to them.

The contract, it appears to us, was one whereby the plaintiff was to receive $1 for each day that his plant was found capable of furnishing 250,000 gallons of water to the municipal wells, such daily payments to continue so long as the plaintiff was able to continue performance, provided, however, that the citizens, during the successful performance by the plaintiff, were given the privilege of bringing the contract to a close and of terminating the obligation to make daily payments by a purchase of the plant for $3,000. The contract, however, contained no compulsory requirement that they should make such purchase, and cannot be supplemented by extrinsic testimony to show that such was the agreement. Though the plaintiff is entitled to hold the defendants to the daily payments contracted, so long as he is able to perform, nevertheless, for a failure on their part to carry out their agreement, his remedy would be for damages growing out of that breach.

For the reasons given, it is our opinion that the judgment of the lower court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN O. ANDERSON, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MARCH 11, 1921. No. 21659.

1. **Appeal: AFFIRMANCE.** A verdict of the jury, which is not contrary to law, will not be set aside, where there is competent evidence to support it, unless this court can, from the record, say that the verdict is clearly wrong, or that it is the result of passion, prejudice or mistake.

2. ———: INSTRUCTIONS: PRESUMPTION. Though it may appear probable, it will never be presumed, that the jury disregarded one of the instructions given by the court, where the record does not positively and affirmatively show such to be the fact.

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

C. A. Magaw, T. M. Hewitt, T. F. Hamer and *T. W. Bockes,* for appellant.

Cook & Cook and *W. A. Stewart, contra.*

FLANSBURG, J.

Action for damages alleged to have been caused to crops and personal property by flood resulting from the defendant's railroad embankment. Plaintiff recovered a judgment, and defendant appeals.

The defendant's principal objection is that the evidence is insufficient to support the verdict. Plaintiff's testimony is to the effect that he is the owner of a farm, and that the defendant's railroad runs across the south part of his land; that the land in this territory slopes from the northwest to the southeast, and that just north of the railroad is a pond of water which is fed by waterways, extending from the northwest. It is the contention of the defendant that the evidence is insufficient to show that the railroad embankment interrupts any natural waterway. On this question maps were introduced showing elevations, and the testimony in behalf of the plaintiff is to the effect that the waterway to the north of the railroad, which empties into the pond, can also be identified and traced as it passes to and beyond the railroad to the south. South of the railroad the waterway is said to extend southeast, and appears as a depression, about two feet deep, across a meadow. The rains during the period preceding the flood were very excessive, and the water was backed up from the defendant's railroad embankment over the plaintiff's land and remained there for weeks. In the face of the testimony in behalf of the plaintiff, we are unable to say that the jury's verdict, to the effect that the railroad embank-

ment interfered with a natural waterway and was responsible for the flooding of plaintiff's crops, is clearly wrong. The trial judge passed upon the testimony and found it sufficient and overruled the motion for a new trial. We are unable to say that the verdict should be set aside.

The defendant further complains that the jury disregarded one of the instructions of the court. By that instruction, the court directed the jury to find for the defendant, in case the jury should determine that the damage to the crops complained of was caused partly by rainfall, for the reason that there was no evidence to separate the damage caused by the back-water.

Plaintiff had claimed damage in the amount of $2,512, but the jury's verdict was $1,050. The defendant argues that the jury must have arrived at this amount as damages by reason of the finding that the damage had been caused in part by rainfall. Such conclusion does not necessarily follow. It was shown that other like crops in the vicinity were not injured by the rains. It was within the province of the jury to determine the amount of the plaintiff's damage, and it may have been that the jury, instead of finding that the total amount of damage was $2,512, as the plaintiff claimed, and that a part of such total damage was caused by rainfall, found that the total damage was $1,050 only.

Defendant raises no other objections, and we see no reason for a reversal of the case. It is therefore

AFFIRMED.

LOUIS SWANSON V. STATE OF NEBRASKA.

FILED MARCH 11, 1921. No. 21723.

Jury: DELINQUENCY: TRIAL BY JURY. The trial of a person charged with causing or contributing to the delinquency of a child, in violation of section 1263, Rev. St. 1913, is required to be conducted in the manner that is provided generally by the Criminal Code for other misdemeanors, and the accused is entitled to a jury trial.

Swanson v. State.

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

Gray & Brumbaugh and *Macfarland & Macfarland,* for plaintiff in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

FLANSBURG, J.

Defendant was charged with contributing to the delinquency of a female child under the age of 16 years, in that he did carnally know and have sexual intercourse with her. The case was tried to the judge of the juvenile court without a jury, though a jury was demanded. The defendant was adjudged guilty and sentenced to imprisonment for a period of 90 days in the county jail and ordered to pay the costs of prosecution.

This action was based upon section 1263, Rev. St. 1913, providing that any person, causing or contributing to the "delinquency" of a child, "shall be guilty of a misdemeanor, and upon trial and conviction thereof, shall be fined in any sum not exceeding five hundred dollars, or imprisonment in the county jail for a period not exceeding six months."

That provision of the statute was not enacted as a part of the juvenile court law. It appears as a separate act, chapter 195, Laws 1905, under a title as follows: "A bill for an act to provide for the punishment of persons responsible for, or contributing to, the dependency or delinquency of children." The juvenile court law (Rev. St. 1913, secs. 1244-1262), on the other hand, is found under chapter 59, Laws 1905, under the title: " A bill for an act to regulate the treatment and control of dependent, neglected and delinquent children." In 1913 the legislature adopted the Revised Statutes, as prepared and presented by the statute revision commission, and under that revision the two laws mentioned were included in the same chapter, as a part of the same act, and under the subject "Juvenile Courts."

It is contended that the statute, here in question, was enacted in 1905 as a supplement to the juvenile court act, that the general procedure of the juvenile court was intended to govern, and that such relation between the two statutes is, furthermore, borne out by the subsequent action of the legislature, combining the two enactments in the revision of 1913.

The statute, making it a misdemeanor to contribute to the delinquency of a child and prescribing punishment for violation, is essentially a criminal statute, and does not purport to dispense with a jury trial, nor with other requirements found in the general Criminal Code, nor does it expressly provide that prosecutions under it shall be conducted in the summary manner afforded by the rules of procedure in juvenile courts. The mere grouping of these two laws under one chapter did not, of course, broaden or enlarge the powers under either.

Juvenile courts are not criminal courts. Their function is not to try criminal charges and punish for criminal offenses. It is only upon the theory that they are not criminal courts that their establishment, and that their methods of procedure, can be sustained as constitutional. Children are considered wards of the state. When a child is found without proper parental care, in poverty, or neglected, or incorrigible, or surrounded by vicious and immoral influences, tending to prevent it from growing into a useful and law-abiding citizen, the juvenile court takes up the matter, not as the trial of a criminal charge, but as a problem to determine the status of the child, to see whether the child is dependent, neglected or delinquent, and hence whether it has become necessary, for the welfare of the child and in the interest of the public, that the state, in the particular instance, shall step in, and require a change of the custody of the child, provide other associates or a new environment, and provide for such care and training as may lead to its reformation. Such a proceeding is obviously quite different from a criminal proceeding, and is not penal in character.

The law governing the procedure of juvenile courts recognizes that criminal charges should be handled in a different manner, and by section 1245 it is provided that in all trials, where a delinquent child is charged with a crime, a jury may be demanded. For a discussion which brings out the distinction between criminal charges and those matters which are properly within the purview of the juvenile court, see *State v. Burnett,* 179 N. Car. 735; *Ex parte Bartee,* 76 Tex. Cr. Rep. 285.

Under the statute involved in this case, the person who causes or contributes to the delinquency of a child is made guilty of a misdemeanor. Prosecution upon that charge is clearly a criminal prosecution. It is not a proceeding to determine a status, but to establish guilt and inflict punishment. It is not such a proceeding as is within the general purview of the jurisdiction of a juvenile court, nor one in which special procedure or summary punishment can be logically justified. 14 R. C. L. 277, sec. 48.

In some states, where the legislature has attempted to provide that the prosecution of such charges shall be had before the juvenile courts without a jury and without that general protection which must be afforded in criminal trials, the laws have been declared invalid, since they impair the constitutional rights of the accused. *Mill v. Brown,* 31 Utah, 473; *Robison v. Wayne Circuit Judges,* 151 Mich. 315; *State v. Tincher,* 258 Mo. 1.

The statute involved, as we construe it, is not a part of the juvenile court act, and prosecutions on the charge of causing or contributing to the delinquency of a child are not matters for summary disposal by juvenile courts, but are for the criminal courts, and are to be tried before a jury and in the manner provided by the general Criminal Code.

The refusal to grant a jury trial is fatal to the proceeding.

REVERSED.

JOSEPH NIGHTINGALE V. STATE OF NEBRASKA.
PHILIP NORTON V. STATE OF NEBRASKA.

FILED MARCH 11, 1921. NOS. 21721, 21722.

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

Gray & Brumbaugh and *Macfarland & Macfarland,* for plaintiffs in error.

Clarence A. Davis, Attorney General, and *C. L. Dort, contra.*

FLANSBURG, J.

These cases were tried together with the case of *Swanson v. State, ante,* p. 761, are decided upon the same record, and involve the same question. They are controlled by the ruling in the *Swanson* case and are reversed for the reasons given therein.

REVERSED.

JAMES M. PRIME, APPELLEE, V. WAITE H. SQUIER, APPELLANT.

FILED MARCH 11, 1921. No. 21246.

1. **Corporations:** SALE OF STOCK: RESCISSION. Where corporate stock is sold upon the faith of representations of fact as to the corporation and its property, under an express agreement that if, after careful investigation, the buyer is not entirely satisfied the property is as represented, he shall receive his money back upon tender of the stock, the intent of the contract being that the buyer's right to rescind shall depend upon the truth or falsity of the representations, rather than upon his mere taste or liking, he is presumed to have undertaken to act reasonably and fairly in the ascertainment of the facts. In such case, his decision that he was not satisfied is not conclusive, and, to entitle him to rescind, it must appear that the facts were such as to justify a reasonable man in reaching that conclusion.
2. ———: ———: TRIAL: INCONSISTENT INSTRUCTIONS. In an action to recover the purchase price of corporate stock under an agreement permitting the buyer to rescind, if satisfied, upon investigation, that the property was not as represented, the court, at plaintiff's request, instructed that, if the plaintiff honestly and in good faith decided it was not as represented, his decision was conclusive, though wrong. On its own motion, the court also instructed that the evidence coming to the plaintiff must have fairly and reasonably satisfied him that the property was not as represented. *Held*, that the two instructions were inconsistent, and the error in charging that the buyer's decision was conclusive, though wrong, was prejudicial, and was not cured by instructing that the evidence must have fairly and reasonably satisfied him.

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

Montgomery, Hall & Young and *Emmet Tinley*, for appellant.

Kennedy, Holland, DeLacy & McLaughlin, contra.

DORSEY, C.

The defendant, Waite H. Squier, sold to the plaintiff, James M. Prime, 1,250 shares of the stock of the Onahman

Iron Company, a Minnesota corporation, with mining property near Duluth, for $3,750, and at the same time executed to the plaintiff a written agreement to the following effect: "I hereby guarantee to return to you the amount so paid me * * * if prior to October 1, 1917, after a visit to the mine and a careful inspection of same, you are not entirely satisfied the property is all that you have been led by me and others to understand it is; the same to be paid to you upon due transfer to me of your said stock."

The plaintiff did not inspect the mine until May, 1918, his trip having been deferred by mutual consent, and upon his return in June, 1918, from his visit to the mine he tendered back the stock and made formal demand for the return of his money, which was refused. This action was afterwards brought to recover the purchase price of the stock under the terms of the agreement above quoted. The verdict and judgment were for the plaintiff, and the defendant has appealed.

The questions raised upon this appeal depend for their solution largely upon a construction of the contract as to the effect upon the plaintiff's right to rescind the sale, of the words "you are not entirely satisfied," appearing therein. The trial court, at the plaintiff's request, gave the following instruction: "You are instructed that, if you believe from a preponderance of the evidence that the plaintiff honestly and in good faith from the evidence received by him on said trip of visitation reached a conclusion that the mine and its management were not as represented to him by defendant and others, then his decision is conclusive, and you will find for the plaintiff, even though you believe that his decision was wrong." The giving of this instruction is assigned as one of the principal grounds for reversal.

Counsel for the plaintiff and appellee rely upon *Thurman v. City of Omaha,* 64 Neb. 490, as authority for the foregoing instruction. In that case a bid was made for city bonds, "subject to our attorney's opinion as to the

legality of the issue," and the attorney refused to approve the issue; whereupon Thurman refused to take the bonds and brought suit to cancel the certified check accompanying his bid. In reaching the conclusion that, under the circumstances of that case, the attorney's opinion was conclusive, it is said in the opinion: "In some cases where the obligation of one of the parties is made dependent upon his approval of the subject of the contract, * * * it is implied that such approval be given whenever the facts are such as to lead the trier of fact to the conclusion that it ought to have been given, and if the trier of fact so concludes, disapproval or failure to approve by the party to whom the matter is left in the contract may not be availed of. In other cases the opinion or decision of the person designated in the contract is conclusive, and his pronouncement will not be reviewed, if he actually and honestly exercises his judgment and states his opinion. The nature of the contract and the character of the required decision or opinion must determine to which class a given cause is to be referred. Contracts of purchase and sale are usually of the latter class, and contracts of any sort are, as a rule, to be put in that class where the approval stipulated for involves either judgment in matters of taste or the personal opinion of one chosen for some special and peculiar reason. * * * If a contract of sale of something already existing is expressly made subject to the approval of the purchaser, or of some one for him, and such approval involves personal judgment or opinion, the person whose judgment is required is made the sole arbiter, and his decision is conclusive, provided he really passes upon the question and reaches a conclusion honestly, whether his conclusion is right or wrong. The parties have stipulated for his opinion, not for the decision of a judge or jury."

As intimated in the discussion from which we have quoted, the nature of the contract and the character of the required opinion is to be considered in determining whether the case falls within that class in which the opinion

of the party designated is to be accorded conclusive weight, or within that class in which its reasonableness or propriety is to be tested by judicial inquiry. In other words, the intent of the parties, as disclosed by their agreement, must govern. Examining the contract which forms the basis of the plaintiff's alleged right to rescind the sale of the mining stock and to have his money refunded, the following facts appear therefrom: First, that representations had been made by the defendant to the plaintiff relative to the mining property; second, that the plaintiff's right to return the stock and receive his money back was made dependent upon the truth or falsity of those representations; third, that the plaintiff was to make a careful inspection of the mine and to base his determination as to the truth or falsity of the representations upon that inspection; and, fourth, he was to be entirely satisfied that the representations were true. It was, in short, a completed sale of mining stock, subject to rescission by the plaintiff upon condition subsequent, namely, that the plaintiff should have the right of later inspection to determine whether the representations were true, and to be satisfied that they were true. He said to the defendant, in effect: "I will buy your stock, but I reserve the right to return it and get my money back if, when I inspect the mine, I find it is not as you represented it." The plaintiff purchased the stock on the faith of the defendant's representations, but upon condition that he might verify them later, and, if he found them false, might rescind his purchase.

It is the representations which differentiate the case at bar from those cases in which the opinion or judgment of the purchaser in a contract of sale has been held conclusive. The contract was not an unqualified reservation to the plaintiff of the right to rescind the sale if, on later inspection, he was not satisfied with the property or with his investment. The right to rescind was reserved to the plaintiff if, after inspection, he was not satisfied the property was what he had been led to believe it was. If the

contract were that he was to be satisfied with the property or investment, it would call for that state of mind or mental condition, called "satisfaction," which relates solely to the personal taste or liking. If, on the other hand, he was to be satisfied, by inspection, as to whether certain things that had been told him with reference to the property were true or false, it called for the exercise of other mental faculties than those of mere taste or liking, or those which produce "satisfaction," in the sense of "contentment" with a thing; it brought into play the faculties of weighing evidence, of reasoning and of judging, and, in that connection, to be "satisfied" means to be "convinced."

An example of those cases which call for personal taste or liking is to be found in *McCrimmon v. Murray*, 43 Mont. 457, 464, cited by counsel for the plaintiff in support of the rule adopted by the trial court in the instruction under consideration. In that case the plaintiff furnished information to the defendant as to a vein of ore upon the latter's promise to pay him a certain part of the selling price of the mining claim, "if upon investigation by the defendant, in his judgment, the said information should be satisfactory to him." It was decided that his judgment was controlling and conclusive, though it was to be exercised honestly and in good faith.

In *Paulson v. Weeks*, 80 Or. 468, also, a like conclusion was reached, where stock was sold with the reservation of the right to rescind, "if plaintiff should at any time thereafter become dissatisfied with the purchase of said shares of stock."

And if the contract in the instant case had been that the plaintiff should have his money back if, upon inspection, the mine or his investment was not satisfactory to him, there would be strong ground for holding that he had stipulated for his personal taste or liking and was entitled to the exercise of it. But where the transaction, in its very essence, involved the truth of the representations upon which he had bought the stock, and he had stipulated for the right to rescind in case he was not satisfied, after

a careful inspection, that they were true, it was not a matter of personal taste or liking dependent upon his uncontrolled judgment, but a question as to the existence or nonexistence of certain facts, in the ascertainment of which he is presumed to have undertaken to act reasonably and fairly. From this, it is said in *Wood Reaping & Sewing Machine Co. v. Smith,* 50 Mich. 565, "springs a necessary implication that his decision in point of correctness and the adequacy of the grounds of it are open considerations and subject to the judgment of judicial triers."

By the instruction complained of the jury were limited in their inquiry to finding whether or not the conclusion that the mine and its management were not as represented was arrived at by the plaintiff honestly and in good faith, from the evidence received by him on his trip of inspection. If he did so, his decision was conclusive. It was not required that the jury find that the facts upon which he founded his conclusion were such as to justify a reasonable man in reaching that conclusion. In view of the fact that from the contract itself it plainly appears that the sale was induced by representations, and that it was the intent that the plaintiff's right to rescind should depend upon the accuracy thereof, we are convinced that he should not be permitted arbitrarily or without reason to say that he was "satisfied" the representations were false, even though a reasonable mind, in the light of the same evidence, would be convinced to the contrary. The instruction in question was therefore erroneous. *Fessman v. Barnes,* 108 S. W. (Tex. Civ. App.) 170; *Fechteler v. Whittemore,* 205 Mass. 6; *Gladding, McBean & Co. v. Montgomery,* 20 Cal. App. 276; *Waite v. Shoemaker & Co.,* 50 Mont. 264; *Duplex Safety Boiler Co. v. Garden,* 101 N. Y. 387.

In other instructions, given on the court's own motion, the jury were told that the right to rescind "must be reasonably exercised" by the plaintiff, and that before he could exercise that right the evidence coming to him must "fairly and reasonably" satisfy him that the mining propo-

sition was not a prosperous and successful concern, as represented. These instructions, however, would necessarily lose their force and be superseded in the jury's mind by the instruction hereinbefore considered, given at the request of plaintiff, in which the issue was made to turn wholly upon the plaintiff's honesty and good faith, and the jury were told that, if he was honest in it, his decision was conclusive, though wrong. This was the same as saying that his decision, though unreasonable, was conclusive if honestly arrived at. It is evident that these instructions cannot stand together, and that the instructions given on the court's own motion do not cure the error in the other instruction.

When the taking of evidence was concluded, the defendant moved for an instructed verdict in his favor, on the ground that the evidence was insufficient to entitle the plaintiff to recover, and the court's refusal to so instruct is assigned as error. We have read the evidence offered on behalf of plaintiff, which consisted of his testimony as to what he saw and what occurred during his visit of inspection to the mine, and the letters that he wrote to the defendant after his return. He testified, also, as to the representations that had been made to him relative to the mining stock and property. We are not prepared to say that, under proper instructions, this evidence would have been insufficient to show *prima facie* a right of recovery on the plaintiff's part. We are satisfied that there ought to be a new trial of this case in accordance with the correct rule governing the plaintiff's right to rescind the sale, and the evidence can then be tested and its sufficiency determined with reference to that rule. These observations apply also to certain alleged errors in the rulings of the trial court in the admission of testimony.

For the reasons stated, we recommend that the judgment of the court below be reversed and the cause remanded.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the court below is reversed and

the cause remanded, and this opinion is adopted by and made the opinion of the court.

REVERSED.

ANDREW G. WOLFENBARGER, APPELLEE, V. JOSEPH B. BRITT ET AL., APPELLANTS.

FILED MARCH 11, 1921. No. 21361.

Contracts: JOINT CONTRACT: PARTIES. Where two or more parties enter into a contract in which their interest in the subject-matter is joint, and the parties have undertaken to accomplish together a single result, and any advantage accruing to any one of them by virtue of the same contract is for the benefit of all, the contract is joint, and not joint and several.

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

C. G. Miles and *G. H. Risser,* for appellants.

Ross P. Anderson, contra.

TIBBETS, C.

This is an action by plaintiff against the defendants, and each of them, to recover for attorney's fees rendered by the plaintiff for the defendants at their request and for cost and expenses paid and expended. Trial had to a jury, who returned a verdict for the plaintiff and against the defendants for the sum of $400.89. Judgment on the verdict. Defendants appeal.

The plaintiff, a practicing attorney in the city of Lincoln, was employed by certain residents, citzens and taxpayers of school district No. 139 of Lancaster county, Nebraska, in reference to the establishment of a location for a schoolhouse and the voting of bonds. There is no contention but what the services were rendered and that the plaintiff was employed to render them. The contract was oral. The defense is principally that the cause of action

did not accrue to the plaintiff against the defendants made parties alone, but jointly with one Douglas H. Roberts and L. L. Turner, who are still living. This the defendants claim was substantially a plea of nonjoinder or misjoinder of defendants on a joint contract, and that the same did not constitute a joint and several contract or a several contract. Defendants also allege that they have paid all the claims and demands against defendants, and a full settlement made. If the contract of the defendants was joint, then the cause should be reversed. If the obligations of the defendants were joint and several, or several, then that defense of the defendants is unavailing. The question of what constitutes a joint and several obligation or a several one is complicated in its nature. There is no question but what if the contract was joint, then under sections 7598, 7599, Rev. St. 1913, defendants' contention is well taken.

Section 7598 reads as follows: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

Section 7599 provides: "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason being stated in the petition."

The testimony shows that the contract was made with the parties named defendants, and also one Douglas H. Roberts and L. L. Turner; it also shows that they are living, and no attempt was shown why they should not have been made parties and service had upon them. The employment was very informal in its nature. A meeting was held at Bethany, in which said district is located, and the defendants, or some of them, and also the said Roberts and Turner being jointly interested with all other defendants, and seeking the same object, attended said meeting,

and Turner was the man who suggested the employment of plaintiff to prosecute the interests of the defendants, and both were equally bound, by their conduct, as the defendants.

Decisions upon contracts of this kind are rare. Usually some instrument in writing or some formal acknowledgment of a contract is produced under which the parties claim, but in the instant case the services were rendered at the request of certain parties. The contract on the part of the plaintiff included no agreement as to the price to be paid for the service, and no agreement as to who should pay the cost and expense incidental to carrying on the litigation. Questions arose as to the value of the services, the payment of the costs, and other matters connected with the litigation that ensued, among which, and on which the defendants rely principally as a defense (outside of the demurrer), was the fact that an agent, as contended by the defendants, made an agreement after the services were nearly completed by which the payment of $400 by the defendants to the plaintiff would be in full satisfaction of all claims and demands plaintiff might have against them for services rendered and expenses and costs advanced. There was also a complaint on the part of the defendants that the court had failed to give certain instructions requested, and gave on his own motion certain erroneous instructions.

In view of the conclusion at which we have arrived, it will only be necessary to enter upon the discussion of the one question, whether the plaintiff can maintain this action against these defendants without joining as defendants the parties heretofore specified. "Where two persons were responsible on the sealed instructions to pay for the erection of a building, and both superintended the work, one acting in the other's absence, and always with a joint view to the same object, a parol promise by each at different times, to waive the written contract and pay the reasonable value, makes the promise joint." *Munroe v. Perkins*, 20 Am. Dec. 475 (9 Pick. (Mass.) 298).

In 6 R. C. L. 878, sec. 266, it is stated: "In some jurisdictions the rule prevails than an obligation *in solido* will never be presumed. But the general rule is that an obligation entered into by more than one person is presumed to be joint, and that a several responsibility will not arise except by words of severance. In other words, an obligation undertaken by two is presumably joint, in the absence of express words to render it joint and several. * * * One of the rules for determining whether a contract is joint is whether the interest of the parties in the subject-matter is joint."

In the case of *Alpaugh v. Wood,* 53 N. J. Law, 638, the court held: "Wherever an obligation is undertaken by two or more persons, the general presumption is that it is a joint and not a several obligation; and this presumption is strengthened when the promisors have undertaken to accomplish together a single result. Such presumption is not defeated by the fact that each promisor is to contribute separately to the entire result for which they bargain, and is entitled to a distinct interest under the contract, for which he would have a separate remedy."

In *Field & Field v. Runk,* 22 N. J. Law, 525, the principle laid down in the preceding case was affirmed.

In the case of *Dumanoise v. Townsend,* 80 Mich 302, the court in the opinion say: "And in determining whether there is a joint interest in the contract the benefit accruing from the contract has an important bearing."

In the case of *Fox v. Abbott,* 12 Neb. 328, Judge Maxwell in the opinion says: "The supreme court of Ohio in construing section 77 of the Code (section 84 of Nebraska) say: 'In an action upon a joint contract, all who are jointly liable must be joined. In this respect the rule of the common law has not been changed by our Code.'" Affirmed in *Young v. Joseph Bros. & Davidson,* 5 Neb. (Unof.) 559, and *Gyger v. Courtney,* 59 Neb. 555.

In *Perkins County v. Miller,* 55 Neb. 141, this court held: "In an action upon a joint contract, all who are jointly liable should be joined as defendants, and if ser-

vice of summons cannot be had upon all, the action may proceed against those served."

In the case of *Bowen v. Crow*, 16 Neb. 556, the court in the opinion states: "The only question presented to this court for consideration is, whether or not an action can be maintained against one of several joint debtors alone, or whether the action should be against all. The law seems to be settled that the action must be against all."

Under the light of the cited authorities, and many others that might be cited to the same effect, we are compelled to come to the conclusion that the liability of the defendants was joint, and that the plaintiff should have united in the action, or in some way account for not so doing, the other two obligors. The test running through all of the authorities seemed to be whether the services rendered were for the joint benefit of all; they all stood upon an equality; the action was not for the benefit of one of them, but of all of them; it was inseparable. The determination of the actions which plaintiff was employed to prosecute would be for or against them all jointly, and not severally.

We come to this conclusion very reluctantly; we see no escape from this dilemma. Our statute is only an affirmation of the common law rule prevailing as to the necessity of making all obligees jointly interested parties. In the case of *Harker v. Burbank*, 68 Neb. 85, Judge Barnes, in writing the opinion, states: "It is thoroughly settled at the common law that joint obligees must sue jointly in actions *ex contractu*, and if it appears on the face of the pleadings in such cases that there are other parties to the contract who ought to be joined as plaintiffs, but are not, it is fatal to the action, and the defendant may raise the objection by demurrer or by motion in arrest of judgment, or he may urge it as a ground of reversal on error."

The common law rule of the necessity of making all those jointly liable parties has been modified in some states by statute, more especially in the state of Iowa. The legislature of Iowa must have conceived that in modern conditions, relations, and necessities, as they exist, the com-

mon-law rule was not a just rule to be followed. The action of the Iowa legislature has been followed by other states, and it can be for no other purpose than as expressed above. The judgment in the instant case undoubtedly may, and undoubtedly does, work a hardship on plaintiff. But the common-law rule and the statute are perfectly plain as to the necessity of making all the joint obligors parties.

We see no necessity of entering into any further discussion. As the answer denied that the plaintiff had made all the necessary parties defendants, the case was tried on that as one of the issues. The defendants have insisted at the trial and in their briefs that it was a fatal defect for which plaintiff would not be entitled to recover against these defendants.

We therefore recommend that the judgment of the lower court be reversed and the cause remanded for further proceedings.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, and this opinion is adopted by and made the opinion of the court.

REVERSED.

FREDERICK W. ETHEREDGE, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MARCH 11, 1921. No. 21386.

1. **Public Lands:** GRANT OF RAILROAD RIGHT OF WAY. By granting a right of way of 200 feet in width to a railroad, congress must have determined that a strip of that width was necessary for the proper construction, operation, and improvement, and future necessities of the road, and the general public has no right to conjecture that any portion of the right of way is not necessary for railroad purposes.
2. ———: ———. The fact that only a portion of the right of way granted to a railroad company by the general government has ever been occupied for railroad purposes is immaterial.

3. Adverse Possession: RAILROAD RIGHT OF WAY. An individual cannot for private purposes acquire by adverse possession any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions as the right of way was granted in the instant case, except by such acts as constitute adverse possession since the passage of the Norris act of June 24, 1912, 37 U. S. St. at Large. ch. 181, p. 138.

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

A. L. Tidd, for appellant.

Byron Clark, Jesse L. Root, W. A. Robertson and *J. W. Weingarten, contra.*

TIBBETS, C.

This is an action by the plaintiff to enjoin defendant from cutting down trees on what plaintiff alleges is a part of lot 6 in the south half of the northwest quarter of section 32, township 12 north, of range 9 east of the sixth P. M., in Cass county, Nebraska, of which plaintiff alleges he is the owner. The evidence is undisputed that the premises in controversy lie within the congressional grant of right of way to the defendant's grantors, being land granted by the congress of the United States to the Burlington & Missouri River Railroad Company over the public lands of the United States and the state of Nebraska, of 200 feet in width by an act passed on the 2d day of July, 1864 (13 St. at Large, ch. 216, p. 364), amending an act of July 1, 1862, (12 U. S. St. at Large, ch. 120, p. 496), relating to the construction of the Union Pacific Railway Company. There is no controversy over the fact that defendant has succeeded to the interest of the original grantor by mesne conveyances to all its rights, title and privileges. The contention of the plaintiff is that the land in controversy had not been fenced or used in any manner by the company for over 30 years and during all of that period the plaintiff and his immediate grantors have been in the actual, continuous, open, notorious, exclusive, peaceable, and adverse possession of the same.

The only question involved herein is whether the lands granted by the government, as in the instant case, can be acquired by adverse possession. The evidence discloses that at the time of the grant to the railroad company the land in controversy was public land; that the grantors of the defendant constructed a line of railroad over the right of way granted, and trains have been operated continuously on and over the same, but not immediately on the part of the right of way herein involved. Where the right of way has been acquired by grant from the general government to public lands, and the railroad is built and in continuous operation over the lands so granted, title cannot be acquired to any portion of the same by adverse possession or by nonuser of a portion thereof. This question is not here for the first time. Several, if not all, of the contentions relied upon by plaintiff were settled by this court in the case of the *Union P. R. Co. v. Wooster,* 104 Neb. 421, where it is held:

"The Norris act will not be given retrospective operation to aid an abutting landowner in acquiring title to part of a railroad right of way by adverse possession.

"To constitute an abandonment by a railroad company of a part of its right of way, there must be a clear intention to abandon. Evidence examined; *held,* there was no intention to abandon that portion of the right of way in suit.

"Whenever a railroad company operates trains daily over its right of way, it is a constant assertion of its intention to use and occupy the full width of same for railroad purposes.

"Mere nonuser by a railroad company of a part of its right of way does not constitute an abandonment of such unused portion."

The following cases seem to be conclusive against plaintiff's contention, not only in this jurisdiction, but his position is also contrary to the decisions of the federal courts: *McLucas v. St. Joseph & G. I. R. Co.,* 67 Neb. 603; *State v. Grimes,* 96 Neb. 719; *Oregon S. L. R. Co. v. Quigley,* 10

Idaho, 770; *Northern P. R. Co., v. Smith,* 171 U. S. 260; *Northern P. R. Co. v. Townsend,* 190 U. S. 267; *Union P. R. Co. v. Laramie Stock Yards Co.,* 231 U. S. 190.

The principal case relied upon by plaintiff in support of his position on abandonment is that of *Denver & R. G. R. Co. v. Mills,* 222 Fed. 481, to the effect that, where there was an abandonment of the right of way, the right of entry might be resorted to. This phase of the question is thoroughly discussed in the above citations, and the reasoning and conclusions arrived at therein are in their essential elements contrary in every respect to the contention of plaintiff as to the right of acquirement by abandonment as applied to the instant case. Also in the case of *Denver & R. G. R. Co. v. Mills, supra,* the decision of that court depended entirely upon the peculiar conditions existing therein, and whether there was an abandonment. The rule is undoubtedly that a railroad company only having the right of easement, upon its abandonment of the grant to it for railroad purposes, a party receiving a patent from the government which, were it not for the easement formerly granted to the railroad company, would include the easement granted to the railroad, and there was no reservation in the patent of the easement, to acquire title to the land so abandoned, or in event that it was abandoned and was not covered by any patent issued by the government, it might perhaps be homesteaded as government land, but in the *Mills* case there was an entirely different condition. That was a grant by the government to the railroad company. Several years after this railroad was completed, and 17 years after the homestead entry, the railroad company relocated its line of road at a distance of 25 miles; it took up its rails and ties from the original right of way, a part of which crossed the homestead referred to, and constructed its line of road along the new line. A better idea may perhaps be gained of the reason of the holding of the court in the *Mills* case from a portion of the opinion of the court in that case. The court say:

"In this case the railroad company, for a distance of 25 miles or more, made a relocation of its line and ran all of its trains over the line thus relocated. The rails and ties on the original line were taken up, and the telegraph poles were cut down. This was done on or about November 12, 1899. No attempt was made to use any part of the old right of way for railroad purposes until June 1, 1912, a period of almost 13 years. * * * No stations or industries along the old line were being served. The track was not maintained. No local traffic passed over the old line, the railroad company had rendered itself incapable of carrying traffic thereon, and it ceased to use that portion of the grant for railroad purposes. * * * When the railroad company on or about the 1st of June, 1912, undertook to lay a track on the land described in the bill, it did not intend to relay the entire portion from which the track and ties had been taken in November, 1899. The purpose was to lay a track for a distance of 6.27 miles to a coal mine of the Alliance Coal Company. This was simply a spur track, as shown by the contract between the railroad company and the coal company, and was put down for the consideration of $24,164. It was not a reconstruction of the old line."

In the instant case there have been no such acts, as the authorities have held, as would constitute abandonment. The nonuser of a portion of the right of way for any period of time of itself does not constitute abandonment. Where an easement is granted by the government to a railroad across public land, and the road is built upon the right of way and trains continuously operated thereon, it is no evidence of abandonment that it did not cover the entire right of way. In the instant case it is true that for years the railroad company did not have its rails upon or use the land in controversy, but the necessity arose, as the evidence discloses, for the construction of an additional line, and it became necessary to occupy this contested portion of land, and as an essential part of the operation in building the same, it became necessary to cut down the trees in

question. We are of the opinion that under the state and federal authorities heretofore cited, wherein this question has been in all of its phases repeatedly determined, there can be no question but what the injunction should be denied and the plaintiff be declared to have no present right, title, interest, claim or demand in or to the premises in controversy. We can see very readily that, if the railroad company had acquired the land in controversy by condemnation proceedings under the right of eminent domain, or purchased the same, and then had abandoned them, the right to hold by adverse possession might possibly lie, but not under the conditions existing in the case at bar.

Another question arises and has been discussed in the brief of the defendant, i. e., that the plaintiff is not entitled to insist at this stage of the proceedings upon the theory of an abandonment; that he did not plead it in his petition, and it was not an issue made in the district court, and therefore cannot be raised for the first time in this court, and has cited us to several authorities which seem to sustain that contention, among which are the following: *Nielsen v. Central Nebraska Land & Investment Co.*, 87 Neb. 518; *Gibson v. Arnold*, 5 Neb. 186; *Omaha Fire Ins. Co. v. Dierks & White*, 43 Neb. 473; *Chapman v. Brewer*, 43 Neb. 890; *Hyde v. Hyde*, 60 Neb. 502. However, it does not become necessary to decide this question. In view of the law and the undisputed facts, we are of the opinion that the judgment of the district court was clearly right, and recommend that the same be affirmed.

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

AFFIRMED.

JOSEPH MALIN ET AL., APPELLANTS, V. NEWTON A. HOUSEL ET AL., APPELLEES.

FILED MARCH 11, 1921. No. 21399.

1. **Judgment: RES JUDICATA.** The constitutionality of an act of the legislature having been passed upon by this court, and no additional grounds being presented, the same will be adhered to in all future cases in which that question is directly involved and in which it becomes a vital and integral factor in the determination of the issues made.
2. **Constitutional Law.** In the case at bar the constitutionality of section 2, ch. 243, Laws 1919, having been determined by this court in the case of *State v. Cox*, *ante*, p. 75, the rule therein declared is followed herein.

APPEAL from the district court for Madison county: WILLIAM V. ALLEN, JUDGE. *Affirmed.*

M. S. McDuffee, for appellants.

Clarence A. Davis, Attorney General, J. B. Barnes and *M. D. Tyler, contra.*

TIBBETS, C.

This action was commenced by Joseph Malin and other residents, taxpayers and electors of school district No. 6 of Madison county, on their own behalf, and on behalf of all other similarly situated, against Newton A. Housel, superintendent of public instruction of said Madison county, and other defendants, commissioners, as provided for under section 2, ch. 243, Laws 1919. The petition alleges, among other things, that defendants are threatening to redistrict all of the territory of said Madison county, including school district No. 6, without authority of law, and prays that defendants be restrained and enjoined from so doing. Plaintiffs' right to the remedy sought depends upon the alleged fact that section 2, ch. 243, Laws 1919, is unconstitutional. The defendants demurred to the peti-

tion, and, the demurrer having been sustained and judgment rendered accordingly, plaintiffs appeal.

Since the filing of this case herein, this court has declared in the case of *State v. Cox, ante,* p. 75, in passing upon the constitutionality of the chapter under discussion: "*Held* constitutional, as not defective in title, and not shown invalidated through failure of proper procedure in enacting." This court also held, in the same case: "The enactment is not in violation of section 11, art. III of the Constitution, providing that "no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended be repealed." This is a recent and last conclusion of this court, and while the constitutionality of the act was attacked on grounds of failure to comply with the proper procedure in procuring its enactment, yet the writer of the opinion, from his investigation, research, and deduction, came to the conclusion he did, which we are not prepared to say is not correct, and by which we are willing to be governed. We were impressed with the logic, force and authorities in the written and oral argument of attorney for plaintiffs, but we cannot agree with him that the decisive question involved was not decided in the case of *State v. Cox, supra.* The syllabus to the effect that the act is constitutional is only a logical deduction from the language used in the opinion, wherein the court say: "It is argued that the bill did not contain the section or sections sought to be amended, nor repeal the sections of the statute so amended. The bill does not purport to be an amendment of the former sections, but enacts entirely new legislation upon the same subject-matter, and repeals the former sections covering that matter. Such enactments are not in violation of the constitutional requirement that '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.' "

This court, after a thorough consideration of all the vital questions that might or have been urged, having

come to a determination thereof, its decision should be conclusive by reason of the interests it affects, and litigants, although presenting new and divergent reasons, should be effectively bound by the decision rendered. We are of the opinion that the act of 1919 was a complete act within itself, and was not an amendatory act, and, if amendatory, presumptively and impliedly repealed all existing acts in conflict therewith, and expressly so as to the acts of 1915 and 1917. Plaintiffs contend that the state superintendent, by section 4, ch. 243, Laws 1919, has been delegated judicial powers, and cite us to the constitutional provision contained in article II of the Constitution, which reads: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." It is true that certain ministerial and executive officers have been under necessity, by virtue of the duties pertaining to their offices, to exercise to a limited extent judicial or quasi-judicial functions, as in the case of railroad commissioners, county commissioners, and others, but that does not come within, and is not an infringment of, said article II.

We have, in consideration of the foregoing, reached the conclusion that the judgment of the district court was right, and rcommend that the same be affirmed.

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

AFFIRMED.

ROSE, J., dissents.

RICHARD SEWARD ET AL., APPELLANTS, V. MICHAEL DANAHER, GUARDIAN, APPELLEE.

FILED MARCH 11, 1921. No. 21311.

1. **Guardian and Ward:** INVESTMENTS BY GUARDIAN. An approval by the county court, without notice to those interested, of a guardian's application to invest his ward's funds is not conclusive upon the ward of either the propriety or safety of the investment or of the reasonableness of the terms or rate of interest. *In re Estate of O'Brien*, 80 Neb. 125, followed.
2. ———: ———: INTEREST. After a guardian has fully accounted for the principal of the funds of his ward invested by him, he is chargeable only with such a reasonable rate of interest thereon as he could have secured by the exercise of reasonable diligence and with due regard to the safety of the investment and with scrupulous fidelity to his trust; but he is always chargeable with the interest actually received by him.
3. ———: ———: ———. There is no rule in this state requiring a guardian to account for the legal rate of interest upon his ward's funds invested by him, where he has actually received less, and where there has been no breach of his duty as guardian. *In re Estate of O'Brien*, 80 Neb. 125, and *Wilson v. Wilson*, 90 Neb. 353, distinguished.
4. ———: ADMINISTRATION OF TRUST: EVIDENCE. Evidence examined, and *held* that the guardian had properly administered his trust, and that there was no ground for his removal from his office and trust as guardian.

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

Roper & Shaw and *George A. Adams*, for appellants.

Hastings & Coufal, contra.

CAIN, C.

This is a suit for an accounting brought against Michael Danaher, guardian of the estate of Bernard Seward and Leo C. Seward, minors, by their father, Richard Seward, and his niece, Kittie F. Noonan. The amount for which judgment was asked aggregates about $3,600. Removal

of the guardian was also asked because of his alleged unlawful and negligent acts in handling the trust funds of his wards. The defendant was appointed guardian on July 6, 1909, and this suit was begun on May 5, 1919, so that it relates to the administration of his trust for a period of about 10 years. The funds of these minors which came into the hands of the defendant guardian and which was their 2/33 interest in the estate of their deceased grandfather, John Danaher, amounted to $6,311.96. The guardian filed a true, but unsigned, inventory on January 28, 1910, showing his receipt of the above amount and the source from which it was derived. Appellants criticise the informality of this inventory, but, as the record shows that they referred to it in their petition, making it the basis of their suit, and as their counsel himself offered it in evidence, together with all other files in the guardianship matter, and as its accuracy is not questioned, we treat it and all other filings as authentic. Moreover, the guardian's undisputed testimony is that the inventory was accurate and that it set forth all the funds of his wards that came into his hands. It is established and admitted that the guardian has accounted for the entire principal sum received by him, with interest thereon at 5 per cent. per annum. The grounds of the wards' suit are as follows: (a) They seek to charge their guardian with the difference between the 5 per cent. interest actually received by him and 7 per cent., the "going rate" of interest on personal unsecured loans, or with the legal rate. This is the principal item of their claim and amounts to about $2,100. (b) That the guardian erroneously paid Daniel Danaher $225 for board and care of the minors and $15 for their clothing which was furnished before his appointment, and it is claimed that there was an agreement that no charge was to be made therefor. (c) That, if the guardian had loaned these funds upon tax free mortgages, he would have saved $465.05 paid for taxes. (d) The guardian paid Agnes Donohoe $315 for the care and support of these minors, and it is claimed that, as their father had suffi-

cient income from his farm and residence properties in Seward county to pay this item, the guardian should not receive credit therefor. (e) That the guardian was not entitled to the compensation of $215.29 received by him. (f) Other small items aggregating $8.33 were charged to the guardian in the petition.

Immediately after the guardian had filed his inventory showing that he had $6,311.96 of his wards' funds in his hands, he filed in the county court a written application to be empowered to invest as much thereof as was not required for the minors' support. Upon this application, on January 28, 1910, the court made an order, reciting that the guardian was present in court personally and by his attorney, Arthur J. Evans, and authorizing the guardian to loan $2,000 of the funds to his brother, James Danaher, and $4,000 thereof to the guardian himself. This the guardian did, taking personal notes therefor. Thereafter, during the 10 years, he annually reloaned the funds to his brothers and to himself, taking notes therefor, always at 5 per cent. interest.

The guardian and his brothers each owned a Butler county farm worth $200 an acre and were financially responsible. All loans were repaid with interest. Richard Seward, father of these minors, was himself under guardianship from 1912 to the time of the trial. On January 28, 1911, the guardian filed with the county judge an application to be authorized to loan $4,000 to John Danaher and $2,000 to Michael Danaher, each at 5 per cent. interest, and on February 8, 1911, the court made an order authorizing these loans on the terms stated. On February 6, 1912, the guardian filed his annual report. On February 28, 1913, the guardian filed application to loan $3,486.65 to James Danaher and the remainder to himself, all at 5 per cent. interest, and the court authorized the loans upon the terms named and directed the guardian to take the personal notes of the borrowers therefor. Verified annual reports were filed by the guardian of all his acts, and setting forth to whom the several loans were made

and the interest derived therefrom. On February 27, 1919, the guardian was authorized to loan $6,000 to himself on second mortgage at 5½ per cent., and this was done. In none of these applications was any notice of any kind given to any one. Appellants claim in their brief that the guardian made 17 different loans to himself and brothers without any authority whatever from the court, and that the 10 other loans made by him were pursuant to *ex parte* orders of the county court, and we think the statement is true. We do not think that these *ex parte* orders of the county court altered the liability of the guardian for the funds of his wards. In the case of *In re Estate of O'Brien,* 80 Neb. 125, this court held:

"Section 27, ch. 34, Comp. St. 1907 (Rev. St. 1913, sec. 1654) requires a guardian to apply to and receive from the county court an order authorizing him to loan the funds of his ward. If he loans his ward's funds without such authority, and a loss ensues, he is liable therefor. * * * The approval by the county court, without notice to those interested, of the usual annual reports of a guardian, wherein he reports loans of his ward's funds without an order of the court, is not equivalent to an order of the court authorizing the guardian to make such loans." In the body of the opinion in that case this court said: "Reference to the section of the statute above quoted will disclose that it was the intention of the legislature that there should be a hearing before the court and notice given to those interested, that an investigation as to the desirability of the proposed loans should be had before the court, that evidence might be taken upon this question of those qualified to give an opinion, and that the court, after hearing the evidence, should render a judicial act in directing or refusing the order to make the loans."

But, though these *ex parte* orders of the county court do not change the extent of the guardian's liability in this case, the filing of his applications therefor and his comprehensive annual reports show at least his good faith in the premises. He testified that he acted under the

advice of his attorney, Judge Evans, until the latter's death in 1913, and thereafter under the advice of other attorneys, and that he kept the father of these minors fully informed of these loans, and that there was no criticism upon his acts until the commencement of this suit. The appellants earnestly contend that the guardian should be charged with 7 per cent., the legal rate of interest on these funds, citing *In re Estate of O'Brien,* 80 Neb. 125, and *Wilson v. Wilson,* 90 Neb. 353, in support of their contention. But both these cases may be readily distinguished from the case at bar. In the *O'Brien* case, the guardian loaned his ward's funds on personal direction of the county judge, but upon mortgage security that was wholly insufficient, and there was a total loss of the funds, while in the instant case there was no loss of either principal or interest of the funds at all. In the *O'Brien* case, the court had no basis for fixing the rate of interest except by adopting the legal rate, while in the instant case the rate of interest was stipulated when the loans were made, and the sole question is whether it was the guardian's duty to obtain the usual rate of interest received by banks on personal unsecured loans, which then was 7 per cent. In the *Wilson* case, *supra,* there was a conversion of the ward's funds by the guardian, and, as there was not even a pretense of a loan, and, hence, no stipulated rate, the court had to resort to the legal rate of interest in requiring the guardian to account. Also, the authorization by the court did not enter into that decision, since obviously the court could not authorize a tortious act, and the reference in the opinion to the lack of authorization by the court is clearly an inadvertence. In both these cases there was a clear breach of trust by the guardian. Neither of them sustain appellants' contention that the lack of a valid order of the county court authorizing the guardian to make the loans fixing the rate of interest necessarily subjects him to the payment of the legal rate of 7 per cent. when he actually received only 5 per cent. It seems that it is only where the guardian has been guilty of some distinct

breach of his trust, such as failure or unreasonable delay to invest his ward's funds, or intermingling them with his own, or a neglect to settle his accounts for a long time, that he is chargeable with the legal rate of interest. 1 Perry, Trusts and Trustees (6th ed.) sec. 468; 21 Cyc. 93. Here the guardian was derelict in none of these particulars. He safely invested his wards' funds, did not intermingle them with his own, and made regular, full and true reports of his doings. But appellants insist that 7 per cent. was also the "going rate" of interest at banks on "personal unsecured loans" during the time in question, and that, therefore, the guardian could have secured and should be required to pay that rate. No authority is cited to sustain this contention beyond the general rule that it is a guardian's duty to render the trust estate as productive as possible consistent with safety.

Passing, for the moment, the obvious and vital fact that this defendant was not a banker, but was a farmer without facilities for ascertaining the demand for or safety of such loans, we address ourselves to a consideration of the measure of a guardian's duty in obtaining a rate of interest upon his ward's funds. For what rate of interest must the guardian account? Is it the highest rate of interest obtainable by lenders of money having complete facilities and large experience in the making of safe loans, or is it such a reasonable rate as a person of ordinary intelligence and vocation could secure, with reasonable diligence and with scrupulous fidelity to his trust? The general rule is laid down in 39 Cyc. 425, thus: "The first general rule covering the accountability of a trustee is that he shall not make a profit for himself out of the trust estate; and this rule subjects him to an account for all the interest which he actually makes and receives, but ordinarily he should not be charged with more than he actually receives, or in the proper exercise of his duties should have received."

Section 1651, Rev. St. 1913, is as follows:

"Every guardian shall manage the estate of his ward frugally and without waste, and apply the income and profit thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any, and if such income and profits shall be insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor, as provided by law, and shall apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any."

Tested by either the general rule or the statutory rule above set out, is the guardian chargeable with the 2 per cent. interest above what he actually received? The evidence is that, during the period involved herein, the usual or "going rate" of interest on first mortgage loans was 5 per cent. per annum, and upon "personal unsecured loans" was 7 per cent. at the banks. But the guardian did not have either the facilities or information of a banker or other money lender, and the statute does not require that he have. If he had secured the assistance of some one having the special skill and facilities of those engaged in that business, he probably would have had to pay enough for the service to reduce the net amount below what he himself actually received. One illustration of the cost of this service is the difference between the rate of interest paid on time deposits at a bank, which at this time was 4 per cent., and the rate of interest at which the bank loans the same money. This would probably amount to 3 per cent. at the then lending rate of 7 per cent., and could not be less than 2 per cent. as, under our statute, 5 per cent. is the maximum rate that banks are allowed to pay on time deposits. In either case, the defendant would not have realized more than 5 per cent. Nor do the loans he made fairly come within the designation of "personal unsecured loans." The Danaher boys were sufficiently well to do so that loans to them were as safe as if they had been secured by first mortgage on real estate. Then, too, in order to realize 7

per cent, the loans likely would have had to be on short time, and there might have been intervals during which the principal was earning no interest. We think that the true rule is that, after a guardian has fully accounted for the principal of the funds of his ward invested by him, he is chargeable only for such a reasonable rate of interest thereon as he could have secured by the exercise of reasonable diligence and with due regard to the safety of the investment, but always is chargeable with the interest actually received by him. 39 Cyc. 425; *Gott v. Culp,* 45 Mich. 265; *In re Estate of Wisner,* 145 Ia. 151; *Taylor v. Hite, Curator,* 61 Mo. 142; *Vaccaro v. Cicalla,* 89 Tenn. 63; *Stevens v. Meserve,* 73 N. H. 293, 111 Am. St. Rep. 612; *Slauter v. Favorite, Guardian,* 107 Ind. 291. And, in our opinion, the defendant guardian's conduct in this case measured up to that rule, and he is not chargeable with more interest than he actually received. If there had been notice to all of his several applications to the court and full hearing thereon, and seasonable objection had been made to loaning to himself and brothers, it is reasonable to suppose that the court would have ordered the funds deposited in a bank at 4 per cent. or loaned on first real estate mortgage at 5 per cent. In either case, no more interest would have been realized for the wards. It follows, too, that the wards' claim for taxes paid was properly disallowed. Finally, on this point, appellants claim that the guardian "profited" by the loans to himself by getting the money at 5 per cent. instead of 7 per cent. which he would have had to pay at the bank. The evidence does not support this claim. The guardian could and probably would have mortgaged his farm and got the money at 5 per cent. rather than pay 7 per cent. at the bank.

We now consider the guardian's claim for a credit of $315 for money paid to his sister, Agnes Donohoe, on January 11, 1916, for the support of these minors from April 1, 1914, to January 1, 1916, a period of 21 months. These children were in the custody of Agnes Donohoe from

October 8, 1913, to January 6, 1919, and their father, Richard Seward, paid for their support all that time, except for the 21 months referred to. The merits of the claim are not questioned, but it is contended that the minors' father was liable to pay it, and that the guardian unlawfully paid it out of the wards' funds and should not receive credit for it. The mother of these wards was in an insane asylum, their father was under guardianship as an incompetent, his guardian lived in Seward county, and it is stipulated that the wards had no cash to pay this claim at the time, and that this defendant guardian paid it, and, after the claim was filed and allowed against this estate, that he reimbursed himself to the amount of the claim for the advancement. We see nothing wrong in this, especially in view of our statute which expressly provides that the guardian shall apply as much of the income of his ward's estate as may be necessary for his comfortable and suitable maintenance and support. Rev. St. 1913, sec. 1651. The immediate necessities of the wards required that their guardian pay this claim, and he is entitled to credit therefor.

Objection is made to the guardian's payment of $240 to Daniel Danaher for board and care and clothing of one of these minors from November 7, 1907, to February 15, 1909, a period of about 15 months. The grounds of the objection are that this indebtedness was incurred before defendant's appointment as guardian, and that there was an understanding that no charge would be made. But there is no evidence that Daniel Danaher himself ever represented that he would make no charge, even if that were decisive of the justness of the claim. And we perceive no reason why the date of the guardian's appointment affects the validity of the claim. It is the income from the ward's estate which the statute directs shall be devoted to his support, and no distinction is made as to whether the claim for that support is incurred before or after the appointment of a guardian. The objection to this claim is untenable. The objection to the small items aggregating $8.33 is likewise without merit.

A careful examination of the record in this case persuades us that the defendant guardian managed the estate of the plaintiff wards "frugally and without waste" as our statute provides, and that they have no just cause for complaint. It follows that his claim for $215.29 for compensation for his services extending over a period of ten years is reasonable and just and its allowance is warranted by section 1665, Rev. St. 1913. And it also follows that there is no cause for his removal as guardian.

In our opinion, the judgment of the district court approving the accounting made in the county court of Butler county and dismissing the wards' complaint and finding in favor of the defendant should be affirmed, and we so recommend.

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

AFFIRMED.

FRANCIS CHASE ET AL., APPELLANTS, V. ALBERT J. LAVELLE ET AL., APPELLEES.

FILED MARCH 11, 1921. No. 21363.

1. **Adverse Possession:** PARTIES IN PARENTAL AND FILIAL RELATIONSHIP. As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title other than mere possession, and knowledge thereof brought home to the owner of the land.
2. **Deeds:** CANCELATION: PARENT AND CHILD. Where it appears, in a suit to cancel a deed from a parent to a child, that mental weakness of the parent combined with artifice and misrepresentations of the child induced the execution of the deed, a court of equity will cancel it.
3. ———: DEED FROM PARENT TO CHILD: PRESUMPTIONS. When a deed is executed for a nominal consideration by an aged parent shortly

before her death, whereby all the grantor's estate is conveyed to one child to the exclusion of her other children without any apparent reason for so doing, the courts will scrutinize the transaction with care; the presumption is against the validity of the deed. *Winslow v. Winslow*, 89 Neb. 189, followed.

4. ———: CANCELATION: EVIDENCE. Evidence examined, and *held* to require a cancelation of the deed, and to quiet title in all the children of the deceased grantor.

APPEAL from the district court for Greeley county: BAYARD H. PAINE, JUDGE. *Affirmed in part, and reversed in part, with directions.*

A. H. Murdock and *Lanigan & Lanigan*, for appellants.

James P. Boler and *P. J. Barrett, contra.*

CAIN, C.

Plaintiffs, Francis, John, Charles and Ambrose Chase, are minor children of Mrs. Anna Chase, who died intestate on May 17, 1919, and bring this suit by their next friend to cancel a deed made October 17, 1918, by their mother to the defendant Albert J. Lavelle, of the southwest quarter of section 4, in township 18, range 10, west of the sixth principal meridian, in Greeley county, Nebraska, and to cancel a tax deed thereto issued to him by the county treasurer on July 6, 1907, and to quiet title in them and Albert J. Lavelle, also a son of deceased, as heirs at law of their deceased mother, and also for an accounting for rents. The grounds upon which cancelation of the first-named deed is sought are that the mother was mentally incompetent to make it, that it was procured by the fraudulent representations of the grantee, and that the consideration of $200 therefor was grossly inadequate. Cancelation of the tax deed is asked on the ground that it is void for lack of compliance with the statutory requirements authorizing the county treasurer to execute it. TheTravelers Insurance Company of Hartford, Connecticut, was made a party defendant because it holds a mortgage for $8,000 executed January 30, 1919, by the defendant Albert J. Lavelle and wife upon the quarter section

above described and also upon the northwest quarter of section 9, in township 18, immediately adjoining to the south; and plaintiffs ask, in the event that they prevail and the mortgage is foreclosed, that the last-described quarter section be sold first to satisfy the debt. The mortgagee did not answer. The answer of the principal defendant, Albert J. Lavelle, denied the grounds alleged for the cancelation of the deeds, pleaded that the deed of October 17, 1918, from his mother to him was valid, and further averred that he had adversely occupied the land for more than the statutory period, whereby he had acquired title thereto. The reply denied the averment of adverse user, and the amended petition alleged that such user was permissive. The court below found generally for the principal defendant, Albert J. Lavelle, and quieted title in him, and further found that the deed of October 17, 1918, was valid, and that he had practiced no fraud in obtaining it, and that he had adversely occupied the land for the statutory period, whereby he had acquired title, but found that the tax deed was void. Plaintiffs appeal, asking a reversal of the decree, except the finding therein that the tax deed is void. As it clearly appears that the tax deed is void, and as there is no contention that it is valid, it may be dismissed from further consideration, except as it appears in a narrative of the facts.

The material facts are substantially without dispute and are as follows: About 1880, Patrick Lavelle, Sr., with his family of several sons and daughters, including Anna, mother of plaintiffs, went to Greeley county and homesteaded. The father entered the northwest quarter and his daughter Anna the southwest quarter of section 4, as homesteads, the latter quarter being the land in controversy. Both received patents from the government. Anna's being issued June 5, 1890. The family residence, however, was maintained on the northwest quarter, which Patrick Lavelle, Sr., took as a homestead, which he owned until 1907, and on which he lived until 1903. No buildings were ever put on Anna's quarter, except a shanty she had on it

before she got her patent, and no one has ever lived upon it since that time. Except for a fence, which her father built around it in 1891, and the breaking of a few acres, and the placing of a hydraulic well and windmill by the defendant Albert J. Lavelle sometime after 1910, no improvements have ever been made on this land. It has always been used in connection with the northwest quarter, on which the family lived, and chiefly as a pasture and hay meadow. In 1881 the defendant Albert J. Lavelle was born on this homestead of Patrick Lavelle, Sr., where he lived with his grandfather until 1903. After Albert's birth, his mother, Anna Lavelle, went to Omaha, where she was employed until about 1898, but she made many visits to her father's home in Greeley county where her son Albert was living. During that period of about 17 years her father managed her land in conjunction with his own, and paid the taxes on it, and continued to do so up to 1903, when he left his farm. On January 1, 1898, three days before her marriage, Anna Lavelle signed and acknowledged a deed of her land to her son Albert for the expressed consideration of $1,000. Three days later she married Mr. Chase in Omaha, and they immediately went to San Francisco to live. On December 13, 1898, this deed was recorded, and in November, 1899, soon after the birth of her first child by Mr. Chase, Anna Lavelle Chase began action in the district court for Greeley county to have it set aside. We gather from her petition in that case that she claimed never to have delivered the deed, but to have placed it in her trunk in her father's house for safe-keeping. At any rate, her case went to decree on January 10, 1900, and the court found in her favor and canceled that deed and quieted title in her. The court also found that the deed was never delivered, but that the defendant Albert J. Lavelle obtained the same and caused it to be recorded without authority, and that he retained the same over her protest; that there was no consideration for the deed other than love and affection; and that she never intended delivery thereof until some indefinite future date and con-

tingency. Anna testified at the trial in Greeley in January, 1900, and a few months afterward left for California, where she lived until her death on May 17, 1919, and never returned to Nebraska. She was, therefore, absent from Greeley county for 19 years. She had, however, a little correspondence with Albert and her sister, Kate O'Connor, who lived in Greeley county. None of her letters to Albert were offered in evidence.

In 1903 and 1904 Albert rented the Sweedler quarter and farmed it and lived with his aunt, Kate O'Connor, while he was tending the crops, and then returned to his grandfather's homestead, which his uncle, Martin Lavelle, was farming in connection with Anna's quarter, as before. In 1905 Albert was married and lived on his grandfather's homestead which he and his uncle Martin rented, up to March 1, 1907, during which period the homestead was operated in conjunction with his mother's land. He also worked a quarter section of his own immediately south of his mother's land. Albert bought his mother's land for the delinquent taxes of 1903, and on July 6, 1907, received a tax deed from the county treasurer, which, as before stated, was void. From the time he received this tax deed, Albert testifies that he claimed to own the land, and that he took possession of it, rented it, and collected the rents, and paid the taxes on it; that, in the summer of 1910, he broke up about 27 acres, and in 1915 about 20 acres more, and fixed the fences and put in a hydraulic well and windmill. There is no evidence that his mother knew anything about what Albert was doing, or that he ever told her of his occupancy of her land until his letter of September, 1918, hereinafter set out. There is also the testimony of several witnesses to corroborate Albert's dominion over the place from 1907 onward.

On September 13, 1918, Albert's attorney composed and typed the following letter, which Albert copied with pen and ink on other paper, and, adding a few words, mailed to his mother at San Rafael, California, as his own:

"Sept. 13th, 1918.

"Dear Mother: I have not heard from you in some time and thought that I would write you at this time as I have been thinking of moving onto the place and improving it.

"I have a tax deed to the place and it will be necessary for me to go through court to perfect my title, that is to give me a good record title. I have always claimed the farm and still claim it but your deed is on record and it will be a cloud on the title, to give me the proper record title so that I can secure a loan on the farm I must go through court and secure a deed in that manner.

"I have consulted an attorney and he said that the expense of the action would be in the neighborhood of $200 and I would rather you would get that than to pay it to some lawyer, now if you will send me a quitclaim deed to the farm that will clear the title and I can borrow money on the place and improve it. As far as the ownership of the place is concerned I know that I am the owner of it but owning property and then trying to borrow on it there is always some flaw found in the title. I have had the exclusive open and adverse possession of the farm under my tax deed for more than ten years and that gives me a perfect title but I must go through court with it.

"Now mother that will save a lot of expense and will be lots easier for me to give you the money than to pay it to a lawyer and I hope that you will send the deed as soon as possible as I want to get to work on the place this fall, and if I do not receive the deed I must start the court action at once, send the deed to either banks at Greeley or place it in a bank out there and I will send the money to the bank and they can send me the deed and in that way whatever money is spent will be kept in the family."

Albert testified that he talked the matter over with his attorney, and that he (Albert) thought it would "look better" for him to write it himself. When pressed by both court and counsel to tell why he consulted an attorney and had him draft the letter, he became evasive. About one month later, Albert's mother executed the deed to him,

which is assailed, before Frank J. Healy, a notary public of San Rafael, California, who testifies that she was in a deplorable condition and so weak she could hardly walk, but apparently knew what she was doing. Healy also testifies that, at the time she signed the deed, she said to him, "This is a piece of property that I have had for several years and I am now about to lose it, which I thought that some day was going to bring me quite a piece of money," and that she also said, "I will get about $200 out of this. Don't you think I ought to realize more than that after having it so many years?" After receiving the deed from his mother, Albert sent her $200, which she used in paying house rent in arrears.

It is now necessary to consider the circumstances and condition of Mrs. Anna Lavelle Chase, both before and at the time she signed this deed. The four plaintiff sons and another son, Samuel, who died after a lingering illness February 3, 1919, were born to her and Mr. Chase in California. The record shows that the family were nearly always in straitened financial circumstances; that Mr. Chase deserted them in 1908; that Mrs. Chase then took in washings, went out to houses to work, and worked nights for dinners at lodges, and baked bread and sold it; and that she continued this work until June, 1918, when she fell sick and never recovered. Thomas O'Connor, probation officer and investigator for indigents, testified that he called upon her many times, and that she received aid from the county from September 1, 1914, at the rate of $25 a month, until her son Frank began work, when it was reduced to $15 a month, which she received until she died. Her work and this county aid and the wages of the older boys, as they got old enough to work, were her only sources of income, and they lived in a rented house. From March to August, 1917, her son Frank was sick in the hospital and could not work again until April, 1918. In 1916 her little son Samuel had pneumonia and was almost a helpless invalid until his death in February, 1919. The different people for whom Mrs. Chase worked gave her

the clothing for the children, and they did not buy any. Nevertheless, on December 20, 1917, Mrs. Chase wrote to her sister, Mrs. Kate O'Connor, living near Greeley Center, the following letter:

"San Rafael, Dec. 20th.

"Dear Sister Kate: You will be surprised when you get my letter for, I am sick and would like you to come and stay with me this winter or Mary whitch one could come but I thought you could come as you children are all growin and could take a trip I am all alone that man Chase has left me eight years Francis and my self was geting along good Now I do want you to I hope that you ar all well at home I want you send a dead so I can sine It for Albert or take it alonge with you how is he geting a long I will write him soon I must ad mit I am a shamed for not doing so be foure I hope youre boy dont have to go to War for it is afel Now I want a lette saying you are coming Francis will meat you at SanFrancisco dont mind getting any thing ready I coud fix you up here With love to Johny and children from Sister Annie"

Again, on May 9, 1918, another letter was received by Mrs. O'Connor, purporting to come from Mrs. Chase. Down to the address at the close, it is in a handwriting other than that of Mrs. Chase, and not identified; but, after the closing address, and on the same sheet, it is in her own writing.

"San Rafael, Cal., May 9, 1918.

"Dear sister Kate: I am just answering your letter with disgust, to think that all these years that you've worked so hard, that you couldn't spend fifty dollars to come to see me. And the change would have done yourself the worlds of good. I was awful sorry to hear of Mary's death And if sister Julia wants to come it might be a good change for her health, for I'll be awful glad to have her, and you too if you want to come. I should think that you have girls enough to keep house for you. I would of gone back, if you would of come last January when I wanted you. But I could not go and, leave the house for Frank

was six months in the hospital, and one year sick. Now I will break the news to you that I have four (4) boys besides Francis, the names as follows:

"Francis 19 years,
"John 16 years,
"Charles 14 years,
"Samuel 13 years,
"Ambrose 12 years.

"You needn't worry about getting back, for I'll pay your fare back, so I'll like to hear from you soon, Send Julia, if you cannot come yourself, as I would like to have one of you come. I am going to send a lot of shoes overcoats etc., back the next week or two, hoping you can make use of them. Hoping to hear from you as soon as possible, also hoping the answer will be one of yourselfs I remain your loving sister A. Chase (add.) Mrs. A. Chase 126 Fourth Street San Rafael, Cal. Mavin Co. I have looked for a deied for my Place from Albert I told you to have him send one so I could sine it I feel so I want it once I hope he will tind to it at once I dont want Chase to come and take it I should have done it before Will close with Love to all hoppind God and his blessid mother will give me my helth."

Defendant argues that these letters show his mother's intent that he should have the land, and, ordinarily, that inference might be justified. But it is to be observed that the letters are written to her sister, and not her son; that they convey the idea that she was in somewhat affluent circumstances at the very time that she was receiving charitable aid from the county. The last letter also shows that her motive for making a deed to Albert was to prevent her husband getting the land, and also shows that there has not been very much communication between herself and relatives in Greeley county, for she "breaks the news" that she has four boys, giving their names and ages. She had kept secret the existence of her son Albert through the years. The inference, too, is reasonable that she was in ignorance of the value of her

land, which at this time was worth about $12,000, as compared with a very low value when she last saw it, 18 years before. These letters must be read in the light of the circumstances which surrounded her at the time. She seemed anxious to convince her sister that she was in comfortable circumstances, perhaps through a pardonable pride, when, in truth, her financial circumstances were desperate. It seems reasonable to conclude that her expressions of an intent to deed the land to Albert were no more authentic than her expressions of affluence while in the pinch of poverty. Then, too, it must be borne in mind that she could then have made a deed to Albert, but did not, and never did until after she had the letter from him of September, 1918, saying that he owned the land, which she evidently believed, since she told the notary that she was "now about to lose it" when she signed the deed. Viewed in the light of all the circumstances, these letters to Mrs. O'Connor convince us that she was professing to her sister that she was in affluent circumstances and did not need the land, rather than that she really intended that Albert should have it. Moreover, the only reason disclosed by the letters for making the deed was to put the land beyond her husband's reach. These letters are not persuasive with us that she intended Albert to have the land.

Many witnesses testified by deposition to the physical and mental condition of Mrs. Chase when she made the deed. Physically she was emaciated and had sores, and had fallen in weight from 180 to 100 pounds. Many witnesses testify to her eccentric behavior, and that she lived in practical seclusion, refusing to see neighbors and others with whom she had theretofore been on terms of somewhat intimate friendship; that, when the priest came to see her, she refused to admit him, though she had been a devout Catholic. These witnesses testify that, from their observation, she was mentally incompetent to make the deed, and none of this evidence is disputed. Her trip to the notary's office to make the deed was the only time she had been out since June preceding, and she was ac-

companied by her invalid son Samuel, who died a few months thereafter.

Viewed in the light most favorable to the defendant, the evidence clearly shows that she was suffering from such extreme mental weakness at the time she made the deed as to be readily susceptible to the positive representations contained in Albert's letter to her. His representations were that he was the absolute owner of the land, and wanted the deed only to make a good record title in him. Unless he had title by adverse possession, which will be discussed presently, these representations were wholly false. She knew, we think, that she was making a deed of her land to Albert, but she could not even consider whether the statements made in his letter were true or false. Her mental weakness was such that she could neither resist the importunity nor detect the artifice of Albert's letter. Its effect upon her weakend mind is clearly shown by the fact that she said she was "losing" her land. Her expressions to the notary show that her intent was to keep it and get "quite a piece of money" out of it, thereby indicating that she claimed to own it. Considering her mental weakness, her poverty, her ignorance of the value of her land and of the validity of her title thereto, the positive, formidable and false representations made in Albert's letter to her, the almost nominal consideration, and the improbability that she would give the land to Albert to the exclusion of her other children for whose support she had done so much, we find that the deed was not her conscious, voluntary act, and was secured by such imposition and fraud that equity requires that it be canceled. *Kleeman v. Peltzer,* 17 Neb. 381; *Jesse v. Brown,* 83 Neb. 311; *Nelson v. Wickham,* 86 Neb. 46; *Winslow v. Winslow,* 89 Neb. 189; *Armstrong v. Randall,* 93 Neb. 722; *Miller v. Wentz Co.,* 99 Neb. 286.

But the defendant, Albert J. Lavelle, claims to have acquired title by adverse possession. We think that the evidence, perhaps, shows that he exercised such dominion over the land for about 12 years that, as between strangers

and under different circumstances, would probably be sufficient to sustain his claim. But, when Anna Lavelle relinquished actual possession of this land, it was to her father, and he held it by her permission and under a perhaps unexpressed arrangement that he was to use it and pay the taxes on it. At any rate, her father's occupancy of the land was known to her and was by her permission. And the evidence pretty clearly indicates that Albert practically succeeded to his grandfather's permissive occupancy. If so, such occupancy could not ripen into title, no matter how long continued, until actual notice was brought home to the owner that the possession was adverse. *Blake v. West,* 89 Neb. 794. And the defendant gave no such notice until September, 1918, in his letter. Moreover, there is a presumption that Albert's occupancy was permissive, and not adverse. The rule is thus laid down in 1 R. C. L. 756, sec. 85: "As a general rule an adverse possession cannot be predicated on the possession of the parent as against a child, or on the possession of a child as against its parent." And in 2 C. J. 157, sec. 283, it is said: "Possession by a child of land belonging to his parent will not ordinarily be considered adverse." This text is supported by the following adjudicated cases: *Hunt v. Hunt,* 3 Met. (Mass.) 175, 37 Am. Dec. 130; *Silva v. Wimpenney,* 136 Mass. 253; *Dunham v. Townshend,* 118 N. Y. 281; *Haggard v. Martin,* 34 S. W. (Tex. Civ. App.) 660; *O'Boyle v. McHugh,* 66 Minn. 390; *McCutchen v. McCutchen,* 77 S. Car. 129, 12 L. R. A. n. s. 1140. The rule is well stated in *O'Boyle v. McHugh, supra,* as follows:

"As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land."

This is the rule. Under it, the defendant's possession was never adverse, except for the few weeks between the

time he wrote the letter to his mother and the time he got the deed from her. Defendant's claim of title by adverse possession cannot stand, and his statement in the letter that his occupancy was adverse was false.

It may be reasonably inferred from all the evidence that there was a sort of understanding between Albert's grandfather Lavelle and his mother that the grandfather was to have the use of the land in return for the payment of the taxes thereon, and that Albert succeeded to this arrangement. It seems equitable to apply that understanding to plaintiffs' demand for an accounting. So applied, the claim for rent offsets the taxes paid. But the $200 paid by Albert to his mother, with interest at 7 per cent. from October 17, 1918, must be returned to him. It follows, too, that the prayer of plaintiffs' petition that, if the $8,000 mortgage is foreclosed, the land involved in this suit must not be sold until the security of the northwest quarter of section 9, township 18, range 10 west, be first exhausted, must be granted.

We recommend that the judgment of the district court be affirmed in so far as it cancels the tax deed, and otherwise reversed, with instructions to cancel the deed of Mrs. Anna Lavelle Chase to the defendant Albert J. Lavelle, dated October 17, 1918, and to quiet title in fee in plaintiffs and the defendant Albert J. Lavelle as tenants in common of equal undivided shares in said land, upon the sole condition that plaintiffs pay the defendant Albert J. Lavelle the sum of $200 and interest as aforesaid, and that all costs in both courts be taxed to the defendant Albert J. Lavelle.

PER CURIAM. For the reasons stated in the foregoing opinion, the decree of the district court canceling the tax deed is affirmed, and is otherwise reversed, with instructions to enter a decree quieting title in fee to the lands in controversy in the plaintiffs and the defendant Albert J. Lavelle as tenants in common of equal undivided shares, as above set forth, and this opinion is adopted by and made the opinion of the court.

JUDGMENT ACCORDINGLY.

RUDOLPH KRAUS, APPELLANT, V. MAX SCHROEDER ET AL., APPELLEES.

FILED MARCH 25, 1921. No. 21299.

1. **Intoxicating Liquors:** STATUTORY LIABILITY. Section 3859, Rev. St. 1913, creates a liability against a licensed vender of intoxicating liquors that did not exist under the common law.
2. ———: LIABILITY FOR INJURIES. Where one became intoxicated by drinking liquors purchased of a licensed saloon-keeper, and as a consequence of such intoxication became insane, and by reason of the insanity thus produced inflicted injuries upon members of his family and upon himself, the saloon-keeper and his sureties are liable in damages. Rev. St. 1913, sec. 3859.

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

Hall, Baird & Williams and *Bartos & Bartos,* for appellant.

T. J. Doyle, John C. Hartigan, Charles H. Sloan and *P. R. Halligan, contra.*

MORRISSEY, C. J.

This is an action against two saloon-keepers and their surety to recover damages under section 3859, Rev. St. 1913, now repealed. The petition contained the usual allegations as to the business of the saloon-keepers and the execution of their bonds by the defendant surety company. It alleged that prior to the date of the injury complained of plaintiff was in the habit of visiting the saloons and procuring therein large quantities of intoxicating liquors and consuming same; that on February 21, 1917, plaintiff purchased from one of the defendant saloon-keepers "a large quantity of gin, whiskey, beer, and other intoxicating liquors," all of which plaintiff took with him to his home and consumed during that night; that by reason of drinking the intoxicating liquors sold by the defendant saloon-keepers plaintiff became insane, and while so insane shot

and killed his wife and two children; that at the same time, while insane, the plaintiff inflicted wounds upon himself which caused him to become totally and permanently blind. Defendants filed a general denial. At the close of the evidence given by both plaintiff and defendants, on separate motion of each defendant, the court peremptorily instructed the jury to return a verdict for the defendants, and from this order plaintiff appeals.

Plaintiff testifies that from May 1, 1916, to February 20, 1917, he had frequently purchased liquor in the saloon of defendant Pimper, and that during the same period he had frequently purchased liquor in the saloon of defendant Schroeder, and had frequently drank intoxicating liquor in these saloons. February 10, 1917, he claims to have purchased beer and whiskey in defendant Pimper's saloon, and that on February 20, 1917, he drank a pint of whiskey he had purchased from defendant Pimper. In view of the instructions given by the court, it is only necessary to examine the bill of exceptions far enough to ascertain whether the testimony offered by plaintiff was sufficient to make a *prima facie* case on the questions put in issue by the pleadings. It is clear that the testimony is sufficient for that purpose. If we understand the attitude of the defendants, they concede that plaintiff had procured quantities of liquor at the saloons mentioned and had consumed the same, but rely upon the common-law rule that one may not take advantage of his own wrong, and they insist that the evidence brings the case clearly within that rule. If the rule of the common law applies, defendants' contention is probably sound. The statute in question was passed in 1881 and remained in force until May 1, 1917, when our prohibitory enactments became operative. During this long period it was frequently construed by the courts and was uniformly held to create a liability upon those who engaged in the liquor traffic under its provisions, creating a liability that did not exist at the common law. The cases permitting recovery where damage resulted because of the traffic are very numerous, but the first case dealing with the right of one who voluntarily consumed

intoxicating liquors and suffered an injury as a result thereof to recover from the vender of the liquors is that of *Buckmaster v. McElroy,* 20 Neb. 557. It was there held that one who voluntarily drank intoxicating liquors purchased from a licensed saloon-keeper and as a result of such indulgence suffered injury had a cause of action against the saloon-keeper. It is true that one member of the court dissented from this holding, reasoning, as counsel for appellees now reason, that one ought not to be permitted by his own wrong to create a liability in favor of himself against those participating with him in the wrong. The majority opinion, however, became the guide for the courts of this state and has so remained without any change by legislative enactment. In *Forrest v. Koehn,* 99 Neb. 441, in citing it with approval, the court said: "We do not deem it necessary to supplement the reasoning in that case. That was the interpretation placed on this section of the statute at the time the defendant saloon-keepers were licensed. Defendants executed the bonds with knowledge of the interpretation placed upon this section by the court, and are not in position to insist that it is a harsh rule." After giving full weight to the logical argument advanced in appellees' brief, we are still constrained to adhere to the rule so long in force in this state, a rule known to defendants when they assumed the obligations provided by the statute. It cannot be denied that, had plaintiff fallen from his conveyance on his journey from defendant's saloon to his home, because of his intoxication, and suffered an injury causing blindness, he might recover for the injury. Nor ought it be said that if, because of his intoxicated condition, his wife and children suffered death, upon proving that his intoxicated condition was due to defendants' traffic in intoxicants, he could not recover for the loss. The statute provides: "The person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic." The primary question then is: Did plaintiff's damages result from defendants' traffic in intoxi-

cants? It is suggested that years before the date of the tragedy he had purchased a pistol with a view of taking the lives of his wife and children and destroying himself. Appellees reason that the occurrence of February 21, 1917, was but the carrying out of a purpose conceived prior to the date he is said to have become the purchaser of liquor in defendants' saloons. If that be the case, it is for the jury to determine in reaching a conclusion as to whether the injuries complained of resulted from the use of the liquor consumed. If it did not, it follows that the defendants are not liable. But if plaintiff's reason was overthrown by the liquors consumed and by reason of that fact the injuries complained of were sustained, defendants are liable for the injury. *Forrest v. Koehn,* 99 Neb. 441.

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

REVERSED.

HENRY D. STEWART, APPELLEE, V. WABASH RAILWAY COMPANY, APPELLANT.

FILED MARCH 25, 1921. No. 21274.

1. **Courts: DISMISSAL: FINAL ORDER.** When, after a formal order sustaining a demurrer and dismissing a cause, the district court of the United States for the district of Nebraska gives leave to file an amended petition in the case, and retains the cause for further proceedings, this court will adopt the construction that court made of its order, and will not hold a judgment final which it refused to so consider.
2. **Master and Servant: DEFECTIVE APPLIANCE.** The uncoupling of the end car upon the stoppage of a train being backed is proof under the safety appliance acts that the coupling was defective.
3. **———: INJURY TO SERVANT: INTERSTATE COMMERCE.** Under the facts stated in the opinion, the act of plaintiff when injured was so closely related to interstate commerce as to bring him within the operation of the federal employers' liability act.

4. ———: ———: PROXIMATE CAUSE. The uncoupling of the car under the circumstances was the proximate cause of plaintiff's injuries.

5. **Evidence** as to the duties of switchmen and customs in the yards of other standard railroads *held* admissible.

6. **Damages** *held* excessive, and remittitur ordered as a condition of affirmance.

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

N. S. Brown and *John L. Webster,* for appellant.

Gerald F. Harrington, R. M. Johnson and *M. F. Harrington, contra.*

LETTON, J.

Appeal from a judgment in favor of plaintiff for damages for personal injuries. Plaintiff was a switch foreman in the freight and passenger yards of the defendant at Council Bluffs, Iowa. He was severely injured by being struck by the handle of a switch lever when he was endeavoring to open a switch upon a "Y" in the yards. Three box cars had been backed from the main line upon the west leg of the "Y" to be fitted with grain doors. Afterwards a number of other cars, variously estimated as from 7 to 8, and from 10 to 12, were backed in, pushing the three cars further along on the "Y." The evidence in behalf of plaintiff tends to prove that the latter cars automatically coupled to the three cars, but that when the engine stopped, the end car of the three became uncoupled and ran toward a switch at the point of the "Y;" that plaintiff saw that as the switch points were set the car would become derailed; that he immediately ran about 40 feet to the switch-stand and attempted to open the switch, when the wheels of the moving car struck the point of the switch, causing the switch-lever to be jerked out of his hand, and to strike him a severe blow in the groin, causing permanent injuries; that the car ran a short distance further and was stopped by another car which stood beyond the switch.

The evidence on behalf of the defendant implies that the accident was caused, not by the breaking loose of a car, but by the failure of the cars that were backed in to couple with the three cars already on the "Y," and that the impact caused the three cars still coupled together to enter the switch-point and throw the lever. This, however, is merely an inference from facts shown. Plaintiff identified the car which entered the switch as "M. & O." car No. 10055. There was evidence in behalf of defendant that no car of this number was in the yards that day, but it was shown by at least one of defendant's witnesses that cars of the Chicago, St. Paul, Minneapolis & Omaha Railway are commonly termed "Omaha" or "M. & O." cars by the railroad men, and that a Chicago, St. Paul, Minneapolis & Omaha car was one of the three cars mentioned.

Defendant's evidence does not disprove that plaintiff was injured by the switch lever, nor that the throwing of the lever was occasioned by the moving of the points of the switch by the wheels of the car. Quite a little time was devoted at the trial with respect to the identity of the car, but we think this was not very material when all the admitted facts are considered. While there is a sharp conflict upon some points in the evidence, we believe it is sufficient to justify the jury in believing that the switch-point was thrown by a car which had become detached from the others by reason of a defective coupling.

The first assignment of error is that the court erred in overruling a plea in bar of defendant. In substance this plea set out that plaintiff filed his petition in the United States District court for the district of Nebraska for damages arising out of the same accident; that a demurrer was sustained in this petition, and a judgment entered on November 10, 1917, which is in full force and effect and is a bar to the prosecution of this action.

On November 7, 1917, plaintiff filed a motion for permission to file, and was given leave to file and did file an amended petition. On December 10, 1917, defendant filed a plea to the jurisdiction, alleging the filing of an amended

petition; that this was in effect the commencement of a new action; and that the suit should have been brought in the district where the defendant is a citizen, and not in the district of Nebraska. On February 9, 1918, this motion was overruled. On February 13, 1918, plaintiff moved the court to dismiss the action without prejudice, and on that date the cause was so dismissed.

Appellant now insists that the order sustaining the demurrer and dismissing the cause was a final order. The journal entry is exceedingly brief. It is not stated that the cause is dismissed without prejudice, or with prejudice. We think it susceptible of the construction given to it by the court which made it; that is, that it was merely intended as a formal order sustaining the demurrer. The court did not regard the judgment as being final, because it retained jurisdiction and finally allowed the action to be dismissed without prejudice. So far as the record shows these proceedings were all had at the same term of court. The final judgment allowing the cause to be dismissed without prejudice apparently still stands. To hold that the federal court erred in allowing the amended petition to be filed, and afterwards in dismissing the cause without prejudice, would amount to a review by this court of the adjudications of the United States district court. Some authorities cited by defendant indicate that a federal reviewing court might have found the proceedings subsequent to the order made on November 10 erroneous. While the question is not entirely free from doubt, we construe the order as did the court which made it, and hold that it was not a bar to the present suit.

Plaintiff testified that, under similar circumstances, where a moving car, or cars, approaches a closed switch, unless the switch was open, derailment would probably occur or the company's property would otherwise be injured or destroyed, and it was his duty to open the switch, and that this was the custom in the yards of the defendant. He introduced the testimony of several other switchmen engaged in like work in the yards of various railroads

in Omaha, to the effect that the same custom prevailed in the Omaha yards, and in railroad yards generally. The same witnesses were examined with respect to their experiences as to the conditions in automatic couplers, and conditions in tracks, under like circumstances, which would cause cars to become uncoupled. This evidence was objected to on the ground that the matters inquired of are not controlled by any custom in the Omaha or other yards, and bear no relationship to the case on trial, or to the car or coupler in controversy, or to the switch-yards in question, or the happening of the accident involved in this suit. These objections were overruled, and the ruling is assigned as erroneous. The witnesses testified that some of the causes of defective couplers, according to their observation, might be worn knuckles, worn knuckle pins or worn locking blocks, and that when couplers are defective they are more liable to uncouple on a curved track than on a straight one; that such cars are apt to uncouple when there is a stop or a jerk when the slack runs out or in, which has a tendency to put a strain on the knuckles.

Appellant argues that all this testimony is inadmissible for the reasons given in the objections, and that it does not tend to prove that the coupler on the particular car in question was defective, nor that that car became uncoupled, and that it opened up collateral inquiries foreign to the case. It is difficult to draw any hard and fast line as to how far evidence of this kind may be admissible. The question at issue was whether the car became uncoupled through a defect in the coupling. The jury found that the car became uncoupled. Obviously if the coupler had been perfect this would not have happened. We are of the opinion that it was not improper to show that cars with defective couplers would become uncoupled under similar circumstances. Railroad cars and tracks on standard railroad systems are quite similar. It would have been entirely proper to show such occurrences and their causes if they had happened in the yards of defendant at Council

Bluffs. Would it make any material difference if the yards did not belong to defendant? There was no direct proof as to a defect in the coupler. The only fact shown was that when the engine stopped the car which had formerly been coupled became detached by force of its momentum. The obvious and fair inference is that the coupler was defective, and the testimony of these witnesses tended to show that under like conditions a like result would follow. We think the evidence was relevant to the question at issue.

In *Minneapolis & St. L. R. Co. v. Gotschall,* 244 U. S. 66, the jury were permitted to infer negligence from the fact that the coupler failed to perform its functions, there being no other proof of negligence. The supreme court held that the principle that negligence may not be inferred from the mere happening of an accident, except under the most exceptional circumstances, was not controlling in the case, "in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars," citing many cases.

In *Texas & P. R. Co. v. Rigsby,* 241 U. S. 33, it was held that an employee of an interstate railway company is within the federal safety appliance acts, although not himself engaged in interstate commerce. In that case the employee was injured when taking a defective car to the shops for repairs. It was held that by these acts interstate railway companies are charged with an absolute and unqualified duty, irrespective of any question of negligence, to maintain the safety appliances, mentioned in the acts, upon railway cars used on a highway of interstate commerce.

In *San Antonio & A. P. R. Co. v. Wagner,* 241 U. S. 476, it was held that a violation of the federal safety appliance act (32 U. S. St. at Large, ch. 976, p. 943), by an interstate carrier, is in itself negligence rendering the railway company liable for the resulting injury to an employee under the employers' liability act of April 22, 1908 (35 U. S. St. at Large, ch. 149, p. 65, U. S. Comp. St. 1913, sec.

8657), as being the result of a "defect or insufficiency, due to the employers' negligence, in its cars, engines, appliances," etc., within the meaning of the latter act. It is said in the opinion that the two statutes are in *pari materia,* and that, when the act refers to a defect due to negligence in its cars, "it clearly is the legislative intent to treat a violation of the safety appliance act as 'negligence'—what is sometimes called negligence *per se.*" *Louisville & N. R. Co. v. Layton,* 243 U. S. 617; *Chicago, B. & Q. R. Co. v. United States,* 220 U. S. 559; *Texas & P. R. Co. v. Rigsby,* 241 U. S. 33; *Illinois C. R. Co. v. Williams,* 242 U. S. 462. We conclude that the detachment of the car sufficiently shows that the coupler was defective.

The appellant insists there can be no recovery because the plaintiff was not engaged in interstate commerce at the time he was injured, nor was the car, which was the cause of the injury, so engaged. This we consider the most serious question in the case. The proof shows that defendant is an interstate carrier with lines extending through Missouri, Iowa, and other states, and running passenger trains into Omaha. Plaintiff had worked as a switchman for defendant for seven years at Council Bluffs. He was acting as switch foreman and was working at the main freight yards on the day of the accident, in yards in which both interstate and intrastate traffic was handled. The three cars were taken from track seven in the yard, and were brought down the main line and pushed upon the "Y." One of the cars belonged to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and another to the New York Central Railroad Company. The engineer testified that, after he coupled on to eight or nine other cars, he was given a signal to clear the main line. The main line was used for both interstate and intrastate commerce. The car which broke loose was the end one of this string of cars which was being pushed on the "Y" for the purpose of clearing the main line. This fact, in connection with the other circumstances in the case, is

sufficient to show that the moving of these cars was so closely related to interstate commerce that the jury properly found that plaintiff was engaged in such commerce at the time of the accident. *New York C. & H. R. R. Co. v. Carr*, 238 U. S. 260; *Pennsylvania Co. v. Donat*, 239 U. S. 50; *Great Northern R. Co. v. Otos*, 239 U. S. 349; *Seaboard A. L. R. Co. v. Koennecke*, 239 U. S. 352; *New York C. R. Co. v. Porter*, 249 U. S. 168; *Kinzell v. Chicago, M. & St. P. R. Co.*, 250 U. S. 130; *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146.

Appellant strongly contends that the detachment of the car was not the proximate cause of the injury. The court instructed the jury: "By the term 'proximate cause' is meant that cause which was the direct and immediate cause that produced the result complained of, and without which that result would not have occurred." Appellant complains of this instruction, and argues that, if plaintiff had not lifted the switch handle, he would not have been injured; that he created the condition which caused the injury; that his action was an efficient intervening cause without which the result would not have occurred and that consequently the uncoupling of the car of itself was not the cause of the accident. The testimony shows that it was the duty of the plaintiff upon seeing a car or cars, running into a closed switch, which would probably cause derailment or injury to the company's property, to open the switch.

Some witnesses for defendant testify that in all probability the damage if the switch had not been opened might have been slight in degree; that the car may have been derailed, or the switch rod broken, with slight cost for repairs, but this we think is not controlling. Quick action was necessary in order to prevent injury to defendant's property, and plaintiff was in the course of his duty in endeavoring to prevent it. There was no time for a balancing of the probabilities. If the switch was not turned, damage in some degree would result; if it was turned in time, no injury to property would happen. Plaintiff testifies that, if

he had failed to act and damage had resulted, he would have been discharged. This is not contradicted. Considering this duty owed by him, we take his action to be not an independent intervening cause, but a part of a chain of circumstances which would naturally be set in motion by the uncoupling of a car in such a situation. *Chicago, R. I. & P. R. Co. v. Brown,* 229 U. S. 317. The uncoupling of the car was the first act in a series of events which would naturally, in view of all the circumstances, be apt to occur; that is, the act which would naturally be expected to occur would be an attempt by the switchman to stop the car in time to prevent damage, or to turn a switch in time to effect the same purpose. If in this attempt injury occurred, it would be a natural sequence to the first act or default.

It is complained that the damages are excessive. The verdict was for $26,500. Plaintiff is 29 years old and his expectancy is 36.03 years. He was earning $115 a month at the time of the accident November 15, 1916. Wages of switch foremen are now about $5 a day. He was operated on at a hospital in Council Bluffs soon after he was hurt and remained there two weeks. In January 1917 an operation for varicocele in the left groin was performed on him at the Wabash hospital in Moberly, Missouri, where he remained three weeks. In June, 1917, he suffered an operation by Dr. Dwyer, at St. Joseph's Hospital in Omaha, who loosened up scar tissue and removed the remains of the left testicle and spermatic cord. He testifies that he is able to walk around as he desires, but complains of nervousness and loss of sleep to some extent, and is only capable of sexual intercourse once a month. Dr. Kelly, a specialist in nervous diseases, testified that he examined him in July, 1917; that his smell and vision were normal, no disturbance in equilibrium, physical power diminished but equal on both sides, no ataxia, neither anesthesia, analgesia nor paresthesia, no deep tenderness or nerve trouble, nor abnormality except the scars due to his accident and the operations which followed. He evinced great pain on examination of the region of the spermatic cord.

Plaintiff testified he was not able to do manual labor and had not enough education to perform clerical work, and his wife testifies he is only able to do light work about the yard. Plaintiff is able to walk about without pain or difficulty and is able to do light work. He suffered three operations resulting in great pain for limited periods, but, though nervous, his bodily functions aside from his impaired sexual powers are not far from normal, according to his own physician. He has lost weight to a great degree, but in July, 1917, the doctor says he was "of muscular build and well developed." Considering the income which money brings in sound investments, and all the evidence, we think the verdict is excessive and must have been, to some degree at least, the result of prejudice. The judgment is reversed unless plaintiff within 20 days files a remittitur of $10,000. If this is done it will stand affirmed.

AFFIRMED ON CONDITION.

FLANSBURG, J., not sitting.

WILLIAM HARRISON, APPELLANT, V. LUKE H. CHENEY ET AL., APPELLEES.

FILED MARCH 25, 1921. No. 21333.

1. **Venue:** ACTION FOR NEGLECT OF COUNTY ATTORNEY. A cause of action for the neglect of a county attorney, after an accused has been held to appear, to file an information at the next term of the district court, or to file reasons for failing to do so, arises in the county where such district court is held.
2. **Criminal Law:** PERSONS HELD TO DISTRICT COURT. Since the amendment of 1915 (Laws 1915, ch. 162) to section 8957, Rev. St. 1913, persons bound or held over to the district court at the next term on criminal charges should be held or bound over to appear at "the first day of the next *jury* term" of such court, instead of to "the first day of the term" as theretofore.

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

J. E. Willits for appellant.

Tibbets, Morey & Fuller and *Stewart, Perry & Stewart, contra.*

LETTON, J.

Action against the county attorney, the deputy county attorney, and the sheriff of Frontier county, and the respective sureties upon their official bonds for wrongful, negligent and oppressive acts alleged to have been committed by the officers named. The action was brought in Adams county. Summons was served on the officers in Frontier county, and for the defendant surety company on the state insurance commissioner in Lancaster county. Special appearances were filed by the defendants separately, substantially on the ground that no defendant had been served in Adams county, and hence there was no authority to direct a summons to another county or to serve a summons in another county. The court sustained the objections to jurisdiction and dismissed the action. Plaintiff appeals.

The facts alleged which are material to the questions presented are in substance as follows: On May 8, 1918, upon a complaint filed by the deputy county attorney and upon a preliminary examination, plaintiff was held and bound over by the county court of Frontier county to appear before the district court for that county on the first day of the next regular term thereof. He was placed in the custody of the defendant sheriff, who caused him to be confined in the county jail of Adams county, where he was detained until December 21, 1918, against his will. The next regular term of district court for Frontier county convened on June 13, 1918, and adjourned *sine die* on June 14, 1918. It was alleged that it was the duty of the county attorney either to file an information at that term or file his reasons in writing for not so doing, but the county attorney and his deputy grossly and maliciously failed to file an information or reasons for not filing one, and on December 21 he was discharged from imprisonment on a writ of habeas corpus; that it was the duty of the

sheriff to produce plaintiff before the district court for Frontier county on the first day of the June term, but he maliciously and oppressively failed to do so, and that the imprisonment of plaintiff was illegal subsequent to June 14, 1918. Damages are claimed for the expenses of the habeas corpus proceeding, loss of earnings, wrongful imprisonment, and mental and physical discomfort and suffering.

The theory of appellant is that the cause of action is false imprisonment, that the cause of action or part of it arose in Adams county, and that an action against a public officer, or on his official bond, must be brought where the cause of action, or some part of it, arose, and hence the court erred in dismissing the action.

The petition does not charge that the arrest and consequent imprisonment were wrongful or illegal in the first instance, but only that the detention was illegal after June 14, 1918. The wrongful omission to act upon the part of the county attorney charged, occurred on June 13 and 14, when district court was in session in Frontier county, and no information was filed and reasons for not filing one were not presented. But this omission was in Frontier county, and the action for such omission should have been brought where the act should have been performed. Neither did the sheriff commit any wrongful act in Adams county or omit to perform any legal duty in that county. He had no right to discharge the plaintiff from custody on his own volition, and there is no statutory provision making it his duty to produce a prisoner who has been committed to await action at the next term of court at any specific time. He must produce such prisoner when directed by the court or by the prosecuting officer, and is not at liberty to release and discharge him without authorization. This being the case, the petition does not allege any cause of action against the sheriff which arose in Adams county. The detention is alleged to have been the result of the failure of the officers to act in Frontier county, and no affirmative act of any of these officers took place in Adams county.

Section 7615, Rev. St. 1913, provides that an action against a public officer for an act done by him by virtue of or under color of office, or for any neglect of his official duties, must be brought in the county where the cause, or some part thereof, arose. The neglect of the county attorney did not occur in Adams county and, as to the sheriff, the allegations of the petition do not show any neglect of a legal duty in that county.

Public officers should not be required to leave the county where the proper discharge of their official duties requires their presence to defend actions based on complaints as to the performance of such duties, except for cogent reasons.

The facts in this case are so different from those in *Vennum v. Huston*, 38 Neb. 293, relied upon by appellant, that the decision in that case is not applicable.

It may be well to notice that the statute relating to persons bound or held over to the district court for trial on criminal charges (Rev. St. 1913, sec. 8957) was amended in 1915 (Laws 1915, ch. 162), so that they now are (and appellant should have been) held to appear forthwith, if the district court is in session, and, if not in session, to appear on the first day of the next *jury* term of the district court.

To sum up, the action was upon the official bonds of the respective officers and was for neglect of official duty. It was not an ordinary action for false imprisonment. It should have been brought in the county where the neglect of the duty is charged to have taken place. The special appearance was properly sustained.

AFFIRMED.

FRANK O'NEILL V. STATE OF NEBRASKA.

FILED MARCH 25, 1921. No. 21523.

1. **Burglary: POSSESSION OF TOOLS: INTENT.** In a prosecution under section 8645, Rev. St. 1913, for the possession or control of burglar's tools, it is not essential to conviction that the instrument is not

susceptible of an innocent use, or is in common use by burglars only. It is the intent with which it is to be used that is the gist of the charge.

2. ———: ———: ———. In such a prosecution it is unnecessary to charge or prove that the intent was to break into any specific building or structure. If the evidence is sufficient to establish a general intent to commit burglary it is sufficient.

3. ———: ———: ———: PROOF. Such intent may be proved by circumstantial evidence, but the circumstances proved must be of such a nature as to exclude the idea of any other than a burglarious intent. A mere conjecture or suspicion will not uphold a conviction.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

Jamieson & O'Sullivan, for plaintiff in error.

Clarence A. Davis, Attorney General, A. V. Shotwell, W. W. Slabaugh and *Arthur Rosenblum, contra.*

LETTON, J.

Plaintiff in error was convicted upon an information charging, in substance, that he and four others on December 5, 1919, in Douglas county, had in their possession, and under their custody and control, "a certain instrument or tool, to wit, a pinch-bar, commonly known as a 'jimmy,' and commonly used by burglars for breaking and entering buildings, with the intent * * * unlawfully, feloniously and burglariously to use said instrument or tool, * * * knowing said instrument or tool, to be in general use among burglars for breaking and entering buildings." Many assignments of error are made, but these only will be considered upon which we think the case turns.

O'Neill with the other men accused drove into a garage at Fortieth and Farnam streets in Omaha, between 10 and 11 p. m., to obtain air, oil and gasoline. Two police officers saw them there, and for some reason not shown in the evidence, but perhaps implied by a statement of officer Adams, then made to them, that Gillinsky and O'Neill had gotten away from him once before, stopped them as they were driving out, made them alight, and searched their

persons and the automobile. Nothing incriminating was found on their persons, but, in the recess in the back of the front seat into which a seat folded, four revolvers were found, and a short iron or steel pinch or wrecking-bar was found under the back seat. It is on the possession of the latter implement that the prosecution is based.

Section 8645, Rev. St. 1913, is as follows: "Whoever shall be found having upon him or her, or having in his or her possession, custody or control any picklock, crow, key, bit, or other instrument or tool with intent feloniously to break and enter into any dwelling house, store, warehouse, shop or other building containing valuable property, shall be deemed guilty of a felony," etc.

Several witnesses testified as to the name and nature of the tool or instrument in evidence. It is undisputed that such a tool is a common article of sale in hardware stores and is in general use by carpenters in the demolition of frame buildings. It is flattened at one and at the other end is curved and made in the form of a claw for the purpose of pulling nails and prying. In the trade it is known as a "wrecking-bar" or "pinch-bar." It is also in use by garage and automobile owners for the purpose of removing tires, especially when the tires are frozen. The court instructed the jury that the gist of the offense is having possession of a burglarious implement or tool, with intent to use it for the purpose specified in the statute, and that it was unnecessary to prove that it should be of a character adapted for burglary only; that it is sufficient if it is suitable for the purpose charged. Complaint is made of this instruction, but we think it is a correct statement of the law.

It is assigned that the verdict is contrary to law, contrary to the law laid down in the instructions, and is not sustained by sufficient evidence. The evidence seems to show that the tool is not what is usually termed by police officers a burglar's "jimmy." Before the days of automobiles a "jimmy" was usually of a length that could easily be carried and concealed upon the person; but, since burglars and safe-crackers have taken to the more speedy

and commodious form of locomotion provided by such modern vehicles, the evidence shows that instruments of the form and size of the one in evidence have been used in several burglaries. The fact is that if the instrument was sufficiently described in the information, as we think it was, the exact nomenclature in thieves' jargon is immaterial.

Plaintiff in error has made an interesting review of the various statutes in England and in this country making the possession of burglar's tools a crime, and insists that an information is defective which fails to describe the building which it is the intent of the accused burglariously to enter. Such a construction would practically nullify the statute, unless in the few cases where one of the parties confessed the intention, or where the crime was almost in the act of being committed when the criminals were apprehended. *People v. Edwards,* 93 Mich. 636; *State v. Erdlen,* 127 Ia. 620.

The critical point in the case is with regard to the proof of intent. The story of O'Neill is that it was proposed by Gillinsky, about 10 o'clock p. m., that they go to Benson to play cards; that O'Neill borrowed an automobile which belonged to his nephew; that they met at a restaurant and invited the three others jointly charged to accompany them; that on the way they stopped at the garage where they were arrested; that the pinch-bar was his and had been in use by him as a tire tool and handle for a jack when he ran a taxicab for hire; that he sold the taxicab and loaned his nephew the tool and wrenches he had; that he had not been in the back seat of the car that evening, and had no knowledge that there were any revolvers in the car. On cross-examination he stated that he was not regularly employed, and had been sick most of the winter; that he had been driving his nephew's car as a taxicab three or four times a week, getting to a taxicab stand about 1 p. m. and working until 1 a. m; that before this he had been a bartender for 15 years.

While O'Neill's story seems somewhat improbable, it was not met with any contradiction. It was not shown that

any of these men had ever been accused or convicted of any crime, or had ever been implicated in a crime of like nature to burglary. O'Neill testifies that one is a switchman, one a jewelry salesman, and the other a jewelry engraver, and this is not disproved. No keys, flash lights, bits, nitroglycerine, soap, fuse, or other articles or instruments in common use by burglars or safe-breakers were found. In fact, if engaged in a criminal enterprise, which may not be improbable, the equipment would seem more likely to be intended for use in committing highway robbery than burglary. Four witnesses, a dealer in tires, a furniture manufacturer, a lawyer, and a deputy sheriff, testified that they each carry in their automobiles a wrecking-bar of this nature and use it for removing tires, especially in winter when there is ice between the rim and the tire. That the tool could be used for innocent purposes is not important, because even a spade, a screw driver, or a hammer, may be used as a burglar's tool. Its presence under the automobile seat may be shown to be consistent with an ordinary use by honest men, as tending to explain its possession under the circumstances.

It may be, and probably is, the fact that the police force and perhaps the court and jury were in possession of knowledge which would justify an ordinary mind in the belief that the men were criminals, and that the tool was intended to be used for a burglarious purpose; but convictions must rest upon evidence produced in court, and not upon extraneous knowledge, nor upon suspicion or inferences based upon insufficient grounds. The evidence as to intent was, and of necessity must nearly always be, based upon inferences from established facts, and therefore circumstantial in its nature; but there must be facts enough to justify a belief beyond a reasonable doubt that a burglarious intent existed. The cases in the books show facts much stronger than those in evidence. The evidence of intent is not sufficient to sustain the verdict, which is not in accordance with the instructions of the court.

REVERSED AND REMANDED.

ROSE, J., not sitting.

PRAIRIE LIFE INSURANCE COMPANY, APPELLANT, V. MYRON M. HEPTONSTALL ET AL., APPELLEES.

FILED MARCH 25, 1921. No. 21301.

1. **Appeal:** PLEADING: WITHDRAWAL OF COUNT. Where two causes of action are stated in a petition and the second count depends on proof of fraud pleaded in the first count, the withdrawal of the second count from the jury may not be prejudicial to plaintiff, if a judgment on a verdict in favor of defendant on the first count is free from error.
2. **Trial:** INSTRUCTIONS. Where the issues of fact raised by the pleadings are correctly stated to the jury, the failure to give an instruction defining plaintiff's theory of the case is not an error in a record failing to disclose the tender of a proper instruction of that kind.
3. **Appeal:** AFFIRMANCE. A judgment will not be reversed for harmless errors in giving or in refusing instructions or in rulings on evidence.
4. **Trial:** MISCONDUCT OF COUNSEL: WAIVER. For the purpose of hearing objections, making rulings and enforcing discipline, a presiding judge who is momentarily absent from the bench with the consent of the parties should be called back by an attorney whose client's rights are being invaded by the misconduct of opposing counsel in addressing the jury, and a failure to pursue this course and to make objections promptly may amount to a waiver of the misconduct.

APPEAL from the district court for Douglas county: ARTHUR C. WAKELEY, JUDGE. *Affirmed.*

T. W. Blackburn, for appellant.

Montgomery, Hall & Young and *Sutton, McKenzie, Cox & Harris, contra.*

ROSE, J.

This is an action to recover damages in the sum of $8,985.22 for alleged fraud perpetrated by defendants in the sale of 500 shares of plaintiff's corporate stock at $20 a share, or for $10,000. The purchasers of the stock were E. W. Burch and J. A. Steinberger. They paid $300

in cash, and contend that the sum of $2,500 was not payable to plaintiff but to promoters for making the sale. Part of the consideration for the purchase was the note of the purchasers for $7,200 secured by a mortgage for that sum on 480 acres of land in Canada. Upon the organization of plaintiff as a corporation defendants became directors. Defendant Heptonstall was elected president and treasurer and served in those capacities. Defendant Tennant was elected secretary and served as such.

Plaintiff pleaded three causes of action. The first count is based on fraudulent representations by defendants respecting the value of the mortgaged land and the financial standing of the purchasers of the stock. The specific charges of fraud are that defendants falsely represented the value of the mortgaged land to be $30 an acre, or $14,400; that the purchasers were men of means and that their note would be good, if unsecured; that plaintiff would be permitted to retain, in addition to the mortgage, 500 shares of stock as collateral security for the payment of the purchase price. It is also charged that the members of plaintiff's board of directors were thus induced to instruct its secretary to complete the transactions with the purchasers, Burch and Steinberger. The claim on this count is $5,000.

The second cause of action includes the fraud pleaded in the first count and contains the charge that defendants converted to their own use 140 shares of plaintiff's stock, paying plaintiff only $300. On this count plaintiff demands $2,500 and interest, amounting in all to $3,275.

The third cause of action includes the fraud pleaded in the first and second counts, and contains a claim for taxes paid by plaintiff on the mortgaged land for four years beginning in 1914, the aggregate being $710.22.

The defenses may be summarized for the purposes of review as follows: Denial of fraud; good faith and full disclosure in all transactions; giving the note and the mortgage for $7,200 and paying $300 in cash in full payment of the 500 shares of stock, including the 143 shares alleged to have been converted by defendants, the remain-

der of $2,500 being payable by the purchasers to a promoting company as commissions for making the sale; denial of pledge of stock as collateral security; payment of the note and satisfaction of the mortgage.

The trial court directed a verdict for defendants on the second cause of action, and instructed that they were also entitled to a finding on the third count unless the jury should find in favor of plaintiff on the first count. The material issues of fraud pleaded in the first count were submitted to the jury. On verdict in favor of defendants the action was dismissed, and plaintiff has appealed.

In one of the assignments of error the instruction withdrawing from the jury the issues on the second count is challenged. This point does not seem to be well taken. The fraud pleaded in the first count was essential to a recovery in favor of plaintiff on the second. It follows that, if the issues of fraud in the first count are correctly determined against plaintiff, defendants are not liable for the conversion pleaded in the second count. This view applies also to the third count for taxes. The purchase price to which plaintiff was entitled was $7,500. Of this there was a payment of $300 in cash. For the remainder of $7,200 plaintiff accepted a note secured by mortgage. Later plaintiff accepted a deed to the mortgaged land, canceled the mortgage, and surrendered the note to the purchasers of the stock. The first count contains the plea that defendants fraudulently represented that the land was worth double the amount of the purchasers' obligations to plaintiff, or $14,400, and that the purchasers' note would be good, if unsecured. As the issues were formed, controverted by proofs on both sides, and determined, the verdict in favor of defendants, which is amply sustained by the evidence, seems to justify the conclusion that defendants did not perpetrate any fraud resulting in damage to plaintiff.

It is argued that there was error in the failure of the trial court to give an instruction defining plaintiff's theory of the case. The material issues of fraud charged in the first count were distinctly stated to the jury in a form not

to be misunderstood by the jury. There was a direct finding in favor of defendants on those issues. If plaintiff's theory of the case was not stated in the charge of the court, a satisfactory instruction in proper form should have been requested. Such an instruction, one that could have been given without error, has not been found in the transcript, and without it prejudicial error in this respect does not affirmatively appear in the record. This assignment of error is therefore overruled.

Complaints are also made of other rulings in giving and in refusing instructions and of rulings on evidence, but error prejudicial to plaintiff in these respects has not been found.

The serious question presented for review is misconduct of one of the attorneys for defendant Heptonstall in addressing the jury. Counsel went outside of the record, indulged in unworthy personalities in referring to opposing counsel, made statements having no foundation in the proofs, and thus abused his privileges as a member of the legal profession. The chief difficulty in basing a reversal on this ground arises from the failure of plaintiff to invoke the power of the court to stop the misconduct at its inception, to discipline the offender, and to direct the jury to disregard the reprehensible utterances. Failure to seek the protection of the court at the time is explained by the temporary absence of the presiding judge who was in an adjoining room. This, however, is not a sufficient justification. Counsel for plaintiff was not without responsibility. In the absence of a record showing the contrary, it will be presumed that the presiding judge was absent momentarily with the consent of all parties to the litigation. A mere call would have brought him to the bench instantly, where his duties called him, to make rulings and to enforce discipline. The misconduct could and should have been stopped at the beginning, and the responsibility of plaintiff for failure to act promptly cannot be ignored. Besides, counsel for plaintiff, at the outset, may have been willing to rely on his own skill, while making his reply, to

turn his opponent's misconduct to plaintiff's advantage. In addition, it is not certain that plaintiff was prejudiced. The trial had been in progress for nearly two weeks and the importance of the evidence adduced as the controlling factor in determining the issues would not escape the attention of the jury. In the instructions subsequently given it was made clear that the preponderance of the evidence should control the jury in making their findings. There is another feature of this inquiry to be considered. There were two defendants represented by different counsel. The jury were permitted to find either against or in favor of each defendant. The attorneys for defendant Tennant had no part in the misconduct. To hold him responsible for it and to reverse the judgment in his favor on that ground would be an injustice. The attack of plaintiff is directed against the judgment as a whole. When this assignment of error is considered from every standpoint, there does not seem to be a sufficient reason for reversal.

Not finding any reversible error in the record, the judgment is

AFFIRMED.

LETTON, J., not sitting.

STATE, EX REL. EDWARD FALCONER, V. MARSHALL EBERSTEIN ET AL.

FILED MARCH 25, 1921. No. 21277.

1. **Criminal Law**: EXTRADITION. Where a person is charged in two states with the commission of a separate offense in each, and has been arrested in one of them, such state has exclusive jurisdiction of the alleged offender until the demands of its laws are satisfied. Nevertheless the governor of such state may honor the requisition of the governor of a demanding state and such surrender of the prisoner will operate as a waiver of the jurisdiction of the asylum state.
2. **Habeas Corpus**: FUGITIVE FROM JUSTICE: CONFLICT OF EVIDENCE. When in an interstate extradition proceeding the evidence con-

flicts on the question of the prisoner's presence in or absence from the demanding state at the time of the commission of the alleged offense, such conflict in the evidence will not require the discharge of the prisoner in habeas corpus.

3. ———: ———: SUFFICIENCY OF INDICTMENT. The technical sufficiency of the indictment of a demanding state, which charges the elements of a crime under the laws of such state, is not a proper subject of inquiry in habeas corpus, where interstate extradition proceedings are involved. That is a question for the decision of the courts of the demanding state.

4. ———: EXTRADITION: COMPLAINT: EVIDENCE. "In habeas corpus to release a prisoner detained under a warrant of extradition, the fact that a complaint was filed against him in the demanding state is *prima facie* evidence that he was there charged with a crime." *Chandler v. Sipes*, 103 Neb. 111.

5. Extradition: REVOCATION OF WARRANT. The power to revoke his warrant, issued by the governor for the surrender of an alleged fugitive from justice, may be exercised by him at any time before the prisoner is taken from the state.

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

Jamieson & O'Sullivan, for plaintiff in error.

Abel V. Shotwell, W. W. Slabaugh and *R. T. Coffey, contra.*

DEAN, J.

Edward Falconer, the relator, filed an application for a writ of habeas corpus in the district court for Douglas county, alleging unlawful restraint of liberty under a warrant issued by the governor of this state, pursuant to a requisition issued by the governor of Iowa. The writ was denied and the relator prosecutes error.

It seems that, a few days before this proceeding was commenced, relator was arrested in Omaha on the oral request of respondent, who is the sheriff of Pottawattamie county, Iowa, and was confined in the Omaha jail. Subsequently he was admitted to bail in the sum of $500. The governor of Nebraska, after an *ex parte* hearing, honored the request for extradition, and relator was remanded to

the Omaha jail, preparatory to being taken to Iowa. To obtain his liberty the relator applied for a writ of habeas corpus.

The offense for which extradition is sought is based on substantially these alleged facts: Relator was indicted by a grand jury in Pottawattamie county, Iowa, and charged by that body with having entered into an unlawful and felonious conspiracy, with four other persons, and that the alleged conspirators "did then and there, jointly and separately, take upon themselves to exercise and officiate in the offices of peace officers," falsely, etc., and that, while acting as pretended law officers, they unlawfully searched the farm premises of William Rodenburg, with the ostensible purpose of discovering whether intoxicating liquors were concealed thereon. Subsequently, it is alleged, relator came to Nebraska, was pursued and arrested, and the proceedings complained of followed.

Relator first argues that, when requisition was demanded and when it was honored, he was then under bail to answer a charge of grand larceny laid against him by the prosecutor of Douglas county, Nebraska. He contends that under the facts, and the terms of his bail bond, and the law, he cannot be lawfully extradited. He cites section 8990, Rev. St. 1913, which provides: "Whenever a demand is made upon the governor of this state by the executive of any other state or territory, in any case authorized by the Constitution and Laws of the United States, for the delivery of any person charged in such state or territory with any crime, if such person is not held in custody or under bail to answer for any offense against the laws of the United States or of this state, he shall issue his warrant, under the seal of the state, authorizing the agent who makes the demand, either forthwith or at such time as may be designated in the warrant, to take and transport such person to the line of this state, at the expense of such agent, and may also by such warrant require all peace officers to afford needful assistance in the execution thereof."

Relator contends that he comes within the purview of section 8990, and is immune, in that he is "under bail" to answer for the commission of an alleged offense against the laws of this state. The weight of authority does not sustain his argument. It has been held that the governor of the asylum state may waive the right of such state, even after conviction, to punish the prisoner for a crime for which he was convicted, and may honor a requisition issued by a demanding state. *People v. Hagan,* 34 Misc. Rep. (N. Y.) 85. In 11 R. C. L. 725, sec. 16, it is said: "But an accused fugitive cannot avail himself of the fact that he has been convicted of a crime in the asylum state and is out on bail pending his appeal, since that is a matter which the asylum state only can take advantage of."

Where a person is charged in two states with the commission of a separate offense in each, and has been arrested in one of them, such state has exclusive jurisdiction of the offender until the demands of its laws are satisfied. Nevertheless the governor of such state may honor the requisition of the governor of a demanding state and such surrender of the prisoner will operate as a waiver of the jurisdiction of the asylum state. *In re Hess,* 5 Kan. App. 763.

Relator contends that he was not in Iowa when the offense, there charged against him, was alleged to have been committed. On this point the evidence conflicts. However, we conclude that the evidence supports the view that he was a fugitive from the justice of the demanding state. In that state of the record, and in view of the facts, relator cannot lawfully be discharged on habeas corpus. In *Munsey v. Clough,* 196 U. S. 364, 375, it is said: "But the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

Relator argues that the conspiring and confederating together of two or more persons, to falsely represent themselves to be peace officers and to do the things charged against relator, and the persons associated with him, is not an act that is injurious to public morals, nor is it injurious to the police or to the administration of public justice. We do not agree with counsel. Section 4902, Iowa Code, 1897, provides that, if any person undertakes to officiate in any office or place of authority without being legally authorized thereunto, he shall suffer imprisonment of not more than one year in the county jail or shall be fined not exceeding $1,000, or both. Section 5059, Iowa Code, 1897, provides that, if two or more persons conspire or confederate together to do any illegal act injurious to public trade, health, morals, or police, or to the administration of public justice, or to commit any felony, they are guilty of conspiracy and may be imprisoned in the penitentiary not more than three years.

It seems that a mere statement of relator's argument is its own refutation. The administration of public justice would soon be destroyed in a community or in a state that would tolerate the assumption of the prerogative of peace officers by persons without authority. Such is the confidence that is reposed generally in the rectitude of those occupying official position that the assumption of pretended official power, in any department of the public service, would afford opportunity to the morally depraved for the commission of the most atrocious crimes.

Relator argues that the indictment under which he was arrested does not state a crime against the laws of Iowa. The technical sufficiency of the indictment of a sister state, which charges the elements of a crime under the laws of such state, and the question of the procedure thereunder, are not proper subjects of inquiry in habeas corpus, where interstate extradition proceedings are involved. That is a question for the decision of the courts of the demanding state. *Munsey v. Clough,* 196 U. S. 364. In *Chandler v. Sipes.* 103 Neb. 111. the *Munsey* case is cited and followed.

Relator complains because the extradition proceedings were *ex parte,* and argues that, if the governor's attention had been drawn to section 8990, Rev. St. 1913, he, in view of the statute and of the facts, would have refused to issue his warrant. It seems that in cases involving interstate extradition governors exercise their discretion, and if it appears that extradition is sought for the purpose of collecting a private debt, or if it is sought for some improper purpose, he may, in the exercise of his discretion, refuse his warrant. It follows that, if it is within the discretion of that official whether the warrant shall issue, it is likewise in his discretion whether after issuance he will revoke it. And, acting in his official capacity, and representing as he does the sovereignty of the state, in either case his reasons cannot be inquired into. It is common knowledge that a governor's warrant, issued pursuant to a requisition, is almost always *ex parte,* so that of course he may at times be imposed upon. It is therefore perfectly proper that the power of revocation should remain in the hands of the governor to be exercised by him at any time before the alleged fugitive is taken from the state. *State v. Toole,* 69 Minn. 104; *Work v. Corrington,* 34 Ohio St. 64; Spear, Extradition (2d ed.) 440. It does not appear that relator applied to the chief executive of the state for a revocation of the warrant, nor that he offered to make any showing that would tend to cause a revocation by that official.

The court did not err in denying the writ. The judgment is

AFFIRMED.

LETTON, J., not sitting.

MINNIE DAVIS, APPELLEE, V. ELLA MURPHY ET AL., APPELLANTS.

FILED MARCH 25, 1921. No. 21285.

1. **Specific Performance:** PAROL CONTRACT. A parol contract is enforceable in a court of equity when one party has wholly performed his part and the other has not performed his part, when it clearly appears that nonfulfilment would work a fraud upon the party who has fully performed.
2. ———. "Specific performance is a matter of discretion in a court, which withholds or grants relief according to the circumstances of each particular case, where the general rules and principles governing the court do not furnish any exact measure of justice between the parties." *Kofka v. Rosicky*, 41 Neb. 328.
3. **Evidence:** DECLARATIONS AGAINST INTEREST. "It is fundamental that declarations against interest cannot ordinarily be annulled or explained away by counter declarations." *Evans v. Kelly*, 104 Neb. 712.
4. **Specific Performance:** EVIDENCE. The evidence examined, and *held* that the making of the oral contract in suit, and the fulfilment by plaintiff of the part to be performed by her, is clearly established by the evidence.

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

Pitzer, Cline & Tyler and *George H. Heinke*, for appellants.

W. F. Moran, contra.

DEAN, J.

Mrs. Minnie Davis brought an action against the estate of her deceased mother, Mrs. Ellen Roddy, to compel the specific performance of an oral contract for the conveyance of a forty-acre tract of land, said to have been entered into by Mrs. Roddy and her daughter in July, 1910. Plaintiff alleged that her mother proposed to her that, if she would provide her with such necessaries of life as she required, until her death, she would convey to her the land,

as compensation for such necessaries, and for necessaries that plaintiff had theretofore furnished. Plaintiff alleged performance on her part and pleaded failure of performance on the part of decedent. Defendants denied plaintiff's allegations generally, and pleaded that, even if there was such a contract, it was void under the statute of frauds. The court found generally in favor of plaintiff, and awarded specific performance. Defendants appealed.

Mrs. Roddy died intestate in April, 1917, without having conveyed the land to her daughter pursuant to the alleged agreement. Five children survived her, as her only heirs at law, namely, Minnie Davis, the plaintiff, and Ella Murphy, Edward Roddy, Frank Roddy, and Catherine Wall, the defendants. Mrs. Roddy was a widow when she died, her husband having died in 1878. Plaintiff is 55, and is the eldest of the children. She too is a widow, her husband having died in 1894.

Mr. Yowell is a railroad employee, and was a near neighbor of Mrs. Roddy for the last 25 years of her life. He testified that 10 or 12 years before she died Mrs. Roddy told him "that she had made a contract with her daughter Minnie, who was to have the farm if she would take care of her in her lifetime." On the cross-examination he testified that she first told him about her contract with Minnie about 20 years ago. He said that subsequently "she told me, I expect, 50 times," and that she spoke to him about her contract with Minnie "two or three times every year." Mr. Graham is a miller, and was a near neighbor and acquaintance of Mrs. Roddy for over 40 years. He testified that on one occasion she handed one of the farm leases to him and, upon her request, he read it to her. He said that she at once expressed surprise that it did not provide that the rent should be paid to Minnie. She told Mr. Graham that she had directed Patrick Roddy, who wrote the lease, to insert such a provision, to the end that it would be so paid if she should die. Mr. Roddy, however, on the part of defendants, denied that he was so directed by Mrs. Roddy. Mr. Daugherty is a section fore-

man. He testified that Mrs. Roddy's house was "almost on the right of way," and that he and his men frequently ate dinner "under the shade of the trees in her yard;" that he once asked her "why she didn't sell her farm and move to town;" that in reply she said she preferred to live where she was, and that "when she was gone why Minnie could do as she pleased with the place." Schuyler Tipton is a rural route mail carrier. His route for about 19 years included the territory where Mrs. Roddy lived. He testified that for practically all of that time he delivered parcel post packages for or to Mrs. Roddy; that they came "once a week, sometimes two a week, and sometimes they wouldn't come for 2 weeks," that they varied in size and weight from 4 to almost 50 pounds; that the packages were nearly all marked as coming from Minnie Davis at Lincoln, where she lived. It was shown that the postal packages contained groceries, meats, clothing, and the like. A granddaughter testified that Mrs. Roddy frequently told her that "Minnie was all she had to depend on for what she needed," and that in sickness she always called on Minnie.

That Mrs. Roddy's supply of clothing and provisions and house furnishings, for almost 20 years before she died, came from Mrs. Davis, and that she took care of her mother in her feebleness and in her helpless age is clearly established by the evidence of six or seven disinterested witnesses. The testimony of the defendants themselves, all of whom had left their mother, and with one exception were residents in other states for more than 20 years, shows that their contribution to the living and to the comfort of Mrs. Roddy was negligible.

For the last year before Mrs. Roddy's death the 40 acres in question rented for $120 cash rent. For the preceding three years the rental was $105 a year. It was not shown that the rental ever exceeded that sum. This income, together with the proceeds from the sale of a few eggs and some poultry, was Mrs. Roddy's sole dependence for her livelihood. The record is clear that but for the contributions of plaintiff she would have been in extreme want.

An attempt was made by defendants to show that Ethel Davis, plaintiff's only child, now married, was kept in the high school by her grandmother until graduation, but the record does not support their contention. Ethel was at her grandmother's place, as shown by the weight of the evidence, less than six months, and was graduated from the Lincoln high school and afterwards attended the university at the sole expense of her mother. On defendant's part a witness testified that Mrs. Roddy in her last illness made statements that were inconsistent with the terms of her alleged contract with plaintiff, and in effect that she wanted her children to share her property equally. It is elementary that declarations against interest are ordinarily conclusive as against the party making them and they cannot be annulled or explained away by counter declarations. *Evans v. Kelly,* 104 Neb. 712. The rule seems to be applicable to the facts before us.

The law in this state is that nothing contained in the statute of frauds "shall be construed to abridge the powers of the court of equity to compel the specific performance of agreements in cases of part performance." Rev. St. 1913, section 2626. Under the act a parol contract is enforceable in a court of equity when one party has wholly performed his part and the other has not performed his part, when it clearly appears that nonfulfilment would work a fraud upon the party who has fully performed. This feature of the act has often been construed by this court and has been so fully discussed that further elaboration does not seem to be necessary. *Kofka v. Rosicky,* 41 Neb. 328, 25 L. R. A. 207, 43 Am. St. Rep. 685; *Moline v. Carlson,* 92 Neb. 419; *Parks v. Burney,* 103 Neb. 572. If there is complaint against the law, application should be made to the legislature for its amendment.

We have examined the case *de novo* and conclude that the judgment must be affirmed. The court's findings are supported by the testimony of six or more witnesses, all disinterested. The weight of the evidence is on the side of plaintiff. That the old lady was able to support her-

self from the proceeds of a forty-acre tract of land, partly overgrown with brush, and that rented for $125 a year, and less for a series of years, is beyond belief. That Mrs. Roddy was practically abandoned by all of her children, except her daughter Minnie, for more than 20 years, sufficiently appears. The record clearly supports plaintiff's allegations respecting the making of the contract and her support of her mother in pursuance of its terms. To deny to her now its fulfilment would be a miscarriage of justice.

The record discloses that the land in question was sold, under the court's direction, for $6,100. The court ordered that, after the statutory charges against the estate, and the costs of administration and the like were paid, the remainder should be paid over to plaintiff. The court did not err in the premises.

The judgment is

AFFIRMED.

SIOUX CITY BRIDGE COMPANY, APPELLANT, V. DAKOTA COUNTY, APPELLEE.

FILED MARCH 25, 1921. No. 21252.

1. **Taxation:** VALUATION OF BRIDGE. In determining the true value of a bridge under the provisions of section 6364, Rev. St. 1913, for taxation purposes, all the elements which go to make up value should be considered. Generally these are the cost of construction, the life of the structure, depreciation, cost of reproduction, net earnings, value of stock and bonds, and, while none of these elements are controlling, each has its proper bearing upon the ultimate question of true value.
2. ———: EQUALIZATION OF ASSESSMENT: REVIEW. "The findings of a board of equalization must be so manifestly wrong that reasonable minds could not differ thereon before this court will disturb them." *Woods v. Lincoln Gas & Electric Light Co.*, 74 Neb. 526.
3. ———: ASSESSMENT. Where property is assessed for taxation at its true value, and other property in the district is assessed at

55 per cent. of its true value, the remedy, to secure equal taxation, is to have the property assessed below its true value raised, rather than to have the property assessed at its true value reduced. Section 6300, Rev. St. 1913, contemplates that all property be assessed at its true value.

4. **Evidence** examined, and *held* to sustain the judgment of the district court.

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

Jesse L. Root and *Wymer Dressler,* for appellant.

George W. Leamer, contra.

DAY, J.

This is an appeal to review the judgment of the district court for Dakota county affirming the action of the board of equalization of that county in assessing the value of the property of the Sioux City Bridge Company for the year 1918 at $700,000. It appears that the Sioux City Bridge Company, hereinafter designated the appellant, was in 1918, and had been for a great many years prior thereto, the owner of a steel bridge spanning the Missouri river near the city of Sioux City, Iowa. This bridge with its necessary approaches was so situated that, based upon the original cost of construction, 73.8 per cent. thereof was within Dakota county and the remainder in the state of Iowa. The bridge was designed and constructed for the use of railroad traffic only. The total length of the bridge and approaches was 3.88 miles, the bridge proper being 1,800 feet long. For several years prior to 1918 that portion of appellant's property situated within Dakota county had been returned by its officer for taxation purposes at a valuation of $600,000. In the spring of 1918 the assessor of Dakota county made out a tax schedule in which he listed the appellant's property at $600,000 and mailed the same to appellant for its signature. Appellant refused to sign the schedule as thus made out and returned the same to the assessor with a protest that the valuation named by him was too high. The assessor declined to reduce

the valuation and thereupon made an entry in his books placing the valuation of the property at $600,000. Objections were filed to this assessment with the board of equalization and a hearing had thereon. At the conclusion of the hearing before the board of equalization, which appears to have been very informal, the valuation was fixed by the board at $700,000. On appeal from the order of the board of equalization the trial court affirmed its action and fixed the valuation at $700,000. It is insistently urged by the appellant that the valuation of $700,000 is excessive and should be reduced.

Section 6364, Rev. St. 1913, relating to the valuation of property of this character, provides, in substance, that any person or corporation owning or operating a railroad bridge independent of a railroad system, over any stream or river forming the boundary line between this and any other state, shall be required to list the same for taxation, and that the same shall be assessed and taxed at its true value in money as personal property. In arriving at one-fifth of the value, if such bridge is constructed over a navigable stream, the value of the same to the center of the channel of such stream, together with all rights, privileges and franchises connected therewith, shall be taken into consideration in ascertaining the true value of such bridge property for taxation.

The testimony shows that the bridge, including the approaches, was constructed 30 years ago at a total cost of $1,022,355.28; that it has been kept in good repair; but it is also shown that it is not the type of construction required to meet the demands of modern railroading; that the spans are not strong enough to permit the larger type of locomotives to be operated over it, nor to permit the use of "double-headed" trains unless 5 cars are placed between the locomotives. It is also shown that the modern tendency in railroading is the use of heavier locomotives and trains. Its construction accommodates but a single track.

One of the witnesess places the depreciation at approximately $200,000. On this basis the portion of the bridge taxable in Dakota county would be approximately $606,900. Another witness places the value of the entire structure for investment purposes at 70 per cent. of its original cost, or $715,648. On this basis the portion in Nebraska would be valued at $528,148. Still another places the depreciation at $300,000, which would mean that the Dakota county portion was worth $533,098. The experts agree that to reconstruct such a bridge the cost would be increased approximately 50 per cent., and all agree that it would be an economic mistake to attempt to reconstruct or remodel it so as to meet the present requirements of railroad business. The testimony shows that the life of this structure is, for the steel work approximately 70 years, and for the masonry 100 years.

The record shows that, beginning in 1907, the bridge was leased to two railroads at a combined rental of 8 per cent. upon the original total cost of construction, the yearly rental being $81,788.42. In addition to this annual rental, the lessees paid the taxes and also a flat sum of $10,000 *per annum* to keep up repairs and meet depreciation. It also appears that the net earnings of the bridge for the period from June 1, 1896, to November 1, 1907, was $1,814,591.55, or an average yearly of $160,150 for that period. What the income may have been from the time the bridge was constructed to June 1, 1896, does not appear.

It is difficult to lay down any hard and fast rule for the determination of the value of such structures for the purpose of taxation. All of the elements which go to make up value should be considered. Generally speaking the cost of construction, the life of the structure, depreciation, cost of reproduction, net earnings, value of stocks and bonds on the market are items which are considered. None of these elements is controlling, but each has its proper bearing upon the ultimate question of true value, so that in the end the question of value must rest in the sound

judgment of the tribunal passing upon the question, giving to the several elements their proper weight.

It will be noted that there is a very wide difference between the value of the property as fixed by the witnesses and the value as found by the board of equalization and subsequently approved by the trial court. The perplexing problem, as we view it, is as to the weight to be given to the earning of the property as bearing upon the ultimate question of the true value.

It must also be borne in mind that the rule is now established in this jurisdiction that the findings of the board of equalization, on the question of value, will not be disturbed unless they be so manifestly wrong that reasonable minds could not differ thereon. *Woods v. Lincoln Gas & Electric Light Co.*, 74 Neb. 526.

Notwithstanding that the bridge may be somewhat obsolescent, in the light of present day demands, a fair analysis of the testimony indicates that in the past the owners of the property have not only received a fair interest return upon the investment, but have also received the larger part, if not all, of the original amount expended, and are still receiving a fair interest upon the original costs. In this connection it is urged by appellant that the type of the structure is such as to invite the competition of a modern, up-to-date bridge, and that when that time comes the present bridge will be practically worthless. It would seem a sufficient answer to this suggestion that the new bridge has not yet been constructed, the present one is still enjoying a fair return on the investment, and when the present bridge ceases to be earning a fair return on its value, the taxing authorities will no doubt give the new conditions their proper consideration. Upon a consideration of all the elements which go to make up value we are of the view that the finding of the board of equalization is not so manifestly wrong that we are justified in disturbing it.

It is finally urged that this court should reduce the true value of the bridge as found by the court to 55 per

cent. of such value, for the reason that other property in the district is assessed at 55 per cent. of its true value, and that it would be manifestly unjust to appellant to assess its property at its true value while other property in the district is assessed at 55 per cent. of its value.

While undoubtedly the law contemplates that there should be equality in taxation, we are of the view that the plan of equalization proposed by appellant is not the proper remedy. The rule is now settled by a recent decision of this court that when property is assessed at its true value, and other property in the district is assessed below its true value, the proper remedy is to have the property assessed below its true value raised, rather than to have property assessed at its true value reduced. *Lincoln Telephone & Telegraph Co. v. Johnson County,* 102 Neb. 254. In the argument of appellant the soundness of this ruling is assailed, and authorities in other jurisdictions are cited which seem at variance with our holding. We are not willing, however, to recede from the rule of that case.

It follows from what has been said that the judgment of the district court should be, and it hereby is,

AFFIRMED.

FERDINAND NABOWER V. STATE OF NEBRASKA.

FILED MARCH 25, 1921. No. 21718.

1. **Rape:** CORROBORATIVE TESTIMONY. In a prosecution charging rape, other direct testimony than that of the prosecutrix as to the particular act is not essential, where there is corroboration of other surrounding facts and circumstances, which support her testimony against the accused as to the particular act, and identify the accused as the guilty party, and where the evidence, taken altogether, is sufficient to satisfy the jury, beyond a reasonable doubt, of the guilt of the accused.

2. ———: CHASTITY: BURDEN OF PROOF: INSTRUCTIONS. In a prosecution charging statutory rape upon a girl between the ages of 15

and 18 years, the burden is upon the state to affirmatively prove the previous chastity of the prosecutrix, and, where the defendant introduces testimony attacking or reflecting upon her character, it is error for the trial court to refuse to instruct upon the matter of consent as a defense, should there exist a reasonable doubt as to previous chastity.

3. ———: ———: ORDER OF PROOF. Though evidence, on the part of the state, of the good reputation of the prosecutrix in such a case is not, in the first instance, admissible, yet where the defendant produces evidence assailing her character, evidence of her good reputation for chastity may then be introduced by the state to discredit such testimony.

4. ———: ———: EVIDENCE. In such an action proof that the defendant, on the day previous to the act charged, had committed a similar act upon prosecutrix is not available to him to show that at the time of the act charged prosecutrix was not of chaste and virtuous character, since the defendant is precluded from setting up his own crime to avoid the application of the statute.

ERROR to the district court for Adams county: WILLIAM A. DILWORTH, JUDGE. *Reversed.*

J. E. Willits, for plaintiff in error.

Clarence A. Davis, Attorney General, and *J. B. Barnes, contra.*

FLANSBURG, J.

This was a criminal prosecution for statutory rape, charged to have been committed by defendant upon a 15-year old girl of previous chaste character. Defendant was found guilty.

The sufficiency of the evidence as to corroboration is questioned. Testimony in behalf of the state is that prosecutrix was acting as a maid at a hotel, owned and operated by her grandparents, in the town of Prosser, Nebraska. Defendant roomed and boarded at the hotel, and the prosecutrix testifies that on February 18, 1920, defendant met her in the office at noontime, closed and locked the door, and forcibly had intercourse with her; that at this time her grandmother was in the adjoining room, and, though after the act had been committed prosecutrix immediately

went into the room where her grandmother was and remained there to help with the dishes and do other work, she said nothing of what had happened. Defendant in his testimony admits having seen the prosecutrix at the time and place alleged, but denies the act charged. It is not disputed, however, that within 15 or 20 minutes after the act is alleged to have taken place defendant and prosecutrix took a train for Hastings, with the intention of being married. It appears that they had previously spoken somewhat lightly of running off together, and prosecutrix testified that the defendant at the train told her that after what had been done they would better be married to avoid trouble. They were unable, because of the tender years of the girl, to procure a marriage license at Hastings, and went on to Grand Island, where a license was procured and a marriage ceremony performed. Immediately after the ceremony, on going out upon the street, they were apprehended by the police and held until the parents of the girl arrived. A physician, who examined prosecutrix the day after she was brought home, testified that her parts were bruised and torn, and that it appeared intercourse had recently taken place. The testimony of the justice of the peace was that at the preliminary defendant denied that he was guilty of rape, but said he might be guilty of an attempt to commit rape and desired to fix the matter up. The testimony of the justice is corroborated to some extent by that of the sheriff and of the chief of police, who were present at the preliminary. Defendant, however, entered a plea of not guilty to both the charge of rape and to the charge of an attempt to commit rape.

Other direct testimony than that of the prosecutrix, as to the particular act which constitutes the offense, is not essential, where there is corroboration of other surrounding facts and circumstances which support her testimony against the accused as to the principal fact and indentify the accused as the guilty party, and where the evidence, taken altogether, is sufficient to satisfy the jury, beyond a reasonable doubt, of the guilt of the accused. *Kotouc v.*

State, 104 Neb. 580; *Day v. State,* 102 Neb. 707; *Hammond v. State,* 39 Neb. 252. Under this rule, there was clearly sufficient corroboration of the testimony of the prosecutrix to sustain the conviction.

The instruction given on corroboration is complained of. In that instruction the court said: "If she (prosecutrix) is corroborated by a witness or witnesses as to circumstances leading up to or following the commission of the offense, and you are convinced beyond a reasonable doubt, by all the evidence, that the act has been committed as alleged in the complaint, then it will be your duty to find the defendant guilty." The objection to this instruction seems to be well taken. It is not the proof of any facts or circumstances "leading up to or following" the commission of the offense which may constitute corroboration, for, obviously, many of such facts and circumstances would have no significant bearing upon the question of the guilt of the accused. It is only proof or corroboration of such peculiar facts and circumstances as point to the guilt of the accused that can be considered as legal corroboration of the story of the prosecutrix. Where there are no facts or circumstances of such a kind, there could be no corroboration. See *Gammel v. State,* 101 Neb. 532.

Error is further predicated upon the ground that many of the court's instructions assumed the previous chastity of prosecutrix, and that the court did not direct the jury that, in case of a reasonable doubt existing upon the question of whether the prosecutrix was chaste at the time of the act charged, a finding that she consented to the act would constitute a defense. Though the court instructed that the burden was upon the state to prove the previous chastity of the prosecutrix, and that, in a prosecution for rape upon a girl "under 18 years of age and over 15 years of age, who is of previous chaste character, it is not necessary to prove that the act was done against her will, and the fact that she consented or resisted is immaterial," the remainder of the instructions of the court apparently assumed that the chastity of the prosecutrix was not in

issue, and that it would, therefore, not devolve upon the jury to consider the question of consent or resistance, and the instruction tendered by the defendant, fully covering that matter, was, upon that apparent theory, refused.

The evidence attacking the chastity of the prosecutrix, it is true, was not convincing. The circumstances, however, under which the act was committed, and the fact that prosecutrix, with no explanatory reason given, made no complaint to her grandmother tended strongly against her testimony that the act was forcibly done. Whether or not she yielded to the act would alone tend to throw some light upon her character. There was also evidence tending to show how she had conducted herself on certain occasions with other men. This evidence, construed in one light, would tend to reflect upon her character, while, on the other hand, the circumstances shown might reasonably have been considered consistent with innocence. The inference to be drawn from this evidence, however, was for the jury. Were we called upon to pass on that issue of fact, we would not hesitate to say that the defendant had failed in his attempt to prove that prosecutrix was of previous unchaste character, but it was only necessary that the defendant introduce sufficient testimony as would give rise to a reasonable doubt as to the previous chastity of the prosecutrix, and the question of that reasonable doubt was for the jury and not for the court to decide. Though the evidence presented by the defendant, upon that question, may have appeared to the court to be weak and inconclusive, yet it was offered in support of a defense, relied upon by the defendant, and it was an issue to be proved by the state beyond a reasonable doubt, and a matter which it was the duty of the court to submit for consideration to the jury. 16 C. J. 1046, sec. 2486. The court's instructions, therefore, assuming that the jury would not go beyond the question of the previous chastity of the prosecutrix, and the refusal of the court to charge the jury upon the matter covered by the instruction tendered by the

defendant, which was to the effect that, if the jury should not be satisfied beyond a reasonable doubt as to the chastity of the prosecutrix, it would then be necessary, in order to convict, to find that the act charged had been done by force and without her consent, were erroneous.

Error is assigned upon the ruling of the trial court in allowing testimony to be introduced by the state, in its case in chief, to prove that the prosecutrix had a good reputation for chastity. The question of the previous chastity of the prosecutrix was, it is true, a matter for affirmative proof by the state. *Hubert v. State,* 74 Neb. 220; *Dallas v. State,* 76 Fla. 358; note, 3 A. L. R. 1462. The direct testimony of prosecutrix, however, made a *prima facie* case on that issue, and evidence of reputation for chastity could not properly be introduced by the state until the character of the prosecutrix had been attacked. It is probable, however, that no prejudice resulted from the introduction of this testimony, though at that time erroneously admitted (*McQueary v. People,* 48 Colo. 214), since it is the rule that, where the chastity of prosecutrix is attacked and testimony is introduced of circumstances tending to reflect upon her character, the state may then introduce evidence of her good reputation for chastity as a matter of rebuttal, and as bearing upon the question of the unlikelihood of her having committed those acts which it has been sought to prove by the defendant's testimony. The testimony of good reputation, though inadmissible in the first instance, would, in this case, have been admissible on rebuttal. *Leedom v. State,* 81 Neb. 585; *State v. Cook,* 207 S. W. (Mo.) 831; *Woodruff v. State,* 72 Neb. 815.

A further contention is made that the testimony of the prosecutrix shows another act of intercourse between herself and the defendant on the day previous to the act charged and under similar, if not almost identical, circumstances, and that such showing is conclusive proof that prosecutrix was unchaste on the day in question.

In the case of *Bailey v. State,* 57 Neb. 706, it is held that a prior act of intercourse between the defendant and

prosecutrix, when committed in another jurisdiction, may be shown as proof of the unchastity of the prosecutrix at the time of the subsequent act charged, but by dictum in that case, approved in *Blair v. State,* 72 Neb. 501, it was declared that, had the first act of defilement occurred in the state of Nebraska, it would have constituted a part of the crime charged, based upon the subsequent act, and, being within the statute of limitations, would have been no defense.

In the case under consideration, it seems clear that the defendant would be precluded from setting up his previous crime to avoid the application of the statute, and from successfully contending that the prosecutrix, by reason of his own act, was not of chaste and virtuous character. *State v. Sargent,* 62 Wash. 692; *Branham v. State,* 16 Okla. Cr. Rep. 308; *Castleberry v. State,* 10 Okla. Cr. Rep. 504. In the case of *State v. Sargent, supra,* the court said (page 695): "If appellant's contention is to be sustained, to the effect that he cannot be convicted for any subsequent act committed within the same calendar month, it would then be impossible to convict any defendant of the commission of this crime, upon the person of a female child over 15 and less than 18 years of age, unless the state relied upon the first act only and was able to produce other evidence to corroborate the testimony of the prosecuting witness as to that particular act. Such a holding would practically remove that protection with which the statute seeks to clothe female children of chaste character between 15 and 18 years of age."

By reason of the error in the instructions and the refusal to instruct, as above indicated, we are of opinion that the defendant is entitled to a new trial. The judgment of the lower court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J., dissents.

LETTON, J., not sitting.

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

FILED MARCH 25, 1921. No. 21086.

1. **Judgment: CONCLUSIVENESS.** General rule stated in former opinion, *ante*, p. 38, that a judgment against an indemnitee is not conclusive upon the indemnitor who had no notice of the action in which the judgment was rendered, adhered to. *Pasewalk v. Bollman*, 29 Neb. 519, distinguished.

2. ———: ———. Unless prior notice be given to an indemnitor of the suit against his indemnitee, a judgment rendered against the latter therein will not be conclusive, but only *prima facie*, evidence of the indemnitor's liability in a later action against him to recover upon his express contract of indemnity, and he may show that the indemnitee had a good defense which he neglected to set up.

3. ———: ———. Judgment was rendered against the surety upon an attachment bond in an action of which his principal had no notice, but in which the surety pleaded and in good faith sought to establish the defense that the liability had been settled and the principal released. In a later action by the surety upon the principal's express contract to indemnify him, the principal set up the identical defense interposed in the former action. *Held*, that, in the absence of any plea of fraud or collusion, the judgment is conclusive as to such defense.

4. **Depositions: EXHIBITS: ADMISSIBILITY.** Where objection was made before the notary to certain exhibits identified and offered as part of the deposition of a certain witness, but later another deposition of the same witness is taken to which the same exhibits are attached without objection, and at the trial the deposition of the witness is offered without specifying which one, and no objection is interposed, it will be presumed that the later deposition was intended and that the exhibits were not objected to.

5. **Evidence: JUDICIAL RECORDS.** If no objection is made when document's purporting to be judicial records of a sister state are offered in evidence at the trial, objection on the ground that they are not properly authenticated will be waived.

Opinion on motion for rehearing of case reported, *ante*, p. 38. *Reversed.*

DORSEY, C.

In *National Surety Co. v. Love, ante,* p. 38, the judgment of the court below dismissing the appellant's action was affirmed and the case is now before us on rehearing.

The circumstances out of which this case arose transpired in Oregon where the appellee formerly resided. He had loaned $1,000 to one Al Crystal and sued the latter to recover that sum in the circuit court for Klamath county, Oregon. Desiring to attach Crystal's property in that action, the appellee filed an attachment bond and procured the appellant to become his surety thereon. This bond provided that the appellee, Love, as plaintiff, and the appellant, as surety, "undertake to pay all costs that may be adjudged to the defendant (Crystal), and all damages which he may sustain by reason of such attachment, if the same be wrongfully or without sufficient cause," etc. Preliminary to the execution of this bond, the appellee signed a written application to the defendant asking it to become his surety, in which there was a clause whereby the appellee agreed to indemnify the appellant "and save it harmless from and against all claims, demands, costs, liabilities, charges and expenses * * * which it should at any time sustain or incur and as well from all * * * judgments * * * against it by reason or in consequence of having executed said bond."

Crystal's property was attached, but before the case was tried the money for which he had sued Crystal was paid to the appellee and the action was dismissed. Thereafter the appellee removed from Oregon to Sioux county, Nebraska. After his departure, Crystal brought suit upon the attachment bond for alleged wrongful attachment, making the appellee and the appellant surety company defendants. The appellee, being then a nonresident of Oregon, was not served with process or otherwise notified of the suit, but the appellant was served and the case proceeded to judgment against it for $500. Having paid the judgment, the appellant brought this suit to recover therefor, and for incidental costs and expenses, in the district

court for Sioux county, Nebraska. The appellee defended on the ground that he had not been notified of the action in Oregon and had had no opportunity to defend there, and also that, by arrangement between his attorney in the attachment suit and Crystal's attorney. there had been a complete settlement and a release of all liability on his part to Crystal, which was evidenced by the order of dismissal entered by the Oregon court in that action.

The decisive point in the instant case is whether the judgment rendered against the appellant in the action for wrongful attachment in Oregon was conclusive upon the appellee under the terms of the indemnity agreement, above quoted from, or whether the appellee, not having been served with process or otherwise notified, might still urge the defense of settlement and discharge from liability. In affirming the judgment of the court below the rule was announced, in the former opinion of this court, that such judgment was not conclusive upon an indemnitor under those circumstances, and the correctness of that rule is vigorously challenged by the appellant on the ground that it is in conflict with the decision of this court in *Pasewalk v. Bollman,* 29 Neb. 519.

We are nevertheless of the opinion that the case referred to is not at variance with the general rule stated in the former opinion in the instant case, to the effect that a judgment against an indemnitee is not conclusive upon his indemnitor who has had no notice of the suit in which the judgment was rendered. In that case a sheriff was sued for conversion and judgment was recovered against him by the owner of personal property which the sheriff had wrongfully taken in execution upon a judgment against a third party. Previous to levying this execution, the sheriff obtained from the execution creditor a bond indemnifying him against the consequences of a wrongful levy. When the action for conversion was commenced, the sheriff notified the execution creditor, who had given him the indemnity bond, and the latter appeared and defended for the sheriff. After judgment went against

the sheriff, he brought suit on the indemnity bond to recover the amount he had been compelled to pay to satisfy the judgment. It appears, however, that the execution creditor, in whose behalf the indemnity bond had been given to the sheriff, had not signed it, but it was signed only by certain sureties; so, in bringing his action on the indemnity bond, the sheriff sued only the sureties. It was, in reality, therefore, an action by an indemnitee against sureties of an indemnitor, upon an obligation of indemnity which the principal had not signed, to recover for damage which had been adjudicated in an action of which the principal indemnitor had full notice and in which he appeared and defended for the indemnitee.

The question in *Pasewalk v. Bollman, supra,* was whether or not, under the circumstances just detailed, the judgment in the conversion action was conclusive upon the sureties, who had had no notice of the pendency of that action, but whose principal had been notified of it and had appeared and defended in it. The point actually decided by this court in that case was, in the language of the opinion (p. 527): "The judgment recovered against the officer is conclusive against the sureties, although they had no notice of the pendency of the action in which the judgment was obtained, when it is shown that their principal defended the suit for the officer."

In the case at bar, however, the appellant was the surety on the attachment bond; the appellee was the principal obligor in that bond, and he had no notice of the action thereon for wrongful attachment and did not appear and defend therein. Here it is a question of the binding force upon a principal of a judgment against which the surety appeared and defended, while in *Pasewalk v. Bollman, supra,* the situation was the exact reverse.

The precise situation in the instant case, briefly stated, is that the appellant surety company, at the appellee's request, had contracted to indemnify Crystal against any damages that he might sustain by reason of the attachment if it turned out to be wrongful, and the appellee had

contracted to indemnify the appellant against any liability that it might be subjected to in consequence of having indemnified Crystal. The attachment bond executed by the appellant was not conditioned to indemnify Crystal against such damages as he might recover in an action against the appellee; if it had been so conditioned, the law might have required the appellee to be joined in the action on the bond for wrongful attachment, and that judgment be recovered against him in that action, or in an independent action, as a condition precedent to the appellant being held liable as surety on the bond. But the condition of the attachment bond in this case was not thus restricted; it was that Crystal should be indemnified against such damages as he might sustain, and therefore Crystal was privileged to bring suit on the bond against the appellant alone, as surety on the bond, and to recover judgment thereon for such damages as resulted from the attachment, if he could prove it was wrongful, without making the appellee, the principal in the bond, a party defendant. 6 C. J. 509, sec. 1211. Especially would this be true if, as was the case here, the appellee had removed from the jurisdiction of the Oregon courts.

In order to protect itself, the appellant required and took from the appellee an indemnity agreement in which the latter promised to save it harmless from liability incurred in executing the attachment bond. The question before us is whether it is the duty of the indemnitee, under such an agreement, to notify his indemnitor of any suit brought against the indemnitee that might result in a liability for which the indemnitor has agreed to be ultimately responsible. The following is stated as the general rule in 22 Cyc. 93: "Unless an express contract of indemnity provides otherwise, it is not necessary, in order to maintain an action against an indemnitor to recover for a liability which has been determined in a prior action against the indemnitee, that the indemnitor should have been notified of the suit against the indemnitee. But unless notice is given the first judgment is *prima facie* evi-

dence only of liability and the indemnitor may show that the indemnitee had a good defense which he neglected to set up."

The defense which the indemnitor, the appellee, seeks to set up in the instant case is that his attorney arranged with Crystal and that they agreed upon a settlement of the attachment suit, that Crystal paid over to the appellee's attorney the money for which that suit was brought, and that there was a dismissal of the action and a release and discharge of the appellee from all liability to Crystal growing out of the attachment suit. It was upon his answer setting forth those allegations and the proof in support thereof that the court below dismissed the appellant's action. While the appellee had no notice of Crystal's action in which he recovered judgment against the appellant for wrongful attachment, the appellant did set up in that action a defense identical with that interposed in the instant case. Stated in its narrowest form, therefore, the question is whether an indemnitor, without notice of the action in which judgment was rendered against his indemnitee, shall be permitted to set up, in a suit against him by the latter to be indemnified on account of said judgment, a defense which was interposed by the indemnitee in the action in which the judgment was rendered.

The rule that, where notice was not given the indemnitor, the judgment is *prima facie* evidence only in a subsequent action by the indemnitee against him seems to be supported by the weight of authority. *Ireland v. Linn County Bank,* 103 Kan. 618; *Clark v. Clune,* 172 Mich. 323; *Grant v. Maslen,* 151 Mich. 466, 16 L. R. A. n. s. 910; *Robinson v. Baskins,* 53 Ark. 330, 22 Am. St. Rep. 202; *Stewart v. Thomas, Adm'r,* 45 Mo. 42; *Browne v. French,* 3 Tex. Civ. App. 445; *Bridgeport Fire & Marine Ins. Co. v. Wilson,* 34 N. Y. 275; *Aberdeen v. Blackmar,* 6 Hill (N. Y.) 324.

In *Grant v. Maslen, supra,* it is said that the indemnitor "may set up any defense which, from the nature of the

action or the pleadings, he could have set up in the former action, had he been a party to it." In *Robinson v. Baskins, supra,* it was held that the indemnitor, who had not been notified of the suit, might introduce evidence to show that the person who obtained the judgment against the indemnitee had admitted that his claim, on which the judgment was based, was groundless. In *Stewart v. Thomas, Adm'r, supra,* it was said that, if the indemnitee had a good defense to the action in which the judgment was obtained and failed to avail himself of it, he could not recover against the indemnitor, and that the latter, not having had notice and an opportunity to defend in the original action, should be permitted, in the later action, to make any defense which could have been made to the original suit. But we have found no case in which it has been explicitly decided whether or not the indemnitor is entitled to urge a defense to the suit by the indemnitee against him which was raised by the indemnitee in the action in which the judgment was obtained.

The record in the instant case shows, not only that the defense of release and settlement was pleaded in the appellant's answer in Crystal's action for wrongful attachment, but that there was an attempt, at least, on the appellant's part to support it by proof. The order of dismissal entered by the Oregon court which the appellee claims constituted a settlement of Crystal's alleged damages in the attachment suit was offered in evidence, and also the testimony of the attorney who acted for the appellee in that suit as to what took place between Crystal's attorney and himself, to show that a settlement of all claims on both sides, and not a mere voluntary dismissal of the appellee's suit, was intended when Crystal's attorney paid over the money to him. This testimony, it appears, was rejected by the Oregon court, which allowed only the order of dismissal to go in, but nothing explanatory of it. There is nothing, however, upon which to base a finding that the attorneys for the appellant were in collusion with Crystal or his attorney to bring about a judgment in order

that it might afterwards be collected from the appellee, and indeed no such fraud or collusion is pleaded in the instant case. The record is so confused and lacking in orderly arrangement that, in reviewing it for the purpose of reaching our former conclusion in the instant case, we formed a wrong impression of the efforts made by the appellant to prove the defense in question in the Oregon court, but we are now convinced there was nothing to show bad faith. Is the appellee estopped from making that defense in the case at bar by the fact that it was made by the appellant in the original action for wrongful attachment in the Oregon court?

From the general tenor of the authorities bearing upon this question we are inclined to the view that the judgment, though rendered without notice to the indemnitor, was conclusive as to the facts necessarily taken into consideration by the Oregon court in arriving at the judgment, where it appears that the defense sought to be interposed by the indemnitor to show his nonliability upon the cause of action on which the judgment was based, had in good faith been presented by the indemnitee in the action wherein the judgment was rendered, and there is no plea of fraud or collusion. *Clark v. Clune, supra.* In our opinion, therefore, the defense of settlement is concluded by the Oregon judgment.

It is claimed by the appellee that the record of the judgment is inadmissible because not authenticated as provided for by section 7979, Rev. St. 1913, with reference to judicial records of a sister state. The record offered consists of copies of the pleadings and docket entries certified to by the clerk of the Oregon court, but without any certificate by the presiding judge. The deposition of the clerk was taken at Klamath Falls, Oregon, on two occasions, the first in November, 1916, and the last in February, 1917, and each deposition has an identical set of these exhibits attached. They were handed to the witness, identified by him, offered in evidence, marked by the notary, and attached by him. When the first deposition was taken, the appellee was represented by counsel who registered an ob-

jection to each exhibit when offered to the notary. When the second deposition was taken, the appellee was not represented and the exhibits went in before the notary without objection.

The bill of exceptions in the case at bar shows at the beginning of the trial the following: "The plaintiff also offers in evidence the deposition of George Chastain, taken in behalf of plaintiff. No objection. Same is admitted and read in evidence by Mr. Boucher." There is nothing to show which deposition was referred to or read. The appellee now contends that, since objections were made to the exhibits attached to the earlier deposition when they were offered before the notary, and the record does not affirmatively show that it was the later deposition that was offered in evidence at the trial, the court must presume that the objections made before the notary were applicable at the trial. We think, however, that in offering the deposition of the witness without designating which one, the exhibits attached to the later one being admitted without objection before the notary and the record of the trial showing "no objection," it will be presumed that the later exhibits were admitted at the trial without objection, and objection to the record on the ground of defective authentication will be held to have been waived. 38 Cyc. 1397.

For the reasons stated, we recommend that the former judgment of this court be vacated, and that the judgment of the court below be reversed and the cause remanded, with instructions to enter judgment in favor of appellant for the amount prayed for in its petition.

PER CURIAM. For the reasons stated in the foregoing opinion, the former judgment of this court is hereby vacated, the judgment of the court below is reversed, and it is ordered that the cause be remanded, with instructions to enter judgment in favor of the appellant for the amount prayed for in its petition, and this opinion is adopted by and made the opinion of the court.

REVERSED.

CAIN, C., dissents.

JOHN E. KRING, APPELLEE, V. SCHOOL DISTRICT, APPELLANT.

FILED MARCH 25, 1921. No. 21383.

Master and Servant: ACTION FOR WAGES: DEFENSES. Where an employee is wrongfully discharged prior to the termination of his contract of employment, in an action to recover the stipulated wages for the entire term covered by the contract, the burden is upon the defendant to plead and prove in mitigation of damages that the plaintiff obtained, or by the exercise of due diligence might have obtained, other employment, and it constitutes a defense which plaintiff is not required to anticipate. First paragraph of the syllabus in the case of *School District v. Foster*, 31 Neb. 501, distinguished.

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

Peterson & Devoe and *George W. Ayres*, for appellant.

Bernard McNeney and *J. G. Thompson, contra.*

TIBBETS, C.

This is an action by the plaintiff against defendant school district No. 3, of Harlan county, Nebraska, for damages for an alleged unlawful discharge of plaintiff as teacher by the defendant. Trial was had by a jury, who returned a verdict for the plaintiff in the sum of $650. The court entered an order that the plaintiff file a remittitur of $72.24, in which event a judgment would be rendered for $577.76. The remittitur was filed and judgment rendered for that amount, from which judgment defendant appeals.

The petition of the plaintiff in this action alleges that the plaintiff was employed by the defendant on the 27th day of April, 1918, as a qualified teacher under the laws of the state of Nebraska for the term of nine months, commencing on the 2d day of September, 1918, and for which he was to receive $144.44 a month; that plaintiff taught in the school for four months, beginning on the 2d day of

September, and on the 24th day of January, 1919, plaintiff was discharged by the defendant and was refused permission to continue his services further, and this without any reasonable cause or excuse; that plaintiff, since his discharge, has made all possible and reasonable endeavor to secure other employment, but has been unable to do so; and that he has been damaged in the sum of $722.

The petition fairly sets out the contract of employment, a copy of which is attached to the petition. The defendant for an answer admits the employment of plaintiff, and denies all other allegations in plaintiff's petition not specifically admitted, and further alleges that the plaintiff failed to comply with his contract, in that he did not teach the school of the defendant in a faithful and efficient manner, and failed to maintain discipline, permitting the school to become disorganized, and that plaintiff was incompatible with the teaching force of the school, and urged changes of various kinds, and was interfering with the work of the other teachers, and his actions were such that they threatened to disrupt the entire teaching force. Defendant also alleges that, in view of a clause in the contract providing that, in the event plaintiff should be discharged for sufficient cause or should have his certificate annulled, he should not be entitled to compensation from and after such dismissal or annulment, or in the event the school was closed by the board of health, and the defendant further alleges that it had sufficient cause for discharging the plaintiff. To the answer plaintiff filed a reply containing a general denial of all the allegations of the answer which did not contain an admission of the allegations of the petition.

The grounds on which the defendant seeks a reversal of this cause are: First, the verdict is not sustained by the evidence; second, the verdict is excessive under the evidence; third, the court erred in giving instruction No. 4; fourth, the court erred in failing to instruct the jury as to the true measure of damages.

Taking the first objection raised by the defendant, that the verdict is not sustained by the evidence, while dif-

ferent minds might draw different conclusions from the evidence as it was adduced at the trial, the jury were called upon to act upon controverted questions of fact, and it was their province, if exercised reasonably, to determine these facts, which they did, and it is not discretionary, nor is it the duty of this court to interfere with that which is exclusively delegated to the jury. We have examined the record and the evidence was sufficient to sustain the verdict.

The second proposition, that the verdict is excessive under the evidence, we do not think is worthy of serious consideration. The question of how much was due plaintiff at the time he was discharged is foreclosed; he stated he taught four months and was paid for four months. That was settled and determined. The school was closed for one month by order of the board of health. There then remained four months to the termination of the contract, which at $144.44 a month would amount to $577.76, the amount for which judgment was rendered.

Third, as to the court having erred in giving instruction No. 4, which reads as follows: "The court instructs you that the whole question for your determination in this case is: Did the defendant discharge the plaintiff as superintendent of said school for sufficient cause. If you find from the evidence that the defendant school district had no sufficient cause to discharge the plaintiff from its employment, then the plaintiff would be entitled to recover and you should determine from the evidence the amount of his recovery. If, on the other hand, you find from the evidence that the defendant school district did have sufficient cause to discharge said plaintiff, then the plaintiff could not recover and your verdict should be for the defendant."

It is a well-settled principle of law in this jurisdiction that the instructions shall be considered as a whole. As far as the court defined the law in instruction No. 4 it was correct, as we will see hereafter, and, if not correct, was in no wise prejudicial to the defendant. It was largely remedied by instruction No. 5, which defines the amount

of his recovery, if the jury should find that the plaintiff is entitled to recover, and we consider that the instructions as a whole, while they may have been irregular in some respects, were in no wise prejudicial to the defendant, as the verdict as to the amount was correct and was based upon the true measure of damages as disclosed by the evidence.

Defendant places considerable stress upon the failure of the plaintiff to secure other employment, if possible, during the time from his discharge to the commencement of this action, and cites us to the case of *School District v. Foster,* 31 Neb. 501. We are aware that an examination of the last-cited case would to some extent at least substantiate the contention of defendant, not only that plaintiff should endeavor to procure employment in order to mitigate the amount of damages, but it became his duty to use every effort to do so, and furthermore that it devolved upon plaintiff to show that he did do so, and this was undoubtedly the idea of the plaintiff also when he alleged in his petition that he was unable to procure employment. However, that is not the law.

In the case of *Wirth v. Calhoun,* 64 Neb. 316, this court held: "In an action by an employee against his employer for damages for breach of contract, arising from the wrongful discharge of the former, that the plaintiff obtained, or by the exercise of due diligence might have obtained, other employment, is a matter of defense, which the plaintiff is not required to anticipate in his petition. The burden of proof is on the defendant to establish such defense, and on failure thereof, or of showing other facts in mitigation of damages, the measure of damages is the contract price." In *School District v. McDonald,* 68 Neb. 610, this court cited with approval the case of *Wirth v. Calhoun, supra.* In *International Text-Book Co. v. Martin,* 82 Neb. 403, the court also cited with approval and adopted the rule as laid down in *Wirth v. Calhoun, supra.*

In *Helwig v. Aulabaugh,* 83 Neb. 542, it is held: "It is the duty of an employee who has been wrongfully discharged in violation of his contract to make reasonable

efforts to avoid loss by securing other employment." In the opinion the court say: "The action of the trial court was also in harmony with the doctrine that the burden is on an employer who discharges his employee in violation of his contract of employment to show in mitigation of damages that the latter by the exercise of due diligence in securing other employment might have reduced the loss" —citing *Wirth v. Calhoun, supra,* and also *Beissel v. Vermillion Farmers Elevator Co.,* 102 Minn. 229.

It seems to be practically the latest and universal rule that, where an employee brings an action against the employer for damages resulting from a violation of the contract of employment, the burden rests upon the defendant to plead and show that the employee might have or could have obtained employment in mitigation of damages. It is uncontradicted that this action was commenced after the termination of the contract period, and that plaintiff did no work for which he received compensation. His measure of damages, then, would be the contract price during the period from the time he was discharged to the termination of the contract. In the absence of a showing of anything specific with reference to moneys received by the employee during the contract term, upon which the jury can fix the amount to be deducted from his salary, the jury should give the employee his full salary. *World's Columbian Exposition v. Richards,* 57 Ill. App. 601. And a mere statement by the plaintiff that for a part of the year he made his personal expenses, with no proof whatever as to their amount, does not furnish sufficient ground for a reduction of damages because of such earnings. *Fuller v. Little,* 61 Ill. 21.

We find no error in the record, and therefore recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

CORN LAND FARMS COMPANY, APPELLEE, V. CHARLES BARCUS ET AL., DEFENDANTS: W. J. DOHERTY, APPELLANT.

FILED MARCH 25, 1921. No. 21397.

1. Sales: AUCTION SALE: WARRANTY OF TITLE. Where one was acting as a clerk of an auction sale, the fact of his employment and the exercise of the duties incidental thereto do not constitute him a warrantor of the title or ownership of the property sold at the sale.
2. ———: ———: ———: LIABILITY OF CLERK. When the clerk of an auction sale receives, as such clerk, money from the purchaser of stolen property sold at said sale, in payment of the property purchased, and the clerk pays the money to the person who offered and procured the sale of the same, believing him to be the true owner, and the purchaser, previous to the sale, knew who offered the articles for sale and that he purported to be the owner thereof, *held*, the clerk was not liable to the purchaser for the amount so paid.

APPEAL from the district court for Wheeler county: BAYARD H. PAYNE, JUDGE. *Reversed and dismissed.*

J. M. Shreve and *W. J. Hammond,* for appellant.

A. L. Bishop and *John E. Kavanaugh, contra.*

TIBBETS, C.

This action was brought originally by the plaintiff, a corporation, against Charles Barcus, George Thompson, Chambers State Bank, a corporation, and W. J. Doherty, in the county court of Wheeler county, Nebraska, to recover for the purchase price paid for a span of stolen mules sold at public auction on or about the 19th day of September, 1915, in Holt county, Nebraska. Judgment was rendered against the defendants and each of them in the county court, and the defendants, except Barcus, appealed to the district court for said county, and the case was therein dismissed by plaintiff as to George Thompson. The action then proceeded against the defendant bank and Doherty. The case was tried upon a stipulation, which

in substance is that the allegations contained in paragraphs 1 and 2 of the plaintiff's petition are true. Paragraphs 1 and 2 referred to the fact that the plaintiff is a corporation, and that the defendant Chambers State Bank is a banking corporation, and that part of said business of said bank is the purchase of sale paper and the conducting as clerk and distribution of moneys received at public sales, and that W. J. Doherty is the cashier of said bank.

"It is further stipulated and agreed that on Oct. 1st, 1915, one W. H. Johns called a public sale and conducted such public sale, and that the defendant W. J. Doherty was the clerk of said sale, and that said W. J. Doherty is and was cashier of the Chambers State Bank. It is further agreed that the Chambers State Bank had agreed to purchase all notes taken from purchasers at said sale that might be recommended by said W. J. Doherty. It is further agreed that said W. J. Doherty collected all money paid at said sale and that he charged a commission for the collection thereof. It is further agreed that on the first day of October the defendant Charles Barcus brought a team of mules to where said sale was being conducted, and that said mules were stolen property and the property of A. C. Thompson. It is further agreed that after his arrival there the plaintiff, acting through its duly authorized agent, one Watson, attempted to purchase said mules from said Barcus, but was unable to do so; that thereafter the said Barcus obtained the consent of said Johns to have said mules put up and sold at said sale. It is further agreed that after obtaining said consent from said Johns said Barcus entered into an agreement with said W. J. Doherty by which said Doherty agreed to purchase any paper that might be given for the purchase price of said mules, and that he would pay a commission of $3.00 to said W. J. Doherty if cash was paid for said mules; that said mules were put up at auction and sold to the plaintiff for the sum of $295; that the plaintiff, acting through its manager and agent, said Watson, made a check to W. J. Doherty for said $295.

"It is further agreed that said W. J. Doherty charged $3.00 for his services and made a check payable to George Wright, who was in fact Barcus, and did so for the purpose of making a distribution of the moneys received at said sale for said mules. It is further stipulated and agreed that no representations as to the value, character or ownership of said mules was made by said W. J. Doherty or by the said Chambers State Bank to the plaintiff, its agent Watson, or to any other person, except such as is under the law and the facts herein set forth. It is further stipulated and agreed that neither said W. J. Doherty nor said Chambers State Bank had any notice or knowledge that said mules were not the property of said Charles Barcus, and that the owner of said property, A. C. Thompson, retook his property from the plaintiff in this action.

"It is further stipulated and agreed that said W. J. Doherty and the Chambers State Bank believed, at the time of the transaction wherein the plaintiff purchased said mules, that said mules were the property of said Charles Barcus, or George Wright, as they then believed his name to be."

The court, upon the stipulation made, found in favor of the plaintiff and against the defendant W. J. Doherty, and dismissed the action as to the Chambers State Bank.

We are constrained, after a thorough examination of the authorities cited by the parties, to hold that the court was in error in rendering the judgment that it did as against Doherty. Doherty was acting as clerk of the sale; his duties were to keep a record of the purchasers, pass upon the notes taken as far as the bank was concerned, take such moneys as might be paid in, and pay it out to the parties who sold the property.

The point on which the court largely bases its judgment is in his finding that Barcus, the pretended owner, arranged with the defendant Doherty to take any paper that might be offered for said mules, or to handle the sale of the mules for a *per centum* of cash that might be paid

for the same under the same terms that he was conducting said sale. In the first place, there was nothing contained in the stipulation to the effect that Doherty was conducting the sale; in fact, it was not Doherty's sale in any sense of the word, and the stipulation is, as regards Doherty's connection with the sale, that Doherty agreed to purchase any paper that might be given for the purchase price of said mules and would get a commission of $3 if cash were paid for the same. It was unwarranted in our opinion that from that part of the stipulation the court could draw the conclusion that it did.

In no event and under no condition, nor under any theory that we are able to perceive was defendant, as clerk of the sale, authorized or empowered to guarantee the title of any property that might be sold, or become liable therefor under the stipulation of facts herein. Appellee has cited us to several authorities in support of its position and it cites us to 6 C. J. 844, sec. 63, in support of the fact that "an auctioneer who sells property for one who has no title and pays over to his principal the proceeds is liable to the real owner for the conversion, even though such auctioneer acts in good faith, and without knowledge of the defect of title."

Plaintiff has proceeded upon the theory that the duties and liabilities of the clerk are the same as those of the auctioneer. The stipulation provides that the clerk shall act for Barcus in the sale of the mules the same as he had in the sale of other property, which was, to take in the money and pay it out to the parties whose property was sold. He had no knowledge presumptively whose property was being sold until announced by the auctioneer. The duty of the auctioneer was to inform him whose property was sold, the amount for which it was sold; and, in passing upon the notes he acted, not as the agent of the auctioneer, but as agent for the bank, which would purchase these if approved by defendant. We do not believe that the same rule would apply to one occupying a purely clerical position as would apply to one who was conducting the sale

as auctioneer. The purchaser knew, or presumptively knew, at least, what the duties of the clerk consisted of when it paid the money to him, and to whom it was to be paid; plaintiff paid it for the benefit of the party who sold the property, Barcus or Wright.

It appears to us that the defendant Doherty, in the position in which he acted in receiving the money, keeping track of the sale, and passing upon the notes offered, was justified in turning the money over to the party who presented the mules for sale, and especially in view of the fact, as in the present instance, that the purchaser at the auction sale had been negotiating with Barcus, or Wright, for the purchase of said mules, and knew Barcus was claiming to be the owner and to have the legal title to them. Consider, for argument's sake, that the rule applied to auctioneers applies to clerks. That brings this case squarely within the rule laid down in the case of *Mercer v. Leihy*, 139 Mich. 447, and the reasoning in that case is conclusive as to the situation of the defendant in the present case. Many of the principles involved in the cases cited by plaintiff were discussed and distinguished in the *Mercer* case. The principal distinguishing feature between the *Mercer* case and the case at bar was that the auctioneer who was sued was selling unknowingly stolen property, and Mercer and Lane were bidding on them. The auctioneer, thinking the bystanders might consider that Mercer and Lane might be bidding on their own horses, announced to the public: "These are not Mr. Mercer's and Lane's horses. They belong to another party." He looked around and did not see the man in the audience, and said: "Where is the man who owns these horses?" The man stepped up and said, "Here I am." That court held: "Where an auctioneer discloses the fact of agency and his principal, the law presumes that he does not contract upon his own behalf, but for the principal." In the instant case, while the auctioneer did not announce for whom the property was being sold, it was immaterial, as the plaintiff's agent knew, as a matter of fact, as heretofore stated, who was the pretended owner.

and, as far as any declaration of the ownership was concerned, it was unnecessary as to him; there was some diligence required upon his part.

In the case cited by plaintiff (*Koch v. Branch & Crookes*, 44 Mo. 542, 100 Am. Dec. 324) the court therein stated: "No one should buy property without good reason to believe that the seller has a right to sell it." Also the last-above cited case is one where the question of agency is involved and the extent of such agency. Suppose in the instant case the plaintiff had handed the money to a bystander, rather than to the clerk, to be delivered to the pretended owner of the mules, would it be presumed that the bystander would have become liable in delivering the money to the pretended owner? When the purchaser delivered the money to Doherty he knew, or should have known, that that money was to be delivered to Barcus, as he knew that Barcus pretended to be the owner of these mules and was offering them for sale.

There is no decision that we are able to find bearing directly upon this question, but reasoning from analogy and the usual rules as to the liabilities and responsibilities of an employee or a person acting in the capacity of a clerk, we are convinced that the judgment of the district court was wrong and should be reversed and the case dismissed, which we recommend.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the case dismissed, and this opinion is adopted by and made the opinion of the court.

REVERSED AND DISMISSED.

INDEX.

Adverse Possession.

1. Limitations do not begin to run until assertion of an adverse holding and notice thereof. *Brooks v. Brooks* 235
2. Uninterrupted possession of land improperly inclosed within boundary-line fence for statutory period creates title to same. *Carnahan v. Cummings* 337
3. The nature of the claim to a disputed strip of land depends on the general character of the claim to the main body of the land. *Carnahan v. Cummings* 337
4. A claim to land up to a boundary fence for the statutory period establishes title to land improperly inclosed. *Pfeifer v. Scottsbluff Mortagage & Loan Co.* 621
5. An individual cannot acquire title by adverse possession to a right of way granted to a railroad, except as provided in the Norris act. *Etheredge v. Chicago, B. & Q. R. Co.* .. 778
6. Possession of land as between parties in parental and filial relations is presumed to be permissive. *Chase v. Lavelle* . 796

Appeal and Error. See CRIMINAL LAW. EVIDENCE, 7, 11-13. HABEAS CORPUS, 1. JUDGMENT, 5.

1. An order denying a continuance will not be reversed except for abuse of discretion. *Mahaffy v. Hansen Live Stock & Feeding Co.* 9
2. The supreme court will not consider a showing on a motion in the district court, filed after the motion was overruled. *Gillard v. Clark* 84
3. Error not affecting a substantial right will not justify a reversal. *Fitzpatrick v. Hines* 134
4. Question determined on former appeal is the law of the case. *Opp v. Smith* 206
5. Denial of right of cross-examination, when prejudicial, is ground for reversal. *Larson v. Hafer* 257
6. Where an action is tried on the theory that an answer has been filed, failure to file answer is not ground for reversal. *Griswold v. Robinson* 182
7. Where a case was tried as if a reply had been filed, failure to file reply cannot be taken advantage of on appeal. *Reynolds & Maginn v. Omaha General Iron Works* 361

Appeal and Error—*Concluded.*

8. Where, in an action for death of a husband, his life expectancy is shown, the supreme court will assume that the jury considered the wife's apparent age. *Bauer v. Griess* 381
9. A judgment will be affirmed in absence of a bill of exceptions when the pleadings are not questioned. *Eisele v. Meeker* 687
10. It will not be presumed that the jury disregarded instructions. *Anderson v. Union P. R. Co.* 759
11. Where the second count of petition depends on proof of first count, withdrawal of second count *held* not prejudicial, in view of verdict for defendant on first count. *Prairie Life Ins. Co. v. Heptonstall* 829
12. A judgment will not be reversed for harmless errors in giving or in refusing instructions or in rulings on evidence. *Prairie Life Ins. Co. v. Heptonstall* 829
13. Findings of court on conflicting evidence sustained. *Shubert v. Western Cereal Co.* 59
14. The supreme court will not examine conflicting evidence further than to determine its sufficiency. *Maurer v. Featherstone* 72
15. Where the evidence shows that a judgment is clearly wrong, it will be reversed. *In re Estate of O'Connor* 88
16. The court having power to conform pleadings to proof, a judgment based on the evidence will not be reversed because amendment was not made. *Root v. Douglas County* . 262
17. Admission of certain receipts *held not* prejudicial, when payments were proved by other and competent evidence. *Hays v. Christiansen* 586
18. Findings on conflicting evidence will not be disturbed. *Omaha Structural Steel Works v. Minkin* 596
19. Exclusion of evidence held not prejudicial. *In re Estate of Stuckey* 641
20. A party cannot predicate error on the admission of incompetent evidence elicited upon his own cross-examination, where he makes no objection or motion to strike. *Blair v. Estate of Willman* 735
21. A verdict supported by evidence will not be set aside unless wrong. *Anderson v. Union P. R. Co.* 759

Attorney and Client. See COSTS, 1. DAMAGES, 6.

Bail.

1. A recognizance should be strictly construed. *State v. Cerscirnello* 314
2. A recognizance for appearance of accused can be forfeited only at the term at which given, and default must be entered during such term. *State v. Cerscirnello* 314
3. Where an appearance bond is not forfeited during the term, the surety is not liable. *State v. Cerscirnello* 314
4. Mere entry of default and forfeiture of a recognizance does not determine the amount of the penalty. *Sullivan v. Furnas County* 564
5. In an action on a forfeited recognizance, the court may reduce the penalty. *Sullivan v. Furnas County* 564
6. The county *held not* entitled to hold money paid into court by surety on a forfeited recognizanec, under mistaken belief that amount of penalty was fixed by forfeiture of the recognizance. *Sullivan v. Furnas County* 564
7. The principal cannot recover money deposited by a surety on a recognizance, before the liability of the surety is determined. *Sullivan v. Furnas County* 564

Banks and Banking.

1. An order refusing a bank charter will be sustained where there is competent evidence to support it. *In re Commercial State Bank* 248
2. The statute governing the state banking board will be strictly construed. *In re Commercial State Bank* 248
3. Where no abuse of discretion is shown, findings of the state banking board will not be disturbed. *In re Commercial State Bank* 248

Boundaries.

1. Government corners control field notes or courses and distances of a subsequent survey. *Harris v. Harms* 375
2. Identified government corners are the best evidence of location of line. *Harris v. Harms* 375
3. Field notes control in absence of the government corner, and are *prima facie* evidence of its location. *Harris v. Harms* 375
4. Evidence *held* to sustain verdict for plaintiff in ejectment. *Harris v. Harms* 375

Brokers.

1. An exclusive agency to sell land does not preclude the owner from selling it; and, while a sale by the owner revokes the agent's power, it does not annul the agreement for compensation. *Staats v. Mangelsen* 282
2. Owner *held* liable for compensation where broker had procured a purchaser before notice of sale by owner. *Staats v. Mangelsen* 282
3. A broker who acts in the interest of the purchaser is not entitled to commission. *Hillyer v. Stansbery* 636
4. A broker who does not effect the sale cannot recover commission. *Hillyer v. Stansbery* 636
5. Evidence *held* to show that broker was acting for purchaser. *Hillyer v. Stansbery* 636
6. A writing listing land with a broker "for sale," *held* not to authorize the broker to enter into a contract of sale. *Gould v. Rockwell* 724

Burglary.

1. The intent with which a tool is to be used *held* to be the gist of the charge of possession of burglar's tools. *O'Neill v. State* 824
2. In a prosecution for possession of burglar's tools, it is unnecessary to charge or prove intent to break into any specific building. *O'Neill v. State* 824
3. Intent to commit burglary may be proved by circumstantial evidence. *O'Neill v. State* 824

Carriers. See CONSTITUTIONAL LAW, 1, 2.

1. A carrier is liable for damage to live stock, except from the act of God, the public enemy, the owner's fault, or the natural propensities of the animals. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 151
2. Receipt of live stock in good condition and delivery in a demaged condition makes a *prima facie* case. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 151
3. The presumption of liability for damage to live stock is rebuttable. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 151
4. An initial carrier constracting to deliver stock beyond its own line becomes liable for default of connecting carriers. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 151

Carriers—*Concluded.*

5. Testimony as to speed of a street car *held* to be conclusions. *Baldwin v. Omaha & C. B. Street R. Co.* 614
6. Evidence *held* to show negligence of defendant. *Baldwin v. Omaha & C. B. Street R. Co.* 614

Charities.

1. District courts have jurisdiction in equity to supervise administration of charitable trusts. *Matteson v. Creighton University* 219
2. Equity may permit alienation of trust property to carry out the donor's intent, though not authorized by the trust instrument. *Matteson v. Creighton University* 219
3. Equity may permit a sale of realty charged with a charitable trust and investment of the proceeds. *Matteson v. Creighton University* 219
4. Equity's supervisory power of administration follows trust property legally changed in form. *Matteson v. Creighton University* 219

Chattel Mortgages.

1. A chattel mortgage merely creates a lien. *Appel Mercantile Co. v. Kirtland* 494
2. Where a mortgagee wrongfully takes possession of morgaged chattels, the mortgagor may sue for the value of same at any time within four years. *Schreiner v. Shanahan* .. 525
3. A mortgagor is not bound by written consent to sell mortgaged property induced by intoxicants furnished by mortgagee. *Schreiner v. Shanahan* 525

Constitutional Law. See CRIMINAL LAW, 9. SCHOOLS AND SCHOOL DISTRICTS, 1. TELEGRAPHS AND TELEPHONES, 4.

1. Sec. 6058, Rev. St. 1913, *held* not unconstitutional, in that it fails to provide reimbursement to the initial carrier for liability for default of connecting carrier. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 151
2. Sec. 6063, Rev. St. 1913, providing for attorney's fees, *held* to be in the nature of costs, and not unconstitutional. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 151
3. The Torrens act *held* not to impose judicial duties on the the register of deeds. *Drake v. Frazer* 162
4. Denial of affiirmative relief to defendants under the Torrens act would not render the act unconstitutional. *Drake v. Frazer* 162

Constitutional Law—*Concluded.*

5. The Torrens act is not unconstitutional as conferring additional duties on the register of deeds. *Drake v. Frazer* 162
6. The constructive notice provided by the Torrens act constitutes due process of law. *Drake v. Frazer* 162
7. District courts have equity jurisdiction which may be exercised without legislative enactment. *Matteson v. Creighton University* 219
8. The constitutional provision for filling vacancies in the supreme court *held* not self-executing. *State v. Minor* 228
9. In interpretation of a statute, questions of policy are not for the court. *Ray v. School District* 456
10. Constitutionality of consolidated school act reaffirmed. *Malin v. Housel* 784

Contempt.

1. Failure to use the word "wilful" in information *held* not fatal. *Kammer v. State* 224
2. Failure to answer in contempt proceedings *held* a confession of guilt. *Kammer v. State* 224
3. Commitment of person found guilty of contempt may be ordered in his absence. *Kammer v. State* 224

Contract.

1. Evidence *held* to show novation of contract by substitution of contractor for vendee of material. *Thomas v. George* . 44
2. Novation requires extinguishment of an existing liability, and substitution of a new one. *Thomas v. George* 51
3. Original debtor has burden of showing release and novation when he asserts it as a defense. *Thomas v. George* 51
4. An informal agreement complete in its terms *held* a valid contract. *Reynolds & Maginn v. Omaha General Iron Works* 361
5. Construction placed on contract to repurchase stock by the parties will be followed by the court. *Griffin v. Bankers Realty Investment Co.* 419
6. Provision in warranty against defects of automobile *held* not to deprive the courts of the right to pass upon the defects. *Mills v. Maxwell Motor Sales Corporation* 465
7. Contract *held* joint, requiring reversal for nonjoinder of defendants. *Wolfenbarger v. Britt* 773

Corporations.

1. Transfer or corporate property *held* fraudulent. *Creighton Gas, Electric Light & Power Co. v. Jamison* 67
2. Creditors of an insolvent corporation cannot sue part of the stockholders unless they show that the others are nonresidents or cannot be reached by process. *Gedney Co. v. Sanford* 112
3. A contract for sale and repurchase of stock *held* indivisible. *Griffin v. Bankers Realty Investment Co.* 419
4. A contract for sale and repurchase of stock *held* to be a single contract. *Griffin v. Bankers Realty Investment Co.* 419
5. A corporation cannot make the defense or *ultra vires* to retain the fruits of an unauthorized contract. *Griffin v. Bankers Realty Investment Co.* 419
6. A contract for sale and repurchase of stock *held* not *ultra vires*. *Griffin v. Bankers Realty Investment Co.* 419
7. To compel a corporation to repurchase stock sold under an agreement to repurchase, the buyer must fulfil the conditions necessary for redelivery. *Griffin v. Bankers Realty Investment Co.* 419
8. A stock subscription induced by misrepresentations may be rescinded. *Griffin v. Bankers Realty Investment Co.* 419
9. Where corporate stock is sold under an agreement that the buyer may rescind if the property is not as represented, his decision to rescind must rest on reasonable grounds. *Prime v. Squier* 766
10. Instructions as to purchaser's right to rescind *held* inconsistent. *Prime v. Squier* 766

Costs.

1. A statutory attorney's fee should be based on value of service, but should not bear an unfair proportion to the amount of recovery. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 151
2. Taxation of costs by clerk of district court is a ministerial act. *Barkley v. Pool* 203
3. Costs may be taxed after the term. *Barkley v. Pool* 203
4. A motion to tax adjudicated costs may be acted upon at a subsequent term. *Barkley v. Pool* 203

Courts.

An order of the federal court dismissing a cause, but with leave to file an amended petition, will not be held final by a state court. *Stewart v. Wabash R. Co.* 812

Criminal Law. See BURGLARY, HOMICIDE, INDICTMENT AND INFORMATION, INTOXICATING LIQUORS, 1-3. LARCENY, PERJURY, RAPE. RELIGIOUS MEETINGS. WITNESSES, 5.

1. In a prosecution for murder, admission in evidence of bloody garments and photographs *held* proper. *Blazka v. State* 13
2. Responsibilty for crime is the capacity to understand the nature of the act, and ability to distinguish between right and wrong. *Philbrick v. State* 120
3. Sanity is a question for the jury. *Philbrick v. State* 120
4. Verdict on defense of insanity will not be disturbed unless unsupported by evidence. *Philbrick v. State* 120
5. Putting accused on trial after discharge of jury for inability to agree, *held* not putting him twice in jeopardy. *Sutter v. State* 144
6. Where there is no probability of an agreement, the court may discharge the jury and remand accused for further trial. *Sutter v. State* 144
7. Journal entries *held* a compliance with the statute, requiring that the reasons for discharge of jury be entered upon the journal. *Sutter v. State* 144
8. The order of proof in a prosecution for adultery rests in the discretion of the trial court. *Wiley v. State* 241
9. Ch. 160, Laws 1919, relating to theft of automobiles, *held* constitutional. *Birdhead v. State* 296
10. An instruction defining reasonable doubt *held* not erroneous. *McIntosh v. State* 328
11. An instruction *held* not prejudicially erroneous, when construed in connection with the other instructions. *McIntosh v. State* 328
12. Admissions of accused *held* voluntary. *McIntosh v. State* 328
13. Testimony of witness at a former trial may be given by the official reporter, though he has no present recollection of the testimony independently of his notes. *Brunke v. State* 343
14. The court may, in its discretion, permit witnesses' names to be indorsed on the information during trial. *Brunke v. State* 343
15. Evidence admissible to show witness was beyond jurisdiction of court. *Brunke v. State* 343
16. In a felony case, arraignment of accused cannot be waived. *Popel v. State* 348

Criminal Law—Continued.

17. A physician in general practice who has had experience in insanity cases may testify as an expert. *Braunie v. State* 355
18. The facts that a juror went to sleep is not ground for new trial. *Braunie v. State* 355
19. Where the undisputed facts point to murder, and no mitigating circumstances are shown, the court need not instruct on manslaughter. *Braunie v. State* 355
20. An instruction on malice which did not include justification *held* not erroneous, where there was no evidence of justification. *Braunie v. State* 355
21. An instruction, declaring that defendant is convicted of murder in the first degree, is a judicial determination of the degree of the crime, though the instruction erroneously stated that the degree of the crime had been determined by the plea of guilty. *Cole v. State* 371
22. Where a plea of guilty is entered in a homicide case, and the court takes testimony, it is presumed that the evidence is taken to determine the degree of the crime and the punishment. *Cole v. State* 371
23. The court's determination of the degree of the crime under plea of guilty is not subject to collateral attack, though the court gives erroneous reasons for his conclusion. *Cole v. State* 371
24. Refusal of a jury trial on a plea in bar to original information *held* not error, where the plea was not urged against an amended information. *Tramp v. State* 386
25. A sentence of 60 days' imprisonment on the third conviction of bootlegging *held* not excessive. *Tramp v. State* .. 386
26. Exhibits must be properly identified as part of the transcript, to be considered on appeal. *Cottrell v. State* 392
27. Articles introduced in evidence in a murder case are in custody of the court, and should not be withdrawn without leave of court. *Cottrell v. State* 392
28. Voluntary statements against interest made at time of commission of crime are admissible. *Witty v. State* 411
29. Instruction that admissions should be received with great caution *held* properly refused. *Witty v. State* 411
30. An *ex parte* record *held* inadmissible in a prosecution for contributing to the delinquency of an infant. *Longsine v. State* 428

Criminal Law—*Concluded.*

31. Where accused has introduced evidence of good character, it is reversible error to refuse an instruction thereon. *McDougal v. State* 553
32. Error must affirmatively appear on the face of the record. *Hutter v. State* 601
33. Indorsement of name of witness on information during trial *held* not prejudicial. *Hutter v. State* 601
34. A conviction may rest upon the uncorroborated evidence of an accomplice, in connection with other evidence. *Hutter v. State* 601
35. The district court may grant a parole, and, for a violation thereof, revoke it and impose sentence. *Sellers v. State* 748
36. Proceeding by motion to vacate a parole sustained; but correct practice requires a verified information. *Sellers v. State* 748
37. Evidence that defendant will not refrain from future criminal acts will sustain revocation of a parole. *Sellers v. State* 748
38. Since the amendment of 1915, persons held to the district court must be bound over to appear at "the first day of the next *jury* term." *Harrison v. Cheney* 821

Damages. See VENDOR AND PURCHASER, 4, 5.

1. $28,800 for personal injuries to a locomotive engineer *held* excessive. *Fitzpatrick v. Hines* 134
2. The measure of damages for breach of contract to lend money is usually the increased interest paid. *Shurtleff v. Occidental Building & Loan Ass'n.* 557
3. Special damages for breach of contract to lend money is recoverable, if within contemplation of the parties. *Shurtleff v. Occidental Building & Loan Ass'n.* 557
4. Increased cost of constructing a building is recoverable on breach of contract to lend money for its construction, if within contemplation of the parties. *Shurtleff v. Occidental Building & Loan Ass'n.* 557
5. Damages for loss of rents on breach of contract to lend money for construction of a building *held* too remote. *Shurtleff v. Occidental Building & Loan Ass'n.* 557
6. Attorney's fees and costs are not recoverable in an action for breach of contract to lend money. *Shurtleff v. Occidental Building & Loan Ass'n.* 557

Damages—*Concluded.*

7. Damages of $26,500 for partial loss of sexual power *held* excessive. *Stewart v. Wabash R. Co.* 812

Deeds.

1. A deed takes effect from time of delivery. *Brooks v. Brooks* 235
2. Possession of a deed by the grantee is *prima facie* evidence of delivery. *Brooks v. Brooks* 235
3. Delivery may be presumed from circumstances showing intent to deliver. *Brooks v. Brooks* 235
4. Placing a deed in grantee's possession raises a presumption of delivery. *Brooks v. Brooks* 235
5. In construction of conveyances, courts will carry into effect the intent of the parties. *Carr v. Miller* 623
6. By statute a conveyance passes all the grantor's interest unless a contrary intent is inferable from its terms. *Carr v. Miller* 623
7. The phrase in a deed, "for terminal and railway purposes and uses," *held* not to limit the estate conveyed, or to cause a reversion in case the land is devoted to a different use. *Carr v. Miller* 623
8. A conveyance for terminal and railway purposes *held* to convey a fee. *Carr v. Miller* 623
9. Deed from mother to child *held* induced by fraud. *Chase v. Lavelle* 796
10. The presumption is against the validity of a deed whereby a parent gives all her estate to one child. *Chase v. Lavelle* 796
11. Evidence *held* to warrant cancelation of a deed from parent to child. *Chase v. Lavelle* 796

Depositions.

Where exhibits were attached to a deposition without objection, it will be presumed that no objection was made. *National Surety Co. v. Love* 855

Elections. See MANDAMUS, 1.

1. Where two candidates are regularly nominated to fill a vacancy in the supreme court, and another vacancy occurs two days before the primary, the persons so nominated are candidates for the first vacancy only. *State v. Minor* 228
2. The legislature having made no provision for nomination of candidates to fill vacancies in the supreme court occurring within 30 days of a primary election, the courts cannot supply such defect. *State v. Minor* 228

Estoppel.

1. Where one induces another to believe in the existence of a state of facts, he is estopped to aver the contrary. *Merchants-Mechanics First Nat. Bank v. Cavers Elevator Co.* 321
2. A grantor cannot question the grantee's capacity to take. *Carr v. Miller* 623
3. Estoppel *in pais* is applicable to municipal corporations. *State v. McIlravy* 651
4. The doctrine of equitable estoppel will be applied where a railroad company has made permanent and expensive improvements under authority from a city. *State v. McIlravy* 651

Evidence. See APPEAL AND ERROR, 13-21. CARRIERS, 2, 3, 5, 6. CRIMINAL LAW. DEPOSITIONS. WITNESSES.

1. In an action upon a written contract executed by an agent on behalf of his principal, where the defense was that the agent exceeded his authority, evidence that the agent informed the other party of his lack of authority *held* admissible. *Omaha Alfalfa Milling Co. v. Pinkham* 20
2. Authentication of a judicial record of a sister state requires certificate of presiding judge. *National Surety Co. v. Love* 38
2. Witnesses who testify alone from comparison of signatures are entitled to less credence than are experts. *In re Estate of O'Connor* 88
4. Comparisons of signatures by handwriting experts merit consideration on the issue of forgery in a civil action. *In re Estate of O'Connor* 88
5. Value of testimony of handwriting expert depends largely on the reasons for his opinion. *In re Estate of O'Connor* 88
6. A record kept by a clerk from data collected by other employees is a book of original entry. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 151
7. In a personal injury action, a verdict for plaintiff based on evidence which is disproved by physical facts will be reversed. *Oliver v. Union P. R. Co.* 243
8. Affirmative evidence that a gong was sounded *held* not overcome by negative evidence. *Oliver v. Union P. R. Co.* 243
9. Conclusion of witness as to who was in possession of land during statutory period is improper evidence. *Carnahan v. Cummings* 337

Evidence—*Concluded.*

10. Where a stock subscription was induced by an agent's misrepresentations, evidence is admissible to show the inducement. *Griffin v. Bankers Realty Investment Co.* 419
11. Evidence of an estoppel based on oral modification of a broker's contract *held* erroneously excluded. *Hecht v. Marsh* 502
12. In an action for death, admission of defendant's testimony on the coroner's inquest *held* not error. *Smoke v. Carter* 520
13. Refusal to allow cross-examination of an expert as to the genuineness of signatures of another person *held* not error. *Schreiner v. Shanahan* 525
14. Courts will not take judicial notice that test of vitality of seed was practicable, customary, or contemplated. *Corry v. Waldron Seed Co.* 580
15. A fact may be etablished by inference from other facts proved. *Weber v. Thompson-Belden & Co.* 606
16. In condemnation, evidence of price paid by state for lots purchased *held* not competent on question of value of adjacent lots. *State v. Wright* 617
17. Recital of consideration in deed *held* incompetent as evidence of price paid. *State v. Wright* 617
18. Parol evidence *held* inadmissible to vary terms of writing. *Smith v. Bailey* 754
19. Though a written contract is incomplete, extrinsic evidence *held* inadmissible to show an inconsistent supplemental provision. *Smith v. Bailey* 754
20. Declarations against interest cannot ordinarily be annulled by counter declarations. *Davis v. Murphy* 839
21. Where no objection was made to authentication of judicial records of a sister state, it will be presumed that objection was waived. *National Surety Co. v. Love* 855

Executors and Administrators.

1. Essential averments of petition for administration stated. *In re Estate of Pollard* 432
2. It is not essential that petitioner for administration have a beneficial interest. *In re Estate of Pollard* 432
3. Statutory preference should be followed in appointment of an administrator. *In re Estate of Pollard* 432
4. Applicant for administration must show fitness to discharge the trust. *In re Estate of Pollard* 432

Executors and Administration—*Concluded.*

5. Where heirs file objections to a claim, the executor may withdraw objections filed by himself. *Blair v. Estate of Willman* 735

Extradition.

1. The state in which accused is arrested has exclusive jurisdiction until its demands are satisfied. *State v. Eberstein* 833
2. The governor of an asylum state may waive jurisdiction of accused and honor the requisition of a demanding state. *State v. Eberstein* 833
3. The governor's warrant for surrender of a fugitive may be revoked before the prisoner is taken from the state. *State v. Eberstein* 833

Fraud.

1. The materiality of deception by a purchaser having secret knowledge of mineral deposits depends on its effect on the vendor's mind. *Long v. Krause* 538
2. Deception by a purchaser having secret knowledge of mineral deposits *held* actionable. *Long v. Krause* 538

Fraudulent Conveyances.

A chattel mortgage given in good faith on merchandise is not within the inhibition of the Bulk Sales Law. *Appel Mercantile Co. v. Kirtland* 494

Gaming.

Grain deals *held* to be gaming contracts, preventing recovery of money advances. *Hall v. Davis* 179

Gifts.

1. Postponement of enjoyment of gift until death of donor does not render the gift invalid. *Dinslage v. Stratman* .. 274
2. Stipulation postponing enjoyment of gift until donor's death is not a condition. *Dinslage v. Stratman* 274
3. Evidence *held* to show a gift *inter vivos* of the chose in suit. *Dinslage v. Stratman* 274
4. Direction to debtor to pay a debt to a donee is a sufficient delivery of the chose as a gift. *Dinslage v. Stratman* 274

Guardian and Ward.

1. Approval by county court, without notice, of guardian's application to invest funds is not conclusive upon the ward. *Seward v. Danaher* 787
2. Guardian's liability for interest stated. *Seward v. Danaher* 787
3. Evidence *held* insufficient to show ground for removal of guardian. *Seward v. Danaher* 787

Habeas Corpus.

1. An officer made respondent in habeas corpus may appeal from an order discharging a prisoner. *Gillard v. Clark* .. 84
2. Habeas corpus must be brought in the county where the prisoner is confined. *Gillard v. Clark* 84
3. Voluntary submission to jurisdiction of district court of another county sustained. *Gillard v. Clark* 84
4. Application for writ by one convicted of a felony without a jury trial, *held* to state facts warranting issuance of the writ. *Gillard v. Clark* 84
5. Child awarded to custody of aunt; it being for the child's best interest. *Lemke v. Guthmann* 251
6. A conflict in evidence as to presence of accused in demanding state at time of offense does not require his discharge on habeas corpus. *State v. Eberstein* 833
7. The technical sufficiency of the indictment will not be inquired into on habeas corpus. *State v. Eberstein* 833
8. The filing of a complaint in the demanding state is *prima facie* evidence that he was there charged with a crime. *State v. Eberstein* 833

Highways.

1. One claiming damages from location of a public road waives all irregularities in the proceedings. *Witherwax v. Holt County* 7
2. County paving contract *held* invalid for failing to state time of performance. *Root v. Douglas County* 262

Homicide. See CRIMINAL LAW, 19, 20.

1. An information for murder should be construed as a whole giving language its usual meaning. *Blazka v. State* 13
2. The word "so" in an information *held* equivalent to "by reason of." *Blazka v. State* 13
3. An information which with reasonable certainty charges the elements of murder is sufficient. *Blazka v. State* 13

Homicide—*Concluded.*

4. Information *held* to charge the crime of murder. *Blazka v. State* 13
5. Evidence *held* to sustain verdict. *Blazka v. State* 13
6. Evidence *held* to sustain verdict of guilty of murder in second degree. *Sutter v. State* 144
7. Evidence *held* to sustain conviction for murder in the first degree. *Jackson v. State* 301
8. Instruction *held* not to direct jury to infer malice from the fact of the killing. *Braunie v. State* 355
9. Evidence *held* to sustain conviction of murder in the first degree. *Braunie v. State* 355
10. Evidence *held* to sustain conviction of murder in first degree. *Cottrell v. State* 392

Husband and Wife. See MECHANICS' LIENS, 3.

1. A husband may act as his wife's agent in contracting for materials for construction of a house on her property. *Thomas v. George* 51
2. The presence of the wife raises no presumption that a tort committed by her husband was committed by him, as her agent, even though with reference to her separate estate. *Carnahan v. Cummings* 337
3. In an action for alienation of affections, failure to instruct that parental advice is a defense is not error, when not pleaded nor proved. *Ruhs v. Ruhs* 663
4. Evidence in action for alienation of affections *held* to sustain verdict. *Ruhs v. Ruhs* 663

Indictment and Information. See HOMICIDE, 1-4.

1. An information which describes the crime in the language of the statute is sufficient. *Philbrick v. State* 120
2. An information for stealing cattle in the language of the statute is sufficient. *McIntosh v. State* 328
3. Where a demurrer to a plea in bar to an information is overruled, an amended information may be filed. *Tramp v. State* 386
4. It is improper to join a misdemeanor count with one for felony, where the lesser offense is not included within the greater. *Longsine v. State* 428
5. Information *held* insufficient to charge the crime of contributing to the delinquency of an infant. *Longsine v. State* 428

Infants. See INDICTMENT AND INFORMATION, 5. JUDGMENT, 4-6.

A child is "neglected" under the statute forfeiting the right of the parent's custody, when the parent is immoral and the child's surroundings are immoral. *Stanley v. State* 260

Insurance.

1. A by-law of a fraternal society enacted after issuance of beneficial certificate must be reasonable. *Garrison v. Modern Woodmen of America* 25
2. A subsequently adopted by-law of a fraternal society as to presumption of death from absence *held* unreasonable. *Garrison v. Modern Woodmen of America* 25
3. Beneficial society estopped from questioning proof of loss. *Garrison v. Modern Woodmen of America* 25
4. A by-law requiring 30 days' notice of change of occupation *held* valid. *Sawyer v. Sovereign Camp, W. O. W.* 395
5. A by-law requiring increased assessments for increased hazards *held* enforceable, though enacted subsequently to issuance of beneficial certificate. *Sawyer v. Sovereign Camp, W. O. W.* 395
6. A member of a fraternal asociation *held* bound to inform himself in regard to new by-laws. *Sawyer v. Sovereign Camp, W. O. W.* 395
7. A member of a beneficial association *held* bound by subsequently enacted by-laws increasing assessments. *Sawyer v. Sovereign Camp, W. O. W.* 395
8. Reasonableness is the test of a subsequently enacted by-law. *Sawyer v. Sovereign Camp, W. O. W.* 395
9. A member of a beneficial association is bound to contribute his share of insurance of all members. *Sawyer v. Sovereign Camp, W. O. W.* 395
10. A member of a beneficial association is bound by its legal enactments. *Sawyer v. Sovereign Camp, W. O. W.* 395
11. Forfeiture of insurance is a reasonable penalty for enforcement of contributions to a fraternal insurance fund. *Sawyer v. Sovereign Camp, W. O. W.* 395
12. Waiver of forfeiture from insured's failure to pay increased dues required by change of occupation, *held* not established by insurer's retention of unearned dues without knowledge of the facts. *Sawyer v. Sovereign Camp, W. O. W.* 395

Insurance—*Concluded.*

13. Foreman of a switching crew *held* to be a switchman within the meaning of a beneficial certificate. *Sawyer v. Sovereign Camp, W. O. W.* 395
14. A fraternal association is liable to a member for libel published by its officers acting within the scope of their authority. *Peterson v. Cleaver* 438
15. A member of a beneficial association must exhaust his remedies within the society before resorting to the courts. *Pixley v. Cleaver* 485
16. Postponement of meeting of supreme lodge of a beneficial association, *held* not to destroy a member's remedy by appeal to that body, nor to justify a resort to equity. *Pixley v. Cleaver* 485
17. Provision for forfeiture of policy and premiums paid, for nonpayment of a premium, *held* legal and enforceable. *Dressler v. Commonwealth Life Ins. Co.* 669
18. Failure to pay premiums held to work a forfeiture of policy. *Dressler v. Commonwealth Life Ins. Co.* 669
19. Notice of forfeiture of policy *held* not necessary. *Dressler v. Commonwealth Life Ins. Co.* 669
20. Misrepresentation of age of automobile *held* not ground for avoidance of insurance thereon. *Traynor v. Automobile Mutual Ins. Co.* 677
21. Misstatement in application for insurance of the year in which an automobile was built *held* not deceit within the statute, in view of other facts stated. *Traynor v. Automobile Mutual Ins. Co.* 677

Intoxicating Liquors.

1. Possession of medicinal compounds enumerated in sec. 27, ch. 187, Laws 1917, is not prohibited unless manufactured, bought, sold, or dealt in for use as a beverage. *Schemmer v. State* 324
2. Whether an alcholic preparation is unfit for use as a beverage is a question of fact. *Schemmer v. State* 324
3. Preparations enumerated in sec. 27, ch. 187, Laws 1917, which can be used as a beverage are within the prohibitory act. *Schemmer v. State* 324
4. Sec. 3859, Rev. St. 1913, creates a liability against a licensed vender that did not exist at common law. *Kraus v. Schroeder* 809
5. A saloon-keeper and his sureties are liable for injuries by an intoxicated person. *Kraus v. Schroeder* 809

Judges.

When a vacancy occurs in the supreme court after the time for nominating candidates for the general election has expired, the govenor's appointee holds until the succeeding general election. *State v. Minor* 228

Judgment.

1. Provisions of U. S. Constitution that full faith and credit shall be given to the judgment of a sister state has no application to judgment against a nonresident joint obligor without notice. *National Surety Co. v. Love* 38
2. A judgment against an indemnitee is not conclusive of liability of nonresident indemnitor without notice of the action. *National Surety Co. v. Love* 38
3. Evidence *held* to sustain judgment of dismissal of action against indemnitor. *National Surety Co. v. Love* 38
4. A judgment against an infant may be opened after majority only on grounds existing at time of rendition of the judgment. *Foerster v. Helming* 531
5. An infant may appeal from a judgment by his guardian *ad litem*. *Foerster v. Helming* 531
6. Where an infant is represented by a guardian *ad litem* on appeal, the judgment is conclusive as to errors. *Foerster v. Helming* 531
7. Issues determined by judgment cannot be relitigated in a subsequent action between the same parties. *Stocker v. Nemaha Valley Drainage District* 684
8. The constitutionality of a statute having been sustained, the question is *stare decisis*. *Malin v. Housel* 784
9. A judgment against an indemnitee is not conclusive upon an indemnitor without notice. *National Surety Co. v. Love* 855
10. A judgment against an indemnitee is only *prima facie* evidence of liability of an indemnitor without notice. *National Surety Co. v. Love* 855
11. Indemnitor *held* concluded by a judgment against his indemnitee. *National Surety Co. v. Love* 855

Jury. See CRIMINAL LAW, 6, 18.

A person charged with contributing to the delinquency of a child is entitled to a jury trial. *Swanson v. State* 761

Justice of the Peace.

Negligent failure of justice to prepare a transcript in time will not bar right to appeal. *Kates v. Spencer* 599

Larcency.

1. Removal of property with intent to steal is a sufficient asportation. *McIntosh v. State* 328
2. Where one, with felonious intent, shoots a steer, drags the carcass from the spot where killed, and for fear of detection flees, he is guilty of larceny of the steer. *McIntosh v. State* 328
3. Intent to convert property to the taker's use is not an essential element of larceny. *McIntosh v. State* 328

Libel.

1. The author of a libelous article published at his instance is liable with the publisher. *Peterson v. Cleaver* 438
2. Instruction as to truth and motive, and as to privilege of publication, *held* proper: *Peterson v. Cleaver* 438
3. Evidence *held* sufficient to submit question of express malice to the jury. *Peterson v. Cleaver* 438
4. A publication by a chief officer of a fraternal association to members is privileged, unless express malice is shown, *Peterson v. Cleaver* 438

Limitation of Actions. See ADVERSE POSSESSION. TAXATION, 2.

1. The statute runs only from time of discovery of fraud. *Brooks v. Brooks* 235
2. Voluntary part payment tolls the statute, and, if debt is barred, revives it. *Blair v. Estate of Willman* 735
3. Payment to employ *held* to be part payment on a continuing contract. *Blair v. Estate of Willman* 735

Malicious Prosecution.

1. Probable cause *held* a question of law. *McHugh v. Ridgell* 212.
2. Elements of probable cause stated. *McHugh v. Ridgell* .. 212
3. Undisputed facts *held* to show probable cause for prosecution for arson, as a matter of law. *McHugh v. Ridgell* .. 212

Mandamus.

1. Mandamus will not lie to compel a ministerial officer to place blank spaces on the official nonpartisan judiciary ballot at an election to fill a vacancy in the supreme court occurring two days before the primary election. *State v. Minor* 228
2. Issuance of writ is discretionary. *State v. McIlravy* 651
3. The grant of writ will be reversed for clear abuse of discretion. *State v. McIlravy* 651

Mandamus—*Concluded.*

4. Mandamus to compel award of bid on state contract denied. *State v. Board of Commissioners* 570
5. The discretion of inferior tribunals cannot be controlled by mandamus. *State v. Board of Commissioners* 570

Master and Servant.

1. Failure to obey orders for a clear track is negligence *per se*. *Fitzpatrick v. Hines* 134
2. It is negligence *per se* to fail to observe rules requiring flagging of approaching trains. *Fitzpatrick v. Hines* 134
3. A locomotive engineer held not to assume extraordinary risks caused by negligence of his employer. *Fitzpatrick v. Hines* 134
4. Under the federal employers' liability act, it is only when the employee's act is the sole cause of injury that the employer is free from liability. *Fitzpatrick v. Hines* 134
5. Defense of assumption of risk *held* properly withdrawn from jury. *Fitzpatrick v. Hines* 134
6. A locomotive engineer *held* not to assume risk of employees of a forward train. *Fitzpatrick v. Hines* 134
7. Notice of appeal from award of compensation may be waived. *Mucha v. Morris & Co.* 180
8. The owner of an automobile kept for family purposes is liable for his child's negligent driving. *Stevens v. Luther* 184
9. "Casual employment" defined. *Bridger v. Lincoln Feed & Fuel Co.* 222
10. A casual employee is not within the workmen's compensation act. *Bridger v. Lincoln Feed & Fuel Co.* 222
11. One unloading coal cars at irregular intervals *held* to be a casual employee under the workmen's compensation act. *Bridger v. Lincoln Feed & Fuel Co.* 222
12. Under the workmen's compensation act, periodical instalments of compensation do not become due, so as to carry statutory penalties, until the employer's obligation is definitely settled. *Osborn v. Omaha Structural Steel Co.* .. 216 *Hall v. Germantown State Bank* 709
13. On appeal in a compensation case, findings of fact supported by evidence are conclusive. *Christensen v. Protector Sales Co.* 389
14. "Regular term of office" in the workmen's compensation law defined. *Rooney v. City of Omaha* 447

Master and Servant—*Continued.*

15. A policeman not being employed for "gain or profit" is not within the workmen's compensation law. *Rooney v. City of Omaha* 447
16. "Gain or profit" in workmen's compensation law *held* to mean pecuniary gain or profit. *Ray v. School District* ... 456
17. State employees not being employed for "gain or profit" are not within the workmen's compensation law. *Ray v. School District* 456
18. A school janitor is not within the workmen's compensation law. *Ray v. School District* 456
19. The taking of testimony after remand of a compensation case *held* discretionary. *Venuto v. Carter Lake Club* 568
20. The name on a vehicle raises a presumption of ownership. *Weber v. Thompson-Belden & Co.* 606
21. Evidence *held* to sustain finding of agency. *Weber v. Thompson-Belden & Co.* 606
22. To recover for injuries caused by defendant's automobile, plaintiff must show that the chauffeur was defendant's servant and engaged in the master's business at time of accident. *Weber v. Thompson-Belden & Co.* 606
23. A newspaper company is not a manufacturing nor a mechanical establishment within the statute regulating hours of labor for women. *State v. Crounse* 672
24. Injury by air hose *held* to "arise out of the employment." *Socha v. Cudahy Packing Co.* 691
25. An anticipated accident may be an element in determining whether injury arose out of the employment. *Socha v. Cudahy Packing Co.* 691
26. Ignorance of the law will not relieve from liability. *Abel Construction Co. v. Goodman* 700
27. An attorney's fee is not allowable in a compensation case. *Abel Construction Co. v. Goodman* 700
28. Employee *held* liable for full statutory "waiting time" penalty, where appeal was not justified. *Abel Construction Co. v. Goodman* 700
29. Award of compensation with statutory "waiting time" penalty upheld. *Abel Construction Co. v. Goodman* 700
30. Evidence *held* to present a controversy as to extent of injury. *Hall v. Germantown State Bank* 709
31. Compensation admittedly due must be tendered to avoid the statutory penalty. *Hall v. Germantown State Bank* 709

Master and Servant—*Concluded.*

32. Uncoupling of car *held* proof that the coupling was defective. *Stewart v. Wabash R. Co.* 812
33. Injury to switchman *held* within the federal employers' liability act. *Stewart v. Wabash R. Co.* 812
34. Uncoupling of car *held* proximate cause of injury. *Stewart v. Wabash R. Co.* 812
35. Evidence as to duties of switchman and yard customs *held* admissible. *Stewart v. Wabash R. Co.* 812
36. In an action for wages, the burden is on the defendant to plead and prove other employment in mitigation of damages. *Kring v. School District* 864

Mechanics' Liens.

1. A husband's contract will not sustain a mechanic's lien on his wife's land. *Thomas v. George* 44
2. Where a vendee of material notified the vendor that a contractor has agreed to take the material, the vendor by silence will be held to have released the vendee. *Thomas v. George* 44
3. Act of husband in ordering materials for construction of a house on his wife's property *held* binding on wife. *Thomas v. George* 51
4. A lumber dealer, who guaranteed that a contractor would construct a building for a specific price, *held* not entitled to a mechanic's lien for materials in excess of such price. *Farmers Lumber & Hay Co. v. Shald* 298

Mortgages.

1. Whether a deed is a sale or a mortgage depends on the intention of the parties. *Snoke v. Beach* 127
2. Parol evidence to show that a deed is in fact a mortgage must be clear and convincing. *Snoke v. Beach* 127
3. Where a deed is in fact given as security, the grantor is entitled to redeem, and to possession. *Snoke v. Beach* 127
4. Evidence *held* to show that a deed was given as security. *Snoke v. Beach* 127
5. A mortgagee in possession must account for rents which he could, with diligence, have received. *Hays v. Christiansen* 586
6. A mortgagee in possession *held* entitled to credit for necessary permanent improvements. *Hays v. Christiansen* 586

Mortgages—*Concluded.*

7. A mortgagee in possession under an agreement to apply rents on the mortgage debt cannot renounce the trust and have a receiver. *Hays v. Christiansen* 586
8. The burden is on plaintiff in foreclosure to establish that payment to his agent was on the agent's individual debt and not on the mortgage debt. *Krause v. Cox* 728
9. Evidence *held* to establish that payment to agent was on the mortgage debt. *Krause v. Cox* 728

Municipal Corporations. See ESTOPPEL, 3, 4.

1. Drivers of vehicles meeting at street intersection must exercise reasonable care. *Barrett v. Alamito Dairy Co.* 658
2. The vehicle first entering a street intersection has the right of way. *Barrett v. Alamito Dairy Co.* 658
3. An automobile does not have the right of way over a wagon at a street intersection. *Barrett v. Alamito Dairy Co.* 658
4. Duty of a wagon-driver meeting an automobile at a street intersection stated. *Barrett v. Alamito Dairy Co.* 658
5. Doctrine of the "last clear chance" *held* not applicable to a collision at a street intersection. *Barrett v. Alamito Dairy Co.* 658
6. In absence of fraud or statutory authority, a petitioner for pavement cannot withdraw after approval of the petition and letting of contract. *Wilkinson v. City of Lincoln* 752

Negligence. See STREET RAILWAYS.

1. Negligence of a husband in driving an automobile cannot be imputed to his wife. *Stevens v. Luther* 184
2. Where injury results from driving an automobile at an unlawful speed, there is an inference of negligence. *Stevens v. Luther* 184
   Lady v. Douglass 489
3. Instruction as to effect of violation of ordinance regulating speed of automobiles *held* proper. *Stevens v. Luther* 184
4. Violation of statutes fixing speed of automobiles distinguished from violation of statutes enjoining affirmative duties. *Stevens v. Luther* 184
5. In an action for injuries from automobile collision, evidence *held* not to show as a matter of law that plaintiff's negligence was the proximate cause, or that it was more than slight in comparison with defendant's negligence. *Robison v. Troy Laundry* 267

Negligence—*Concluded.*

6. Comparative negligence and proximate cause *held* questions for the jury. *Robison v. Troy Laundry* 267
7. The owner of an automobile is not an insurer of a guest's safety, but he is bound to use ordinary care in driving. *Bauer v. Griess* 381
8. Driving a motor vehicle at a speed exceeding the limit provided by statute is not negligence *per se*. *Lady v. Douglass* 489
9. Direction of verdict for defendant in an action for death *held* not error. *Sund v. Smisek & Hrdlicka* 602
10. Contributory or comparative negligence cannot properly be submitted, where there is no evidence that defendant was negligent. *Sund v. Smisek & Hrdlicka* 602

Novation. See CONTRACTS, 2, 3.

Parent and Child. See INFANTS.

Parties. See CONTRACTS, 7.

Partnership.

1. On the death of a partner, the partnership assets pass to the surviving partner. *Ekberg v. Lancaster* 510
2. Where a surviving partner is dissipating partnership assets, a court of equity will give relief. *Ekberg v. Lancaster* 510
3. A partner's right to compensation for his services depends on contract. *Efner v. Reynolds* 646
4. A managing partner is not entitled to a salary for his services, unless allowed by contract. *Efner v. Reynolds* 646
5. A partner who manages a newspaper is not entitled to compensation for his services. *Efner v. Reynolds* 646
6. A managing partner is not entitled to compensation for winding up partnership affairs. *Efner v. Reynolds* 646

Payment.

1. Payment is an affirmative defense. *Omaha Alfalfa Milling Co. v. Hallen* 193
2. Money paid under mistake of fact is recoverable. *Merchants-Mechanics First Nat. Bank v. Cavers Elevator Co.* 321

Perjury.

One who swears falsely to an assessment is guilty of false swearing, though the oath is administered by a *de facto* assessor. *Brunke v. State* 343

Pleading. See APPEAL AND ERROR, 6, 7. SALES, 10, 11.

1. A motion to strike a petition for want of verification is waived by filing an answer. *Blodgett v. Swanson Bros.* .. 191
2. After trial on an amended petition and an amended answer, defendant cannot complain of the amendment to petition. *Six v. Bridgeport Irrigation District* 254
3. New matter in reply to an answer is deemed denied. *Sawyer v. Sovereign Camp, W. O. W.* 395

Principal and Agent.

1. Rule stated as to whether an act is within the scope of an agent's apparent authority. *Mahaffy v. Hansen Live Stock & Feeding Co.* 9
2. Whether or not an act is within the scope of an agent's apparent authority is a question for the jury. *Mahaffy v. Hansen Live Stock & Feeding Co.* 9
3. A contract in excess of agent's authority does not bind the principal. *Omaha Alfalfa Milling Co. v. Pinkham* ... 20
4. Where an agent has rendered services before revocation of his authority, the principal is liable. *Staats v. Mangelsen* 282
5. A power not coupled with an interest may be revoked. *Staats v. Mangelsen* 282
6. Agent *held* authorized to collect money due on a note. *Kile v. Zimmerman* 576
7. Payment to third party *held* authorized by the holder of a note. *Krause v. Cox* 728

Public Lands.

1. Congressional grant of right of way to a railroad will be presumed to be necessary. *Etheredge v. Chicago, B. & Q. R. Co.* 778
2. The fact that only a portion of the right of way granted to a railroad is used is immaterial. *Etheredge v. Chicago, B. & Q. R. Co.* 778

Quieting Title.

Plaintiff *held* not chargeable with laches, in view of infancy and ignorance of his rights. *Brooks v. Brooks* 235

Railroads. See CARRIERS. DEEDS, 7, 8.

Evidence as to whether signals were given *held* insufficient to sustain verdict. *Oliver v. Union P. R. Co.* 243

Rape. See WITNESSES, 6.

1. Testimony of prosecutrix must be corroborated. *Force v. State* 175
2. Evidence *held* insufficient to sustain conviction. *Force v. State* 175
3. While, in a prosecution for rape, the state may only inquire of prosecutrix whether she made complaint and when and to whom, the defense, in cross-examination, may inquire as to the particular facts. *Witty v. State* 411
4. In a prosecution for rape on a girl under the statutory age of consent, the question of consent is immaterial. *Witty v. State* 411
5. In a prosecution for rape, the prosecutrix may be corroborated by evidence of surrounding facts and circumstances. *Nabower v. State* 848
6. In a prosecution for rape upon a girl between the age of 15 and 18 years, the burden in on the state to show previous chastity. *Nabower v. State* 848
7. Refusal to instruct as to consent is error where complainant's character has been attacked. *Nabower v. State* 848
8. Where the reputation of the prosecutrix for chasitity is assailed, the state may introduce evidence to refute it. *Nabower v. State* 848
9. The accused's previous coition with prosecutrix cannot be shown to prove her unchastity. *Nabower v. State* 848

Records. See CONSTITUTIONAL LAW, 3-6. REMAINDERS.

Religious Meetings.

1. A member of a church may, with good motives, interrupt a minister during a sermon to correct an utterance at variance with church tenets. *Gaddis v. State* 303
2. Conviction for disturbing a religious meeting *held* not sustained by the evidence. *Gaddis v. State* 303

Remainders.

Proceedings under the Torrens act adjudicating the rights of contingent remaindermen *held* conclusive on unborn remaindermen. *Drake v. Frazer* 162

Sales.

1. A consignee who is agent of the consignor for sale of goods may become the principal debtor after sale. *Maurer v. Featherstone* 72

Sales—*Concluded.*

2. A letter to a firm proposing to furnish material for a building, in case the firm should be the successful bidders therefor, when accepted after award of the contract to the firm, constitutes a valid contract. *Reynolds & Maginn v. Omaha General Iron Works* 361
3. Evidence *held* to establish oral acceptance of proposition to furnish building material. *Reynolds & Maginn v. Omaha General Iron Works* 361
4. Claims for automobile repairs under a warranty require clear proof. *Mills v. Maxwell Motor Sales Corporation* .. 465
5. Evidence *held* not to sustain judgment for plaintiff on seller's warranty of automobiles. *Mills v. Maxwell Motor Sales Corporation* 465
6. Transaction *held* to be a sale. *Fulton Motor Truck Co. v. Gordon Fire-Proof Warehouse & Van Co.* 515
7. Contract to pay the best price obtainable *held* to be indefinite and unenforceable. *Schreiner v. Shanahan* 525
8. Failure to give notice of breach of warranty as provided by contract is no defense, where the seller undertakes to remedy the defects. *Ditto v. International Harvester Co.* 544
9. Provision in contract that rentention of a machine would operate as a waiver of defects, *held* waived by conduct of seller. *Ditto v. International Harvester Co.* 544
10. A buyer must plead that a test of seed to determine its vitality was practicable, customary, or contemplated. *Corry v. Waldron Seed Co.* 580
11. An answer admitting receipt of seed and alleging that it was inferior to contract requirement, but which fails to plead that a test was practicable, customary, or contemplated, *held* not to state a defense. *Corry v. Waldron Seed Co.* 580
12. Acceptance of seed will not be presumed from mere fact of delivery, and before test, where buyer has the right to test it. *Corry v. Waldron Seed Co.* 580
13. An order for goods may be rescinded for false representations. *National Novelty Import Co. v. Reed* 697
14. A clerk of an auction sale does not warrant title of property sold. *Corn Land Farms Co. v. Barcus* 869
15. The clerk of an auction sale *held* not liable to purchaser of stolen property, when the purchaser knew who offered the property for sale. *Corn Land Farms Co. v. Barcus* .. 869

Schools and School Districts.

1. Consolidated school act (Laws 1919, ch. 243) *held* constitutional. *State v. Cox* 75
2. Participation of patrons *held* not to void action of school board in expulsion of pupil. *Smith v. Johnson* 61
3. Suit to enjoin removal of school property cannot be maintained by one who is not a resident, elector, and taxpayer of the district. *Stewart v. Consolidated School District* .. 685

Specific Performance.

1. To establish an oral agreement for adoption requires clear evidence and proof of performance. *Cain v. Dowling* 741
2. A parol contract is enforceable if one party has performed. *Davis v. Murphy* 839
3. Specific performance is discretionary. *Davis v. Murphy* 839
4. Evidence *held* to establish oral contract of decedent to convey land in consideration of support. *Davis v. Murphy* 839

States.

1. The board of commissioners of state institutions in awarding contracts exercises discretionary judicial power. *State v. Board of Commissioners* 570
2. In determining responsibility of bidders on contracts, the board of commissioners must act on evidence sufficient to show a reasonable basis for its decision. *State v. Board of Commissioners* 570
3. The term "lowest responsible bidder" defined. *State v. Board of Commissioners* 570

Statute of Frauds.

1. Oral acceptance of a written offer to sell goods *held* sufficient to satisfy the statute. *Reynolds & Maginn v. Omaha General Iron Works* 361
2. Written offer *held* a sufficient memorandum. *Reynolds & Maginn v. Omaha General Iron Works* 361
3. Sale of corporate stock under an oral contract to repurchase *held* not within the statute. *Griffin v. Bankers Realty Investment Co.* 419
4. An oral promise by an officer of a corporation to repurchase stock *held* not within the statute. *Griffin v. Bankers Realty Investment Co.* 419
5. The statute can only be invoked to avoid an oral contract by one free from deceit. *Griffin v. Bankers Realty Investment Co.* 419

Statute of Frauds—*Concluded.*

6. A person inducing an oral modification of a contract within the statute cannot assert that such modification is invalid. *Hecht v. Marsh* 502

Statutes.

1. To overcome the presumption of regularity afforded by the enrolled bill as to matters not required to be journalized, the journal must clearly disclose the irregularity in its passage. *State v. Cox* 75
2. An enrolled bill is *prima facie* evidence of compliance with constitutional requirements in its passage not expressly required to be shown on the journal. *State v. Cox* 75
3. A new bill germane to the original may be substituted by amendment. *State v. Cox* 75
4. A bill substituted for one read the first and second time need not be placed on first and second reading. *State v. Cox* 75
5. Consolidated school act *held* not invalid, as not printed before final passage. *State v. Cox* 75
6. Consolidated school act *held* not violative of sec. 11, art. III, Const., relating to amendments. *State v. Cox* 75
7. Provision in consolidated school act providing an appropriation *held* invalid. *State v. Cox* 75

Street Railways.

Violation of ordinance or statute regulating speed of automobile or street car is ground for inferring negligence, to be submitted to the jury as evidence of negligence, with other evidence. *Dorrance v. Omaha & C. B. Street R. Co.* 196

Taxation.

1. The review of county assessments is limited to questions presented to the county board of equalization. *Reichenbach Land & Loan Co. v. Butler County* 209
2. Possession for five years under treasurer's deed under scavenger act bars action to recover the land. *Mills v. Bundy* 470
3. Publication of notice of application for a tax deed is not required, unless there is no person in actual occupancy of the premises, and, also, the person in whose name the record title appears cannot, upon diligent inquiry, be found in the country. *Sanford v. Scott* 479

Taxation—*Concluded.*

4. A tax deed need not be witnessed. *Sanford v. Scott* 479
5. There is no merger of a tax title with a quitclaim title where the possessor of both titles did not so intend. *Sanford v. Scott* 479
6. The revenue laws require assessment of personal property with reference to ownership as of April 1. *Seward County v. Jones* 705
7. A cause of action in tort is not a right in "property" within the revenue laws. *Seward County v. Jones* 705
8. Final judgment in an action in tort rendered April 3, 1916, *held* not taxable in that year. *Seward County v. Jones* .. 705
9. Elements to be considered in determining the value of a bridge for taxation stated. *Sioux City Bridge Co. v. Dakota County* 843
10. The findings of a board of equalization will not be disturbed unless manifestly wrong. *Sioux City Bridge Co. v. Dakota County* 843
11. To secure equal taxation, property assessed to low should be raised. *Sioux City Bridge Co. v. Dakota County* 843
12. Evidence *held* to sustain assessment of bridge. *Sioux City Bridge Co. v. Dakota County* 843

Telegraphs and Telephones.

1. The statute requiring physical connections between telephone companies' lines applies only to trunk and toll lines. *Blackledge v. Farmers Independent Telephone Co.* 713
2. The railway commission's power to control telephone companies defined. *Blackledge v. Farmers Independent Telephone Co.* 713
3. In ordering physical connections of telephone systems, the railway commission must protect the rights of the respective companies. *Blackledge v. Farmers Independent Telephone Co.* 713
4. An order of the railway commission requiring physical connection of two telephone systems *held* not due process of law. *Blackledge v. Farmers Independent Telephone Co.* 713
5. Power of court over railway commission's orders requiring exchange of service between telephone companies defined. *Blackledge v. Farmers Independent Telephone Co.* 713

Trial. See APPEAL AND ERROR. CORPORATIONS, 10. CRIMINAL LAW.

1. Direction of view of locality rests in the discretion of the court, notwithstanding consent of the parties. *Robison v. Troy Laundry* 267
2. View of premises may be denied where not necessary, or where it is not shown that no material change has occurred. *Robison v. Troy Laundry* 267
3. It is not error to omit to give a specific instruction, in absence of request and tender of proper instruction. *Robison v. Troy Laundry* 267
4. An instruction that jurors, in passing on credibility of witnesses, need not lay aside knowledge derived from common experience, *held* not improper. *Nye-Schneider-Fowler Co v. Chicago & N. W. R. Co.* 151
5. An instruction as to burden of proof *held* erroneous, but not reversible error in view of other instructions. *Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co.* 151
6. Instructions are to be considered together. *Brailey v. Omaha & C. B. Street R. Co.* 201
7. In an action for death, instructions *held* not in conflict. *Smoke v. Carter* 520
8. Instructions *held* sufficient, though a single paragraph was inaccurate. *Ruhs v. Ruhs* 563
9. Failure to instruct on plaintiff's theory of the case is not error in absence of tender of instruction. *Prairie Life Ins. Co. v. Heptonstall* 829
10. Failure to call presiding judge, momentarily absent, to object to misconduct of counsel is a waiver of the misconduct. *Prairie Life Ins. Co. v. Heptonstall* 829

Trusts.

Evidence *held* insufficient to establish a parol trust. *Dittberner v. Teske* 405

Vendor and Purchaser.

1. Where land is described in gross, the purchaser is not entitled to abatement in price for deficienry, in absence of fraud. *In re Estate of Robinson* 1
2. Evidence *held* to sustain decree that a certain tract of land was included in an agreement to convey. *Creighton Gas, Electric Light & Power Co. v. Jamison* 67
3. Evidence *held* to sustain verdict for vendee, whose vendor failed to perform. *Ridgeway v. Eastern Colorado Development Co.* 288

Vendor and Purchaser—*Concluded.*

4. The measure of damages for the vendee's failure to perform is loss of profits. *Ridgeway v. Eastern Colorado Development Co.* 288
5. Expenses of resale are not proper elements of damage for vendor's breach of contract. *Ridgeway v. Eastern Colorado Development Co.* 288
6. Equity will not permit a vendee to retain rents, and not pay interest on the unpaid purchase price, in absence of tender of the price. *McCleneghan v. Powell* 306
7. A vendee recovering judgment for rent is liable for interest on unpaid purchase price, in absence of tender of the price. *McCleneghan v. Powell* 306
8. An erroneous recital of value of land in an executory contract will not invalidate it, where the valuation intended is disclosed by other provisions of the contract. *Hecht v. Marsh* 502
9. Vendor *held* not entitled to avoid an executory land contract because of an erroneous recital of valuation. *Hecht v. Marsh* 502

Venue.

1. A suit against a city to contest a water bond election and to enjoin issuance of bonds must be brought in the county where the election is held. *Russell v. City of Indianola* .. 207
2. A cause of action for neglect of county attorney to file information *held* to arise in county where district court is held. *Harrison v. Cheney* 821

Waters.

1. Statutory notice to irrigation district for failure to deliver water *held* given in time. *Six v. Bridgeport Irrigation District* 254
2. Evidence *held* to sustain verdict for failure to supply water. *Six v. Bridgeport Irrigation District* 254
3. The department of public works is invested with reasonable discretion. *In re Application of Babson* 317
4. The department of public works, under abnormal conditions, has discretion to extend the time within which the work of diverting water for power purposes may be completed. *In re Application of Babson* 317
5. The findings and orders of the department of public works will not be disturbed, in absence of abuse of discretion. *In re Application of Babson* 317

Waters—*Concluded.*

6. A landowner on an unnavigable stream owns to the thread of the stream, including islands. *Haney v. Hewitt* 746

Wills.

1. Testator's intent controls in construing a will. *Stone v. Stine* 33
2. A legatee by claiming under the will submits to the testator's intent. *Stone v. Stine* 33
3. Where a testator treats life insurance payable to his heirs as part of his estate, legatees claiming under the will must so regard it. *Stone v. Stine* 33
4. Testimony of experts that a will is a forgery may overturn testimony of subscribing witnesses. *In re Estate of O'Connor* 88
5. Testimony of subscribing witnesses that a will was executed may be overthrown by other testimony. *In re Estate of O'Connor* 88
6. Where substantial contradictory evidence has been adduced, there is no presumption that subscribing witnesses to a will testified truthfully. *In re Estate of O'Connor* 88
7. Where there is credible proof that a will is a forgery, there is no presumption that subscribing witnesses testified truthfully merely because they were not directly impeached. *In re Estate of O'Connor* 88
8. Where circumstances show that subscribing witnesses testified falsely, a will may be rejected without proof of reputation. *In re Estate of O'Connor* 88
9. Evidence *held* to show that will was a forgery. *In re Estate of O'Connor* 88
10. In a suit to set aside probate of a will, plaintiffs must show diligence and want of neglect. *Scudder v. Evans* 292
11. Where, in a suit to set aside probate, no fraud is shown, probate will not be set aside. *Scudder v. Evans* 292
12. Parties opposed to probate of a will must assume that proponent will produce evidence that it was legally executed. *Scudder v. Evans* 292
13. Power to sell real estate construed to be an equitable conversion of the realty into money at the testator's death. *Stalder v. Stalder* 367
14. Where a will directs the realty to be converted into money, a beneficiary given a share as a remainderman takes no interest in the realty. *Stalder v. Stalder* 367

Wills—*Concluded.*

15. The testator's intent, as ascertained from the entire will, must govern. *Pickens v. Pickens* 498
16. Bequests to widow of "whole income" construed to include interest on children's notes to the estate. *Pickens v. Pickens* 498
17. A lapsed legacy or devise goes to residuaries. *Marble v. City of Tecumseh* 594
18. An unequal distribution of property among children raises no presumption of undue influence. *In re estate of Stuckey* 641
19. To invalidate a will, undue influence must destroy the testator's free agency. *In re Estate of Stuckey* 641
20. In a suit to set aside probate, evidence *held* insufficient to show undue influence, or concealment and fraud. *In re Estate of Moran* 688
21. Plaintiffs in suit to set aside probate *held* guilty of laches. *In re Estate of Moran* 688

Witnesses. See EVIDENCE.

1. Under sec. 7894, Rev. St. 1913, a person is not incompetent to testify to independent acts performed for one since deceased. *Larson v. Swingley* 116
2. A person filing a disclaimer is a competent witness as against decedent's representative. *Brooks v. Brooks* 235
3. A witness may be fully cross-examined in rebuttal of inferences of fact arising from his direct examination. *Larson v. Hafer* 257
4. A litigant is bound by statements in cross-examination at variance with his direct examination. *McCleneghan v. Powell* 306
5. Communications to prosecuting officer by complaining witness denying defendant's guilt *held* not privileged in a criminal proceeding. *Centoamore v. State* 452
6. In a prosecution for rape, statments of prosecuting witness to county attorney denying guilt of accused may be shown. *Centoamore v. State* 452