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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1914.

VOLUME XCVI.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

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SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME.

NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Johnson, Nemaha, Pawnee and Richardson.	John B. Raper.....	Pawnee City.
Second.....	Cass, Otoe and Sarpy....	James T. Begley....	Papillion.
Third.....	Lancaster.....	Albert J. Cornish....	Lincoln.
		P. James Cosgrave...	Lincoln.
		Willard E. Stewart...	Lincoln.
Fourth.....	Burt, Douglas and Washington.	George A. Day.....	Omaha.
		James P. English....	Omaha.
		Lee S. Estelle.....	Omaha.
		Charles Leslie.....	Omaha.
		Willis G. Sears.....	Tekamah.
		Abraham L. Sutton..	South Omaha.
		Alexander C. Troup..	Omaha.
Fifth.....	Butler, Hamilton, Polk, Saunders, Seward and York.	George F. Corcoran...	York.
		Edward E. Good.....	Wahoo.
Sixth.....	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Frederick W. Button.	Fremont.
		George H. Thomas...	Schuyler.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth.....	Antelope, Knox, Madison, Pierce and Wayne.	Anson A. Welch.....	Wayne.
Tenth.....	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Harry S. Dungan....	Hastings.
Eleventh.....	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	James R. Hanna.....	Greeley.
		James N. Paul.....	St. Paul.
Twelfth.....	Buffalo, Custer and Sherman.	Bruno O. Hostetler...	Kearney.
Thirteenth...	Arthur, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln, Logan and McPherson.	Hanson M. Grimes....	North Platte.
Fourteenth...	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Ernest B. Perry.....	Cambridge.
Fifteenth.....	Boyd, Holt, Keya Paha and Rock.	R. R. Dickson.....	O'Neill.
Sixteenth.....	Brown, Box Butte, Cherry, Dawes, Sheridan and Sioux.	William H. Westover	Rushville.
Seventeenth..	Banner, Garden, Morrill and Scott's Bluff.	Ralph W. Hobart....	Mitchell.
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UNITED STATES.

STATUTES AT LARGE.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1914.

DRAINAGE DISTRICT, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED APRIL 17, 1914. No. 17,476.

1. **Constitutional Law:** DRAINAGE DISTRICTS: VALIDITY OF STATUTE. The drainage act of 1905 (laws 1905, ch. 161) reexamined, and paragraphs 1 and 2 of the syllabus in *Barnes v. Minor*, 80 Neb. 189, reaffirmed.

2. ———: ———: DUE PROCESS. Section 5, ch. 161, laws 1905, examined, and *held* not void as wanting in due process under the federal constitution.

3. ———: ———: EMINENT DOMAIN: COMPENSATION. Section 12, ch. 161, laws 1905, examined, and *held*, not void as authorizing the taking of property without due compensation to the owner thereof; nor does the fact that it allows a drainage district two years from the filing of the report of the commissioners or appraisers appointed to ascertain the compensation to be made to the owners or parties interested, within which to enter upon and appropriate the lands appraised, render the act void as being in conflict with section 13, bill of rights, constitution of 1875.

4. ———: ———: VALIDITY OF STATUTE. Section 36, ch. 161, laws 1905, examined, and its validity not determined, but *held*, that, even if void, its invalidity would not render the entire act void.

5. ———: ———: ———. The act of 1905 (laws 1905, ch. 161) examined *in re* the question as to whether or not the act is void in conferring public functions upon private corporations, and *Neal v. Vansickle*, 72 Neb. 105, and *Drainage District No. 1 v. Richardson County*, 86 Neb. 355, upholding the act, reaffirmed.

6. **Evidence:** SUFFICIENCY. The evidence referred to, but not set out in the opinion, examined, and *held* sufficient to sustain the finding and judgment of the district court as to the benefits received by defendant from the system of drainage of the plaintiff district.

7. **Drains:** ASSESSMENT: RAILROADS. Section 19, ch. 161, laws 1905, examined, and *held* sufficient to authorize the legislature to confer upon the supervisors of a drainage district, organized under such act, the power to assess a railroad company for special benefits accruing to it from a drainage improvement, the same as private individuals, and in proportion to the benefits conferred by such district.

8. ———: ———: ———: OFFSET. The defendant, for the protection of its railroad right of way, road-bed, bridges and other property, dug two ditches, in and by which the channels of the Nemaha river and Linn creek were straightened at two given points within the limits of the district subsequently organized by plaintiff, thereby accelerating the flow of water in those streams, and to the extent thereof specially benefiting defendant's property. After the organization of plaintiff district it inaugurated a general system of drainage, which consisted of straightening the channels of said two streams from points above to points below the ditches so dug by defendant, and, in digging its ditches for the purpose of carrying out such general system of drainage, it extended the ditches so dug by defendant, both above and below such ditches, thereby appropriating the same and making them a part of its general system of drainage. *Held*, that defendant is entitled to set off, against the special benefits which it has derived from the entire scheme of drainage, that portion of such benefits as was caused by the work which it had itself done in producing those benefits; and that the rule for determining the amount of such offset is the sum which it would have cost plaintiff to dig those portions of its general drainage ditches which the defendant had previously dug.

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

Byron Clark and *C. C. Flansburg,* for appellant.

Kelligar & Ferneau and *A. R. Keim, contra.*

FAWCETT, J.

Defendant appeals from a judgment of the district court for Pawnee county, in a trial had in that court on an appeal by the defendant from the action of the board of

supervisors of plaintiff, fixing the amount of special benefits accruing to the defendant from the operations of plaintiff in providing new channels and straightening the Nemaha river and Linn creek, in Pawnee county. The several assignments of error presented and argued in defendant's brief will be considered in the order in which they appear therein.

The first assignment assails the constitutionality of the law under which the plaintiff district was organized, being the act of 1905. Laws 1905, ch. 161. This assignment is divided into subdivisions from A to F, inclusive.

Under subdivision A it is claimed that "Corporations, under the constitution, must be created by general law. A law giving courts the power in their discretion to create corporations by judicial decree violates such provision." We think the point here made is fully covered and correctly disposed of adversely to defendant's contention in *Barnes v. Minor,* 80 Neb. 189.

In subdivision B it is contended that "the act of 1905 is void as denying the equal protection of the laws under the federal constitution." In *Barnes v. Minor, supra,* it is said (p. 194): "It seems clear that neither a county nor a railroad company, under the circumstances shown to exist in the case at bar, is a necessary party to the proceeding in the district court to declare the drainage district a public corporation." Counsel say in their brief that this construction by the court is the basis for their second contention; that the drainage law is unconstitutional because it denies to the railroad company the equal protection of the law. It is argued that a railroad company, by this holding, cannot become a member of the drainage district, cannot be incorporated within the boundaries or be a member of the drainage district, so that it is unnecessary to name it as a landowner or to summon it into court as other landowners are brought in; that every other landowner is summoned, has a right to appear, and under section 3 of the act may file objections; that, acting under the construction of the statute given in *Barnes v. Minor, supra,* defendant was not brought into court and

given an opportunity of showing those things which other persons, who were brought in, were permitted to show. We think the discussion in *Barnes v. Minor, supra,* fairly answers the argument made on this point. In that opinion it is said (p. 193): "From the nature of quasi public corporations, such as counties, and public service corporations, like railroad companies, it would seem clear that neither of them could become a member of a drainage district. From the very nature of their organization, and the powers conferred upon them by law, they would be unable to exercise the duties and claim the privileges required of and given to private owners of land situated within such district." As argued by counsel for plaintiff in their brief, if a railroad company is assessed for a benefit arising from the construction of a drainage improvement, and it has notice of the assessment, and a time and place fixed for a hearing, and actually is heard on its objections, and is accorded an appeal to the courts on the justice of such assessment, it occurs to us that such company has had due process of law, and the equal protection of the law, and it is not in a position to complain because it was not summoned into court as a party on the preliminary proceedings for the organization of such district.

In subdivision C it is argued that "the act is void as wanting in due process under the federal constitution." The gist of this contention is that the tribunal which levies the assessment is disqualified by reason of the interest of the individual members comprising said board. This board is by statute made to consist of landowners within the district, and it is argued that they therefore sit in judgment, not only upon their own claims, to determine the amount of their own assessment, but the assessment of every other individual in the district; that a judgment by such a tribunal does not constitute due process. This contention was considered in *Nemaha Valley Drainage District v. Marconnit,* 90 Neb. 514, 525, and decided adversely to defendant's contention. The argument now made upon this point fails to shake our confidence in that case.

Under subdivision D it is argued that "the law is void because it authorizes the taking of private property without compensation to the owner thereof." Section 12 of the act provides that the drainage district shall have the right to the appointment of a commission to ascertain the compensation to be made to owners or parties for right of way; that the same proceedings for condemnation of right of way shall be had as provided by law in condemnation proceedings by railroads; that property shall not be entered upon or appropriated by the district until the damages awarded are paid to the county judge for the use of the owner; and that, if the property is not taken and paid for within two years from the time of condemnation, the proceedings shall abate at the cost of the district. It is argued that in the case at bar there is no fund whatever for the payment of defendant's right of way; that the special assessment may or may not be paid; that the amount of the levy may or may not be sufficient; that, until the fund is actually paid "or provided for," no condemnation can be had. It will be conceded that no condemnation can be had until the fund for the payment of the land is actually paid "or provided for." Under the provisions of section 24 of the act, a contract cannot be let until after the levy of the assessment provided for in section 18, and, of course, no lands are needed or are taken until the construction work is to be entered upon. The record shows the total benefits levied against the property in this district to be $331,555, which is levied against agricultural lands within the district. The cost of the improvements are estimated at $107,982, so that there remain benefits unlevied and uncollected, which are subject to levy and collection, to pay for right of way, damages, and other items of cost, over $200,000. As the assessments are by section 21 made a lien "against the said property assessed," the fact that the special assessments may or may not be paid can only depend upon the question as to whether or not the work is ever entered upon. In the present case, we are not left in doubt upon that point, as the work has been entered upon. The fear, therefore, that the special assessments may not

be paid, or that the amount of the levy may not be sufficient, appears to us quite groundless. It is urged that it is unfair to allow a corporation to condemn property and appraise damages to-day and take no further action for two years, and then, when the property has risen greatly in value and the damages would be much enhanced, permit the corporation to then elect to pay the damages and appropriate the property. Possibly this may be unfair, but it is within the law, as enacted by the legislature, and we do not think is in conflict with section 13, bill of rights, constitution of 1875.

Under subdivision E it is claimed that "the act is void because it denies the right to enjoin void assessments, but requires payment thereof to the county treasurer; denies any recovery from the party to whom payment is made." This refers to section 36 of the act, which provides that the collection of assessments to be levied to pay for the location, construction, maintenance or repair of any ditch, etc., "shall not be enjoined nor declared void; * * * and no injunction shall be allowed restricting the collection of any assessment until the party complaining shall first pay to the county treasurer the amount of his assessment, which amount so paid may be recovered from said district in any action brought for that purpose in case said injunction is made perpetual." We are unable to discover the materiality of this assignment of error as applied to the issues in this case. This is an appeal from a judgment of the district court, based upon an appeal from the action of the board of supervisors of plaintiff district in levying an assessment against defendant over its written protest and objections filed with and heard by the board at the time of making the assessment. No pleadings were filed in the district court, but the case was tried there and must be determined here upon the issues tendered by such protest and objections so filed with the board. In those objections defendant objects to the approval of the engineer's report and every part thereof in any manner affecting the classification of the lands of the defendant or its right of way; objects to the apportion-

ment of benefits and to the proposed special assessment, and to everything connected with the proposed assessment of the lands, property, right of way, road-bed, and track of defendant, for the following reasons: (1) That the track, road-bed, and right of way of the defendant is not swampy or overflowed land, and does not come within the character of land embraced within the statute concerning the establishment of drainage districts; (2) because the establishment of the drainage district will not and cannot confer any benefit of any kind upon the right of way of defendant or upon its lands located within the district; (3) because the road-bed, track, and right of way cannot be affected or damaged by any flood in the Nemaha river and within the district that is likely to occur at any time, for the reason that defendant has at its own expense and at large cost raised its road-bed, traveled track, ties and property above the highest flood that can possibly occur in said river within the district; (4) because none of its land is swampy, marshy, boggy, or flooded, nor does its traveled track, road-bed, embankment and right of way cross or traverse any swampy, boggy, marshy or overflowed land, and no drain or ditch to carry off surface water from any of that character of lands within the drainage district could be of any possible benefit to the road-bed or right of way of defendant; (5) that the traveled track, road-bed, and right of way of defendant is elevated to such a degree that it is not subject to overflow, does not need the protection of any drainage canal, and would not be benefited in any manner or to any extent by the construction of the canal contemplated by plaintiff; (6) "because any assessment levied against the right of way lands, track, road-bed or property of this railroad company would be a taking of its property without any compensation, would confer no benefit upon this objecting railroad or its right of way, road-bed or other property mentioned." During the hearing, by leave of the board, defendant amended its objections so as to claim the sum of $18,000 against the plaintiff district on the ground that it appeared from the evidence at the hear-

ing and the plat filed that the project contemplated the adoption and use, as a part of plaintiff's plan, of the cut-off made by defendant in section 20, which it had made at its own cost and after purchasing the right of way therefor at a cost of $11,000, and also uses and adopts the work done in straightening Linn creek at a cost to defendant for labor and right of way of $6,000, and that the taking of such property by the drainage district, without any compensation, is in violation of the law and constitution. In the light of the issues as thus made, the only consideration we need now give to section 36 is to determine whether or not that section, even if void, would render the entire act void. We cannot so hold. An examination of section 36 shows that every provision therein might be stricken down without in any manner affecting or impairing the remainder of the act.

In subdivision F it is contended that "the act is void in conferring public functions upon private corporations." This point has been decided adversely to defendant's contention in *Neal v. Vansickle,* 72 Neb. 105; *Drainage District No. 1 v. Richardson County,* 86 Neb. 355. We are satisfied with our holding in those cases, and must decline to reconsider the question. It follows from what has been said that defendant's first assignment of error must fail.

By the second assignment it is contended that "there is no evidence to show that the railroad company would receive any benefit by reason of this improvement." The evidence upon this point is voluminous, so much so that we will not attempt to give even the substance of it. Suffice it to say that we have carefully examined the evidence submitted on both sides, and, while it must be conceded to be conflicting, it is not only ample to sustain the finding of the district court, but in our judgment preponderates in favor of the same.

By the third assignment it is contended that "there is no power, under the act, to lay any assessment against appellant." Under this head it is argued that, "before there can be laid an assessment against a railroad, under this act, there must not only be *'protection, derived from*

the drainage works and improvements,' but the benefit to be assessed is limited 'to the *increased efficiency and value added thereto* by reason of said improvements.' " Section 19 of the act confers power to assess a railroad for benefits accruing from a drainage improvement "the same as to private individuals, and in proportion to the benefits conferred by said ditch." We are unable to discover any reason why the legislature has not the right to confer this power upon a drainage district. The only reason any property owner within the district can be assessed is because his property is benefited by the improvement, for, unless benefits accrue, there is no liability to assessment. If, therefore, a railroad company derives protection to its road-bed, bridges, and depot grounds, there is no reason why it should not be assessed, as increased efficiency and added value necessarily follow from such protection. In this case the defendant company had nine miles of road-bed, at least two bridges, and valuable depot grounds within the limits of the district. While the evidence is conflicting, it is ample to show that the improvements made by plaintiff have been of great value to defendant as to all of these items of property. It shows that, by reason of the straightening of the Nemaha river and Linn creek, the defendant's embankments and other property are relieved of the accumulation of water after heavy rains in one-fourth of the time that it was relieved before plaintiff's improvements were made, and that the work has resulted in lessening the amount of care and work upon the road-bed, in the protection and care of its bridges, and in the delay of its trains, incident to the action of the water prior to the making of the improvements. That such a result is a material benefit to the railroad and a manifest increase of its efficiency and added value must be apparent even to a layman in such matters. The estimate of this value in dollars and cents may be problematical, but so are many other questions of fact which courts are called upon to decide. As said in *O'Brien v. Schneider,* 88 Neb. 479, 482: "No system of assessment can bring about absolute equality or attain exact justice among property owners or taxpay-

ers. The best that can be expected is a substantial approximation of burdens according to benefits, and the legislature is vested with great discretion in providing the methods by which that approximation shall be attained."

By the fourth assignment it is contended that "the railroad has a right to offset, against any assessment for benefits, the value of its property taken and used by the drainage district in making improvements and not paid for by said district." It appears that before the plaintiff district was organized defendant at its own expense purchased a strip of land one-half mile long and 350 feet wide, and dug a canal across an ox-bow of the Nemaha river, by which the river was diverted into this channel and its course thereby straightened, at a cost of about $11,000, and that at a cost of about $6,000 defendant made a similar straightening of the channel of Linn creek. By the general scheme of drainage adopted by plaintiff it is appropriating the work thus done by defendant. The straightening of the channels of the Nemaha and of Linn creek are both admitted by a stipulation of the parties. It is also stipulated that Linn creek is a regular water course with channels and banks, and that the Nemaha river is one of the regular streams of the state; that the plaintiff in laying out its plan of drainage straightened out Linn creek and the Nemaha river both above and below the channels cut by defendant. It is further stipulated: "(7) That the cut-off channels of both Linn creek and the Nemaha river thereby became part of and were incorporated in the canal and ditches of the said drainage district. (8) No condemnation proceedings were had, and no contract, or payment made by the drainage district to the railroad company for either of the cut-off channels. (9) That, if the drainage district had made the channel on Linn creek which was excavated by the said railroad company, it would have been compelled to purchase 2 acres of right of way at $60 per acre, and excavate 7,310 cubic yards of earth at 10 cents per yard, and to have grubbed out 76 squares at a total costs of $851; that, if the drainage district had made the channel on the Nemaha river which

was excavated by the said railroad company, it would have been compelled to purchase 8½ acres for right of way at $60 per acre, and excavate 27,600 cubic yards of earth at 8.25 cents per yard, at a total cost of $2,787. It is agreed that the two blue-prints marked defendant's exhibit 3 are correct representations of the location of the cut-offs mentioned and the territory through which the streams mentioned pass."

An examination of the blue-prints referred to shows that the two cuts made by the defendant company now form a part of the continuous scheme of the straightening of these two streams. The defendant contends that, plaintiff having appropriated "the labor and property of the railroad company, built by the railroad company for its own protection," it must pay to the railroad company "the reasonable value of its property." Plaintiff contends that there is no legal theory upon which it can become liable to the railroad company for the expense incurred by it in the construction of these cut-off channels, for the reason that it is not claimed that liability in this respect rests on contract, express or implied, and that, if the defendant can offset or recover in any manner the expense of this work, it must found its claim on some recognized theory of legal liability. It is argued that these improvements were made in 1897, long before the drainage improvements were deemed necessary or even possible in that section of the state; that the expense was incurred in the betterment of the track, grade and embankment of the defendant, and to enable it to keep its track in condition for transportation of goods and passengers; that when a cut-off is constructed from one bend to another, and the water of a stream flows through the cut-off, then the cut-off is the river, just as much as any other portion of the stream; that this is just as true of Linn creek and of the Nemaha river, and the stipulation agrees that each of the cut-off channels became part of the stream; that the company could not claim any proprietary interest in either of these streams, or that it had any power to change the course of the running waters of either, and the fact that

neither the state nor any private citizen interfered to prevent such use of the streams cannot be construed as imparting life or vitality to its claim for compensation; that defendant's act in this respect was a violation of the public right in these streams, and cannot be made the basis of a claim of legal liability against any other corporation which comes along later and lawfully and rightfully employs the channel as part of a public improvement; that plaintiff did nothing which in any manner affected the rights, interests or property of the defendant; that, when it examined the valley with a view to designing drain improvements, this cut-off channel was found in operation, and what plaintiff did was to construct similar channels above and below on lands purchased by it, and the waters of the stream still continue to flow through the railroad cut as they formerly did; that, even if some legal principle existed upon which a liability for the claim could be predicated, a set-off or counterclaim cannot be presented and sustained in this proceeding; that under certain sections of the act the board of supervisors, acting on the report of the engineer, and after due notice, hears all objections which property owners desire to present to the proposed assessment of benefits, and this procedure includes railroads; that after ascertaining the benefits to all property within the district the drainage board fixes and assesses the benefits, assessing to each property its due proportion, and then apportions the cost of construction to each property; that from this procedure any person aggrieved may appeal; that under other sections of the act a different procedure is provided for the ascertainment of any damages that arise out of or for the construction of the improvements, which procedure ultimately leads to a trial by jury; that this is true, whether the damage comes from a direct condemnation action, or flows indirectly from some other form of injury; that it thus appears that, in the ascertainment of the amount of benefits and the levy of the amount of tax for apportionment of cost of construction which will be paid by any particular property, the forms of procedure are practically the same as

those employed under the general law for the ascertainment and levy of any other form of tax for the use of city, county and state governments; and that the ascertainment of damages, if any, is a regular court proceeding, culminating in a jury trial; that under this condition of legislation damages or claims in the nature of set-off or counterclaim cannot be used against the levy, assessment or collection of benefits, unless the statute under which the proceeding is held so provides, and that in this statute there is no authority for any such proceeding; that in *Nemaha Valley Drainage District v. Stocker,* 90 Neb. 507, a claim for damages was made in a similar proceeding, and both the trial court and this court disregarded such claim and refused to consider the same in arriving at the amount of benefits. They also refer to *Nemaha Valley Drainage District v. Marconnit,* 90 Neb. 514. In the *Stocker* case the point under consideration, so far as it appears there, is held to have been ruled by *Nemaha Valley Drainage District v. Marconnit, supra.* In the latter case, on pages 518 and 519, to which counsel for plaintiff particularly refer, after considering the point raised, it is said: "But this question is not involved here and is not decided." They also cite cases to the effect that an assessment on land to pay for levies must be paid without regard to any claim for damages or compensation the owner may have against the district, the statute authorizing the assessment making no provision for set-offs for such claims; that a special assessment is a tax, and that a tax is not liable to counterclaim or set-off, nor is it subject to execution or attachment; that the general trend of authority everywhere is to the effect that taxes are not debts in the ordinary sense of that term, but enforced contributions made by the state, which are neither the subject of set-off, nor may they be used for that purpose.

We do not think the cases cited should be applied to the case at bar. We think the facts stipulated by the parties present the situation in this case thus: Plaintiff is seeking to assess the defendant for benefits accruing to it from a general system of drainage by straightening for a con-

siderable distance the channels of the Nemaha river and Linn creek. This straightening of the channels of these two streams extends from points above to points below the road and other property of defendant. For a certain distance the channel of each of these streams had already been straightened by and at the expense of the defendant. Defendant has been specially benefited by this system of drainage, but it was benefited by that part of the system which it made before the plaintiff district made its part. To the extent that defendant was benefited by what it had done in the way of straightening these two channels prior to the organization of the district, the district by its operations has not benefited the defendant. If the defendant had not done this work itself, the plaintiff would have been compelled to do it. In that case the entire benefit which the defendant derives from the drainage scheme would have been properly assessable against it; but we are unable to see why it should be assessed for benefit which it has received from the work which it had itself done. To so hold would be unjust and inequitable. To the extent, therefore, of the expense which the plaintiff would have had to bear had it done the work which the defendant had already done, the defendant has not been benefited and should not be assessed. It is not, therefore, strictly speaking, a case of taking property from the defendant. Conceding that the defendant had no proprietary right in the channel of the river which it had created, we nevertheless think that it had a right to have deducted from the benefits which it has derived from the entire scheme of drainage by straightening these rivers the value of what it has itself done in producing those benefits.

In *County of Blaine v. Brewster,* 32 Neb. 264, Brewster owned a bridge across the North Loup river. The county commissioners subsequently located a public road to and over the bridge and appropriated the same by the public. An appraiser was appointed by the commissioners, who fixed the value of the bridge at $610. A claim for that amount was filed against the county and rejected by the board. Brewster then appealed to the district court,

where judgment for the amount of his claim was rendered in his favor, and that judgment was approved by this court. In the concluding paragraph of the opinion it is said: "A public road was created in this case across the bridge, evidently for the purpose of enabling the county to appropriate the bridge in question. It thereupon became a public bridge and has been used by the public ever since. It is but justice, therefore, that the defendant in error be paid the value of the same." Bearing in mind the fact that Brewster's bridge was across a public stream, in which he had no proprietary right, the analogy becomes plain. In that case the public laid out a road to each end of the bridge and appropriated the bridge. In the case at bar the district located ditches both above and below and connecting with the ditches which had been dug by the defendant. It thereby appropriated the work which the defendant had done in digging those ditches. We think it is but justice, therefore, that the defendant be allowed the value to plaintiff of defendant's contribution to the continuous ditch which now constitutes the main work of improvement done by the plaintiff, and for which it is levying an assessment upon property within the district. The stipulation shows that, if plaintiff had dug the two channels which had been dug by the defendant, the cost to it would have been: For the cut in the Nemaha river $2,787, and for the cut in Linn creek $851, a total of $3,638. This amount the court should have permitted defendant to offset against the amount of benefits as found by the court.

If plaintiff, within 60 days from the handing down of this opinion, enters a remittitur in this court of $3,638, the judgment of the district court will stand affirmed. Failing so to do, the judgment will stand reversed, and the cause remanded.

AFFIRMED ON CONDITION.

LETTON, J., dissenting in part.

I am unable to concur in the doctrine set forth in the eighth paragraph of the syllabus. To hold that this court

has the right or the power arbitrarily to assume that the cost of excavating the cut-off channel is a proper deduction to be made from the special assessment of benefits made by the proper officers of the district, and has jurisdiction to offset the same against the sum assessed, is, in my judgment, opposed to every authority upon the subject, and is unauthorized by law. No authority has been presented by the appellant or in the opinion to sustain such an offset, and every authority I have been able to find is directly against it. "In the absence of specific statutory provision, no set-off can be allowed." 1 Page and Jones, Taxation by Local and Special Assessments, sec. 73, citing many cases. The question is fully discussed in *Hedge v. City of Des Moines*, 141 Ia. 4.

The statute requires the engineer, in the first place, to make an estimate of the benefits sustained, and provides for the filing of objections before the board of supervisors to the assessments stated in his report; that a hearing shall be had upon such objections, and if the board finds the "assessment of benefits to the lands and other property to be in any respect inequitable, either less than or in excess of the benefits accruing to the lands and property from the drainage improvements, or in any particular unfair or unjust, they shall so order, and they shall thereupon so amend, adjust and equalize the classification and benefits as may appear fair, just and equitable to them." Rev. St. 1913, sec. 1822. An appeal may be taken to the district court, which "shall hear and determine all such objections in a summary manner as a case in equity, and shall increase or reduce the amount of benefit on any tract where the same may be required in order to make the apportionment equitable." Section 1824. Section 1816 of the same statute gives the district the right to acquire "any real estate, easement or franchise" necessary for right of way, and provides that damages shall be paid. It was settled in the early history of this state that county commissioners or other boards with special powers granted by statute could exercise no powers not specifically granted to them or incidentally necessary to carry them into ef-

fect (*McCann v. Otoe County,* 9 Neb. 324; *Lancaster County v. Green,* 54 Neb. 98); and it is equally well settled that upon appeal from such tribunals neither the district court nor the supreme court is vested with any greater or wider jurisdiction than that conferred on the original tribunal. *Blaine County v. Brewster,* 32 Neb. 264, cited in the opinion, is not authority for the holding, but, on the contrary, supports the view taken by the writer. In that case the county had taken the bridge, but proper proceedings had been taken under the statute to ascertain the damages by the appointment of an appraiser, and an award was made which the county refused to pay, but the courts on appeal enforced.

Appellant argues that this is an equity case, and that a court of equity having obtained jurisdiction will retain it for all purposes; but this is a mistake. While under the statute the procedure on appeal follows the method in courts of equity, the whole proceeding is purely statutory, and neither the district court nor this court has any greater powers than the board of supervisors of the drainage district.

If the original estimate of the engineer or the findings of the board of supervisors had shown that the benefits to the road-bed, etc., derived by the railroad company by reason of the excavations made by it which had been taken and used by the district amounted to a definite sum, and that the total benefits to its property within the district by reason of the general scheme of drainage had amounted to a greater sum, an assessment derived by deducting the partial benefits caused by the excavations, from the total benefits derived from the general scheme would show the actual benefits derived, but there is no evidence in the record upon which such an assessment can be predicated. The testimony of the engineer for the district is that the benefits to the whole nine miles of road amount to a definite sum, and there is no proof as to the monetary value of the benefits arising from the construction of the short cut-offs.

For these reasons, I cannot agree to the proposition embraced in the eighth paragraph of the syllabus or that portion of the opinion upon which it is based.

SEDGWICK, J., dissenting.

I think that the supervisors of the district in determining the benefits received by any person or corporation should consider all the equities arising in favor of the person whose benefits they are determining, and the courts should do the same on appeal. The benefits to the railroad company by the improvements of the district should be determined by considering the improvements made by the railroad company itself, and the company should be held liable only for the additional benefit caused by the district improvements, as expressed in the dissenting opinion of Mr. Justice Letton. I cannot agree to the rule expressed in the eighth paragraph of the syllabus.

DAVID P. EGNER, APPELLEE, V. CURTIS, TOWLE & PAINE COMPANY, APPELLANT.

FILED APRIL 17, 1914. No. 17,540.

1. **Trial:** JURY: VOIR DIRE EXAMINATION. Where a defendant, in a personal injury action, is indemnified by an employers' casualty insurance company, it is proper for plaintiff's counsel to show such fact when impaneling the jury, and to inquire of each juror upon his *voir dire* if he is a stockholder or agent, or in any manner interested in such company.

2. **Evidence:** ACTION FOR PERSONAL INJURIES: ADMISSIONS. In an action for personal injuries, plaintiff, to prove an admission of liability, may show a demand made on defendant for payment for his injuries, and that defendant, through its general manager or duly authorized agent, made such admission.

3. ———: ———: ———. And in such a case, if such general manager or duly authorized agent puts a refusal of defendant to pay solely on the ground that it is insured and for that reason it cannot pay, plaintiff is entitled to have the conversation admitted and the

evidence submitted to the jury, under suitable instructions, for them to determine what the true import of the conversation was.

4. **Trial:** WITNESSES: EXAMINATION. It appears that after plaintiff was injured a physician, unknown to, and without authority from, him, was called to treat his injuries, and without any subsequent employment by plaintiff continued to treat him for a considerable period of time. Upon the trial plaintiff's counsel called such physician to the witness-stand, and attempted to show by him who employed him. *Held,* not misconduct on the part of counsel.

5. ———: ARGUMENT OF COUNSEL. Ordinarily, in a civil action, statements made by plaintiff's counsel in his closing argument will not justify a reversal of the judgment, where it appears that exception was taken to the statement at the time it was made, the exception sustained, and the jury duly admonished by the court.

6. **Appeal:** HARMLESS ERROR. The fact that plaintiff, in a personal injury suit, is permitted, over objections, to show that he has a family consisting of a wife and four children will not be held to be prejudicial error, where it does not appear that the admission of such testimony could have influenced the jury in arriving at the amount of their verdict.

7. **Instructions Approved.** The action of the court in refusing certain instructions requested by defendant, and in giving the instructions given by the court on its own motion, examined and approved.

8. **Appeal:** CONFLICTING EVIDENCE. The verdict of a jury, rendered upon conflicting evidence and sustained by the trial court, will not, ordinarily, be disturbed on appeal.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Morning & Ledwith, for appellant.

George W. Berge, contra.

FAWCETT, J.

From a judgment of the district court for Lancaster county, on a verdict for $3,000 in favor of plaintiff in an action for personal injuries, defendant appeals.

Defendant is a corporation, and, among other things, is engaged in running a planing mill. In connection with its business it owns a four-story building and has in use therein a freight elevator. The petition alleges: That the defendant, through its foreman, ordered plaintiff, who was

one of its employees, to leave his work in another part of the building and help the foreman break a hole in the pit of the elevator shaft, for the purpose of permitting accumulated water to run into an adjacent sewer; that there was about a foot of water in the pit; that as soon as they entered the pit the foreman directed plaintiff to reach down into the corner and into the water where the foreman had been digging a hole during the forenoon, for the purpose of removing a stone or obstruction in the pit, so as to let the water flow out; that plaintiff, in stepping down to reach the stone, and on account of the water in the pit, was obliged to and did place his right hand against the wall of the elevator shaft in order to support himself, and while so stooping down and endeavoring to reach the stone with his left hand, and while in the exercise of due care and caution, and without any fault or negligence on his part, the elevator was suddenly moved upward, throwing the counterweights, suspended by ropes attached to the elevator, and weighing approximately 2,500 pounds, onto the right hand of plaintiff, thereby completely crushing and breaking the bones of his right wrist and arm and completely and permanently destroying his right hand. Numerous grounds of negligence on account of what had happened are alleged in the petition, among them negligence of the defendant in directing plaintiff "to go into said elevator basement, without notifying him that said elevator was not fastened or chained, as was the custom when working about said elevator, and because of the negligence of the defendant in not fastening or chaining said elevator while plaintiff was directed to work under the same." The trial court withdrew from the consideration of the jury all of the acts of negligence charged in the petition except these two. The answer admits the corporate character of defendant, the business in which it was engaged, and that plaintiff was in its employ at the time he received the injury set out in the petition; alleges that he had been so employed for several weeks; that the labor in which he was engaged at the time he received the injury was within the scope and terms of his employment; denies

in detail all the acts of negligence alleged in the petition; and alleges contributory negligence. The reply is a general denial.

The assignments of error argued in defendant's brief will be considered in the order in which they are therein presented.

Misconduct of plaintiff and his attorney. When the jury were being impaneled, counsel for plaintiff, in examining the first juror, asked: "Mr. Fox, are you acquainted with the American Fidelity Company, or Williams & Walt, its agents?" An objection was made to this question on the ground that neither the Fidelity Company nor Williams & Walt are "parties to this suit, or connected therewith." The objection was sustained, and no further question of that kind was asked by counsel for plaintiff in his *voir dire* examination of the jury. Defendant argues that, notwithstanding the fact that the objection was sustained, to ask the question and make it necessary for defendant to object was misconduct, entitling defendant to a new trial. We are unable to give our assent to this contention for two reasons: First, in our judgment, it could not have prejudiced the defendant with the jury; second, the error of the court was in not overruling the objection, as it should have done. Upon this point we concede that the authorities, cited from other states, are conflicting; but we think the correct rule is the one announced in *Foley v. Cudahy Packing Co.*, 119 Ia. 246; *Brusseau v. Lower Brick Co.*, 133 Ia. 245; *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354; *Antletz v. Smith*, 97 Minn. 217; *Citizens Light, Heat & Power Co. v. Lee*, 62 So. (Ala.) 199; *Swift v. Platte*, 68 Kan. (on rehearing) 10; *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340. *In Spoonick v. Bachus-Brooks Co., supra*, it is said (p. 359): "It is no answer to this to say that the insurance company is not named as a party to this action, for the bias of the juror is not to be determined by this fact. Nor is it an answer to say that counsel may protect his client by using a peremptory challenge. It is his right first to learn the facts, and he must do so to exercise intelligently his right to

challenge peremptorily. The authorities all go to show that a very insignificant interest in the result of an action, and frequently a very trifling relationship to one of the parties, is sufficient to disqualify a person from sitting as a juror. In order to secure to litigants unbiased and unprejudiced jurors, we are compelled to hold that plaintiff's counsel had a right to ascertain whether there was such a relationship between the persons called as jurors and the insurance company, a corporation vitally interested in the result, which would disqualify these persons, because, by implication, they would be biased and prejudiced."

It is further argued under this assignment that plaintiff's counsel, "under the pretext of trying to get his client to testify to a statement made by Mr. Towle, general manager and treasurer of the defendant, as to defendant's liability, sought through several pages of record, over repeated objections, to draw into the case an alleged statement of Mr. Towle that the defendant carried insurance against liability for such accidents, and he succeeded in doing so." We do not think the record sustains the aspersions thus cast upon counsel. We think it shows, as stated by counsel in his brief, that he was earnestly endeavoring to show by his client, who had a very imperfect understanding of English, a conversation had with Mr. Towle after plaintiff was able to leave the hospital, in which Mr. Towle, the general manager, admitted the liability of his company, but gave as a reason for not paying plaintiff his damage that defendant's employees were all insured, and for that reason defendant could not pay. The court ruled so constantly with the defendant throughout the examination of plaintiff by his counsel that about all counsel for plaintiff obtained was an answer to the question, "What did Mr. Towle say about the liability of the Curtis, Towle & Paine Company for that injury? A. He told me the people is all insured and so it is not right to pay me." This answer was on motion stricken out. Thereupon counsel for plaintiff stated: "Q. Mr. Egner, we will try it again. Let the reporter read the question."

The question was read, and after persistent objections the witness answered: "A. Well, he gave an address and sent me over on the office, I guess Williams & Walt." This answer was stricken out. The court then put the question to the witness: "Mr. Egner, in making your answer, confine your answer to what Mr. Towle said about the Curtis, Towle & Paine Company. A. That is all what was said; he sent me over to the insurance company, and they helped me out in the suing." On motion of defendant all of this answer was stricken out except the words, "That is all what was said." Here, again, we think the court erred against the plaintiff. Plaintiff, in attempting to prove an admission of liability, had a right to show a demand made on defendant for payment for his injuries, and what defendant's general manager said in answer thereto. If the general manager put the refusal of defendant to pay solely on the ground that it was insured, and for that reason defendant could not pay, plaintiff had a right to show that fact, and have it go to the jury, and leave it for them to say whether the true import of the conversation was an admission of liability on the part of defendant.

Anderson v. Duckworth, 162 Mass. 251, holds: "In an action for personal injuries occasioned to the plaintiff while in the defendant's employ, it is competent for the judge, in the exercise of his discretion, to admit in evidence the whole of a conversation offered by the plaintiff for the purpose of showing an admission of liability on the part of the defendant, and in which reference was made by him to the fact that he was insured against accidents, with a caution to the jury that the fact of insurance is not to be taken as an admission by the defendant, and then in the charge, after saying again that the insurance is not to be regarded as an admission, to leave it to the jury to find, under suitable instructions, what the true import of the conversation was."

It is next urged that counsel for plaintiff was guilty of misconduct in the examination of Doctor Hummel, called as a witness for plaintiff. The record shows that after the injury Doctor Hummel was called to see plaintiff at his

(the doctor's) office, where he found him when he "came down." The doctor testified that he did not know who it was that called him; that it was not Mr. Egner; that he was not the physician of the Curtis, Towle & Paine Company. He was then asked: "Q. What company are you a physician for?" An objection to this question was sustained. He then testified that Mr. Egner had never paid him for his services, nor had the defendant. He was then asked: "Q. You are not looking for any pay from Mr. Egner, are you? A. Well, I am looking for pay from Mr. Egner. I see no reason why he should not pay. He is able. I presented the bill to him. Q. He never employed you, did he?" The record, as set out in defendant's brief, shows that an objection to this question was sustained, yet it gives the answer: "A. I don't hardly know how to answer that, your honor. As I answered before, I was called to attend him, and I kept on treating him until he quit coming. Q. Where were you called to attend him; what was the reason for it?" Objection sustained. "Q. Of course, you expect pay from some source for your work on Mr. Egner, don't you?" Objection sustained. "Q. You have already received it, haven't you? A. Pay for treating Mr. Egner? Q. Of some sort? A. No, sir; not a penny." We are unable to discover how this examination of the doctor could have prejudiced the defendant. It is too apparent for serious discussion that Doctor Hummel is the physician of the insurance company. He was the one called to treat plaintiff after his injuries, and treated him for a considerable time. Plaintiff was practically driven to calling Doctor Hummel to the stand in order to properly prove his injuries. If, as a matter of fact, Doctor Hummel was the physician of the insurance company, and by reason of that fact was called to treat plaintiff after his injury, plaintiff had a right to show the fact as a circumstance tending to show that defendant recognized a liability. In cases of this character, an insurance company that has contracted to indemnify a master for injuries to his servants, but which refuses to pay for those injuries until liability has been fastened upon its client,

should in all fairness come forward and openly defend the action. If the defendant was not itself resisting plaintiff's demand, plaintiff had a right to show that fact. If some insurance company was defending it under the cover of defendant's name, it was proper to uncover it. We know of no rule of justice which permits an employers' liability company to resist a claim, for which it has contracted to assume liability, under the name of another, while denying that privilege to other corporations or private individuals.

It is further argued under this assignment that counsel for plaintiff in his closing argument stated to the jury, in substance, that the defendant had not taken much interest in the case, and that, in fact, it wanted the plaintiff to get a big verdict against it. Exception was taken to this statement, and the jury were instructed not to consider the remark. In its ruling the court went to the limit in sustaining defendant's objections, and after the trial was over it evidently did not consider that what had transpired could have prejudiced the defendant with the jury, or it would have granted a new trial. The trial court, who saw and heard what transpired, was not able to discover any prejudice, and we are not able to discern any.

The next assignment is that the court erred in permitting plaintiff to testify, over defendant's objection, that he had a wife and children. This point is covered by two questions and answers: "Q. You got a family? A. Yes, sir. Q. A wife and children? A. Yes, sir; wife and four children—four girls." Counsel for plaintiff admits that, while it would have been proper to have excluded this evidence, it was not error to admit it. Conceding that, strictly speaking, it was error to admit it, it affords no ground for reversal. When we consider the serious injury which plaintiff had received, that he was but 37 years of age, and the amount of the verdict returned by the jury, it is very apparent that no extra allowance was made on account of plaintiff's wife or children.

It is next urged that the court erred in refusing to give instructions 2, 3, 4, 5, 6, 7, 10 and 12, requested by de-

fendant. We deem it unnecessary to set out these instructions, or to comment upon them, for the reason that everything contained in them which defendant was entitled to have submitted to the jury fairly appears in the instructions given by the court.

The next objection is that the court erred in giving instructions 5, 7 and 11. These instructions are all three so clearly in line with the rule in cases of this character, repeatedly sustained by this court, that we shall not take the time to consider them. They were properly given.

The last assignment is that the verdict is contrary to the evidence. The court in its instructions withdrew from the jury all of plaintiff's allegations of negligence except: "(a) The allegation of plaintiff that the defendant was negligent in directing the plaintiff to go into said elevator pit and do the work that he was there directed to do, without notifying the plaintiff that the elevator was unfastened; and (b) the further allegation that the defendant was negligent in inviting the plaintiff into said elevator pit for the purpose of doing what the evidence discloses he was directed to do, without fastening the elevator." The evidence is uncontradicted that the elevator was not fastened. The court would therefore have been warranted in instructing the jury that that allegation had been established. The evidence that plaintiff was sent into the pit, without notifying him that the elevator was not fastened, is conflicting, but it is sufficient to sustain the verdict of the jury.

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

AFFIRMED.

LETTON, J. Being unable to assent to a number of statements made in the opinion which I deem not essential to the disposition of the case, I concur in the conclusion only.

JOSEPH E. FREDERICKS, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED APRIL 17, 1914. No. 17,552.

1. MASTER AND SERVANT: INJURY TO SERVANT: LIABILITY OF MASTER. Where a brakeman on a freight train, without the knowledge or consent of his master and in violation of its known rules, in the absence of the engineer, takes possession of the engine and runs and operates the same in switching cars in the master's yard, and while so engaged his fellow brakeman is injured, the master cannot be held liable for such injury, even though the injured servant may not have known that the engine was being operated by his unauthorized fellow brakeman.
2. **Appeal**: REVERSAL. "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin*, 90 Neb. 122.

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

A. A. McLaughlin, Edgar R. Hart and *Wymer Dressler*, for appellant.

M. F. Harrington, contra.

FAWCETT, J.

Appeal by defendant from a judgment of the district court for Holt county, in favor of plaintiff, for personal injuries.

Plaintiff was a brakeman on a freight train of defendant. The train on which he was employed left Norfolk, in this state, and was bound for Missouri Valley, in the state of Iowa. The briefs filed are quite voluminous. They argue a number of questions, notably the question as to whether or not the work, in which plaintiff was engaged at the time he received his injury, was interstate or intrastate business. The question is an interesting one, and, were it at all necessary in the determination of this case,

we would gladly consider the able briefs presented upon that point. We find it unnecessary to consider any of the questions, however, for the reason that we are met at the very threshold of the case with the contention of defendant that the evidence fails to show any negligence on its part. This question being decisive of the case, we shall consider it and no others.

The evidence shows that the train reached West Point at about 5:20 in the evening. When it arrived there, some empty flat cars, used as gravel cars, were standing upon the main line. The crew of the freight train switched those cars onto a side-track and then ran their own train upon another side-track. On account of a strong wind that had been blowing, the engine was found to be short of coal. By reason of that fact the engine was detached from the train, and the engineer, fireman and conductor ran it to Scribner, for the purpose of coaling. While they were gone, plaintiff and the other brakeman, Uecker, ate their supper. The engine returned from Scribner, according to the testimony of plaintiff, "between 6:30 and 7 o'clock," when it was headed in on the track where the train was standing and coupled on to the caboose. Up to this point there is no conflict in the evidence. After the engine had been coupled on to the caboose, the overwhelming weight of the evidence is that the engineer, fireman and conductor all left the train and went to a hotel or eating house, where, together they ate their supper. While they were eating supper, the plaintiff and his fellow brakeman, Uecker, without any instructions or permission from either the conductor or engineer, uncoupled the engine from the caboose, ran it over onto another side-track, and proceeded to the switching of certain cars; Uecker running the engine and plaintiff acting as brakeman. While they were engaged in this unauthorized work, plaintiff undertook to climb down from a flat car as they were approaching a switch, for the purpose of manipulating the switch when it was reached. In so doing he took hold of a stake which was one of a number of stakes upon the flat car resting in sockets and used for the purpose of

supporting the sideboards of the car when being filled with gravel, or other ballasting material. He took hold of this stake for the purpose of supporting or steadying himself while resting his foot, or possibly both feet, upon the journal, or "oil house," as it is termed by the conductor, so as to be ready to drop from the car when they reached the switch. The stake either broke or slipped out of the socket, causing plaintiff to fall and to receive the injury for which he seeks to recover. It is conclusively established that the engineer, fireman and conductor had gone to supper and had not returned to the train at the time plaintiff and Uecker commenced their independent switching, or at the time of the injury. Uecker testified that he and plaintiff engaged in this independent work at the suggestion of plaintiff. Plaintiff denied this, and testifies upon his direct examination that the engineer was on the engine at the time; but upon cross-examination he says he does not know who was on the engine. He and Uecker both agree that they were in the caboose together at the time they decided to do the switching referred to.

Plaintiff testified, on cross-examination, that he was taking his orders from Uecker; "he told me what to do." Previous to that, on direct examination, he had testified: "Q. Is five (the freight train) a freight or passenger train? A. Passenger train. Q. Who give you directions what to do? A. My superior officer. Q. Who was he? A. The conductor. Q. What is his name? A. Dorsey." On his direct examination he was asked: "Q. What did the engineer do? A. He was on the engine." On cross-examination he was asked: "Q. When this moving of the train was going on, where was the engineer? A. Well, he was sixteen carlengths from me. Q. Well, he was on the engine, was he not? A. Supposed to be; it was around a curve. Q. Do you know whether he was or not? A. No, sir; I do not; I think he was." Further on in the cross-examination he was asked: "Q. Did you see the conductor or engineer or fireman after they came back from Scribner before you got hurt? A. Yes, sir. Q. Where did you see them? A. Why, Conductor Dorsey

went over to the depot; they all went over there. Q. You saw them going over? What did they go there for? A. Going over there, I suppose Dorsey was going to report. Q. You were then in the way car? A. Yes, sir. Q. And it was then standing on the passing track? A. Yes, sir. Q. Where was the engine standing? A. The engine was then headed in on the way car. Q. How far away? A. Coupled right on. Q. Did you couple that engine on to that way car? A. Yes, sir." He was then asked: "Q. Now, after the engine was coupled on to the way car, did you see the engineer and fireman go over toward the depot? A. I saw Dorsey, and I think the fireman. Q. You saw Dorsey and the fireman? A. Yes, sir. Q. Was the engineer with them? A. No, sir. Q. Where was French (the engineer) then? A. I don't know, I went down to make this cut, cut off these cars. I started up along the track to make the cut. Q. Who told you to do that? A. Heine Uecker. Q. Where was he at that time? A. He was in the caboose cleaning lamps." He was further interrogated about a statement he had made to a representative of the defendant, after he had received his injury, as follows: "Q. Did you know at that time, when Mr. Hunter was there and you made that statement, that this engine which was moving this train wasn't being operated by the engineer at all at the time you were hurt? A. No, sir. Q. You did know that the brakeman had no business or authority to be running an engine at all, didn't you? A. I don't think that he has. Q. And you don't think that a brakeman ought to be engaged in cutting out cars and moving the train over switches and on the track if the engineer and fireman are both absent from the engine? A. No, sir."

We have then this situation: It is clear, beyond possible contradiction, that neither the engineer nor fireman was on the engine at the time plaintiff was injured; that neither the engineer, fireman nor conductor was on or near the engine when it was taken by plaintiff and Uecker to do the switching referred to. Plaintiff has shown his own unreliability as a witness by testifying at first in posi-

tive terms that the engineer was on the engine at the time, and subsequently admitting that he did not know whether he was or not. In fact, his testimony upon every material point in the case—in relation to the whereabouts of the engineer, in relation to the condition of the stake, and in relation to the questions as to whether or not the car was equipped with a grab iron—is too incredible to entitle him to belief. But, it is argued by his counsel that the jury are the judges of the credibility of witnesses and of the weight to be given their testimony; that the jury saw the witnesses upon the stand and had a right to take into consideration the circumstances under which they were testifying and their interest in the result of the suit; intimating that defendant's witnesses were employees of the railroad company and were therefore interested in protecting the interests of their employer. We concede, as a general proposition, that a jury has a right to take such matters into consideration, but there should be offset against that the direct and decided pecuniary interest of the plaintiff in the result of an action of this character. The courts of the country have gone a long way in sustaining the rule that the jury are the judges of the credibility of the witnesses and the weight of the evidence, but cases sometimes arise, like the one we are now considering, when to apply that rule would be a travesty upon justice. The other well-established rule that a plaintiff must establish his case by a preponderance of the evidence should not be entirely lost sight of even in an action for personal injuries; however much the plaintiff's unfortunate plight may appeal to the sympathy of the court. The evidence in this case is so clear that plaintiff's injury was not the result of any negligence on the part of defendant that there is no room for disagreement by unprejudiced minds.

The plaintiff admits that a brakeman ought not to be engaged in cutting out cars and moving a train over switches, if the engineer and fireman are both absent from the engine, and the undisputed proof shows, not only that the engineer did not authorize Uecker to run the engine, but that he had no authority to order him to do so. This

being true, plaintiff and Uecker were doing work entirely outside of the scope of their employment and in defiance of the known rules of their employer. That plaintiff knew they were doing the work in that manner is to our minds clear; but, even if he did not know that Uecker was running the engine, he, knowing that the fireman was away from the engine, knew enough to put him upon inquiry as to who was, in fact, running the engine. If he failed to make that inquiry, he proceeded with the work at his own risk. Indeed, we think the rule is even stronger than that. We think it is immaterial whether he knew or did not know who was running the engine. The defendant was not guilty of negligence, nor could it be held to have invited plaintiff to proceed with the braking, if, in fact, the engine was at the time being run by an interloper. The fact that Uecker was a brakeman on the train did not give him any right to take charge of the engine, without the knowledge and consent of his employer, and proceed to run it. When he did so he was as much an interloper as if he had been a "hobo," stealing a ride, and the defendant can no more be held responsible for his act than it could be for the act of any stranger. It needs no argument to convince even a layman that the defendant would never have considered for a moment permitting one of its brakemen to operate one of its engines on any part of its railroad, and especially over and across the street intersections of a city.

Two servants are employed for the sole purpose of keeping a master's automobiles clean and supplied with oil and gasoline, neither of whom has authority from the master to run one of the engines, but, on the contrary, both are prohibited by the terms of their employment from so doing. Suppose, without the knowledge of his master, one of these servants takes an automobile out of the garage and while running it runs down his fellow servant. Can the master be held liable for an injury caused by his machine while it is being so used, even though the servant injured did not know that the machine was being run by his unauthorized fellow servant? Assuredly not. And suppose,

further, that it was a part of the first servant's duties to go to the store for oil and gasoline when needed, and that it was the duty of the chauffeur when called upon to take the servant to the store for that purpose. Would that change the rule so as to make the master liable for the unauthorized acts of his servant? Again, we say, assuredly not. We are unable to see why the rule should not be the same in the case at bar.

By instruction No. 2, requested by defendant, the court charged the jury: "I instruct you that if you find from the evidence that at the time of the injury to the plaintiff, complained of by him, the plaintiff's fellow brakeman, Uecker, was with the plaintiff's knowledge or by an agreement made by and between the plaintiff and Uecker that he (Uecker), should go upon, run, operate and move the engine, and the plaintiff do the switching, and that while the switching was being so done the plaintiff was injured, then I instruct you that the plaintiff cannot recover, and your verdict must be for the defendant." This instruction was as favorable to plaintiff as he had any right to expect. It told the jury in plain terms that, if they found from the evidence that Uecker was, with the plaintiff's knowledge, operating and moving the engine while plaintiff was doing the switching, plaintiff could not recover, and they should return their verdict for the defendant. This instruction the jury disregarded. As we read and examine this record, it leaves no room for doubt that, to say the least, plaintiff knew that Uecker was running the engine at the time he received his injuries. Even by his changed testimony on cross-examination he admits that he saw the fireman and conductor leave the train. He therefore knew that the fireman was not upon the engine, and it would take direct proof to make us believe, or to cause us to approve a finding that an experienced engineer, such as French is shown to have been, would run his engine over and across the streets of a city, switching cars from one track to another, without the fireman on the engine, not only to do the firing but to ring the bell. It is

taxing our credulity too much to ask us to believe such a statement. It is evident that the verdict in this case "must have been found through passion, prejudice, mistake, or some means not apparent in the record." In such a case we have held that the verdict of the jury "will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin,* 90 Neb. 122; reaffirmed in *Tyler v. Hoover,* 92 Neb. 221.

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

REVERSED.

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

JOHN J. KUPER, APPELLEE, V. FRANK SNETHEN, APPELLANT.

FILED APRIL 17, 1914. No. 17,571.

Fraud: DAMAGES. In order to sustain an action for fraud and deceit, plaintiff must plead and prove actual damage. Deceit and injury must concur.

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

J. H. Broady and *James E. Leyda,* for appellant.

Reavis & Reavis, contra.

FAWCETT, J.

From a judgment of the district court for Richardson county, in favor of plaintiff, in an action for fraud and deceit, defendant appeals.

On October 30, 1905, plaintiff purchased from one Kinsloe the west half of section 7, township 1 north, range 27 west of the 6th P. M., in Red Willow county, in this state, for the agreed sum of "$25 per acre for the actual number

of acres that it will survey out." The land in controversy, being the west half of section 7, makes it the western boundary of the second row of sections in that township. As is not unusual in such cases, this half section is what is termed a long half section. When the contract was entered into, plaintiff paid down $50, was to pay $950 additional as soon as an abstract was furnished showing good title in Kinsloe, and $4,000 was to be paid on or before the 1st day of the following March, the balance to be settled for by first mortgage. Before the transfer was made, plaintiff decided that he would pay all cash instead of giving a mortgage for an unpaid portion of the consideration. This plan seems to have been agreeable to all parties concerned. Not having sufficient money himself, he negotiated a loan from the defendant for the balance needed. At that time both the seller and buyer had the idea that the half section contained 331.52 acres, which at the contract price would have amounted to $8,287.50. Having paid the first thousand dollars, in accordance with the terms of the contract, there remained due, under the then supposition of the parties, $7,287.50. This sum plaintiff delivered to defendant with which to close the deal. Defendant took a draft for that amount with him and proceeded to Danbury, in Red Willow county, where the agent of Kinsloe resided. A question arose as to the number of acres actually in the tract. Kinsloe's agent, McDonald, advised defendant that a survey had been made. This survey had been made by a surveyor by the name of Hill in 1880. An examination of that survey showed that the half section contained 378 acres. On that basis the draft which defendant had taken with him lacked $1,162.50 of being enough to pay for the acreage which the Hill survey showed plaintiff would be receiving. Thereupon defendant delivered the draft, which he had taken with him, to McDonald, wrote plaintiff advising him that there was more land than they had supposed, and asking him to come to defendant's bank. Plaintiff and his father met defendant at the bank as requested, and after a conversation, as to the purport of which there is a conflict between the testimony of

defendant and that of plaintiff and his father, plaintiff borrowed from defendant the necessary $1,162.50 for six months, his father signing the note with him as surety. The deed was thereupon delivered, and plaintiff went into possession of the land and is now in possession of the same. The note was promptly paid on the date of its maturity.

Plaintiff now charges that he in fact only received 331.52 acres, and that he was induced to pay the additional $1,162.50 through misrepresentations fraudulently and deceitfully made to him at the interview in defendant's bank, above referred to. Counsel for plaintiff in their brief say: "In fact, if the jury were not able to find from the evidence that the plaintiff had been damaged by the conduct of defendant, of course that would be the end of the case." This admission of counsel correctly recognizes the law governing the present action. Regardless of what the defendant may have said to plaintiff about the survey known as the Hill survey, or in reference to an additional acreage, which induced plaintiff to make payment for such additional acreage, if plaintiff in fact received the amount of land for which he actually paid, then he has not been damaged, and his action must fail. Upon this point we are unable to discover any real conflict in the evidence. The fact as to the number of acres included in the tract, which plaintiff obtained, is to be determined from three surveys: One the Hill survey, made in 1880, the one which McDonald had called to the attention of defendant prior to closing the deal; another made by one Barber a short time prior to the trial in the district court; and the other by one Roland, made on November 30 and December 1 to 7, inclusive, 1910. Before proceeding to give the result of these surveys, it should be stated that the evidence shows that the land was fenced all around, the fence on the east line of the half section having been up, as the witness Dolph states, "since the 80's," and that there is a public road along the north, west and south sides, which roads have been in use for many years. That plaintiff actually received the land within these boundaries is not controverted, nor is the fact that plaintiff has

a good title to the lands within such boundaries disputed. The simple question, therefore, is, how much land has plaintiff obtained by this transaction? The Hill survey shows that the tract described contains 379 and a fraction acres. The Barber survey shows that it contains 388 and a fraction acres. Mr. Roland gives the number of acres as 341.943. The jury returned a verdict in favor of the plaintiff for the difference between 331.52 acres and 378 acres, the number which plaintiff paid for. The trial court, as a condition of overruling defendant's motion for a new trial, required plaintiff to remit the difference between 331.52 acres and the amount of the Roland survey, 341.943.

The question now is, does the Roland survey raise such a conflict in the evidence as to the number of acres contained in this tract as to preclude a reversal of the judgment which plaintiff has obtained? It appears from statements of counsel on both sides that the judgment now appealed from was obtained on the third trial of this action. In all three of these trials the verdict of the jury was in favor of plaintiff. It is significant that the trial court set aside the first two verdicts. It is not shown that those verdicts were set aside on account of any errors of law committed by the court, hence it is a fair inference that the trial court set those verdicts aside because it thought plaintiff was not entitled to them. When the verdict at the last trial was obtained, it is said by counsel that the court stated that, there being some questions of law which it thought the supreme court ought to determine it would overrule the motion, enter judgment upon the verdict, and let the case come to this court for its determination of those questions. If the Roland survey really raised a conflict in the evidence, so that we could say that it was for the jury to determine from the evidence the number of acres which plaintiff had obtained, we would feel it to be our duty to accept the verdict of the jury and proceed to a determination of the legal questions involved; but we cannot so construe the Roland survey. The Roland survey is set out *in extenso* as exhibit O in the bill

of exceptions, and to it is attached a plat made by Mr. Roland. This plat shows the fences and roads surrounding the tract, as above set out; but Mr. Roland did not follow those lines. Being unable to find all of the section corners and quarter-section corners, he seems to have taken the section corner on the western township line, at the southwest corner of the tract in controversy, and run a line between that point and the section corner at the southeast corner of section 12, which would be on the eastern township line of that township, and then to have gone to the south line of the township at the southeast corner of section 31, and run a line between that point and the section corner on the north line of the township at the northeast corner of section 6, and to have made his survey of this tract by straight lines, thus obtained. This method assumes that the north and south half section line of section 7 must necessarily be in line with the corresponding half section lines in all sections north and south of section 7 in the township; that is, that the north and south half-section line is part of a continuous straight line through the township. This arbitrary assumption applies in like manner to the east and west line on the south line of the half section. Clearly, no such presumption will justify changing lines that have been plainly marked by fences and acquiesced in by all parties interested for more than 20 years. The survey by Roland is therefore worthless, as against the surveys of Hill and Barber. By their surveys the land conveyed to plaintiff by the deed he received is the full amount paid for by him. Hence, he has not been damaged. This being true, he is not entitled to any recovery in this action. The case has been tried three times. We think it is time the litigation should end.

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

REVERSED AND DISMISSED.

JOHN G. PETSEL, APPELLEE, V. THEODORE STRENGER, APPELLANT.

FILED APRIL 17, 1914. No. 17,579.

Appeal: CONFLICTING EVIDENCE. A verdict tendered on substantially conflicting evidence and approved by the trial court will not be disturbed on appeal, unless manifestly wrong.

APPEAL from the district court for Keya Paha county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

A. M. Morrissey and *Walcott & Walcott,* for appellant.

Arthur F. Mullen and *Lear & Lear, contra.*

FAWCETT, J.

This action was instituted in the district court for Keya Paha county, by plaintiff as next friend for his minor daughter, Evelyn Petsel. The petition alleges that Percy Strenger is the son of defendant, and at the time complained of, viz., May 27, 1909, was about 12 years of age, and was living at home with his father; that about a year prior to that date the defendant carelessly and negligently purchased and gave to his said minor son a 22-caliber Savage rifle, which the boy was in the habit of using in a careless and negligent manner, so as to endanger the lives and property of persons about him, "all of which facts were well known to the defendant, who encouraged, countenanced and consented to his carrying said gun and using it in said careless and negligent manner;" that, on the date named, "the said Percy Strenger carelessly and negligently fired upon the said Evelyn Petsel with the said rifle so furnished him by the defendant;" that the ball so fired from the rifle struck Evelyn in the knee, piercing the same to the bone of the joint, and lodging against the bone; that, as a result, Evelyn has been permanently injured and cripped for life, etc., to her damage in the sum of $2,000. The answer was a general denial. Plain-

tiff recovered a verdict for the sum of $500, upon which judgment was rendered, and defendant appeals.

The "errors relied on" are three in number: (1) That the court erred in overruling defendant's motion to instruct the jury to return a verdict for the defendant, at the close of plaintiff's case in chief; (2) that the verdict is not sustained by sufficient evidence; (3) that the verdict is contrary to law. An examination of the record before us shows that the first and third assignments must stand or fall with the second. Defendant invokes the rule of the common law as to the nonliability of a father in damages for the tort of his child, and cites authorities from several states supporting the rule. The rule as announced in the authorities cited is conceded by counsel for plaintiff to be sound; but they cite a number of authorities showing the exception to the rule. "By the well-settled rule of the common law, a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another person, in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured, who is not himself in fault." *Carter v. Towne,* 98 Mass. 567. "A father who permits his infant son to handle a loaded gun, when, from extreme youth or mental weakness or the use of intoxicants, the boy is incompetent to be entrusted with a deadly weapon, is liable for injury to another resulting therefrom, if he knew the danger, or should have known it in the exercise of ordinary care." *Meers v. McDowell,* 110 Ky. 926, 53 L. R. A. 789. The rule thus stated is the one that applies to the facts in this case.

The evidence in the record before us is conflicting. Defendant, his wife, and the boy Percy all testify very strongly that the boy was prohibited by the father from ever using the gun except when the father was present, while a number of witnesses for the plaintiff testify to the habitual use of the gun by the boy, both on the defendant's premises and upon the street, and to the fact that he ha-

bitually used the gun carelessly and negligently. It is shown that on one occasion he shot a dog belonging to a Dr. Keys; that on one or two other occasions bullets from the boy's gun passed near enough to other parties for them to hear the "whiz" of the same; that the defendant's attention was called to some of these circumstances. In short, the evidence is of such a character that the case is one peculiarly for the jury. Most of the witnesses were upon the witness-stand. The jury and the trial court saw and heard them testify. They were therefore in a position to determine whom to believe. The jury by their verdict discredited the evidence offered by defendant, and accepted that offered by plaintiff. The trial court has ratified their finding by entering judgment upon the verdict. While from the cold record before us we entertain some doubt as to the correctness of the verdict, we cannot say that it was manifestly wrong. It must therefore be sustained.

This being true, the trial court did not err in refusing to direct a verdict for the defendant, nor is the verdict contrary to law.

AFFIRMED.

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

FRANK P. DAVEY ET AL., APPELLEES, V. A. B. CURRY ET AL., APPELLANTS.

FILED APRIL 17, 1914. No. 17,605.

Appeal: SUFFICIENCY OF EVIDENCE. The evidence considered in the light of the circumstances shown, and *held* sufficient to sustain the judgment.

APPEAL from the district court for Dixon county: GUY T. GRAVES, JUDGE. *Affirmed.*

Kingsbury & Hendrickson, for appellants.

J. J. McCarthy, contra.

FAWCETT, J.

The controversy between the parties to this action is substantially this: Plaintiffs sold to defendant A. B. Curry the north half of the southwest quarter and the southwest quarter of the northwest quarter of section 2, township 30, range 5, in Dixon county, containing 120 acres, "more or less, according to government survey," for $6,500. When the time came to conclude the transaction, some question arose as to a strip 7½ feet wide and 80 feet long, along the north side of the tract, over which it was thought that one William Millie claimed a right of way or easement as an outlet from his farm to the public highway. Defendants claim that plaintiffs were to either obtain a quitclaim deed for this strip or have the claim for right of way set aside by a court proceeding on the ground of nonuse by Millie. Defendant Curry retained $1,500 of the agreed purchase price of the land as a guarantee that plaintiffs would carry out this agreement. Plaintiffs did not obtain a quitclaim deed, nor have Millie's right canceled by any court proceeding, and brought suit to collect the $1,500 which defendants had retained. Defendants filed an answer and cross-petition in which they claimed damages, by reason of nonperformance by plaintiffs of their oral agreement, in the sum of $1,500. There was a trial to the district court without the intervention of a jury. The trial court found there was due to plaintiffs on their contract of sale the sum of $1,679.37; that there was due to defendant, by reason of the easement above referred to, the sum of $100, and entered judgment for plaintiffs for the balance of $1,579.37. Defendants appeal.

The only error assigned and argued in the brief is that "the damages allowed by the court are inadequate." We have examined the record and are unable to sustain this contention. On the contrary, we think the evidence is sufficient, when considered in the light of the circumstances shown, to sustain the judgment. It is therefore

AFFIRMED.

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

ANGELA A. ROACH, APPELLEE, v. JOSEPH WOLFF ET AL., APPELLANTS.

FILED APRIL 17, 1914. No. 17,606.

1. **Intoxicating Liquors:** ACTION FOR DEATH: SUFFICIENCY OF EVIDENCE. Evidence examined and set out in the opinion, *held* sufficient to sustain the verdict and judgment.
2. **Witnesses:** COMPETENCY: IDENTIFICATION. Where a witness, in testifying to the actions of a certain individual who was a stranger to him, states that he made inquiry in a crowd, where such individual was well known, as to his identity, and in answer to the inquiry was told his name, and such witness also correctly describes the size of the individual and the manner in which he was dressed at the time about which the witness is testifying, as shown by the undisputed testimony of other witnesses in the case, it is not error for the trial court to permit the testimony of such witness to go to the jury.
3. **Trial:** CONDUCT AND ARGUMENT OF COUNSEL. The conduct of counsel for plaintiff and the statements made by him, in his argument to the jury, set out in the opinion, *held* not so clearly outside of the scope of legitimate argument as to constitute error on the part of the trial court in not preventing it.
4. **Bill of Exceptions:** AFFIDAVITS. Affidavits used in support of a motion for a new trial on the ground of newly discovered evidence must, in order to be considered on appeal, be preserved in the bill of exceptions.
5. **Damages.** The verdict of the jury examined in the light of the evidence, and *held* not excessive.

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

J. A. Douglas, A. W. Scattergood and *Albert S. Ritchie,* for appellants.

John M. Cotton, R. M. Johnson and *M. F. Harrington, contra.*

FAWCETT, J.

The plaintiff alleges substantially that at the time complained of, July 4, 1911, the defendants were licensed sa-

loon-keepers in the village of Long Pine, Nebraska; that on July 4, while so engaged in that business, the defendants and each of them separately sold, furnished and delivered to John F. Roach, the then husband of plaintiff, large quantities of whisky, beer and other intoxicating liquors, which Roach then drank and consumed, and by reason thereof became intoxicated, and while in such intoxicated condition, during the night of July 4, 1911, he "wandered and walked upon the railroad track of the Chicago & Northwestern Railway Company in said Brown county, and while on said track by reason of such drunken and intoxicated condition did not know what he was doing or where he was, and did not realize his situation, and by reason of such drunken, intoxicated, and helpless condition so occasioned by such drinking of liquors was struck and run over by an engine and cars of said railway company, and was crushed, mangled and ground up by reason of being so run over, and was killed and instantly died;" that plaintiff was his wife, and that Ruth Roach, who is less than two years of age, is the daughter of the decedent and plaintiff; that at the time of the death of the husband and father plaintiff and the daughter were entirely dependent upon him for their support and maintenance; that decedent did support and maintain them and contributed large sums of money therefor; that by reason of his death they have been deprived thereof. Plaintiff brings the action in her own behalf and in behalf of said infant daughter, and prays damages in the sum of $25,000. A joint answer was filed by the defendants, in which they jointly and severally deny every allegation in the petition except such as are specifically admitted; the admissions being as to their being licensed dealers in intoxicating liquors, that they were so engaged on July 4, and the relationship of plaintiff and her daughter to the decedent. An affirmative defense was pleaded in the answer, but this defense was, by leave of court, stricken out of the answer by defendants before entering upon the trial. Thereupon the case went to trial upon the petition and an answer which is in effect a general denial only. There

was a verdict for the plaintiff for $5,000 and judgment thereon, from which defendants appeal.

The main question argued in the briefs is that the verdict is not sustained by the evidence and is excessive in amount. Three links in the chain are, in our judgment, established beyond reasonable doubt: (1) That on the day in question, being the 4th of July, 1911, decedent drank repeatedly in the saloons of both defendants; (2) that from such drinking he became intoxicated; and (3) that he was killed by a train on the Northwestern railroad. The evidence shows that the village of Long Pine was celebrating the National Day in an unprecedented manner for that village. Some of the witnesses testify that there were more people in Long Pine on that day than had ever been in the village before. The two saloons were doing such a thriving business that at times during the day, and particularly towards closing time, the patrons were compelled to elbow their way up to the bar to obtain drinks and to purchase bottles of liquor to take with them when the saloons closed.

The witness Bigelow testifies that shortly before 8 o'clock, while he was pressing his way up to the bar to get a bottle of liquor, "some fellow staggered against me to get up to the bar to get a bottle of whisky, and pretty near knocked me down, and I turned around and said to somebody there, 'Who is that fellow,' and some gentleman there said his name was Roach." Bigelow did not know Roach personally, so counsel for defendants objected on the ground that the testimony was incompetent and no foundation laid. The objection was overruled. After the answer had been given, counsel for plaintiff asked Bigelow to describe the man who was called Roach. He described him as a man who would weigh 170 to 175 pounds; that "he had on a light pair of pants" and a "kind of light colored shirt;" that he thought he wore a soft hat. This description of Roach tallies with the description given of him by other witnesses, notably the description given by the undertaker who took charge of the body where it was found by the side of the railroad track the following morn-

ing. Under these circumstances, we are not willing to say that the court erred in allowing this testimony to go to the jury. Bigelow then testifies that Roach called for and obtained a bottle of whisky; that "he took it and went out; said he was going home." There is testimony to the effect that about 5:20 or 6 o'clock in the evening the decedent went to the railway station, evidently for the purpose of taking a passenger train going west at that time, and returning to his home, which we infer from the evidence was near to a station to the west of Long Pine. He entered a coach on the train. As he was entering, a brakeman who was passing asked him if he had a ticket. He said, "No." The brakeman who asked the question then called the attention of another brakeman, who was standing by the entrance to the coach, to the fact that Roach did not have a ticket, and that brakeman entered the coach for the purpose of removing him from the train. Two of the decedent's friends came up and requested permission to go into the train and assist in getting decedent off. Permission was given and they entered. Shortly thereafter the decedent and his two friends, and the brakeman who had followed the decedent into the car, all came out of the coach, decedent getting off the train peaceably, but remarking to the brakeman that he would "see him again," or "see him later," or words to that effect. That he then went back up town and resumed his drinking is clearly established. There was some testimony that the decedent was seen during the evening after closing time of the saloons up to as late as nearly midnight. Mrs. Nevers and William Nevers both testify that during the evening, a little before sundown, they saw a man walking west on the railroad track; that the man was staggering from one rail to the other. They do not identify the man, but describe how he was dressed. Their description would tend to show that the man they saw was the decedent. Just how and at what time of the night the decedent was killed is not shown. The evidence shows that after the passenger train, from which decedent was ejected in the early evening, the next train that passed was one going west a little after

midnight. The next train to pass was from the west, which reached Long Pine about 2 o'clock in the morning. After this train passed no other train passed over the road until about 7 o'clock in the morning of July 5, when a freight train passed, going west. It is clear that he did not take the early evening train. He could not have been killed by the freight train that passed west at 7 o'clock the next morning, for the reason that he was found soon after that train had passed, and the evidence of the undertaker is that at that time rigor mortis had set in, and that he must have been dead from 5 to 12 hours. Other witnesses as to the cold condition of the body corroborate the testimony of the undertaker. The evidence shows that after he was struck by the train that evidently killed him he was rolled or dragged some distance westward. This would indicate that he was killed by the train that went west a little after midnight. The trouble with this theory is this: When the body was found in the morning both legs had been completely severed from the trunk and the body was lying between the rails of the track, so that if he was killed by the train going west a little after midnight, then the train that passed east about 2 o'clock, as well as the train that went west at 7 o'clock in the morning, must have passed over his dead body. Defendants claim that this could not possibly be, for the reason that if those trains had passed over the body it would have been struck by the locomotives and would have been badly mangled. The evidence shows that the pilot of a locomotive is about four or four and a half inches above the top of the rails, and that the rails at the point where decedent is alleged to have been killed stood four inches above the ties, and that the road-bed was not graded above the tops of the ties, so that there would be a space of some eight or eight and a half inches between the ties and the pilot of the engine. The testimony of the engineers is to the effect that this space is so small that the body of a man of the size of the decedent would have been rolled by the engine passing over it, and in their judgment would have been badly mangled. One of the engineers testified, however, that he had

crawled under his engine with his regular working clothes on. We confess that we are unable to solve this problem. Hence, we cannot say that the jury's solution of it was wrong. We are forced to concede that it is possible that the decedent was killed by the midnight train and his body passed over by the two later trains.

One ground of complaint is misconduct of counsel for plaintiff while discussing this phase of the case in his argument to the jury. Counsel for plaintiff got down upon the floor, for the purpose of illustrating to the jury the possibility of an engine passing over his body without striking him. This demonstration was objected to by counsel for defendants, and we have the following record: "By the court: 'Any demonstration that is made is not to be considered as evidence in this case, and, if not made for the purpose of argument solely, is not competent.' By Mr. Harrington: 'It is made for the purpose of argument solely, and is made in response to the statement of counsel for the defense that it is impossible for a man to be run over by an engine, as this man was, and not be crushed to pieces.' By Mr. Douglas: 'The objection is renewed, and defendants further object, for the reason it is improper argument in a case of this character and kind.' By the court: 'The objection will be overruled.'" Counsel for defendants then objected to a statement made by counsel that "I can go through an aperture eight inches in height, and with a pair of shirts and everything on," for the reason that the same was improper argument. "By the court: 'The jury are instructed that they are not to consider such statements as evidence, or any part of the evidence in the case, but they may consider the same as part of the argument of counsel.'" Defendants then objected to the remark of counsel in his argument: "The voice of John Roach cries out from the cemetery, 'I am going home, and not loaf around town all night in Long Pine.'" The objection was overruled. Counsel for defendants have assailed this action on the part of counsel for plaintiff so vigorously that we have set it out fully. While the course pursued by counsel is somewhat unusual,

we cannot say that it was so clearly outside of the scope of legitimate argument that the court erred in not preventing it.

After the evidence was all in and one argument on each side had been made to the jury by counsel, defendants moved the court for a reopening of the case to take the testimony of two witnesses named, which, it was contended, would explain certain testimony given by one of the railroad engineers who had testified. Counsel for plaintiff stated that he did not desire to object, but the court on its own motion denied the request. This was assigned as error in the motion for a new trial, and the transcript shows that a number of affidavits were filed in support of the assignment. Those affidavits have not, however, been preserved in the bill of exceptions, and under our oft-repeated rule they cannot be considered.

Objection is made to certain instructions given by the court, and to the refusal of the court to give some of the instructions requested by defendants. We have examined them carefully and are unable to find prejudicial error in any of the instructions given by the court. As to those requested by defendants, we deem it sufficient to say that as to some of them the points are fully covered by the instructions given by the court, and as to the others we think they were not within the issues; notably, the point that decedent may have fallen or been thrown from a train while stealing a ride was expressly withdrawn from the issues tendered by the answer of defendants as originally filed, when they on their own motion struck out their affirmative defense which covered that point.

In the light of the evidence that the decedent was a strong, healthy, industrious man, 27 years of age, we cannot say that the verdict is excessive. The fact that decedent had a father who was helping him to get a start in life was an asset and not a liability.

Without pursuing the subject further, we deem it sufficient to say that we are unable to find any prejudicial error in the record; that, while the exact hour and the par-

ticular train by which decedent was killed are not clearly shown, we think the evidence, taken as a whole, sustains the verdict. Indeed, we think that a verdict the other way could not have been sustained.

The judgment of the district court is therefore

AFFIRMED.

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

LYLE EDWARD ROACH, APPELLEE, V. JOSEPH WOLFF ET AL., APPELLANTS.

FILED APRIL 17, 1914. No. 18,350.

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

J. A. Douglas and *Albert S. Ritchie,* for appellants.

R. M. Johnson, John M. Cotton and *M. F. Harrington, contra.*

FAWCETT, J.

The only brief on file in this case is one by the appellants, in which it is stated: "This case, being No. 18350, was advanced and ordered to be heard together with No. 17606. The cause of action on which the recovery is based is the same in both actions, and the only difference between them is as to the damages, and on this question of damages no citation of authority is necessary. We claim them to be excessive in both cases." In case No. 17606, *Roach v. Wolff, ante,* p. 43, the action was brought by the widow of the decedent for herself and her minor daughter. After that case was tried and judgment entered, a son was born, and this action was instituted to recover damages on his behalf. As no reason is assigned in the brief why this action cannot be maintained, and the difference, if any, on the question of damages between this action and No.

17606, *Roach v. Wolff, ante,* p. 43, not having been pointed out, and it being conceded that the cause of action upon which the recovery is based is the same in both actions, and the evidence substantially the same in both, we do not deem it necessary to make an independent examination of the record in this case. On the authority, therefore, of our judgment in No. 17606, *Roach v. Wolff, ante,* p. 43, and for the reasons therein stated, the judgment of the district court in this action is

AFFIRMED.

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

LION BONDING & SURETY COMPANY, APPELLEE, V. CAPITAL FIRE INSURANCE COMPANY ET AL., APPELLEES; FARMERS & MERCHANTS BANK, APPELLANT.*

FILED APRIL 17, 1914. No. 17,689.

1. **Insurance Companies:** CONVERSION: EVIDENCE. If the agent of an insurance company in the management and control of its financial affairs buys school warrants with the funds of the company, this does not of itself prove that the agent had converted the money of the company to his own use, in the absence of any evidence that the directors of the company were ignorant of such purchase or had made any objection thereto.
2. ———: LOANS: EVIDENCE. If such agent applies to a bank for a loan to his company, and the loan is made and the money placed to the credit of the company in its account with the bank, and the company duly notified of such credit, the fact that the note representing the loan was signed by the agent individually, and not in the name of the company, will not of itself overcome the positive and otherwise uncontradicted evidence of the cashier of the bank that the loan was made to the company and solely upon its credit.
3. ———: ———: FRAUD: SUBROGATION. It appears that the cashier of the bank had reason to suppose that the agent of the insurance

*June 22, 1914. Judgment modified. "Decree of district court against the Farmers & Merchants Bank reversed, and cause as to the bank dismissed."

company procured this credit in the bank to the account of his company for the purpose of imposing upon the state insurance department. The insurance company, being the principal in this transaction, cannot predicate a cause of action against the bank thereon, and the plaintiff, who is seeking to be subrogated to the rights of the bank, has no greater right.

4. **Appeal:** TRIAL DE NOVO. Upon appeal in an action in equity this court is required to try the case *de novo* without reference to the decision of the trial court. Upon the evidence discussed in the opinion, it is found that there is no cause of action against the defendant bank.

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

Stewart, Williams & Brown, for appellant.

J. C. McNerney, E. J. Clements, and *George W. Berge, contra.*

SEDGWICK, J.

The defendant, George W. Losey, was secretary and treasurer of the defendant corporation, the Capital Fire Insurance Company, from some time in the year 1908 to some time in the year 1911. In October, 1909, he executed a promissory note for the sum of $3,000 to the defendant, the Farmers & Merchants Bank, and caused the money obtained thereon to be credited to the account of the insurance company. Afterwards, in February, 1910, this note became due and was canceled by the bank and the amount charged to the account of the insurance company. The plaintiff, the Lion Bonding & Surety Company, a corporation doing business under the laws of this state, with its principal office in the city of Omaha, gave the said insurance company its bond, guaranteeing that company against pecuniary loss by any act of larceny or embezzlement on the part of the said Losey while in the service of the said insurance company. In January, 1911, the insurance company made claim against the plaintiff that the said Losey had embezzled money of the insurance company, and upon such claim obtained from the plaintiff the sum

of $2,000, as surety for Losey. Afterwards the plaintiff began this action in the district court for Lancaster county against the said bank, making the said insurance company and the said Losey parties defendant therein. The plaintiff alleged in his petition that the "said George W. Losey was personally indebted to said Farmers and Merchants Bank upon his promissory note in the sum of $3,000, and on or about said February 1, 1910, the said defendant Farmers and Merchants Bank, without any lawful authority so to do, and well knowing that the money so on deposit in said bank in the name and to the account of the defendant Capital Fire Insurance Company was then the money and property of said Capital Fire Insurance Company, and not the money or property of the said George W. Losey, with the knowledge, consent and connivance of the said George W. Losey, wrongfully and unlawfully took and applied of the money of the said Capital Fire Insurance Company, so on deposit in said bank as aforesaid, the sum of $3,000 to the payment of the aforesaid note of said George W. Losey, and wrongfully and unlawfully converted to its own use the money and property of said Capital Fire Insurance Company, so on deposit as aforesaid, to the amount and in the sum of $3,000, without the consent of the said Capital Fire Insurance Company, and has ever since refused to pay the same to said Capital Fire Insurance Company or to any person for said Capital Fire Insurance Company, and said sum of $3,000, has been ever since February 1, 1910, due and owing, and is now due and owing said Capital Fire Insurance Company from said Farmers and Merchants Bank. * * * That by reason of the aforesaid wrongful acts of the defendant George W. Losey while under bond furnished for him by plaintiff, as aforesaid, guaranteeing his fidelity and honesty to the defendant Capital Fire Insurance Company, whereby plaintiff was compelled to and did pay the sum of $2,000 in satisfaction of its liability thereunder, there is now due and owing plaintiff from said George W. Losey the sum of $2,000, with interest thereon at 7 per cent. from June 9, 1911, and by reason of the payment

by plaintiff to defendant Capital Fire Insurance Company of the said sum of $2,000, as aforesaid, and by reason of the provisions of aforesaid bond, plaintiff is in equity and good conscience entitled to be subrogated to all the rights of the defendant Capital Fire Insurance Company against the defendant Farmers and Merchants Bank to the extent and in the amount of $2,000, with interest thereon at 7 per cent. from June 9, 1911, arising and existing in favor of said Capital Fire Insurance Company and against said Farmers and Merchants Bank by reason of the wrongful conversion by it of the money of said Capital Fire Insurance Company on deposit, as aforesaid, and the plaintiff is entitled to a judgment against said Farmers and Merchants Bank for the said sum of $2,000, with interest from June 9, 1911."

The plaintiff asked for a decree "that the said Capital Fire Insurance Company now has a cause of action against said George W. Losey and said Farmers and Merchants Bank, for the recovery of said sum of $3,000; that plaintiff, by reason of its payment of $2,000 to the Capital Fire Insurance Company upon breach of its bond given on behalf of defendant George W. Losey, as aforesaid, is entitled to be and is subrogated to all the rights of the defendant Capital Fire Insurance Company against the defendant Farmers and Merchants Bank for the money and funds of said Capital Fire Insurance Company so wrongfully converted to its own use by the said Farmers and Merchants Bank, aforesaid, to the amount and in the sum of $2,000, with interest thereon from June 9, 1911, and that plaintiff have judgment against the said defendants George W. Losey and Farmers and Merchants Bank of Lincoln, Nebraska, for the sum of $2,000, with interest from June 9, 1911, and costs of suit," and for general equitable relief.

The insurance company answered, alleging that the amount that the defendant Losey embezzled from it was $5,132.81, including the said $3,000 alleged to have been wrongfully paid to Losey by the defendant bank, and "that the $2,000 paid by the plaintiff to this defendant, as alleged

in the petition, was so paid for and on account of a shortage other than that created by the conversion of defendant's deposits by the Farmers and Merchants Bank, and for a release of plaintiff from any claim of liability for said $3,000, and it was then and there understood and agreed that the plaintiff should not and did not pay any part of said $3,000, but that defendant should look to said bank for the payment thereof, and not to the plaintiff."

The bank answered, admitting the incorporation of the plaintiff, and that it furnished the bond as alleged; admitted the allegations of the incorporation and business of the insurance company and that the defendant Losey was the secretary and treasurer during the time alleged; admitted that the defendant Losey deposited the money of the insurance company during the year 1909 and a part of the year 1910, and "drew money from such deposit account with this defendant as treasurer of such insurance company," and denied all allegations of the plaintiff's petition and the cross-petition of the insurance company.

Afterwards the controversy between the insurance company and the plaintiff was adjusted by stipulation and the cause proceeded against the defendant bank. The trial court found in favor of the plaintiff and the insurance company, and entered a decree against the bank in favor of the plaintiff for $1,068.05, and a decree against the bank in favor of the insurance company for $2,136.10, being the amount of the said $3,000, and interest thereon, and the bank has appealed.

Mr. Losey was the secretary and treasurer of the insurance company. He appears to have been in the full management of its investments and financial affairs generally. There is no evidence to the contrary. He had misappropriated the funds of the company. If this was suspected by the officers of his company, it does not appear that any of the officers of the bank had any knowledge of any misconduct of that kind on the part of Mr. Losey. It affirmatively appears without contradiction that Mr. Probasco, the cashier of the defendant bank, had no knowledge or information that Mr. Losey was in default with

his company or was in any way neglecting or mismanaging its business. It appears that Mr. Losey had invested some of the assets of his company in school warrants, and that he understood that the inspector of the state insurance department would not approve of the investments and would not recognize them as assets of the company. In order to make a showing of the assets of the company that would be satisfactory to the inspector, Mr. Losey devised the plan of borrowing $3,000 of the defendant bank and leaving the money in the bank, intending that the inspector should inquire of the bank as to the amount of money of the insurance company there on deposit. To carry out this plan, he borrowed $3,000 and placed it to the credit of the company in the bank. He appears to have given his individual note for the $3,000. He represented to Mr. Probasco that the company would need the money only a few days, and the note was given on demand. The money remained in the bank to the credit of the insurance company for about 60 days, when the note was canceled, and the $3,000 charged to the bank, the interest being paid in cash. If this is the whole explanation of the transaction, the insurance company was not injured. Even if Losey had borrowed the money personally, and so obtained a credit to the account of the insurance company, and that same credit was afterwards absorbed in canceling the loan, the financial condition of the insurance company would be unaffected by the whole transaction.

It is contended, however, that Losey was "short in his accounts" with his company, and borrowed this money on his own credit to make good that shortgage; that he had used the money of the company to purchase the school warrants on his own account, and that his company did not own the warrants and had no knowledge of them. There is no evidence to support this contention. The evidence, so far as it goes, tends to show that the warrants were bought in the interest of the company. The fact that they were paid for by checks drawn on the company's account does not of itself tend to prove that Losey had or intended to convert the warrants to his individual

use without the knowledge or consent of the company. It is equally consistent with the view that they were bought for and held by the company. These warrants were at other times pledged as security for money loaned by this bank to the insurance company, and otherwise treated as the property of the company. The dealings with the warrants were not done in Losey's name, nor in the name of the company, but in the name of the Conservative Investment Company, and there is no evidence as to who constituted or owned the latter company. Mr. Probasco understood at the time, from declarations of Losey and the nature of the transaction through his bank, that the insurance company was the promoter and owner of the investment company, and that the business that was being transacted in the name of this latter company was in reality the business of the insurance company. He had no notice that Losey was then in default, if that was the fact, and the business had been carried on in a similar way long before it is claimed by any one that any default had occurred on the part of Mr. Losey.

There is no doubt under this evidence that this money was loaned to the insurance company. Mr. Probasco so testifies, and the bank books show that it was credited to the account of the company, and so stood until the note was canceled and that item balanced. The note was given December 15, 1909, and $600 in cash was deposited to the account of the insurance company at that time. December 31 the bank rendered a statement to the insurance company which shows a credit on December 15 of the $3,000, in addition to the cash deposit. When the note was given the deposit slip was delivered to the insurance company showing a deposit of currency, $600, "checks N," $3,000, total $3,600. It must be presumed that the officers of the insurance company, who controlled its business, knew that the company had received this credit on account of this note. The evidence is that no question was raised by the insurance company in regard to this transaction until the commencement of this suit, more than two years thereafter. In January, 1911, after Losey

had left the company, the new officers of the company called at the bank to investigate, but the evidence does not show that even then there was any intimation that the insurance company should, for any reason, be credited with the loan and not be charged with its payment. If Mr. Losey was a defaulter at that time and desired to have this $3,000 appear in the company's account so as to cover up the default and satisfy his superior officers, it is clear that Mr. Probasco was not aware of any such fact, or of any such purpose on the part of Mr. Losey. Mr. Probasco understood that he was loaning to the company; he knew of no other explanation of the fact that the money was placed to the credit of the company. He was the principal witness in the case. He testified as a witness for the plaintiff, and also as witness for the defendant, and was examined and cross-examined by all the parties interested. The matters now in dispute rest almost entirely upon his testimony. He made no attempt to shield himself, nor to favor the interests of the bank that he represented. His whole evidence shows him to be a candid and truthful witness. Mr. Losey told him that the state insurance department objected to the warrants as assets of the insurance company, and that the intention in borrowing this money was to increase the apparent cash of the insurance company and so satisfy the department. Mr. Probasco conceded upon the witness-stand that this appears to him now to be wrong, and he made no attempt to justify himself in consenting to so deceive the department. He protested that he was not interested in the matter at the time, and did not realize that he was assisting the insurance company in imposing upon the authorities. This excuse cannot of course change the situation. The bank must be held to have assisted the insurance company in practicing this fraud. If he had known that Losey was in default to his company, and so had need to borrow upon his own responsibility to make good that default, such a circumstance would have tended to show that the money was loaned to Losey and not to the bank. The note was signed by Losey individually. This fact alone is not sufficient to

overcome the positive evidence of Probasco, and the fact that the money was credited to the company without any reason known to Probasco for doing so, unless the money was loaned to the company. Losey had a reason for borrowing the money in the name of his company and giving his individual note therefor. It swelled the assets of his company without an apparent corresponding increase of its liabilities. If the officer of the insurance department should inquire as to the liabilities of the company to the bank, which it does not appear that he did, he would be effectually imposed upon. This was fraudulent on Losey's part, and was not prevented by Probasco, but it was, as Probasco supposed, for the benefit of the company only, and does not tend to prove that the money was in fact loaned upon the personal responsibility of Losey. It does not appear to be necessary to determine whether the bank under these circumstances must be held to be in equal fault with the insurance company. If the action was by the bank to recover this money from the insurance company, that question would become important. The insurance company was represented in this transaction by its secretary and treasurer, who was in apparent charge and full control of the interests of the insurance company. The company obtained the apparent control of this money for a short time, and then relinquished it and the credit was canceled. The insurance company was the promoter and beneficiary of the fraud, and, even if it had been damaged by the transaction, would have no legal claim against the bank by reason thereof. The bonding company asks to be subrogated to the rights of the insurance company, and, as that company had no cause of action against the bank, the bonding company now fails also. There is no substantial conflict in the evidence, and there is no equity in the plaintiff's favor.

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

REVERSED AND DISMISSED.

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

FRANKLIN STATE BANK, APPELLANT, V. THOMAS GETTLE ET AL., APPELLEES.

FILED APRIL 17, 1914. No. 17,622.

1. **Parol Evidence:** ACTION ON NOTE: CONSIDERATION. Where, in an action by a bank against the indorsers, the defense of no consideration is set up, parol testimony may be received to show the want of consideration and that the note was given for the mere convenience of the bank.

2. **Appeal:** CONFLICTING EVIDENCE. The verdict of a jury based upon conflicting evidence will not be interfered with by this court if there is sufficient competent evidence to support the same. *Franklin State Bank v. Chaney*, 94 Neb. 1.

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

C. C. Flansburg and *W. C. Dorsey*, for appellant.

E. U. Overman and *G. W. Prather, contra.*

HAMER, J.

Suit was brought in the district court for Franklin county by the Franklin State Bank against Thomas Gettle, William H. Chaney, Stephen T. Doher, Carson Hildreth, and W. E. Bruce. There was a verdict for the defendants Gettle, Chaney and Doher. The motion for a new trial was overruled, and there was judgment on the verdict. The plaintiff appeals.

Fitz & Bruce, who operated a brick-yard at Franklin, Nebraska, became indebted to the Franklin State Bank in the sum of $1,000, or thereabouts, which was secured by a chattel mortgage on the brick-yard property. The brick-yard business became insolvent. Fitz & Bruce owed Gettle $500, Chaney $200, and Doher $200. There was a meeting at the bank at the instance of Hildreth, its president and principal stockholder. He and the appellees, Gettle, Chaney, and Doher, talked over the financial affairs of the brick-yard with the view to saving the property of the

same and collecting the debts due to themselves. The talk seems to have been along the line of proceeding in a friendly way and to avoid litigation. There was talk of taking over the yard and releasing the chattel mortgage and turning the property over to the bank to sell, and then to pay the debts owing to the different parties, the bank and the appellees to receive *pro rata* payment according to their several claims. The interest of the appellees was to save their claims. One hundred fifty thousand brick were supposed to be ready for sale. They were valued at $7 a thousand. They were to be sold to pay special claims, such as mechanics' liens and labor claims. There was also other property supposed to be worth in the neighborhood of $2,500. The plaintiff bank appears to have been first to ascertain the insolvency of Fitz & Bruce. There does not seem to have been any writing at the meeting which was held December 19 or 20, 1902, when the note sued on was signed, but there was a writing. Hildreth explained at the meeting that, if the bank released its chattel mortgage against the brick-yard business, it could not carry its interest in the brick-yard; that the bank desired to have a note to hold as an asset representing its interest in the brick-yard property; that while the bank was the holder and owner of an interest in the brick-yard, as were the appellees, yet it desired its interest in this brick-yard property represented in the bank assets in the form of a promissory note. It is claimed that the appellees were asked by Hildreth as an accommodation to the bank to indorse the note, and that Hildreth said he would also indorse the same. This was to be done as an accommodation to the bank so that the bank could carry the note until the brick-yard could be turned into cash and the money received from the sale prorated according to the agreement, at which time the bank would destroy the note. Bruce signed the note as the maker thereof, and Gettle, Chaney, Doher, and Hildreth indorsed it. The note was made payable to Thomas Gettle or order. It is claimed that Gettle had no interest except as a joint maker with the other

defendants. That the note should be made payable to him was a part of the arrangement.

After this arrangement a considerable quantity of brick was sold. Hildreth took some of the brick to build a new bank. The brick were manufactured at the yard. Gettle and Chaney wanted brick also. The bank kept disposing of the property and applying the money to its own note or paying off claims against the yard, but it is claimed by Gettle, Chaney, and Doher that they received no money.

Gettle, Chaney, and Doher filed a joint answer to the plaintiff's petition. They admitted the execution and delivery of the note, and set up that Hildreth was the president and principal stockholder of the bank, and its general manager and agent; that on behalf of the bank the note sued on had been made; that at the time of bringing the action Hildreth was still the president of the bank and transacting and directing its business; that the defendants, together with the plaintiff bank had been interested as creditors in the operation of the brick-yard, which had been turned over to them by Fitz & Bruce, who owed the bank a thousand dollars, Gettle $500, Chaney $200, and Doher $200, each of said sums being secured by chattel mortgages; that it was agreed that all of said chattel mortgages should be released; that the bank agreed to operate and manage the property turned over by Fitz & Bruce for its own benefit and the benefit of the defendants, paying the claims of the plaintiff and defendants *pro rata* out of the proceeds of such operation and management; that the plaintiff bank by Hildreth had requested the defendants to sign the note as evidence of the interest of the plaintiff in the property and for the convenience of the plaintiff, and in order that the plaintiff might carry its interest in the brick-yard as an item of loans and discounts rather than as an item of personal property; that the defendants signed said note, together with their co-defendant, Carson Hildreth, he being at the time the representative of the plaintiff bank; that said note was to be of no force or effect except for the convenience of the plaintiff, which was to carry the said note on its books as a

resource and expressed in a promissory note instead of other personal property; that the defendants received no money because of the signing of the said note, and that no consideration of any kind came to the defendants from the plaintiff bank; that at the time the notes were signed the defendants were assured by the bank that it would surrender or destroy the note as soon as the brick-yard property was disposed of; that in or about April, 1904, it was agreed that the defendants should waive their claims against said property, and that the plaintiff bank should have full possession and control of it without regard or reference to the claim of the defendants, and should sell the property and dispose of the same to pay its own claim against Fitz & Bruce without accounting to the defendants, and, in consideration of the release and the taking over of the property free from the claim of the defendants, the bank was to destroy the note so that there should be no possibility of its being held as an obligation against the defendants. It is further alleged that the plaintiff bank procured the note through fraud and deceit; that at the time of the execution of the same it intended to hold the note as an obligation against the defendants, and that such intention was not known to the defendants, but that the defendants believed and relied upon the statements of the plaintiff that it wanted said note merely as a convenience and without any purpose to hold the defendants liable. The reply to this answer was a general denial.

There was evidence before the court tending to establish the defense set up by the defendants. Hildreth does not seem to have had any personal claim, but he agreed to assume $300 of the debt due to the bank. This would reduce the bank's claim to $601.34. The written agreement made about the same time the note was made may tend to somewhat confuse and prevent a clear understanding of the facts. There is testimony tending to show that Doher, Gettle, Hildreth, and Chaney took possession of the brick-yard and sold the brick on hand. They seem to have hired a manager. He took charge of the brick-yard, but it does not seem to have paid out. Hildreth contends

that the transaction was fair, and that there was a real indebtedness to the bank. The good faith and honesty of the transaction has been submitted to the jury. There was a sharp and persistent conflict of testimony at the trial.

The case of the *Franklin State Bank v. Chaney,* 94 Neb. 1, presents a case very like this one. It seems to be its twin. In that case the same oral agreement made in this one was discussed, and the finding of the jury was the same as in this one and its finding was sustained by this court; Judge Letton delivering an opinion, which seems to include a clear comprehension and disposition of the case. He recites the evidence, and says that there is a decided conflict in it "on almost every material point, and we are unable to say that there is not sufficient evidence on behalf of the defense to support the verdict on the issue as to want of consideration."

The verdict of a jury based upon conflicting evidence will not be interfered with if there is sufficient competent evidence to support the same. Parol testimony may be properly received to establish the defense of no consideration and to show that the note was given merely for the convenience of the bank and so that it might hold the note as a memorandum of the transaction. We are unable to say that the evidence is not sufficient to sustain the verdict. It was clearly a question for the jury to decide. They have found for the defendants.

The judgment of the court below is

AFFIRMED.

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

LIBBIE MOON, APPELLEE, V. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, APPELLANT.

FILED APRIL 17, 1914. No. 17,693.

1. **Insurance:** ACTION FOR DEATH: SUFFICIENCY OF EVIDENCE. The plaintiff, Libbie Moon, as the beneficiary of John W. Moon, in an action against the defendant, a fraternal accident association, alleged the death of her husband, John W. Moon, on February 16, 1911, through a bodily injury effected through external, violent and accidental means, and which alone occasioned his death. On said day, while going up the steps leading into his yard in the city of Omaha, the assured accidentally slipped and fell with force and violence, striking his external body near the region of the heart upon a large stone with such force as to cause a rupture of the left auricle of his heart, from which he immediately died. *Held,* That the petition states a cause of action which the evidence sustains, and that the death was caused by external, bodily injury, as contemplated by the indemnity clause in the certificate and the constitution of the association.
2. ———: ———: PROXIMATE CAUSE. The fact that the condition of the heart and other organs of the body of the assured may have the more readily permitted the rupture, it not having been shown that death would have ensued at the time it did but for the accident, the jury were warranted in finding that the accident was the proximate cause of the death.
3. ———: ———: ———. The fact that a person of 50 or 55 years of age would be likely to have a normal hardening of the arteries in parts of the body which might tend to bring about a rupture of the heart in case of a violent accident of the kind which occurred in the instant case is not sufficient to show that the accident was not the proximate cause of the death of the assured.
4. **Appeal:** CONFLICTING EVIDENCE. Where, in an action by the beneficiary against a fraternal accident association, there was evidence tending to show that the proximate cause of the death of the assured was a rupture of the left auricle of the heart, occasioned by his accidentally falling and striking his body on a large stone, although there was other and conflicting evidence as to the condition of the assured's health and the probable cause of his death, a verdict against the association will be sustained.

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

96 Neb. 5

Greene, Breckenridge, Gurley & Woodrough and *Vorys, Sater, Seymour & Pease,* for appellant.

A. W. Jefferis, contra.

HAMER, J.

The defendant, a fraternal accident association insuring the lives of its members against death by accidental means and for accidental injuries, appeals from a judgment of the district court for Douglas county.

It appears that the defendant is a corporation organized under the laws of the state of Ohio, and it is authorized to do business in Nebraska, and that it conducts its business upon the mutual assessment plan. On or about April 12, 1907, John W. Moon, the decedent, became a member of the Order of United Commercial Travelers of America, and received his certificate of membership and insurance on his life. The plaintiff, Libbie Moon, is the widow of the said John W. Moon, and she is his beneficiary. John W. Moon died in Omaha, Nebraska, February 16, 1911. The plaintiff filed her petition in the district court for Douglas county May 9, 1911. On the 28th day of May, 1912, plaintiff recovered a judgment assessing her damages in the sum of $6,606.25.

Section 5, article VI of the constitution of the association, provides: "If any member of the order (other than a social member) who has paid, when due, all fees, fines, costs, dues and assessments charged or levied against him, shall sustain, during the continuance of his membership, and while in good standing, bodily injury effected through external, violent and accidental means, which, alone and independent of all other causes, shall occasion death immediately or within six months from the happening thereof, the Order of United Commercial Travelers of America, within ninety days of receipt of satisfactory proof of said accidental death, shall pay to the person or persons entitled thereto the sum of five thousand ($5,000) dollars, and shall also pay to the person or persons entitled thereto, as aforesaid, thirteen hundred ($1300) dollars in weekly

instalments of twenty-five ($25) dollars each, the first of such weekly instalments to be paid within ninety days from the receipt of such proof of death."

It is alleged in the petition that said Moon, up to and including the day of his death, paid all fees, fines, costs, dues and assessments charged against him by the defendant, and at the time of his death was an active member in good standing in the order and entitled to all rights and benefits under its constitution; that on February 16, 1911, said John W. Moon sustained a bodily injury effected through external, violent and accidental means, which injury, alone and independent of all other causes, occasioned his death; that said Moon on that day, while walking up the steps leading into his yard, accidentally slipped and fell with force and violence, and that his external body about and near the region of his heart struck upon a large stone with such force as to injure the left auricle of his heart, and also injured his body upon its external surface, and that the said injury so effected through said means, alone and independent of all other causes, occasioned the death of said Moon in about half an hour after he received said injury; that after the death of her husband plaintiff as his beneficiary performed all the conditions required of her by the defendant association, and permitted an autopsy to be held upon the remains of her said husband as demanded by the defendant, and furnished the defendant with notice and proofs of her husband's death in support of her claim under the certificate hereinbefore mentioned. The prayer was for judgment for $6,300, with interest at 7 per cent. from the 20th day of March, with costs of suit.

On the 12th of February, 1912, the defendant filed its amended answer, setting up that it is a corporation organized under the laws of the state of Ohio as a fraternal beneficiary association for the purpose of uniting fraternally all commercial travelers, and providing, among other things, for the establishment and maintenance of an indemnity fund for the protection of its members from accidental injuries and their beneficiaries against death re-

sulting from accidental means; that it admitted that said John W. Moon, on or about April 12, 1907, became a member of the order, and that the certificate set out in the petition was issued to him, and that he continued to be a member of the order in good and regular standing until the time of his death, and that all fees, fines, costs and dues charged against him as a member of the order were paid at the time of his death; that section 5 of article VI of the order was in the terms stated in the petition; that after the death of the said John W. Moon, and by and with the consent of the plaintiff, and in accordance with the provisions of section 9 of article VI of the constitution and by-laws of the order, an autopsy was held upon the body of the deceased, and that thereafter defendant denied any and all liability to plaintiff under and by reason of the terms of the contract existing between the order and the said John W. Moon at the time of his death, and refused and still refuses to pay to the plaintiff the sum of $6,300 or any part thereof; that said association denied all the allegations of the petition not expressly admitted to be true; that the defendant, for its second and separate defense, alleged, in addition to the provision hereinbefore quoted, that it was further provided in said section 5 of article VI of the constitution and by-laws of the order that "payments authorized under the provisions of this section shall not cover or extend to any death, disability, or loss resulting from or in consequence of fighting, duelling, over-exertion; * * * nor to any death, disability or loss resulting from or in consequence of bodily infirmity or deformity * * * mental infirmity, fainting spells, fits, epilepsy or vertigo; * * * nor to any death, disability or loss which results from or in consequence of the insured having been or being to any degree under the influence of intoxicating liquors, drugs or narcotics; * * * nor to any death, disability or loss of which there is no external or visible mark of the accident on the body (the dead body not being such a mark except in cases of drowning); nor to any death, disability or loss which results from or in consequence of any disease; nor to any death, disability

or loss caused wholly or in part by bodily infirmity or disease; nor to any death, disability or loss, unless caused by bodily injury which is external, accidental, and is the proximate, sole and only cause of the death, disability or loss;" that said provision last quoted related to and was a condition upon the provisions of that part of section 5 of article VI of the constitution and by-laws which was accepted by the said Moon and became binding on him at the time he became a member of the defendant order, and is now binding upon the plaintiff and upon all persons claiming under, through or by virtue of the membership of the said John W. Moon in the defendant order; that the alleged injury and disability claimed to have been sustained by the said John W. Moon happened directly or indirectly in consequence of a disease, and was caused solely or in part by bodily infirmities or disease; and that the alleged injuries as claimed to have been sustained by the said John W. Moon, if any such were received by him, were not the proximate, sole and only cause of his death, and that his death was not caused by any external, accidental means. A reply was filed to the second defense March 12, 1912, denying each and every allegation therein contained.

At the trial George Moon testified, on behalf of the plaintiff, that he was 26 years of age and the son of the plaintiff, and the deceased, John W. Moon; that on the day of his death he met his father in a cigar store and pool hall at 1904 Cuming street in Omaha, between 2 and 3 o'clock in the afternoon; that the father bought a cigar, and together the father and the witness started for their home at 1429 North Fourteenth street, which was about four or five blocks north from the cigar store; that it was rainy; that the sidewalks were slippery and the moisture freezing; that the father was wearing a heavy ulster overcoat and was smoking a cigar; that there were steps just inside the gate; that these steps were about 8 inches high, and about 13 or 14 inches wide, made of hard cement; that a brick walk led from the steps up to the front porch about 14 or 15 feet away; that there were two wooden

steps up to the porch proper, which was 6 feet wide; that when the witness and his father reached the gate it was closed, and the witness opened it, and the father stepped into the yard first and they started up the steps together; that when the father stepped on the first step his foot slipped and he fell forward, sideways, and hit his side against the top of the stairs, at or near the corner of the step, striking his left side near the heart; that his hands were in his overcoat pockets as they started up the steps; that his father said he could not catch himself; that he had an awful hard fall; that he could not protect himself because he had his hands in his pockets; that the witness assisted his father to arise and the father walked into the house himself; that the steps were icy and slippery, the same as the rest of the walks all around. The witness testified that his father was 5 feet and 8 inches high; that he weighed 180 to 190 pounds; that after his fall he walked up the porch steps and into the house and took off his overcoat, his collar and necktie, and sat down in a chair; that the witness took off his father's shoes, and the father sat there a little bit, when the witness suggested that he had better lie down, and if he did so he might feel better, and that his father said, "I feel better now;" that his father had his hand on his side and held it there until after he got into the house and sat down; that he then put his hand on the arm chair and leaned back and talked to the witness and his mother, and after a few minutes he went into the bedroom and laid down on the bed; that the witness took his father's trousers off, and the father showed him where he had hurt himself when he fell; that he opened his shirt and exposed his side, which was swollen; that there was a red swollen spot about 3 or 4 inches across, which looked like a bruise; that no one was present at the time except the witness and his mother; that the witness got some liniment and rubbed on his father's side, and asked him if he wanted a doctor; that he replied that he felt a little better, but in a few minutes his mother called Dr. McCleneghan; that the mother also helped rub the father's side with liniment; that about 15

minutes after he was called Dr. McCleneghan came; that at that time the father was either dead or was just dying.

The father traveled for a wholesale grocery firm in Council Bluffs, and the witness saw his father every Saturday and Sunday, and had so seen him for the five or six years that the father had been traveling for this grocery firm; that the witness did not notice any shortness of breath on the part of the father when he ran the washing machine that day, or at dinner; that his father was never at home sick at any time; that the father had a good complexion; that he seemed to breathe all right; that the witness never heard his father complain or make any complaint of pain about his heart or any other part of his body; that the father was 55 years old; that he had lost no time from sickness. The witness also described the father as being conscious up to within two or three minutes before his death. The witness also testified that his father appeared to be healthy, and that his color was healthy looking. It seems to have been only 25 or 30 minutes from the time when the deceased slipped and fell until he died.

Mrs. Jacob Voegeli saw the deceased and his son come home together; they were talking and laughing; she saw them turn in toward the house; she saw Moon as he fell on the steps, and noticed that he fell on his left side; she noticed his son take him by his arm after he got up.

Fred J. Stock described the color of the deceased as good. He never noticed any blueness in Moon's appearance or any shortness of breath. This witness described a spot on the left side of the upper part of the body. It was a pinkish spot two or three inches in diameter and in the region of the third or fourth rib from the bottom on the left side. The witness bathed the body and embalmed it. He saw the heart of the deceased and saw that the left auricle was ruptured. He squeezed the heart and blood would emerge from the rupture, and there was clotted blood in the auricle where the rupture was; the clot was perhaps the size of the ordinary hickory nut.

Dr. McCleneghan testified that he took up the subject of the autopsy with Dr. Fitzgibbon, one of the doctors

who represented the insurance company. The heart was removed from the body; also, the brain, liver, kidneys, stomach, lungs, and all the organs. He also testified that he examined Moon when he was alive; that there was no murmur in the heart; that the heart beats were regular, and the heart sounds normal, and his conclusion was that the heart was normal in size, and that the lungs were in order. He was at the autopsy. He described the wall of the auricle at the point where the rupture occurred as not very much thinner than normal, but he described the heart as hypertrophied and enlarged, although he was not certain of its diseased condition, and he was certain that the kidneys were diseased. He remembered that the doctors at the autopsy concluded that the diseased condition of the heart permitted its rupture. He did not appear to be fully satisfied with the sworn statement which he had signed along with the other doctors. He said it had been prepared before he signed it.

Mrs. Harriet Marty testified that she was a daughter of the deceased and the plaintiff; that her father had been a traveling man for 13 or 14 years for Groneweg & Schoentgen, and also for Raymond Brothers & Clarke of Lincoln, and Meyer & Raapke of Omaha; that during those years he had never been confined to his room on account of sickness; that she saw her father in the morning on the day he died, and that they took lunch together at noon that day, and that she saw him walk down the street with Don (a son); that at lunch they were talking and laughing together, and that her father made no complaint of any kind and looked the same as usual.

Don Moon testified that he saw his father on the day of his death. At lunch the father talked and laughed and enjoyed the meal, as they all did; that his father did not complain of fatigue or prostration or pain or anything of that kind; that he walked with his father from Nineteenth and Cuming streets, about four blocks from the home; that he looked and walked as usual.

Frank Read testified that he had known the deceased 7½ years, and during that time had seen him every Sat-

urday, and sometimes on Sunday; that the physical appearance of the deceased during that time was "a very healthy condition;" that the witness had noticed nothing out of the ordinary in Moon's appearance during his acquaintance with him; that he was a very active man; that prior to his death, for at least 6 weeks, the witness saw him daily; that they ate their dinner together, and that during that time his health seemed good in every way, and that he made no complaint about his heart or any other part of his body.

S. H. Nichols testified that he had known the deceased some 7 or 8 years. He saw him once a week on Saturdays when he came in, and occasionally on Sunday morning. The witness saw him often. He testified: "His appearance was that of a perfectly healthy man;" that he never heard him make any complaint; that he did not see any bluish appearance in his complexion.

Dr. Goetz testified that he had studied medicine in Cincinnati, Ohio, Vienna, and Berlin, and that he was then practicing in Omaha; that in the opinion of the witness the sole cause of the death of the deceased was the rupture of the heart, or some large blood vessel, or an aneurism—some hemorrhage.

R. F. Seitz, a traveling salesman, testified that he had been out on the road with the deceased covering his territory with him 3 or 4 times a year; that he was with him for 5 or 6 years; that these trips took about 2 weeks; that Moon traveled over the Missouri Pacific, Burlington, and Rock Island, and southwest of Council Bluffs in Nebraska; that he and the witness sometimes would make as high as 5 towns in a day; that their business required them to walk considerably; that the last time they traveled together was in November or December before Moon's death; that during the 5 or 6 years of their association the witness observed the ability of the deceased to move around and do business, and his personal appearance and physical condition; that he kept going and attending to business; that he did not make complaints to the witness: that he did not complain of any pain in his heart, back,

or kidneys, or in the region of the kidneys; that the witness did not hear him complain of any pains or sickness or ailments.

Mrs. Flood testified that she lived about four blocks from the Moon residence; that the day of his death it was a rainy and sleety day, and the sidewalks were slippery; that she had occasion to go out of doors that day, and saw Mr. Moon in the morning, and again at noon; that he was walking straight, smoking a cigar, and talking and laughing with his son; she saw him in the afternoon, and he and his son were walking as she saw them the first time; that she saw the face of the deceased, and that the face looked well to her, and that the deceased did not look sick, and that he was talking.

Miss Anna Tighe testified that she saw the deceased two nights before his death; that his complexion and color at that time were the same as at any other time when she had seen him; that he moved around as any one would; that she had never heard him complain of any pains or sickness.

The plaintiff testified that she had been married to the deceased 31 years, 14 years of which time they had lived in Omaha; that the deceased was a traveling salesman, giving the names of the firms for whom he had worked; that during their married life the deceased had never lost any time by reason of sickness; that about a month before his death he had a touch of grippe; that that was the only sickness she knew about; that it only lasted for a few days; that on the morning of the day of his death he ran the washing machine and wringer for the plaintiff, and took lunch at home with the family; that his complexion was the same as it always was; that she had never heard him make any complaint of fever; that his face did not appear feverish or blue; that he made no complaint of suffering pain on that day, or previously; that there were no eruptions on the skin or shortness of breath that day or prior thereto which the plaintiff noticed; that she saw him come in at the door on his return from down town after lunch on the day of his death; that he was holding his side and

said it hurt him very badly; that he then walked across the room and removed his overcoat, hat, collar and necktie; that he put them on the sideboard, and sat down in the chair about 10 feet from the door; that he again complained that his side hurt him very badly from the fall; that he was holding his hand to his side, and the witness asked him if he would have a doctor and he refused, saying that perhaps he would soon be better; that the son, George, took his shoes off, and that the deceased walked to the bedroom and sat on the bed; that George removed his trousers; that his shirt was opened, and the witness placed her hand on his side, and he told her that was where he was hurt; that it was swollen over an area of about three inches in diameter; that she rubbed the side with some liniment; that he then said the doctor had better be called, that he was hurt badly; that his fall was worse than he thought, and that he was going to die; that he said, "My God, Libbie, I've got to die; I know I have; I can't stand the pain;" that Dr. McCleneghan came just as he died; that he died about 25 or 30 minutes from the time he entered the door.

Dr. Paul H. Ellis testified that he was a graduate from Creighton Medical College, Omaha; that for 6 or 7 years he had taught the practice of medicine in the Creighton Medical College; that he had been practicing medicine and surgery in Omaha for 15 years. In answer to a hypothetical question, claimed to cover the main facts in the case, the doctor testified, in substance, that the fall was the cause of his death.

It is in evidence that the right auricle of the heart was thin, probably in the neighborhood of one-twelfth of an inch; that the left auricle was a trifle thinner than the right; that with age the walls of the heart grow thinner, that they become so thin that the light will show through; that a diseased kidney will produce a gradual enlargement of the heart because it is an impediment in the circulation. It is also in evidence in this case that the kidneys were diseased; the disease seems to have been Bright's

disease, and it was said by witnesses that it was probably of long standing.

Dr. Fitzgibbon testified that he was present at the post mortem; that Dr. E. C. Henry and Dr. McCleneghan were there; that Dr. McCleneghan did the operating; that when the witness and Dr. Henry arrived the autopsy was already commenced by Dr. McCleneghan, who had begun to use the knife; that the heart, sections of the aorta (which distributes the blood), the kidney, sections of the liver and the spleen, sections of the femoral artery, and the brain were removed; that the femoral artery was found to be brittle, sclerosed, hard (unnaturally hard and unnaturally brittle, except as particularly applicable to the condition of the arteries in old men); that the body was noticeable for an unusual amount of fatty tissue; that the heart was enlarged; that the valves were diseased in the sense that they were shrunken and hardened; that the kidney examined was enlarged; that the spleen was enlarged; that the arteries were hardened; that the heart was about twice the normal size; that the walls were unusually thick in some places, and unusually thin in others; that there was a puncture or rupture of the left auricle; that the rupture was a tear one-half to three-fourths of an inch across; that the walls of the left auricle where the rupture occurred were translucent so that you could see the light shine through them; that the wall was from one-twelfth to one-fifteenth of an inch thick; that it was diseased and degenerated at the particular point of the rupture; that the condition was due to chronic disease; that the condition of the kidney was due to Bright's disease; that the rupture of the left auricle of the heart caused the death of the deceased; that the heart looked to the witness to be at least one and one-half times as large as a normal heart; that there were lacerations around the rupture extending from nothing to one-fourth of an inch, resembling somewhat the cracks in a broken window. This witness was acting as the surgeon of the defendant order.

Dr. W. O. Henry testified he had lived in Omaha 21 years; that he was a graduate of Bellevue College of New

York in 1879; that he took a postgraduate course in London; that he had taught orthopedic surgery and gynecology in Creighton Medical College, Omaha, for 10 years; that he measured the heart, and its circumference at the base was 11½ inches; that the circumference at the middle was 10½ inches; that it was 1½ times as large as the normal heart of a man 55 years of age and weighing 180 to 190 pounds; that the walls of the left ventricle were 1¼ inches thick; that the left auricle was dilated and ruptured, and that the walls of the left auricle were very thin; that the rupture in the left auricle was just above the junction of the auricle with the ventricle; that the edges of the wall at the point of rupture were as thin as a sheet of writing paper; that near the place of the rupture there was another very thin portion of the wall about half an inch in diameter; that the walls of the right auricle were also thin; that the aorta valves were sclerotic and unable to perform their duty in closing the orifice between the auricle and the ventricle; that the left auriculoventricular valve cusps were sclerotic; that the right cusps of the same kind were also sclerotic and incompetent; that the right auricle was dilated and the walls thin; that the right ventricle was dilated and the walls were thinner than normal; that the internal wall of the ascending portion of the aorta was roughened and sclerotic; that the aorta starts from the left ventricle, winds back over the top of the heart, and turns down posteriorally or behind the heart, distributing the blood of the entire body; that the kidney examined was affected by chronic Bright's disease, probably of long standing; that such a rupture as he found, however produced, would cause death; that rupture of the heart is produced by external or internal force; *that external force to the body may rupture a normal heart;* that it would not be possible for external violence to produce such a rupture in a normal heart as he found in the heart which he examined.

It was contended by the defendant that, if "death was occasioned by a bodily injury effected through external violence and accidental means alone, and independent of

all other causes, the plaintiff can recover and the judgment should be affirmed." But it is further contended that, if the death "was caused wholly or in part by bodily infirmity or disease, the plaintiff has no cause of action." It is contended that the autopsy showed that the deceased at the time of his death had interstitial nephritis, or Bright's disease, of long standing, and arterial sclerosis or hardening of the arteries well advanced, a chronic heart disease, which caused or contributed to cause a rupture of the heart, from which death resulted. It is in evidence that the thinning of the wall of the auricle was due to disease, and that the rupture was caused by increased pressure on the diseased heart; that the heart was diseased, being hypertrophied and enlarged; that the right auricle and the left ventricle were enlarged; that there were lacerations around the rupture. It is also in evidence that a sclerosed condition of the human body is a change which comes to *everybody with age;* a person of 50 or 55 years of age would have a *normal hardening* of the arteries in parts of the body. The evidence tends to show that the deceased was enjoying comparatively good health; that, if there was chronic disease of the heart and kidneys prior to the accident, there was no special reason to apprehend the immediate death of the assured; that at the time of the accident his foot slipped from the step, which was covered with ice and slippery; that the result was a severe fall, and the left side of the deceased, near the region of the heart, struck upon the edge of a stone step with great force, and the death was probably due to the accidental fall, which apparently caused the rupture of the left auricle of the heart.

There was a trial to the jury, and the physical condition of the deceased immediately prior to his death was necessarily one of the subjects of such investigation. The jury returned its verdict for the plaintiff, and the judgment of the district court was rendered upon it. Unless there was error in the conduct of the trial prejudicial to the defendant, we are not disposed to disturb the judgment, because it seems to be fully supported by the evidence.

It is seriously contended that the walls of the heart, the left and right auricles, were more or less thinned by the effect of advancing years, and it is argued that because of their condition the order should not be held liable. To this it may be said that, if the insurance is to be defeated because of the fact that the walls of the heart grow thinner by advancing age, or the arteries become sclerosed, or the valves of the heart act improperly, and this condition is the result of age, then the collection of insurance money may nearly always be defeated by the effect of increasing years which change the condition of the assured. We do not believe this to be the policy of the law. If it was the policy of the law it would permit the defeat of meritorious cases. It would, in effect, allow an association of this sort to conduct a business and to furnish salaries to those engaged in managing the affairs of the association, and it would give the members of such an association and their families nothing upon which there might be any reliance. It is contended by the defendant that the provisions of section 5 of article VI should not cover or extend to any death unless the injury which produces the death is external, accidental, and the proximate and only cause of the death. It is also contended by the defendant that the death was in consequence of disease, and that it was caused wholly or in part by bodily infirmity, and that the injury received was not the proximate, sole and only cause of the death. This would seem to bring us to the question whether the beneficiary of an elderly person who dies because of the injury received through an accident can recover anything if the organs of the body are affected by the age of the assured. When the membership is created it must be known that the member will grow old if he lives, and that the organs of his body, including the heart, lungs and kidneys, are likely to be affected in time, and that the assured will be unable to resist in his old age the force of an accident which he might have successfully resisted at an earlier period.

Dr. W. O. Henry, a witness for the defendant, testified that the rupture of the auricle would produce death, also

that it would not be possible for external violence to produce such a rupture in a normal heart as he found. The effect of this evidence, it is contended by the defendant, releases the company from liability, for the reason that it tends to show that the disease which thinned the wall of the auricle made the death possible, and in that way that such disease contributed to it, and that death was not "occasioned by a bodily injury effected through external violence and external means alone and independent of all other causes."

In *Caldwell v. Iowa State Traveling Men's Ass'n*, 156 Ia. 327, it was held: Where death results from erysipelas, which follows as a natural, though not as a necessary, consequence of an accidental wound upon the cheek, it may be deemed the proximate result of the wound, and not of the disease, within the requirements of an accident policy that death must result solely by accidental means. In the same case it was held: In an action on an accident insurance policy, evidence of the existence of a slight wound upon the cheek was sufficient to support a finding that the cause of the wound was violent and external. In the body of the opinion in that case it was said that the certificate provided for accident insurance only, and that the question at issue was whether the death of the assured was caused solely by external, violent, and accidental means. It is then related that the assured received a slight accidental injury on his left cheek, which caused a slight abrasion of the skin, and that it was this injury which resulted in the erysipelas. It is also said that it is undisputed that the immediate cause of the death of the assured was the erysipelas. It was contended by the defendant in that case that the evidence was wholly insufficient to sustain a finding that any accidental injury was in fact sustained by the assured, and there was a motion by the defendant for a directed verdict, which was denied. The court held that there was enough evidence to make a *prima facie* case and to go to the jury. It was said that the evidence was sufficient to sustain a finding that the

death of the assured was the proximate result of the wound or abrasion referred to.

In *Jenkins v. Hawkeye Commercial Men's Ass'n,* 147 Ia. 113, 30 L. R. A. n. s. 1181, the assured was 61 years of age. A fish bone lodged in the rectum, and, being removed therefrom by the deceased, caused an accidental wound, from which blood-poisoning ensued and death resulted. In that case *Carnes v. Iowa State Traveling Men's Ass'n,* 106 Ia. 281, 68 Am. St. Rep. 306, and *Miller v. Fidelity & Casualty Co.,* 97 Fed. 836, are cited with many other cases. In the *Jenkins* case it is said that the cases last above cited proceed on the theory that the design of the provision of the policy limiting it to "accidental operation of external means may be wholly internal." It is said that they proceed on the theory that the design of the provision is to guard the insurer against a liability upon a fraudulent claim of the insured for indemnity for bodily injuries "of which the only evidence might be the word of the person, and that, as the terms of the policy are to be construed most strongly against the insurer, the means coming from outside the body, though the injury be internal, should be regarded as external." The following authorities support the doctrine that death or injury from substances taken internally will be deemed to have been caused by *external* means: *Bayless v. Travelers Ins. Co.,* 14 Blatchf. 143, Fed. Cas., No. 1138 (taking larger dose of opium than prescribed); *Miller v. Fidelity & Casualty Co.,* 97 Fed. 836 (swallowing certain hard, pointed, and resistant substances of food); *Fidelity & Casualty Co. v. Lowenstein,* 97 Fed. 17, 46 L. R. A. 450 (unconsciously and unintentionally inhaling gas while asleep); *Healey v. Mutual Accident Ass'n,* 133 Ill. 556, 9 L. R. A. 371 (accidentally drinking poison); *Metropolitan Accident Ass'n v. Froiland,* 161 Ill. 30, 52 Am. St. Rep. 359; *Travelers Ins. Co. v. Dunlap,* 59 Ill. App. 515, affirmed in 160 Ill. 642 (taking carbolic acid); *Carnes v. Iowa State Traveling Men's Ass'n, supra,* (overdose of morphine); *American Accident Co. v. Reigart,* 94 Ky. 547, 21 L. R. A. 651 (food

passing into windpipe in attempt to swallow it); *Pickett v. Pacific Mutual Life Ins. Co.*, 144 Pa. St. 79, 13 L. R. A. 661 (inhalation of deadly gas in a well into which the assured descended).

In *French v. Fidelity & Casualty Co.*, 135 Wis. 259, the assured accidentally struck the lower part of his right leg on a small iron safe. Septic poisoning set in, and he died as a result of the injury. The policy had a clause in it "against bodily injuries sustained through external, violent, and accidental means." This clause stipulated that, "if death shall result from such injuries within 90 days, independently of all other causes, the company will pay the principal sum of $5,000." It was held that the blood-poisoning in this case, following a slight accidental abrasion of the skin, was within the provision "bodily injuries sustained through external, violent, and accidental means independently of all other causes." The company was held liable.

In *Delaney v. Modern Accident Club*, 121 Ia. 529, 63 L. R. A. 603, it was held that, where death caused by blood-poisoning received through a slight wound on the hand is the result of an accidental injury, it is within the meaning of an accident insurance policy, whether the poisoning was introduced into the wound by the instrument which inflicted it or from some other source.

For anything that appears in the evidence, the deceased might have lived many years but for the accident. We are of the opinion that the fall was the proximate cause of his death, and that the injury sustained is within the conditions of membership as set out in the certificate.

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

AFFIRMED.

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

ANGELIKE KATSURA, APPELLEE, V. GEORGE SALETOPULOS, APPELLANT.

FILED APRIL 17, 1914. No. 17,748.

Appeal: CONFLICTING EVIDENCE. The verdict of a jury will not be interfered with where it is rendered upon conflicting evidence and there is sufficient competent evidence to support the same.

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

Louis J. Piatti, for appellant.

Sullivan & Rait and *John O. Yeiser, contra.*

HAMER, J.

This action was brought in the district court for Douglas county for an alleged breach of promise to marry. There was a verdict in favor of the plaintiff, and judgment was rendered thereon. The defendant prosecutes an appeal.

It is said in the entertaining brief of counsel for the appellant that the testimony on behalf of the plaintiff is flimsy and unreliable, and *Tyler v. Hoover,* 92 Neb. 221, is cited. In that case it was said: "Where a verdict is so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside." It is contended with some ingenuity and great energy that there is nothing whatever to sustain the verdict. It may be remarked that a promise to marry need not be in writing. It generally needs favorable surroundings, a proper time of life, and the natural inducement of association. An examination of this record shows these essentials. The defendant, George Saletopulos, was born and raised in the village of Andreitsena, Greece. He had a neighbor who was the father of the little girl who grew up and became the plaintiff in this

case. Her name is Angelike Katsura. The father came to the United States and brought the plaintiff and one of her younger sisters with him. He was a bookkeeper for the government in Athens, Greece. The parties were immediate neighbors in the little village. The young man came to America, settled in Omaha, and became prosperous. News of his prosperity was carried back to Athens by Mr. Frankadonis. He was on a visit and told the plaintiff's father that the defendant was prosperous and unmarried. A correspondence began between the plaintiff's father and the defendant. The successful Greek sent to his old neighbor sufficient funds to come to America and bring the daughter with him. The father had been told that the prosperous Saletopulos had thought of Angelike as a suitable bride. The families had lived in adjoining houses and so were well acquainted. When the father and his daughter arrived Saletopulos was at once attentive. He had an automobile. This was occupied during his spare time from business by himself and the young lady. They went all about. They were constantly together. They were at the high school grounds, at the theatres, and went to all places that seemed inviting. According to the testimony of the plaintiff, the young man talked marriage to her immediately after she arrived. He talked it on the first evening and kept it up with great regularity after that for more than nine months. There could not be anything more appropriate under the circumstances. The father had left part of his family behind him because unable to bring all. He had come to the new country because of the prospect of a good husband for the eldest daughter who had arrived at marriageable age. His daughter was the childhood friend of the defendant. He was the father of six daughters. He was naturally solicitous to provide for his children. He had reared and educated these six daughters and he was to do the best for them that he could.

Having won the daughter, the defendant seems to have lingered on the edge of matrimony. He put the girl off from month to month. It was a case of hope deferred. When the defendant was about to start on a return visit to

his native land the plaintiff sued him. He has denied the promise to marry, but his conduct seems to fully support it. The plaintiff's testimony is corroborated by the admitted conduct of the defendant. He does not deny his association with the plaintiff, nor the things which tend to show that the plaintiff's testimony is to be believed. He denies a few things, but they are isolated facts. The companionship, the rides in the automobile, the visit to theatres, and all the things which tend to establish a devoted courtship are undenied. The plaintiff testified that he said to her little sister Georgia, in her presence, "He thought we was going to get married, he say we will take you with him and your papa, too." From this it appears that he had gone so far as to provide how they were to live in the future. He denies it, but he does it in a feeble-hearted sort of way, and Georgia testified that he promised to marry her sister. She says in her poor English: "He get my sister to marry." From a careful reading of the evidence we are unable to see how the jury could have reached a different conclusion than that which it did reach.

It is objected that evidence was admitted tending to show that the plaintiff had told her father and sister and had written friends in Greece of her betrothal to the defendant. This sort of testimony is competent because it tends to establish an element of damages, the humiliation of the plaintiff and injury to her feelings because she had been discarded. *Liebrandt v. Sorg,* 133 Cal. 571; *Reed v. Clark,* 47 Cal. 194; *King v. Kersey,* 2 Ind. 402. In *Liebrandt v. Sorg,* a witness, under objection by the defendant, was permitted to answer the question as to whether Mrs. Liebrandt had said that she was going to marry Mr. Sorg. The court said it is elementary law that evidence of this character is inadmissible as tending to prove the agreement to marry. But this character of evidence is admissible as tending to increase plaintiff's damages occasioned by a breach of the contract, and it was upon this theory that it was offered and admitted before the jury. In that case it was said: "This character of evidence is

always admitted after a *prima facie* showing of the existence of the agreement to marry and a breach thereof." In *Reed v. Clark,* it was said: "It cannot be doubted that knowledge of the fact of a marriage engagement by the intimate friends and relatives of a party to the contract, with whom she has frequent and familiar intercourse, would increase in a considerable degree the annoyance and mental suffering occasioned by a sudden discontinuance of the relationship, * * * but the announcement of the engagement to a few intimate friends may be neither improper nor unbecoming, and certainly requires no express authorization. We think the jury should be permitted to consider this, with the other circumstances of the case, in estimating the injury occasioned to the plaintiff by breach of the contract." In *King v. Kersey* the court said, as to the declarations, that there was doubt, but that the judges had "concluded that said declarations, made while she was receiving the visits of the defendant, and before any estrangement had commenced, to members of her family, were admissible, for the purpose above mentioned, as part of the *res gestae,* explanatory of her conduct and intention in receiving those visits, whether with a view to marriage or from mere politeness, and thus tending to show a promise on her part of marriage."

Taken as a whole, the evidence on behalf of the plaintiff is most convincing. Giving to the defendant's denials the greatest consideration to which they are entitled, it must, in any event, be said that there is a conflict of evidence. It was for the jury to determine that conflict. It has done so. We find in the record all that is necessary to sustain the verdict.

The judgment of the district court is

AFFIRMED.

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

LIZZIE L. WRIGHT ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.

FILED APRIL 18, 1914. No. 17,189.

Opinion on motion for rehearing of case reported in 94 Neb. 317. *Rehearing denied, and former opinion modified.*

PER CURIAM. After the reargument in this case, we have carefully reexamined the record and are satisfied with the following language in the former opinion (94 Neb. 317) for the reasons there given: "A rule that a switch engine may run through the yards, on the main line, not under control, but at a high rate of speed, when its crew all know that there is an 'extra' on the main line passing through the yards, would be a barbarous rule; and, if the rules of a railway company permit such a practice, it should be held liable for injuries to employees on the extra who are injured while such extra is being operated in compliance with the rules of the company, viz., under full control. If the reasonableness of a rule is for the court, and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable. Submitting the question to the jury in such a case could not, therefore, prejudice defendant." The decedent was running his engine under full control, within the meaning of the rule of the company. There was no express rule as to the speed allowed to the switch engine. Of course, the law requires that such engine should not be run at an unreasonable rate of speed under the circumstances. The engineer of the switch engine must have had a clear view of the approaching engine for at least 420 feet, and it was run at least 370 feet of this distance before the collision occurred. It could have been stopped within a distance of 60 feet unless running at a greater speed than 20 miles an hour, and, knowing, as the crew of the switch engine did, that No. 1468 was in the yards, to run at a greater speed than 20 miles an hour in such a locality and under such

circumstances was in itself negligence. In such a case the court might properly have told the jury that any rule of the company which permitted such action was unreasonable, and the giving of an erroneous instruction as to the reasonableness of the rules would be without prejudice to the defendant. There is, however, no doubt that the instruction given by the court was erroneous. The jury were told: "In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries"—thus submitting to the jury to determine the reasonableness of the rules of the company as a whole so far as they were or were not sufficient to protect the employees. Different juries might not take the same view of a system of rules for the running of trains and engines in a complicated railroad yard, and it is beyond their power to determine what those rules should be. When the question of negligence depends upon the reasonable sufficiency of a certain rule, the court should determine the question, if the facts are not in dispute. If the facts upon which the reasonableness of the rule depends are in substantial conflict, the court should tell the jury plainly under what conditions the rule would be reasonable and allow the jury to determine the facts. In such cases the reasonableness of the particular rule becomes a mixed question of law and fact, the law to be determined by the court and the facts by the jury. To this extent our former opinion is modified, and, as there is no prejudicial error in the verdict for the reasons stated above, and in our former opinion, the motion for rehearing is overruled and our former judgment adhered to.

REHEARING DENIED.

HAMER, J., dissenting.

1. I feel that I am in duty bound to dissent from the majority opinion. We cannot too zealously protect the rights of litigants. As I look upon it, the errors of the

trial court which contributed to the bringing about of the verdict and the judgment are most manifest. The majority opinion concedes the following instruction to be wrong, but undertakes to say that it worked no injury to the defendant. It is claimed that it was not prejudicial. The jury were told by it: "In this connection you are further instructed to determine from all the evidence in this case whether the defendant's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees at the time plaintiff's intestate sustained his injuries." It is argued that the foregoing was erroneous, and it is said that the reasonableness of the rules of the company as a whole should be determined by the court, and not by the jury, and it is claimed that for this reason the instruction could have done no harm. To this I say that, if the particular instruction conduced to the bringing about of a wrong verdict and a wrong judgment, then this court should undo what the lower court did. That is the beginning and the end of it. By the instruction quoted the jury were turned loose to determine whether the railroad company should not have made better rules for the protection of its employees. Of course, in such a case the jury have not been instructed along the lines of conducting a railway. They had no special instruction on the subject. Neither are they lawyers. They are wholly disqualified from the standpoint of practical mechanics and legal knowledge. But turned loose with the invitation to range at large in the field of speculation in determining whether the rules adopted might not have contributed to bringing about the result, they would be sure to condemn the railway company. When they condemned the railway company they did it by the rendition of a verdict which was reached because of the error of the trial court. It is said in the majority opinion that, if the facts upon which the reasonableness of the rule depends are in substantial conflict, then the court should tell the jury under what conditions the rule would be reasonable and then allow the jury to de-

termine the facts. It is further said that the reasonableness of the particular rule becomes a mixed question of law and fact, the law to be determined by the court and the facts by the jury, and that to this extent the former opinion of this court is modified. But that reasoning has nothing to do with the question as to whether the instruction conduced to the bringing about of this verdict. It perhaps determines something for the future, but it determines nothing in the present. The instruction of the lower court sent the jury on a wild goose chase after the construction of rules for the protection of employees, when it should have directed their attention to the practical question of whether the switch engine was run too fast. If that switch engine was run too fast and thereby caused the death of the plaintiff's decedent the railway company is to be blamed for its negligence. The jury were not told that. Instead, they were told "to look about and find something." Of course, they found it. Whatever the rule, it would not justify the railway company in running its switch engine too fast. It could make no rule to justify that and the actual thing to be considered by the jury was whether the switch engine did or did not run too fast and whether because of that fact it did not bring about the collision and occasion the death of the deceased. The railway company could make no rule which would relieve the crew of the switch engine from exercising ordinary care to avoid a collision.

2. The defendant requested the giving of instruction No. 13. As requested it contained the following: "And if you find from the evidence that at or immediately before the accident, when the engines first came in sight of each other, the said Otto O. Wright was running his engine at a rate of speed so as not to be under full control, and that this was the proximate cause of the injury, then you are instructed that plaintiffs cannot recover." This involved the idea that, if the decedent was himself negligent and by his negligence contributed to his death, the plaintiffs may not recover. This ought to be the law. I believe it to be the law, and that the trial court should have ob-

served it, and should have properly instructed the jury on that question.

3. A careful reading of the evidence may justify the conclusion that the deceased was not running his engine at an excessive rate of speed immediately before the accident occurred, but such examination as I have given to the testimony quoted in the briefs has created the impression in my mind that he was running his engine at the rate of ten miles an hour, or thereabouts, and that rate seems too fast to run in a cut over a curve where the view was obstructed, as it was in this case. I think that the deceased was negligent in maintaining a greater rate of speed than the conditions permitted and that he thereby contributed to the causes which produced his death. It is not enough that the case was submitted to a jury. There should be evidence sufficient to bear examination by an impartial, intelligent and discriminating mind, which should find therein facts and reason sufficient to sustain the verdict. If the deceased by his conduct brought about the danger which caused his destruction, the railway company ought not to be compelled to pay.

4. But whatever may be the finding concerning the rate of speed, it is apparent from an examination of the testimony of the witnesses that the deceased disregarded the rule which required him to run his engine "under full control." John Bell, a locomotive engineer for 13 years, had run from Fairbury to Council Bluffs. He testified: "Q. In passing around and over that curve, Mr. Bell, what is the highest amount of speed that could be obtained and be under control?" He answered: "Not over five miles an hour." Engineer Hall testified: "The maximum speed at which an engine could run around and through that curve at Holdrege street, *being under full control,* would not be over four or five miles an hour at *any point* in that curve." W. B. Oakford, the road foreman of equipment, who had had 18 or 19 years experience as an engineer, testified: "The man who is supposed to run 'under full control' would have to go in that cut and around that curve at the rate of from three to five

miles an hour." He is positive that the rate of speed should not exceed five miles an hour in any event. B. J. Shamp testified: "I should not think a person would be absolutely *under full control* going over five miles an hour, because you cannot see far enough around that cut to be able to stop, to be going at a greater speed." J. J. Breheny testified that he was familiar with the term "under full control;" that the maximum rate of speed "in running around this curve" in order to keep within that definition and in order to keep within control should not exceed five miles an hour, *the distance you can see any obstruction on the track to be clear "is not a great deal, and I would want to stop very quickly."* J. E. Odey, a locomotive engineer for 25 years, and who was familiar with the place, testified that he was familiar with the term "under full control," and that "running *under full control* through the cut and round the curve at Holdrege street would be from three to five miles an hour going east." John T. McLean testified that to exceed five miles an hour around this Holdrege street cut and curve would *not* be going "under full control."

The engineer who was killed apparently took his life in his hands when he went in that cut so fast that he would be unable to stop within the distance that he could see. He was not, according to the testimony of these witnesses, going "under full control." If he went to his death because of his fearless recklessness, the railway company ought not to pay.

5. The deceased operated an "extra." It was an inferior train expected to run "under full control." It was to find the main track occupied. It was to be able to stop *within the distance that the vision of the engineer showed the track to be clear.* That is what is meant by "under full control." The trial court submitted to the jury whether the company's rules with respect to the operation and control of its engines and trains, including its switch engines in the Lincoln yards, were reasonably sufficient for the protection of its employees. The question was not tried like any other issue of fact. The rules being proved,

the plaintiff proceeded to contend that they were insufficient, and the judge licensed the jury to go out on an exploring expedition of its own. The jury were permitted to come to any conclusion they liked and without any direction of any kind by the court. The contention in the majority opinion that the position of the trial court was sound is said to be supported by *Southern R. Co. v. Craig*, 113 Fed. 76. If I understand that case, it did not submit to the jury whether the rules of the defendant company were sufficient. The case simply holds that it was for the jury to say whether the switch engine exercised ordinary care in avoiding a collision with the incoming train. It may be said that it would always be the duty of the engineer of the switch engine or any other engine to exercise ordinary care to avoid a collision. I have made an examination of some of the other cases cited in the majority opinion. I am unable to agree with my associates.

6. In the original majority opinion there is the following: "'Q. Have you any rule applying to switch engines about running under control? A. No, sir.' It will be seen, therefore, that in the defendant's yard the switch engine was a free-lance as against all except first-class trains." The opinion emphasizes the fact that under the rules the switch engine did not have to run "under full control," while the engine attached to the train was required to do so. The opinion seems to regard this as restrictive and irksome. It is further said in the original majority opinion: "If the reasonableness of a rule is for the court, and not for the jury, the court should in such a case instruct the jury that such a rule is unreasonable. Submitting the question to the jury in such a case could not, therefore, prejudice defendant." The contention is that neglect of the court to discharge its duty and at the same time violating and neglecting a duty that is incumbent upon it, and requesting the jury to do something it has no authority to do, is without prejudice. The contention is to the effect that a wrong conception of its duty by the court and a wrong exercise of that duty hurts nobody. The original majority opinion seems to the writer

to be clearly wrong in that contention. It is to the effect that the court may be blind and the jury may be blind, and yet nobody is hurt because no one can see the wrongful thing that is done.

THOMAS J. DOMAN ET AL., APPELLANTS, V. WILLIAM T. FENTON, SHERIFF, ET AL., APPELLEES.

FILED MAY 4, 1914. No. 17,730.

1. **Homestead:** TENANCY. A homestead may be claimed in lands held in joint tenancy or tenancy in common.
2. ———: EQUITABLE TITLE. The ownership of an occupying claimant need not be of an estate in fee simple, but the owner of an equitable title, occupying under a contract of purchase, may claim the homestead exemption under the statute.
3. ———: ABANDONMENT: BURDEN OF PROOF. "It appearing from the evidence that the premises had been occupied by the debtor as a homestead, the burden is upon the execution creditor to show both removal therefrom and intentional abandonment." *Union Stock Yards Nat. Bank v. Smout*, 62 Neb. 227.

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

Reavis & Reavis, for appellants.

John Wiltse, contra.

REESE, C. J.

This is an action to enjoin the sheriff of Richardson county from selling, under execution, lots 7 and 8, in block 130, in the city of Falls City. It is alleged in the petition that plaintiffs are the legal owners of one-fourth interest in the lots, two-fourths being owned by certain minor children, relatives of Mrs. Doman, and who have constituted a part of her family since the decease of Mrs. Doman's sister-in-law, the mother of said children, some five years before the commencement of the suit; that the other one-

fourth interest is held by a brother of the two minor children, and who had entered into an agreement with plaintiff, who was then Mrs. McPherson, that if she would take into her family and care for the minor children of his deceased mother he would transfer his interest in the property to her; that before her marriage to her coplaintiff, Thomas J. Doman, she, with the minor children referred to, had occupied the house and premises as her and their homestead, and upon her marriage to Doman, while still holding her homestead right to said property, they had temporarily occupied other and more convenient property, renting the homestead to tenants, but with the intention to return, improve and occupy the property as soon as vacated by their tenants; that the legal title to Mrs. Doman's interest has since been conveyed by her to her husband Thomas J. Doman, but her homestead right still exists; that the homestead is of less value than $2,000; that Mary E. Kentner obtained a judgment against plaintiff Mrs. Doman, has caused execution to be issued thereon and placed in the hands of defendant Fenton, sheriff, who threatens to levy the same upon said property and sell it; that the judgment is not a lien thereon, has never been, the property being exempt as the homestead of plaintiffs. The prayer is for an injunction restraining defendant from proceeding to make the levy and sale, and for general relief.

Mary E. Kentner, the judgment plaintiff, was substituted as defendant, and filed an answer to the petition, in which it is alleged that on the 14th day of September, 1911, she recovered a judgment against Isabel McPherson (now Isabel Doman, plaintiff) before a justice of the peace for the sum of $100 and $2.50 costs; that a transcript was taken of said judgment and filed in the office of the clerk of the district court for said county on the 16th day of September, 1911; that Isabel McPherson, now Doman, first acquired title to the one-fourth interest in said property by a deed on the 12th day of September, 1910, which was filed for record October 4, 1910; that the deed from Isabel Doman to Thomas J. Doman, her hus-

band, was executed on the 26th day of October, 1911; that the other interests in the property are as stated in the petition. The occupancy of the premises as a homestead by plaintiffs is denied, and it is alleged that the judgment is a valid lien upon the premises, and there is no equity in plaintiffs' petition. There is a general denial of all other averments in the petition. Prayer for dissolution of the restraining order and that plaintiffs' action be dismissed. The reply is a general denial. The cause was tried to the court, resulting in a general finding in favor of defendant and a dismissal of the suit. Plaintiffs appeal.

It is insisted that the suit was prematurely brought, as it was not alleged that any act had been committed by the sheriff or defendant Kentner in the way of seizing or levying upon the property. Strictly speaking, this is perhaps true, especially since the general denial should, we think, in strictness, be held to deny that defendant intended to levy upon the property, or that such a levy was threatened, but, as we have often held, this court will not depart from the theories and issues actually adopted and tried by the parties; and, instead of following the technical issues as presented by the pleadings, we will treat the case on its merits as though the levy was in reality made. It must be conceded that the cause was not as carefully and thoroughly tried as is usually done by the bar of Richardson county, and some features of the case were not brought out by the evidence as fully as they should have been.

It appears to be sufficiently proved that some five years before the trial the sister-in-law of Mrs. McPherson, now Mrs. Doman, died leaving minor children. Those children had before that time been cared for and maintained by Mrs. McPherson, but after the decease of their mother it was agreed by their older brother, who was of lawful age, and Mrs. McPherson that she should take the children into her family, care for and maintain them, and for which the brother, who owned one-fourth interest in the property, was to convey his interest to her upon such terms as might be agreed upon. Under this arrangement she took possession of the property with the minor children as one

family and occupied it as a home. By this arrangement and its performance on her part, she had an equity in the property. If there was at that time an absolute agreement with the older brother to convey his interest in the property to her, with which she complied and took possession, this would constitute an equity in her favor. It further appears that soon after another brother who owned a one-fourth interest in the property, having become of mature age, conveyed his interest to Mrs. McPherson, who subsequently conveyed it to her present husband, Mr. Doman. We think there was no time following the death of the mother of those minor children and Mrs. McPherson's agreement with the older brother, who was not a minor, the assumption of her obligation to the minors on her part, and who then owned three-fourths of the title, the two minors yet owning one-half interest, when considered in connection with her absolute possession, occupation and control of the property, she did not have a sufficient equity to support a homestead right.

In *Giles v. Miller,* 36 Neb. 346, we held that "an undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest and his family as a home, is sufficient to support a homestead exemption." It is provided in section 3090, Rev. St. 1913 (Comp. St. 1911, ch. 36, sec. 15) that the family may consist of "the minor child of a deceased brother or sister." As the children maintained by Mrs. McPherson were the children of her deceased sister-in-law, they fall within the protection of the statute, and, with Mrs. McPherson, constituted the family.

Proof of abandonment of the homestead is wanting. It is shown by the testimony of Mrs. Doman, formerly Mrs. McPherson, that when she left the home on the lots in dispute, it was with the fixed purpose and determination to return, and with no intention of a permanent abandonment of her homestead right. A portion of her household furniture was left and still remains in the house, which is temporarily occupied by a tenant, the rent being paid

to her or to her present husband, and applied to the clothing and necessities of the children. The fact that the family leased and removed to a more commodious house, the lease being from month to month, is not in any sense conclusively contradictory of plaintiffs' testimony asserting a continued purpose to return and improve the property as soon as the outstanding interests could be secured. So long as there was no intention to abandon the homestead, the temporary absence could not affect the right. The occupancy having been shown, the burden is upon the execution creditor to show both removal therefrom and intentional abandonment. *Union Stock Yards Nat. Bank v. Smout*, 62 Neb. 227.

The decree of the district court is reversed and the cause remanded to that court, with directions to reinstate the restraining order and grant a perpetual injunction against the defendants as prayed for in the petition.

REVERSED.

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

DUNCAN D. TURNER, APPELLANT, V. COLUMBIA FIRE INSURANCE COMPANY, APPELLEE.

FILED MAY 4, 1914. No. 17,732.

Judgment: RES JUDICATA. "A 'right, question or fact' distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and this even though the second suit is for a different cause of action." *State v. Broatch*, 68 Neb. 687.

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

Harry Fischer, Mulfinger & Yates and *J. G. MacVeigh*, for appellant.

Stout, Rose & Wells, contra.

REESE, C. J.

This action was commenced in the district court for Douglas county for malicious prosecution. It is alleged in the petition that defendant is a corporation organized under the laws of this state; that on the 2d day of June, 1908, the defendant by and through its agents and attorneys, maliciously intending to injure plaintiff, appeared before the grand jury of Douglas county, and, without probable cause therefor, and by false testimony, maliciously caused and procured plaintiff to be indicted by said grand jury for the crime of arson; that by reason of said indictment a capias was issued, plaintiff was arrested, cast in jail, and there held and deprived of his liberty for some five hours, when he procured bail and was released therefrom; that defendant by its attorneys, without probable cause therefor, continued its malicous prosecution throughout the trial, but upon the final conclusion thereof plaintiff was acquitted of said charge and discharged therefrom, and the prosecution was thereupon finally ended and terminated; that by reason of said malicious prosecution he suffered damages in the sum of $50,000, for which judgment is demanded.

Defendant answered by general denial, and as a second defense alleged as defensive matter that on or about the 27th day of July, 1908, plaintiff commenced his action against defendant in the district court for said county by which he sought to recover judgment for the sum of $2,500, and interest from April 10, 1908, upon two certain policies of insurance theretofore issued to plaintiff by defendant, insuring him against loss or damage by fire of certain personal property alleged to have been contained in a certain building, described in the answer; that in the petition filed by plaintiff it was alleged that the insured property was on the 2d day of April, 1908, wholly destroyed by fire which did not originate by or through any wrongful act on the part of plaintiff; that defendant appeared in said suit, filed its answer, alleging and charging that the

fire by which the insured property was destroyed originated and was caused by the wilful act and procurement of plaintiff, setting out the specific acts alleged to have been committed by plaintiff, by the placing of inflammable and explosive material in and near the property and causing the same to be ignited, with the fraudulent intent of making a false claim against defendant for the alleged loss by fire; that plaintiff filed his reply to said answer, denying the allegations thereof, and the issue thus formed was duly tried by the said district court and a jury, a general verdict having been returned in favor of defendant. A transcript of the proceedings in said cause was attached to and made a part of the answer. It is further alleged that judgment was rendered upon said verdict in favor of defendant and against plaintiff, and which said judgment is final, unappealed from, remains in full force and effect, and is a final adjudication and determination of the matter involved in the action, and plaintiff is estopped to assert or maintain that he did not wilfully cause said property to be destroyed.

To this answer plaintiff filed his reply, admitting that plaintiff commenced his action against defendant for the sum of $2,500, and interest, upon two policies of insurance, as alleged, and that defendant made answer thereto, setting up as one of its defenses that the loss occurred and the fire originated by the wilful act and procurement of plaintiff, to which plaintiff filed a reply, denying the allegation of said answer. It is further admitted that in the trial of said cause the jury returned a general verdict in favor of defendant and against plaintiff, and upon which the district court rendered judgment against plaintiff and in favor of defendant. Plaintiff denies that he ever at any time set fire to the building or to the goods insured therein, as described in the answer of defendant and in its answer filed in the suit upon the policies, and denies that the judgment rendered in the suit upon the policies is a final adjudication and bar to this action, or that plaintiff is estopped thereby from claiming and maintaining the allegations of his amended petition herein.

Upon the filing of the reply, defendant presented its motion for judgment in its favor upon the pleadings upon two grounds: "(1) On the face of the pleadings defendant is entitled to a final judgment in its favor. (2) The second defense in defendant's answer sets forth a meritorious defense to plaintiff's cause of action, and the facts therein alleged, and the proceedings had in the suit therein referred to, a certified copy whereof is attached thereto and made a part thereof, are not controverted or denied in the reply, and must therefore be taken as true without proof." The motion was sustained, the court finding "that said defendant is entitled to a judgment upon the statements in the pleadings." Judgment was accordingly entered dismissing the case, to which plaintiff excepted, and from the judgment he appeals.

As will be observed, the only question presented is whether the suit and judgment in the original action upon the two policies of insurance constitutes a bar to this action. In order to an action for the malicious prosecution of a criminal case, it must be shown that the criminal prosecution was both malicious and without probable cause. *Hagelund v. Murphy,* 54 Neb. 545. It clearly appears from the transcript of the record and trial of the suit instituted by plaintiff upon the two policies of insurance that the only question at issue and tried was whether plaintiff had unlawfully caused and procured the insured property to be destroyed by fire. By the verdict and judgment in favor of defendant, it was judicially and finally determined as between the parties to that suit and this suit that he was guilty of the act charged in the answer. This being true, we are unable to see how it can be held that that judgment unappealed from, whether right or wrong, did not present probable cause for the prosecution. The fact that plaintiff was acquitted upon the trial of the criminal charge, while more or less persuasive of his innocence, does not counteract or impair the judgment as between the parties, as defendant was not a party of record in that prosecution. It was therefore the duty of the trial court, under the rule stated in *Bechel v. Pacific*

Express Co., 65 Neb. 826, to dispose of the case without going through the form of an unnecessary jury trial. Ordinarily, where an issue is formed upon the question of former adjudication, the record is only *prima facie* proof of the fact alleged to have been adjudicated, and the question is therefore open to trial. *Cobbey v. State Journal Co.*, 77 Neb. 626; *Figg v. Hanger*, 4 Neb. (Unof.) 792. But in this case plaintiff's reply to the answer of defendant admits the truth of the allegations of the answer as to the trial, verdict and judgment in the previous action, and left nothing in that behalf to try. It is true that the causes of action presented by the pleadings are not identical, but the rule seems to be well settled that this is not necessary if the question presented in a former suit between the same parties is the same as in the one under consideration. If the former case goes to final judgment and the issue is thus settled, it will be binding upon the parties whether the cause of action (the subject matter) is the same or not. Chand, Law of Res Judicata, sec. 28 *et seq.*; 1 Van Fleet, Former Adjudication, secs. 216-228; *State v. Broatch*, 68 Neb. 687.

As it was conclusively shown that the question of fact presented in the two trials is the same, it follows that the judgment of the district court in dismissing the action will have to be and is

AFFIRMED.

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

HERMAN BROTHERS COMPANY, APPELLANT, V. CONRAD WACKER, APPELLEE.

FILED MAY 4, 1914. No. 17,719.

1. **Statute of Frauds:** MEMORANDUM. The written memorandum required by section 2631, Rev. St. 1913 (statute of frauds) may be made out by connecting two or more papers, such as written correspondence between the parties.

2. ———: ———: SIGNING. It is not essential that each paper be signed by the party sought to be charged, provided those not signed are referred to with reasonable certainty in those which are signed. But the relation to each other of the documents relied on to satisfy the requirement of the statute must appear on their face, and cannot be established by parol evidence. *Fowler Elevator Co. v. Cottrell*, 38 Neb. 512.

3. ———: ———. An unsigned order for a bill of goods was given to a traveling salesman, a copy of the order was handed to the merchant, and the original sent to the wholesaler. The merchant afterwards wrote a letter to the wholesaler requesting him to cancel certain items contained in the order as described therein. This request was acceded to, and after some other letters had been written in relation to the order the merchant, by letter, insisted on a cancelation of the whole order. *Held*, That there was a sufficient acknowledgment in writing of the making of the order to take it out of the statute of frauds, and the jury should have been instructed to that effect.

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

Mockett & Peterson, for appellant.

C. E. Eldred and *J. W. Cole, contra.*

BARNES, J.

Action to recover profits on an alleged order for the sale of certain goods and merchandise by the plaintiff to the defendant. A trial in the district court for Hitchcock county resulted in a verdict for the defendant. A motion for a new trial was overruled, judgment was rendered on the verdict, and the plaintiff has appealed.

It appears that the plaintiff, under the name of Herman Bros. Co., was engaged in the wholesale business in the city of Lincoln, Nebraska, and on or about April 22, 1907, the defendant, Conrad Wacker, was a retail merchant in the town of Culbertson, in this state; that, on the forenoon of the day above mentioned, a traveling salesman of the plaintiff called on the defendant and took his order for certain goods to be delivered at once, which were to be paid for in cash when delivered; that the goods were shipped by plaintiff to defendant, were received by him,

were paid for, and about this there is no dispute. On the afternoon of the same day the plaintiff's salesman returned to the defendant's store and secured an order for certain fall goods, to be shipped in July, and paid for on or about November 1, 1907. This order was entered by the salesman in what is called a traveling-man's order book, and a copy of it was handed to the defendant. It appears that on April 24, 1907, the plaintiff wrote defendant a post card as follows: "Your order of * * * to be shipped later, is received and will have our prompt and careful attention. With thanks, Herman Bros. Co."

On May 4, 1907, defendant wrote plaintiff the following letter:

"Culbertson, Neb., May 4, 1907.

Herman Bros. Co., Lincoln. Gents: Please cancel the pants ordered for to be shipped in July. In looking over my stock I find that I have a good supply on hand. The Nos. are as follows: 9882 1 doz. $36. 9800 1 doz. $36. 9871 1 doz. $30. 9874 1 doz. $30—$132. C. Wacker."

In reply to this letter plaintiff wrote defendant as follows:

"Mr. C. Wacker, Culbertson, Neb. Dear Sir: We are just in receipt of your letter of May 4th, asking us to cancel four dozen of extra pants off of your order given to our Mr. Robinson and we are complying with your request and hope this will be satisfactory. Yours truly, Herman Bros. Co., per. C. H."

On May 8, 1907, defendant wrote plaintiff as follows:

"Herman Bros. Co., Lincoln, Neb. Gents: Yours at hand this morning and note what you say regarding to shortage of one boy's suit. The way your letter reads you people never make any errors. Now I tried to do business with you people once before. But it seems like we can't manage to get along. So we will quit right now. You may countermand my entire and all disputes will be ended. I don't want to do business in a scrapping way. Yours truly, C. Wacker."

On May 14, 1907, defendant wrote plaintiff as follows:

"Herman Bros. Co., Lincoln, Neb. Gents: Yours at hand and note what you say regarding cancelation of order. I will not reconsider the matter and I want the order canceled. Yours resp., C. Wacker."

On May 18, 1907, defendant wrote plaintiff again as follows:

"Herman Bros. Co., Lincoln, Neb. Referring to your letter and note what you say in regards to cancelation of my order. Now I want you to understand that I mean what I say. I will positively not accept the goods if you ship them and if you are in the market for trouble I suppose you can find it. According to your letter you folks never make any errors. Yours truly, C. Wacker."

In reply to this letter plaintiff wrote defendant as follows:

"Mr. C. Wacker, Culbertson, Neb. Dear Sir: We are in receipt of your letter of May 18th in regard to the cancelation of your order. We see that you refuse to do anything at all in the way of making a settlement, so we hereby withdraw all propositions we have made and notify you hereby when the proper time comes we will sue you for the profits that we would have made on the balance of your order that was to be shipped later *excepting on those pants on which we accepted your cancelation.* But we will hold you for the profits on all the balance. Yours respectfully, Herman Bros. Co., per C. H."

We have thus quoted all of the correspondence which seems to bear in any manner upon the present controversy. As a defense to plaintiff's action, defendant pleaded the statute of frauds, which reads as follows: "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless, first, a note or memorandum of such contract be made in writing and be subscribed by the party to be charged thereby; or, second, unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action; or, third, unless the buyer shall pay some part of the purchase money." Rev. St. 1913, sec. 2631.

It is clear that the order in question was not signed by the defendant or any one for him. But it is contended that the order, which was on a sheet separate from the cash order above mentioned, was a part of the same order; that the defendant received and accepted the goods mentioned in the two sheets of the order taken in the forenoon, and his acceptance took that contract out of the statute of frauds. It appears, however, that the goods described in sheets 1 and 2 were to be delivered at once, and to be paid for in cash on delivery, and that order was taken by the plaintiff's traveling salesman in the forenoon; that in the afternoon he returned to the defendant's store and solicited the order in question, which was for fall goods, to be delivered in July, and paid for the first of the following November. It seems clear, therefore, that the order in question was separate and distinct from that contained on sheets 1 and 2; that it was different as to the time of delivery and the terms of payment.

Plaintiff contends that by the letters above quoted defendant acknowledged the making of the order in question, sufficiently identified it, and thereby took it out of the operation of the statute. In *Fowler Elevator Co. v. Cottrell,* 38 Neb. 512, it was held: "The written memorandum required by section 9 of our statute of frauds (Comp. St. 1893, ch. 32) may be made out by connecting two or more separate papers, such as the written correspondence between the parties. It is not essential in such case that each paper be signed by the party sought to be charged, provided those not thus signed are referred to with reasonable certainty in those which are signed. But the relation to each other of the documents relied upon to satisfy the requirement of the statute must appear on their face, and cannot be established by parol evidence." That case is an instructive one, and defendant contends that it is decisive of the question involved in this appeal, and resolves it in his favor. The facts in this case, however, are not the same as those set forth in the record in *Fowler Elevator Co. v. Cottrell, supra.* In that case the defendant in no manner acknowledged that he entered

into a contract of any kind with the plaintiff. There was nothing in the correspondence which identified any kind of an agreement; and, while that case is correctly decided, it has no direct application to the facts in the case at bar. Here the defendant wrote plaintiff a letter in which he, in effect, admitted making the order, and asked the plaintiff to cancel certain items contained therein. A letter was sent to him by the plaintiff acceding to his request, and in several of the letters which defendant wrote to plaintiff he spoke of the order in question, and, in effect, admitted that he gave it to the plaintiff's salesman, and finally he insisted on its cancelation.

As we view the record, there was a sufficient acknowledgment in writing of the making of the order to take it out of the operation of the statute. Defendant has at no time denied that he gave the order. There is no dispute as to that fact, and the court should have instructed the jury that defendant, by his letters, had acknowledged the making of the order, in writing, and therefore it was not within the statute of frauds.

For failing and refusing to so instruct the jury, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED.

H. F. CADY LUMBER COMPANY, APPELLANT, V. THOMAS H. MILES ET AL., APPELLEES.

FILED MAY 4, 1914. No. 17,761.

1. **Mechanics' Liens:** MORTGAGES: PRIORITIES. A mechanic's lien for material sold and delivered to an owner for the erection of a dwelling is superior to, and takes precedence over, the lien of a mortgage executed and recorded subsequent to the date when the first part of the material was delivered at the premises where the dwelling was being constructed.
2. ———: ———: ———. The fact that the first load of material was used in the construction of a shack temporarily occupied by the

owner, which was taken down as the work progressed, and was used in completing the dwelling, as was agreed upon between the owner and the materialman, will not affect the question of the priority of the lien over that of a mortgage subsequently executed and recorded.

3. ———: ———: ———. A mortgagee who takes a mortgage on the premises after having notice that a materialman has commenced to furnish the lumber for the erection of the dwelling is not in a position to insist that the lien of his mortgage is superior to that of the materialman.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed as modified.*

De Bord, Fradenburg & Van Orsdel, for appellant.

J. P. Palmer, Crane & Boucher, Parish & Martin, T. E. Brady and *Alvin F. Johnson, contra.*

BARNES, J.

H. F. Cady Lumber Company, plaintiff, filed its petition in the district court for Douglas county to foreclose a mechanic's lien upon property belonging to Thomas H. Miles and Mary Miles, his wife. The lumber and building material furnished by the plaintiff to the Mileses amounted to $714.45, upon which there remained unpaid $424.45. It was alleged that the first item delivered was on February 8, 1909, and the last item December 3, 1909; that the lien was filed within four months of the furnishing of the material. It was alleged that other parties had furnished material, and claimed to have liens upon the property, which was situated on a lot at the corner of Forty-seventh street and Military avenue in the city of Omaha. Cross-petitions were filed by other lien-holders, and an answer and cross-petition was also filed by the Nebraska Savings & Loan Association, claiming under a mortgage upon which it had elected to declare due the sum of $1,280.50, with interest. Certain replies were filed, but the main issue in the case, and the only one which is brought to this court for determination, relates to the priority between the plaintiff's mechanic's lien and the lien of the mortgage of the Nebraska Savings & Loan As-

sociation. A trial of the case was had in the district court, and resulted in findings and judgment declaring the priority of liens, and in which it was held that the lien of the Nebraska Savings & Loan Association was prior and superior to the mechanic's lien of the H. F. Cady Lumber Company. From that judgment the lumber company has appealed to this court, and we are required to try and determine the question presented without regard to the finding and judgment of the trial court.

The H. F. Cady Lumber Company, to establish the priority of its lien, produced as a witness one John Wilson, who testified as follows: "I am employed by the H. F. Cady Lumber Company, and have been for six years. I was out at the premises involved, and saw the shack which was built there by Miles. He lived in this shack while he was building the main house. He made the cement blocks for his house, and, while making these and building the house, he lived in the shack. The plaintiff furnished the material for the shack as well as the house. The first bill of materials furnished by the plaintiff was delivered for the shack, * * * at the premises, on April 27, 1909, and consisted of 1,000 feet of shiplap, two rolls of tar felt, a lot of 2x4's, a window and a door, total $40.66. The tar paper went into the roof and the shiplap went into the siding of the shack. The 2x4's were used for studding. The window and door were also used in the shack. Later on Miles tore down the shack and used the material in the house. I know that the shiplap which was on the shack was later incorporated in the house, because in the cellar partitions of the house I saw this shiplap, and on it were large-headed nails with parts of tar felt sticking to them, and from this I know that this shiplap with these nails sticking in it came from the roof of the shack, for the roof of the shack was made with shiplap with the tar felt tacked on with these nails with large heads. Miles bought the lumber for the shack at our place. I know that this was the only building that Miles had on hand. Miles told me that he intended to use all of the material that went into the shack in his completion of the main building, and,

before tearing down his shack, he told me he intended to incorporate the materials into the main building."

The plaintiff called as a witness George W. Platner, who testified: "I was formerly with the Cady Lumber Company, as treasurer of that company, but at present am not interested in the company at all, having sold all my interest in it. I know Miles and saw him about ordering of the Cady Lumber Comany the lumber for his job at Forty-seventh and Military avenue. Mr. Miles arranged with me at one time for the purchase of two batches of materials, one for the shack and the other for the house, explaining to me that he would so construct the shack that he could afterwards tear it down and put the material in the house. The Cady Lumber Company furnished the material for the shack, and I know that it went into the construction of the shack. I agreed to sell this lumber to Miles, on the part of the Cady Lumber Company, on the arrangement that he was to get a loan, so that he might pay off the bill. I think I talked with a loan company beforehand, and got word that he was going to secure a loan." The witness further testified that besides the original bill some extras were furnished Miles to complete the house; that "the materials named in the estimate, and the material that went into the shack, and the extras were arranged to be sold to Miles by the Cady Lumber Company at the same time, and on the same day; that is, the material that went into the shack and that which went into the house were furnished under one contract, made at one time. Miles ordered that the material should be sent up to the premises, as he would require it in the shack and the house. I think I had assurance that the loan would be made to Miles before we furnished him any of the materials. I remember, when Miles asked us to deliver it up there, that he explained to me what he was going to do—that he was going to build this shack to live in, and afterwards use it in the house, before the house was completed. I thought that was an economical move on his part. I believe he told me at that time that he was paying rent, and wanted to get rid of the question of

rent, or that he had sold his other place, or something had forced him to have a place for shelter temporarily until he got his building further along." Witness further testified: "Before we delivered any of the material for the shack, the lumber company was obligated to deliver to Miles all the material which finally went into the permanent building."

Plaintiff also called as a witness F. A. Ewing, who is secretary and treasurer of the lumber company. He testified that he "was not with the Cady Lumber Company when the Miles bill was sold; that he had talked with Miles after the material had all been furnished, and Miles made no question about the amount of the bill, that Miles told me that all the lumber named in the lien had been received; and that the material that he got for the shack came from the Cady Lumber Company; and that this material later went into the house; that the full amount of the lien, $424.45, remained unpaid."

It was stipulated that the mortgage of Mary Miles and Thomas H. Miles to the Nebraska Savings & Loan Association was executed by them on the date mentioned in the mortgage; that the mortgage was filed on June 21, 1909, and recorded in the register of deeds office in Douglas county; that the bond for $1,250, dated June 19, 1909, likewise executed by Miles and his wife, is the bond mentioned in the mortgage.

The building association then called one J. R. Brandt as a witness. He identified the mortgage and bond, and gave its date as June 19, 1909; that the shack was built on the lot next to and east of the one described in the mortgage and mechanic's lien; the foundation was of cement, having cement floor; that before the mortgage was taken or recorded he did not examine the property to see whether the materials had been placed thereon by the lienors. Witness never talked to Platner about making a loan to Miles. Witness said: "He thought the lot was 22 feet wide, and that the house was between 20½ to 22 feet wide; that Miles and his wife lived in the shack while the house was being built. There was no other house on

the lot next east except the shack. He understood that the shack was put there just temporarily, but did not ask Miles where he had got his lumber to build the shack with, but Miles told him he had built a shack out there, and that the Cady Lumber Company had extended him a credit of $40 to build the shack with." Witness asked Miles "if he had paid Cady, and he said he had paid them for the material for the shack, all but $10. This was before they put their loan upon the property, and, before they gave him the loan, Miles told him that he had built the shack out there and had gotten the lumber for it from the Cady Lumber Company. The shack was as much as two feet east of the permanent house."

The association then produced Thomas J. Fitzmorris as a witness, who belonged to the real estate committee to put valuations upon property for loans which had been asked of the company. He testified: "When I went out to look at the property, I went into a little shanty that was located just to the east of the house. I didn't look particularly to see whether there was any lumber on the lot. I think I would have seen it if it had been there. I think the shanty must have been two or three feet east from the house. The Miles family were then living in the shanty. I examined it probably between the 12th and 15th. When I was out there to look over the property, the excavation had been made for the house, and half of the cellar floor was built for the main house, and half the basement walls were up. I at that time paid no attention to the lines of the lot."

The following stipulation was also entered into: "It is admitted that Mrs. Mary Miles, who was the owner of the property, authorized her husband, Thomas H. Miles, to build a house, buy material for the house for the purpose of building it, and to charge her property with it, and this stipulation applies to the lien of the H. F. Cady Lumber Company, and to all the other liens."

It also appears that the lumber for the shanty was delivered on the premises on the 27th day of April, 1909; that the lumber to build the main house was delivered on

the premises, commencing on the 22d day of June, 1909, and from time to time until the following December, when the house was completed.

We have thus set forth a greater part of the evidence for the reason that our conclusion in regard to the priority of the liens in question does not coincide with the judgment of the district court. As we view the evidence, it establishes the fact that the delivery of material by the plaintiff on the 27th day of April, 1909, at the premises in question, was material for the construction of the house, and the fact that it was used temporarily in the shack to shelter the Miles family at the time when they commenced building the house, did not make it a delivery for the construction of any other building. The delivery by the plaintiff of other and additional material from time to time until the building was completed gave it a lien which attached on the date of the first delivery. It further appears that the Nebraska Savings & Loan Association had notice that some one was furnishing material for the construction of the house before it took its mortgage, and therefore its lien should be held subject to the lien of the materialman. The mechanics' lien law has always been liberally construed with a view of making it effective. *Foster v. Dohle,* 17 Neb. 631; *Irish v. Pheby,* 28 Neb. 231; *Marrener v. Paxton,* 17 Neb. 634; *Watkins & Co. v. Kobiela,* 84 Neb. 422.

It follows that the judgment of the district court should be, and is, modified to the extent of subjecting the lien of the Nebraska Savings & Loan Association's mortgage to the lien of the H. F. Cady Lumber Company, and the cause is remanded to the district court for Douglas county, with directions to modify its judgment in accordance with this opinion.

AFFIRMED AS MODIFIED.

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

MILTON R. ILER, APPELLEE, V. MERRICK COUNTY, APPELLANT.

FILED MAY 4, 1914. No. 17,764.

1. **Sheriffs:** COMPENSATION AS JAILER. The sheriff of a county, who performs the duty of jailer in addition to his duties as sheriff, is entitled to the compensation provided for the performance of that duty while there are prisoners confined in the county jail. *Dunkel v. Hall County*, 89 Neb. 585.

2. ———: OCCUPANCY OF COUNTY JAIL: LIABILITY FOR RENT. Where the sheriff is required to occupy the rooms in the second story of the county jail under a resolution of the county board requiring him to pay the sum of $50 a year for fuel and lights, and has paid that sum according to the terms of the resolution, he is not liable to the county for rent for the use of the county jail.

3. **Trial:** DIRECTING VERDICT. Where there is no conflict in the evidence on the issues joined in an action, it is proper for the trial court to direct a verdict in accordance with the facts.

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

W. H. C. Rice and *Patterson & Patterson*, for appellant.

W. H. Thompson, Elmer E. Ross and *H. F. Allen, contra.*

BARNES, J.

On the 11th day of July, 1911, the plaintiff filed his claim with the board of supervisors of Merrick county for $1,261.50, for fees which he claimed were due him as jailer of said county from January 9, 1908, to the 11th day of July, 1911; and on the 17th day of August, 1911, he filed with the board of supervisors an additional bill for the sum of $57 as jailer's fees from the 11th day of July, 1911, to the 17th day of August, 1911. At a regular meeting of the board of supervisors of said county on the 19th day of August, 1911, his claims were wholly rejected and disallowed. Whereupon plaintiff appealed from the action of the board to the district court for Merrick county, and filed

his petition in said court, setting forth the fact that he was elected sheriff of Merrick county for the term commencing January 9, 1908; that as sheriff he performed the duties of jailer of said county from the 9th day of January, 1908, to the 10th day of July, 1911, inclusive; that during said time prisoners were confined in the jail of said county for 841 days, and he was entitled to have and recover from the county the sum of $1.50 a day during all of said time; that on the 11th day of July, 1911, plaintiff filed a verified account with the clerk of said county, claiming that there was due him the sum of $1,261.50; that the board disallowed the said claim. It was further alleged that the plaintiff filed a second claim with the county board for services rendered as jailer for an additional 38 days; that there was due therefor the sum of $57, which was also disallowed, and that there was justly due from the county to the plaintiff for said services the sum of $1,318.50, with interest thereon from the 18th day of August, 1911, for which sum the plaintiff prayed judgment.

The defendant filed an answer, denying each and every allegation contained in plaintiff's petition, and alleged that on October 24, 1911, the plaintiff was justly indebted to the defendant in the sum of $1,080, as reasonable rent for the jail of said county, including lights and fuel; that the upper story of the jail of said county belonged to and was owned by the defendant county; that it was used and occupied as a residence by the plaintiff, and that plaintiff impliedly agreed to pay the defendant county the said sum of $1,080 for the use of the upper story of said jail building. Defendant further alleged that the plaintiff was indebted to it in the sum of $54 for certain fees earned and collected by the plaintiff as sheriff of said county which he had not accounted for as required by law, and had wrongfully and unlawfully converted that sum to his own use; that no part of said sums of $1,080 and $54 had been paid, and that there was now due and payable to the defendant county the said sums of money aforesaid. It was further alleged that the plaintiff was indebted to the county in the sum of $300 for back fees and rewards col-

lected by the plaintiff while acting as sheriff of said county; that defendant county was unable to itemize the said accounts because the sheriff had kept no record of said rewards.

The plaintiff filed a reply to defendant's answer in which he admitted that the jail referred to in defendant's answer was the property of said county and alleged that during all of the time said plaintiff was the sheriff of said county he and his family occupied the upper rooms of the jail building; that the fuel and lights were furnished in pursuance and by virtue of a resolution of the board of supervisors of said county wherein it was provided that the compensation to be paid by plaintiff for fuel and lights was the sum of $50 per annum, and that plaintiff had duly paid the same; that the upper rooms of said jail building were occupied by plaintiff by virtue of his rights, powers and duties as sheriff and ex officio jailer of the county, so that he might give the necessary and proper care to the building and the prisoners confined therein, and better perform his other duties pertaining to said office. The plaintiff specifically denied the right of any other person or persons to use or occupy any part of the jail building while he was sheriff, and denied the right of said board of supervisors to determine who should occupy the upper rooms of said jail building during the time plaintiff was acting as sheriff of the said county, and denied all of the other allegations of the answer.

On the issues thus joined the cause was tried to a jury, and after the introduction of all of the evidence the judge of the district court directed the jury to return a verdict for the plaintiff and against the defendant county for the sum of $1,264.50. A motion for a new trial was overruled, judgment was rendered on the verdict, and the defendant county has appealed.

There is no conflict in the evidence. It appears beyond question that the plaintiff was the sheriff of Merrick county during the time mentioned in his petition; that there were prisoners in the jail of said county for the number of days stated therein. It is also conceded that the plain-

tiff had no deputy, and had never appointed any one to act as jailer of the county, but had performed the duties of jailer during all of his terms of office, with some trifling assistance from the janitor of the courthouse or "roustabout" who was engaged in that work; that the county has never paid any other person for performing the duties of jailer. It follows that, the sheriff having elected to serve the county in that capacity, he was entitled to compensation therefor at the rate of $1.50 a day while the jail was occupied by prisoners. This case falls squarely within the rule of *Dunkel v. Hall County,* 89 Neb. 585.

It is contended, however, that the sheriff must, by some affirmative action on his part, elect to perform the duties of jailer. It appearing that the sheriff never appointed a deputy or jailer, but performed those duties himself, his conduct amounted to an election, and that contention is not well founded.

We come now to the consideration of the defendant's claim for rent of the upper story of the jail with which it sought to charge the plaintiff. It appears that the defendant county had constructed a jail which was a building separate and apart from the courthouse. The lower story of the building was fitted up in a suitable manner for the confinement of prisoners, and the upper story was constructed for a sheriff's office, with rooms which the sheriff was required to occupy with his family in order that he, as jailer, might be in close touch with the prisoners, he being responsible for their safe-keeping, including their board; that by resolution the county board required the sheriff to pay the sum of $50 a year for lights and fuel, and that sum had been paid by the plaintiff. As we view this matter, such payment was a complete discharge of any liability to the county for rent, on plaintiff's part. It follows that the defendant was not entitled to recover on its claim for rent of the jail building.

It also appears that there was a small amount of fees which plaintiff had not accounted for and paid over to the county treasurer. This sum was deducted by the court from the plaintiff's claim, and the jury were properly di-

rected to return a verdict for plaintiff for the balance due him, amounting to $1,264.50.

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

AFFIRMED.

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

ALEXANDER A. LA LONDE, APPELLEE, V. PETER SODERBERG, APPELLANT.

FILED MAY 4, 1914. No. 17,766.

1. **Master and Servant:** DUTY OF MASTER. A master is not an insurer of the safety of his servant, but is only required to use ordinary care in furnishing the servant with reasonably safe, suitable tools and implements, and a reasonably safe place in which to perform his work.

2. ———: ASSUMPTION OF RISKS. An experienced carpenter engaged in the work of erecting a one-story building assumes the ordinary risks of his employment, and is required to use such means in climbing upon and descending from such building as his own judgment and convenience may suggest.

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

Edgar M. Morsman, Jr., for appellant.

W. W. Slabaugh and *John W. Battin, contra.*

BARNES, J.

Alexander La Londe was injured while in the employ of Peter Soderberg, a contractor and builder, and commenced this action in the district court for Douglas county to recover his damages therefor. From a judgment in plaintiff's favor the defendant has appealed.

It appears that Soderberg had a contract for the erection of certain government buildings located at Fort Omaha. One of the buildings was known as an oil house.

That building was one-story in height, and consisted of a wooden frame of 2x4's, covered with corrugated iron. It was 14 feet wide and 40 feet long. The inside of the building was open, with no ceiling or attic. At no time were more than three workmen employed in the construction of the building, and up to the time when the accident occurred all of the work had been performed thereon by the plaintiff, a fellow servant named Johnson, and Anderson, who was Soderberg's foreman. The plaintiff was an experienced carpenter, and had worked for Soderberg upon the job in question for several days prior to the accident. He had worked four full days upon the oil building itself, and the work had progressed so far that the studding was up and the tie joists fastened. The plaintiff then went to work upon what is called the feed building, and, while working on that building, Johnson and Anderson continued to work on the oil building. After working on the feed building for two or three days the plaintiff returned to work on the oil building, and was told to put in place the short gable studding. To perform that work it was necessary for him to climb up onto the tie joists. This the plaintiff did, and, just prior to finishing the work of putting in the gable studding, Anderson told the plaintiff that when he had finished he should come down and put in the doubles on the doors. No ladders were furnished for the use of the men in the performance of the work upon any of the buildings. The men themselves made their ladders as they needed them. There was no ladder used at the oil building, but there was one at the feed building which La Londe and another workman had constructed out of 2x4's. The oil building was so small that no ladders were needed. The plaintiff in putting in the short gable studding at the north end of the building climbed up to the plate by means of the header of a window frame. No particular method of climbing up or down was prescribed by any one, nor did Soderberg attempt to furnish any means whereby the men could ascend or descend from the tie joists. When the plaintiff had finished the task of putting in the gable studding, he started to climb down to

work on the doors. It appears that a loose 2x4 lay directly beside a tie joist. In descending the plaintiff took hold of this loose 2x4, which turned over, and caused him to lose his hold and fall. It is his contention that this loose 2x4 had been placed beside the tie joist during the time he was working on the feed building, and when he climbed up on the morning of the accident to put in the short gable studding he did not notice or look at the 2x4 because, as he testified, he "was not paid for looking, but was paid for working." Plaintiff fell the distance of 8 or 9 feet, and struck on the floor joist of the building. That he was injured, to some extent, there is no dispute.

The petition contains many averments of negligence, but all of those averments were eliminated by the instructions of the court except one, and by instructions 4 and 7 the court submitted to the jury the question as to whether or not the defendant was guilty of negligence in failing to provide a safe place for the plaintiff to work. The jury returned a verdict in plaintiff's favor, and the issue raised by this appeal is whether or not there was sufficient evidence to justify the jury in finding the defendant negligent by reason of the fact that he failed to prevent some employee from leaving a loose 2x4 lying beside the tie joist. It is not contended that the defendant had any personal knowledge of that condition. It was the contention of the defendant that in the construction of this one-story oil building he furnished sufficient material for all purposes, and made no attempt to prescribe the manner or furnish the means by which the men should ascend or descend to or from the attic of the building. He had left it with the plaintiff himself to determine how he should climb up and down. There is thus presented the simple question as to whether or not a master is liable to his servant who is injured in descending from the tie joist of a one-story building, which is in course of construction, by taking hold of a loose 2x4 which turns over under his weight. It is the contention of the appellant that the master is not an insurer of the safety of his servant, but is liable only for negligence.

In 26 Cyc., p. 1077, it is said: "The master is not, however, liable as an insurer, and is only required to exercise such ordinary and reasonable care and precaution for the safety of his servants as the nature and dangers of the business admit of and demand. As between master and servant negligence should be measured by the character and risk of the business engaged in, and the degree of care of all parties is higher when the lives and limbs of themselves and others are endangered than in ordinary cases." On page 1113 of the same work it is said: "A master owes it to his servant to furnish him with a reasonably safe building or other place in which to do his work, and is liable for injuries occasioned by his negligence in this regard. This rule does not apply to a case where servants are creating a place of work, when it is constantly changing in character by their labor, when it only becomes dangerous by the carelessness or negligence of the workmen, when the dangers which arise are very short-lived, or when, by the negligence of the workmen, the place is rendered unsafe without the master's fault or knowledge." On page 1115 it is further said: "Where a master furnishes, or causes to be built under his direction and control, a platform, scaffold, staging, or like structure for the use of his servants in the prosecution of their work, it is his duty to exercise ordinary care to see that it is reasonably safe for the purpose contemplated. But where the structure is erected by the workmen from material furnished by the master, and the master has no direction or control of the construction, he is not liable for injuries sustained by one of the workmen by reason of defects in the structure, provided he has used reasonable care in the selection of proper and suitable material. This is the only duty which the law imposes upon him."

The rule thus announced was followed in *Lincoln Street R. Co. v. Cox*, 48 Neb. 807, where it is said: "A master does not insure his servants against defective appliances. The rule is that he is bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe for use, and that they are after-

wards maintained in such reasonably safe condition. He is not liable for defects of which he has no notice, unless the exercise of ordinary care under all the circumstances would have resulted in notice. In an action by a servant against his master for personal injuries the jury cannot be permitted to infer negligence from the mere fact that an accident happened. A want of ordinary care must be pleaded and proved."

In *Swift & Co. v. Holoubek*, 55 Neb. 228, it was held that the "master does not insure his servant, although the latter be of immature years, from injury by machinery in its nature dangerous, and an instruction which permits the jury to find for the plaintiff if the machinery was dangerous, and the plaintiff was not guilty of contributory negligence, is erroneous."

A servant by his contract of employment assumes all risks and dangers incident thereto. *Missouri P. R. Co. v. Baxter*, 42 Neb. 793.

In the case at bar the plaintiff was an experienced carpenter. He knew the dangers incident to the work of constructing an ordinary building, such as the one on which he was employed. He and his fellow servants were constantly changing the situation in relation to the building in question, and there was no evidence that the defendant had knowledge that the 2x4 had been left at the place where the plaintiff took hold of it in attempting to climb down from the plate where he had been working; and, as we view the case, the defendant was not liable for the plaintiff's injuries. At the close of the testimony counsel for the defendant requested the jury to return a verdict in his favor. This request should have been granted.

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

REVERSED AND DISMISSED.

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

STATE, EX REL. JAMES P. ENGLISH, COUNTY ATTORNEY, APPELLEE, V. CHARLES E. FANNING ET AL., APPELLANTS.*

FILED MAY 4, 1914. No. 17,670.

1. **Nuisance**: DECREE: CONCLUSIVENESS. Where a decree was rendered under sections 8775-8782, Rev. St. 1913, declaring certain property a public nuisance, and enjoining the owner and occupant thereof from further illegal acts, and no appeal is taken therefrom, upon appeal from further provisions of the decree ordering the furniture, etc., removed and the building effectually closed for a year, that portion of the decree not appealed from is a final adjudication as to the existence of the nuisance.

2. ———: SUIT TO ABATE: PARTIES. In a proceeding for an injunction and to abate a nuisance under said sections, where it is shown that persons not parties to the suit are the owners of the furniture in the building, the court is without jurisdiction to order the furniture to be removed and sold. In such a case the owners of the property sought to be seized should be made parties defendant to the action.

3. **Constitutional Law**: STATUTE FOR ABATEMENT OF NUISANCE. The provisions of the statute declaring that the owner or lessee of any building used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and that the building and the furniture, fixtures, etc., contained therein also constitute a nuisance, providing for an injunction against the continuance of the same and for the abatement of the nuisance, are not in conflict with the constitution of the United States or the constitution of this state.

4. ———: ———. Section 8782, providing for the assessment of a tax of $300 against the property, and against the persons maintaining the nuisance, and the payment of a portion of the tax to the attorney prosecuting the action, violates section 1, art. IX of the constitution, and section 5, art. VIII thereof. It is, therefore, void and incapable of enforcement. This section, however, was not an inducement to the passage of the act, and its elimination in no wise affects its validity.

5. **Nuisance**: SUIT TO ABATE: PARTIES. The right to bring an action to abate a public nuisance may be conferred upon private individuals by the legislature.

6. ———: ———: BOND. Construing sections 8779 and 8781 together, it is *held* that it is the intention of the law that a building declared to be a nuisance shall be closed effectually for all purposes, unless a bond to release the same is given as provided in section 8781.

*Reversed on rehearing. See opinion, 97 Neb. —.

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

I. J. Dunn, for appellants.

George A. Magney and *Charles Haffke, contra.*

LETTON, J.

Action for an injunction and to abate a nuisance, brought under the provisions of chapter 63, laws 1911 (Rev. St. 1913, secs. 8775-8782), commonly known as the "Albert Law."

The petition alleged that defendant Fanning owned and defendant Prenica was the lessee of a three-story brick building in Omaha, known as the Oma Hotel, and that the "said building is now, and for some time has been, used by said defendant Louis W. Prenica for the purpose of lewdness, assignation and prostitution." The prayer is that the defendants be perpetually enjoined from using or leasing the property for such purposes and that the nuisance be abated. The answer of Prenica is a general denial of the facts alleged in the petition, and averments that the affidavits attached thereto making specific charges of lewdness were made by the paid agents of persons engaged in a conspiracy to injure the business of the hotel, and were false and untrue. The answer of Fanning admits that he is the owner of the real estate, denies each allegation of the petition, and pleads that the law under which it is sought to maintain the action is unconstitutional. After a hearing the court found that Fanning was the owner and Prenica the manager of the hotel, that the building was used for the purpose of lewdness, assignation and prostitution; declared the real estate and building to be a nuisance which ought to be enjoined and abated; found that the fixtures, furniture and other movable property are not the property of defendants or either of them, but that the same should be removed from the building, and "said building closed against its use for a period of one year, unless sooner released." The decree

enjoined defendants from using the building or permitting its use for such purposes, and ordered that the fixtures, furniture and movable property be removed from the premises, and the building be closed and kept closed for one year, unless sooner released. At the request of defendants that portion of the decree providing that the furniture, fixtures and other property used in conducting the hotel be removed from the premises, and the building be closed and kept closed for a period of one year, was superseded upon their giving a bond for an appeal therefrom, and is now before us for review. That portion which enjoins Fanning and Prenica from using the premises for the purpose of lewdness, assignation or prostitution is not appealed from, and is therefore final.

The evidence as to the hotel having an evil reputation was conflicting. The fact that persons living in the immediate vicinity saw nothing out of the way and never heard anything against the reputation of the hotel must be taken in connection with the cross-examination of the state's witnesses, which indicated that rumors of the same nature were rife in Omaha with respect to the reputation of nearly every other hotel in the city. Whatever the actual fact may be, the testimony in the record upon this point, standing alone, would not justify an order declaring the hotel to be a nuisance. The evidence which we think justified the issuance of the injunction was furnished in the main by paid decoys or informers hired by the superintendent of the anti-saloon league, and it is urged that it was procured by means of money furnished by a conspiracy to injure the business of the hotel. However, it is worthy of remark that the defendants make no complaint of the findings and decree so far as it finds that unlawful practices were indulged in and enjoins the continuance of the same in the future. Moreover, if the unlawful nuisance actually existed, the motives of the complainant are not material, though they might seriously affect the credibility of his or their testimony as witnesses. A recital of the details of the reprehensible methods employed by these agents is unnecessary, and will not

be made. The hotel contains about 100 guest rooms, and there are usually about 35 permanent occupants of rooms and from 30 to 50 transients in the building. It is not shown that any improper conduct took place except in one or two rooms and at long intervals, though there is enough shown to justify the belief that sufficient care and diligence was not exercised by the management to prevent questionable characters from occupying rooms.

The first question is whether that portion of the decree ordering the furniture, etc., removed and sold is erroneous. The evidence shows that the building was leased to the Chesapeake Restaurant Corporation, and the furniture was owned and the business conducted by it, and that Prenica was merely the manager of the hotel, although he was a stockholder and had been secretary of the corporation. The lessee of the hotel and the owner of the furniture should have been made a party to the suit, so that the rights of all parties interested could have been adjudicated.

Section 8779, Rev. St. 1913, provides for the seizure and sale, as under execution, of all fixtures, furniture and movable property used in conducting the nuisance. Section 8780 provides that, after the costs of the action and abatement are paid from the proceeds of the sale, the balance, if any, shall be paid to the *defendant*. There is a clear implication here that the owners of the property should, whenever practicable, be made a party defendant to the action. The principle which allows the seizure and destruction or sale of property used for an unlawful purpose cannot be applied in such a case as this, where the property which may have been used for such purpose is not identified, and where, if so used, it has in all probability constituted an exceedingly small proportion of the total mass. The case is different than if it were the furniture, fixtures and musical instruments of an ordinary bawdy or assignation house, where it would seem apparent that the main and almost the only purpose of the property was to carry out the illegal purpose in which case the legal principle mentioned might perhaps apply. A similar ques-

tion came before the courts of Iowa, whence the procedural provisions of this statute evidently were taken, and it was held that the property of persons not parties to the suit could not be disposed of in this manner. *Danner v. Hotz,* 74 Ia. 389; *Shear v. Green,* 73 Ia. 688.

Under the evidence before us, we are of opinion that the owner of this movable property is entitled, as a constitutional right, to its day in court before its property can be seized, removed and sold and that the judgment of the district court in this respect is erroneous.

Coming now to the complaint of the owner of the building as to the order directing the building to be closed and kept closed for one year, unless sooner released. It is urged that the law is unconstitutional and void for a number of reasons assigned; among others, that it deprives a citizen of his property without trial by jury, and without due process of law, and is a denial of the equal protection of the law. The powers of a court of equity to abate nuisances and to deprive persons of property used in the perpetration thereof have existed for centuries, and have been exercised in this state since its organization. Before the enactment of the statute under which these proceedings are brought, this power was exerted in the case of *Seifert v. Dillon,* 83 Neb. 322, to close up a bawdy house as a nuisance, and to prevent its use for such purpose in the future. The provisions of the bill of rights with respect to trial by jury have no application to remedies in courts of equity existing at the time of its adoption. *Littleton v. Fritz,* 65 Ia. 488, and in such cases due process of law is observed by using the equitable remedies existing concurrent with the strictly legal one of trial by jury, or those provided by statute law which afford notice and an opportunity to defend. The principal features of this law have evidently been derived from the statute of the state of Iowa providing for the suppression of the illegal traffic in intoxicating liquors by treating the occupation, the building in which it is conducted, and the furniture, fixtures and movable property used in the business as a nuisance. This statute has been attacked before the courts

of that state upon the same grounds as are urged here, and has uniformly been sustained. *Littleton v. Fritz,* 65 Ia. 488; *Martin v. Blattner,* 68 Ia. 286; *State v. Jordan,* 72 Ia. 377.

It is further urged that the act is unconstitutional on account of the inclusion of section 8782, providing for the assessment of a tax of $300 against the property and the ground upon which the same is located, and against the person maintaining the nuisance and the owner or agent of the premises, and the payment of a portion of the tax to the attorney prosecuting the action. This section is a clear and palpable violation of section 1, art. IX of the constitution, and section 5, art. VIII, as well probably as of other provisions of the same instrument, and is void and incapable of enforcement. However, the deletion of this section in nowise affects the enforcement of the main provisions of the act, and it could not have been the inducement to its passage. The act may stand notwithstanding the invalidity of this section.

The right of the state to authorize such an action to be brought is also assailed. We are of opinion that the right to bring an action to abate a public nuisance may be conferred upon a private individual, in addition to his existing right to bring such actions where there is a special injury to him in addition to that suffered by the public at large. This point has also been considered and determined by the Iowa court.

In the other respects upon which the act is assailed, we find no violation of any constitutional provision. It is contended that the building may not be closed for all purposes under the provisions of the statute, but only for the purposes named and prohibited. The language of the statute is ambiguous, and, were it not for the provisions of section 8781 as to giving bond and procuring a release, we would hold that section 8779 did not warrant such a decree as rendered. But the supreme court of Iowa construed these provisions before the act was adopted by this state, and held that the intention of the law was to close the building effectually, unless a bond was given, and that

a decree allowing it to be used for other purposes was erroneous. *McCoy v. Clark,* 109 Ia. 464. This construction will be adopted here under settled principles of statutory construction.

Do the facts warrant the decree closing the building unless the bond is filed? That portion of the decree which declared the property to be a public nuisance and enjoined the owner and occupant from further illegal acts was not appealed from. There is therefore a final adjudication that the building is a public nuisance. Mr. Fanning testifies that he had no knowledge of any illegal acts, and had only been in the building once or twice since he purchased it, and then only to see about repairs. If knowledge and either active or tacit consent to the illegal use of the building is necessary to justify a decree closing a building, then the decree in this respect is erroneous. This question also has arisen in Iowa. As we understand the cases of *Martin v. Blattner, supra,* and *Morgan v. Koestner,* 83 Ia. 134, that court held that, under such a state of facts, the unlawful use of the building in which the illegal practices are carried on constitute it a public nuisance which the court should abate, even though the evidence as to the lack of knowledge on the part of the owner is such that it does not warrant an injunction or a judgment for costs against him. Of course, the owner by giving bond may procure its release at once, as provided by section 8781. The granting of the temporary injunction was notice to defendant Fanning that illegal practices were charged to be carried on in the building. The owner should then have taken steps to abate the nuisance, or at least to determine by legal proceedings whether the terms of his lease were being violated; failing this, he accepted as an alternative the contingency of having the building declared a nuisance and being compelled to give the statutory bond for its release.

It is impossible to separate the building into parts and to segregate one portion as that in which the nuisance existed. This being so, the only method to abate the same

was to declare the whole of the premises a public nuisance and abate the same by the decree. *Carter v. Bartel,* 110 Ia. 211.

The judgment of the district court is reversed as to the order removing the contents of the building, and affirmed as to the remainder of the decree.

JUDGMENT ACCORDINGLY.

FRANK E. COE, GUARDIAN, APPELLEE, V. NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY, APPELLANT.

FILED MAY 4, 1914. No. 17,735.

1. **Death:** PRESUMPTION: EVIDENCE. "The death of an absent person may be presumed in less than seven years from the date of the last intelligence from him, from facts and circumstances other than those showing his exposure to danger which probably resulted in his death." *Cox v. Ellsworth,* 18 Neb. 664.
2. ———: ———: ———. "Evidence of character, habits, domestic relations, and the like, making the abandonment of home and family improbable, and showing a want of all those motives which can be supposed to influence men to such acts, may be sufficient to raise the presumption of death, or from which the death of one absent and unheard from may be inferred without regard to the duration of such absence." *Cox v. Ellsworth,* 18 Neb. 664.

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

John C. Watson, for appellant.

Paul Jessen, contra.

LETTON, J.

This is an action to recover upon an insurance certificate. Plaintiff recovered, and defendant appeals.

Harry F. Ganson, on September 8, 1910, was a dentist, residing in Nebraska City, about 44 years of age. He had been married twice. The family consisted of his sec-

ond wife with their three children, the oldest being 8 and the youngest 4 years of age. The ward of plaintiff, who is a daughter by the first wife, also lived in the family. Dr. Ganson had lived in Nebraska City for about 8 or 9 years. At the time of coming there he had but little of this world's goods, but was successful in his business, and by September, 1910, he had fully paid for his office building and fixtures, had purchased and furnished a home, a mortgage upon which was held by a building and loan association and was partly paid. He also had purchased and paid for three or four city lots. His income was from $1,800 to $2,000 a year from his business. He carried $5,000 fraternal life insurance, $3,000 of which was in favor of his daughter Josephine. Eight days before his disappearance he allowed a $2,500 accident insurance policy to lapse. Some bills he was sending out were found on his desk, and some dental supplies he had ordered on the 17th came in on the 19th. He was a man of domestic tastes and spent most of his spare time with his family. His wife testifies that because his business kept him closely engaged he purchased a bicycle, and it was his custom to take a ride each morning, leaving before the family were up and returning for breakfast. He was fond of fishing and swimming, and was a kind and indulgent husband and father. The family spent part of the summer of 1910 in Ohio, the doctor joining them, staying about two weeks, and coming home with them about the beginning of August. He was a member of the official board of the Methodist church, a member of the choir, and had no bad habits of any kind. He was fond of the open air, and while the family were in Ohio he pitched a tent in Riverside Park, near the Missouri River, and slept there during their absence, and on their return moved the tent to his back yard and slept there with his little boy. On Saturday, September 17, the family with some friends went to Riverside Park for a moonlight picnic. They returned home a little after 9 o'clock. The family soon retired, leaving Dr. Ganson sitting reading. About half past 2 in the morning Mrs. Ganson was awakened by the little boy crying, and

found the doctor was not in the tent with him. She testifies he had drunk two cupfuls of coffee at the picnic, and he could not sleep when he drank coffee. His nightgown was hanging on the side of the bed where he had hung it. All of his clothing, except a pair of khaki trousers, a shirt and a pair of bicycle shoes, were in the places where they were usually kept. About 6 in the morning the doctor's bicycle was found at Riverside Park on the crest of the bluff overlooking the river. A stick was stuck in the mud on the bank of the river and the clothing taken by him was hanging upon this stick. His bicycle shoes and his socks were on the ground beside it. Tracks of a barefooted man led from this point to the water's edge, and there were other tracks coming from the water and leading to a drift or log that was lying partly in the water, and which had been used by boys to jump into the river. The bank of the river was muddy, but there were no footprints leading back to the solid ground. The sheriff, who reached the scene about 7 o'clock in the morning, with others went up and down the river bank for a distance of between a half mile and a mile to see if they could find any fresh tracks leading out of the river, but were unable to find any. In the afternoon the river, which was from 6 to 9 feet deep at that point, was dragged, and afterwards on Sunday and Monday dynamite was used in the attempt to raise the body. Search was also made for footprints for about a mile on the other side of the stream, but none were found, though the character of the bank was such that an imprint would have been left if a man had walked over it. The following Tuesday some men who were working at a brick-yard at a point about a mile below testify they saw an object which they believed to be a naked body coming down the river. When asked as to the color of the object, a witness answered: "Why, he was white and shiny—you could see hair, you know; it looked like a man's or woman's body." This object was out about 150 yards. Some of the men went after a boat, but before they got it launched and reached the spot the object had disappeared. Another witness watched the body while the men went for

the boat. He says it was rolling along on the edge of a sand-bar, and sank before the boat reached the spot.

Notices were printed and distributed along the river and elsewhere. Mrs. Ganson wrote to many of his relatives and old school friends, and caused many inquiries to be made, but neither she nor any one else ever received any communication from him or from any other persons who saw him afterwards.

No evidence was introduced by the defendant. This action was begun about a year after the disappearance. The principle governing this case is well expressed, as follows, by Judge Sanborn in a case from this state, citing *Cox v. Ellsworth,* 18 Neb. 664, and other cases: "The established presumption of fact from the disappearance of an individual under ordinary circumstances, from whom his relatives and acquaintances have never afterwards heard, is that he continues to live for seven years after his disappearance. If this presumption was unaffected by countervailing facts, it would continue in the case at bar until August 22, 1899; but this presumption of fact is not conclusive. It may be overcome, not only when the testimony of those who saw the insured die or saw his body after his death is produced, or when he was last seen in a peril that might probably cause his death, but also, when all the facts and circumstances of the case—the possible motives, if any, of the lost one to absent and conceal himself in view of approaching failure, disgrace, or punishment, his possible motives, if any, for returning to his family and occupation, his attachments to the members of his family and his friends, his interest and prospects in his business or occupation, and the extent of the unavailing search that has been made for him—are such that they would take the case out of the category of an ordinary disappearance, and would lead the unprejudiced minds of reasonable men, exercising their best judgment, guided by the established rule that life is presumed to continue seven years after an unexplained disappearance, to the conviction that death had intervened at an earlier date." *Northwestern Mutual Life Ins. Co. v. Stevens,* 71 Fed. 258. See, also, *Winter v.*

Supreme Lodge, K. of P., 96 Mo. App. 1, 101 Mo. App. 550.

While there is a possibility that Dr. Ganson may still be alive, we are of the opinion that a consideration of his whole history, his tastes, his habits, his occupation and his manner of life, when taken in connection with the facts that all the clothing which he is known to have been possessed of has been accounted for, that it was not shown that he was in possession of any money at the time of his disappearance, that his last known appearance in life was when he stood unclad upon the bank of the treacherous Missouri river, that what was believed by several witnesses to be the naked body of a human being a few days afterwards was seen in the river at a point below, was sufficient to justify the district court in finding that he died as alleged in the petition. We have been cited in defendant's brief to numerous instances of the disappearance of persons who were afterward found to be alive, but in none that have been called to our attention are the circumstances similar to those in this case.

The judgment of the district court was warranted by the evidence, and it is therefore

AFFIRMED.

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

WILLIAM C. FRASER, APPELLANT, V. TED P. HUNTER, APPLICANT, APPELLEE.

FILED MAY 4, 1914. No. 18,455.

1. **Intoxicating Liquors:** LICENSE: DISCRETION OF BOARD. The determination of the locality in which a saloon may be conducted is one which is committed to the good judgment of the licensing body, and not to the discretion of the courts. The courts may investigate whether the law has been complied with as to the facts upon which the right to grant a license depends, but, unless perhaps in extraordinary cases, this is as far as they may go.

2. ———: LICENSE: REVIEW. The facts in evidence *held* to justify the district court in refusing to set aside a saloon license.

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

W. C. Fraser and *George A. Keyser,* for appellant.

Myron L. Learned and *Joseph T. Votava, contra.*

LETTON, J.

Appeal from an order of the district court affirming the granting of a saloon license. Two remonstrances were filed. One denies that the applicant is a man of sufficient moral character to be granted a saloon license, alleges that he has within the year last past shown by his conduct that he is an improper person to be licensed to sell intoxicating liquors, and that he has within the last year been guilty of a violation of the statute, and of the ordinances of the city of Omaha with reference to the sale of intoxicating liquors. The other states that the applicant "has permitted women to loiter in and about his place of business, and has permitted them to remain in his place of business in a back room, * * * and has sold to said women quantities of intoxicating liquors," and, as a further ground, it alleges that the neighborhood in the vicinity of the saloon is of a strictly residence character, and the saloon is a nuisance in that particular community.

The errors complained of are with respect to the finding that the applicant was a fit person to be granted a license, in finding that he had not been guilty of selling intoxicating liquors to an habitual drunkard and to minors, of violating the statute in regard to screens and obstructions during the license year of 1913, and in refusing to determine the question as to the locality of the saloon. The testimony with respect to the character of the applicant satisfies us that the burden of proof placed upon the applicant has been fairly met upon this point. The evidence as to the assignment that the applicant had been guilty of sales of liquor to an habitual drunkard is not

entirely free from doubt. It is shown that an old man who lived nearby was frequently seen in an intoxicated condition, but it seems also established that this condition was observed when he came from down-town and when he was going to the saloon, fully as often as at a time when he was coming away from it. The applicant and his bartender both testify they had refused to sell him; at first refusing while he was intoxicated, and after July, 1913, denying it to him on all occasions. There is testimony that this man was seen going to the saloon with an empty bottle, and returning with it apparently containing beer, but there is no definite proof that this occurred after July, 1913. While we are inclined to the view that this man was such an habitual drunkard that sales made to him would be a violation of the law, we are inclined to give the applicant the benefit of the doubt upon the evidence, and to hold that his license should not be refused upon this ground alone. A continuance of sales to this man, however, with the knowledge that the applicant now possesses, we think would constitute a violation of the statute in this respect. The other evidence, with respect to sales to minors and disorderly conduct in and about the saloon, is insufficient to warrant us in reversing the action of the licensing board and of the district court.

The evidence describes occurrences undesirable in residence neighborhoods, but which are not unusual accompaniments of the traffic in intoxicating liquors. However disagreeable such happenings may be, and however bad an example they may set to children of the remonstrants, the statute permits the traffic under certain conditions. The saloon has been in existence there for years. If the licensing board sees fit to allow it to continue in such a neighborhood, that body has the power to do so, and must accept the responsibility.

The determination of the locality in which a saloon may be conducted is one which is committed to the good judgment of the licensing body, and not to the discretion of the courts. The legal principle involved is fully considered in *Jugenheimer v. State Journal Co.*, 81 Neb. 830, and

in *In re Jugenheimer,* 81 Neb. 836, and it is unnecessary to restate the basis on which it rests. The matter is as fully committed to the judgment of the licensing board as that of the location of a road to the discretion of the county commissioners. The courts may investigate whether the law has been complied with as to the facts upon which the right to grant a license depends, but, unless perhaps in extraordinary cases, this is as far as they may go.

We are not convinced that the license should be set aside. The judgment of the district court is

AFFIRMED.

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

FAIRBANKS, MORSE & COMPANY, APPELLEE, V. HARMON B. AUSTIN ET AL.; WALTER P. MANN, APPELLANT.*

FILED MAY 4, 1914. No. 17,647.

1. **Appeal:** RULINGS REVIEWABLE. In an action at law a ruling not challenged in the district court by the motion for a new trial is not reviewable in the supreme court.*
2. **Trial:** REQUEST FOR DIRECTED VERDICT: PROCEDURE. Where both parties, at the close of the evidence, request a peremptory instruction, the trial court may pronounce the judgment demanded by the pleadings and the evidence, without submitting issues of fact to the jury.
3. **Appeal:** AFFIRMANCE. Where no specific error has been pointed out by appellant and no plain error appears in the record presented to the reviewing court, the judgment of the trial court may be affirmed.

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

Allen G. Fisher and *William P. Rooney,* for appellant.

Albert W. Crites, contra.

*First paragraph of syllabus set aside. Rehearing denied. See opinion, p. 139, *post.*

ROSE, J.

In the county court of Dawes county, Fairbanks, Morse & Company sued Harmon B. Austin, Walter P. Mann and L. Edgar Sprague for the purchase price of the following items of machinery alleged to have been sold and delivered by plaintiff to defendants: Gasoline engine, $150; pulley-blocks, $9.97. The county court dismissed the action as to Sprague, and entered judgment against the other defendants, who had been partners. Mann alone appealed to the district court, and there denied liability to plaintiff, pleaded that no binding contract of purchase had been made; that Austin assumed payment of the firm debts; that plaintiff knew the partnership had been dissolved before delivering the machinery; that immediate shipment, though necessary, was delayed until defendants, through necessity, were compelled to buy another engine; that Austin took possession of the engine as a gratuitous bailee of plaintiff, retaining it for the latter; that plaintiff claimed title when the engine was in Austin's possession; that the order for the machinery was countermanded. On a trial of the issues the district court directed a verdict for plaintiff, and defendant Mann has appealed.

The sustaining of a motion to strike a number of allegations from the answer is assigned as error. This assignment is unavailing because the ruling of the district court was not challenged by the motion for a new trial.

The next assignment of error is the overruling of a motion, when plaintiff first rested, to direct a verdict in favor of defendant Mann. The petition stated a cause of action. Plaintiff adduced evidence sufficient to support findings that the sale was made, that the machinery was delivered, and that the purchase price had not been paid. It is clear that there was no error in overruling the motion.

Complaint is also made because a verdict was directed in favor of plaintiff. Both parties at the close of the evidence requested a peremptory instruction. The trial court was thus invited by both parties to render the judgment demanded by the pleadings and the evidence. There was

therefore no error in failing to submit issues of fact to the jury. *Henton v. Sovereign Camp, W. O. W.*, 87 Neb. 552. Moreover, the judgment seems on the face of the record to be just and fair.

No specific error has been pointed out, nor has a plain error been found in the record.

AFFIRMED.

The following opinion on motion for rehearing was filed July 11, 1914. *Rehearing denied.*

PER CURIAM. A motion for rehearing has been filed in this case, which calls attention to an error in the first paragraph of the syllabus, and in the second paragraph of the opinion. We have repeatedly decided that rulings on demurrer and motions to pleadings need not be called to the attention of the trial court by motion for new trial in order to make them reviewable in this court. *Anderson v. Union Stock Yards Co.*, 84 Neb. 305. The first paragraph of the syllabus and the second paragraph of the opinion are therefore disapproved and set aside.

This requires us to consider whether the court erred in striking certain allegations from the answer filed in the district court. These allegations set up new matters of defense which were not pleaded, or in issue, at the trial of the case in the county court, from which this action was appealed. No error was made in striking them from the answer.

The motion for rehearing is

OVERRULED.

GEORGE W. MYERS, APPELLEE, V. MICHAEL P. MUSSER, APPELLANT.

FILED MAY 4, 1914. No. 17,611.

Tax Sale: SUIT TO REDEEM: PAYMENT OF TAXES. Where, in a suit in equity to redeem land from a tax sale, the petition fails to allege payment of taxes for the year preceding the commencement of the suit, but subsequently an amended petition is filed which alleges the payment of such taxes, the laches of plaintiff in paying the same will not defeat his action.

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

John J. Sullivan, for appellant.

J. H. Edmunds, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Sheridan county, to redeem certain real estate in that county from a treasurer's tax sale. The action was commenced on November 15, 1910. At that time the taxes for the year 1910 had not been paid by plaintiff, or by any one for him. On April 5, 1911, defendant filed a general demurrer based upon the proposition that the petition did not allege that all taxes due upon the property had been paid by plaintiff or by the persons under whom he claims title, "on November 15, 1910, the time when this action was commenced." On June 3, 1911, plaintiff filed an amended petition, which sets out numerous grounds, assailing the validity of the tax sale and the tax deed issued thereunder, and also alleges that on the 1st day of May, 1911, plaintiff paid the taxes and assessments against the land for the year 1910. (The original petition is not in the transcript.) Nothing further appears to have been done in the case until April 9, 1912, when the demurrer was considered by the court as a demurrer to the amended petition. The demurrer was

overruled, and defendant, refusing to plead further, was adjudged in default, and a decree entered in favor of the plaintiff, as prayed in his petition. From this decree defendant appeals.

Defendant in his brief says: "The only question raised by the demurrer and the only question presented to this court for decision is whether an action could be instituted by the plaintiff without prepayment of the taxes for 1910. * * * Conceding the truth of every fact alleged in the petition, as is done by the demurrer, it stands conceded upon the record that the taxes which were due November 1st, 1910, were not paid until May 1st, 1911." In his brief counsel for defendant cites *Thomas v. Farmers Loan & Trust Co.*, 76 Neb. 568. In that case there were two or three years' taxes unpaid, and no pleading ever filed in the case showing their payment. The case is not an authority here. Counsel also cites *Maxwell v. Palmer*, 73 Ia. 595. It is claimed, and we concede, that that decision was rendered upon a statute similar to ours, but in that case plaintiff failed to pay the taxes for a preceding year, and contented himself by offering, in his petition, "to pay the taxes, if it be determined that he is entitled to redeem." That case is not an authority here. Thirteen years later, in May, 1910, in *Hintrager v. McElhinny*, 112 Ia. 325, the supreme court of Iowa held: "Where, in an action to redeem land from a tax sale, the taxes for the year preceding the commencement of the action were not paid at the time of the commencement of the action, but were paid at the time of the filing of the amended complaint, in which it is claimed that no valid notice of the expiration of the period for redemption was served prior to the issuance of the treasurer's deed, the laches of plaintiff in paying the taxes will not defeat his action." That decision is squarely in point in this case, and its soundness so meets our approval that, without further discussion, we accept the holding of the court of defendant's own choosing, and hold that, the amended petition in the case at bar having alleged the payment of the tax for the preceding year,

plaintiff's laches in paying the same cannot be held to defeat his action.

AFFIRMED.

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

FARMERS & MERCHANTS BANK OF ULYSSES, APPELLEE, V. R. J. TATE, APPELLEE; G. L. SMITH, APPELLANT.

FILED MAY 4, 1914. No. 17,616.

1. **Process:** NEW PARTIES: SUMMONS TO ANOTHER COUNTY. Where, in an action by the indorsee of a promissory note against the maker thereof alone, the maker answers, and alleges that the transfer of the note by the payee thereof to such indorsee was without consideration and a mere device on the part of the payee and his indorsee to enable the latter to fraudulently collect the note for the benefit of the payee, it is not error for the court, upon the application of the maker, to order that the payee be impleaded in such action; and, where the payee is so impleaded, he is properly brought within the jurisdiction of the court by a summons issued to the sheriff of any county in the state where he resides and duly served upon him in such county.
2. **Bills and Notes:** PAYMENT. Where, in the purchase of real estate, the vendee pays a portion of the consideration in cash, and enters into a written contract with the vendor for the payment of the balance of the purchase price at a stipulated time, and at the same time, and as a part of the transaction, signs and delivers to the vendor a promissory note, the payment by the vendee, or by his agent for him, of the entire contract price of the land purchased, less the cash payment made at the time of the purchase, operates as a payment and full satisfaction of the debt evidenced by the note so given.
3. ———: ———: LIABILITY OF PAYEE AS PRINCIPAL. And in such a case, if the payee of the note transfers the same to an innocent purchaser prior to the maturity of the contract, and subsequently collects the full amount of the contract price of the land from the maker's agent, during the absence of the maker, without disclosing to such agent the existence of the note, it is his duty to pay the note so held by his indorsee; and, in the event of his failure so to do, a judgment in favor of the indorsee in an action against the maker, wherein the payee is impleaded, fixing the liability of the payee as that of a principal, and the liability of the maker as that of a surety, is proper.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

L. S. Hastings, Frank Dolezal and *E. A. Coufal,* for appellant.

Sullivan & Rait, M. V. Beghtol and *C. M. Skiles, contra.*

FAWCETT, J.

August 9, 1909, defendant Tate bought from G. L. Smith 640 acres of land in Cheyenne county, for the agreed price of $15 an acre, which would be $9,600. Tate prepared a contract for execution, which recited the consideration named, and provided that he should pay $1,000 in cash and the balance, $8,600, March 1, 1910. He signed the contract so written and passed it over to Smith for signature. Smith thought that $1,000 was hardly a sufficient cash payment upon so large a transaction. Tate then proposed to give him his note for $2,000, payable on the same date that the contract would mature, stating that, if he (Tate) then failed to make good his contract by paying the balance of the agreed consideration, Smith would have $1,000 in cash and Tate's promissory note for $2,000. This was satisfactory to Smith, and he thereupon executed the contract. The contract was executed in duplicate and each of the parties took a copy thereof. Subsequently, and before the maturity of the note and contract, Smith assigned the note to the plaintiff bank, of which he was president and a director. Four days before the maturity of the note and contract Smith visited Fremont, the home of Tate, and, Tate being absent from the state on an extended visit to California, represented to Tate's business associate, Mr. Ehrhardt, that he (Smith) would like to have the deal closed up a few days in advance of the date named in the contract, so as to enable him to close some other deals which he had maturing on March 1. Ehrhardt took Tate's copy of the contract, and met Smith in the office of the cashier of Tate's bank in Fremont. There, in the presence of the cashier, Mr. Knapp, Mr. Ehrhardt called the

attention of Smith to the terms of the contract, viz., that the consideration for the purchase was $9,600, of which Tate had paid $1,000, and that the balance due was $8,600. This statement Smith verified. Thereupon, interest on the $8,600 for the four days which the contract still had to run was deducted from the $8,600 and the balance was paid to Smith by Ehrhardt. Ehrhardt knew nothing about the note which Tate had given, and Smith said nothing about it at the time he received the payment upon the contract. When the note matured plaintiff called upon Tate for its payment. As soon as Tate returned home he repudiated his liability upon the note, asserting that it had been fully paid by the payment made by Ehrhardt on February 25. He and his attorney visited Smith and tried to prevail upon him to give up the note for cancelation. This Smith refused to do; the substance of his refusal being that Tate had prepared the contract, that no mention of the note was made therein, and that he (Smith) had the note and intended to keep it. Tate refused to pay, and the bank brought this action against him alone to recover the amount of the note. Tate answered, setting up the facts above outlined, and alleged that plaintiff was not a *bona fide* holder of the note; that the transfer by Smith was a device; and that the bank and Smith were conspiring to defraud him out of the amount named therein. Upon his application, the court made an order impleading Smith. Thereupon summons was issued to the sheriff of Butler county, where Smith resided, and service had upon him in that county. Smith appeared specially, and objected to the jurisdiction of the court over him, on the ground that the summons was served on him in Butler county where he resided; that the petition shows that Smith was not a party to the original action, but was made such by defendant Tate; and that the pleadings show that the action set out in Tate's cross-petition is not one of the causes of action, provided for by the code, which could be commenced in Dodge county, and service had upon Smith in Butler or any other county in the state except Dodge county. The special appearance was accompanied

by an affidavit stating the facts as pleaded in the special appearance. The special appearance was overruled, whereupon Smith answered, denying that the land was sold to Tate for $9,600, and alleging that the consideration was to be $11,600, to be paid as follows: $1,000 cash, $2,000 by the promissory note in suit, and the balance of $8,600 on March 1, 1910. Subsequently Smith added to his answer an amendment that Tate, prior to the maturity of the contract, had for a valuable consideration transferred the same to the "Tate-Ehrhardt Land Company," a corporation, and that the payment made on February 25, 1910, was made out of the funds of the corporation; that Tate paid no part of the same. The reply of the plaintiff admits "that one G. L. Smith is the president and one of the directors of the plaintiff bank," and denies all other allegations in the answer and counterclaim of defendant Tate. Upon the issues thus framed, the court, after hearing the evidence and arguments of counsel, found in favor of the plaintiff against defendant Tate, and against Smith, impleaded with plaintiff; found the amount due upon the note in favor of plaintiff from Tate and Smith to be $2,366.60, and that as between Tate and Smith the duty and obligation to pay the sum so found is a primary duty and obligation as to Smith, and a secondary obligation and duty as to Tate; and entered judgment that plaintiff have and recover from Smith, as principal debtor, and from Tate, as his surety, the sum so found due, together with costs of the action; that Smith pay at once to plaintiff the said sum, and that plaintiff accept and receive such payment in full satisfaction of the judgment; that, in case Smith should fail or refuse to pay the sum as aforesaid, execution issue therefor against him, but, in case sufficient property of Smith cannot be found to satisfy such execution, then and in that case execution shall be satisfied by seizure and sale of the property of defendant Tate, who should thereupon be subrogated to all the rights of the plaintiff in the judgment. Smith appeals.

The only question of law we deem it necessary to consider is the one raised by the special appearance of Smith;

that is to say, could Smith, who was a resident of Butler county, by a summons served upon him in that county, be brought into the action, commenced by plaintiff against Tate alone and then pending in Dodge county? The district court properly answered this question in the affirmative. A simple illustration will show the correctness of the holding of the learned trial judge: Suppose, after Smith had collected the full amount named in the contract from Tate's agent during Tate's absence and without his knowledge or consent, Tate, upon learning that Smith had made the pretended sale of the note to plaintiff, had commenced a suit in equity to obtain a cancelation of the note, and plaintiff and Smith had been residents of different counties. Could he have commenced his suit in the county of plaintiff's residence and issued summons for Smith to the county of his residence? Clearly, yes. He could have commenced such a suit in the county where either of the parties resided and issued summons to the county of the residence of the other. The fact that plaintiff initiated the litigation without joining its alleged coconspirator as a party did not deprive defendant of his right to have the entire controversy settled in the one action.

The fact that the contract of sale was set out in the cross-petition and introduced in evidence cuts no figure in this case, except as evidence offered by defendant Tate to corroborate his testimony as to the facts and circumstances which led to his giving Smith the note in suit. If the purchase price of the land bought by Tate from Smith was $9,600 and the note in controversy was given as part of the consideration for that purchase, it matters not whether the note was given at or subsequent to the time the contract was actually signed and delivered, or whether or not it was indorsed upon the contract as a payment thereon. That it was so given is established by the overwhelming preponderance of the evidence. We are not surprised that the trial court so found. It could not have found otherwise. The question as to whether on February 25, 1910, the contract belonged to Tate individually or to the "Tate-Erhardt Land Company" is immaterial, so far

as Smith is concerned. The only question material here is, has Smith been paid the full consideration for the land which he sold to Tate? If so, he has no right to compel Tate to pay the note which represented simply an unpaid portion of that contract at the time the note was given. Courts of justice, in these days, steadfastly refuse to juggle with legal technicalities to defeat justice. The evidence is clear, explicit and overwhelming that Tate bought from Smith 640 acres of land at $15 an acre, which would amount to $9,600; that he paid $1,000 in cash at the time of purchase; and that subsequently, and during Tate's absence from the state, Smith went to Fremont, where Tate then resided, and obtained from Tate's business associate the full sum of $8,600, concealing from him the fact that he held Tate's note for $2,000. Upon that payment being made, he was in duty bound to return to Tate his note. If he had made a *bona fide* sale of the note to an innocent purchaser for value, it was his duty to have so advised Tate's agent, and to have only collected upon the contract $6,600. By the course pursued, he is now attempting, under the most flimsy kind of a legal technicality, to obtain from Tate $2,000, which he never agreed to pay. Such an attempt will always receive at the hands of this court scant consideration.

The judgment of the district court is in all things

AFFIRMED.

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

NOLEN E. O'DELL, APPELLEE, V. JAMES STEWART & COMPANY, APPELLANT.

FILED MAY 4, 1914. No. 17,625.

1. **Master and Servant:** APPLIANCES: DUTY OF MASTER. It is the duty of a master to use reasonable care in furnishing appliances reasonably safe for the use of his servants in carrying on his business.

2. ———: ———: NEGLIGENCE: QUESTION FOR JURY: INSTRUCTIONS. And in this case the questions as to whether or not the defect in the plank furnished by defendant for plaintiff's use was so obvious that plaintiff was guilty of negligence in not discovering the same, or so latent that an inspection of the plank by the defendant would not have revealed the defect, and as to whether or not defendant failed to use reasonable care in furnishing the plank which proved to be defective and not sufficiently strong for the purpose for which it was intended to be used, were questions for the jury, and were properly submitted by the instructions of the trial court.

3. **Damages**: PERMANENCY OF INJURY: EVIDENCE. Evidence examined, and set out in the opinion, *held* sufficient to require the submission to the jury of the question as to whether or not the injuries of the plaintiff were permanent.

4. ———. The amount of the verdict returned by the jury examined in the light of the evidence set out in the opinion, and *held* not excessive.

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

Rich, Nolan & Woodland, for appellant.

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

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in the sum of $8,000, in an action for personal injuries, defendant appeals.

Defendant is a copartnership, and had a contract for the erection of the Union Pacific headquarters building in the city of Omaha. Plaintiff was an iron-worker, belonging to what was known as the "derrick gang." The building is of steel construction. When the steelwork for the second floor was in place, defendant ordered from two reputable local lumber dealers about 65,000 feet of No. 1 pine and fir lumber, consisting of planks 12 inches wide, three inches thick, and 20 feet long. The planks were brought to the building in wagons. They were used for temporary flooring over the steelwork as it was erected and put in place. They were used in this manner on every alternate floor. They were first used on the second floor.

to which they were raised by a derrick. When a wagon-load of these planks was brought to the building, the iron men, of which plaintiff was one, would come down on the derrick rope, throw the rope or chain around the entire load, and take it up a load at a time. It was the duty of the plaintiff to come down on the derrick rope, fasten the chain around the load of planks, and ride up with the load to the floor on which the planks were to be scattered. After the steelwork had been put in up to and including the steelwork in the fourth floor, these planks which had been laid on the second floor were piled up together, the derrick chain fastened around them, and each pile of planks carried by the derrick to the fourth floor, on which they were distributed as they had been on the second floor. In this work plaintiff participated. On the day of the injury, October 21, 1910, plaintiff and another workman stepped at the same time on one of these planks on the fourth floor. The plank broke, and both men fell to the ground below. Plaintiff sustained a fracture of the right leg and other injuries. Upon examination after the injury it was found that the broken plank had a large knot in it, extending the entire width of the plank, with the exception of about two inches on one edge.

The negligence charged by plaintiff in his petition is that it was the duty of the defendant to provide plaintiff with a safe place to work, "and to provide, select and use sufficient, strong, safe and secure planks to cover over the fourth floor of the iron framework of said building for the plaintiff and other workmen to stand and walk upon in the performance of their duties on said building as structural iron-workers, but, disregarding its duty, the said defendant carelessly and negligently failed to provide and furnish sufficient, strong, safe and secure planks to cover the fourth floor of said iron framework of said building, and carelessly and negligently, selected, provided, furnished and used as one plank extending across one of the eighteen-foot panels on said fourth floor a defective, unsafe, and insecure, brittle, sappy, cross-grained plank with a knot therein near the middle portion for the iron-work-

ers, among them this plaintiff, to stand and walk upon in the performance of their work;" that the facts alleged were unknown to the plaintiff, but were known to or could have been known by the defendant had the defendant exercised due care in providing, selecting, furnishing and using such plank. Then follow the nature and extent of plaintiff's injuries, with a prayer for damages in the sum of $25,000.

The answer (1) admits the copartnership character of defendant, the work in which it was engaged, that plaintiff was in its employ, that he received an injury on the date named, the nature and extent of which was to the defendant unknown. (2) Denies every allegation in the petition not admitted in paragraph 1. (3) Sets out some of the facts in relation to the use and handling of the planks, and alleges that the negligence, if any, in the selection, laying and using of the planks, and more particularly the one alleged to have broken, was the negligence of plaintiff and fellow servants of plaintiff, and not the negligence of defendant. (4) A plea of contributory negligence. (5) "Further answering said petition, this defendant alleges that the employment on which the plaintiff was engaged at the time of the said accident was inherently a dangerous one, and that the accident from which plaintiff suffered was one of those risks incident to the occupation and employment in which he was engaged, and was well known to and recognized and assumed by him." The reply is practically a general denial.

Defendant assigns nine errors, which are grouped and discussed in the brief under three subdivisions, which we will consider in the order in which they appear in the brief.

1. "The defense of 'assumption of risk' was properly pleaded and proved, and should have been submitted to the jury." This subdivision is based upon the fifth paragraph of the answer quoted above. It is argued by counsel for plaintiff that the defense of assumption of risk was not presented by the paragraph of the pleading quoted. We deem it unnecessary to decide this point, for the reason that, as we view the case, even if a proper affirmative

plea of assumption of risk was tendered by the pleading, there is no evidence in the record to require its submission to the jury in any other manner than was done. It was no part of plaintiff's duty to inspect the plank furnished for the use of himself and his coemployees, nor was any opportunity afforded him to make such inspection. As already shown, the planks were hauled to the building in a wagon. When the wagon arrived, plaintiff, alone or in company with another employee, would descend on the derrick rope, fasten the rope or chain around the entire load, and ascend with it on the derrick to the floor where it was to be used. He therefore had no opportunity for inspection nor is there any evidence to show that any opportunity was afforded him, after the planks had been elevated to the floor of the building for use, to make such inspection, nor does the evidence show that the defect in the plank was of such a character as to be at once detected by plaintiff and his coemployees as they scattered the planks upon the floor. There is, therefore, an entire absence of testimony to show that plaintiff knew of the defect in the plank which caused his injury, or had any reason to suspect the same. The inspection of these planks was a duty which the defendant owed to plaintiff. *Union Stock Yards Co. v. Goodwin,* 57 Neb. 138. But, it is said, he knew the planks had not been inspected. The evidence falls short of showing such knowledge. It shows that he knew the planks were not inspected after they arrived on the wagon at the building, but there is no evidence to show that he knew that they had not been inspected at the time they were loaded upon the wagon. It is true he testified that they had never been inspected *so far as he knew*; but that is not proof that he knew they had not been inspected. They might easily have been inspected and he not have known it. But, even if he knew they had not been inspected, he did not know that the plank which caused his injuries was defective. The defect was not so open and obvious as to charge him with negligence in not discovering it, and he therefore had the right to assume that the boards were all reasonably safe

and fit for the purposes for which they were intended, and for which they had been furnished by the defendant. In *Cudahy Packing Co. v. Roy,* 71 Neb. 600, it is said: "The rule is well settled in this state that it is the duty of a master to use ordinary and reasonable care to furnish appliances reasonably safe for the use of his servants in carrying on his business, and that a failure to exercise such reasonable and ordinary care upon his part renders him liable, if the servant suffers any injury by reason of his negligence in that behalf. * * * It was the duty of the employer to use reasonable care in the furnishing of a lever of sufficient size, and to use reasonable care in the inspection of the lever at the time that the same was put in place, and if any defect had been visible or discoverable by the use of such care, by which a reasonable man might conclude that it was weakened or rendered unsafe for the purpose for which it was used, then the defendant would become liable for any damages which resulted in consequence thereof. The question as to whether or not the defect was obvious or was latent, so that an inspection of the lever would not have revealed it, is a matter for the jury to determine from all the evidence in the case, and it is for the jury to say whether or not the master used reasonable care in furnishing a lever which proved to be not sufficiently strong for the purpose, either by reason of its lack of size or by reason of a defect therein. It cannot begin its inquiry with the assumption that it is the master's absolute duty to furnish a safe appliance, but rather its inquiry should be whether he used reasonable care to provide such an appliance." Paragraphs 6 and 7 of the instructions given by the learned trial judge show that he was entirely familiar with the rule above announced. Indeed, they so closely follow the rule announced by Letton, J., in the opinion cited, that they cover every point indicated by the opinion as questions for the jury. We will not extend the length of this opinion by quoting the two instructions referred to, but content ourselves with saying that they correctly instructed the jury as to the law applicable to the facts in the case.

2. "It was error to admit the Carlisle table, and to give instruction No. 13." It is conceded in defendant's brief that instruction No. 13 would have been a proper instruction if plaintiff had lost his leg; but it is said that it "had no proper place in a case in which all the evidence was to the effect that there would be a complete recovery in not more than two years, by which time the injured leg would be as strong as ever, and where there is no evidence to justify the jury in assuming that the earning capacity of the plaintiff has been permanently impaired." The evidence as to the nature and extent of plaintiff's injuries rests entirely in the testimony of himself and his attending surgeon, Dr. T. J. Dwyer. We have read this testimony very carefully. Upon the trial plaintiff removed his outer garments and exposed the injured leg, and the injury and condition of the leg were pointed out to the court and jury by Doctor Dwyer. The main injury was a compound fracture of the thigh bone about half way between the knee and the hip. The fracture was an oblique one. Both ends of the broken bone were sticking through the flesh at the point of the fracture. Several splinters were broken clear off the bone at the point of the fracture. Some of these pieces of bone were removed at the time the bone was set, while others manifested their presence in such a way as to require their removal subsequently thereto. There was also an injury to the leg below the knee. That injury, however, appears to have been of minor importance, and was practically well at the time of the trial. The testimony of the doctor was of such a character that the jury could fairly find from it that as a result of plaintiff's injury his leg has been shortened three-quarters of an inch, and that this shortening of the leg will be permanent; that the knee had become ankylosed; that is, it had become so stiffened that, notwithstanding the fact that the doctor had "broken" it, by forcing a bending of the knee, the plaintiff was at the time of the trial unable to bend it more than 5 per cent. of normal; that is to say, the action of the knee at that time had been lessened 95 per cent. He also testifies that at the time of the trial the injured leg was some-

what atrophied, and that, while the leg may assume its normal size after it had been in use for a certain length of time, the muscles will never in his opinion, have exactly the same play as they would before his injury. In the light of this testimony, and much more of like character, it was not error for the court to admit the Carlisle table, and to submit to the jury for their determination the question as to whether or not plaintiff's injuries were of a permanent character.

3. "The verdict is excessive." The plaintiff at the time he received the injury was 25 years of age. He had been following the work of an "iron-worker" for about four years. At the time of the injury he was earning $4.50 a day. The uncontradicted evidence shows that prior to receiving his injuries he was a strong, hearty man. In the light of the injuries as shown by the evidence contained in the record, a portion of which is above outlined, we are unable to say that the verdict was excessive.

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

AFFIRMED.

H. HERPOLSHEIMER COMPANY ET AL., APPELLEES, V. LINCOLN TRACTION COMPANY, APPELLANT.*

FILED MAY 4, 1914. No. 17,666.

1. **State Railway Commission:** JURISDICTION: STREET RAILWAYS. By the constitutional amendment of 1906 and the statute pursuant thereto, the power and *duty* of the state railway commission "shall include the regulation of rates, service, and general control of common carriers."

2. ———: ———: ———. The street railways of the city of Lincoln are under the jurisdiction of the state railway commission, and it is the *duty* of the commission to regulate such services.

3. **Street Railways:** DISCONTINUANCE OF SERVICE: INJUNCTION. When a company has obtained a franchise from the city to construct and operate its railway on certain streets of the city, and has constructed its

*Rehearing denied. See opinion, 97 Neb. —.

tracks and is operating its cars thereon pursuant to such franchise right, it will be enjoined from removing such lines or withdrawing its cars from such service without first obtaining authority from the state railway commission so to do.

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

C. S. Allen, E. J. Hainer and *Hall & Bishop,* for appellant.

Frank E. Edgerton and *C. Petrus Peterson, contra.*

SEDGWICK, J.

Before the year 1905 the Lincoln Traction Company owned and was operating lines of street railway in the city of Lincoln, some of which lines extended outside of the corporate limits of the city. In that year the Citizens Railway Company was organized, and constructed and operated lines of street railway over other public streets of the city, some of the said lines also extending outside of the limits of the city. It constructed what is known as "Loop No. 1" in the central part of the city, from the intersection of N and Twelfth streets, two blocks north to the intersection of Twelfth and P streets, thence one block west to Eleventh street, and thence south along Eleventh street to N street, and east on N street to the intersection of Twelfth street. Also a line from the intersection of N and Twelfth streets along N street to Twenty-ninth street, and one along Twelfth street from N street to South street, and thence east on South street to Twenty-sixth street. It also constructed several lines connected directly and indirectly with the said loop at the intersection of N and Twelfth streets. Afterwards, in 1909, the two companies were consolidated, and both properties taken over by the defendant, the Lincoln Traction Company. A corporation, known as the Citizens Interurban Railway Company, was organized by some, if not all, of the principal stockholders of the Citizens Railway Company. It built a road from the village of College View to the intersection of Twenty-sixth and South streets in the city of

Lincoln. The Citizens Railway Company had for some time before the commencement of this action operated its cars over this line to and into the city of Lincoln over South and Twelfth streets. After the consolidation the defendant abandoned some parts of the said line formerly owned and operated by the Citizens Railway Company, and the plaintiff began this action in the district court for Lancaster county to enjoin the defendant, its officers and agents, "from ceasing to operate a line of street cars around said Loop No. 1 and over said Twelfth street to South street, and thence east to Twenty-sixth street, and thence over said 'High Line' to the village of College View, and back and around said Loop No. 1," and from "abandoning any of the lines of street cars and street car service which were owned and operated by said Citizens Company prior to the said alleged consolidation; that they may be required to forthwith operate said line of street cars from the intersection of N and Twelfth streets south on Twelfth street to South street, and thence east on South street to Twenty-sixth street, and thence over said 'High Line' to College View and back, and to give the same street car service that there was over said line on Twelfth street and to said village of College View and back that was given prior to said alleged consolidation; that defendant may be required to restore the street car service on all the lines which it has abandoned, and that it may be required to operate all of its cars around said Loop No. 1, and give the same service on said cars that was given and afforded by said Citizens Company prior to said alleged consolidation." Seventeen citizens, who claimed to be interested in the Twelfth street line, and an organization, styled the Public Service League of Lincoln, united in a petition in intervention, alleging generally the interest of each in the Twelfth street line, and alleging that the petitioners and many other citizens named in the petition "will be without remedy at law and will suffer irreparable damage should the prayer of plaintiff to this action be denied." Afterwards other citizens joined in this petition in intervention. The prayer of the interveners was sub-

stantially the same as to the Twelfth street line as the prayer of the petitioners. The defendant answered, admitting the allegations of the petition as to the organization of the various companies, and their construction and operation of the street car lines described in the petition, and the consolidation of the Citizens Railway Company and the Lincoln Traction Company, and denied generally the other allegations of the petition. The plaintiffs and the interveners filed replies to the answer of the defendant in the nature of general denials. The trial court made quite extensive findings of fact, and enjoined the defendant, its officers and agents, "from abandoning Loop No. 1 as herein described, and from abandoning the South Twelfth street line from Twelfth and N streets to South street, and thence east on South street to Twenty-sixth street, and from abandoning any of the lines formerly operated by the Citizens Railway Company now operated around Loop No. 1, and from changing the routing of the cars of said lines from the route over which they are now operated, and especially from routing any of said lines so as to remove the same from said Loop No. 1," and "that the defendant do forthwith restore and operate the line of street cars from the intersection of N and Twelfth streets south on Twelfth street to South street, and thence east on South street to Twenty-sixth street, and thence over said High Line to College View and back, and give the same street car service over the south Twelfth street line and 'High Line' to said village of College View and back that was given by the Citizens Company over said lines prior to the consolidation;" and "that the plaintiffs and interveners recover their costs in this action as taxed at $——." The defendant has appealed.

The petition alleges that the plaintiff Henry Herpolsheimer is the owner of several lots in the city of Lincoln, located at the intersection of N and Twelfth streets, and that there is a large store building on these lots fronting on N and Twelfth streets, and that the plaintiff H. Herpolsheimer Company has occupied the building as a place for conducting a general merchandise business, and has,

at all times mentioned in the petition, carried a stock of merchandise in said building of the value of more than $100,000, and that, when the Citizens Railway Company was organized, at the request of that company the said Henry Herpolsheimer took 10 shares of stock therein and paid therefor $1,000; that, in consideration of the taking of said stock by the said Herpolsheimer, and for other considerations set out at large in the petition, the officers and promoters of the Citizens Railway Company assured the said Herpolsheimer "that there would be no change in the operation of cars over said Twelfth street from the intersection of N and Twelfth streets to and from said College View, or in the operation of cars over said Loop No. 1." This contract is urged as one of the reasons for enjoining the defendant as prayed in the petition. The defendant, in the briefs, insists that the plaintiffs are not entitled to the injunction because the state railway commission has exclusive jurisdiction of the matters and things complained of in their petition.

The constitutional amendment of 1906 provides: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." Const., art. V, sec. 19*a*. The statute enacted pursuant thereto provides: "The commission shall have the power to regulate the rates and services of, and to exercise a general control over all railroads, * * * and all other common carriers." Rev. St. 1913, sec. 6107. There is no doubt that the building and operation of a street railway line through the city affects the values of property in the vicinity, and the financial interests of the citizens, as well as their convenience and other interests. Substantial changes in the service may affect those values and interests either favorably or unfavorably. It is alleged that the principal stockholders and officers of the defendant railway company are largely interested in property and different lines of business in the city, and that

the proposed changes of the routing of the street cars, and other proposed changes in the service, are for the benefit and in the interests of those officers and directors, and not in the interest nor for the benefit of the public at large, and that such changes would be highly injurious to the property and business of these plaintiffs, as well as to the value of the property and the interests of the interveners who reside upon, or in the vicinity of, the Twelfth street line. When such changes are made they should be made in the interest of the public generally, and the rights of the street railway company, the economy and efficiency of the service, and the interests of the citizens whose property rights and convenience are especially affected, should all be considered. Contracts between individuals and public service companies which are for their benefit alone should also be considered, so far as those contracts do not interfere with the superior rights of the general public. There is no doubt that such matters are within the purview of the constitutional provision and the statute above quoted, which provide that the state railway commission shall have power to regulate the service and control common carriers of passengers. It appears that changes of this kind have been made by the street railway company, and that such changes have been by the company reported to the state railway commission from time to time, but it does not appear that these changes were authorized by the state railway commission, nor that any application has been made to that commission for authority to make such changes. The power to regulate rates of common carriers would be incomplete and comparatively useless without the corresponding power to regulate the service, and control the common carrier in performing such service, and these powers are expressly given to the state railway commission by the terms of the constitution, and the statute enacted thereunder. It seems clear that these provisions prevent the defendant from making such changes in the service without first obtaining the authority of the state railway commission so to do.

In determining such matters the state railway commission is not required to adjudicate the alleged contracts between individuals and the defendant, nor to determine as to the existence of alleged conspiracy between the stockholders and officers of the defendant to violate such contract and to injure the plaintiffs. These are judicial questions, and the courts are not deprived of jurisdiction thereof by the constitutional amendment and statutes referred to. *State v. Chicago & N. W. R. Co.*, 83 Neb. 524. But the railway commission should consider the proposed changes in the service as affecting the public interests, and whether and to what extent the interests of the general public would be affected by the enforcement of such private contracts. They will take a general view of the whole situation, and determine the necessity and propriety of the proposed changes, having due regard to the rights of the defendant, and economy of service, and the interests of all parties concerned, and especially the superior rights of the general public.

The decree is modified so as to apply to the line of the Citizens Interurban Company from College View to the intersection of Twenty-sixth and South streets in the city only so far as this defendant controls the bringing of cars from over that line into the city of Lincoln and to the business section thereof. It may be that considerations of public benefit and convenience, if brought to the attention of the state railway commission, may dictate an approval of the present service or a modification of the service as directed by the decree of the district court. With these questions this court cannot be concerned, since they are administrative in their nature, and not judicial. The affirmance of the decree of the district court necessarily must leave these matters open for such action as may be taken by the commission upon proper application being made, and is without effect upon its discretion in the matter. In all other respects, the decree of the district court is affirmed. The costs of this appeal will be taxed to the defendant.

AFFIRMED AS MODIFIED.

HAMER, J., concurring in part, and dissenting in part. (Filed July 3, 1914.)

Henry Herpolsheimer is alleged to be the owner of a large store building on certain lots in Lincoln at the intersection of N and Twelfth streets. The building is used for general merchandise purposes. It is said that the Herpolsheimer Company has occupied this store building for several years, conducting a general merchandise business, and that there is kept therein a large stock of goods, amounting in value perhaps to more than $100,000. Henry Herpolsheimer became a stockholder in the Citizens Railway Company. He subscribed to ten shares of the stock and paid $1,000 for the same. In the petition it is alleged that, in consideration of the taking of said stock by said Herpolsheimer, and certain other considerations, the officers and promoters of the said Citizens Railway Company assured the said Herpolsheimer "that there would be no change in the operation of cars over said Twelfth street from the intersection of N and Twelfth streets to and from said College View, or in the operation of cars over said Loop No. 1."

It appears that the Citizens Railway Company owned and operated lines of street railway in the city of Lincoln extending outside of the corporate limits of the city. It built "Loop No. 1," which extends from the intersection of N and Twelfth streets two blocks north to the intersection of Twelfth and P streets, and thence a block west to Eleventh street, and thence south along Eleventh street to N street, and thence east on N street to the intersection of Twelfth street; then a line from the intersection of N and Twelfth streets along N street to Twenty-ninth street; and then one line along Twelfth street from N street to South street, and thence east on South street to Twenty-sixth street. The Lincoln Traction Company owned and operated other lines of street railway extending beyond the corporate limits of the city. In 1909 there seems to have been a consolidation of the railroad properties of Lincoln. There were three corporations, the Lincoln Trac-

tion Company, the Citizens Railway Company, and the corporation known as the Citizens Interurban Railway Company. The Citizens Interurban Railway Company built a road from College View to the intersection of Twenty-sixth and South streets. The Citizens Railway Company operated its cars over the line of the Citizens Interurban Railway Company from College View to the intersection of Twenty-sixth and South streets. Before the commencement of this action the Citizens Railway Company had operated its cars over this line into the city of Lincoln over South and Twelfth streets. After the consolidation of the street railways the Lincoln Traction Company, which took over the other properties, abandoned parts of the said line operated by the Citizens Railway Company. Then the plaintiff began this action in the district court for Lancaster county to enjoin the defendant "from ceasing to operate a line of street cars around said Loop No. 1 and over said Twelfth street to South street, and thence east to Twenty-sixth street, and thence over said 'High Line' to the village of College View, and back and around said Loop No. 1," and from "abandoning any of the lines of street cars and street car service which were owned and operated by said Citizens Company prior to the said alleged consolidation; that they may be required forthwith to operate said line of street cars from the intersection of N and Twelfth streets south on Twelfth street to South street, and thence east on South street to Twenty-sixth street, and thence over said 'High Line' to College View and back, and to give the same street car service that there was over said line on Twelfth street and to said village of College View and back that was given prior to said alleged consolidation; that defendant may be required to restore the street car service on all the lines which it has abandoned; and that it may be required to operate all of its cars around said Loop No. 1, and give the same service on said cars that was given and afforded by said Citizens Company prior to said alleged consolidation."

Certain citizens claim to be interested in the Twelfth street line. There also appears to have been a Public Serv-

ice League of Lincoln. There was a community of interest on the Twelfth street line. The trial court enjoined the defendant "from abandoning Loop No. 1 as herein described, and from abandoning the South Twelfth street line from Twelfth and N streets to South street, and thence east on South Street to Twenty-sixth street, and from abandoning any of the lines formerly operated by the Citizens Railway Company now operated around Loop No. 1, and from changing the routing of the cars of said lines from the route over which they are now operated, and especially from routing any of said lines so as to remove the same from said Loop No. 1;" and "that the defendant do forthwith restore and operate the line of street cars from the intersection of N and Twelfth streets south on Twelfth street to South street, and thence east on South street to Twenty-sixth street, and thence over said 'High Line' to College View and back, and give the same street car service over the South Twelfth street line and 'High Line' to said village of College View and back that was given by the Citizens Company over said lines prior to the consolidation."

The *contract* not to change the operation of cars over said Twelfth street from the intersection of N and Twelfth street to and from said College View is urged as one of the reasons for enjoining the defendant.

It is claimed by the defendant that the plaintiffs are not entitled to an injunction because of the fact that the state railway commission has exclusive jurisdiction. This necessitates an examination into the powers of the state railway commission.

The constitutional amendment of 1906 reads: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." Const., art. V, sec. 19*a*. Under this section a statute was enacted which provides: "The commission shall have the power to regulate the rates and ser-

vices of, and to exercise a general control over all railroads, express companies, car companies, sleeping car companies, freight and freight line companies, and all other common carriers engaged in the transportation of freight or passengers within the state." Rev. St. 1913, sec. 6107.

In the majority opinion it is said that the building and operation of a street railway line through the city affects the values of property in the vicinity of the line, and that it also affects the financial interests of the citizens. The opinion says: "It is alleged that the principal stockholders and officers of the defendant railway company are largely interested in property and different lines of business in the city, and that the proposed changes of the routing of the street cars, and other proposed changes in the service, are for the benefit and the interests of those officers and directors, and not in the interest nor for the benefit of the public at large, and that such change would be highly injurious to the property and business of these plaintiffs, as well as to the value of the property and the interests of the interveners who reside upon, or in the vicinity of, the Twelfth street line." The fact above stated is probably true. It is also said in the opinion that such changes should be made in the interest of the public, and that "the economy and efficiency of the service, and the interests of the citizens whose property rights and convenience are especially affected, should all be considered." The above statement is followed by an expression of the view that "contracts between individuals and public service companies which are for their benefit alone should also be considered, so far as these contracts do not interfere with the superior rights of the general public. There is no doubt that such matters are within the purview of the constitutional provision and the statute above quoted, which provide that the state railway commission shall have power to regulate the service and control common carriers of passengers." The thing proper to do is to search the constitutional provision above mentioned and the statutes for evidence of the thing alleged in the opinion. The constitution provides for the regulation of *rates,* service and

general control of common carriers. The use of the words "rates" would not include the routing of cars or the maintenance of a line of road. An examination of the statute shows that the legislature provided that the commission "shall have the power to regulate the rates and services of, and to exercise a general control over all railroads," etc. Rev. St. 1913, sec. 6107. It is difficult to understand how the establishing of rates would determine where the cars were to be run. The control over railroads is to be a "general control." Before the commission has power to control the details of the operation of a street railway, or of any other corporation of like character, there should be specific authority conferred by the constitution, and under such provision in the constitution there should be legislation directly authorizing the thing to be done which is attempted to be done.

But the opinion becomes more harsh as it proceeds. It says: "It appears that changes of this kind have been made by the street railway company, and that such changes have been by the company reported to the state railway commission from time to time, but it does not appear that these changes were authorized by the state railway commission, nor that any application has been made to that commission for authority to make such changes. The power to regulate rates of common carriers would be incomplete and comparatively useless without the corresponding power to regulate the service, and control the common carrier in performing such service, and these powers are expressly given to the state railway commission by the terms of the constitution, and the statute enacted thereunder. It seems clear that these provisions prevent the defendant from making such changes in the service without first obtaining the authority of the state railway commission so to do." According to this opinion, no initiative can be exercised by business men desiring to construct a street railway and to operate it, or a railroad, until there is first an application made to the railway commission. It is put at the gate to stand as a guard against the exercise of all enterprise. There is certainly nothing

wrong with the exercise of power to establish *rates*; but it seems very wrong to say that the *business* shall not be determined upon and the railway shall *not be constructed* unless the railway commission says so. More than that, it is *against public policy*. What right have we to create an institution that shall determine the business we engage in? The power to *prevent discrimination*, the power to establish *rates*, is one thing; but the power to determine the *construction* of a railway company is entirely a different power. There should be some freedom of action. The legislature is the representative of the people. It is established, among other things, for the purpose of defining legal rights, and outlining the direction in which business may be transacted; but it is not created for the purpose of constructing an image before which the citizen shall be compelled to fall down and worship before he engages in business. In the zeal to regulate the action of American railway builders and street railway builders, the legislature has clearly overstepped the proper bounds if it can do the thing which is here sought to be done. I concur in the right of the legislature to control and regulate *rates*, and it should be permitted to have a "general control," if such control is restricted; but here, according to the opinion, there is a sort of unlicensed autocracy given to this board which men would hesitate to give to kings and parliaments.

Mr. Herpolsheimer had the power to draw a contract with the gentlemen who told him they were going to build the street railway, and he should have done so if he wished protection. He should have said to these men, "before I pay you $1,000 for the stock, I want your guaranty that you will operate the street railway in the way that you say you will. I want to know that my $1,000 is measurably safe." He might have taken a bond, as men do in other business. He knew that the gentlemen who proposed to construct the street railway were going to operate it in the street, and that there might be *divergent* interests that would pull the line in some *other* direction, or that would result in the routing of a disproportionate share of the

cars on some other line. Unless he was willing to take chances on the $1,000 as a voluntary subscriber, he should have employed his lawyer to draw up the proper contract. If this had been done, it would have been done in any event at the risk of a change being made to provide for the superior wants and necessities of the public. The public is never to be lost sight of, and the roads are to be maintained for its benefit. The most that Mr. Herpolsheimer would have been able to obtain, if the contract had been disregarded, would perhaps be damages. This, however, is in the field of speculation, and a mere dictum.

The power exercised by the state railway commission is threefold. It is legislative, administrative, and, within proper limits, it is judicial. It is only judicial, however, over those matters specifically authorized. If the regulation of rates or the operation of the line is an *administrative* exercise of duty, then how is an appeal to be taken from this *administrative board* on this *administrative question* to a *judicial body* that does not have *any* administrative power whatever? I am ready to be informed. There is great danger, first, of an *iron rule* which makes the repository of power a sort of despot; second, there is such a thing as the court arrogating to itself the exercise of legislative and administrative power. The creation of this railway commission is something that should be carefully guarded. It should not be allowed to be a tyrant and to put its foot upon our necks.

If, as a matter of fact, the state railway commission has jurisdiction to regulate the management of the street railway, and perhaps it has, then it should exercise such control as the law gives it; but the *supreme court* of the state should not be made the manager of a street railway company by *an appeal from the railway commission.*

Section 6109, Rev. St. 1913, provides that the commission shall have the power, and it shall be its duty, to make necessary classifications, necessary rates and charges, to regulate freight and passenger tariffs, to correct abuses, to prevent unjust discriminations, extortions and overcharges in *rates* and passenger *tariffs*. But there is noth-

ing anywhere in the act which authorizes the determination by the commission of whether a street car shall run on one line or another.

Section 6111, Rev. St. 1913, authorizes the commission to fix different rates for different railroads and for different lines under the same management, or for different parts of the same line, but there is nothing said about taking the cars from one line and putting them on another. To the mind of the writer the opinion of the majority justifies an intervention of private rights, and destroys the initiative of the persons who run the street railway company, and is without regard to the interests of the public. It is simply a mistake.

It is provided by section 6137, Rev. St. 1913, that any person "complaining of anything done or omitted to be done by any railway company or common carrier, subject to the provisions of this article, or any of the laws of this state, relative to the control and regulation" of such common carriers, may apply to the commission, briefly stating the fact, and thereupon a copy of the complaint shall be served on the carrier, "who shall be required to satisfy the complaint, or file a written answer thereto within a reasonable time." It is further provided that "whenever the commission has reason to believe that any railway company or common carrier is violating any provisions of this article, or any laws of this state relative to the control and regulation of railway companies or common carriers, it shall at once institute an inquiry and fix a time and place for hearing thereon." It will be noticed that the fact that a complaint is made is the basis of the jurisdiction to hear the case. Until a complaint is made there is no jurisdiction. The section does not look to such a proceeding as this. This proceeding in this case is entirely outside of the contemplation of the section referred to, and it is outside of the act. The idea of the section and of the statute is that the regulation shall apply to a service which is *already created* by the carrier, and which is supposed to be not suitable for the public convenience and safety. The theory is that upon an investigation such an order will be

made as will make the service suitable. The thing attempted to be done is beyond and outside of the statute.

Mr. Herpolsheimer put himself in the hands of the state railway commission if that body has jurisdiction. He did not put himself in the hands of the Nebraska supreme court, because that has no authority to review matters that are administrative or legislative. No appeal can be taken from the legislature to the supreme court. No appeal can be taken from the action of the governor to the supreme court. The supreme court of Nebraska is a limited body, and it will have enough to do if it stays within judicial lines and discharges its duty where the constitution and the statutes have provided that it may work.

I do not think that the effect of this new constitutional and legislative provision is yet understood. It will require the experience of the people, the common carriers, and the commission, as well as the time and labor of the courts, to develop and formulate a system that will be satisfactory in the main to all concerned. There should probably be further investigation and a further effort now. I hope that the protest which I here record will result in a careful consideration of the powers conferred, and in an opinion of this court elaborately setting forth that which may properly be done.

RICHARDSON COUNTY, EX REL. NORRIS SHEEHAN ET AL., APPELLANT, V. DRAINAGE DISTRICT ET AL., APPELLEES.

FILED MAY 4, 1914. No. 18,447.

1. **Drains:** APPORTIONMENT OF BENEFITS. Sections 7640, 7646, Rev. St. 1913, have no application to proceedings before the supervisors of a drainage district to determine benefits that will accrue to lands and property within the district.
2. **Judgment:** CONCLUSIVENESS. A judgment in mandamus is conclusive upon the parties to an action of all issues of fact litigated therein.

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

James E. Leyda, C. F. Reavis and *Edwin Falloon,* for appellant.

Kelligar & Ferneau, contra.

SEDGWICK, J.

The board of supervisors of Drainage District No. 2 of Richardson county on the 18th day of February, 1910, apportioned and set off to the county of Richardson a portion of the costs and expenses of the drainage improvements of that district pursuant to section 1830, Rev. St. 1913. Afterwards, the amount so apportioned to the county not having been paid, the drainage district began an action in mandamus in the district court for Richardson county to compel the supervisors of the county to appropriate, levy and pay the drainage district the assessment levied against it for the year 1910, and the assessment levied against it for the year 1911. An alternative writ was issued on the 24th day of July, 1912, and the county made return thereto by answer, and upon trial on the 24th day of October, 1912, the alternative writ was made peremptory, commanding the county authorities to "immediately, upon receipt of this writ, appropriate, levy, collect and pay to the relator, Drainage District No. 2 of Richardson County, Nebraska, the assessment levied against you by said drainage district for the year 1910, in the sum of $1,046.15, and appropriate, levy, collect, and pay to the relator, Drainage District No. 2, Richardson County, Nebraska, the assessment levied against you by said drainage district for the year 1911, in the sum of $622.31, and this you are not to omit to do." On the 9th day of September, 1913, the county made application to the board of supervisors of the drainage district, which was in effect to vacate the apportionment made by the board and to give the county authorities opportunity to be heard as to the benefits for which the county should be held liable. On the 23d day of September, 1913, the plaintiff herein began this action in the district court for Richardson county to enjoin the drainage district "from

executing said judgment of mandamus or proceeding thereunder against plaintiff for contempt, or otherwise, until a final disposition of the proceeding to open said judgment now pending before said drainage board." The drainage district answered, alleging the facts in regard to the original proceedings before the supervisors of the drainage district, and that the findings and order of the supervisors apportioning the benefits of the county were valid, and also alleging the proceedings and judgment in the mandamus case. The district court, upon the trial, found the issues in favor of the drainage district, and dismissed the plaintiff's case, and the plaintiff has appealed.

The plaintiff contends that the proceedings and judgment in the mandamus case are not a bar to this action, and also contends that the proceedings before the supervisors of the drainage district in apportioning the benefits to the county are vacated by the application to set aside those original findings. In the brief the plaintiff speaks of the action of the supervisors of the drainage district in apportioning the benefits as a judgment, and contends that it is governed by section 7646, Rev. St. 1913. This section has no application to proceedings of this nature. By section 7640, service by publication is authorized in the cases therein specified. There are six subdivisions of the section, and each of them specifies what circumstances would justify such service; that is, in "actions" for certain purposes and under certain circumstances service may be made by publication. The language of section 7646 shows that the "actions" in which service may be made by publication are in a court of justice, and not before an assessment board. The proceedings before the supervisors of the drainage district are not "actions," within the meaning of this statute. Such proceedings are rather in the nature of the assessment of taxes, and the decision of the supervisors in apportioning the benefits of the drainage system is not a judgment contemplated in the statute providing for service by publication. The drainage act makes no provision for any service of notice of the proceedings of the supervisors in apportioning the benefits except by publication. The ap-

portionment of benefits to the county is not, strictly speaking, an assessment of taxes upon the property of the county. It is not necessary to determine in this case whether the statute is defective in not providing specially how counties shall be notified of the pendency of such proceedings. If it should appear that the officers of the county in fact had knowledge of such pendency, and neglected to protect the interests of the county, the proceedings would not be invalid, although the formal notice of their meeting for such purpose might be defective. On the trial of the case at bar, the district court found specially that the officers of the county had notice of the pendency of the original proceedings before the supervisors of the drainage district. If it should be thought that the published notice of those proceedings was not sufficient, and that for that reason the apportionment was invalid, such fact would constitute a defense in the mandamus proceedings to compel the county authorities to collect and pay the amount so apportioned to the county; but such defense in the mandamus case would be unavailing, as it appeared that the authorities of the county had actual notice of the proceedings before the drainage board.

The principal question discussed by appellant in the brief is whether the evidence is sufficient to show that the county authorities had no actual notice of the original proceedings before the supervisors of the drainage district. This same question must also have been presented in the action for mandamus. It follows that the objection that the county authorities did not have such notice was involved in and decided by the mandamus proceedings, and those proceedings and the final judgment therein constitute a complete bar to this action for an injunction.

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

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

ANDREW WYTOSKI, APPELLANT, V. AUGUST KIOLBASSA, APPELLEE.

FILED MAY 4, 1914. No. 17,594.

Appeal: BILL OF EXCEPTIONS: AFFIDAVITS. Affidavits used in district court upon the hearing of a motion and not preserved in a bill of exceptions will not be considered on appeal.

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

T. T. Bell, for appellant.

J. R. Shields and *W. L. Rose, contra.*

HAMER, J.

This is an appeal from a judgment of the district court dismissing an appeal of plaintiff from a judgment of the county court which dismissed his action.

The judgment in the county court was rendered on February 2, 1910. An appeal bond was duly filed, and a transcript prepared and filed in the district court on March 3, 1910. No further proceedings were taken until December 5, 1911. A motion was then filed by defendant to dismiss the appeal on account of the failure of plaintiff to file his petition within 20 days from the filing of the transcript, and a showing that no petition had ever been filed. On December 14, 1911, an order was made upon the plaintiff to show cause by December 24, 1911, why the motion for dismissal should not be sustained. On December 21, plaintiff moved for leave to file his petition. He filed his own affidavit and that of his attorney in support of his motion. These affidavits are not preserved by a bill of exceptions, and therefore cannot be considered. It is not shown that the court has abused its discretion. The judgment of the district court is therefore

AFFIRMED.

FIRST NATIONAL BANK OF LOUP CITY, APPELLANT, V. GEORGE F. PFLAESTER ET AL., APPELLEES.

FILED MAY 4, 1914. No. 17,612.

1. **Appeal in Equity.** It is the duty of this court upon appeal in an equity case to examine the evidence and to reach its own conclusion thereon; yet, where the evidence is entirely oral and the trial court may be fairly presumed to have a general local knowledge of the parties, the witnesses and the subjects of the controversy, the finding of the trial court is entitled to consideration.
2. **Evidence** examined, and *held* to sustain the findings and judgment of the trial court.

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

R. J. Nightingale and *H. S. Nightingale,* for appellant.

Aaron Wall and *Kimball & Peterson, contra.*

HAMER, J.

This action was brought by the First National Bank of Loup City against the defendants, George F. Pflaester, Andrew W. Pflaester, and Pflaester Brothers, and Lewis S. Howe, defendant and appellee, to foreclose certain alleged chattel mortgage liens claimed to be in its favor. The case as between the plaintiff and Mr. Howe is to determine whether the plaintiff has a lien upon certain personal property claimed by Mr. Howe. After this there is a second contention as to whether the defendant Howe is indebted to the plaintiff. There was a finding and judgment for the defendant Howe on the claims against him. It is uncertain how many mortgages were executed and delivered to the appellant by the defendants George F. Pflaester, Andrew W. Pflaester, and Pflaester Brothers. The pleadings in the case are somewhat long and involved and given to much detail. We will therefore omit a statement of their contents.

There is no question about the liability of the Pflaester Brothers. They make no contention. The decree of the district court, was against Andrew W. Pflaester and the Pflaester Brothers, nothing being claimed of George F. Pflaester. Of course, the vital question is whether there is a liability upon the part of the defendant Lewis S. Howe. Lewis S. Howe was the owner of a certain farm and pasture land. On the 3d day of August, 1908, he made a bargain with George F. Pflaester by which said Pflaester went on the farm to remain thereon in the management and working thereof according to such instructions as should be given to him from time to time by said Lewis S. Howe. There was on the farm certain live stock and personal property of which the said Pflaester took charge. The farm contained about 800 acres. Under the contract the said Pflaester was to farm the land in good husbandmanlike manner, and he was to furnish at his own expense all the hired help, and was to harvest the crops and feed the stock. He was to keep an accurate account of all transactions with respect to the property involving expense incurred at any time for feed, and was also to keep account of receipts, and the account was to be subject to the inspection of said Howe. The contract provided that he had no authority to collect any money or market any stock unless both parties were present at the sale. He was not to incur any debts without obtaining the consent of the said Howe. He was to have half of the increase of the cows and heifers, and also he was to have a half interest in all the crops raised. Hogs were to be raised on the farm and the party of the first part was to have half of the hogs. The contract contained the provision that it was to be good for two years, but that it could be extended for a longer time. It was signed by George F. Pflaester and Lewis S. Howe. Pflaester started in under this contract. Subsequently his brother joined him. The original live stock that was there was owned by Howe. Pflaester borrowed money of the bank. Becoming largely indebted to the bank, he went away. After he went away his brother executed a mortgage upon a lot of property including, as it is claimed by

the defendant Howe, the property which belonged to him. The trial judge who presided in the district court, and who had an opportunity to see the witnesses and to hear their testimony, was better prepared than we are to say which of the witnesses were credible and which were not. The petition and the assignments of error are quite voluminous and much given to detail. The actual issues, as shown by the evidence, are not extensive. The contract is not an unusual farm contract. It did not undertake to make the owner of the farm and the tenant partners. The understanding of the parties appears from the oral testimony, as well as from the written contract.

The defendant Andrew W. Pflaester did not sign the contract, and apparently had nothing to do with the arrangement at its commencement. Howe seems to have furnished 75 "she" cattle, 5 young steers, 1 bull. He testified that he furnished everything to run the place except 2 horses. George F. Pflaester was to have a half interest in the colts raised on the place, and also in the calves.

Howe testified that the property was always to remain his. This refers to the original stock. He also testified that he never sold Pflaester any interest in the cattle or in the machinery, but seems to have furnished all the machinery used on the place, a swinging hay stacker which he bought at Council Bluffs, a hay wagon and harness which he bought at a sale, a scraper, a lister, a disc, a new wagon, a corn binder, 2 riding cultivators, a 3-row cultivator, a 2-section harrow, a set of double harness, a 16-inch plow, a span of mules named Jack and Jennie, bought of James Foulon, a set of harness for the mules, a 7-year old mare called Bessie, bought in Council Bluffs, an 8-year old mare named Dolly, having a white stripe in her face, and which the defendant Howe raised, 27 head of cows 5 years old, some of which the defendant Howe raised, and some of which he bought at Thompson's sale, and some of which he shipped from South Omaha, one set of pump tools, and one grindstone. The defendant Howe testified that he owned all this property, and that he never transferred any interest in it to the Pflaesters or either of them; that he was

the owner of all of this property at the time of the trial. He also testified that he owned an undivided half interest in the 2 colts, and that George Pflaester owned the other undivided half interest. The testimony of the defendant Howe is corroborated by the testimony of other witnesses who recognized the original stock. Something of a contest is made by counsel for the plaintiff on the theory that the agreement that Pflaester was to pay Howe on the value of the tools and horses used on the place 6 per cent. It is contended that this must have been property that had been sold to Pflaester. The whole contract should be construed together, and, so construing it, it is apparent that Howe agreed to furnish the tools and the horses for use on the place, and that the tenant was to pay him for the use of the same as long as they might be used 6 per cent. per annum on the value thereof. This would not seem to be an unreasonable charge considering the fact that within a few years the horses would die and the tools would wear out.

This court has so held in *Katz v. Ish,* 84 Neb. 380. In that case the first paragraph in the syllabus reads: "While it is the duty of this court upon appeal in an equity case to pass upon the evidence and reach its own conclusion thereon, still, in ordinary cases, where the evidence is entirely oral and the trial court may be presumed to have had a general local knowledge of the parties, the witnesses and the subjects of controversy, the finding of the trial court is entitled to careful consideration." The judgment of the trial court in that case was sustained. In the body of the opinion it is said: "A critical analysis of the testimony of each witness is impracticable with the time at our command, and we can only say that, while not entirely satisfied, we think the preponderance of the evidence is with the defendant, and that the district court was justified in so finding."

In *McNamara v. McNamara,* 93 Neb. 190, which was a divorce case, this court held: "In an action in equity this court, upon appeal, must try the case *de novo* upon

the evidence in the record. A decree of divorce will be affirmed if a cause of action alleged in the petition is supported by the evidence, although the trial court based the decree upon another alleged cause of action not established by the evidence."

After a careful examination of the testimony of the witnesses, briefs of counsel, and authorities cited, we are unable to say that the findings and judgment of the district court are wrong. It is shown by the record that the trial judge was careful in his examination of the details of the case. We adopt his conclusion. The judgment of the district court is

AFFIRMED.

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

H. C. KERR, APPELLEE, V. ADAMS COUNTY; UR S. ROHRER, APPELLANT.

FILED MAY 15, 1914. No. 17,416.

1. **Appeal:** SUFFICIENCY OF PLEADINGS. Where a case is brought to the supreme court on appeal, without a bill of exceptions or special findings, the only question which can be considered upon the appeal is the sufficiency of the pleadings to sustain the judgment.
2. **Pleadings** examined, and found sufficient to sustain the judgment of the district court.

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

M. A. Hartigan and *John Snider,* for appellant.

J. W. James, contra.

BARNES, J.

This is an appeal by a taxpayer from a judgment of the district court for Adams county in favor of one H. C. Kerr

on a claim for services rendered by the claimant as a county supervisor of that county.

It appears that the claim filed was for $21.10. It was duly itemized and sworn to by the plaintiff, and was audited and allowed by the county board. Thereupon, one Ur S. Rohrer, as a taxpayer, appealed to the district court. The plaintiff filed his petition claiming the sum of $21.10, and appellant answered admitting the validity of certain items of the claim amounting to $9, and alleged that plaintiff was not entitled to recover the balance of his claim because the services in dispute were rendered after the expiration of plaintiff's term of office, to wit, between Thursday after the first Tuesday in January, 1911, and the second Tuesday in that month. The cause was tried without a jury. There was a finding and judgment for the plaintiff for the full amount of his claim, and to reverse that judgment the taxpayer has brought the case to this court.

The record contains no bill of exceptions, and the only question presented for our consideration is: Do the pleadings sustain the judgment of the district court? The petition sets forth a good cause of action. As to certain items thereof, the appellant admitted that the plaintiff was entitled to recover. Without a bill of exceptions, we are unable to say that plaintiff was not entitled to judgment on the contested items. It is contended, however, that the term of office of all state and county officers, judges of the supreme court, district and county courts, and regents of the university shall begin on the first Thursday after the first Tuesday in January next succeeding their election, and shall continue until their successors shall be elected and qualified. Const., art. XVI, sec. 14.

It is alleged in the answer that plaintiff's successor was duly elected, and received his certificate of election before the first Thursday after the first Tuesday in January, 1911, and that he duly filed his bond as such supervisor. But it is nowhere alleged in the answer that the plaintiff's successor qualified by taking the oath of office before the second Tuesday in January of that year.

By section 1067, Rev. St. 1913, it is provided: "The supervisors shall severally lay before the board, at the first regular meeting after election, their certificates of election, which shall be examined by the board, and if found regular shall be filed in the office of the county clerk."

Section 1064, Rev. St. 1913, provides: "The regular meetings of the county board shall be held on the second Tuesday of January and the first Tuesday after the second Monday in July."

In the absence of a bill of exceptions, it will not be presumed that the plaintiff's successor qualified until the second Tuesday in January, 1911, and, it appearing from the pleadings that the plaintiff performed the duties of his office and held over until that date, it follows that he was entitled to recover the full amount of his claim.

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

AFFIRMED.

EDWARD P. DONAHUE, APPELLANT, V. JOHN J. HANIGHEN, APPELLEE.

FILED MAY 15, 1914. No. 17,537.

1. **Partnership.** The plaintiff in this case sought to establish the existence of a partnership between himself and the defendant. The defendant denied that that relation existed, and alleged that plaintiff was employed by him on a salary of $100 a month, and that it was agreed that if the business in which he was engaged should prove profitable he would give the plaintiff a share of the profits to be fixed by the defendant. *Held*, That the plaintiff failed to establish the existence of a partnership by a preponderance of the evidence.

2. **Contract of Employment.** The district court found that under their agreement plaintiff was entitled to receive 25 per cent. of the net profits of the business originating in the city of Omaha, and rendered a judgment for the plaintiff for $664.12 accordingly. *Held*. That the judgment was sustained by the evidence and should be affirmed.

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

Smyth, Smith & Schall, for appellant.

W. H. DeFrance, contra.

BARNES, J.

The plaintiff brought this action in the district court for Douglas county on the theory that he was a partner of the defendant, Hanighen, in the construction of certain sewers in the city of Omaha and elsewhere. He prayed for an accounting of the profits in the alleged partnership business, and for a judgment for the amount found to be due him on such accounting. The defendant by his answer denied the existence of any partnership agreement between himself and the plaintiff, and alleged that in the spring of 1909 he employed the plaintiff to work for him in his business of constructing sewers, and agreed to pay plaintiff the sum of $100 a month, and if his business was profitable he agreed he would, in addition to his salary of $100 a month, pay the plaintiff a part of his profits, which was to be afterwards determined by the defendant himself.

It appears that the plaintiff was an engineer who had been employed by the city of Omaha in such work as was performed by the city, and had theretofore had some experience in the construction of sewers; that for about six or eight months before he was employed by the defendant he had been out of a job, and was therefore somewhat anxious to obtain employment. The plaintiff testified that the defendant sent for him to discuss the matter of entering into a partnership, while the defendant testified that one Hammond came to the defendant, and told him that Donahue was out of a job and would be glad to get something to do, and defendant told Hammond to send Donahue around to see him. It appears from the testimony that afterwards Donahue met the defendant as he was driving in a buggy, and defendant invited him to ride. On the way they made an arrangement by which Donahue was

to go to work for the defendant, and was to have $100 a month, with a prospect of a share of the profits in case the business was profitable. No arrangement was ever made between them, so far as the record discloses, and no articles of copartnership between plaintiff and defendant were ever entered into in writing or filed in the office of the county clerk of Douglas county. The plaintiff was thereafter paid a weekly salary of $25, and after he worked for the defendant some six or eight months asked the defendant to advance him more money. This the defendant did from time to time, until Donahue had overdrawn his salary to the amount of $1,741.96. Meanwhile the defendant had constructed sewers in sewer districts Nos. 360, 361, 362, 363, 373, 377, 395 and 404; the last mentioned sewer being known as the "Izard street sewer," or "North Omaha main sewer." In addition the defendant had obtained a contract for and built a sewer for the United Real Estate & Trust Company, had obtained a contract and built a sewer for Milton Rogers & Son Company, had also built a sewer for the school district of Seward, known as the "Franklin school sewer." In addition thereto, the defendant had obtained contracts from the United States government and built a sewer near Fort Russell and one near Fort Robinson. After this work was nearly all completed the plaintiff demanded more money from the defendant, and was told that he had overdrawn his salary account to the amount of something over $1,700, and there was nothing more coming to him. Defendant also informed the plaintiff that he had concluded to give him 25 per cent. of the profits realized on the contracts which were obtained in the city of Omaha, and that the amount that plaintiff had overdrawn would just about balance the account for those profits. Defendant refused to pay the plaintiff any further amount until he received his pay on the balance of the contracts, which had not as yet been completed. Plaintiff was dissatisfied with this arrangement, and brought the present suit.

The plaintiff testified, among other things, that the defendant never said to him that the $1,741.96 was in addi-

tion to his salary, and claimed that he received that amount on account of his interest in the partnership, and not otherwise. Plaintiff also testified that in the summer of 1910 he had a talk with the defendant, and asked him for a statement showing the amount that the defendant owed him; that defendant sent a statement, made by his bookkeeper, Larson, through the mail. In that statement nothing was said in regard to the contracts at Fort Russell and Fort Robinson. The statement showed that the defendant had received net profits on all his Omaha contracts amounting to $10,058.66. Plaintiff also testified that, at the time defendant fixed the salary question, he said that they were to consider the partnership arrangement later on; that he did not ask for any money after the 22d day of May, 1910; that after that his only demand was for a statement, and not for money; that he did not ask the defendant what per cent. he was going to pay at that time, but did later. He also testified that he never had anything to do with the jobs at Fort Russell and Fort Robinson, and was never nearer to that work than the city of Omaha.

It appears that one contract for a sewer in the city of Omaha was taken in the name of the plaintiff, but it also appears that defendant furnished the certified check and the money to secure and carry out the contract. It also appears from the plaintiff's own testimony that he never furnished any of the means necessary to carry out the several contracts taken by the defendant; that he never furnished any of the material; and in fact the only thing the plaintiff did was to act as a foreman in supervising and looking after the work on the contracts which were entered into between the defendant and the city of Omaha. Plaintiff also testified that he spoke to the defendant about getting up articles of agreement between them, and that defendant replied that the articles would be ready in about a week. He also testified that there never was any special arrangement as to the interest he was to have in the partnership. The testimony of the defendant was corroborated by the evidence of his bookkeeper, Larson, and that of Walter M. Ord. Defendant also testified that he

told Ed (meaning the plaintiff) that he intended to give him 25 per cent. of the net profits on the Omaha jobs; that plaintiff said to him, "I think you are hogging it a good deal;" that he replied, "That is just a question of opinion between you and me. I furnished my money and my brains to put this thing through. I am giving you 25 per cent. I don't think I am hogging it." Plaintiff said, "'I am not satisfied.' I said, 'I can't help it; that is the best that I can do for you.' He never made any claim in any of his conversations that we were partners." Donahue was general foreman on every one of the contracts with the city. With respect to the money advanced to Mr. Donahue outside of his salary, the defendant testified that "he had been with me over a year, and he asked for some money. I said, 'Ed, how much do you want?' I don't know if it was $50, $100 or $150. I told the bookkeeper to give it to him. Later on he wanted $400 or $500 more, and I said, 'All right, you can have it.' Then he wanted some work done in his house. I said, 'Sure, we will be glad to do it.' I loaned him $150 more, until it got up to the amount of $1,700; then I thought he was getting close to the limit; that was the last. Yes, he asked me for an advance after that. I told him no, it was more money than was coming to him."

As we view the record, the plaintiff failed to establish the existence of a partnership agreement between himself and the defendant, Hanighen, and on this point we are of opinion that the finding and judgment of the district court was right. It appears that the court then took into consideration the amount of the profits on the Omaha contracts, and made a finding that there was due from the defendant to the plaintiff, in addition to his salary of $25 a week, the sum of $664.12 as his share of the profits on those contracts on the 25 per cent. basis as fixed by the defendant, and rendered judgment accordingly.

As we view the record, the judgment of the district court was right, and it is in all things

AFFIRMED.

LEOPOLD DOLL ET AL., APPELLEES, V. AUGUSTUS DOLL ET AL., APPELLANTS.

FILED MAY 15, 1914. No. 17,734.

1. **Trusts:** TITLE TO REALTY. Where one buys real estate for which he pays the purchase price, and for convenience takes the title in the name of another, the person taking the title will hold the property in trust for the one who pays the purchase price.
2. ———: RESULTING TRUST: STATUTE OF FRAUDS. The trust thus created is what is known as a resulting trust, and is not affected by the statute of frauds.
3. ———: TITLE TO REALTY: PAROL AGREEMENT: STATUTE OF FRAUDS. A parol agreement, made at the time of executing a conveyance of real estate, that the grantee shall hold the title to property in trust for the grantor, and when sold pay the proceeds to him, the grantor at all times retaining the possession and collecting the rents and profits thereof, is not within the statute of frauds, and the land, and the money for which it is sold, belongs to the grantor.

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

Guy R. C. Read and *George W. Shields & Sons*, for appellants.

Baldrige, Keller & Keller, De Bord, Fradenburg & Van Orsdel, Piatti & Wear and *John G. Kuhn, contra.*

BARNES, J.

This action was commenced in the district court for Douglas county by Leopold Doll, and the other heirs of August Doll, deceased, who died intestate in said county, against Augustus Doll and Charles F. Doll, together with William Doll, Cina Hanson, Mary Doll McArdle, and Clara Joern, who refused to be joined in the suit as plaintiffs, to establish a trust in certain real estate, which it was alleged August Doll owned, and in which he had an equitable interest at the time of his death, the legal title to

said property at that time being in the defendant, Augustus Doll. Issues were joined, and the cause was tried to the court without the intervention of a jury; the trial resulted in findings and a decree for the plaintiffs as to all that part of the real estate for which August Doll had paid the purchase price, and which he had caused to be conveyed by the vendors to Augustus, and as to the property which August Doll, by deed in which he was the grantor, had conveyed to Augustus, the decree was for the defendants. The defendants excepted to so much of the findings and decree as were adverse to them; the plaintiffs excepted to that part of the decree which was in defendants' favor, and the case comes to this court on the appeal of the defendants and plaintiffs' cross-appeal.

It appears that August Doll was a widower, his wife having died some time in the year 1887; that during the last 20 years of his life he acquired and established a custom of buying and selling property and transacting business in the name of his nephews, Augustus and Charles F. Doll. His reasons for adopting that custom are not material to this controversy, but he seems to have been actuated by some financial losses, which he had sustained by having signed certain bonds for some of his friends. In pursuance of that custom, August Doll purchased property from time to time and caused it to be conveyed by the former owners to his nephews Charles and Augustus. In all cases of that kind August paid the purchase price and exercised full ownership and control over it. He leased it, collected the rents arising therefrom, paid the taxes thereon, and from time to time sold parts of it, Augustus executing deeds and conveyances therefor when he was instructed to do so by his uncle. That custom was kept up until about the time of August Doll's death, which occurred in the month of August, 1910. At the time of his death he owned a tract of land in South Dakota, more particularly described in plaintiffs' petition and the decree of the district court, for which he had paid the purchase price to a Mrs. Offerman, and which he caused her to convey by warranty deed to his nephew, Charles F.

Doll, and in turn he caused Charles F. Doll, on June 1, 1901, to convey it to Augustus for the consideration of one dollar. The testimony with respect to this land shows that August at all times exercised the rights of ownership over it, paid the taxes, and made some improvements thereon. At the time of his death he was also the owner of a farm in Antelope county, Nebraska. It appears that a Mrs. Getzschmann owed August some money, and in order to pay that indebtedness turned over the Antelope county land to him, and he caused her to make the deed of it to his nephew Augustus. August, however, took possession of the farm, paid the taxes thereon, leased it, and collected the rents arising therefrom. When August died he was the owner of a contract of sale of a tract of land in Douglas county, known as the "Ainsworth place," which had been conveyed by the person from whom he purchased it to his nephew Augustus, and for which Augustus had, under his uncle's direction, executed a contract of sale to one Brock. Those properties the district court found and decreed were held by Augustus under what is known as a resulting trust for the benefit of the plaintiffs, the heirs of his deceased uncle. There seems to be no dispute as to the fact relating to that part of the estate of August Doll. He paid the purchase price of the South Dakota land, the Antelope county farm, and the Ainsworth property, and conveyances were taken from the vendors to Augustus in two instances, and in the third to the nephew Charles, and from him to Augustus. This is not disputed by any one. Therefore, in disposing of the contention in relation to those properties, it is sufficient to say that the well-established rule in this state is that, when one person buys real estate and pays the purchase price thereof, and the title is taken for convenience in the name of another, the person taking the title will hold the property in trust for the person paying the purchase price. *Hoehne v. Breitkreitz*, 5 Neb. 110; *Chicago, B. & Q. R. Co. v. First Nat. Bank*, 58 Neb. 548; *Kobarg v. Greeder*, 51 Neb. 365; *Detwiler v. Detwiler*, 30 Neb. 338. Without citing the cases from other jurisdictions, it is sufficient to say that they are gen-

erally in accord with the rule so often announced by this court.

To avoid the undisputed facts above stated, the defendants alleged by their answer that after the death of August Doll's wife he made an arrangement with Charles and Augustus by which they were to have all of his property; and Augustus and Charles agreed to give their uncle August all the money that they then had, and all that they might thereafter have, except such as was necessary for the support of their families. They also agreed to borrow from their brothers and sisters, and to deliver to their uncle August such moneys as their brothers and sisters would loan to them, and their uncle August promised and agreed during his lifetime, and at such times as he should desire, to transfer or cause to be transferred to Augustus and to Charles all the property owned by him; that he was to have his living therefrom, "or all the income of such property, during his life, or while he was able to take care of it, for his own use, if he so desired." Upon this agreement the defendants predicated their defense. The testimony in support of this remarkable agreement appears to be neither persuasive nor convincing. Augustus testified that he gave his uncle a great deal of money from time to time; that all the money he gave to his uncle was represented by checks on the United States National Bank; that the checks were either payable to himself or to his uncle personally. After this testimony had been given by Augustus, a record of all of the checks which he had ever drawn during the years in question on the United States National Bank, were produced in evidence, together with a bank statement of all of his business transactions. This evidence completely refuted his testimony. None of his checks were ever drawn to his uncle August, and the sums mentioned in his testimony totally failed to correspond in amount with any of the checks which he had testified had been drawn by him in furnishing the money which he claimed to have given to his uncle.

The trial court, in disposing of the defense made by Augustus and Charles, said: "The testimony of Augustus

Doll, however, has been very much discredited by his statements upon the witness-stand, and by his conduct and actions, and in determining the rights which he has the court cannot be blinded to the fact that he has made contradictory statements upon oath with respect to his rights in this property. So that * * * it seems to me that, with the presumption of a resulting trust arising by the consideration being furnished by the old man, the title being taken in the young man, the presumption of the trust has not been overcome by the testimony of the defendants; and the court will hold and determine that it is within the rule of a resulting trust, and that the land is being held by Augustus Doll in trust for the plaintiffs in this suit." After a careful reading of the record, we are of opinion that the finding above quoted is amply sustained by the evidence, and we adopt it as our own. It follows that so much of the decree as was in plaintiffs' favor was right and should be affirmed.

This brings us to the consideration of the plaintiff's cross-appeal. It appears from the record that on the 29th day of November, 1899, August Doll conveyed to his nephew Augustus Doll, by warranty deed, the northeast quarter of section 15, in township 14 north, of range 26 west, situated in Lincoln county, Nebraska, for the express consideration of one dollar; that such transfer placed the legal title to the premises in his nephew Augustus. It also appears that on the 7th day of July, 1901, August Doll conveyed to Augustus, by warranty deed, the following described real estate situated in Douglas county, Nebraska, to wit: Lots 7 and 8, in block 14, lot 7 in block 13, Isaac & Seldon addition to the city of Omaha; also the east half of tax lot 30, and all of tax lot 31, in section 21, township 15, range 13 east, Douglas county, Nebraska, and the west 45 5/10 feet of the east 631 feet of lot 16 in Bartlett's addition to the city of Omaha, for the consideration expressed in said deed of $9,000. It appears that the uncle, during the remainder of his life, collected the rents and profits of all of said property, but at his death the legal title was in his nephew Augustus, and there was no

writing in existence from which it could be ascertained how Augustus held the title to the said real estate; but, as we read the record, it appears from the evidence that August intended to retain the equitable title and the beneficial interest to said real estate in himself, and the fact that at all times he kept the possession and collected the rents and profits thereof, and converted them to his own use, takes the case out of the rule announced in *Cameron v. Nelson,* 57 Neb. 381, and *Marvel v. Marvel,* 70 Neb. 498.

Section 2623, Rev. St. 1913, commonly called the statute of frauds, provides: "No estate or interest in land, other than leases for a term of one year from the making thereof, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." Section 2624 provides: "The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law."

It is contended by the appellant that the conveyances above mentioned by August Doll to his nephew Augustus created an express trust, and fall within the inhibition of the statute. But it clearly appears that August did not surrender the possession when the title was taken in the name of his nephew, but himself remained in possession and control of the property. This possession takes the case out of the statute.

Oberlender v. Butcher, 67 Neb. 410, was a case where a mother gave her son $500 and asked him to buy her a house. He bought the house, taking title in his own name. Later she went into possession. During her possession the son first mortgaged and then conveyed the premises. In disposing of that case the court said: "Another objection to the decree is that the transaction is within the statute of frauds. As this is an express trust the statute is

applicable here, and as the letters which passed between the parties were not produced there was no written evidence of the transaction. But the *cestui que trust* remitted her money on the strength of it, and afterwards came from another state and took possession of the premises, and this, in the absence of writing, is a sufficient performance and execution of the trust to take it out of the statute." 2 Reed, Statute of Frauds, secs. 889, 890.

In *Woodward v. Woodward,* 89 Neb. 142, it was said: "The fact that the property was purchased upon an express oral agreement of the wife to hold it, or any part thereof, in trust for him (the husband) does not destroy the trust arising from the transaction, but should be considered as tending to rebut the presumption that the money was paid as a settlement upon her."

In *Cowles v. Cowles,* 89 Neb. 327, Cowles purchased the land in question from the Burlington railroad and took a contract therefor. He paid the original payment, and thereafter kept up the subsequent payments. He went into possession of the land, and remained during the whole period of time leading up to the litigation in possession thereof. At the time he completed his payments he directed that the railroad company should make out the deed in the name of his mother. At the time this was done Cowles had a judgment against him which he claimed was an unjust one. He had paid the debt before the judgment was procured. He had the land taken in the name of his mother in order to avoid the payment of this judgment. During the life of the mother she made a will leaving the land to her daughter, and during the last years of her life the mother and father of Cowles lived with him upon the land, and the daughter as well occupied the home of her brother during the last years of her mother's life. The will was made bequeathing this land to the daughter at the request of the plaintiff. In that case the court held: "In disposing of defendant's first contention, it is sufficient to say that the well-established rule in this state is that when one person buys real estate and pays the purchase price thereof, and the title is taken for convenience in the

name of another, the person taking the title will hold the property in trust for the person paying the purchase price."

It must be observed in the case at bar that the conveyance by the uncle to the nephew by direct deed of the property described in the petition was for the accomplishment of a specific purpose. It was to enable the uncle to use the name of his nephew as the conduit through which the title to different pieces of real estate should pass. The understanding was to use the name of Augustus as a matter of convenience.

Myers v. Myers, 88 Neb. 656, was an action for a divorce and alimony. In disposing of the contention as to the question of alimony, it appeared that the property had been accumulated by the joint efforts and economy of the husband and wife, and the title, for convenience or by accident, was taken in the name of the wife. It was held, in granting an absolute divorce, that the property was the property of the husband, and a suitable allowance was made to the wife for permanent alimony.

In 15 Am. & Eng. Ency. Law (2 ed.) p. 1127, it is said: "Where land has been conveyed by an absolute deed, the intention of the parties not being to confer on the grantee the beneficial interest, but merely to facilitate the accomplishment of some specific purpose, it has been held that the purpose of the conveyance may be shown by parol, and thereby a resulting trust may be raised in favor of the grantor." This rule is fully recognized in *Beadle v. Beadle,* 2 McCrary (U. S.) 586; *Stubblefield v. Stubblefield,* 45 S. W. (Tex. Civ. App.) 965; *Rice v. Rice,* 107 Mich. 241; *Bartlett v. Bartlett,* 15 Neb. 593; *Clark v. Clark,* 21 Neb. 402; *Pollard v. McKenney,* 69 Neb. 742; *Koefoed v. Thompson,* 73 Neb. 128. Many other cases might be cited in support of the rule. We are therefore of opinion that the district court erred in holding that by the two conveyances last mentioned an express trust was created and that as to the property thus conveyed the plaintiffs could not recover.

As we view the evidence, the judgment of the district court should be modified in so far as that court held that the land described in the said last two mentioned conveyances became the absolute property of Augustus; we find that the real estate described in those deeds was held by Augustus in trust for his uncle August and his legal heirs. The cause is therefore remanded to the district court, with directions to modify the judgment which it heretofore rendered in this case, and enter a decree in accordance with the views expressed in this opinion.

MODIFIED AND REMANDED, WITH DIRECTIONS.

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

JOHN A. JOHNSON, APPELLEE, V. SWAN A. LARSON, APPELLANT.

FILED MAY 15, 1914. No. 17,741.

1. **Appeal:** CONFLICTING EVIDENCE. In an action on a promissory note, where the evidence on the question as to whether the note was purchased by the plaintiff before due and in due course is conflicting, a verdict of the jury in plaintiff's favor on that point will not be set aside.
2. ———: PLEADING: WAIVER OF OBJECTIONS. Where the plaintiff's petition in general terms was sufficient to state a cause of action, and was not attacked by motion or demurrer before judgment, defendant's objection that the title of an indorser of the note was not pleaded with sufficient particularity will not be considered.
3. **Attachment:** COMMENCEMENT OF ACTION. "An action is considered commenced, so far as the right to issue a writ of attachment is concerned, as soon as the petition is filed in the proper court, and a summons is issued thereon with a *bona fide* intent that it shall be served." *Coffman v. Brandhoeffer*, 33 Neb. 279.
4. ———: DISSOLUTION. The fact that plaintiff, as a matter of precaution, obtained a second attachment, which was levied on property more than sufficient in amount to satisfy plaintiff's claim, is not a ground for a dissolution of the attachment.

5. ———: PRIORITIES. On an examination of the proceedings set forth in chronological order in the opinion, *held*, that the plaintiff's attachment created a lien on the attached property prior in point of time to the attachment of the interveners.

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

France & France, for appellant.

King & Bitner, John C. Martin and *V. E. Wilson, contra.*

BARNES, J.

This was an action on a promissory note executed by the defendant, Swan A. Larson, for $1,000, which the plaintiff alleged was purchased by him before due in the usual course of business. The suit was aided by an attachment. To make clear the questions presented by the appellant, the proceedings will be chronologically stated.

On March 4, 1911, plaintiff filed in the district court for Polk county his petition, affidavit, bond for attachment, and præcipe for summons. On March 6 summons and writ of attachment were issued and served upon the defendant by delivering to him personally duly certified copies thereof. The attachment was levied upon 120 acres of land as the property of the defendant. The summons was not indorsed with the amount for which plaintiff would take judgment if the defendant failed to appear. March 8 the summons and writ of attachment were returned by the sheriff and filed with the clerk. April 24 default was entered against the defendant in the main action, and on the same day the motion of plaintiff to quash and for an alias summons was filed; an alias summons was issued containing the necessary indorsements of the amount for which the plaintiff would take judgment on default. April 27 the alias summons showing personal service on the defendant was returned and filed with the clerk. September 28 defendant filed a motion to dissolve the attachment on the ground that the facts stated in the affidavit were insufficient to sustain the writ and were untrue. October

3 defendant filed an affidavit in support of his motion to dissolve the attachment, and an answer to plaintiff's petition in the form of a general denial, and a hearing was had on his motion to dissolve the attachment. October 4 the intervening creditors filed petitions, by leave of the court, after having sued out attachments against the defendant and levying them upon the land previously attached by the plaintiff. Plaintiff on the same day sued out a second writ of attachment against the defendant, which was levied on the property of the defendant other than that seized under the first writ. October 9 defendant was heard further upon his motion to dissolve plaintiff's first writ of attachment, and he also at that time filed a special appearance and motion challenging the jurisdiction of the court over his person and over the property seized under the plaintiff's first writ on the ground that no suit was commenced at the time the writ was issued or levied as required by law. October 10 defendant's motion to dissolve the first attachment upon a consideration of the issues of fact was overruled. December 27 the defendant filed a motion to dissolve plaintiff's second attachment. January 29, 1912, plaintiff filed an amended reply to defendant's answer. On February 5 a trial was had in the main action, and the jury returned a verdict for the amount prayed for in plaintiff's petition, on which a judgment was rendered. On February 6 all of the defendant's motions attacking both attachments, including his motion objecting to the jurisdiction of the court, were overruled. Defendant has appealed, and his first contention is that the verdict is not sustained by sufficient evidence.

Defendant relies on his own testimony to substantiate that fact. His evidence consists of the single statement that he told the plaintiff prior to his purchase of the note that there was no consideration for it. Defendant also stated that the Stromsburg Auto Company, from whom plaintiff purchased the note, had floated it, which we understand to mean that plaintiff knew that the note had been sold. His testimony is seriously affected, however, by the several contradictory statements made by him. He

even denied his own signatures, and then afterwards readily assented to their genuineness when examined by his own counsel. On the other hand, the evidence that plaintiff was the holder and owner of the note in due course which was purchased before maturity seems to be clear and convincing. Plaintiff denied unequivocally the statement defendant says he made that the note was without consideration, and testified that he had no conversation with the appellant prior to the day the note was due. His testimony flatly contradicted plaintiff's evidence that he was told of a defect in the note prior to its purchase, and he was corroborated, to some extent, by the testimony of the other witnesses. It further appears that there was a consideration for the note when it was executed. It was given for a one-half interest in a $1,500 real estate mortgage on property in Garrison, Nebraska, and a one-half interest in $880 of real estate commissions owned by the firm of Carmine & Fillman, to whom the note was given. We are therefore of opinion that the evidence was sufficient to sustain the verdict.

Defendant further contends that the petition did not state facts sufficient to constitute a cause of action against him, in that plaintiff's title to the note was not sufficiently pleaded. It is alleged that the petition should have set forth the partnership character of the Stromsburg Auto Company through whom plaintiff derived title to the note. The averments of the petition showed a transfer by indorsement and delivery, and sufficiently stated a good cause of action. No motion was filed by the defendant to make the petition more definite and certain, and it was not attacked in any way before judgment. We therefore hold that this assignment of error is without merit.

It is next contended that the court erred in overruling the defendant's motion to dissolve the first writ of attachment on the ground that at the time the writ was issued the plaintiff's action had not been commenced; and it is argued that, because the summons issued at the time the petition and affidavit for attachment were filed contained no indorsement of the amount for which plaintiff

would take judgment if the defendant failed to appear, that summons was void, and as matter of fact no action was commenced against the defendant until the alias summons was issued and served.

In *Tootle, Hanna & Co. v. Ellis,* 63 Kan. 422, it was held that a failure to indorse on the summons the amount for which the plaintiff would take judgment, in case the defendant failed to appear, was not a part of the summons, but simply an indorsement upon it.

In *Dusenberry v. Bennett,* 7 Kan. App. 123, the court held that a summons not indorsed for the amount for which judgment would be rendered in case the defendant failed to appear is irregular, but not void.

In *Simpson v. Rice, Friedman & Markwell Co.,* 43 Kan. 22, a summons was issued December 13, 1886, without the usual indorsement. An order of attachment was issued on the same day. On December 14 another and corrected summons was issued, and it was held that the attachment was valid, although the summons which was made the basis for attachment was never served, and a new summons was issued.

In *Watson v. McCartney,* 1 Neb. 131, it was said: "The office of the notice indorsed on the summons is to advise the defendant of the amount claimed. He then is at liberty to consent or resist."

In *Crowell v. Galloway,* 3 Neb. 215, it was held that the failure of the clerk to indorse the amount of the plaintiff's demand on the summons, where all the other requirements of the statute are observed, is of no consequence, unless the defendant fails to appear.

In *Elmen v. Chicago, B. & Q. R. Co.,* 75 Neb. 37, it was held that a summons which contained no indorsement might be amended, but an alias summons issued and served was held not to relate back to the time of the original summons so as to defeat the running of the statute of limitations.

In *Coffman v. Brandhoeffer,* 33 Neb. 279, it was said: "An action is considered commenced, so far as the right to issue a writ of attachment is concerned, as soon as the

petition is filed in the proper court, and a summons is issued thereon with a *bona fide* intent that it shall be served." In the case at bar it appears that the original summons was served personally upon the defendant.

In *Darnell v. Mack,* 46 Neb. 740, the court said: "Where property has been seized under a writ of attachment regularly issued and levied, the court acquires jurisdiction over the property, so far at least as to render the custody of its officers lawful, and jurisdiction to that extent is not lost, so long as the action remains pending by failure to serve process in the main action upon the defendant."

In *Jones v. Danforth,* 71 Neb. 722, it was said: "In this state the court acquires jurisdiction over the *rem* by its seizure, and failure to give the notice does not thereby cause the court to lose jurisdiction so long as the action remains pending."

We are therefore of opinion that, by the filing of the affidavit in attachment, and the levy and return of the writ which was issued thereon, the plaintiff acquired a lien upon the property of the defendant which was seized under the writ. Again, it may be said that the defendant, by filing an answer to plaintiff's petition on the merits, and a motion to dissolve the attachment on the question of the sufficiency of the affidavit and its truthfulness, entered a general appearance before he interposed his plea to the jurisdiction, and such appearance operated as a waiver of all defects in the original summons.

It is further contended that the second attachment was void, and the motion to dissolve, because more property was seized than was necessary to satisfy the plaintiff's judgment, should have been sustained. It appears from the record that the defendant had disposed of his property or transferred it to his wife for the purpose and with the intention of defrauding his creditors, and the fact that the plaintiff, as a precautionary measure, caused more property to be seized under the two writs of attachment than was sufficient to satisfy his claim did not render the second attachment void.

Finally, it is contended that the court erred in holding that plaintiff's lien on property attached was prior to that of the intervening creditors whose attachments were levied long after the commencement of plaintiff's action. A reference to the chronological statement of the proceedings found in the beginning of this opinion sufficiently disposes of this assignment of error.

From what we have said, it appears that the proceedings were without reversible error, and the judgment of the district court is in all things

AFFIRMED.

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

ROBERT W. RALSTON, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MAY 15, 1914. No. 17,751.

1. **Carriers:** INJURIES TO CATTLE IN TRANSIT: EVIDENCE. In an action against a common carrier to recover damages to a shipment of live stock over the defendant's line of railroad, it having been shown by plaintiff that the injuries to the animals could not have been occasioned by reason of their own inherent vice, but must have been sustained by delay and want of proper care in transportation, it is not error to refuse to direct a verdict for the defendant.

2. ———: ———: LIABILITY. Where a shipper of live stock does not agree to furnish a caretaker, and some of the animals die or are injured for want of proper care and protection while in transit, the carrier is liable and must bear the loss.

3. ———: ———: DEFENSES: BURDEN OF PROOF. Where the carrier defends on the ground that the stock when received for transportation was weak and thin in flesh and unfit for shipment, and that the injuries sustained in transit were caused by reason of that fact, it is not error to instruct the jury that the burden is on the defendant to show that fact by a preponderance of the evidence.

4. ———: ———: REVIEW: ADMISSION OF EVIDENCE. Where the plaintiff has been permitted to prove the unsuitable condition of the car in which the stock was shipped without objection, the introduction

of such proof furnishes no grounds for a reversal of the judgment, although some of the evidence related to a matter not specifically set forth in the pleadings.

5. ———: ———: DAMAGES: EVIDENCE. Evidence examined, and found that the verdict was not excessive, and was sustained by the evidence.

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

Edson Rich, John A. Sheean and *A. G. Ellick,* for appellant.

H. M. Sinclair, J. H. Linderman and *W. A. Stewart, contra.*

BARNES, J.

The plaintiff commenced this action in the district court for Dawson county to recover damages alleged to have been caused by the negligence of the defendant railroad company in the transportation of two car-loads of cattle over its line of railroad from Denver, Colorado, to points in Nebraska. One car-load was billed to Lexington and the other to Willow Island in Dawson county in this state. The shipment to Lexington was consigned by the Laverty Brothers to the plaintiff, and the shipment to Willow Island was consigned by Laverty Brothers to Frank Ralston, a brother of the plaintiff.

The grounds of negligence charged as to the Lexington shipment were that the stock was kept in the process of transportation for 61 hours, while the reasonable running time between the place where the shipment originated and the place of its destination was only 25 hours; that defendant negligently permitted the existence of a hole between the jamb of a door and the door itself, and because of the rough handling of the car some of the cattle became fastened therein and were thereby injured. The charge of negligence as to the Willow Island shipment was that the time actually consumed in the transportation of the car was 51 hours, while the reasonable

time required for such transportation was only 24 hours, and that the cattle were roughly handled in transit.

The defendant answered as to both shipments, alleging that they were moved under written contracts from the point of origin to the point of destination within a reasonable time; that the injury to the stock, if any, was due to the inherent vice of the cattle and their condition, and to the lack of vitality when received by the defendant at the point of loading; that plaintiff failed to send a caretaker for either shipment of the stock in order to look after it and care for it during its transportation.

On a trial to a jury, a verdict was rendered for the plaintiff, fixing his damages for the Lexington shipment at the sum of $500, and for the Willow Island shipment there was a recovery for $183, with interest on the said amounts. Defendant's motion for a new trial was overruled, and a judgment was rendered on the verdict in favor of the plaintiff and against the defendant for the sum of $733.04. To reverse that judgment the defendant has brought the case to this court by an appeal.

1. In defendant's first assignment of error, it is alleged that the court erred in refusing to direct the jury to return a verdict for the defendant on both of the plaintiff's causes of action; that the court erred in refusing to strike out the testimony relating to the reasonable running time between the point of origin and the destination of the plaintiff's stock shipments, and there was error in refusing to give instructions numbered 4 and 12 requested by the defendant.

On the question of directing a verdict, it may be fairly said that there was a conflict of evidence as to the condition of the stock at the time it was received by the defendant for shipment and when it reached its place of destination. It appears by the plaintiff's evidence that, when the stock was received, it was in a fairly good condition for shipment. The testimony discloses without question that when it reached its destination it was in such a condition as to be unsalable, and the plaintiff refused to receive it from the hands of the carrier. It seems clear that the

stock had been seriously injured in transit, and therefore the court correctly refused to direct a verdict for the defendant.

As to the question of striking out the testimony tending to show the reasonable running time from Denver to the place of destination in Nebraska, the distance of about 300 miles, it cannot be said that the reasonable running time was more than 24 hours, for at a rate of speed not exceeding 15 miles an hour the stock could have easily been delivered at the place of destination within that time. It follows that the court did not err in refusing to give instructions numbered 4 and 12, as requested by the defendant.

2. Appellant alleges that the verdict is contrary to instructions 12 and 13 given by the court on its own motion. Those instructions related to the defense of the inherent vice of the animals embraced in the two shipments. In regard to this contention, it may be said that it was the duty of the carrier, when a shipper provided no caretaker, to look after the cattle and use all reasonable efforts to properly care for them, and a failure to exercise such care while the animals were being transported afforded the plaintiff a just cause of action.

It appears from the evidence that at least six of the animals were killed outright or died en route, and many of the others were injured. One had its leg broken by being caught in the car door; others were bruised, and skinned in spots; and still others were injured by running against a bolt which projected inside of one of the cars. In fact, there was evidence which tended to show that the cattle could not have received such serious injuries by reason of their own inherent vice, and therefore it cannot be said that the verdict was contrary to those instructions.

3. Appellant assigns error for the giving of instructions numbered 10 and 11 given on the court's own motion. By instruction No. 10 the jury were told, in substance, that if the plaintiff's cattle were in poor condition when they were accepted by the defendant company for shipment, and

some of them died and others were injured because of their inherent weakness without any fault or negligence on the part of the defendant, the plaintiff could not recover, but the burden of proof was on the defendant to show those facts by a preponderance of the evidence. This instruction was quite as favorable to the defendant as the evidence warranted.

By instruction No. 11 the court told the jury, in substance, that if they believed from the evidence that when defendant accepted the cattle in question for shipment, knowing they were poor and thin in flesh, and by reason thereof were not in a fit and suitable condition to endure shipment, or if they believed that their condition as above stated was apparent to the observer, and the defendant accepted the cattle in such condition, then under such facts, if they were found to exist, defendant would be liable for such damages as plaintiff suffered by reason of any negligence and carelessness of the defendant in transporting the cattle from Denver to their respective points of destination. As we view this instruction, it was correct and accords with the great weight of authority.

4. The defendant complains because the court refused to strike out of the record the evidence of the existence of a bolt on the inside of one of the cars in which the stock was transported, and on which it is apparent some of the cattle were injured, as not within the issues. As we read the record, this evidence was received without objection. It was apparent that the existence of the bolt was the cause of serious injury to some of the cattle. We fail to find any motion to strike this evidence from the record, and therefore this assignment cannot be considered as a ground for a reversal of the judgment.

5. Defendant complains because the court permitted the plaintiff to answer the questions as to the value of the cattle at Lexington on February 26, and what would have been their value had they arrived in the condition in which they were loaded at Denver. As we view this evidence, it was competent and furnished a means of ascertaining the amount of plaintiff's damages.

6. It is contended that the court erred in excluding the testimony of the witness Palmer that he had requested Laverty Brothers to furnish a caretaker when the shipment arrived at Sterling, Colorado. We think this contention is without merit. In fact, this question, with many other of defendant's objections, appear to have been settled in *Chicago, B. & Q. R. Co. v. Williams,* 61 Neb. 608, where it was said:

"A railroad company acts in the capacity of a common carrier of live stock which it receives for transportation; and as such carrier it is bound to provide cars fit and suitable under existing conditions, and exercise due care to carry safely.

"Where a shipper of live stock does not agree to furnish a caretaker, and some of the animals die or are injured for want of proper care and protection while in transit, the carrier is liable and must bear the loss.

"Where a shipper of live stock agrees to furnish a caretaker and fails to do so, the carrier, if it has knowledge of such failure and proceeds under the shipping contract, is liable for any loss resulting from its failure to provide the stock with proper care and protection."

Finally, it is claimed that the damages were excessive, and were given under the influence of passion and prejudice. The argument on this assignment is without merit.

As we view the record, the defendant had a fair trial; and, no prejudicial error appearing, the judgment of the district court is

AFFIRMED.

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

GEORGE V. HILL, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MAY 15, 1914. No. 17,935.

1. **State Railway Commission:** APPEAL TO SUPREME COURT. Section 7, art. VIII, ch. 72, Comp. St. 1911, providing for a direct appeal from an order of the state railway commission to the supreme court, is special in its nature, is to be strictly construed, and governs the court as to the manner of procedure.

2. ———: ———: REVIEW. On the hearing of such an appeal, the order of the commission will be affirmed, unless it appears from the record and evidence that there was prejudicial error in the hearing before the commission, that the order is unreasonable or unjust or that the commission exceeded its powers.

3. **Railroads:** REGULATION: STATE RAILWAY COMMISSION. Evidence examined, and found to be insufficient to require a reversal of the order of the railway commission.

APPEAL from the State Railway Commission. *Affirmed.*

Edson Rich, for appellant.

Grant G. Martin, Attorney General, and *J. G. Beeler, contra.*

BARNES, J.

This case is before us on a direct appeal from an order of the Nebraska state railway commission requiring the Union Pacific Railroad Company to construct a depot and install an agent therein at the village of Gandy.

The appellant has filed a motion asking the court to remand the cause to the commission for the purpose of taking further testimony and making a different order. The application is supported by affidavits showing, or tending to show, some change in the conditions since the order appealed from was made. This application should be determined before the questions raised by the appeal are considered.

We held in *Hooper Telephone Co. v. Nebraska Telephone Co.,* p. 245, *post,* that the jurisdiction of this court upon

such appeals is only to reverse, vacate or modify the order of the commission, which will not be done unless it appears from the record that there was error in the proceedings before the commission prejudicial to the appellant, or that the commission has exceeded its power. If the order is affirmed, it becomes the final order of the commission, and the judgment of this court affirming the order is without prejudice to future applications to the commission for a modification of the order. The motion to remand to the commission is overruled.

We come now to the consideration of the order from which the appeal is taken. It appears that the complainant, George V. Hill, is a resident of the village or town of Gandy, and is chairman of the board of trustees of said village; that Gandy is the county seat of Logan county; that the Union Pacific Railroad Company, hereafter called the appellant, has constructed and is operating its line of railway through said county at a point about one and a half miles from the said village; that an addition to the village has been laid out, which extends to the appellant's railroad.

It further appears that since this complaint was filed appellant has established a depot at Stapleton, about three miles from the town of Gandy, and has refused to build a depot and establish an agent at the latter point, and the town and its inhabitants, and the inhabitants of the surrounding country, are thus denied railroad facilities. Thus far the parties have agreed upon the facts, and therefore they may be said to be established without any dispute. The amount of business which the railroad facilities would bring to the appellant at the point in question is not shown, and it is difficult to see how it could be ascertained until after a depot is furnished and an agent installed, and the business is conducted for at least some reasonable length of time.

On the hearing before the commission, it seems to have been practically agreed by both parties that, brushing aside all of the immaterial issues involved, the question to be determined was, What is Gandy and the surround-

ing country entitled to in view of their location, and all of the existing circumstances? It appears that the population of Gandy, as given by the last census report, was 318, and at the time of taking the census it had no railroad facilities nearer than 20 or more miles; that Gandy, previous to the time of building the extension of the appellant's railroad, was the business center of Logan county, and had a courthouse, two banks, and a number of well-established business houses. It is situated on an elevated site in the Loup Valley. As to the construction of the contiguous railroad line, it was contended that it was impracticable to leave the valley along which the road is built, and attempt to climb the grade to the town of Gandy, consequently the road was located at one and a half miles north of the village. It is the contention of the railroad company that the citizens of Gandy and vicinity are reasonably well served at Stapleton, where a depot has been built and an agent installed, and that the company should not be compelled to provide facilities for the people of Gandy. The evidence shows that Gandy has been the county seat of Logan county for more than 20 years; that the major portion of the local business of appellant's railroad would come from a farming settlement on what is known as the "Garfield Table," where most of the farm products of the county are produced; that in order to reach Stapleton those products will have to be hauled through Gandy, the distance between Gandy and Stapleton being something over three miles; that the road is very sandy, while the road between Gandy and the point on the railroad one and a half miles north of the town is solid, and can be well maintained.

It appears to have been argued before the commission by the appellant that most of the business houses formerly located in Gandy have moved to Stapleton, and it is only a matter of time until they will all be moved, and that eventually the courthouse will be located there. It appears, however, that a large number of persons are desirous of maintaining their homes at Gandy; that they have so maintained them for many years, having no rail-

road facilities, and now that the railroad has been built they insist that they should have the opportunity of enjoying the benefit of it at its nearest possible point. A large part of the strictly farming population of Logan county lies south and east of Gandy, making a longer and more difficult haul necessary if Stapleton is to be the only place where railroad facilities are furnished. Logan county is sparsely populated. The courthouse was built many years ago; the bonds issued for its construction have just been paid; and it may be that the citizens of the county are not ready to assume the new obligation for the construction of another courthouse, but will prefer to put up with the present inconvenient location for a considerable period. The commission found that it has no way to estimate the earnings of this line of road, but that the company has obligated itself by such construction to give reasonable service to the community through which it passes; that, had Gandy not been built and the county seat not located previous to the time the road was constructed, the prayer of the petition might properly be denied, but under existing circumstances it was the opinion of the commission that the rights of the people should be protected. The commission also found that the peculiar situation existing at Gandy was to be considered as a ruling factor in determining the question at issue, and the finding of the commission was: "That the defendant company shall make provision at the most convenient point on its line north of the village of Gandy to receive and discharge passengers and freight; that a small station building shall be constructed; that blue prints and specifications of the proposed building shall be submitted to the commission on or before December 15, 1912, and that the building shall be completed on or before June 1, 1913, and an agent installed." A more detailed statement of the evidence is unnecessary, for it would add nothing to the value of our opinion.

It does not appear from the record that the commission has exceeded its power, that the order is unreasonable or

unjust, and, no prejudicial error appearing, the order of the commission is

AFFIRMED.

ANDREW E. LEE ET AL., APPELLEES, V. POLLY P. NEWELL ET AL.; MARY BUTLER, APPELLANT.

FILED MAY 15, 1914. No. 17,466.

1. **Subrogation.** A court of equity will apply the doctrine of subrogation where to refrain from so doing would permit a person who has received the benefit of money paid under a mistake of fact, which discharged a lien upon real estate, to retain such benefit under such circumstances that equity and good conscience dictate its repayment or the preservation of the lien.
2. **Vendor and Purchaser:** BONA FIDE PURCHASER. One who purchases land with knowledge of the fact that a suit is pending to establish a tax lien thereon, which was begun in due season against the grantor, takes subject to the pending action.

APPEAL from the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

W. R. Butler, for appellant.

Arthur F. Mullen, contra.

LETTON, J.

This is an action to subrogate the plaintiffs to the rights of Holt county to the foreclosure of a tax lien, upon certain lands of which they are not the owners, upon the ground that their agent and attorney paid the taxes upon the land by mistake, instead of purchasing the property at tax sale as he was directed to do. The prayer is that the apparent satisfaction of the tax lien be canceled, and that a foreclosure may be had. Defendants Newell disclaimed ownership, and alleged they had sold the land to Mary Butler. Afterwards Mary Butler was made a party defendant, and

filed an answer alleging ownership and payment of taxes since her purchase, making a general denial, and pleading the statute of limitations, gross negligence, etc.

The facts seem to be that the plaintiffs, who reside in South Dakota, are the owners of a large tract of land surrounding the tract in question; that they desired to acquire a tax title to the land, and directed their agent in Holt county, Mr. Benedict, to acquire the land at tax sale; that he misunderstood, thought they were the owners of the property by purchase from Newell, and paid the taxes, instead of purchasing the same from the county; that at that time the title was in defendants Newell; that a few weeks after he had made the payment, Mr. Butler, the husband and attorney of Mary Butler, was told by Mr. Benedict that he had paid the taxes by mistake, but that the land was still liable for the taxes. Mr. Butler admits he knew these facts before the purchase from the Newells, and that his principal occupation for some years has been purchasing defective titles and tax liens in the name of his wife, Mary Butler, and clearing the titles by litigation, if necessary. The deed from the Newells to Mary Butler was filed for record May 22, 1905, but by error this land was not described. This action was begun on June 10, 1905, while the record title was in Mrs. Newell. Mr. Butler testifies that, after the deed was returned to him from the county clerk after recording, he sent it to Mr. Newell and had the proper description inserted, and that after its return to him he asked the county clerk to correct the record. There was a mistake of fact made by Benedict as to the ownership of the land when he paid the taxes. The object of the plaintiffs was to purchase the tax lien of Holt county, and not to discharge it by payment. Full notice of these facts was had by the Butlers before any money was paid to the Newells for the land.

These facts bring the case within the powers of a court of equity to grant relief. The plaintiffs paid the money without receiving that which they intended to purchase, and the defendant is not entitled to be protected, for the reason that to allow her to retain the benefit of a mis-

take, when she had full notice of its having been made and of the plaintiffs' rights, would be unjust and unconscionable. 2 Pomeroy, Equity Jurisprudence (3d ed.) sec. 849; Keener, Quasi Contracts, p. 43.

Mrs. Butler, by procuring the land apparently free of the tax lien, has in effect become the person for whose benefit the money was paid, and in equity and good conscience should return it to the plaintiffs.

It is claimed that the action against Mrs. Butler is barred by the four-year statute of limitations. The action was begun against the Newells in due time. Mrs. Butler, by taking the title from Mrs. Newell after the action was begun, with knowledge of the facts, obtained no greater rights than her grantor, and took subject to the result of the pending action. This plea is, therefore, ineffectual.

The judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

FILED MAY 15, 1914. No. 17,733.

Carriers: TARIFFS: REGULATION. The order of the state railway commission set forth in the opinion *held*, under the facts in the case, not to be unreasonable and unjust.

APPEAL from the State Railway Commission. *Dismissed.*

M. A. Low, Paul E. Walker, E. P. Holmes and *G. L. DeLacy,* for appellant.

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

LETTON, J.

This is an appeal from an order of the state railway commission denying the request of the appellant that it

approve, ratify and confirm supplement 97 to Freight Tariff No. 21,432, which eliminates from the tariff providing for switching charges the names of certain corporations and individuals as engaged in industries located upon the track of the applicant. The commission allowed the Benjamin F. Bailey Sanatorium Company to be eliminated, but denied the request as to the others named in the application. The evidence indicates that all of the occupations affected are carried on at some distance from the tracks of appellant; that by an error of a former agent the names were listed and placed upon the tariff sheet without regard to the fact that the industries were not situated upon a track; that they have been allowed for years to use tracks other than the regular team track; and that no separate tariff charge has been made for this service. It is conceded by the attorney general that the railway company is not bound by this refusal so far as concerns interstate shipments. It is also conceded that it may require reasonable compensation for delivering shipments upon these tracks which have been received from other railroads. With these concessions, and with the provision contained in the order that the service shall only be continued until a showing is made to the railway commission that the industries on and adjacent to the right of way on these industrial tracks are inconvenienced by this service, it appears that no property right is affected, and it does not appear that by the order the property of the railway company is taken without due process of law. Under these circumstances, the order of the railway commission is not so "unjust and unreasonable" (Rev. St. 1913, secs. 6128, 6129) as to warrant a court in interfering with the legislative function exercised in the regulation of the published tariff. *Hooper Telephone Co. v. Nebraska Telephone Co.*, p. 245, *post*.

The appeal is therefore

DISMISSED.

IRVING G. CHAPIN, APPELLEE, V. OCEAN ACCIDENT & GUARANTEE CORPORATION, APPELLANT.

FILED MAY 15, 1914. No. 18,119.

1. **Insurance:** AUTOMOBILE ACCIDENT INDEMNITY: NOTICE OF ACCIDENT. A provision in an automobile accident indemnity policy that the assured on the occurrence of an accident shall give immediate written notice thereof, with the fullest information obtainable at the time, to the assurer is a reasonable requirement, but the term "immediately" is to be reasonably construed in connection with the attendant circumstances.

2. ———: ———: ———. Such a provision in a policy executed "to indemnify the assured against loss from the liability imposed by law upon the assured for damages, on account of bodily injuries (including death at any time resulting therefrom) accidentally suffered," etc., does not require notice of all accidents, but is construed to mean that notice is only required of such accidents as result in bodily injuries.

3. ———: ———: ———. In a case where no bodily injury is apparent at the time of the accidental occurrance, and there is no reasonable ground for believing that a claim for damages against the owner of the automobile may arise therefrom, he is not required to give the assurer notice until the subsequent facts as to injury would suggest to a person of ordinary and reasonable prudence that a liability to the injured person might arise. In such case the duty of the assured is performed if he gives notice within a reasonable time after the injury presents an aspect suggestive of a possible claim for damages.

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

C. S. Allen, O. B. Clark and *Frederick Shepherd,* for appellant.

Field, Ricketts & Ricketts, contra.

LETTON, J.

Action to recover upon an automobile indemnity insurance policy. Defendant demurred to the petition. The demurrer was overruled. Defendant elected to stand

thereon, and judgment was rendered for plaintiff. Defendant appeals.

The petition, in substance, alleges that on March 30, 1910, the defendant, in consideration of a premium of $78, issued and delivered to plaintiff an insurance policy, by the terms of which it agreed for one year thereafter to indemnify the plaintiff against loss for liability imposed upon him by law for damages on account of bodily injuries accidentally suffered as the result of the use of an automobile owned by plaintiff, to contest and defend suits brought on account of such injuries, and to reimburse plaintiff for expenses incurred in providing immediate surgical relief in case of accident. On March 1, 1911, plaintiff's automobile, when being driven by his employee, collided with one William N. Lewis, who was then riding a bicycle. The fender struck Lewis with sufficient force to throw him from the bicycle to the pavement and shocked him. Plaintiff was immediately notified, and at once interviewed Lewis, and was told by Lewis that he was not hurt. Relying on this statement, plaintiff did not notify defendant of the collision. Lewis continued in his usual and customary employment, and the plaintiff heard nothing further about the collision until on or about February 22, 1912, when he was advised that Lewis was suffering from a species of paralysis, and at the time claimed that his condition was traceable to and caused by the fall upon his collision with the plaintiff's automobile. Immediately upon receipt of this advice, plaintiff notified defendant of the facts and circumstances touching the accident, and the statement by Lewis that he was not hurt at the time, and also of the condition of Lewis at that time, and of the claim that it was traceable to the fall received in the collision aforesaid. During the interval between the collision and the time of receiving the notice of claim of Lewis, plaintiff honestly believed the statement of Lewis that he had received no injury from the collision, for which reason plaintiff did not give notice of the collision to defendant. Afterwards plaintiff was notified by an attorney that Lewis was about to bring suit for damages. He there-

upon, at once, notified defendant of this fact, and requested defendant to take up the matter and settle or defend any suit brought by Lewis on account of the injury. Defendant disclaimed any liability for the reason that plaintiff had not given notice at the time of the collision. About August 1, 1912, Lewis died of a disease alleged to have resulted from the fall. An administratrix was appointed, who brought suit against this plaintiff. Defendant again refused, upon demand, to defend the action. Plaintiff was compelled to employ counsel who after full investigation advised plaintiff that the claim contained elements which might subject plaintiff to a large judgment upon a trial of the case to a jury, and recommended a settlement if the same could be reached upon a reasonable basis. Finally, by agreement a judgment for $2,500 and costs was rendered against him. A number of other facts are set out showing proper diligence in the efforts made by plaintiff to defend the action against him. It is also alleged that plaintiff incurred a liability for legal expenses and services in the sum of $500.

A copy of the policy is attached to the petition, which contains the following provisions: "The assured, upon the occurrence of an accident, shall give immediate written notice thereof, with the fullest information obtainable at the time, to the American head office of the corporation, or to one of its duly authorized agents. The assured shall give like notice, with full particulars, of any claim made on account of such accident."

The demurrer of plaintiff is based upon the thought that no liability exists on account of the failure of the insured to give immediate written notice of the accident as required by the terms of the policy. A provision in an insurance policy of this nature requiring immediate written notice of the occurrence of an accident is not unreasonable. Its purpose is to enable the insurer to promptly inform itself concerning the same, so that it may investigate the circumstances, prepare for a defense, if necessary, or be advised whether it is prudent to settle any claim arising therefrom. Some courts construe such provisions

strictly in favor of the insurer. *Northwestern Telephone Exchange Co. v. Maryland Casualty Co.*, 86 Minn. 467; *Underwood Veneer Co. v. London Guarantee & Accident Co.*, 100 Wis. 378; *Employers Liability Assurance Corporation v. Light, Heat & Power Co.*, 28 Ind. App. 437; *Travelers Ins. Co. v. Myers*, 62 Ohio St. 529, 49 L. R. A. 760; *National Construction Co. v. Travelers Ins. Co.*, 176 Mass. 121; *Rooney v. Maryland Casualty Co.*, 184 Mass. 26.

The principle stated, however, in our view does not cover or determine the question presented in this case. The agreement in the policy is that defendant will "indemnify the assured against loss from the liability imposed by law upon the assured for damages, on account of bodily injuries (including death at any time resulting therefrom) accidentally suffered," etc. Defendant agrees further "to contest claims and to defend suits, even if groundless, made or brought against the assured on account of such bodily injuries or death." The notice required is "upon the occurrence of an accident," and "of any claim made on account of such accident." An insurance contract like any other, must be reasonably construed. The contract does not require that all accidents resulting from the use of the automobile should be made the subject of a notice, and many accidents might happen in the use of the machine which are not the subjects of indemnity under the policy. Accidents resulting in injury to the owner himself or to the property of others are not included. The purpose was to protect the insured from liability against damages for bodily injuries accidentally suffered, and it is only those accidents which result in bodily injuries which are embraced within its terms. In determining the question presented, the meaning of the term "immediate written notice" and of the word "accident," as used in the policy, becomes important. Since the giving of "immediate" notice would in most cases, if the word were defined in its strictest sense, be impossible, courts generally hold that the word "immediately" does not mean instantly, but is to be construed as meaning within a reasonable time, having regard to all the circumstances. *Empire State*

Surety Co. v. Northwest Lumber Co., 203 Fed. 417; *Columbia Paper Stock Co. v. Fidelity & Casualty Co.*, 104 Mo. App. 157, 78 S. W. 320; *National Paper Box Co. v. Aetna Life Ins. Co.*, 170 Mo. App. 361, 156 S. W. 740; *Odd Fellows Fraternal Accident Ass'n v. Earl*, 16 C. C. A. (U. S.) 596.

The word "accident" is susceptible of and has received many definitions, varying with the connection in which it is used. It is: "An event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency; often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; casualty; mishap; as, to die by an accident." Webster's New International Dictionary. In the Century Dictionary, among the definitions given are: "2. Specifically, an undesirable or unfortunate happening; and undesigned harm or injury; a casualty or mishap." As used in an indemnity policy such as this, we are of opinion that the word "accident" means an undesigned and unforeseen occurrence of an afflictive or unfortunate character resulting in bodily injury to a person other than the insured. It is evident that it cannot have been the intention of the parties that such an accident as a mishap, casualty or misadventure occurring without bodily injury to any one should be reported, since with such an occurrence defendant has no concern. To illustrate, suppose that in carelessly closing the door of an automobile the man in charge should inflict a slight or trivial bruise upon a passenger or bystander, of which no present external indication appeared, and as to which the individual disclaimed any injury, or, suppose that the finger of such a one was pricked or his skin abrased in some manner, resulting from the use of the automobile, would the policy make it imperative that immediate notice of such occurrences should be given, upon the penalty of a loss or forfeiture of the insurance in case an injury later developed? We cannot take this view. If no apparent injury occurred from the mishap, and there was no reasonable ground for believing at the time that bodily injury would result from

the accident, there was no duty upon the assured to notify the insurer. The supreme court of Missouri has said: "An injury might be of such character as to afford, at first, no reasonable ground for thinking that it might support a claim for damages against the employer. In such case we think the assured would not be required, under the reasonable rule of construction we are discussing, to give the assurer notice until such time as the facts of the injury and its progress began to suggest to a person of reasonable care and prudence that a possible liability of the assured to answer in damages lurked in them. * * * Frequently an injury apparently too trivial to cause any damage or inconvenience develops into a most serious phase. The duty of the assured in such instances with respect to giving notice is performed if he gives notice within a reasonable time after the injury first takes on a serious aspect, an aspect suggestive of a possible claim for damages." *National Paper Box Co. v. Aetna Life Ins. Co., supra.*

This language states the true principle, and in our opinion is determinative of this case. Accidents occurring to bicycle riders, which throw them to the pavement, are of very frequent occurrence, and it is a matter of common knowledge that as a rule they do not result in serious consequences. At the time and shortly after the collision Lewis stated that he had received no injury. If he had received no injury, or if the accident would not in an ordinary mind induce a reasonable belief that it might result in bodily injury, there was no obligation to notify the insurance company. At the time that the plaintiff first received knowledge that Lewis was injured and that a claim was liable to be made upon him for damages, he immediately notified the insurance company, and from that time on performed all the conditions which he was required to perform under the conditions of the policy. We cannot say as a matter of law that the conditions attending the accident were such as to bring it within the class of which it was his duty to give notice, or that the notice he did give was not given within a reasonable time, considering all

the circumstances of the case. We have said with respect to a case where notice was not given within the time specified in a policy and an excuse was offered: "The question of the sufficiency of the excuse offered and the reasonableness of the time in which the act is performed (is) to be determined according to the nature and circumstances of each individual case, the beneficiary in all cases being required to act with due diligence and without laches on his part." *Woodman Accident Ass'n. v. Pratt,* 62 Neb. 673, 687.

The defendant having elected to stand upon the demurrer, the facts alleged in the petition are admitted, and, since we cannot say as a matter of law that the notice was insufficient, the judgment of the district court was correct, and is

AFFIRMED.

MAX BURSOW, APPELLEE, V. SOLOMON DOERR ET AL., APPELLANTS.

FILED MAY 15, 1914. No. 17,665.

1. **Process:** SUMMONS: SERVICE: "AT" USUAL PLACE OF RESIDENCE. Service of summons on defendant by leaving a copy "at his usual place of residence," *held* valid, within the meaning of that term as used in section 69 of the code, on a record showing that the sheriff went into defendant's yard; that he handed a copy of the summons to defendant's wife, who was at the time not more than 20 feet from the house in which he resided; that he asked her to give the copy to defendant; that she said she would do so; and that she went into the house with it.
2. **Appeal:** CONFLICTING EVIDENCE. A verdict on substantially conflicting proof will not be set aside, where it is supported by sufficient competent evidence.
3. **Damages.** A recovery of $3,990 for assault and battery, and of $1,300 for malicious prosecution, *held* not excessive.
4. **Appeal:** BILL OF EXCEPTIONS: AFFIDAVITS. Affidavits purporting to show misconduct of counsel, to be available on appeal, must be included in the bill of exceptions.

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

James E. Addie and *Brown & Venrick,* for appellants.

R. M. Proudfit and *Hastings & Ireland, contra.*

ROSE, J.

The petition contains two counts, one demanding $5,080 for assault and battery, and the other $2,075 for malicious prosecution. In the answers defendants deny that any unlawful assault was made upon plaintiff, and allege that he shot the wife of defendant Kelly, and that the latter thereupon assaulted plaintiff, but used no more force than was necessary to protect her from further injury and to preserve his own life; that no one assaulted plaintiff but Kelly, who was justified in doing so. The allegation that the prosecution of plaintiff was malicious and without probable cause is denied. The jury rendered a verdict in favor of plaintiff for $3,990 on the first count, and for $1,390 on the second. From a judgment on the verdict defendants appeal.

The jurisdiction of the court is challenged by defendant Doerr on the ground that the sheriff never served a summons upon him by delivering a copy to him personally, "or by leaving one at his usual place of residence," as required by section 69 of the code, containing those words. Doerr's residence was with his wife and children in a house on a farm in Saline county. The sheriff went into their yard and handed a copy of the summons to Doerr's wife, who was at the time not more than 20 feet from the house. He testified that he asked her to give the copy to Doerr; that she said she would do so; and that she went into the house with it. The contention is that the copy was not left "at" his usual place of residence, within the meaning of that word as it appears in the language copied from the statute. It is argued that "at" means "in," as used by the legislature, and that the sheriff was required to leave the copy in some part of the house. In the general use of the word there is a diversity

of meaning, owing to the context. Had the lawmakers intended to limit the meaning to "in," they would have used that word. "At," in the language quoted, has a wider signification, referring evidently to a point in space. In this sense, some of the definitions given by the Standard Dictionary are: "In proximity to; in the vicinity or region of; close to; by; near." "At" includes "in," because leaving a copy in the house occupied by Doerr as a residence would comply with the statute, but it is used in a broader sense. For the purpose of imparting notice, leaving a copy by or near the residence, with the wife, who was in the yard, within 20 feet of the house, and who took it into the house, was as effective as leaving it in the house would have been. It not only means "in," but it also means "by" or "near," in a situation like that described. In this view of the statute, the objection to jurisdiction was properly overruled.

On the merits of the case the principal discussion relates to the sufficiency of the evidence to sustain the verdict. Plaintiff was assaulted, seriously injured, prosecuted criminally, and kept in the custody of a constable five days. The examining magistrate found that the prosecution of plaintiff was without probable cause and released him. These facts are not disputed, but evidence that defendants were the aggressors is contradicted. The assault occurred early in the morning, November 21, 1910. Plaintiff had come from Poland five years earlier, and was deficient in the use of the English language. When assaulted, he was 26 years old and unmarried. He was small of stature, compared with defendants. He had rented 15 or 20 acres of land in Saline county, with an orchard, a pasture, a barn, a corral, and a windmill. There was also on this land a frame house which he occupied as a residence with a family consisting of Adolph Suesz and his wife and children. The house was in an open yard between the orchard and the pasture, with a public road in front. Plaintiff, under a lease, had been farming an unfenced 80-acre tract across the road. Part of it was in corn, which plaintiff had been husking. Adjoining the

cornfield, defendant Doerr, a neighboring farmer, had an open field of wheat growing across the road from the house occupied by plaintiff, who, earlier in the season, had farmed the land on which the wheat was growing. Horses owned by plaintiff had been in the wheatfield two or three times, and he had been reminded of the fact. Defendant Kelly had been in the neighborhood four or five days only, and was an employee of Doerr. The material parts of the story told by plaintiff and his witnesses may be summarized as follows: On the morning of the assault plaintiff had hitched a team to a wagon and had driven to his cornfield to husk corn. A mare and two colts had broken away from him at the corral before he left, and had run across the road into Doerr's wheatfield. Plaintiff could not catch them at the time, but, thinking he could do so a little later, went to his cornfield. When there he saw Doerr, his two daughters, Emma and Alma, and Kelly, and the latter's wife. They had three teams and wagons. They drove onto Doerr's wheatfield. The men chased the mare and the colts and tried to drive them off. Plaintiff immediately returned with his team and wagon and left them at the windmill back of his house by the corral. In the meantime Mrs. Kelly and Emma Doerr left their wagons, went to a private lane in plaintiff's yard between the road and the corral, and tried to prevent the mare and the colts from going in, the intention of defendants being to drive the trespassing animals away for the purpose of impounding them. The women were near plaintiff's house. He protested against their driving his stock away from his premises. The men approached hurriedly. Observing that they meant mischief, plaintiff crawled through the fence into his pasture and tried to escape by flight. Doerr followed him, and Kelly attempted to intercept him. He changed his course to avoid Kelly and ran into Doerr, who beat him severely. Kelly came up, knocked him down and pounded him. Plaintiff was helped up by defendants, and went to his house pursuant to their orders. In the meantime the mare and the colts returned to the corral. Defendants started to take them away, and plaintiff pro-

tested, complaining bitterly. Again apprehending danger, plaintiff went into his house. Defendants and the women came up. Mrs. Suesz went to the front door, said she was sick, and told the assailants not to come in. They went to the back door, which had been locked, broke it open, and entered. Plaintiff ran up stairs, got a shotgun belonging to Suesz, and threatened to shoot. The stairway door below was opened. To frighten the intruders, plaintiff fired without stopping them, the shot striking the casing near the top of the stairway door. He again threatened to shoot, and pulled the trigger, but the second cartridge did not explode. He was dragged down stairs and beaten into insensibility. Defendants took him to Doerr's in a wagon, and from there to Friend, where they had him arrested. Plaintiff was unable to give an account of his injuries, but it is shown by physicians or by other witnesses that there was a deep wound in one of his legs; that blood ran from his nose, from his mouth, and from one of his ears; that an eye was closed; that a lip was cut; that his head and face were bruised; that his skull was fractured; that his brain was injured; that one side of his body was partially paralyzed, temporarily interfering with his speech and with his sight; that his hearing in one ear was permanently injured, if not destroyed. The interior of the house, after the assault, as described by witnesses, bore marks of violence. This is the substance of the story told by plaintiff and his witnesses.

On the other hand, defendants testified that plaintiff was the aggressor; that he had been warned to keep his horses out of Doerr's wheatfield; that defendants were pursuing the advice of counsel in attempting to impound the trespassing animals; that when plaintiff came back from his cornfield he used profane language and threatened to shoot Kelly's wife and Doerr; that defendants were not in his pasture or house; that he came out of his house and shot Mrs. Kelly; that he aimed at Doerr, the gun failing to go off; that he was assaulted by no one except Kelly, who did not strike him until after he shot Mrs. Kelly.

The jury evidently believed plaintiff's version of the controversy. It is supported by ample evidence. The proofs are conflicting, and the verdict settled the issues of fact. There is no substantial ground for setting aside the verdict on either count as excessive. Plaintiff was permanently injured. While partially paralyzed and at times unconscious, he was in the custody of a constable for five days. He was comparatively a stranger in a strange land. Suffering and mental anguish were inevitable results of the assault and of the prosecution. No sufficient reason for disturbing the judgment as unsupported by the evidence or as excessive has been suggested or found.

Some complaint is made of rulings in admitting and in rejecting evidence, and in giving and in refusing instructions, but it is clear that in these respects no ruling properly assailed is prejudicially erroneous.

An assignment of error is directed to alleged misconduct of an attorney for plaintiff in treating jurors to cigars. The bill of exceptions contains no evidence of such misconduct, and for that reason the assignment is overruled.

Finding no error in the record, the judgment is

AFFIRMED.

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

NICOLAUS OPP, APPELLANT, V. FREDLIN W. SMITH ET AL., APPELLEES.

FILED MAY 15, 1914. No. 17,642.

1. **Appeal**: ISSUES REVIEWABLE. Issues tendered by the pleadings, but not determined by the district court, and not discussed in the briefs on appeal, will not be considered by this court.
2. **Adverse Possession.** Where a claimant to land by adverse possession resides upon land adjacent thereto, and it appears that the land in controversy was not inclosed, cultivated, or improved by the erection of buildings thereon or otherwise, and the possession and use

of the land claimed was in connection with other open and unoccupied lands many miles in extent and containing thousands of acres upon which the live stock of the claimant grazed at will, the live stock of others not being habitually excluded from the land claimed, such use and occupation does not constitute such adverse and exclusive possession as will ripen into a title by limitation.

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

G. J. Hunt, for appellant.

Williams & Williams and *J. E. Philpott, contra.*

FAWCETT, J.

Plaintiff, claiming to be the owner by patent from the United States government of the southwest quarter of section 1, township 20, range 51, in what was formerly Cheyenne but is now Morrill county, brought suit in the district court for the latter county to quiet his title as against a claim by defendant Taylor as grantee of the defendants Smith, and a further claim of title by adverse possession. From a judgment in favor of the defendant on his claim of title by adverse possession, plaintiff appeals.

The record shows that about May 1, 1899, one Blanche Willis, then betrothed to defendant F. W. Smith, at his instance made a homestead entry upon lands east of and adjoining the land in controversy. As soon as her entry was made, Smith built a dwelling-house thereon for himself and his fiancee. At that time Smith was engaged in the stock business; his cattle being on the south side of the river from Camp Clarke. About the time indicated, he says: "I brought my cattle over and my horses. Q. What did you do? A. I turned them loose right there and ranged them." On October 13, 1900, the land in controversy was purchased at private tax sale by defendants F. W., F. L. and Angelus Smith. September 28, 1903, the treasurer of Cheyenne county issued a tax deed to the purchasers at the tax sale. On March 17, 1904, defendant

F. W. Smith and his wife, Blanche, conveyed the land to defendant Taylor, and on August 28, 1909, Angelus Smith, single, and F. L. Smith and F. W. Smith, with their respective wives, executed to Taylor a quitclaim deed therefor. The petition sets out numerous grounds upon which plaintiff claims that the tax sale and the tax deed issued thereunder were void, and alleges that defendants are claiming title thereunder, and that they are also claiming title by adverse possession, and prays that plaintiff's title may be quieted against the clouds thus cast thereon. Certain special appearances were filed by defendants, and upon their motion the original summons was quashed. An amended petition was filed, and alias summons issued and duly served. Defendants answered and the case proceeded to trial. The proceedings, under which the land was sold for taxes and the deed issued, were introduced in evidence, but the question of their validity was not considered and determined by the decree of the district court. It is stated in the abstract that considerable testimony was received bearing upon the proceedings leading up and subsequent to the tax sale, "but which, owing to the finding of the court below, become immaterial upon the review, except exhibit M, which is an affidavit of the defendant, F. W. Smith." The finding of the trial court, as shown by the decree entered, is as follows: "The court being fully advised in the premises, on consideration whereof the court finds for the defendant Alanson O. Taylor that he and his privies have been in the continuous, open, notorious and undisputed adverse possession of the lands described in said petition for ten years prior to the commencement of this action, and has a legal estate therein, and that his title thereto should be quieted in him as against the plaintiff and all those claiming under him." If the allegations in plaintiff's petition as to the proceedings leading up to the tax sale and the issuance of the tax deed are true, the tax sale and the deed are void, and defendants obtained no title thereunder. As both sides have ignored that question in their briefs, and argued the

case solely upon the question of adverse possession, we will pursue a like course.

The evidence shows that no buildings or improvements have ever been erected upon the land, and that no attempt was ever made to fence the same until Taylor obtained his deeds from his codefendants. The only improvement claimed to have been made by defendant F. W. Smith is that in December 1903, the year before he conveyed the land to Taylor, he began the excavation of a small irrigation ditch across the land. The evidence shows that the most he was ever able to irrigate by this ditch is about one acre. The record does not show that either F. L. or Angelus Smith ever attempted to exercise any control over the land, and the evidence as to F. W. Smith's possession shows that, while living upon the adjoining land with his wife, he ranged his cattle over this and other lands, some of which was owned by the government and some by individual owners. This range extended for many miles west and a number of miles north, and included thousands of acres of land. He says he claimed this land; but, if Mr. Opp, the owner of the fee, had driven by, he would not have suspected any such a claim by reason of anything that was apparent upon or surrounding the land. This claim of possession by Smith is one of numerous claims of like character in the open country in the western part of the state. The settlers are few and far between. They are engaged mostly in stock-raising. Their cattle range over large areas. By a sort of gentlemen's agreement each settler claims the special right to let his stock graze over a certain portion of the public domain, and, so far as it can be done without too much trouble on the part of his neighbors, his claim under this agreement is respected; but, notwithstanding the agreement, the evidence shows that the cattle do in fact graze over the entire section of country. It shows that such was the fact in the present case. Other people's cattle grazed upon the land in controversy, and Smith's cattle grazed upon tracts which they were supposed to be claiming. As said in *Lanning v. Musser*, 88 Neb. 418, such a possession "did not constitute

such adverse and exclusive possession as would ripen into a title by limitation." That Smith did not consider that he and his copurchasers at the tax sale were in possession of this land is evidenced by the affidavit he executed September 7, 1903, and which affidavit was made for the purpose of securing a deed under the tax sale referred to. In that affidavit he stated that when on June 28, 1902, they gave notice of the expiration of the time for redemption from the tax sale, "no person was in actual possession or occupancy of said land, and that Nicolaus Opp, the person in whose name the title appears of record, could not, upon diligent inquiry, be found in said county, and therefore personal service of the notice of expiration of time for redemption could not be made." Further comment is unnecessary. The district court erred in finding title in defendant Taylor by adverse possession, and in dismissing plaintiff's petition.

The judgment of the district court is therefore reversed and the cause remanded, with directions to determine the question of the validity of the tax deed, set out in the pleadings, and of the tax sale upon which such deed is based, and, if the same are found to be void, to ascertain the amount which plaintiff should be required to pay in order to redeem the lands in controversy, and to permit such redemption.

REVERSED.

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

G. N. WHITTIER, APPELLEE, V. E. D. WENNER ET AL., APPELLANTS.

FILED MAY 15, 1914. No. 17,675.

1. **Husband and Wife**: JOINT NOTE: INTENT AS TO WIFE'S PROPERTY: QUESTION FOR JURY. Whether a promissory note, executed jointly by husband and wife, was executed by the wife with reference to her separate property, trade, or business, or upon the faith and credit

thereof, and with intent on her part to thereby bind her separate property, is, ordinarily, a question of fact for the jury.

2. ———: ———: CONSIDERATION. And in such a case, where there is competent evidence to show that all of the property of the family belongs to or is in the name of the wife, the husband owning no property whatever, and a creditor who holds a valid claim against the husband, upon which there is a large accumulation of interest, offers to remit such accumulated interest on the condition that the husband and wife join in a note for the principal, and the wife, without fraud or coercion, joins with her husband in accepting such compromise and in signing a note therefor, stating at the time that the land was in her name and she would sign the note, the giving of such note will be held to be a new and independent contract, entered into by the husband and wife jointly, as principals, and upon sufficient consideration.

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

Tibbets, Morey & Fuller, for appellants.

M. D. King, contra.

FAWCETT, J.

The petition counts in the usual form on a promissory note, dated January 30, 1906, for $240, executed by defendants E. D. and Mary C. Wenner. The answer alleges that the petition does not state a cause of action; that defendants have for more than ten years been husband and wife; and that defendant Mary C. Wenner was never indebted to plaintiff in any amount whatever. The reply admits that the defendants are husband and wife, and alleges that defendant E. D. Wenner, while a single man, borrowed from plaintiff's mother $1,000, to be used for making payment for the quarter section of land "now occupied by defendants;" that prior to the date of the note plaintiff, through the death of his mother, became the owner of a portion of the indebtedness; that at the time the note was given a large amount of interest had accumulated on the indebtedness; that it was agreed between the parties that all interest on the indebtedness should be waived and canceled, provided defendants would obligate

themselves for the principal; that in accordance with the said agreement, the note sued upon was executed by both defendants; that defendant Mary C. Wenner thereby became a principal on the note; that the note was executed and given by her and accepted by the plaintiff solely with reference to her separate estate and with the intention of binding the same, and that the settlement was made and the note accepted for the sole reason that she was the owner of the land upon which she and her husband resided. The jury returned a verdict in favor of plaintiff for the amount of the note and interest, upon which judgment was entered, and defendants separately appeal.

In the single brief filed for both defendants, they argue that the undisputed evidence shows that the defendants are husband and wife; that the note sued upon was given for the debt of the husband; that there was no acknowledgment in writing by the wife that the note was given for the benefit of her separate estate or business, or that she intended to bind her separate estate, or that for the payment thereof she did bind her separate estate; that the note was not given for the benefit of her separate estate; that the note was not given for necessaries for the family, or in connection with the defendant Mary C. Wenner's separate estate, trade, business, lands or property. The evidence shows that the debt originated, as stated in the petition, in a loan made by plaintiff's mother to defendant E. D. Wenner. Upon the death of the mother plaintiff became the owner of a portion of the indebtedness. Being desirous of collecting the amount due him he sent his brother-in-law, Henry Wenner, a brother of the defendant E. D. Wenner, to try and secure an adjustment of the matter. Henry met the defendant E. D. Wenner at a sale. After talking the matter over, they repaired to the home of the defendants, where the note was signed by both defendants. The testimony of Henry and the two defendants, as to the conversation and circumstances surrounding the execution of the note, is conflicting. At this time a considerable amount of interest had accumulated on the indebtedness. Henry testified that the three were

sitting at a table talking the matter over; that "Ed said that if they would throw off the interest they would go back to the original amount;" that "I sat down to draw up a note for one year, but she says: 'No, you make it for two years and we can meet it then.' Then I took the original amount of the money that he borrowed and deducted the interest, and she signed the note. She said: 'We will pay the note in two years;' and the date was made two years." When asked as to what conversation took place between them as to why she signed the note, he answered: "She said the land was in her name and she would sign the note." He further testified that his brother said that Mary would sign the note if he would throw off the interest. On cross-examination he testified that he said: "Ed, we will waive the interest then and you sign the notes—you and Mary." The defendant Mrs. Wenner denied emphatically that anything was said to her about interest by either Henry or her husband. She was asked: "Q. Did your husband tell you the amount of the note? A. I don't think he did. Q. Did he tell you anything about the amount of interest that had been thrown off? A. No, sir; he didn't talk anything about interest." She testified that she signed the note because her husband coaxed her to do it, and that she had no intention of paying it. Her husband, E. D. Wenner, testified that when he talked with his wife at that time he told her that Henry was there and wanted to fix up the note, "and that he agreed to throw off the interest if she would sign it. Q. You told her that? A. Yes, sir." It is not disputed that E. D. Wenner had failed in business and owned no property, and that the quarter section of land upon which they resided was in the name of Mrs. Wenner.

The simple question presented by the record is: Is the evidence sufficient to sustain the verdict and judgment which holds Mrs. Wenner responsible on the note in suit? In *Godfrey v. Megahan,* 38 Neb. 748, we held: "Whether a contract of a married woman was made with reference to her separate property, trade, or business, or upon the faith and credit thereof, and with intent on her part to

thereby bind her separate property, is always a question of fact." In *Spatz v. Martin*, 46 Neb. 917, Spatz, who had performed professional services for the wife of one Adams, had been charged with negligence in his treatment of her, and in settlement of the controversy had given the note sued upon, his wife joining him in its execution. The note was subsequently indorsed to Martin, who brought the action. Upon the trial she testified that she did not sign the note with reference to her separate estate, and did not intend to bind it. The evidence showed that all the property was in her name. On page 919 of the opinion, we said: "The jury was not bound by her direct denial of the fact that she did intend to bind her separate property. It had a right to believe from the evidence that when she had signed the note, owning all the property of the family, and knowing that her signature was desired because of that fact, her intention was to charge that property." The judgment against her was affirmed. That case is so clearly in point with the one at bar that we are content to rest upon it without pursuing the discussion further.

It is urged by defendant that "the court erred in admitting in evidence confidential communications and conversations between husband and wife." The ground of this complaint is that, upon cross-examination of Mrs. Wenner, counsel for plaintiff was permitted to ask her about a talk she had with her husband privately in an adjoining room, as to which she was asked: "Q. What did he tell you? A. He came in and told me Henry wanted me to sign the note; that is what he told me. Q. What did you say? A. Well, I said I wouldn't do it." These questions were asked upon cross-examination, following and relating to testimony which had been drawn from her on direct examination, and were not improper.

The final complaint is that the judgment was erroneously rendered against both defendants as principals. No exception as to the form of the judgment was taken at the time it was entered, nor, so far as the record shows, was any attempt ever made to correct it in the lower court.

But, aside from that, we think the judgment was properly entered. The transaction of the giving of the note in suit was a joint transaction on the part of the two defendants. The husband was indebted to Doctor Whittier for borrowed money, upon which there was a large accumulation of interest. All of the family property stood in Mrs. Wenner's name. It was proposed by plaintiff's agent that, if they would give their joint note for the amount of the principal the accumulated interest would be remitted. The length of time for which the note was to run was, according to the testimony of Henry Wenner, made two years, instead of one. On the statement of Mrs. Wenner that, if he would make it two years, "we can meet it then," it was so made. That she signed the note, and that it was accepted on the strength of her separate estate, and that she intended to bind her separate estate for such payment was established by sufficient evidence to sustain the verdict of the jury. Under the facts shown, it must be held that the giving of the note by the two defendants was a new and independent contract entered into by them jointly as principals, and upon sufficient consideration.

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

AFFIRMED.

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

W. A. WELLS, APPELLANT, V. JOHN KINDLER ET AL., APPELLEES.

FILED MAY 15, 1914. No. 17,697.

Fraudulent Conveyances: GIFT TO DEBTOR'S WIFE. Where a father, in making a gift of land to his children, knows that one of his sons is in debt, and that a gift to him would inure to the benefit of his creditors, he may lawfully convey the portion, which he would otherwise have conveyed to such son, to the wife of the latter, and in such case the wife takes the title free from the lien of any judgments outstanding

against her husband. Such act being a purely voluntary act on the part of the parent, the question of the *bona fides* of the transaction, so far as it relates to the judgment creditors of the son, does not arise.

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

Roper & Fuller, for appellant.

Matt Miller, contra.

FAWCETT, J.

The petition alleges, substantially, that plaintiff obtained a judgment in the county court of Butler county against defendant John Kindler, which he caused to be transcripted to the district court for that county; that he caused execution to be issued upon the judgment as transcripted, which was returned *nulla bona*; that while defendant John Kindler has no real estate in Butler county, or in any other county in Nebraska, the title to which stands in his own name, and upon which such writ of execution could be levied, he is, in fact, the real and actual owner of an undivided one-eleventh interest in a quarter section of land, which is described in the petition; that plaintiff caused the writ to be levied on such interest, but is prevented from selling the same under the execution, for the reason that the title stands in the name of defendant Etta L. Kindler, the wife of John; that Etta L. received the deed, under which she obtained her title, after the filing by plaintiff of his transcript in the district court; that defendant John paid the consideration for the deed, and that the deed was made to his wife, Etta, wrongfully and fraudulently, and with intent to hinder and delay and defraud plaintiff and John's other creditors. The prayer is that the deed be canceled and annulled in so far as the same concerns or affects the title of John, or vests the same in his wife; that she be decreed to hold the title in trust for John and his creditors; that plaintiff's judgment be decreed a first lien on the undivided one-eleventh interest in the land designated; and that the same be sold for the satis-

faction of plaintiff's judgment. The answer was a general denial. The district court found for the defendants, decreed that the judgment was no lien upon the land, and dismissed plaintiff's action, with costs. Plaintiff appeals.

The evidence shows the transcript of the judgment, that the judgment is unpaid, the execution that was issued and the return thereon, and the levy upon the one-eleventh interest in the land. Plaintiff then introduced in evidence a deed from August Kindler and Augusta Kindler, which recites: "For and in consideration of the sum of one dollar cash in hand paid, and for love and affection I have for each of my children, Charles F. Kindler, August H. Kindler, George E. Kindler, Edward S. Kindler, Frederick William Kindler, Louis L. Kindler, Samuel B. Kindler, Frank B. Kindler, William R. Kindler, Albert C. Kindler, and my daughter-in-law, Etta L. Kindler, wife of my son John E. Kindler, do hereby grant, bargain, sell, convey and confirm unto the same, of the county of Butler and state of Nebraska, the following described real estate situated in Butler county, and state of Nebraska, to wit." The premises are then described. The deed contains this provision: "Subject to a mortgage of two thousand ($2,000) dollars on this and other lands, which mortgage was assumed by the grantee herein and is a part of the consideration for the purchase price of said land. The use and occupancy of said lands to be retained by me so long as I shall live." The only other evidence offered was a stipulation in the following language, as shown by plaintiff's abstract: "It is admitted between the parties hereto that the deed offered in evidence is the deed made by the father, August Kindler, and his wife, Augusta Kindler, to each of his sons and to his daughter-in-law, the defendant Etta L. Kindler, in this action, subject to a life lease of August Kindler." No other evidence was offered by either side.

It is contended by plaintiff that the judgment must be reversed for the reason that plaintiff made out a *prima facie* case, and that the burden was then shifted to the defendants, and that defendants failed to plead the *bona*

fides of the transaction, and to introduce evidence in support thereof. Numerous authorities are cited on the question of transactions between relatives, and that, where a deed is made by third parties to the wife of a judgment debtor, the law will presume that the consideration was paid by the husband, and that the burden rests upon the wife to prove the *bona fides* of the transaction; that is, that the consideration was paid by her, or by some person other than her husband. There is no doubt about the soundness of the rule contended for as a general rule, and the authorities cited cannot be questioned; but this rule, like all other general rules, has its exceptions. That a father may make a gift of his land to his children cannot be doubted, and if, when he desires to distribute a part of his estate among his children, he knows that one of his sons is in debt, and that if he gives the land to him it can be taken by his creditors, he has an undoubted right to convey the land to the son's wife, thereby securing to the family of his son the fruits of his patrimony. It is said the defendant offered no evidence. In this counsel is in error. The stipulation above quoted contains ample evidence that the transaction was a gift by August and Augusta Kindler to their eleven children; but, for the purpose of saving to the family of the son John his interest in the gift, the deed was made to John's wife. In this there is not even a semblance of fraud.

The district court, therefore, rightly held that plaintiff's judgment was not a lien upon Mrs. Kindler's interest in the land in question, and in dismissing plaintiff's suit.

AFFIRMED.

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

VICTOR H. DEBOLT, APPELLEE, V. JASPER L. MCBRIEN, APPELLANT.

FILED MAY 15, 1914. No. 17,415.

1. **Appeal:** AFFIRMANCE FOR WANT OF BRIEFS: REHEARING. In the practice of this court, an order affirming the judgment of the lower court for want of briefs is considered as final and conclusive as a judgment upon briefs and oral argument. Upon motion a rehearing will be granted if a plain error appears upon the record probably requiring a reversal.
2. **Officers:** ACTION FOR DAMAGES. If an officer performs an act in the exercise of his office, which it is his plain duty to perform, his motives for such action cannot be questioned in an action for damages.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

A. C. Epperson and *Burkett, Wilson & Brown,* for appellant.

Ringer & Bednar and *Murdock & Pancoast, contra.*

SEDGWICK, J.

This defendant was state superintendent of public instruction of the state of Nebraska, and this plaintiff was one of the school teachers of the state. The plaintiff brought this action in the district court for Lancaster county against the defendant and the surety on his official bond to recover damages for an alleged libel. Upon trial in the district court the action was dismissed as to the surety; there was a verdict and judgment in favor of the plaintiff, and the defendant has appealed.

When this case was called for hearing in this court, the appellant was in default for a brief, and the judgment of the district court was affirmed for that reason. Afterwards, upon motion for rehearing, it was considered that there was a plain error, prejudicial to the appellant, in the record of such a nature as, without discussion, to require this court to grant a rehearing upon the merits.

In the practice of this court, the order affirming the judgment of the lower court for want of briefs is considered as final and conclusive as a judgment upon briefs and oral argument, and a rehearing will not be granted unless a plain error appears upon the record probably requiring a reversal. In this case a rehearing was ordered, and the cause was submitted upon the briefs and oral argument.

The amended petition, among other things, alleges that "in a letter to A. E. Littel, the then county superintendent of Wayne county, under date of April 22, 1908, defendant Jasper L. McBrien accused the plaintiff of poker playing and being under the influence of liquor at a certain time prior thereto, and stated that he was not worthy of being granted a certificate, and, in this connection, plaintiff informs the court that said letter is a part of the public records of the state superintendent of public instruction." To this allegation the defendant in his amended answer alleges: "And this defendant further admits that he did write of and concerning the plaintiff that he was said to be a poker player, and that he was of questionable character, and that plaintiff was unfit to teach school." The answer also admitted that the defendant was at the time complained of state superintendent of public instruction, and alleged that the letter complained of was written in good faith in the course of his duties as such officer. There was an attempt to present other issues in the petition and in the answer, but upon the trial the court withdrew all other issues from the consideration of the jury and confined their inquiries to the issue above stated.

The court instructed the jury: "The court now submits to you for your consideration two utterances of the defendant in a letter dated April 22, 1908, to superintendent A. E. Littel, said utterances being as follows: 'The charge against Mr. DeBolt by Mr. McDonald was poker playing Sunday afternoon. Mrs. Gamble charged him with being under the influence of liquor once in her presence.' These are the only allegations of libel that the court now submits to you for your consideration. All other utterances of the defendant concerning the plaintiff are now withdrawn

from your consideration, as definite and affirmative utterances of libel, and are left for your consideration only as bearing upon the question of whether the defendant, in uttering the two sentences quoted from his letter of April 22, acted maliciously, or as in aggravation or mitigation of plaintiff's damages, if any you should find. * * * It appears from the evidence that the defendant wrote the letter dated April 22, 1908, to superintendent A. E. Littel containing the utterances quoted in the fifth paragraph of these instructions. You are instructed that each of these sentences contains language which is libelous *per se,* and it is unnecessary to plead special damages. However, it appears from the pleadings and evidence that the defendant, in writing the letter of April 22, was communicating to the county superintendent of Wayne county, Nebraska, information touching the fitness of the plaintiff to teach school at Winside, and you are instructed that in so doing he was in the performance of his official duties. What he there wrote was therefore conditionally privileged, which means that the defendant was not, and is not, liable for what he there wrote until the plaintiff removes the privilege by affirmative proof on his part of actual or, as it is sometimes called, express malice on the part of the defendant, in writing one or both of those sentences contained in said letter of April 22. * * * Express malice is an actual, spiteful, malignant or revengeful disposition or ill will against another. In order for the plaintiff to establish express malice in this case, it is necessary that he establish by a preponderance of the proof that the defendant, at the time he wrote one or both of said sentences, wilfully entertained an actual, spiteful, malignant or revengeful disposition or ill will against the plaintiff."

Mr. Littel, to whom the letter referred to was sent, was county superintendent of schools of Wayne county, and it was the duty of the state superintendent to advise him in regard to his duties. In this part of the letter submitted to the jury, the defendant did not make any charges against the plaintiff as of his own knowledge. He told the county

superintendent what information he had, and gave the names of his informants, and stated plainly and, so far as our attention has been called to the condition of the record, truthfully the accusations against defendant that had been made to him in his official capacity. That Mr. McDonald, one of the officers of the school board where the plaintiff had been teaching, had informed the state superintendent that the plaintiff had played poker on Sunday afternoon, and that "Mrs. J. W. Gamble, of Plattsmouth," had charged the plaintiff "with being under the influence of liquor once in her presence," were facts that the county superintendent should know in making the investigation that the law required him to make as to the character of an applicant for a teacher's certificate. The state superintendent was clearly right in passing this information on to the county superintendent. The trial court correctly told the jury that "in so doing he was in the performance of his official duties." But the court also told the jury that, if the defendant had actual malice "in writing one or both of these sentences," or if "in repeating what he had heard about the plaintiff * * * (he) acted maliciously, then you are instructed that the defendant, by so doing, indorsed said charges as his own, and he is liable for all the natural and probable consequences of his acts."

Much evidence was taken as to the condition of the defendant's mind and feeling toward the plaintiff when he gave this information to the county superintendent. The theory of the trial being that, if the defendant had a "spiteful, malignant or revengeful disposition or ill will" against the plaintiff when he performed this duty, he would be liable to an action for damages. This is not the law. If an officer performs an act in the exercise of his office, which it is plainly his duty to perform, it may give him pain to perform it because it injuriously affects a friend, or pleasure because it affects an enemy; such motives may be discreditable, but they cannot be inquired into in an action for damages. His duty is the same whether it affords him pain or pleasure to perform it. If a public officer is corrupt, and from prejudice or other

vicious motives unnecessarily injures another, the law generally provides means for removing him from office; but if the act complained of is in the line of his official duty, and not unlawful, the public welfare requires that he shall be free to perform his official duties without being subject to inquiry by a jury as to the condition of his mind and heart when such duties are performed. The law goes much further in the protection of an officer in the discharge of his duties than is necessary in this case. The head of an executive department is not liable in damages on account of official communications made by him pursuant to an act of congress, and in respect of matters within his authority, by reason of any personal or malicious motive that prompted his action. *Spalding v. Vilas*, 161 U. S. 483.

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

REVERSED.

ROSE, J., not sitting.

REBECCA M. WHITE ET AL., APPELLANTS, V. PAPILLION DRAINAGE DISTRICT ET AL., APPELLEES.

FILED MAY 15, 1914. No. 18,297.

Drainage Districts: ASSESSMENTS: BENEFITS. So many questions of law are raised in the record and briefs, many of which have been heretofore decided by this court, that we have stated in the opinion our view of the law upon the points raised without formality or extended discussion, and no further syllabus is necessary.

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

Charles Haffke, for appellants.

Courtright & Sidner, contra.

SEDGWICK, J.

The Papillion Drainage District was formed in 1909, and in August of that year the preliminary estimate of the costs of the improvements was made, and thereafter the board of directors made an apportionment of the benefits to the different tracts of land in the district. A levy and assessment were made accordingly, and afterwards these plaintiffs began this action in the district court for Douglas county to cancel the assessment and enjoin further action in enforcing the same, and to remove the apparent lien upon plaintiffs' land and quiet their title. Upon the trial the court found the issues in favor of the defendants, and dismissed the plaintiffs' action and entered judgment of foreclosure upon defendants' cross-petition, and the plaintiffs have appealed.

The plaintiffs have furnished us a printed abstract of over 200 pages and an extensive brief with many assignments discussed at large. The most important matters discussed have been heretofore decided by this court, and, although interesting and earnestly presented, we must be content with briefly referring to our former decisions. The constitutionality of the act under which this district was organized (laws 1907, ch. 153; Rev. St. 1913, sec. 1866 *et seq.*), and similar statutes, has been considered in various cases, including *Neal v. Vansickle,* 72 Neb. 105; *State v. Hanson,* 80 Neb. 724; *Drainage District No. 1 v. Richardson County,* 86 Neb. 355; *O'Brien v. Schneider,* 88 Neb. 479.

1. The law is not unconstitutional as not providing an opportunity for a hearing upon the apportionment of benefits and assessment. *State v. Hanson,* 80 Neb. 724; *O'Brien v. Schneider,* 88 Neb. 479.

2. The right of eminent domain is not involved in this action. That provision of the act is separable, and it is not necessary in this case to consider whether section 14 of the act is valid.

3. A drainage district under the act is a local, administrative political corporation. *Neal v. Vansickle,* 72 Neb. 105.

4. The directors are public officers, and the right of appeal from their decisions is provided. They are corporate authorities, within the meaning of section 6, art. IX of the constitution. The act is not unconstitutional because it gives these officers jurisdiction to apportion benefits and levy assessments.

5. There is no express provision in the act prohibiting the incorporation of two distinct watersheds in the same district. If there were error in that respect, it might be corrected on appeal, but cannot be urged in this collateral proceeding. The plaintiffs by participating in the organization of the district are estopped to now urge this objection.

6. It is now too late in this collateral proceeding to attack the authority of the directors to apportion benefits and make assessments on the ground that the record does not state that the county board formally found that the improvement would be conducive to public health, convenience or welfare.

7. If the detailed plans and estimate are insufficient they should be corrected upon the hearing of apportionment of benefits.

8. The apportionment of benefits may be made after the commencement of the work and after the contract for the work has been let. *O'Brien v. Schneider, supra.*

9. The notice of apportionment of benefits must be published at the county seat of each county, in which the lands of the district lie, for at least one week, but it is not necessary that it be published daily; if it is published in a weekly paper one week before the meeting for apportionment it is sufficient.

10. If the notice names the place of meeting in the proper county, and the meeting is there held at the place and time stated in the notice, and the apportionment of benefits agreed upon and fixed by the directors, it will not be invalid because the record of the proceedings is compiled, extended and authenticated in another county of the state.

11. Assessments are not void because some of the lands in the district are found not to be benefited, and for that reason are omitted from the assessment. *O'Brien v. Schneider, supra.*

12. Errors of the board in making the apportionment of benefits may be corrected on appeal. In a subsequent action to cancel the tax, objection to the form or letter of the findings or order of the board in determining the apportionment of benefits which are not of a jurisdictional nature will not be considered. *State v. Hanson, supra.*

13. By section 18 of the act (laws 1907, ch. 153), the board is required to "determine the amount of money necessary to be raised," but if they "apportion the same in dollars and cents against the tracts," and the amount so raised is easily ascertainable by computation, the assessment will not be held void because of a failure to state specifically the amount of the assessment or the amount so raised.

14. If the publication of notice of apportionment of benefits is proved by affidavit, such affidavit must be filed within six months after the last date of publication, but the omission of such proof may be supplied by the evidence of witnesses at the trial.

15. Upon cross-petition of the defendant district the court may decree a foreclosure of the tax lien without a prior administrative sale, if the land has been once offered for sale and not sold for want of bidders. Rev. St. 1913, sec. 6559. The objection that the action to foreclose a tax lien must be in the name of the county is unavailing. The section provides that the county may "proceed to foreclose the lien," but in doing so it acts as trustee for the real parties in interest, and when the party in interest is before the court, and the court has ascertained its interest and declared the law, it would be an unnecessary formality to bring the county in as a party.

We have found no error in the record requiring a reversal and the decree of the district court is

AFFIRMED.

HOOPER TELEPHONE COMPANY, APPELLEE, V. NEBRASKA TELEPHONE COMPANY, APPELLANT.

FILED MAY 15, 1914. No. 18,340.

1. **Constitutional Law:** AMENDMENTS TO CONSTITUTION: CONSTRUCTION: RAILWAY COMMISSION: POWERS. The constitution as amended must be construed as a whole, and the purpose and scope of amendments are not limited by former provisions only as the plain meaning of the whole instrument requires. The amendment creating the state railway commission and the statute enacted pursuant to the power given to the legislature thereby confer administrative and judicial powers upon the commission in addition to the main purpose of its creation, which is the exercise of legislative powers.
2. **Courts:** SUPREME COURT: JURISDICTION: DECISIONS OF RAILWAY COMMISSION: REVIEW. Chapter 94, laws 1911, providing for proceedings in this court to review the decisions of the state railway commission, confers appellate jurisdiction upon this court, within the meaning of section 2, art. VI of the constitution.
3. **Constitutional Law:** RAILWAY COMMISSION: REVIEW OF DECISIONS. The statute is not unconstitutional as an attempt to confer legislative powers upon this court, its purpose being to afford a speedy determination as to the regularity of the proceedings of the commission and the legality of its decisions. It should not be construed as giving this court any different jurisdiction than in ordinary civil cases under the former statute by proceedings in error, which also gave this court jurisdiction "to reverse, vacate or modify" judgments, and not to retry the case as an original action.
4. ———: DUE PROCESS OF LAW: TELEPHONE COMPANIES. Chapter 79, laws 1913, is not unconstitutional as taking private property without due process of law.
5. **State Railway Commission:** JURISDICTION: TELEPHONE COMPANIES. The state railway commission has jurisdiction under that act to order physical connection of telephone lines and exchanges, and, when the parties fail to agree, it is the duty of the commission to determine and prescribe the terms and conditions of such connection and of the use of the lines so connected, and apportion the expense of connecting the same.
6. ———: ORDERS: REVIEW. The orders of the commission are presumed to be within the power given by the constitution and statutes, and will not be reversed by this court upon appeal, unless it appears affirmatively from the evidence in the record that there was error in the

proceedings prejudicial to the party complaining, or that the commission has otherwise exceeded its powers.

7. ———: ———: ———: FINAL ORDER. When appeal from the order of the commission is taken directly to this court, and the proper bond given, such order becomes the final order of the commission, when approved by this court. The remedies recognized by subdivision *e*, sec. 5, ch. 90, laws 1907, are not superseded by such order of the commission.

8. ———: ———: TELEPHONE CONNECTIONS. The evidence in the record is not sufficient to show that the order of the commission is impracticable or incapable of execution, or that the commission has proceeded illegally, or has exceeded its powers in this case.

APPEAL from the State Railway Commission. *Affirmed.*

Edgar M. Morsman, Jr., for appellant.

Grant G. Martin, Attorney General, George W. Ayres, Frank E. Edgerton and *Courtright & Sidner, contra.*

Byron Clark, Jesse L. Root and *Holmes & De Lacy, amici curiæ.*

SEDGWICK, J.

The complainant, Hooper Telephone Company, filed its complaint with the state railway commission, alleging that it is, and for several years past has been, operating a public telephone station and exchange at Hooper, in Dodge county, and that the defendant, Nebraska Telephone Company, is, and for many years last past has been, "operating public telephone stations and exchanges and various telephone toll lines throughout the state of Nebraska, one of such exchanges being at Fremont, Nebraska, which exchange has more than two thousand subscribing telephones connected therewith;" that the Fremont Telephone Company had for several years been doing a similar business in Dodge county, and that company and complainant had owned and maintained a county line jointly, and that the Nebraska Telephone Company had purchased the stock of the Fremont company, and asked the railway commission to order the defendant to connect its switchboard and exchange with the complainant's lines. The railway commis-

sion heard the evidence, and ordered the connection made substantially as asked by the complainant, and the defendant, Nebraska Telephone Company, has appealed to this court.

1. The complainant filed a motion to dismiss the appeal on the ground that this court has no jurisdiction thereof, and this presents the first question to be determined.

Sections 1, 2, art. VI of the constitution, are as follows:

Section 1. "The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts, inferior to the district courts as may be created by law for cities and incorporated towns."

Section 2. "The supreme court shall consist of seven (7) judges; and a majority of all the elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision. The supreme court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law."

In 1906 an amendment to the constitution was adopted providing for a state railway commission. Since the revision of the statutes in 1913, this amendment appears as section 19*a*, art. V of the constitution, and is as follows: "There shall be a state railway commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law. But, in the absence of specific legislation, the

commission shall exercise the powers and perform the duties enumerated in this provision."

The legislature of 1907 enacted a general comprehensive statute entitled "An act, creating and defining the powers, duties and qualifications of the state railway commission and the secretary thereof and fixing their compensation; defining railway companies and common carriers, regulating the same, and providing the method of fixing, establishing, publishing rates, charges and classifications for the transportation of passengers, freights and cars, including joint through rates and joint traffic arrangements, over and upon the various lines of said railway companies and common carriers in this state; to provide for a system of annual reports by common carriers; the method of making, establishing and enforcing the general orders of said commission; defining unjust discriminations; to provide penalties for the violation of the provisions of this act, and to repeal all acts or parts of acts in conflict herewith, and to declare that an emergency exists." Laws 1907, ch. 90.

Section 2 of the act provides for the organization and the powers and duties of the commission. Subdivision *b* of that section is: "Said commission shall have the power to regulate the rates and services of, and to exercise a general control over all railroads, express companies, car companies, sleeping car companies, freight and freight line companies, and all other common carriers engaged in the transportation of freight or passengers within the state." The commission also is required, by subdivision *c*, to "investigate any and all cases of alleged neglect or violations of the laws of the state by any railway company, or common carrier." Subdivision *d* of this section provides: "Said commission shall have the power, and it shall be its duty to make all necessary classifications and to fix all necessary rates, charges and regulations to govern and regulate the freight and passenger tariffs of railway companies and common carriers, the power to correct abuses and prevent unjust discriminations, extortions and overcharges in rates of freight and passenger tariffs on the different

railroads in this state, and to enforce the same by having the penalties inflicted as hereinafter provided, through proper courts having jurisdiction." The commission was given power, by subdivision *j*, "to administer all oaths, certify to all official acts, to compel the attendance of witnesses, to examine any of the books, papers, documents and records of any railway company or common carrier subject to the provisions of this act, or have such examination made by any person or persons that they may employ for that purpose, to compel the production of such books, papers, documents and records, or to examine under oath, or otherwise, any officer, director, agent, or employee of any railway company or common carrier subject to the provisions of this act or any other person."

Subdivision *e*, sec. 5, provides: "No railway company or common carrier applying in any court for any temporary writ of injunction or other mandatory order, with reference to any or all of said rates so complained of, shall be entitled to any injunction or mandatory order unless it show to the court that there has been a hearing before said commission with reference to said rate or rates, within the time fixed by said commission for said rate or rates to go into force and effect, and shall attach to said application for said temporary writ of injunction or other mandatory order, and make the same a part thereof, a transcript of the record of said commission upon said hearing with reference to the rate or rates complained of, which said transcript shall contain a copy of the complaint filed with said commission, their decision and findings of fact with reference thereto, and all the evidence introduced at said hearing, which transcript shall be considered by the court in allowing or disallowing said temporary writ of injunction or other mandatory order."

Section 7 provides for appeals from the decisions of the commission as follows: "If any railway company, common carrier, or any person or persons affected thereby, shall be dissatisfied with the decision of said railway commission, affirming, revising, annulling or modifying any rate or rates complained of in said original schedule, or

any subsequent schedule which may be the subject of investigation, or with the decision of said commission with reference to any rate classification, rule, charge, order, act or regulation made or adopted by them, upon which there has been a hearing before said commission, except as otherwise expressly provided for herein, such dissatisfied railway company, common carrier, person or persons, may file a petition, setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in the district court of the county where the cause of action arose in this state, sitting as a court of equity, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, criminal cases excepted, and shall be tried and determined as other civil causes in said court. Either party in said action may appeal to the supreme court of this state, and said appeal shall be at once returnable to said court, and said action so appealed shall have precedence in said court of all causes of a different character pending therein; provided that if the district court be in session at the time such right of action accrues, the suit may be filed during the term and stand ready for trial after ten days notice." Section 11 provides for enforcing the decision of the commission: "Whenever any railway company or common carrier shall violate or refuse or neglect to obey any order or orders of said commission which have been finally established, the commissioner, or any company or person interested in such orders, may apply in a summary way, by petition, to the district court of the county in which the violation or disobedience of such order or orders shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such notice to the railway company or common carrier complained of, as the court shall deem reasonable; and such notice may be served on such railway company or common carrier, its officer, agents, or servants, as the court shall direct; and said court shall proceed to hear and determine the matter

speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end, such court shall have power, if it deem proper, to direct and prosecute in such manner and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and if it be made to appear to such court on such hearing, or on the report of any such person or persons, that the order or orders of the commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such railway company or common carrier, and its owner, directors, officers, agents, employees, lessees, trustees, or receivers or representatives, upon whom the duty may devolve or through whose agency said order or orders are to be carried out, from further continuing such violation or disobedience of said order or orders, and enjoining obedience to the same, and in case of any disobedience of any such writ of injunction, or other proper process, mandatory or otherwise, said railway company or common carrier, and its owners, directors, officers, agents, employees, lessees, trustees, or receivers or representatives, to whom said writ of injunction or other process, mandatory or otherwise, was directed, shall be guilty of contempt of court, and it shall be lawful for such court to issue a writ of attachment or other process of said court, incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against said railway company or common carrier, to pay any sum of money, not exceeding for each railway company or common carrier, the sum of one thousand dollars for every day, after a day to be named in the order, that said railway company or common carrier shall fail to obey such injunction or other proper process, mandatory or otherwise, and said owners, directors, officers, agents, employees, lessees, trustees, or receivers or representatives, upon whom the duty may devolve or through whose agency said order or orders are to be

carried out upon failure so to do shall be deemed guilty of misdemeanor and upon conviction thereof shall be imprisoned in the county jail not less than ten days nor more than thirty days. Said moneys shall, when paid, be disposed of according to law, and the payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order, in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court, saving to the commission and to any other party or person interested therein, the right to appeal to the supreme court under the same rules now provided by law in relation to appeals to said court as to security for such appeal, except that in no case shall security for such appeal be required when the same is taken by the commission; but no appeal to said supreme court shall operate to stay or supersede the order of the court, or the issuance of execution thereon, and such court may in every such matter order the payment of such costs and attorney and counsel fees as shall be deemed reasonable."

The legislature of 1911 amended section 7 in an act entitled "An act to amend section 7, chapter 72, article 8, Compiled Statutes of Nebraska for 1909, and to repeal said original section." Laws 1911, ch. 94. The first part of the former section was retained, but, beginning with "may file a petition, setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in the district court," the following was substituted for the remainder of the section: "May institute proceedings in the supreme court of Nebraska to reverse, vacate or modify the order complained of. The procedure to obtain such reversal, modification or vacation of any such order or regulation made and adopted, upon which a hearing has been had before said commission, shall be governed by the same provisions now in force with reference to appeals and error proceedings from the district courts to the supreme court of Nebraska. The evidence presented before the railway commission, as reported by its official stenographer

and reduced to writing, shall be duly certified to by said stenographer and the chairman of the railway commission as the true bill of exceptions, which, together with the pleadings and filings, duly certified in said case under the seal of the railway commission, shall constitute the complete record, and the evidence upon which the case shall be presented to the appellate court; provided, however, that the time for appeal from the orders and rulings of said railway commission to the supreme court shall be limited to three months; and provided further that in no case shall the filing of a supersedeas bond suspend the putting in force or operation of any decision, regulation, rate, schedule, order of the commission of any nature whatsoever, unless such supersedeas bond is conditioned and in sufficient amount, to be approved by the commission, to insure the prompt refunding by the appealing common carrier to the parties entitled thereto, of all charges which such common carrier may collect or receive pending the appeal in excess of those fixed or authorized by the final decision in said cause by the supreme court."

This last act, it is insisted, is unconstitutional and void. Section 2, art. VI of the constitution, above quoted, prescribes the original jurisdiction of this court. If the jurisdiction which this statute attempted to confer is original, this court cannot have such jurisdiction under the constitution, unless it can be held that the "state is a party," within the meaning of that provision. Whether the state may be so far interested as to be considered a party in the sense intended by the constitution, although not named as such, or this provision must be taken literally and the state must be actually named as a party, and, if the former, whether the state is in fact defending this action of the commission, and so is the real party in interest, are interesting questions, in view of decisions of this court in cases such as *State v. Pacific Express Co.*, 80 Neb. 823, and holdings of the supreme court of the United States in the so-called rate cases. We have concluded to place our decision of this motion to dismiss the appeal upon grounds perhaps less difficult, although not entirely free from

doubt. The same section of the constitution to which we have just referred contains also the provision that this court shall have "such appellate jurisdiction as may be provided by law." This language is broad and general. The power of the legislature to enlarge the appellate jurisdiction of this court is unlimited. But what did the constitution makers regard as "appellate jurisdiction," as the phrase is here used? This question is elaborately and learnedly discussed in the briefs.

In *State v. Piper,* 50 Neb. 25, 33, the court said: "It is very evident an appeal or proceeding in error will not lie directly to this court to review the decisions of the secretary of state under the Australian ballot act, for two reasons: First, no provision is made therefor by the law in question, or by any other statute; and, in the next place, the appellate jurisdiction of this court is confined to a review of the judgments and orders made by the several district courts of the state. Neither error nor appeal can be prosecuted from the decision of any other court or tribunal directly to this court." The action was an original one in mandamus to compel the secretary of state to certify to the county clerks the names of certain persons only as nominees for certain offices. There was no question of appeal involved, and the language above quoted was used merely *arguendo.* If it involved a point necessary to be decided in the case, the first reason given for holding that no such appeal would lie was amply sufficient. It was not necessary to say that neither error nor appeal can be prosecuted directly to this court from the decision of any other court or tribunal than the district court. *Cleghorn v. Waterman,* 16 Neb. 225, is cited, which decides only that this court can reverse, vacate or modify a judgment rendered by the district court only for error appearing on the record, and does not consider the question of the right of appeal from other courts or tribunals. There is still a stronger reason for not regarding *State v. Piper, supra,* as authority in this case. At that time the constitutional provision creating the railway commission was not in existence, and the statement that no appeal could be taken

from any other court or tribunal than the district court could not then apply to the state railway commission.

Of course, "a state may, by constitutional provision, unite legislative and judicial powers in the same body." *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210. The amendment gives very large powers to the legislature. In providing for general legislation upon the subject of the powers and duties of the commission, it uses the words: "As the legislature may provide by law." It is not necessary now to determine whether the legislature could confer the powers of a court upon this commission. It is sufficient to consider that the amendment introduces a new element into our constitution, and, construing the other provisions together with this amendment its purpose and scope must not be limited only as the necessary meaning of the whole instrument requires. We must therefore consider this constitutional amendment itself in the light of other provisions of the constitution, and discover whether the legislative construction of its power to allow appeals from the decisions of the railway commission is so clearly unwarranted as to require us to hold this legislation unconstitutional for that reason. The words "appeal" and "appellate" are words of general application in the law. Ordinarily they refer to the removal of proceedings from one court or tribunal to another for review. In section 9, art. IX of the constitution, the word appeal signifies a transfer of proceeding for review from an executive office to the district court. The former decisions of this court would, perhaps, preclude construing the word appellate in section 2, art. VI, so broadly. But it is not necessary to do so in this case.

Article II of the constitution provides: "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." The last clause of this provision implies that some of the provisions of the constitution

expressly direct or permit one department of government to exercise powers belonging to another department. The state railway commission is considered as belonging to the legislative department. Has this amendment given it judicial powers? In providing for this appeal, the legislature considered that this amendment and the statutes authorized thereby have given the commission administrative and judicial powers, in addition to its legislative powers, the main purpose of its creation. It has not attempted to authorize this court to act in a legislative capacity. The decision of the commission in this case compelling physical connection of these telephone systems is not wholly legislative. Even legislative acts may be of such a nature and so grossly unreasonable as to present a judicial question for the consideration of the courts. But, so far as they are legislative, the courts in this state have no jurisdiction over them by appeal or otherwise. "Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. St., sec. 720, no matter what may be the general or dominant character of the body in which they may take place. * * * The nature of the final act determines the nature of the previous inquiry. * * * And all that we have said would be equally true if an appeal had been taken to the supreme court of appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called." *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226. That was an action in the federal courts to enjoin a railroad rate prescribed by the corporation commission of Virginia. The statute of the state provided for an appeal directly from the commission to the supreme court of the state. The supreme court of the United States held that when such appeal was taken the action of the commission was not final before the supreme court of the state had passed upon the appeal; that then the rate was fixed, if

affirmed by the supreme court, and that then action might be brought in the same manner and for the same purpose as though there had been no appeal from the decision of the commission. This holding was upon the ground that the supreme court of the state was given legislative jurisdiction by their statute providing for appeal, and acted in that capacity in reviewing the action of the commission, so that the legislation was not complete until the court had acted. This court has no legislative powers, but the same conclusion is necessary for another reason. The statute providing for this appeal does not expressly require or authorize this court upon appeal to act in a legislative capacity.

Our constitution forbids the legislature to confer legislative powers upon the courts. If the statute providing for this appeal necessarily does so, such legislation would be void. The statute must be sustained if it will admit of any reasonable construction in harmony with the constitution. By section 11 of the act provision is made for enforcing the orders of the commission when they become effective. By subdivision *e,* above quoted, the remedy of injunction and "mandatory order" are recognized as existing independently of the remedies provided by the act. Section 7 of the original act, which provided for an appeal to the district court, is the only part of the act amended. That section provided that, when the proceedings were so removed to the district court, that court should be "sitting as a court of equity," and the case should "be tried and determined as other civil cases in said court." These provisions were omitted in the amended section, and in lieu thereof it is provided that the procedure "shall be governed by the same provisions now in force with reference to appeals and error proceedings from the district courts to the supreme court of Nebraska." The evidence taken before the commission is certified to this court, and this court is to act only upon the record so made. The court is to "reverse, vacate or modify" the decision of the commission. These words are borrowed from the statute

which provided for petitions in error to this court in ordinary civil suits, and it seems plain that the legislature did not attempt to give this court any other jurisdiction on these appeals from the commission. When the decision of the commission has been "fixed and authorized" by this court upon appeal, it becomes the final order of the commission, so that by this amendment of section 7 the legislature has not attempted to confer legislative power upon this court.

We conclude that, under the power given to the legislature to provide generally the appellate jurisdiction of this court, in view of the scope and purpose of the constitutional amendment which creates the railway commission, and the power given to the legislature by that amendment, and the general statutes enacted pursuant to that power, the amendment of the statute providing for appeals directly to this court is not in violation of the constitution. The motion to dismiss the appeal is therefore overruled.

2. In 1913 the legislature enacted a statute entitled "An act compelling all persons, associations or corporations doing a public telephone business in this state to connect trunk or toll lines through their switching stations, and to give and make terminal service to all subscribers from any point in the state of Nebraska, regardless of the ownership of lines or routes over which such message or service was received. To provide in what manner same shall be done, and giving certain instructions to the state railway commission regarding the division of toll charges and the enforcement of the provisions of this act, and to provide a penalty for the violation of the same, and to repeal all acts and parts of acts in conflict herewith." Laws 1913, ch. 79. The first section of the act is as follows: "Any telephone company, corporation, association, person or persons doing a public telephone business in the state of Nebraska shall take the calls or messages coming from any other telephone company, corporation, association, person or persons, and so switch and connect its wires that such telephone message from any point in

Nebraska may be delivered to any subscriber served by its telephone exchange or switched through, so that any message may be passed on to another exchange over such trunk or toll lines as may be available and designated by the exchange or switching station where the call originated, regardless of the ownership of such lines. And such telephone company, corporation, person or persons shall also take calls from its subscribers and public pay stations and pass such calls through its exchange toward destination and over the lines and the route designated by the person making such telephone call if there be competing lines existing between such points. Provided, that, in case the person making such telephone call, does not designate a route for such message, or that no competing lines exist between points of origination and destination, then the company may by its operator at originating point, make such designation of route, but calls or messages must be switched through to destination if the point be reached by any connecting wires." The second section provides for maintaining connections when connecting plants or exchanges have been consolidated. Section 3 makes provision for division of toll charges when physicial connection is made between plants or exchanges; and section 4 provides a penalty for violation of the act.

The appellant contends (a) that the railway commission has no jurisdiction of the controversy; (b) that the commission had no authority to make an order in reference to physical connection between telephone lines as that matter is regulated by statute; (c) that chapter 79, laws 1913, is unconstitutional, because it provides for taking of private property without due process of law, which is forbidden by the state constitution, as well as by the fourteenth amendment to the federal constitution; (d) that the order of the commission is void for the same reason. It also contends that the order of the commission is not supported by the evidence and that the Fremont Telephone Company was a necessary party. It is contended that the statute itself fixes and determines the rights of the public and of individuals, and has left nothing for the railway

commission to do in that regard, and therefore the state railway commission has no jurisdiction in the matter. It must be conceded that the statute is somewhat indefinite as to the duties of the railway commission in the matter. The title of the act, however, recites that one of the purposes of the act is to give "certain instructions to the state railway commission regarding the division of toll charges and the *enforcement of the provisions of this act;*" and section 3 of the act provides that "in case of a failure to agree (upon division of toll charges) the company where the messages originate and the company where the messages destinate shall report to the railway commission," etc. It is suggested in the appellant's brief, and perhaps the record discloses, that there are many matters involved in making physical connections of telephone lines which require adjustment in detail when the parties fail to agree, and to adjust these matters equitably between the parties would seem to be the proper function of the commission. In this connection it is also insisted in the brief that the order of the railway commission should be reversed because of its indefiniteness in not having made the necessary adjustment of the rights and duties of the parties and the expenses incurred in complying with the order of the commission. The appellant is not in a position to complain of this. It failed entirely to bring this matter to the attention of the commission. Its answer to the complainant before the commission was substantially a general denial. It made no attempt to present the issues which it now insists the commission should have determined, and offered no evidence from which the commission might make such a determination.

The appellant contends that the order compelling it to make physical connection with the Hooper company amounts to the taking of its property without compensation, and, as the statute makes no provision for compensation, it violates both the state and federal constitution in that respect. It is conceded that the appellant is engaged in the carrying on of a general telephone business, and operates telephone exchanges located in various towns in

the states of Nebraska, Iowa, and South Dakota; that it owns and operates toll lines which connect the telephone exchanges owned by it in those states, which lines connect with toll and long distance lines and with telephone exchanges owned and operated by other persons and companies. It is also conceded that its toll lines can be physically connected with the lines of the Hooper company, but its contention is that the "result of such a connection is to at once pass to the Hooper company as much dominion and control over the toll lines as the Nebraska company itself possesses, and when service is given over such a connection the Hooper company is in control, not only of the toll line, but likewise of its operation. * * * Telephone lines are operated by an electric current, and wherever the line terminates there lies the control of the entire line. But one conversation can pass over a circuit at the same time, and the minute the telephone circuit is connected with the switchboard of the Hooper company the switchboard becomes the end of the circuit, and it lies within the power of the Hooper company to interfere with and control the traffic of the entire circuit all the way between Omaha and Norfolk," and that there is no escape from the conclusion that physical connection with the toll circuit "subjects the property of the Nebraska Telephone Company to certain risks and dangers against which the Nebraska Telephone Company cannot guard, because these risks and dangers arise from the fact that the Hooper Telephone Company has the physical possession of the end of the toll circuit."

Perhaps we do not fully understand the argument and reasoning upon this point. It appears that physical connection of different telephone lines has been made in many instances without any such direful results. When an individual asks for connection of his private telephone with the toll lines of the company, and such connection is made for him, he has the exclusive use of the toll line of the company for a certain time. There is no doubt that if he complies with the reasonable regulations of the company he is entitled to such use of the line, and that the

company could be compelled to furnish such use upon reasonable terms and upon complying with reasonable regulations without any greater use of the company's property or any greater danger of injury thereto than in case such service is furnished to a patron of the company itself. If there are inherent reasons for making the distinction which the appellant seeks to make, that fact does not appear from the evidence in this record. The brief does not make it clear that this court should take judicial notice of such conditions.

Another contention is that, since the order of the commission includes physical connection with the lines formerly operated by the Fremont Telephone Company, that company is a necessary party to these proceedings, without which no such order could be made. It is conceded in the record that the Nebraska Telephone Company has purchased, and now owns and controls, the stock of the Fremont Telephone Company, except a few shares not nominally held by the Nebraska company, the ownership of which is not disclosed in the record. Since purchasing this stock, the Nebraska company has transferred the business of the Fremont company to its own exchange and is using the lines of the Fremont company in connection with its own business. It does not appear from the evidence that it would be impracticable for the railway commission to adjust equitably the terms and conditions upon which the Nebraska company might make physical connection of these lines with those of the Hooper company. We cannot therefore determine from this record that the railway commission has exceeded its powers in proceeding to a determination of the matter without bringing in the Fremont company.

The order of the Nebraska state railway commission is affirmed, without prejudice to either party to apply to the commission to introduce further evidence, and obtain the order of the commission adjusting terms and expenses of making the connection, and such other or further action on the part of the commission as may be necessary.

AFFIRMED.

ROSE, J., not sitting.

WILLIAM STULL, APPELLANT, V. MATILDA P. GOOLD, APPELLEE.

FILED MAY 15, 1914. No. 17,617.

1. **Quieting Title.** In an action to quiet title, the rule is that the "plaintiff must succeed only on the strength of his own title, and not on the weakness of his adversary." 32 Cyc. 1329.
2. ———. "In an action having for its object the declaration of a trust in land in favor of the plaintiff and the quieting of title in him, it is incumbent upon the plaintiff to affirmatively establish an equitable title in himself, and, if he fail to do so, the nature of defendant's title, or the existence of any title in defendant, is immaterial." *Blodgett v. McMurtry*, 39 Neb. 210.
3. ———. Where the plaintiff, one W. S., fails to establish his title to the premises in question as against a deed made to the defendant, M. P. G., by the receiver of the S. L. & T. Co., and she (said defendant) is shown to have taken possession under the said deed, and to be in the full and exclusive enjoyment thereof, the plaintiff is not entitled to recover. The evidence examined, and found to sustain the judgment of the district court.

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

Albert Muldoon, for appellant.

J. G. Beeler and *H. A. Dano, contra.*

HAMER, J.

This is an action brought by William Stull against Matilda P. Goold and John Doe, defendants. The petition alleges that William Stull is the owner in fee of the property in controversy, the northwest quarter of section 32, in township 13 north of range 39 west of the 6th P. M., in the county of Keith, state of Nebraska. He prays that a certain alleged pretended deed executed by H. L. Goold, as receiver of the State Loan & Trust Company, to Matilda P. Goold be canceled and annulled, and that the title shall be quieted in himself *as against said deed,* and for such other and further relief as equity may require. The

defendant, Matilda P. Goold, claims through a deed from the receiver of the State Loan & Trust Company, dated May 25, 1909. The deed to her recites that H. L. Goold on the 29th day of September, 1896, was appointed and qualified as receiver of the State Loan & Trust Company, and the proceedings are copied into the deed showing such appointment. It is this deed which the plaintiff attacks. It is recited in it that the sum offered for the real estate is a good and sufficient sum, and that it is for the best interests of said State Loan & Trust Company, and the creditors thereof, that the property be sold, and there is an order directing the receiver upon the payment of $2,400 to execute and deliver to said Matilda P. Goold a good and sufficient deed to the land in question. The bill of exceptions shows that on the 25th day of May, 1909, the receiver reported the sale of the land to Matilda P. Goold, and that he had received therefor the sum of $2,400. It is also shown by the report of the receiver that the proceeds received from the sale of the property were used in payment of the debts of the company. The deed made by the receiver to Matilda P. Goold was recorded on the 26th day of May, 1909. The report of H. L. Goold, receiver, shows the amount paid to him for the land, and which he reports to have paid out in payment of debts against the State Loan & Trust Company, and further shows that all claims against the State Loan & Trust Company had been fully paid and satisfied.

Among the conveyances upon which the plaintiff relies to establish his claim is a quitclaim deed from the State Loan & Trust Company to Stull Brothers, dated August 27, 1896, and filed for record February 23, 1910. The deed recites a consideration of one dollar paid by Stull Brothers to the State Loan & Trust Company.

The bill of exceptions shows a conveyance by Louis Stull and his wife, Grace W. Stull, for the alleged consideration of one dollar, paid September 20, 1898, acknowledged December 20, 1898, and filed for record November 26, 1906, and recorded in miscellaneous record C at page 300. The purported quitclaim deed from Louis Stull and wife

to William Stull undertakes to convey the interest of said Louis Stull in any and all property, "real, personal and mixed, belonging to said firm of Stull Brothers, and to all lands and lots in the states of Nebraska, Iowa, Kansas, and Missouri standing in the name of Louis Stull of said Stull Brothers, acquired by, through or on account of any mortgage or trust deed in favor of said Stull Brothers, Louis Stull, or William Stull, whether as beneficiary, trustee or mortgagee." This instrument is at most a relinquishment by Louis Stull to William Stull of any possible right which the said Louis Stull may have in the kind of property described and within the states mentioned.

William Stull's testimony is not very clear. He speaks of releasing the bank from liability, and gives that as one of the reasons for not filing the deed sooner. It does not appear that the bank assumed to pay the mortgage debt upon the premises. The land is conveyed by George W. Ryan, Jr., and his wife, Nellie W. Ryan, to the State Loan & Trust Company, "subject, however, to one certain mortgage of $700, drawing 7 per cent. interest semiannually in favor of Stull Brothers, of Lincoln, Nebraska, and we do hereby covenant with the said State Loan & Trust Company of Ogalalla, and their heirs and assigns, that we are lawfully seized of said premises; that they are free from incumbrance, except as above mentioned, and we have good right and lawful authority to sell the same; and we do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever." The language used shows no assumption of the mortgage debt. It gives no sufficient reason for not filing the deed of record in a reasonable time. There was no liability on the part of the State Loan & Trust Company to pay this debt; at least there is no evidence tending to establish that fact. Nothing passed from Stull Brothers to the State Loan & Trust Company. Stull did not settle the mortgage debt. He did not release the mortgage. Theodore Goold, the stepson of the defendant, wrote to William Stull about releasing the mortgage. Of course,

this enabled Stull to learn of the death of Mr. Goold. Mr. Goold's death prevented his testimony in this case.

William Stull testified concerning the quitclaim deed of date of August 27, 1896, the deed professing to convey the land in controversy to Stull Brothers by the State Loan & Trust Company for the consideration of one dollar. "Q. Did you have any personal consideration in this deed yourself? A. We had an interest in the mortgage; it was an assignment of coupons; and we had advanced some taxes that we were interested in. Q. Can you explain why the deed was not recorded? A. The correspondence was through a broker to whom we sold the paper, and we did not know the actual or *bona fide* owner of the paper, but these brokers, Haines & Co., the loan had been sold through them to some one, we didn't know to whom, and the interest had been sent to them, the coupons returned to us; they were a reliable house, and they were representatives of the owners of the mortgage. Our attorneys advised us not to record that deed for the reason that, inasmuch as we had nothing in writing from the owner of the mortgage, it would be unsafe for us to file it for record; the owner of the mortgage might repudiate his agent's promises, and then take the position that we had bought the land, and we were under no obligation to pay the debts. Q. Did you know who the real owner and holder of the mortgage was at the time you took the deed? A. No, sir; we did not. Q. Can you state approximately how much of a consideration you had personally advanced in this deed? A. I would say about $100, as near as I can remember. Q. Did you have some correspondence with the parties who paid this consideration, you individually? A. Well, I say the firm; the firm did either while a firm, or I did it later, and it became my property. Q. Did you have any correspondence, or did you notify these brokers of this transaction? A. Yes, sir; and they promised to come forward and take up our advances; that is, refund to us what interest we had in the mortgage. Q. And you were then to furnish a deed? A. Yes, sir; or we were to settle it up some way; they agreed to either buy or sell, and settle the mat-

ter up. Q. Did they ever make a settlement? A. I do not know whether that offer was ever consummated or not; we have several along these lines; and whether it was ever settled up, I cannot say; it was long drawn out, I know that, so I cannot say." Cross-examination: "Q. How much money did you advance to the broker, that was the agent, or the broker of the owner of this mortgage? A. I cannot say, I cannot remember now." Apparently this transaction is very hazy and uncertain in the mind of the witness. His testimony tends to show that he does not know the owner of the mortgage; that he is uncertain whether he paid anything. If he paid nothing, he has nothing. His interest in the matter must depend upon the good faith of the transaction. The evidence shows that Goold paid $125 to Stull or to Stull Brothers. On examination Stull endeavors to show that the $125 did not apply on the Ryan loan. Stull testified: "Q. Answer my question; have you anything from Mr. Goold to show that the money which he remitted you was to be applied upon the two loans other than the Ryan loan, and not upon the Ryan loan? A. I do not know that I have. * * * Q. The amount which you had advanced would have been paid, would it not? A. I don't know whether it would have been or not; I don't remember the amount. Q. You said it was about $100, didn't you? A. That is my recollection. Q. He remitted you a draft for $125? A. Yes, sir; we canceled and surrendered the coupons to offset it."

If the foregoing money was paid, then Stull Brothers and William Stull had no interest in the premises because they had received all the money they claimed to have advanced, therefore the district court had a right to find against the plaintiff. It would seem that it was bound to do so under the evidence. There was no foreclosure shown of the trust deed made by George W. Ryan and wife to William Stull, trustee. The said trust deed was dated October 25, 1887, acknowledged October 28, 1887, and filed for record October 28, 1887. William Stull does not claim

anything for himself by reason of this trust deed, and there is no evidence that he is entitled to anything.

Whether the delay of 13 years, 5 months, and 25 days in filing the quitclaim deed made by the State Loan & Trust Company to Stull Brothers, of the date of August 27, 1888, was for the purpose of waiting until the statute of limitations would apply to the trust deed and make the claim which it secured uncollectible, we have no testimony, and only such suggestions for this unreasonable delay as the evidence may furnish, together with the somewhat uncertain testimony of William Stull, which, however, shows that the trust deed had been sold to some person and that the claim was held by some person. During all these years of the receivership the possession of the land in controversy remained in the receiver until it was conveyed to Matilda P. Goold.

In an action having for its object the declaration of a trust in land in favor of the plaintiff and the quieting of title in him, it is incumbent upon the plaintiff to affirmatively establish an equitable title in himself, and, if he fail to do so, the nature of defendant's title, or the existence of any title in defendant, is immaterial. *Blodgett v. McMurtry,* 39 Neb. 210.

"The rule is that plaintiff must succeed only on the strength of his own title, and not on the weakness of his adversary." 32 Cyc. 1329, and cases cited.

"Irrespective of his title, possession in defendant is a sufficient defense, where plaintiff shows no title in himself." 32 Cyc. 1344, and cases cited.

This case was heard in the district court for Keith county. Its opinion is entitled to consideration. Familiarity with the witnesses who testified, an acquaintance with the parties, and the circumstances attendant upon the case give the findings of that court a value which they might not have in a case further removed from the journeys of the judge.

The State Loan & Trust Company, through its receiver, was in possession of the land in 1909, when the sale was made to Mrs. Goold. These facts would seem to make it

safe for any purchaser to buy the land and to pay his money for it. Stull Brothers permitted Matilda P. Goold to expend $2,400 in buying the land and paying for it. Stull Brothers allowed the sale to be made and the money to be distributed to the creditors. "There is nothing in the relation of vendor and vendee by deed executed and not executory which will prevent the vendor who may remain in possession, or who may afterwards take possession, from claiming adversely to the vendee and relying on the statute of limitations. The covenant of warranty contained in the deed will not defeat title by limitations acquired after the deed. Such title is no breach of the covenant, which cannot be extended to cover future laches of the grantee whereby he loses the title conveyed to him." 1 Cyc. 1040. See, also, 1 Cyc. 1041. The statute of limitations is clearly applicable in this case.

We think that the judgment of the district court is fully justified by the evidence. The testimony of the plaintiff fails to make a case, even if there was no question of adverse possession. The finding of the district court against the plaintiff seems to be warranted because of the weakness of the plaintiff's title, the lack of equity in his petition, and on the ground that the statute of limitations applies, and establishes the right of the defendant under the doctrine of adverse possession. We cannot in any event say that the finding is wrong.

The judgment of the district court is

AFFIRMED.

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

CHARLES REYNOLDSON, APPELLEE, V. VIVIAN REYNOLDSON, APPELLANT.

FILED MAY 29, 1914. No. 17,773.

1. **Marriage:** CONTRACT. The contract requisite to the creation of the marriage relation need not be expressed in any special manner, or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct.
2. ———: COMMON LAW MARRIAGE. Evidence examined, its substance stated in the opinion, and *held* sufficient to sustain a finding that, when the marriage ceremony was performed between plaintiff and defendant, the defendant was the common law wife of one James S. Boyer, and therefore was incapable of entering into the marriage relation with the plaintiff.

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

H. C. Vail and *F. J. Mack,* for appellant.

James S. Armstrong, A. E. Garten and *Frank D. Williams, contra.*

BARNES, J.

Charles Reynoldson commenced this action in the district court for Boone county against Vivian Reynoldson for a divorce on the ground of adultery. Before trial the action was changed by the plaintiff in an amended petition to one for an annulment of the marriage relation between himself and the defendant, in which it was alleged that the defendant was the common law wife of James S. Boyer at the time when the marriage ceremony between the plaintiff and the defendant took place. A trial was had, which resulted in a finding and decree declaring the marriage void and annulling the marriage relation between the plaintiff and defendant, and from this decree the defendant has prosecuted an appeal.

The appeal really presents but one question for our determination, and that is: Was Vivian Reynoldson, at the

time of the marriage between herself and Charles Reynoldson, competent to contract marriage with him? James S. Boyer testified that he was manager of the Cody Hotel at Cody, Nebraska; that he became acquainted with the defendant at McCook, Nebraska, April 18, 1907; that he and the defendant were arrested and taken to the state penitentiary for safe-keeping; that afterwards, while they were confined in the jail at McCook, they occupied the same cell, and a marriage contract between them was entered into "to live together as man and wife." He further testified that after he had been liberated, and the defendant had received a jail sentence, they agreed that after she had served her sentence she should go to Red Oak, Iowa; that he was to get some money, and after he got it he was to go there, and they were to live together as man and wife. He said: "I went to Red Oak, Iowa, out to her people's house, got her, and we lived together from that time continuously until the 4th of July, 1910, as man and wife." He further testified, in substance, that they lived together in various places in Nebraska, Colorado, and Wyoming as husband and wife, and held themselves out to be such.

There is evidence in the record that the defendant registered at the Cornland Hotel, Lexington, Nebraska, March 11, 1909, as Mrs. J. S. Boyer, Sheridan, Wyoming; that Boyer also registered, and they occupied the same room. It further appears that the defendant wrote a postal card and mailed it at Sterling, Colorado, in which she said: "My dear Husband: Everything O. K. Will write tomorrow. As ever, V. B." This card was addressed to J. S. Boyer, Scott's Bluff, Nebraska. On September 31, 1910, she wrote Boyer a letter from Alliance, Nebraska, in which she closed with, "Your wife, Vivian." It also appears that his laundry was marked as follows, "J. S. B.," and hers, "V. B." Her umbrella was marked with the same initials. On cross-examination the witness Boyer further testified in relation to the marriage contract as follows: "She said, * * * 'You will go away and leave me, being that I am in custody; and that you have come clear;' and I told her that I wouldn't, and we agreed

* * * to live together as man and wife, and represent ourselves as the same. Q. You agreed to that at that time? A. At that time; yes, sir. * * * Well, she said that she would agree to it."

A. Bauman, jr., ex-sheriff of Dodge county, testified that while sheriff, and shortly after the trouble at McCook, as related by J. S. Boyer, he detained Boyer and Vivian Boyer at Fremont, but released them in a few moments; that she did most of the talking. She told the witness that Boyer was her husband.

J. C. Cook testified, in substance, that he was county attorney at the time testified to by sheriff Bauman, and he interrogated Mr. and Mrs. Boyer as follows: "I asked her what relation she was to this man, and she said this man was her husband."

Mrs. Mary Weisbrod testified that she was running a rooming house at Sterling, Colorado, for a good many years; that Mr. Boyer and a lady as his wife stopped at her rooming house for two or three weeks. She identified Boyer and the defendant in this case as the parties, and testified that while they were at her house they conducted themselves properly. She said: "I never had a quieter couple in my house." On cross-examination the witness testified that they purported to be husband and wife.

William Weisbrod testified that he had a rooming house in Sterling, Colorado; that he knew J. S. Boyer and his wife; that their conduct while they were at his house was as a perfect lady and gentleman so far as he knew.

Ella Hague testified that she kept a rooming house at Sterling, Colorado; that she had been acquainted with J. S. Boyer and his wife, indicating the defendant in this suit; that they had a room at her house, and represented themselves to be Mr. and Mrs. Boyer. "Mr. J. S. Boyer, I believe is his initials, and Vivian Boyer." She testified that Mrs. Boyer came to her house first, and represented herself to be Mrs. Boyer. Several other witnesses testified to the same effect, and each one of them spoke of the good character of both Mr. and Mrs. Boyer while they were at Sterling, Colorado.

The evidence of these witnesses covered a period of about one year immediately following the time when the marriage contract was entered into at McCook, Nebraska. There was testimony of a witness at Grand Island, Nebraska, that while Boyer and the defendant were living at that place they represented themselves as husband and wife, and so registered at the different boarding houses and hotels. Similar testimony was produced from witnesses in Kearney, Nebraska, Lexington, Nebraska, and Gothenberg, Nebraska. One Cullom, a merchant at Gothenberg, testified, in substance, that Mrs. Boyer came into his store and introduced herself; that she priced some rugs, furniture and carpet; that at that time he said he was selling under the instalment plan, and she stated that she would have her husband come in; that he had known Boyer and the defendant for about three years, and that he had never known the lady under any other name than Mrs. Boyer; that she introduced herself as Mrs. Boyer, and that he had always known her by that name; that Mr. Boyer usually paid the bills.

Mrs. Mary Cullom testified that she first met Mr. Boyer about 8 years ago when he was buying horses; that she met the defendant as the wife of Boyer; that she was called Mrs. Boyer, and told the witness she had been married for 15 years; that she never doubted the fact that Boyer and the defendant were husband and wife.

On the other hand, the defendant denied that she was the wife of J. S. Boyer, and testified that she was generally known as a sporting woman, and that Mr. Boyer was generally known as her companion, getting trade for her. She admitted, however, that they had registered at hotels as husband and wife, and there is considerable evidence in the record supporting the testimony of the defendant.

It also appears that James S. Boyer prosecuted an action in the district court for Cherry county, Nebraska, against the defendant in this case for a divorce; that she made no appearance in that action; and a decree was rendered in favor of Boyer and against the defendant dur-

ing the pendency of the present suit. The decree in that case was introduced in evidence in the instant suit over the objections of the defendant, who contends that this evidence was incompetent, and proved nothing as to the question of defendant's common law marriage with Boyer, while, on the other hand, it is contended by the plaintiff that this evidence was competent, and settled the status of the parties thereto. As we view the question, it is not at all necessary to decide that the evidence was competent. The testimony without this was ample and sufficient to prove the common law marriage of defendant and James S. Boyer, and, as the court was supposed to consider only competent evidence, its reception in any event could only amount to error without prejudice.

There is also testimony in the record which shows that when Boyer was unable to furnish the defendant with money she abandoned him, and took up with a man named Henry Doggett. It appears that in a short time she and Doggett learned of the desirability of the plaintiff, Reynoldson, as a party with whom marriage might be contracted, and that Reynoldson was induced to go to Columbus, and see "a good, honest girl who wanted to marry a good man and a home;" that upon his arrival there he was met by the defendant, who called herself Vivian Devere, and he was induced to marry her. It appears that she soon brought dishonor to the plaintiff's home and scandalized the community where they resided. She brought her paramour, Doggett, and a vile woman and other boon companions to his home, where they were guilty of such conduct that this action was commenced.

We find that the record clearly shows that, when the marriage ceremony was performed between plaintiff and defendant, she was the common law wife of James S. Boyer, and was not competent to enter into a marriage contract with the plaintiff. *University of Michigan v. McGuckin*, 62 Neb. 489; *White v. White*, 82 Cal. 427, 7 L. R. A. 799; *Eaton v. Eaton*, 66 Neb. 676; *Bailey v. State*, 36 Neb. 808; *Coad v. Coad*, 87 Neb. 290.

As we view the record, the decree of the district court was right, and is

AFFIRMED.

MARGARET TRUDEAU, APPELLEE, V. EDWARD H. FISCHER, SHERIFF, ET AL., APPELLANTS.

FILED MAY 29, 1914. No. 17,489.

1. **Deeds:** CONSTRUCTION. The instrument set forth in the opinion *held* to be more than a quitclaim deed and to convey by apt words all the right, title and interest of the grantor in certain real estate devised to him by the will of his father.
2. **Judgment Lien.** After this deed was made, a transcript of a judgment against the grantor was filed in the office of the clerk of the district court for the purpose of securing a lien upon his real estate. Subsequently he became the owner, by survivorship under the will, of a further interest in the real estate. *Held,* That his title and interest derived by virtue of the will, together with his right of survivorship, had passed to his grantee, and that the filing of the transcript and the issuance of an execution did not create a lien thereon.

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

Andrew P. Moran, for appellants.

Paul Jessen, contra.

LETTON, J.

This action was brought to procure an injunction against the levy of an execution upon an undivided interest in 160 acres of land as the property of John Trudeau. A permanent injunction was granted, and defendants appeal.

Nelson Trudeau died on January 6, 1897, leaving surviving him Margaret Trudeau, his wife, and seven children, Laura, Olive, Annie, Nellie, John, Charlie and Maggie. He left a will which was duly probated and allowed. If construed as plaintiff contends it should be, five of the

children of Nelson Trudeau acquired a fee simple title to the tract of land levied upon. This they afterwards conveyed to their mother, the plaintiff in this case.

Defendants' position is that the provisions of the will prevent a fee simple title from vesting, and that upon the death of any one of the children at any time without issue the share of that child went to the surviving children of Nelson Trudeau. Without entering into an extended discussion, we are of opinion that whichever horn of the dilemma is taken the judgment of the district court should be sustained. If the children took a title in fee, then the plaintiff has acquired that title. If they did not take a title in fee, the facts hereinafter set forth show that whatever title John Trudeau acquired by virtue of the death of his brother Charles and sister Maggie, and his survivorship under the will, he conveyed during his lifetime to his sister Laura, and the plaintiff has received the same by conveyance from her.

John Trudeau, one of the children and devisees, married Emma Vette, who afterwards obtained a divorce from him, and procured in that action a judgment of $1,000 alimony for the support of herself and their infant son. A transcript of this judgment was filed in the office of the clerk of the district court for Otoe county in May, 1903. The execution, the enforcement of which was enjoined in this action, was issued on this judgment. Mrs. Trudeau afterwards married one Ruge, and she is the real party in interest in this case as execution creditor. Maggie Trudeau, one of the devisees, died testate and without issue about April 3, 1903, leaving her interest in the real estate to her mother. Charles Trudeau, another of the devisees, died intestate without issue about July 9, 1904. Before his death he transferred all right, title and interest he had in the real estate, describing it specifically, to his sister Olive E. Ahsan.

On July 9, 1903, John Trudeau, for an expressed consideration of $1,850, executed a conveyance to his sister Laura Straub, reciting that he "has granted, conveyed, released, remised, and quitclaimed, and by these presents

do grant, convey, remise, release and forever quitclaim unto the said party of the second part, and to her heirs and assigns forever, all his right, title, interest, estate, claim and demand, both at law and in equity, of, in and to the following described real estate situated in Berlin precinct, Otoe county, and state of Nebraska, to wit: All his right, title, emoluments, interest, claim and demand of all kind and nature, granted and conveyed by the last will and testament of Nelson Trudeau, deceased, to this said grantor by said instrument now on file and of record in the county judge's office in said county and state, my intention being to convey both at law and in equity all of my interest and claims and demands in said estate for the above named consideration which has been fully paid." This deed was recorded on July 15, 1903. Suit was afterwards brought by the judgment creditor, Mrs. Ruge, to set it aside, but the court found, after issue joined, and trial had, that the deed was valid, was made in accordance with a contract made in 1897, and was not subject to the judgment lien. Mrs. Straub, however, disclaimed any right to any interest which John Trudeau "may have had or may now have * * * as an heir or devisee of Maggie Trudeau, deceased," and limits her claim to the interest which he had on November 25, 1897, as devisee and legatee of Nelson Trudeau, deceased.

In August, 1905, Laura Straub and all the other living children of Nelson Trudeau conveyed the land to Olive E. Ahsan, and she conveyed the same to the plaintiff.

Plaintiff contends that, if John Trudeau took any interest under the will by survivorship on the death of Charles and Maggie, it passed to his grantee by the deed previously made. This instrument was more than a quitclaim. It conveyed by apt words all the interest in his father's estate which John was, or could be, entitled to under the will, which, of course, included his right of survivorship. After its execution the share of the estate devised to Charles and Maggie came to him by virtue of the terms of the will, and passed *eo instante* by his former deed to Laura. Rev. St. 1913, secs. 6192, 6193. The

case is ruled in this respect by *Ford v. Axelson,* 74 Neb. 92, which is not so strong in its facts as this. *Hagensick v. Castor,* 53 Neb. 495. His entire interest in the estate had passed before the filing of the transcript. The disclaimer of Mrs. Straub only extended to the estate he might take as an heir or devisee of Maggie Trudeau, at her decease, but as he took under the will of his father, and not as her heir or devisee, this had no application to the interest which came by the devise from his father. Plaintiff, having acquired from his grantees all that John Trudeau had to convey before any lien attached, was entitled to the injunction.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

STATE, EX REL. GRANT G. MARTIN, ATTORNEY GENERAL, ET AL., RELATORS, V. WILLIAM B. HOWARD ET AL., RESPONDENTS.

STATE, EX REL. WILLIAM B. HOWARD, AUDITOR OF PUBLIC ACCOUNTS, RELATOR, V. LAWSON G. BRIAN ET AL., RESPONDENTS.

FILED MAY 29, 1914. Nos. 18,175, 18,213.

1. **Constitutional Law:** INSURANCE CODE: VALIDITY. A comprehensive act of the legislature, such as chapter 154, laws 1913, commonly known as the "Insurance Code," consisting of 11 articles and 183 sections, the evident purpose of its enactment being to cover and codify the law upon the whole subject of insurance, will not be held invalid for the reason that a portion of a proviso to one section was not correctly copied into the enrolled bill which was signed by the officers of the legislature and by the governor, or on account of the inclusion in another section of an invalid minor provision, when it does not appear that the defective portions constituted the inducement to the passage of the act, and when the objectionable parts may be eliminated and still leave an enforceable law which expresses the legislative will.

2. ———: DELEGATION OF LEGISLATIVE POWER. "In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the constitution." *State v. Atlantic C. L. R. Co.*, 56 Fla. 617.

3. **Insurance:** STANDARD FORM OF POLICY: CONSTRUCTION OF STATUTE. By the terms of the act the insurance board created thereby is directed to prepare a form of fire insurance policy "as nearly as practicable in the form known as the New York standard." Many provisions are contained in other sections of the act denying contract provisions contained in the New York standard form, and permitting others not so contained. *Held*, That it was the intention of the legislature that the New York form should be adopted as the basis of the insurance contract, and that the words "as nearly as practicable" should be construed to mean "as nearly as practicable" considering all other provisions contained in the insurance code which are inconsistent with or modify the provisions of the New York standard form.

4. ———: ———: ———: CONSTITUTIONALITY. The duty of the board in this regard is to arrange and prepare in proper form the form of contract required under this statute, omitting all provisions of the New York form which are in conflict with the provisions of the code. Its duties are, therefore, ministerial or administrative, and not legislative, and the section imposing the duty is not an unconstitutional delegation of legislative power.

5. ———: ———: VALIDITY OF STATUTE. That portion of the section referred to which provides that the New York form shall be used as it "may be hereafter" constituted is invalid, because its effect would be that the future action of the legislature of another state would govern and control the duties of officials in this state, and would require legislative action by the board.

6. **Constitutional Law:** INSURANCE CODE: RATES. Sections 147, 148 and 149 of the act in question, permitting the establishment of maximum rates of premium for surety and fidelity companies under certain circumstances by the insurance board, are not void on account of taking property without due process of law, or as being an unlawful delegation of legislative power.

7. ———: DELEGATION OF LEGISLATIVE POWER. "Authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations, is not an exclusively legislative power. Such authority is administrative in its nature, and its use by administrative

officers is essential to the complete exercise of the powers of all the departments.'' *State v. Atlantic C. L. R. Co.*, 56 Fla. 617.

8. ———: PRESUMPTIONS: INSURANCE BOARD. The court, in an action brought by a public official and member of the board created by the law, will not anticipate, for the purpose of declaring a law unconstitutional, that the acts of the board, to which is committed its administration, will in the future infringe upon the rights of others, or deprive persons of property without due process.

9. **Foreign Corporations:** LEGISLATIVE CONTROL. The state may impose such conditions and limitations as it sees fit upon foreign corporations seeking the privilege of doing business in this state.

No. 18,175. Original application for a writ of mandamus to compel respondents to deliver to the insurance commission the records of the insurance department. Writ allowed; and, on motion to recall writ, *motion overruled.*

Grant G. Martin, Attorney General, for relators.

Stout, Rose & Wells and *Wilmer B. Comstock,* for respondents.

No. 18,213. Original information in *quo warranto* to oust respondents from the insurance commission. *Proceedings dismissed.*

Stout, Rose & Wells and *Wilmer B. Comstock,* for relator.

Grant G. Martin, Attorney General, for respondents.

Burkett, Wilson & Brown, E. C. Strode, W. O. Temple and *J. H. Broady, amici curiæ.*

LETTON, J.

This is an original information in *quo warranto* brought to oust the governor of the state and the attorney general from the positions of members of the state insurance board, and to oust Lawson G. Brian from the office of secretary of such board, to which he was appointed by the officers named, acting as the insurance board. The relator is the auditor of public accounts. He claims the right to ad-

minister the insurance department by virtue of the statutes which were in force when he assumed his office. The respondents admit that at the time he became state auditor he was charged with the administration of the insurance department of the state, with the custody of the records, books and accounts of that department, and the safe keeping of deposited securities, and that he took charge of and administered this department until on or about the 19th day of July, 1913. They claim to hold the office called in question by virtue of an act passed and approved upon April 18, 1913, and popularly known as the "New Insurance Code." The relator maintains that this act is in conflict with the constitution and void for a number of reasons, which will be considered in the order in which they are presented in the relator's brief.

The title to the act the validity of which is attacked in this proceeding is "An act to provide for the organization and government of insurance companies and to regulate, supervise and control the business of insurance in Nebraska, to provide penalties for its violation, to provide for an insurance board and define its duties and powers, and to repeal chapter 31 of the Revised Statutes of 1913, being chapter 24 of Cobbey's Annotated Statutes of Nebraska, for 1911 (C. S., ch. 16, secs. 1-14*a*; ch. 43; ch. 28, sec. 47) and all acts and parts of acts in conflict therewith." It was introduced in the senate as Senate File No. 364 and is chapter 154, laws 1913.

The act is divided into 11 articles. Article I is concerned with definitions alone, and occupies nearly three pages of text. Article II provides for a state insurance board, and prescribes its constitution, powers and duties. Article III is taken up with general provisions. Article IV treats of kinds of insurance and organization of companies. Article V covers the subject of reserves. Article VI: Standard Forms and Provisions. Article VII: General Provisions Covering Fire Companies. Article VIII: General Provisions Governing Life, Health and Accident Companies. Article IX: Assessment Associations. Article X: Miscellaneous Provisions. Article XI: Frater-

nal Insurance. The whole act consists of 183 sections. The evident purpose of the enactment was to cover and codify the whole subject of insurance in every phase, to embody necessary reforms, and to substitute a harmonious arrangement in orderly sequence for the badly arranged mass of insurance legislation which formerly appeared upon the statute books.

By this act a state insurance board is created, "which shall consist of the governor, who shall be *ex officio* chairman thereof, the auditor of public accounts, and the attorney general, a majority of whom shall constitute a quorum." This board is given general supervision, control and regulation of insurance companies of all kinds, and of the business of insurance in Nebraska. It is also provided that immediately upon the taking effect of the act the auditor shall surrender to the state insurance board all the records, books, blanks, reports and other property pertaining to insurance and the insurance department, together with all the securities and properties of insurance companies now held by him, and the board was authorized to elect and appoint with other officers "a secretary of the board, who shall be known and styled herein as 'Insurance Commissioner.'"

After the act took effect the auditor refused to assemble with the other members of the insurance board or take any part in its deliberations, and refused to deliver to Lawson G. Brian, the insurance commissioner appointed by the board, the records, books, blanks, securities and other property held by him by virtue of former statutes. In July, 1913, an application for a peremptory writ of mandamus to compel him and subordinate officers of his department to deliver such books and securities to the board was granted by this court and complied with by him. A motion was afterwards filed by him to vacate the peremptory writ. This motion is now pending. In August, 1913, this action in *quo warranto* was begun. The same points are urged in both cases by the auditor, who is relator in the *quo warranto* case, and respondent in the

mandamus proceedings. Both cases, therefore, will be considered and disposed of in this opinion.

Coming now to the contention of the relator, it is first claimed that the act in the form in which it was enrolled and presented to and approved by the governor did not pass either house of the legislature, and that it is void for that reason. It is alleged that when the bill was finally agreed to by the senate and house, in its provisions with reference to the governing body of fraternal beneficiary associations, it was "provided, that the elected members shall not have less than three-fourths of the vote, nor less than the votes required to amend its constitution and by-laws," but that after the bill had been agreed to and passed, the enrolling clerk or clerks, either through fraud or error, materially altered and radically changed the proviso to read, as follows: "Provided, that the elected members shall have not less than nine-tenths of the vote nor less than the vote required to amend its constitution;" and as so enrolled and presented to the governor this proviso was never agreed to or passed by the legislature of either house; that it was only through the appointment of a conference committee, and the approval and recommendation of that committee in fixing the ratio of the vote of elected members to that of the total governing body at three-fourths, that the houses were able to agree upon its passage, and that the agreement upon this ratio was a material inducement to the passage of the act.

Section 1, ch. 47, laws 1897 (Ann. St. 1911, sec. 6635), provides: "A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each such society shall have a lodge system, with ritualistic form of work and representative form of government." This provision, with the word "society" substituted for the word "association" as the fourth word, formed section 156 of the new act when first introduced. The evidence shows that it was amended in the senate by adding: "Any such society shall be deemed to have a

representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body composed of representatives elected either by the members, or by delegates elected directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws; provided, that the elected members shall constitute three-fourths in number, and have not less than nine-tenths of the vote, nor less than the votes required to amend its constitution and laws," etc. The bill passed the senate with this and many other amendments. Many amendments were made in the house. A conference committee was appointed, who agreed in their report, and as finally adopted by the house and senate the first proviso to section 156 should read: "Provided, that the elected members shall constitute three-fourths in number, and have not less than three-fourths of the vote, nor less than the votes required to amend its constitution and laws," etc. In the enrolled bill which was actually signed by the officers of the legislature and approved by the governor this portion of the proviso reads: "Provided, that the elected members shall have not less than nine-tenths of the vote, nor less than the votes required to amend its constitution and laws."

It seems clear from the changes made in its progress that the discrepancy is a mere clerical error, and that the enrolled bill as presented to the governor, so far as concerned this proviso, did not express the legislative will. The governor is a part of the law-making department, but his approval of that which never in fact passed the legislature can give it no vitality. Neither can the true intendment of that which actually was enacted by the legislature be given force and validity (except under circumstances provided for in the constitution) unless it has met the approval of the governor. For these reasons, we are of opinion that the portion of the proviso that the elected members "shall have not less than nine-tenths of the vote, nor" was not enacted in accordance with the requirements of the constitution, and is of no effect.

Can it with reason be said that this was the inducement to the passage of the act, and that for this omission the whole act should be declared void? It has consistently been the doctrine and practice of this court in cases where the validity of an act of the legislature governing a whole subject, and practically codifying the law thereon, is attacked because of defective provisions, and it is not clear that the defective section, subdivision or proviso was the inducement to the passage of the whole act, and it appears that the objectionable portion may be eliminated without interfering with the general scope and purpose of the legislation, that the whole act will not be held invalid on that account, but that, if the valid and invalid parts are so intermingled that they cannot be separated and leave an enforceable law expressing the legislative will, the whole act will fall. *State v. Adams Express Co.*, 85 Neb. 25; *State v. Junkin*, 85 Neb. 1; *State v. Fleming*, 70 Neb. 529. It would indeed be a serious addition or omission which would justify a court in declaring the whole scheme of legislation void. We are of opinion that, since the omission of the defective portion of the proviso, to wit, "not less than nine-tenths of the vote, nor," leaves the portion of the law relating to fraternal beneficiary associations unambiguous and enforceable, the whole act may stand.

It is next contended that sections 100 and 138 of the act are invalid because they attempt to confer legislative authority upon the insurance board. Section 100 provides: "No fire insurance company shall issue any fire insurance policy covering any property or interest therein in this state other than on a form prescribed by the insurance board as nearly as practicable in the form known as the New York standard as now or may be hereafter constituted, except as follows." Then follows subdivisions from 1 to 10 authorizing and permitting insurance companies, at their option, to write or print in the policies a large number of other stipulations not contained in the New York standard form, and permitting combination policies including loss by fire, hail, lightning and tornado to be written. Section 138 provides: "No insurance pol-

icy or certificate of any kind shall be issued or delivered in this state unless and until a copy of the form thereof has been filed with the insurance board and approved by it."

It is insisted, under the authority of *O'Neil v. American Fire Ins. Co.*, 166 Pa. St. 72, 26 L. R. A. 715; *Anderson v. Manchester Fire Assurance Co.*, 59 Minn. 182; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 31 L. R. A. 112; *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, that provisions in a statute authorizing and directing the insurance commissioner to prepare a standard form of policy surrender to the commissioner the function of legislation, and are void for that reason. In *O'Neil v. American Fire Ins. Co., supra,* the court, after defining the words "legislative power" to mean "the power or authority, under the constitution or frame of government, to make, alter and repeal laws," state that this is a power that cannot be delegated, and, after examining a number of the cases in that state, say: "The effect of our cases is to settle firmly the rule that the law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and that nothing must be submitted to the judgment of the electors or other appointee of the legislature except an option to become or not to become subject to its requirements and penalties." The law attacked in that case directed the insurance commissioner to prepare "a printed form in blank, of a contract or policy of fire insurance, together with such provisions, agreements or conditions as may be indorsed thereon or added thereto and form a part of such contract or policy; and such form when filed shall be known and designated as the standard fire insurance policy of the state of Pennsylvania." Another section made the use of this standard form obligatory upon fire insurance companies doing business in the state after a certain date, and provided penalties for failure to do so. The principal reasons given by the court for declaring the act unconstitutional were: (1) It does not fix the terms and conditions of the policy. (2) It delegates the power to prescribe its form and conditions to a single individual. (3) The appointee is not

named, but is the person who may happen to be insurance commissioner at the time the form is to be prepared. (4) The form "does not become part of the statute in fact, is not recorded in the statute book, and no trace of it can be found among the records of either branch of the legislature." (5) "The appointee had until the following November to prepare and file the form of policy over which when filed the legislature had no control whatever. They did not consider, they had no knowledge of, the form which they required all companies doing business in the state to adopt, and the use of which they compelled by heavy penalties."

It will be seen that the reasons given by the court for its decisions do not apply to the Nebraska act. The form of insurance policy which the legislature adopted, known as the New York standard, is a definite and well-known form of contract. Its characteristics, terms and conditions are known and recognized by the legislature of New York and other states, and are familiar to all carrying on the business of fire insurance.

In addition to the provisions embodied in the New York form, a large number of other conditions and limitations upon the contract specified in the statute may be added by the insurance companies at their option. The insurance board is not vested with the power to forbid or in anywise interfere with any of these provisions. As to all these matters the statute leaves the companies unfettered, and does not confer upon the insurance board any legislative powers whatever. The only matter in which any discretion in this regard is left to the board is that the form it is required to prepare shall be "as nearly as practicable in the form known as the New York standard, as now or may hereafter be constituted." This is an exceedingly narrow limitation which was no doubt inserted in order that the form of the New York policy might be modified so as to conform to a number of other provisions in the act which would be inconsistent with it if copied in its original form.

In contradistinction and antithesis to the objectionable provisions of the Pennsylvania statute, this act (1) fixes the terms and conditions of the policy; (2) does not delegate the power to a single individual; (3) the insurance board is not given unlimited power, but, as we construe the act, is confined to the code provisions in preparing the form of policy; (4) the form of the policy is, in fact, "recorded in the statute book" in the form of the well-known New York standard and modifications contained in the act; and (5) the legislature did consider and had knowledge of the form which they required the insurance companies to adopt.

In Wisconsin and Minnesota the insurance commissioner was required by a special statute, not forming a part of a general act or code regulating the business of insurance, to prepare and adopted a printed form of fire insurance policy, "and such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so-called and known; provided, however, that five days' notice of cancelation by the company shall be given, and provided, that proof of loss shall be made within 60 days after a fire." He was authorized to call upon the attorney general for assistance in its preparation, and it was made the duty of the attorney general to assist him in the work. After the forms had been prepared and put in use, an action was begun in each of these states by a policyholder who had suffered a loss. In the Wisconsin case the standard form which was used provided that the policy should be void if it insured personal property being, or to become, "incumbered by a chattel mortgage," and provided that no representative of the company could waive any of the provisions or conditions of the policy, unless the waiver was written thereupon. The court held that a parol waiver was sufficient to allow the insured to recover, because the act permitting the insurance commissioner to prepare a standard form of policy was void.

In the opinion the Wisconsin court said it was impossible to adopt the New York standard without repealing

the valued policy law and the general insurance law, as well as other provisions for the cancelation of policies, proofs of loss, etc. The act did not contain a repealing clause. It provided that the policy should "conform to the type and form of the New York standard," and the court say: "Had the commissioner wholly declined to prepare, approve, and adopt any form whatever, it would not have been possible to carry into effect so imperfect or uncertain an enactment, or to transact business under it." Within the lines indicated, a discretion was reposed in the commissioner as to the form of the policy which embodied the existence of the contract, and which was to have the sanction and force of law. The effect clearly was to transfer to him bodily the legislative power of the state on that subject. "Conceding that the legislature might have adopted the New York form as an entirety by the use of general language, it is evident that the proposed form, to conform 'as near as can be to the form adopted in New York,' involved a duty equivalent to that of revision, which it cannot be contended could be delegated, except subject to legislative approval," and held that the objection that the form had not received the legislative sanction was fatal, citing the Pennsylvania and Minnesota cases. *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 31 L. R. A. 112.

The Minnesota court took the same ground, and held there was not such a distinction between the Minnesota statute and that of Pennsylvania as to take away from the insurance commissioner the power to insert in the standard form such provisions as he saw fit, and that the act attempted to clothe him with power to enact a general law prescribing the provisions and conditions which should and should not be inserted in a policy of insurance.

The Michigan statute considered in the case of *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, was subject to the same objections as the Pennsylvania act, since it gave the sole power to the insurance commission to prescribe the form, and made no reference to any standard form

already in existence. We have no fault to find with the opinion in this case, or with that of the supreme court of Pennsylvania. It will be observed that in both the Minnesota and Wisconsin cases the form prepared by the insurance commissioner contained provisions not in the standard form, which militated against the interests of the insured, and the decision of the court holding the insurance commissioner had no power to prepare a standard form prevented a forfeiture in each case. It may also be noted that the words of the Minnesota and Wisconsin statutes, providing that the form "shall, as nearly as can be made applicable, conform to the type and form of the New York standard fire insurance policy," are contained in an act which was concerned with that subject alone, and the words "as nearly as can be made applicable" could have no reference to any other provisions in that act.

The act which we are now considering consists of nearly 200 sections. Scattered throughout there are sections which are inconsistent with the New York standard form, such as the provisions in section 49 which prohibit the insertion in any policy of a stipulation "that such policy shall be construed according to the laws of any other state or country, or any provision limiting the time within which an action may be brought to less than the regular period of time prescribed by the statute of limitations of this state, unless otherwise prescribed by this act," and the provision in section 74 providing for valued policies.

We are of the opinion that it was the intention of the legislature that the New York form should be adopted as the basis of the insurance contract, and that the words "as nearly as practicable" should be construed to mean as nearly as practicable considering the other provisions contained in the insurance code which in anywise are inconsistent with or modify the provisions of the New York standard form of contract. By this construction, the board is not allowed to legislate, but only to arrange and prepare; the powers given are delegable by the legislature, and the sections attacked are valid. *Aetna Life Ins. Co. v. Hardison*, 199 Mass. 181. If the language of a statute is suscep-

tible of a reasonable construction which will uphold its constitutionality, it is the duty of the court to adopt such construction, if at all consistent with common sense and reason.

That portion of the section which provides the form shall be used as it "may be hereafter" constituted is too indefinite and uncertain to be valid. It would leave the form to the future action of the New York legislature or insurance commissioner, is surplusage, unconstitutional, and void.

Sections 147, 148 and 149 of the act are assailed upon three grounds: (1) Because it is said they delegate legislative functions; (2) because they fix the compensation of a personal risk or a private risk; and (3) because the subject matter of the sections has been condemned by a specific determination in the circuit court of the United States for the district of Nebraska. These sections are concerned only with the rates of premium charged by surety and fidelity companies transacting business within this state, permit the insurance board, when a necessity arises, to fix a maximum schedule of rates or premium to be charged upon insurance contracts of the nature specified, and further provide that it shall be unlawful for any fidelity or insurance company to charge or receive any greater rates than those so fixed. A penalty is provided if any officer, agent or inspector violates these provisions. While in the case of the *American Surety Co. v. Shallenberger,* 183 Fed. 636, the United States circuit court for this district adjudged like provisions in a former statute of this state to be in violation of the Fourteenth amendment to the constitution of the United States, in the very recent case of *German Alliance Surety Co. v. Barnes,* 189 Fed. 769, the district court of the United States, and the supreme court of the United States, in the same case, reported under the title of *German Alliance Surety Co. v. Lewis,* 233 U. S. 389, reached the conclusion that the provisions of the Kansas statute permitting the superintendent of insurance of that state to fix maximum rates upon fire insurance policies were valid. The question

how far, under the constitution of the state of Nebraska, and of the constitution of the United States, a legislative or administrative officer appointed by the legislature may regulate contracts of insurance and fix a maximum rate of premiums or charges is one of first impression in this state, and is of far-reaching importance. The Kansas statute provided for the filing of schedules of rates by every fire insurance company doing business in that state, and that, "when the superintendent of insurance shall determine that any rate made by an insurance company in this state is excessive or unreasonably high, or that said rate is not adequate to the safety or soundness of the company granting the same, he is authorized to direct said company to publish and file a higher or lower rate, which shall be commensurate with the character of the risk, but in every case the rate shall be reasonable." The collection or receiving of any other rate than that authorized by the superintendent was declared to be unlawful, and penalties were provided for a violation of the act. Practically the same argument was made as is made here. In the opinion by Pollock, district judge, the question is stated as being: "Can it be said the state must be denied the right to regulate the rates and charges of either foreign insurance companies transacting business within her borders, as is complainant, or domestic insurance corporations of her own creation, in the exercise of her reserved powers, having in view the great magnitude of the business transacted by such companies, its intimate relation to the commercial business world, and the direct influence the business so transacted has on the prosperity of the individual citizen affected thereby?" Basing its decision upon the principles announced in *Noble State Bank v. Haskell,* 219 U. S. 104, and comparing the business of banking with that of insurance, the court hold: "The state may take under its control the whole subject of fire insurance and conduct its operations in such manner by such agencies and on such terms and conditions as to form of contract, compensation to be paid for the indemnity from risks secured by its citizens, as the law-making power may

in its wisdom prescribe." It is further said: "Again, the power of the state over the transaction of corporate insurance companies, foreign or domestic, * * * must be conceded to be as plenary as is the power of congress over interstate commerce under the commerce clause, if we lay aside from consideration, for the moment, the public nature of such interstate commerce." The court also suggests that it is not entirely clear at this late day that the business of fire insurance, although in its nature private, will continue to be regarded as one which is entirely unaffected with a public use.

When the case reached the supreme court of the United States, the opinion was written by Mr. Justice McKenna. That court boldly grasps the nettle, and holds in conformity with the suggestion of the more conservative district court that a nation-wide business, such as that of fire insurance, is affected with a public interest which justifies its regulation, even to the extent of fixing maximum rates by an administrative agency or department of the government. The court goes back to the maxim of Lord Hale that, when private property is "affected with a public interest, it ceases to be *juris privati* only," which was amplified and applied in the opinion in *Munn v. Illinois,* 94 U. S. 113, holding that private property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. A vigorous dissent was filed by Mr. Justice Lamar, concurred in by the Chief Justice and Mr. Justice Van Devanter. It is probably true that the dissenting opinion expresses views which have heretofore been generally held by most lawyers, and that strict adherence to the doctrine of most of the cases intervening between the Granger cases and *Noble State Bank v. Haskell, supra,* would have made the dissenting opinion the opinion of the court; however, we are living in an era of changing economic conditions, and one of the chief glories of the common law is, and has been, that it is not fixed and certain from generation to generation, but that it follows the trend of the times and meets occasions as they arise. In 1674 Sir John Davis, in his

eulogy of the common law (Preface to Davis Reports) in speaking of conflicting judgments, said: "It is objected that our later judgments do many times cross and contradict the former directly, in one and the same point of law, which is a manifest argument of uncertainty in the law. Assuredly there are very few precedents of such contrary judgments, scarce two in one age. And yet, if the reasons of the later judgments did appear of record, we should find them grounded upon mischiefs and inconveniences arising since the former judgments, or upon other weighty considerations, respecting the good of the commonwealth in general." The police power of the state may be employed as said in *Noble State Bank v. Haskell, supra,* "in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

We are convinced that, in the light of the case referred to, there is doubt as to whether the legislature had exceeded its constitutional limitations. In such case the law-making body is entitled to the benefit of the doubt; only a clear case of violation will justify the court in interfering, and this has not been shown.

The complaint is made that subdivision 8, sec. 101, is void because it regulates the interest on money in special cases, and deprives insurance companies of their property without due process of law. The state may in the exercise of its police power in the regulation of different forms of business prescribe rates of interest which may be charged. These are not local or special laws, but general laws affecting all members of a class. The statute permits parties to contract for any rate of interest not exceeding 10 per cent. per annum; but this does not prevent the state from fixing a lower rate in its power of regulation. The rate of interest to be paid by municipal corporations and counties upon their obligations is fixed by statute, as well as that upon bonds issued by paving districts, sanitary districts and other governmental or administrative subdivisions. The rate of interest upon deposits is fixed in the banking law, and the rate of interest upon

judgments is also fixed. Neither can the argument based upon the claimed lack of due process be sustained. It is a matter of common knowledge that policy-loans of the nature provided for in this subdivision are voluntarily offered by leading life insurance companies. There is room for argument as to whether the reserve from which the loan is made is the property of the company or of the policyholder, but whatever its status may be until it can be demonstrated that the operation of this subdivision has the effect asserted we would not be justified in declaring the act unconstitutional for this reason.

Attack is also made upon the law on account of the provisions of sections 11, 27 and 92. These sections all relate to powers given to the board, some of which it may never be called upon to exercise. Section 11 relates to the winding up and dissolution of insolvent companies and of those refusing to comply with the provisions of the insurance code. It authorizes the board to apply to the courts for an order directing the company to show cause why the board should not take possession of its records, property and effects, and conduct or close its business, and for such other relief as the nature of the case and the interest of its policyholders, creditors, stockholders or the public may require. The court is authorized after a hearing to either deny the application, or direct the board to take possession of the property and effects of such company and conduct its business, until, on the application either of the board or of the company, it shall appear that the cause of such order has been removed, and that the company can properly resume the possession of its property. The court is also given power after hearing to decree the liquidation of the company. We find nothing objectionable in these provisions. The only difference between these and the ordinary proceedings for the same purpose is that the board itself is given charge of the affairs of the delinquent corporation under the direction of the court, instead of a receiver appointed by the court. The whole matter is in the hands of a court of equity, and not in the hands of the board acting as an independent and uncontrolled body.

As to the provisions of section 27, which allow the board to extend the time beyond July 1, 1915, within which existing companies may pay in additional capital stock, this section can only apply to existing companies, not to those hereafter created. There is no showing that any existing company has not already complied with the law and amended its articles, or that the occasion for the exercise of such power will ever arise. A court will not anticipate prospective conditions, which may never arise, in order to declare a law unconstitutional. And so, also, as to section 92. It will not be assumed that any arbitrary action, or any proceeding in violation of the constitutional rights of stockholders or members, or of companies or associations, will ever be taken by the board. The relator is a member of the board, and the court will not presume that he, with the other members, will so transgress. Not until in the administration of the law the board exceeds its powers, or by a harsh and arbitrary use of the forms of law attempts to invade private rights, can the rights of any person or corporation be infringed under these sections. *Business Men's League v. Waddill,* 143 Mo. 495, 40 L. R. A. 501.

The complaint made in the brief of *amici curiæ* that the act is void on account of discrimination against foreign companies by requiring them to comply with certain regulations is also unsound. The state admits them as a matter of grace, and not of right, and may impose conditions upon the right to do business here. *State v. Fleming,* 70 Neb. 523; *State v. Standard Oil Co.,* 61 Neb. 28; *Daggs v. Orient Ins. Co.,* 136 Mo. 382, 35 L. R. A. 227, and cases cited therein. They should, however, be fairly and justly treated, not only as a matter of right, but because of retaliatory provisions in other states. We assume that the purpose of the legislature was not to discriminate against foreign companies, but to take the further precaution for the protection of policyholders in such companies that the fact of nonresidence seemed to it to require. The ultimate result of the working of these provisions was a matter for the legislature to consider, and

not for the court. Moreover, by section 13 the right of appeal is specially preserved from any action taken or order made by the board under the provisions of section 11 which are complained of.

Answering a number of contentions made in the brief, we agree with the supreme court of Florida: "In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the constitution. * * * Authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations, is not an exclusively legislative power. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all the departments." *State v. Atlantic C. L. R. Co.*, 56 Fla. 617, 32 L. R. A. n. s. 639.

We have entered into a discussion of several questions raised in this case which the relator in his capacity as a public officer and member of the board perhaps was not entitled to raise; but we deemed it better to meet the objections raised and to indicate our views for the guidance of the board. It is possible that in an act of this scope and magnitude there may be inconsistent and inharmonious provisions embraced, and that it will take the process of amendment to render the legislation most valuable and effective for the purpose for which the code was compiled. It is also possible that at some time in the future the constitutional rights of some person or corporation may be infringed; but this is apt to occur under any law regulating such a complex business, and the courts are open for relief if occasion arises. Until evidence is furnished that this has occurred, we find no reason for finding the law or any of its parts unconstitutional, with

the exception of the two short clauses referred to and so declared.

The motion to recall the writ of mandamus is overruled, and the proceedings in *quo warranto* are

DISMISSED.

ROSE, J., not sitting.

CLARA MUSIC, APPELLANT, V. WILLIAM T. ADAMS ET AL., APPELLEES.

FILED MAY 29, 1914. No. 17,238.

Action for Personal Injuries: TRIAL: DIRECTING VERDICT: EVIDENCE. The record examined, its substance set out in the opinion, and *held* not to disclose any prejudicial error.

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

John O. Yeiser, for appellant.

Morsman, Maxwell & Thompson, contra.

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county, against William T. Adams, T. B. Norris, Thomas H. Van Nostrand, and Rose Van Nostrand, defendants, for personal injuries sustained by her in stumbling over a pile of dirt, which she alleges the defendants had negligently placed upon a public sidewalk, and of the presence of which she had no knowledge. Whether she stumbled over the obstruction after dark or in broad daylight, the petition does not state. When both sides had rested, the court directed a verdict in favor of the three last named defendants, and submitted the case to the jury as to the defendant Adams. The jury returned a verdict in favor of the defendant, upon which judgment was rendered, and plaintiff appeals.

We doubt the sufficiency of the petition; but, as the defendants saw fit to answer and proceed to trial upon it, thus treating it as sufficient, we will treat it likewise.

The errors relied upon are: (1) That the court erred in directing a verdict for the three defendants as above indicated. (2) That the court erred in its answer to a question propounded by the jury after it had retired for consideration of the case. (3) That the court erred in overruling the motion for a new trial and in entering judgment.

The uncontradicted evidence shows that defendants Norris and Rose Van Nostrand were the owners of lots 1 and 2, block 21, West Omaha, an addition to the city of Omaha; that Norris, acting for himself and Mrs. Van Nostrand, entered into a written contract with defendant Adams to grade these two lots for a stipulated sum. The contract is set out in full in the record. By the terms of the contract the dirt taken from these two lots was to be put on a lot across the street. It appears that Adams conveyed a considerable portion of the dirt across the street by means of horses and scrapers. The execution of the contract and performance of the work under it are not denied, but it is sought to fasten liability upon the three defendants, in whose favor the verdict was directed, by attempting to show that Mr. Norris was present where the work was being done, almost every day while the work was in operation, and that Mr. Van Nostrand gave directions for putting the dirt upon the sidewalk, and in fact placed the first of the dirt there himself. There is no evidence to show that Mr. Norris gave any directions whatever about the work. All the evidence shows is that he visited the work several times during its progress, made estimates of the amount of work that had been done, and made payments to defendant Adams on the contract. There is no evidence to show that Mrs. Van Nostrand was ever present or had anything to do with the manner of performing the work. That the verdict was properly directed in favor of Mrs. Van Nostrand and Mr. Norris is therefore entirely clear. The only evidence under which the attempt

to hold Mr. Van Nostrand liable is the testimony given by the husband of plaintiff, who testified that he saw Mr. Van Nostrand there giving directions, and saw him also with a shovel; that he was covering up a curb and sidewalk so the wheels would not break it; that he did this on both sides of the street; that he saw him haul dirt on it; that it was the same place where more dirt was afterwards deposited. It is not shown how much dirt was put upon the walk while Mr. Van Nostrand was there. It is too evident for serious disagreement that all he was doing was indicating to Adams and his graders—several in number, as shown by the evidence—how to proceed without breaking the cement walk which had been recently laid. We think the district court was justified in holding that this testimony was insufficient to justify a verdict against Mr. Van Nostrand, who was not an owner of any part of the property, was not authorized to act for his wife, and had nothing whatever to do with the making of the contract. The uncontradicted evidence shows that Mr. Norris was acting for himself, and was the only one with authority to act for Mrs. Van Nostrand. Plaintiff's first assignment must therefore fail.

The petition made Mr. Adams a party defendant jointly with the other defendants named. The summons is not set out, but, so far as the record discloses, he was served the same as the other defendants. However that may be, but one answer was filed, and it was filed for "the defendants." The prayer of the answer is a general prayer by "these defendants" that they be each dismissed, etc. It is clear, therefore, that Mr. Adams was a party to the suit and had answered therein. After the jury had retired, and on the same day, they sent to the court the following: "Judge Redick: We, your jury in the case of Clara Music v. W. T. Adams et al., desire to be enlightened on the following question, viz.: 'Are we to consider the appearance of Mr. Adams on the witness-stand as an answer in this action as defendant, or are we to consider him as merely a witness?' D. J. Hinchey, Foreman." The court noted below the following: "Only as a witness.

Redick"—and then returned it to the jury. We are unable to see how this could have prejudiced the plaintiff. Mr. Adams was a defendant in the case and had filed an answer. The record does not disclose any fact as having transpired during the trial to negative the idea that he was an answering defendant. The case was submitted to the jury as to him, alone, and the court told the jury all that it was necessary for them to know. The second point must therefore fail.

The third point, that the court erred in overruling the motion for a new trial, must fall with the other assignments. Upon consideration of the entire record, we conclude that the plaintiff had a fair trial, that the case as to the defendant Adams was properly submitted to the jury, and as to him the verdict should be treated as final. As to the other three defendants, a verdict against them could not have been sustained under this record if there had been a submission to the jury and a verdict for the plaintiff as against them.

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

AFFIRMED.

HENRY A. WELLS, APPELLEE, V. WARREN GARRISON ET AL., APPELLANTS.

FILED MAY 29, 1914. No. 17,684.

Guaranty: CONDITIONS PRECEDENT: LIABILITY. W. supplied H. with goods, wares and merchandise, on the oral directions of G., coupled with the further direction that W. present, monthly, written orders from H. W. obtained from H. three written orders as directed, which were presented to and accepted by G., and also supplied H. with goods in excess of such orders. *Held,* That the direction from G. to W. to present written orders from H. constituted a condition precedent upon which G. agreed to be bound for goods furnished by W. to H., and that for the goods furnished in excess of such orders G. is not liable.

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

H. M. Sinclair, for appellants.

N. P. McDonald, contra.

FAWCETT, J.

Plaintiff brought suit in justice court, in Buffalo county, to recover for goods, wares, and family necessaries, sold and delivered by plaintiff to one Charles Huff, an employee of defendants, on the order and request of defendants. Plaintiff recovered judgment, and defendants appealed to the district court, where, on a trial to the court without the intervention of a jury, plaintiff again recovered, and defendants now appeal to this court.

The petition in the district court alleged that plaintiff was engaged in the general mercantile business; that one Charles Huff, who was then in the employ of the defendants, made application to plaintiff to purchase goods on credit for himself and family, which plaintiff refused; that thereupon defendants orally agreed with plaintiff that, if plaintiff would let the said Huff have goods for himself and family in amount not exceeding the sum of $25 a month, they would pay for the same upon the first of each month, and directed the plaintiff to present orders on them monthly for the amount of the goods so purchased; that, relying upon the promise of defendants and at their instance and request, plaintiff furnished goods to Huff during the period of time covering the months of February to July, inclusive, in 1909; that Huff made and delivered to plaintiff written orders on defendants on or about April 1, May 6, and June 10, 1909, for sums aggregating $88.79, which orders plaintiff presented to defendants, and they orally accepted the same; that during all the time the goods were being furnished to Huff he was in the employ of defendants at a salary of $45 a month, and at the time of the presentation of said orders, and afterwards, defendants had in their possession funds belonging to Huff, or were indebted to him to the amount of said orders; that at the time of the presentation of the orders defendants accepted the same and now have them in their possession. The answer was a general denial.

Upon the trial the evidence was conflicting. It is ample to sustain the allegation of plaintiff's petition as to the furnishing of the goods, but we do not think it is sufficient to sustain a recovery beyond the sum of the three orders set out in the petition, which, according to the evidence, were as follows: March 27, 1909, $38.85; May 8, $25; June 18, $23.87. The agreement on the part of defendants to pay for goods furnished by plaintiff to Huff to the extent of $25 a month was coupled with the direction to plaintiff to present, monthly, written orders from Huff. The agreement to pay and the direction to furnish written orders constituted a single transaction and made the furnishing of the written order a condition precedent to the right to demand payment. The reason for this requirement is apparent. Defendants of course intended to make these payments out of Huff's wages, and they evidently did not want to have any controversy with their employee as to the amounts of such deductions. For the amounts covered by the orders defendants are liable. For the goods furnished in excess thereof they are not. The trial court entered judgment for the entire amount of plaintiff's claim. This was an excessive allowance.

The judgment of the district court is reversed and the cause remanded, with directions to enter judgment for plaintiff for the amounts of the three orders, as above indicated, with interest from their respective dates to the time of entering judgment; the costs in this court to be taxed to plaintiff; and all costs in the court below to be taxed to defendants.

REVERSED.

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

GEORGE E. MIZEN, APPELLEE, V. ADAMS COUNTY; UR S. ROHRER, APPELLANT.

FILED MAY 29, 1914. No. 17,686.

1. **Officers:** POWER TO RATIFY ACTS. It is a general rule that public officers may ratify such acts as they could in the first instance have authorized.
2. **County Clerk:** COMPENSATION: POWER OF COUNTY BOARD. Under the provisions of section 42, ch. 28, Comp. St. 1907, the county boards, in counties having over 18,000 and less than 25,000 inhabitants, are prohibited from authorizing or allowing the county clerk of any such county to receive and retain in the aggregate, as salaries or compensation for himself and his deputies, clerks and assistants, any sum in excess of the amount of the fees actually collected.

APPEAL from the district court for Adams county: GEORGE F. CORCORAN, JUDGE. *Reversed and dismissed.*

Snider & Bruckman, M. A. Hartigan and *Don C. Fouts*, for appellant.

Tibbets, Morey & Fuller, contra.

FAWCETT, J.

Plaintiff, for the year 1910, was county clerk of defendant county. At the close of the year he filed a claim with the county board for a "balance due as per report for year 1910, $469.55." On January 9, 1911, the bill was audited and allowed by the board, and from this allowance Ur S. Rohrer, a citizen and taxpayer of the county, appealed. On a hearing in the district court there was a finding for plaintiff and a judgment for the amount of his claim, with interest added, from which Mr. Rohrer has appealed to this court.

The two principal grounds of appellant's complaint are: (1) That the county board did not in advance find that it was necessary for plaintiff to have any deputy or assistants, and prescribe the number, the compensation, and the time of employment of each. (2) That the amount paid

out by plaintiff for deputy and extra clerk hire, plus his salary of $1,500, which was paid by warrant upon the general fund of the county, exceeded the amount of fees actually collected by plaintiff for that year, to an amount equal to or more than the amount of the claim in suit.

We shall not spend time discussing the first point. It is well settled, under the decisions of this court, that public officers may ratify such acts as they could have authorized, and, as said by Sedgwick, J., in *Gage County v. Wright,* 86 Neb. 436, 440: "We see no reason for refusing to apply that rule in this case."

The second point is more serious. It appears that, in accordance with the custom prevailing in the defendant county, plaintiff employed a deputy and such extra clerk hire as he deemed necessary, paid the persons so employed their stipulated compensation out of the receipts of the office, as far as they extended, and the balance from his private funds. Each quarter during the year he collected his quarterly salary of $375, and then filed the present claim for the balance due him under that arrangement. In accordance with the custom referred to, the board, finding that the amount expended was reasonable, allowed the claim. From the record before us it is evident that the plaintiff, as county clerk, and the members of the county board all acted in the utmost good faith. This fact is so clearly established that we regret that a plain provision of the statute alone prevents the giving of our approval to what was done.

Plaintiff cites *Emberson v. Adams County,* 93 Neb. 823, in which we sustained the action of the board of the defendant in this case in making an allowance to the county attorney for such clerical assistance as was deemed necessary for the purpose of enabling that officer to properly perform the duties devolving upon him in conducting the business of his office, and based our decision on *Berryman v. Schalander,* 85 Neb. 281, which was also a case of an allowance to a county attorney of certain expenses incurred by him in the discharge of the duties of his office.

The difference between those cases and this is that, while there is no provision in the statute authorizing payment by the county board of such expenditures for a county attorney, there is no statutory prohibition against their allowance. In the *Berryman* case we said (p. 283): "That such action of the county board should be sustained unless clearly prohibited by express statute is too plain to require discussion. We know of no statute which prohibits it." Unfortunately for plaintiff the statute in plain terms prohibits the allowance of his claim. The legislature of 1907 (laws 1907, ch. 57) amended section 42, ch. 28, Comp. St. 1905, fixing the compensation of county judges, county clerks and county treasurers, and provided that, in counties having over 18,000 and less than 25,000 inhabitants (which class includes defendant county), "the county clerk shall receive a salary of fifteen hundred ($1,500) dollars per annum which salary shall be paid by warrants drawn on the county general fund of the counties in which they hold their respective offices." It then proceeded to fix the salary of county clerks in counties having over 25,000 and less than 60,000 inhabitants, at $2,500 per annum, and provided that in such counties the "county clerk shall also have such other clerks or assistants, to be appointed by him, as the county board may find to be necessary, and to be paid out of the county general fund at rates of compensation to be fixed by the county board." It then made similar provisions for deputies and assistants in counties having over 60,000 and less than 140,000 inhabitants, and for counties having over 140,000 inhabitants. The act then provided that, if the duties of any of the officers named in any county having a population of not more than 18,000 inhabitants shall be such as to require one or more assistants or deputies, such officers might retain the amount necessary to pay for such assistants or deputies, not exceeding the sum of $1,000 per year. It also provided that, if the duties of any of the officers above named in any county having a population of over 18,000 and less than 25,000 inhabitants shall be such as to require one or more assistants or deputies, "then such offi-

cers may retain any amount of fees collected sufficient to pay the salaries of such deputies and assistants, not exceeding the sum of $1,000 per annum for each of said deputies or assistants; but in no instance shall such officers in counties not having more than 18,000 inhabitants receive more than the fees by them respectively and actually collected." Had the act stopped here, which was substantially the act of 1905, considered in *State v. Drexel,* 75 Neb. 614, cited by plaintiff, we would have no difficulty in affirming this case by adhering to that. But, by the amendment of 1907, the legislature added the following clause: "Nor in any of the counties in this state, shall any one of the above named officers and the deputies, clerks and assistants of such officer, receive in the aggregate salaries or compensation in excess of the amount of the fees of such officer actually collected, except in those cases where the amount of the salaries or compensation of such deputies, clerks or assistants, is by this act directed to be paid out of the county general fund, and, in all such excepted cases, such officer and his deputies, clerks or assistants, shall respectively receive the several amounts of money as hereinbefore specified (or as fixed by the county board in the case of, and for, such clerks and assistants as do not have their compensation fixed by this act), although such amounts so received by such officer and his deputies, clerks and assistants may in the aggregate exceed the amount of fees collected by such officer." The "excepted cases" referred to are the cases of the several classes of counties having a population in excess of 25,000 inhabitants, as above shown. The reason for the exception is apparent, viz.: That as to those counties not only the county clerk himself, but his clerks and assistants are paid their salaries or compensation out of the county general fund, and not from the fees collected, while in counties of the class of defendant the county clerk alone is paid a salary of $1,500 out of the general fund, while his clerks and assistants can only be paid out of the fees of the office. Just why the legislature should apply a different rule to this class of counties, where the clerk himself receives his com-

pensation out of the general fund, is not clear to us, but that it has applied a different rule to such counties is clear. Whether the application of such a rule is wise, or fair, is a question that we cannot determine. Our duty is to enforce the law which the lawmaking body has enacted.

The evidence shows that the plaintiff paid out during the year 1910 for deputy and extra clerk hire a sum which, added to his salary of $1,500, which he drew quarterly, would exceed the total receipts of the office more than the amount of the claim in suit. It follows from what has been said that the board exceeded its powers under the statute in allowing the claim. The doctrine of ratification or estoppel cannot apply, for the reason that the county board could not in advance have authorized an expenditure by plaintiff of any sum in excess of the fees actually collected by him.

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

REVERSED AND DISMISSED.

OMAHA GENERAL HOSPITAL, APPELLANT, V. ROBERT C. STREHLOW, APPELLEE.

FILED MAY 29, 1914. No. 17,688.

1. **Principal and Agent:** ACTS OF AGENTS: LIABILITY OF PRINCIPAL. Where a master, at the time his employee receives a severe bodily injury, calls his own regular physician and surgeon over the telephone and instructs him "to come and take care of the injured man," and at the time of giving such direction well knows that the injuries of his employee are of such a character as to render it necessary to immediately remove him to a hospital, and the doctor at once responds and takes the man to a hospital, and for the purpose of inducing the hospital authorities to receive him states to them that the principal for whom he is acting will be responsible for the payment of the hospital bill of the injured man, the master is bound by such acts and declarations on the part of his agent.

2. **Contracts: TERMINATION.** And where subsequently, and while the patient was yet incapable of being removed or discharged from the hospital without great danger to his life or health, the master gave notice that thereafter he would not be responsible for care and treatment "from now on," *held*, that the master had no right to thus terminate his liability; that, under the circumstances, it was an implied condition of the contract that the master could only terminate his liability to the hospital by removing the patient, or when he could be dismissed by the hospital without serious danger to his life or health, or by showing that the injured man had means out of which the hospital could and should have collected its pay.

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

William Baird & Sons, for appellant.

Greene, Breckenridge, Gurley & Woodrough, contra.

FAWCETT, J.

Plaintiff is a corporation for the purpose of carrying on a general hospital business for pay. Defendant was a building contractor. In March, 1910, John T. Anderson, one of defendant's employees, while engaged in work for defendant, fell from a trestle and was seriously injured. Upon receiving such injury he was taken by defendant's regular physician to plaintiff's hospital, where he remained and received surgical and hospital treatment until October following, when he died. This action was instituted in the district court for Douglas county against defendant to recover for such services. There was a trial to the court without the intervention of a jury. Judgment was entered for plaintiff in the sum of $15, from which it appeals.

The petition alleges the above facts in customary language; alleges that Anderson was in the hospital for 29 weeks; that plaintiff received him into its hospital at the instance and request of defendant, and relying solely upon the credit of defendant, and prays judgment for the sum of $320. The answer admits that defendant was engaged in the contract business; that Anderson was in his employ and received an injury at the time stated in the petition, and that Anderson "went to said Omaha Gen-

eral Hospital for care and treatment;" but denies that he was sent to the hospital or kept there at the request of defendant; alleges that on several occasions he informed the general manager of plaintiff that he (defendant) would not pay or guarantee the payment of the hospital charges for Anderson.

The errors assigned are that the court erred in not entering judgment for plaintiff for the full amount of its claim, for the reason that the evidence shows that defendant's doctor had authority to place Anderson in the hospital and to bind defendant for the payment of the hospital bill; that the evidence shows that defendant had knowledge of and acquiesced in the placing of Anderson in the hospital "and ratified all his agent's (Doctor Ward's) acts in connection therewith, and is estopped from denying his liability on this hospital bill."

The finding and judgment of the trial court were based upon the theory that defendant was only liable to plaintiff for emergency treatment, and the sole question involved is the correctness of that holding upon the evidence in the record before us. Doctor Ward, who acted for defendant at the time, departed this life prior to the trial of the court below. Anderson was also dead. The evidence as to what transpired after the accident and at the time of taking Anderson to the hospital is given by defendant himself and by the general manager of the hospital. Defendant testified that Anderson was in his employ; that in trying to climb a trestle he fell and broke his leg; that he was not present, but was in his home nearby; that he was called from his home to the scene of the accident. "Q. What did you do after you were called over there? A. I called at once to my doctor and told him to come at once, a man was hurt there. Q. Who was your doctor? A. Dr. Ward. * * * Q. What did you state to Dr. Ward? A. I just simply told him through the phone to come and take care of the injured man. Q. He came, did he? A. Yes; he came at once. Q. Dr. Ward was your regular physician? A. Yes, sir. Q. Was this man Anderson able to get about at that time? A. No;

while I called for the doctor somebody called for the ambulance, and they took care of him in the ambulance." This is all the evidence in relation to what was said by defendant to Doctor Ward.

Mr. Robel, the manager of plaintiff, testified that Anderson was brought to the hospital on March 25, 1910, and remained there until October 14. "Q. Who brought him to the hospital? A. Dr. Ward. Q. Dr. Ward to which Mr. Strehlow has testified? A. Yes; now deceased. Q. Will you state the fact as to whether you had any conversation with Dr. Ward as to who was to pay for this man's injury in the hospital? A. I did have such conversation. Q. Will you kindly state to the court—state the conversation, or the substance thereof, as you may remember it? A. Dr. Ward informed me that Mr. Strehlow would be responsible for the payment of the hospital bill of Mr. Anderson; that he was employed by Mr. Strehlow to look after his men, and had been ordered by him to take Mr. Anderson to the hospital. Q. Then, if I understand you correctly, Dr. Ward informed you that Mr. Strehlow would pay you for the services that the hospital rendered? A. Yes, sir." This is all of the evidence as to what was said by Doctor Ward at the time he placed Anderson in plaintiff's hospital. Mr. Robel was then interrogated as to a conversation he had with defendant about five days after Anderson was taken to the hospital, as follows: "Q. Will you state that conversation as you remember it, or the substance of it? A. Mr. Strehlow stated to me that he wished to state that he wouldn't be responsible for the payment of the John F. Anderson account 'from now on.' My reply was that we had been holding him responsible for the payment of it and would continue to do so. To which he replied, 'You fight it out with the insurance company.' My reply to that was that we had no fight with the insurance company; the hospital didn't pay the premium for the protection of his men; if there was any fight in connection with the case, of course it must be with him. Q. That was all, was it, of the conversation? A. That was all."

The evidence clearly establishes the fact that from the time Anderson was taken to the hospital until the moment of his death there never was a time when he could have been safely removed therefrom. The injury proved to be a very serious one. A number of necessary operations were performed; but, in spite of all the well-known skill of Doctor Ward, Anderson died. There is no evidence that defendant at any time, subsequent to his interview with Mr. Robel, offered to remove Anderson from the hospital, nor was any evidence offered by defendant to show that Anderson was possessed of any property or funds from which plaintiff could have recovered pay for its services. It is contended by defendant that Doctor Ward had no authority to bind defendant for the payment of Anderson's hospital charges. We think this contention is unsound. According to defendant's own testimony, he placed no limitation upon his instructions to Doctor Ward, who was his regular doctor. He called him "and told him to come at once, a man was hurt." When asked what he stated to Doctor Ward, he testified: "I just simply told him through the phone to come and take care of the injured man." He showed that, while he was telephoning, somebody—evidently some of his other employees—called for the ambulance. He knew, therefore, that the man was badly injured, and that an ambulance was necessary to convey him somewhere for treatment. While no witness so testified, it is a fair inference that Anderson was a single man. He could not in his then condition be taken to his room, and hence defendant could not help but know that he would have to be taken to a hospital. He did not direct Doctor Ward to simply administer first aid or to give him emergency treatment, but he told him "to come and take care of the injured man." He did the proper and humane thing, just what any employer ought to do where an employee is lying helpless as the result of an injury received in his employment. He knew, as well as he knew anything, that Doctor Ward would at once take Anderson to a hospital, and, if he wanted to place any limitation upon the doctor's authority to bind him for

services rendered by the hospital, then was the time for him to impose such limitation. It is clear, therefore, that Doctor Ward was fully authorized by defendant to take Anderson to a hospital.

After he was taken to plaintiff's hospital, defendant said nothing to the hospital authorities for five days, and not then until, as he himself testifies, he was called by the manager, when for the first time he told them that he would not be responsible for the payment of the Anderson account "from now on." By this statement he recognized the right of Doctor Ward to take Anderson to the hospital, and ratified that act. The only question, therefore, for our determination is: Could he, after having unloaded his helpless employee upon the plaintiff, relieve himself from further liability by his own *ipse dixit,* or was it his duty, after taking Anderson to the hospital, to pay for the hospital charges up to that time and remove him to some other place? If he did not want to be further liable and Anderson had no means to pay the charges himself, was it the defendant's duty to appeal to the proper "poor authorities," or did that duty rest upon the plaintiff?

Defendant cites *Salter v. Nebraska Telephone Co.*, 79 Neb. 373. The holding in the third paragraph of the syllabus in that case seems to sustain his contention and to hold that, when defendant declined to be further responsible, his liability would only exist for a time sufficient to enable the plaintiff to give notice to the proper poor authorities if Anderson was entitled to public care. There is a difference, however, between that case and this. In that case the injured employee was taken to the hospital by the foreman in charge of the working gang, who made arrangements with the hospital for the reception and treatment of the employee, all of which was done, as we gather from the opinion, under the emergency which then confronted the foreman, and without the knowledge of the managing officers of the telephone company. On the very next day the hospital authorities were notified that the defendant would not be responsible for any services other than the first treatment. In this case we think Anderson

was taken to the hospital by direction of the defendant as fully as if defendant had given that direction to Doctor Ward in express terms. In other words, we think that, when Doctor Ward took Anderson to the hospital and stated that defendant would be responsible for his treatment, it was the same as if defendant had taken him there himself and made that statement. He has no more right to disaffirm what was done and said by Doctor Ward than if he had done and said the same things himself. We are therefore unwilling to apply the rule announced in *Salter v. Nebraska Telephone Co., supra,* but prefer to adopt the reasoning and holding in *St. Barnabas Hospital v. Minneapolis International Electric Co.,* 68 Minn. 254. That was an action to recover for the care and treatment of one Soutar, given and performed at the instance and request of defendant. Soutar sustained severe injuries while in defendant's employment. The defendant took him to the hospital, and plaintiff received and accepted him as a patient upon the faith of defendant's promise to pay for his care and treatment. The evidence on the part of plaintiff was that nothing was said about the length of time, while defendant's evidence was to the effect that his promise was to pay for his care until further notice. The court say: "As we view the case, it is immaterial which is correct." Soutar was taken to the hospital on October 22. On November 12 defendant gave notice that he would not continue responsible for any further treatment or care of Soutar after the next day. The court say: "The contention of the defendant was that it had the absolute right to terminate its promise instanter at any time by giving notice to that effect, and therefore could not, under any circumstances, be held liable for Soutar's care and treatment after November 13. The contention of the plaintiff, and the view of the law on which the court submitted the case to the jury, was that under the circumstances the agreement was not one which the defendant had an absolute right to terminate at any time merely by giving notice; that defendant, having brought a seriously injured man to the hospital, and the plaintiff having taken him in

and accepted him as a patient at the request of defendant, and on the faith of its promise to pay, it would remain liable, notwithstanding notice to the contrary, until it removed him, or until he sufficiently recovered, so that he could have been dismissed or put out of the hospital without great danger to his health or life, unless it appeared that he had means of his own out of which plaintiff could have collected its pay. This was an implied condition, upon which the contract could be terminated. It is in accord alike with common sense and the dictates of humanity. The plaintiff having taken in a helpless and severely injured man at the defendant's request, and upon its promise to pay for an indefinite time, it would be monstrous if the defendant could, the very next day, summarily withdraw its promise, leave the sick man on plaintiff's hands, and put it to the alternative of either keeping and caring for him without pay, or else cruelly and inhumanly throwing him into the street." With regard to the probable ability of Soutar to pay, the court say: "There was no evidence that Soutar had any means to pay for his own treatment. All that it shows is that he was a single man, and presumably had no home of his own. The charge of the court implies that the burden was on the defendant, if it would relieve itself from liability on that ground, to show that Soutar had means to pay for what care he received. We are of opinion that this was right. Plaintiff's contract was with the defendant, and not with Soutar. Defendant having brought the patient to the hospital, and promised to pay for his treatment, if it would relieve itself of liability after notice, notwithstanding its failure to remove him, and the further fact that he was in no condition to be dismissed, it was at least incumbent on it to show that plaintiff could and should have collected its pay from Soutar himself." We adopt the reasoning of the Minnesota court. Applying the law as there announced, defendant has not shown any facts which relieve him from his liability for the full amount of plaintiff's claim.

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

REVERSED.

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

PAULINA KUCERA, APPELLEE, V. LOUIS HANSEN, APPELLANT.

FILED MAY 29, 1914. No. 17,723.

1. **Briefs** not prepared in accordance with the rules of this court are not entitled to consideration.
2. **Bastardy: LIMITATION OF ACTION.** Where the fact of the paternity of a bastard child is satisfactorily proved to charge the putative father, the statute of limitations will not run against a claim by the mother for the support of the child during the time it requires her care. *Denham v. Watson*, 24 Neb. 779.

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

A. R. Oleson, for appellant.

Dolezal & Johnson, F. D. Hunker and *H. M. Nicholson, contra.*

FAWCETT, J.

From a judgment of the district court for Cuming county, in favor of plaintiff in a proceeding under the bastardy statute, defendant appeals.

The brief filed by defendant contains no formal assignments of error, nor are the subdivisions of the discussion in the brief even numbered. It is therefore not entitled to be considered, except on the point that the evidence is insufficient. We have made an examination of the record and have been unable to discover any prejudicial error. While some of the evidence offered by plaintiff seems somewhat unreasonable, and different statements made by her are conflicting, we cannot say that the verdict of the jury,

finding defendant to be the father of plaintiff's child, is not sustained by the evidence.

The transcript shows that defendant moved to quash the complaint, for the reason that it shows upon its face that more than four years had elapsed since the time when the cause of action accrued and the filing of the complaint, and that the cause of action is barred by the statute of limitations. This motion was properly overruled, as was a demurrer based upon the same ground. The evidence shows that the action was commenced within less than four years after the birth of the child, but more than four years after the time of conception, at which time it is contended a cause of action under the bastardy act arises, and the statute of limitations begins to run. The distinction is immaterial. The statute does not begin to run from either of those dates. The plaintiff testified that both before and after the child was born she told defendant that he was the father and asked him to marry her, but that he put her off, saying he was not of age yet, and that she would have to wait until he became of age; that he then would marry her. This testimony brings the case within the rule announced in *Denham v. Watson,* 24 Neb. 779, where Judge Maxwell, speaking for the court, said: "It is not the policy of the law to encourage prosecutions of this kind brought years after the event, and, unless the testimony shows that the mother from the first had charged the offense upon the putative father, the claim could not be maintained. In other words, the charge made years afterwards must not rest on the mere assertions of the prosecutrix, then made and communicated to the putative father, but must show that from the conception or birth of the child he had been charged by the mother as being the child's father. The law is to be carefully guarded in this respect to prevent it from being used as a means of extorting money upon a false charge. Where, however, the fact of the paternity of the child is satisfactorily proved to charge the putative father, the statute of limitations will not run against a claim for its support during the time it requires the mother's care. The expenses in

such case being continuous, the father must provide for them. In other words, he must support his own child, and the statute will not bar such claims." In the case at bar the fact of the paternity of the child was, in the estimation of the jury and the trial court, satisfactorily proved, upon evidence which we think is sufficient to sustain their finding, and the evidence is also sufficient to show that plaintiff, both before and immediately after the birth of the child, claimed to the defendant that he was the father and insisted that he right her wrong by marrying her. Her action was not barred.

The court, evidently guided by *Denham v. Watson, supra,* made no allowance for past expenses, but entered judgment for $600, payable in monthly instalments of $10 each, the first instalment to be paid on the first of the month following the entry of the judgment.

The defendant seems to have had a fair trial, and the judgment is not excessive.

AFFIRMED.

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

FLORA L. THOMAS, APPELLANT, V. MICHAEL SHONSEY, APPELLEE.

FILED MAY 29, 1914. No. 17,739.

Specific Performance: DISCRETION OF COURT. A court of equity is entitled to exercise a sound judicial discretion in disposing of a case involving the specific performance of a contract.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Elmer E. Ross, for appellant.

Martin & Bockes, contra.

FAWCETT, J.

From a decree of the district court for Merrick county, awarding defendant specific performance of a contract for the sale to him by plaintiff of the northwest quarter of section 1, township 15, range 5 west, in said county, plaintiff appeals.

The errors assigned by plaintiff are that the findings and judgment of the court are not supported by the evidence, but are contrary to the facts and contrary to law. We do not think a discussion of the theories upon which plaintiff bases these assignments would be of benefit to the parties or to the profession at large. The only question for our determination is: Did the district court err in granting defendant a specific performance of the contract involved? We have carefully examined the record and cannot say that the judgment of the trial court is wrong. On the contrary, we think it is right.

AFFIRMED.

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

LENA KING, APPELLANT, V. CHARLES H. BOETTCHER ET AL., APPELLEES.

FILED MAY 29, 1914. No. 17,463.

1. **Life Estates:** PAYMENT OF TAXES. "As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate." *Spiech v. Tierney*, 56 Neb. 514. *Disher v. Disher*, 45 Neb. 100.
2. ———: ———: LIABILITY OF PURCHASER. The purchaser of the life estate assumes by such purchase the burden of paying the taxes which the law imposed upon his grantor, and may not escape such burden by the claim that he was not liable for the taxes until he made the purchase.
3. **Wills:** CONSTRUCTION: RIGHTS OF SURVIVING REMAINDERMEN. Where the will of the testatrix authorized the executor to sell certain lands in Alabama, and to invest the proceeds of the sale elsewhere, and

accordingly such real estate was sold and the proceeds invested in a lot in the city of Lincoln, *held*, that the conditions of the will touching the right of survivorship between remaindermen will be applied and carried out as to the property purchased.

4. **Deeds:** ESTATE OF PURCHASER: LIFE ESTATE. Where the purchaser of a life estate in real property received a quitclaim deed thereto which neglected to recite that the interest conveyed was the life estate of the grantor, the purchaser may not lawfully claim a greater interest in the property than the grantor had to sell.

5. **Vendor and Purchaser:** NOTICE: RECITALS IN DEED. All persons claiming an interest in or a lien upon real estate are bound to take notice of the recitation in a duly recorded deed in the chain of title of their grantor. *Mathews v. Jones*, 47 Neb. 616; *Albers v. Kozeluh*, 68 Neb. 522.

6. **Tax Sale:** REDEMPTION. The scavenger act should receive a liberal construction in favor of the owner where he seeks to redeem from the sale made, and he should be allowed to redeem where full and actual compliance with the statute has not been observed. *Ambler v. Patterson*, 80 Neb. 570, 575.

7. ———: ———: NOTICE. Notice of the time when the redemption of land from tax sale will expire must be given by the tax purchaser or his assignees before the expiration of the time to redeem. *Ambler v. Patterson*, 80 Neb. 570.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed in part and affirmed in part.*

Morning & Ledwith, for appellant.

F. A. Boehmer & Son, Frank E. Edgerton and *A. W. Lane, contra.*

HAMER, J.

The plaintiff, Lena King, seeks by this action to perfect her title to lot 3, block 85, in Lincoln, Lancaster county, Nebraska. Frances B. O'Reilly died testate in Mobile, Alabama, her home, in February, 1887. Her will was probated. By its provisions the testatrix devised her property in Mobile, Alabama, to Charles I. Green, as trustee, so that her son, Ignatius J. O'Reilly, the father of this plaintiff, should have the use thereof during his lifetime,

and after his death the remainder to descend to his children or the survivor or survivors of them living at the time of the father's death, share and share alike.

In 1891, or thereabouts, the family homestead in Mobile, Alabama, was sold, and the proceeds were invested by the trustee in lot 3, block 85, Lincoln, Lancaster county, Nebraska. That is the property involved in this controversy. The deed to the Lincoln property conveyed the title to Ignatius J. O'Reilly for life, and after his death to his two children, Lena O'Reilly, now Lena King, the plaintiff herein, and to her brother, John O'Reilly, now deceased, share and share alike. It is claimed by the plaintiff that this deed failed to provide, as the will directed, that the remainder estate should vest in the survivor of the children of the said Ignatius J. O'Reilly. The will provided that Ignatius O'Reilly should have the use of the Alabama property during his lifetime, and after his death this homestead was to go to the children of Ignatius O'Reilly, born and to be born of his then wife, or to the survivor or survivors of them, living at the time of the death of Ignatius J. O'Reilly, share and share alike. It was provided in the will that the homestead might be sold for the purposes of reinvestment in real estate in some other state if desired. Such request was made, and the executor and trustee conveyed said homestead, and took the proceeds of the same and invested such proceeds in the real estate in controversy. Lena O'Reilly and her brother, John O'Reilly, were the heirs at law of the remainder estate so disposed of and reinvested in said lot 3, in block 85, Lincoln, Nebraska.

About the year 1896 John O'Reilly, then of the age of about 16 years, died intestate, unmarried, and without issue. The plaintiff is the only surviving child of said Ignatius J. O'Reilly. Said Ignatius J. O'Reilly is divorced from his wife, Addie E. O'Reilly, the mother of the plaintiff, and appellant. Under the terms of the will, if it shall be applied to lot 3, the plaintiff is the owner of the entire remainder estate in said real estate.

When the real estate in Mobile, Alabama, was sold, and the proceeds invested by the trustee in said lot 3, and in accordance with the trust vested in him, the deed which was made to the Lincoln property failed to provide that the remainder estate should vest in the survivor of the children of said Ignatius J. O'Reilly. This was an omission and contrary to the terms of the will. The deed as made is recorded in book 62 at page 175 of the records of Lancaster county on the 6th day of April, 1891.

Ignatius J. O'Reilly was divorced from his wife, Addie E. O'Reilly, subsequent to the probate of the will of said Frances B. O'Reilly, and the plaintiff, Lena King, and her brother, John O'Reilly were the only children born to Addie E. O'Reilly, and were the only children referred to in the will of the said Frances B. O'Reilly.

On the 9th day of March, 1907, Ignatius J. O'Reilly, who was then unmarried, conveyed by quitclaim deed to appellee, Charles H. Boettcher, said lot 3, and omitted to recite in said conveyance that only the life estate which he held in said property was conveyed.

At the time of the said conveyance by Ignatius J. O'Reilly to the said Charles H. Boettcher there was an outstanding "scavenger" tax sale certificate. It was issued on November 2, 1905, to the said Charles H. Boettcher, the purchaser, for the sum of $500.27. Charles H. Boettcher could acquire by the quitclaim deed made to him by Ignatius J. O'Reilly only the life estate which said O'Reilly had in the property. He could acquire only the interest which Ignatius J. O'Reilly had. The defendant Charles H. Boettcher entered into possession of said lot 3 under the said quitclaim deed, and his possession has since been continued until the present time. Ignatius J. O'Reilly and the defendant Charles H. Boettcher failed to pay the taxes against said lot for the years 1899 to 1904, inclusive. They failed to pay the general taxes, as well as special assessments, and permitted the same to become delinquent, and the property was sold for such delinquent taxes.

On July 1, 1905, a petition was filed in the district court for Lancaster county, Nebraska, under chapter 77, art. IX,

Comp. St. 1903. Notice of said action was published, and notice was given that the property was taxed for $516.21, $243.91 being regular taxes for the years 1895, 1899 to 1904, inclusive; that $181.93 was for regular city taxes for said years, and $95.37 for unpaid paving taxes for the paving of the streets of the city in front of said property. Service by publication was had against said property that "I. O'Reilly" is the owner. Said property was taxed in that name. A default decree was entered against said lot 3 in September, 1895; the lot being described as tract No. 0393. After the default decree notice was published under the said "Scavenger Act," and on November 2, 1905, a sale of said lot was made to the defendant Charles H. Boettcher, and said certificate of sale above mentioned was issued to him. On July 25, 1907, an affidavit for publishing a final notice was filed in said tax suit, a copy of which is attached to the plaintiff's petition. Said affidavit is the only affidavit for service by publication which was filed in said suit. A certain notice designated "Final Notice" was published in a newspaper known as the "Legal News," and proof thereof was filed in said tax suit on August 12, 1907. Copies of the same are attached to the petition.

On November 4, 1907, two years and two days after the date of the sale of the said property, notice of confirmation was entered in confirmation record book 1, at page 2. Said notice by its terms fixed the date for the confirmation of the sale of said property as November 9, 1907. No proceedings were had on said suit on said day; but on the 16th day of November, 1907, an order of confirmation was entered in said suit, and on the 16th day of November aforesaid there was issued to Charles H. Boettcher a sheriff's deed which purported to convey said lot to him. This deed was duly recorded. Plaintiff, during the proceedings in said tax suit, claimed to have been a nonresident, and to have been absent from the state of Nebraska, and to have had no knowledge or personal notice of said tax procedure and made no appearance therein. The evidence shows this claim to be sustained. The defendant Boettcher now claims to be the owner in fee of said prop-

erty, and disputes plaintiff's right to the same. He occupies and controls the same adversely to the plaintiff. It is shown that the defendant Boettcher refuses to liquidate and discharge the liens for taxes against said property. He is apparently endeavoring to permit his title to ripen into a fee simple title, and thereby is attempting to cut off plaintiff's interest in the property.

It is claimed by the plaintiff that the tax deed issued to said Charles H. Boettcher is void, and does not convey the title to said real estate to said Charles H. Boettcher, for the reason that it was the duty of the said Boettcher to pay all taxes on said property and to redeem it from said tax sale, he being the life tenant of said real estate. It is further claimed by the plaintiff that said deed is void because no affidavit of service of "Final Notice" by publication addressed to the plaintiff was filed in said suit. It was also claimed that no "Final Notice" as required by the "Scavenger Act" was given to plaintiff or addressed to her in the notice published in said suit; also, because the holder of said certificate on or before the last day of the redemption, November 2, 1907, either by himself or agent, entered in the "Confirmation Record" the date of the decree entered in said suit, and did not enter the time nor the place where the hearing would be had at such confirmation, as required by said act; and because no valid confirmation of said sale was ever had. It is alleged that the defendant Auguste Boettcher is the wife of the defendant Charles H. Boettcher; that Ignatius J. O'Reilly has no interest of any kind in the property, and that the other defendants are tenants. The plaintiff prays that her interest in said property may be established; that the tax liens and party-wall agreements and tax deeds held by Charles H. Boettcher, all of which are alleged to cast a cloud upon her title, may be canceled and the cloud cast thereby removed; that, if the court finds any of the taxes or special assessments to constitute a special lien upon the property, plaintiff may be permitted to redeem; and that the defendant be required to account for rents and profits received by him while in possession of the property; and, if it be found

that plaintiff be liable for taxes on special assessments, that she be permitted to pay all or any part thereof. Plaintiff alleges that she stands ready and willing to abide the judgment and order of the court in that regard. Plaintiff also prays that the warranty deed to Ignatius O'Reilly, dated April 6, 1891, be reformed so as to create in plaintiff the right of survivorship in said real estate upon the death of her brother, John O'Reilly, in harmony with the terms and provisions of said will; and that her fee-simple title or reversionary interest in said real estate be ascertained and established, and that she be decreed to be the owner of the fee-simple title and remainder subject to the life estate of the said Ignatius J. O'Reilly conveyed to the defendant Charles H. Boettcher, as set forth; that said Charles H. Boettcher be adjudged to have no other interest in said property than the life estate of said Ignatius J. O'Reilly, and that the sheriff's deed to Charles H. Boettcher, dated November 16, 1907, be canceled of record, and declared void and not to constitute a cloud upon plaintiff's title in said property, and the tax liens of the defendant Charles H. Boettcher, and all his claims thereunder, be declared as being a payment of taxes due from the life tenant; and that plaintiff's title to said property be quieted in her; and that defendant Charles H. Boettcher be enjoined from asserting any other interest than a life estate therein. To this petition are attached exhibits: On page 12 there is a statement of the amount of taxes that were delinquent at the time of the foreclosure proceedings; on page 13 is the affidavit of defendant Charles H. Boettcher for constructive service and notice of confirmation; on page 14 is exhibit C, the notice that the time for redemption of said tax sale will expire November 2, 1907; on page 15 is the affidavit of publication by D. M. Butler that the notice was published in the "Legal News."

The answer admits that on March 9, 1907, Ignatius O'Reilly gave defendant Boettcher a quitclaim deed for said property, which was recorded in book 139, at page 176; admits that said Ignatius O'Reilly now is and for some years has been in possession of said property under

his tax deed; admits that an action was commenced in the district court for Lancaster county under the so-called scavenger act to foreclose the unpaid taxes on the property; alleges that notice was published in said cause, that the total taxes amounted to $516.21, of which $95.37 was for the street paving; alleges that the notice published was against the property, as well as the person in whose name it was taxed, and who held title thereto and possession thereof; admits that this tract was described as No. 0393, that the decree of foreclosure was duly entered, that notice of the sale for November 2, 1905, was given, at which time defendant Boettcher purchased said property and obtained a certificate of sale therefor, that subsequently an affidavit for notice was filed and that thereafter notice was published, and that thereafter the sale was confirmed by the district court, and defendant Boettcher obtained a tax deed from the treasurer for said property, which deed was duly recorded; alleges that if the plaintiff had any interest in said property prior to said sale it was her duty to pay all the taxes and assessments against the property, and that if they were not paid when due the property was liable therefor and subject to sale for such unpaid taxes; admits the conveyance to Ignatius J. O'Reilly. There is in addition a general denial.

In his cross-petition defendant Boettcher alleges: (1) That said lot 3, in block 85, was located so as to be liable for the city and street paving, together with other taxes for state and county purposes; that at the time of the tax sale said lot was liable for its proportionate share of paving tax, amounting to $95.37. (2) That, in addition to said special assessments, said property was liable for the general, state, county and city taxes for the years 1899 to 1904, inclusive; that said taxes at the time of said sale remained unpaid to the amount of $181.93, and that the balance of unpaid taxes then due was for general taxes for state and county purposes. (3) That an action was begun under the "Scavenger Act" to foreclose on said lot for the amount of $516.21; that due notice was given, and

that said cause was regularly presented upon due and regular notice to the person in whose name the property had been taxed, as well as the property itself; that a decree of foreclosure was entered, notice of sale given, and the property sold to the defendant Boettcher; certificate of sale issued, then notice of time of redemption and date of confirmation given as required by statute; and that after such confirmation a tax deed was issued by order of the court by the treasurer of Lancaster county, whereby all interest and claims of any kind to said property were transferred to the defendant Boettcher, whereby he became and ever since has been the owner of said lot; that, in order to obtain any income from said property, this plaintiff had to spend a great deal of money in improving the property; that he excavated a part of the cellar, put in new foundation and side walls on the south and west sides, placed a new front in the building, put new floors therein, and a new roof thereon, and that in this manner appellee spent $3,000 in repairing the premises, consisting of a store building; that in addition thereto he erected a barn on the rear of said lot of the value of $200. (4) That these expenses were a fair and reasonable value, *and were necessary in order that said property could be rented.* There is a prayer that the petition be dismissed, and the title to the property be quieted in Charles H. Boettcher.

The plaintiff filed a reply to the answer, and an answer to the cross-petition of the defendant Charles H. Boettcher, denying each and every allegation therein.

Because of the fact that the findings of the court are very long, we will only set up such parts of the same as seem most pertinent: "And the court further finds that the plaintiff, Lena King, is now the sole owner of the entire fee title to the remainder estate of the real estate described in plaintiff's amended petition, to wit: Lot 3, block 85, in the city of Lincoln, Lancaster county, Nebraska, subject, however, to the life estate in said real estate which is now owned and held by the defendant Charles H. Boettcher, and the court finds that the said Charles H. Boettcher is the life tenant of said real estate,

and the court further finds that on the 9th day of March, 1907, Ignatius O'Reilly, then an unmarried man, executed and delivered to the defendant Charles H. Boettcher, in the name of C. H. Boettcher, a quitclaim deed conveying to him the life estate in said lot 3, block 85, in the city of Lincoln, Lancaster county, Nebraska, and that said deed is recorded in book 139 of deeds, at page 176 thereof, and the court finds that the defendant Charles H. Boettcher, under and by virtue of said quitclaim deed from and after the 9th day of March, 1907, the date of said deed, came into possession of and became entitled to the right, title and interest in said property for and during the term of the natural life of said Ignatius O'Reilly." It is also found that said Ignatius O'Reilly failed to pay the regular current annual taxes from 1899 to 1906, inclusive, as also the part of the special assessment levied against said real estate, and which he permitted to become delinquent. There is an itemized statement of such taxes and assessments attached to the amended petition. It is found that the taxes not paid by said Ignatius O'Reilly amounted to $527.05. There are numerous small findings relating to unpaid taxes. We omit the details of these findings because they cover several pages. The court "further finds that at this time it *is*, and that ever since the 9th day of March, 1907, the date of the deed to said Charles H. Boettcher from Ignatius O'Reilly, it *has been*, the duty of said Charles H. Boettcher to fully discharge and cancel all taxes and special assessments levied and assessed against said property." There is also a finding that the defendant Boettcher made improvements on said property to the sum of $3,144.94; also that the expectancy of life of Ignatius O'Reilly at the date of the stipulation in the case is 11.79 years. There is no finding "with respect to the liability of the several parties for the improvements made on said described property by the defendant Charles H. Boettcher." It is found that the party-wall agreement is a valid and subsisting agreement, and binding upon the plaintiff.

It is decreed that the deed from Englehardt and Swingle to Ignatius O'Reilly, dated April 6, 1891, and recorded in book 62, at page 175, in deed records of Lancaster county, Nebraska, be reformed and corrected so as to create in the plaintiff, Lena King, the right of survivorship in said lot 3, in block 85, Lancaster county, Nebraska, upon the death of her brother John O'Reilly, in harmony with the provisions of the last will of Frances B. O'Reilly, deceased. It is also found that Lena King is the sole owner of the entire fee title and remainder estate in said described real estate, subject, however, to the life estate of Ignatius O'Reilly which has been conveyed to Charles H. Boettcher. It is decreed that the treasurer's deed to Charles H. Boettcher, dated November 16, 1907, recorded in book 140, at page 454 of the records of Lancaster county, Nebraska, be, and the same hereby is, canceled of record, decreed and declared to be null and void.

It is further decreed that the party-wall agreement set forth in the answer of the Lincoln Steam Paste Company is valid and binding upon all parties to the suit; that defendant Charles H. Boettcher is entitled to a tax lien against the remainder estate in said described property in the sum of $810.15, which is hereby declared to be a judgment in favor of the defendant. There is a judgment for that sum of money against the plaintiff.

It is decreed that plaintiff's title in the remainder estate, subject to the life estate now owned by Charles H. Boettcher, be forever quieted and established in her as against each and all of said defendants; that from November 2, 1905, the date when Boettcher purchased the tax certificate, until the 9th day of March, 1907, the day when he became a life tenant, he paid all the taxes assessed against the property, which payments, together with interest thereon from the time of the several payments until the date of the decree entered in this case on July 14, 1911, amounted to the sum of $810.15.

The district court decreed Lena King to be the sole owner of the entire fee title and remainder estate in the said described real estate, subject, however, to the life

estate of Ignatius O'Reilly, as above set forth; also that the treasurer's deed is null and void because of defects in the scavenger proceedings leading up to its acquirement. The deed is canceled by the decree.

It is further decreed that the defendant Charles H. Boettcher is entitled to a tax lien against the remainder estate in said property in the sum of $810.15, and it is ordered that Lena King's remainder estate in said property shall be sold to satisfy this lien, if the judgment is not paid within twenty days from the date of the decree. It is from this portion of the decree that Lena King appeals.

The errors assigned are: (1) That the court erred in finding that the defendant Charles H. Boettcher was entitled to a lien against the remainder estate in said property in the sum of $810.15; (2) that the judgment in favor of Charles H. Boettcher is contrary to law.

1. Upon the life tenant rests the duty to pay the taxes which are assessed against the property. "A life tenant st pay all the ordinary taxes on the property during the continuance of his estate." 16 Cyc. 632.

"Life tenant of lands is charged with the duty of paying the taxes which accrue upon the property of which he is enjoying the use, rents and profits." *First Congregational Church v. Terry,* 130 Ia. 513. 45 Cent. Dig. (Taxation) sec. 1358, and note; 33 Cent. Dig. (Life Estate) secs. 18, 39, 51; 12 Dec. Dig. (Life Estate) sec. 18.

"As between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land during the continuance of his estate." *Spiech v. Tierney,* 56 Neb. 514. In the last named case it is said in the body of the opinion: "As between the heirs and the tenant for life, it was undoubtedly the duty of the latter to pay all taxes assessed against the land during the continuance of his estate. *Disher v. Disher,* 45 Neb. 100; *Prettyman v. Walston,* 34 Ill. 175; *Thompson v. McCorkle,* 136 Ind. 484; 1 Washburn, Real Property, secs. 96, 97. This was a duty due from Kyron Tierney to the owners of the fee, and one which they might by an appropriate

action enforce at any time. * * * They were a lien on the land itself, and were payable at the treasurer's office without demand."

In *Disher v. Disher,* 45 Neb. 100, it is said in the syllabus: "As between a tenant for life and the reversioner, the former is required to pay taxes assessed against the estate." In that case the remaindermen sought to enjoin the life tenant from cutting and removing valuable timber. She set up by way of defense, that she was cutting and selling the timber to provide funds for the payment of current taxes. This court held: "That as between herself and these plaintiffs it was her duty to pay the taxes."

It is said in the supplemental brief of defendants: "It is admitted that it is the duty of the life tenant to pay the taxes." This concession requires but little further investigation of the facts or consideration of legal principles. In the same paragraph it is said: "If Mr. Boettcher acquired the rights of Mr. O'Reilly, it was Mr. Boettcher's duty *thereafter* to pay the taxes on this land. Prior to that time, no duty was upon him to pay any of the taxes." Before the purchase from O'Reilly there could have been no duty upon the part of Mr. Boettcher to pay the taxes; whenever Boettcher *did make the purchase,* then he bought *what O'Reilly had to sell, and nothing more.* O'Reilly was bound to keep up the taxes because he was the owner of the life estate, and that duty was enjoined upon the owner of such estate, whoever he might be, because it was a legal burden which belonged to the life estate itself, and was inseparable from it. For that reason, Mr. O'Reilly could not release the life estate by selling it to Boettcher, and Boettcher bought it subject to the burden which O'Reilly had permitted to accumulate. If O'Reilly could convey the life estate separate from the legal burden enjoined upon it, then he could transfer to Boettcher a greater interest than he himself enjoyed. Concert of action between O'Reilly and Boettcher should not be permitted to destroy the interest of the remainderman or to lessen its value.

2. It is said in the supplemental brief of defendants that the deed under which the O'Reillys held this land made it to "Ignatius J. O'Reilly for life, and thereafter to his children, Lena O'Reilly and John O'Reilly, in fee forever, share and share alike." It is then contended that the records of Lancaster county show under this deed that the life estate was in Ignatius J. O'Reilly; that the remainder went to his two children, John and Lena, share and share alike. Under such a deed it is said that, upon the death of the remainderman, unmarried and without issue, the father, under our laws, would inherit his share of the remainder. It is stated in the petition that John O'Reilly died about 1896, at about the age of 16, unmarried and without issue, and these facts are not denied. It is said by Boettcher: "Under the deed, and by reason of the death of John, the father, Ignatius, became the owner of an undivided one-half of the remainder, as well as the life estate." It should be remembered that the condition in the original will provided: "The use of such homestead or dwelling-house shall be vested for the term of his natural life in my son Ignatius O'Reilly, remainder to his children born, and to be born, of his present wife, or to the survivor or survivors of them living at the time of his death, share and share alike." It is further provided in the will that, upon request being made for a reinvestment, the executor shall sell the homestead, the proceeds to be invested "as my son shall request, and in such place as he shall request. * * * When such reinvestment is made, the said executor shall have the deed to the property made to my son Ignatius for life, remainder to his children, born or to be born of his present marriage, or to the survivor or survivors of them at his death, share and share alike." The deed, in order to conform to the will, should have contained the foregoing provisions. While Ignatius O'Reilly undertook to make a quitclaim deed for lot 3, he could not in any event convey more than the life estate which he owned. Counsel for the appellees fail to show us any authority for holding that the deed shall enable the

holder of the life estate to take more than the will provided, or to grant more than he owned.

The deed made by George Englehardt to Matilda Englehardt, husband and wife, and Calvin W. Swingle and Armila J. Swingle, husband and wife, conveys the lot in controversy to Ignatius O'Reilly "for life, and thereafter to his children, Lena O'Reilly and John O'Reilly in fee forever, share and share alike." When Boettcher made his purchase from Ignatius J. O'Reilly, he may have had no notice of the fact that O'Reilly only owned a life estate. The quitclaim deed made by Ignatius O'Reilly to Boettcher said nothing about the life estate. For anything that appears to the contrary, O'Reilly and Boettcher may have been attempting together to destroy the rights of remaindermen. Boettcher and O'Reilly were failing to keep up the taxes, and were taking such steps as might be taken to acquire title to the property in Boettcher, without regard to the rights of the plaintiff or the limitations of the will making the plaintiff the survivor.

The case of *Jones v. Merrill,* 69 Miss. 747, is not unlike the instant case. In that case it is stated in the syllabus: "(1) One who has acquired and holds the life estate of another in land cannot, in the lifetime of such other, acquire and set up against the remaindermen a tax title thereto, although the forfeiture for taxes occurred before he acquired such life estate. (2) Nor is he relieved of such disability by the fact that, before he acquired the life estate, he had entered and was in possession under a previous tax title; this being void and having been so adjudicated at the suit of the remaindermen."

3. The defendant Boettcher seems to have had notice that Ignatius O'Reilly only had a life estate in the premises. In the deed executed by George Englehardt and wife and Calvin W. Swingle and wife to Ignatius O'Reilly there is contained in the body of the same the following: "To Ignatius J. O'Reilly for life, and thereafter to his children, Lena O'Reilly and John O'Reilly, in fee forever, share and share alike." The foregoing language shows the terms and

conditions of the grant, and to whom the lot was conveyed.

All persons claiming an interest in or a lien upon real estate are bound to take notice of the recitation in a duly recorded deed in the chain of title of their grantor. *Mathews v. Jones,* 47 Neb. 616; *Carter v. Leonard,* 65 Neb. 670; *Albers v. Kozeluh,* 68 Neb. 522.

The petition of the plaintiff alleges that she is uncertain whether any part of the special assessments "should be borne by this plaintiff as remainderman," but that "she stands ready and willing to abide the judgment and order of the court in that regard." Where the facts are uncertain, as shown by the evidence, and may not in any event be definitely ascertained until after the trial is concluded, such willingness as is set forth in this petition would seem to be about all that should be required of the plaintiff in an equity case. By this averment the plaintiff may have tried to comply with the maxim that "one who seeks equity must do equity." *Payne v. Anderson,* 80 Neb. 216; *Humphrey v. Hays,* 85 Neb. 239.

4. It will be seen that the tax sale to the defendant Charles H. Boettcher was had upon a decree rendered in the Lancaster county district court under the provisions of what is known as the "Scavenger Act." The decree was entered September 15, 1905. The sale of the property involved was had November 2, 1905. The sale was confirmed November 16, 1907. On that day the treasurer's deed was executed and delivered to the defendant Charles H. Boettcher. On the same day it was filed for record. On March 19, 1907, Ignatius O'Reilly conveyed all his title and interest in the property by a quitclaim deed to defendant Charles H. Boettcher. As O'Reilly had a life estate, that is what he succeeded in conveying to Boettcher. The defendant Boettcher by his purchase of the scavenger tax certificate on November 2, 1905, did not become the owner of the fee title of the property. At that date the sale was not final, and therefore could not be complete. The sale of November 2, 1905, was only one of several essential steps necessary to be taken under the "Scavenger

Act" in order to obtain a tax title to the property. The sale cannot be complete until confirmation is had in the regular prescribed manner. *Parsons v. Prudential Real Estate Co.*, 86 Neb. 271.

The regularity of the proceedings upon which the treasurer's deed was executed is not admitted by the plaintiff. It is contended that said deed is void: (1) Because the affidavit for service by publication of the "Final Notice" did not set forth the name of the plaintiff, who was the owner of the property, which fact could have been ascertained from an examination of the title as shown by the record. (2) Because the published notice of the time limited in which redemption could be made was not directed to the plaintiff. (3) Because the holder of the tax certificate did not make the proper entries on the confirmation record until after the expiration of the time of redemption. Section 11181, Ann. St. 1911, provides: "It shall be the duty of the holder of each certificate of tax sale other than the state, county, or city, on or before the last day of the redemption period, either by himself or by his agent or attorney, to enter in said confirmation record the date of such decree, as well as the number of the tract covered by his certificate of tax sale, together with a description of the real estate on which confirmation is sought, and the time when and the place where a hearing will be had upon such confirmation. The entry of notice in such confirmation record shall be deemed equivalent to personal service upon all persons served with final notice." (4) Boettcher failed to comply with the requirements of said sections 11176, 11177, 11178, 11181, and thereby lost any rights that he may have had.

It was Boettcher's duty as the owner of the interest of the life tenant to pay the taxes assessed against the property. This purchase of the tax certificate was the equivalent of a payment of the taxes and special assessment.

Section 11176, Ann. St. 1911, provides that the "'Final Notice' to be served upon the owner" shall be so served not more than "six months from the expiration of the period of redemption," fixing the day of expiration of the

time of redemption, and directing the person served to examine the confirmation record for notice of the time when and place where the confirmation of sale will be had. It is provided in section 11177: "Where the owner of any real estate is a nonresident of the state or cannot, with reasonable diligence, be found therein, or in cases where the name or names of such owner or owners cannot be ascertained by the exercise of reasonable diligence, it shall be sufficient * * * to cause a notice * * * to be published once a week for three consecutive weeks in some newspaper of general circulation in the county where the land is located." It is further provided by section 11177 that prior to the giving of such notice it shall be the duty of the purchaser, his agent or attorney, to make and file in the office of the clerk of the district court an affidavit setting forth the names of the parties to be served by publication, and that they are nonresidents of the state, or cannot be found within the state upon the exercise of reasonable diligence, or that the names of the owners are unknown. Neither the affidavit for service by publication nor "Final Notice" as published (Abs., pp. 25-26) contain the name of the plaintiff. They did not therefore comply with the requirements of the sections above quoted.

Notice of the time when the redemption of land from tax sale will expire must be given by the tax purchaser or his assignee before the expiration of the time to redeem. *Ambler v. Patterson,* 80 Neb. 570; 45 Cent. Dig. (Taxation) secs. 1418, 1425, and cases cited.

"A tax deed, issued in April, 1904, without an affidavit showing the service of a notice to redeem, as required by section 124, art. I, ch. 77, Comp. St. 1901, having been first filed with the county treasurer, is void." *Peck v. Garfield County,* 88 Neb. 635.

"There being no legal service of the notice of expiration of time for redemption from the sale, the county acquired no title through its certificate, but merely retained a lien on the land by virtue of such certificate." *McKenzie v. Boynton,* 19 N. Dak. 531. *Archer v. Tubbs Sheep Co.,* 25 S. Dak. 399.

A notice of the expiration of the time of redemption from a tax sale is necessary to cut off the owner's title. *Neilan v. Unity Investment Co.,* 147 Ia. 677; *Johnson v. Fraser,* 112 Minn. 126.

Notice as published was directed to C. as "receiver of the *McKinley-Lanning Loan & Trust Company.*" C. was the receiver of the McKinley-Lanning Loan & Trust Company. "Held, That the notice as published was deficient and did not confer jurisdiction." *Lanning v. Musser,* 88 Neb. 418. *Lanning v. Haases,* 89 Neb. 19.

"The notice of the expiration of redemption from a tax sale must be given in strict compliance with the statute." *De Laurier v. Stilson,* 141 N. W. 293 (121 Minn. 339).

"Scavenger tax law must be strictly construed against one claiming title by a tax purchase thereunder." *Archer v. Tubbs Sheep Co.,* 25 S. Dak. 399.

Section 10681, Ann. St. 1903, construed in *State v. Several Parcels of Land,* 75 Neb. 538, held to afford the landowner an opportunity to have the question of the validity of the tax determined before he is deprived of his property; held, also, that the decree does not operate to deprive her of her day in court before being divested of her title.

In *Prudential Real Estate Co. v. Hall,* 79 Neb. 805, it is held: "The validity of taxes involved in a default decree rendered in a scavenger suit may be contested upon an application to confirm the sale." The "Scavenger Act" should be followed in every detail to the end, and it should not be abandoned for or blended with the proceedings provided by the general revenue law.

There must be a strict compliance with the Scavenger Act or the holder of the certificate acquires no title under the tax deed. It was said in *Ambler v. Patterson,* 80 Neb. 570, on rehearing, 575: "A thorough examination of what is known as the 'Scavenger Act' (Comp. St. 1903, ch. 77, art. IX) convinces us that it was the intention of the legislature to allow the owner of land, against which a decree of sale for delinquent taxes has been entered, every

opportunity to save his land, either by paying the amount of the decree prior to a sale, or by redeeming from the sale afterwards made. That the act should receive a liberal construction in favor of the owner to comply with this evident purpose of the legislature should not be denied; and it is our duty to afford the owner the opportunity to redeem his land where full and actual compliance with the statute has not been observed." In that case it was held that a notice running to several persons describing different tracts of land in which each had a separate interest or ownership was not sufficient. Because of the error in the "Final Notice" the judgment of the court below was reversed.

In *Peck v. Garfield County,* 88 Neb. 635, it was held that a tax deed issued in April, 1904, without an affidavit showing the service of a notice to redeem as required by section 124, art. I, ch. 77, Comp. St. 1901, having been first filed with the county treasurer, is void. In the body of the opinion it is said: "For the failure of Mr. Ratcliff, the holder of the tax sale cetrificate, to perform the plain statutory condition precedent to his obtaining a tax deed, the deed issued upon such certificate was absolutely void. It follows that the court erred in refusing to permit plaintiff to redeem." The judgment of the district court was reversed, with directions to enter a decree canceling the tax deed, and to permit the plaintiff to redeem from the tax sale, and quiet plaintiff's title to the property.

The findings and judgment of the district court establishing a tax lien in favor of defendant Charles H. Boettcher against the remainder estate of plaintiff in the sum of $810.15, and ordering the property sold for the payment thereof, in the event that plaintiff shall fail to pay the same within twenty days from the entry of judgment, is reversed, and the claim of said defendant Boettcher, and every item thereof on which such judgment is based, is and are dismissed, with prejudice, and the remainder estate of plaintiff in fee simple is quieted and confirmed in her, subject to the life estate of said Ignatius J. O'Reilly, now

owned by said defendant Boettcher. In all other respects the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

LETTON and SEDGWICK, JJ., not sitting.

JOSEPH SIMCHO, APPELLEE, V. SCHOOL DISTRICT OF OMAHA, APPELLANT.

FILED JUNE 23, 1914. No. 18,551.

Intoxicating Liquors: LICENSE MONEY: FORFEITURE. Plaintiff obtained a license to sell intoxicating liquors at a designated place in the city of O. He entered upon the licensed business and continued in the trade for some time, when, under permission of the city council, he removed his saloon and business to another part of the city. The district court issued a mandamus to the council compelling it to rescind the alleged permission to remove. In the meantime another had obtained rightful possession of plaintiff's former location, which he had abandoned, and procured a license to sell liquors therein. *Held*, That as plaintiff had voluntarily abandoned the only place where he could lawfully sell intoxicating liquors, his license remaining in force he could not recover from the school district any part of the money paid for the license.

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

Carl E. Herring, for appellant.

Daniel Horrigan, contra.

REESE, C. J.

This is an action instituted by plaintiff against the defendant school district for the sum of $543.64, being a part of the sum of $1,000 paid to the city of Omaha, and by said city turned over to the school district, to whom it belonged, the payment having been made for a license to sell intoxicating liquors at 914 North Sixteenth street in said city. The petition alleges the payment of the money for the license, which was issued on the 31st day of De-

cember, 1912; that plaintiff took possession of the property named, and entered upon the business of maintaining a saloon therein; that on the 11th day of March, 1913, the city council of said city, by resolution, granted plaintiff permission to remove his license to 1701 Cuming street therein, whereupon plaintiff removed his license and business to that place and proceeded to sell liquors until the 9th day of May, 1913, when said city council rescinded the resolution and ordered plaintiff to close his place of business at 1701 Cuming street, and to cease selling liquors at said place under said license; that the city council on the 12th day of June, 1913, granted a license to Wilber Wood to sell liquors at 914 North Sixteenth street, that being the identical place named in plaintiff's license, and the said Wood took possession of said premises and proceeded to operate and conduct a saloon therein under a license issued to him; that the granting of the license to Wood amounted to a cancelation and revocation of the license granted to plaintiff; that plaintiff was entitled by law and the terms of said license to the exclusive privilege of selling liquors at said 914 North Sixteenth street during the year 1913, unless the same was revoked through or in consequence of plaintiff's fault; that the action of the city council in granting the license to Wood was through no act of forfeiture of plaintiff, and he is entitled to recover back from defendant the proportionate part of the license for $1,000 for the period during which he was denied the privilege and opportunity to the use of said license. Judgment is demanded for the sum of $543.64, with costs.

Defendant filed a general demurrer to the petition. The demurrer being overruled, an answer was filed admitting the averments of the petition as to plaintiff's license, the resolution permitting the removal to 1701 Cuming street, its rescission by the council, but alleging that the rescission was pursuant to a writ of mandamus issued by the district court for Douglas county, citing the case by docket and page number. The averment of a license having been issued to Wilber Wood is admitted, but the materiality

of the allegation is denied. It is alleged that plaintiff's license is still in force, has never been canceled, and his "failure to enjoy his privileges" does not constitute grounds for an action against defendant. On filing of the answer, plaintiff moved for judgment on the pleadings. The motion was sustained and judgment rendered in favor of plaintiff for the sum of $543.64. Defendant appeals.

By the pleadings this statement of facts is established. Plaintiff applied for and received a license to maintain a saloon at 914 North Sixteenth street in Omaha. After engaging in business at that point for some time, the city council granted him permission to remove his saloon to 1701 Cuming street, which was evidently at his request. He left his former place of business and located on Cuming street. By order of the district court the permission to remove was rescinded, which left him without the apparent authority to conduct his business elsewhere than at the place named in his license. After his vacation of his place of business on North Sixteenth street, it was occupied by Wood, who obtained a license to conduct a saloon therein. The permission to remove plaintiff's saloon and his subsequent removal were in violation of law, and furnished no protection to him or his business, as section 5, ch. 50, Comp. St. 1911, requires that the license should state "the place where the liquor is to be sold," and the sale of liquor elsewhere would not be protected by the license. The removal of the saloon and the abandonment of the place of business, named in the license, was of plaintiff's own volition, and his free act. The license remained in force until the end of the license year. His error was in surrendering his possession of the number on North Sixteenth street, and allowing another to obtain rightful possession, who, under the law, might be granted a license upon a compliance with its provisions. Plaintiff, as well as the city council, was charged with knowledge of the law. Can he, after thus voluntarily abandoning the place of business named in the license as the only place where he could lawfully sell liquors, recover from the school district what he has voluntarily paid and as voluntarily rendered

unproductive? This presents an entirely different question from those presented in the cases cited by appellee. In each one of those cases the license was canceled without the procurement or consent of the licensee, and we have uniformly held that, where he is deprived of his license by acts or circumstances over which he has no control, and without his volition, he could recover back what he has paid for a privilege which had been denied him. To this we adhere. But this rule can have no application where the licensee retains his license, voluntarily vacates his place of business, thus rendering his license ineffective, owing to his own act in withdrawing from the premises. If such were the law, a person could procure a license, enter upon the business, and, if the volume of trade was not satisfactory, vacate the place where he is allowed to sell, and recover back such portion of the money paid as the unexpired term of the license year bore to the whole year, which would in effect render the school district the insurer of the success of the business venture. This is not the policy of the law.

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

REVERSED.

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

JOHN HUNT, APPELLANT, V. SCHOOL DISTRICT ET AL., APPELLEES.

FILED JUNE 23, 1914. No. 17,403.

Adverse Possession: INJUNCTION. One who agrees to sell a site for a schoolhouse to a school district, which takes possession thereof and erects its schoolhouse thereon, and uses the same for school purposes for more than 25 years without objection on the part of the vendor and without any demand for the payment of the purchase price, which was merely a nominal sum, is not entitled to an injunction to restrain the district from repairing and enlarging the schoolhouse on the ground that the district has no title to the schoolhouse site.

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

J. F. Boyd, for appellant.

O. A. Williams, contra.

BARNES, J.

Plaintiff commenced this action in the district court for Antelope county to enjoin the defendant from building an addition to its schoolhouse. His petition alleged, in substance, that the school district has never purchased a site for its schoolhouse; that plaintiff is a taxpayer, residing in said school district; that he has no adequate remedy at law to prevent the unlawful expenditure of the taxpayer's money. The county judge, in the absence of the judge of the district court, granted a temporary order of injunction.

The defendant answered plaintiff's petition, alleging, in substance, that the defendant, in the year 1880, entered upon a tract of land consisting of about a half an acre in area situated in the southeast corner of the south half of the northeast quarter of section 23, township 25 north, of range 5 east, in Antelope county, Nebraska, and erected thereon a schoolhouse, and has ever since said date maintained a schoolhouse upon said tract and used said tract of land for school purposes, and has been in the open, notorious, peaceable, exclusive, continuous and adverse possession of said tract; that defendant long since acquired a good indefeasible title thereto by adverse possession, and that said site is now owned by said school district; that plaintiff claims that the school district has no title to the schoolhouse site aforesaid, and has brought this action to enjoin the expenditure of money thereon because of his said claim; that said claim made by the plaintiff interferes with the full and free enjoyment of its property by the school district, and constitutes a cloud upon its title, which defendant is entitled to have removed. The answer concluded with a prayer that the title as to said tract

of land be quieted in the defendant against the claims of the plaintiff, and for equitable relief.

The plaintiff, by his reply, among other things, denied the allegations of the defendant's answer. A trial was had on the issues joined. The court found that the temporary order of injunction should not have been granted; that plaintiff is entitled to the use of the premises in question, and in the event, and if at any time, the school district ceases to use the same for school purposes and as a schoolhouse site, the same should revert to plaintiff. The temporary injunction was dissolved. The title to the premises was quieted in the defendant for its use as a schoolhouse site as long as the same should be used for that purpose. The decree provided, however, that, in case the defendant should abandon the site for school purposes, then the same should revert to the plaintiff. Plaintiff's action was thereupon dismissed at his costs, and he has brought the case to this court by an appeal.

The bill of exceptions discloses that when the defendant's schoolhouse, which it sought to repair, was built, the tract of land in question was owned by the Burlington & Missouri River Railroad Company, for which one Michaelson had a contract of purchase. The plaintiff testified that he was a joint purchaser of the land, and that the contract was taken in the name of Michaelson for their mutual benefit; that when the schoolhouse was erected it was agreed between himself and the moderator and treasurer of the school district that, as soon as he obtained title to the land, he would sell the tract on which the schoolhouse was built, consisting of about half an acre, to the school district; no other agreement was ever made, either written or oral; that the schoolhouse was built in 1887, and the following spring the plaintiff helped to put the seats therein. Michaelson made the payments upon his contract with the Burlington railroad, and on the 21st day of November, 1887, obtained a deed for the quarter section of land above described, and thereupon, on the 20th day of June, 1888, Michaelson and wife conveyed the south half of the quarter section to the plaintiff.

It thus appears that, at that time, the district was entitled to a deed for the tract of land occupied as a schoolhouse site upon payment of the reasonable value thereof to the plaintiff. It also appears that the value of the tract of land so occupied by the defendant, at that time, was about $2.50. The plaintiff testified that he gave his consent to the schoolhouse being placed on the tract in question, and that he continued to act as a director of the school district, and in the meantime became the owner of the premises where the schoolhouse had been placed; that no other agreement was ever made. It appears that the school district continued to use the property, and plaintiff let it go that way. He said he never received a cent of rent for the tract in question. Witness further testified that he had been an officer of the school district during the last eight or nine years; that last fall he told the officers that they must move the schoolhouse off; that he was not very friendly with the officers of the district at that time. On redirect examination he stated that the arrangement was made between himself and Novell and Pete Thompson, and that it was agreed that when he got title, if they wanted to buy the site, they should buy it, and if they did not want to buy it, and he wanted to sell it, they should either buy it or take the schoolhouse off; that last spring he demanded $50 for the site, and told them that if they did not pay him that amount they should move the schoolhouse away.

We find from the record that as early as June, 1888, the plaintiff had the right to demand payment for the tract of land in question; that he neglected to make any such demand, and since that time has acquiesced in the claim of the district to be the owner of the schoolhouse site. It appears that the plaintiff, as well as the school district officers, have for more than 20 years acquiesced in the situation, and until the plaintiff became unfriendly with some of the school district officers he made no objection to the use of the school site for school purposes. It is true that the matter of the payment for the land was never discussed, and that question was never raised between plain-

tiff and the school district until just before the commencement of this action.

We are of opinion that the plaintiff's claim of possession of the schoolhouse site, at this remote period, cannot be maintained. It is evident that the district has acquired the right to use the site by prescription, and that the plaintiff cannot now maintain this action.

The judgment of the district court is therefore

AFFIRMED.

DORA ADLER, APPELLEE, V. MORITZ KOHN, APPELLANT.

FILED JUNE 23, 1914. No. 17,725.

1. **Vendor and Purchaser:** TITLE: PURCHASE MONEY. Ordinarily a contract for the sale and purchase of real estate requires the vendor to execute and tender to the vendee a deed conveying to him a good merchantable title to the premises, and until such deed is tendered to the purchaser he cannot be required to pay the purchase price named in the contract.

2. ———: ———: RIGHT TO MONEY IN ESCROW. When a part of the price has been deposited in a bank in escrow, to be paid over to the vendor upon the delivery of a deed to the vendee conveying to him a good merchantable title, the vendor is not entitled to claim a forfeiture of the sum so deposited until such a deed has been tendered.

3. ———: ———: ———: RESCISSION. Where the vendor, failing to execute and deliver such a deed to the vendee, proposes to rescind the contract, and such proposal is assented to by the vendee, and the contract is rescinded, ordinarily the vendor will not be entitled to recover that part of the purchase price which has been deposited in the bank in escrow.

4. ———: ———: ———: ———. The execution and delivery to the bank, where the escrow is deposited, of a deed to the premises after such rescission will not entitle the vendor to maintain an action to recover the amount of the deposit.

APPEAL from the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed, and decree entered.*

Hainer & Craft, for appellant.

F. A. Boehmer, A. M. Morrissey, F. M. Tyrrell and *Field, Ricketts & Ricketts, contra.*

BARNES, J.

This was a suit in equity brought by Dora Adler against Moritz Kohn and the Central National Bank of Lincoln to recover the sum of $650, with interest from October 26, 1911, on a contract for the sale of certain real estate, and to have the contract canceled.

Plaintiff alleged in her petition that she was the owner of lot 8, block 85, in the city of Lincoln, and that on July 26, 1911, she and her husband, Moritz Adler, entered into a written contract with Moritz Kohn, whereby she agreed to sell and convey said real estate to said Moritz Kohn by a good and merchantable title. The contract, which was made a part of the petition, recites, in substance, that the party of the first part agrees to sell and convey unto the second party, upon the performance of the covenants hereinafter set forth, the property above described. The second party agrees to pay as the purchase price of said property the sum of $7,650, in the following manner, to wit: $650 shall be paid in cash on delivery of this contract, the same to be placed in the Central National Bank of Lincoln, Nebraska, together with a copy of the contract in escrow until the abstract of title to said premises has been examined and approved by the second party, and the balance of $7,000 shall be paid in cash on or before the 20th day of August, 1911, when the deed from Mrs. Adler to the premises shall be delivered to the second party, the said $650 so deposited in the bank shall be paid over to Mrs. Adler on the 20th day of August, 1911, and if the second party fails to pay the balance of $7,000 by said date and take up his deed he shall forfeit the $650 so paid in escrow, and said money shall be paid to the first party to cover damages sustained by her in the sale of this property by first party to the second party. The contract also provided for the payment of delinquent taxes on said property, each party to pay one-half of the same. The first party agreed to convey $8,000 worth of

fire insurance on said property and $5,000 worth of tornado insurance thereon to the second party; second party to pay the first party the unearned premium due on the policies. The petition further alleged that the defendant paid to the Central National Bank as a part of the purchase price, and as a forfeit, the sum of $650. It was alleged that Laura Kohn is the wife of Moritz Kohn. It was also alleged that thereafter, on the 20th day of August, 1911, plaintiff and defendant entered into an oral contract, by the terms of which the performance of the first contract and the payment of the money therein mentioned was extended until such time as the plaintiff could secure a deed duly signed and acknowledged by Moritz Adler, her husband, who was then in Austria. It was alleged that the defendant had caused the contract to be recorded in the office of the register of deeds, and that the same was a cloud on the plaintiff's title. It was further alleged that on August 25 and September 22, 1911, the defendant examined and approved the abstract of title to the premises; that plaintiff has always been and still is ready and willing to perform the agreement on her part on being paid the remainder of the purchase price pursuant to the agreement. Finally, it was alleged that on or about the 26th day of October, 1911, plaintiff tendered to defendant and deposited in the Central National Bank a warranty deed showing a good and merchantable title to said property, together with an abstract of title showing said plaintiff had a good and merchantable title to said property, but the plaintiff then and there and ever since has refused to accept said deed or pay the balance of the purchase price.

The bank filed an affidavit and disclaimer showing that it held the money and had no interest in the controversy, and was ready and willing to pay the $650 to the one that the court should decree was entitled to receive it.

Defendant Kohn answered setting forth, in substance, an admission of the making of the contract, and its recording as pleaded; alleged that he had deposited the $650, in accordance with the terms of the contract, in escrow in the

defendant bank; that Laura Kohn is, and was during all the times mentioned, the wife of Moritz Kohn, and denied generally all of the other allegations of the petition. Defendant further alleged that Dora Adler and Moritz Adler were husband and wife, and constituted one family; that the lot mentioned in the petition was and is the homestead of said Dora and Moritz Adler, under and by virtue of the homestead laws of the state of Nebraska; that on July 26, 1911, the time of the execution of the contract sued upon, plaintiff represented to defendant that she had in her possession a power of attorney in due form of law and fully executed by her husband, Moritz Adler, authorizing and empowering her to sell and convey said lot, and that she thereupon agreed to execute and deliver to defendant on August 20, 1911, a warranty deed duly and fully executed in accordance with the usage and custom of the country, and in the English language, for said premises, and accompany the same by an abstract of title duly executed and certified by a competent abstracter, showing the title conveyed by said deed to be a good and merchantable title conveying a perfect title of record from said Dora and Moritz Adler, as husband and wife, to the defendant Moritz Kohn.

By defendant's answer it was further alleged that Dora Adler did not have and did not acquire a valid power of attorney from said Moritz Adler authorizing such conveyance; that the instrument which she then had and held was prepared and written or printed in the German language, and not in the English language, and was not in the form of a warranty deed used and employed in the state of Nebraska for the conveying of real property, and was an agreement which by reason of its terms, and the fact that it was in the German language, was not admissible to record in the deed records of Lancaster county, Nebraska, and was not such a deed as had been agreed upon by and between the parties to the contract; that on August 20, 1911, plaintiff applied to the defendant, Moritz Kohn, and requested further time within which to secure a deed duly signed and acknowledged by Moritz

Adler, her husband, and which deed, when executed by herself and husband, would fully and duly convey a perfect legal title to the premises to the defendant, subject only to the taxes mentioned in the contract; that thereupon defendant extended the time within which plaintiff could comply with her contract until the 20th day of September, 1911; that on the 22d day of September, 1911, plaintiff tendered to the defendant an instrument purporting to be a deed for said premises which deed was executed partly in the English and partly in the German language, and was not in the form commonly used in making conveyances and deeds in the state of Nebraska, and was not subject to be recorded in the office of the register of deeds of Lancaster county; that the register of deeds, to whom it was offered for registration, refused to record the same; that plaintiff has not complied with the contract for a good and merchantable title.

Defendant further alleged that he had been all along ready and willing to close up the transaction in accordance with the contract, and to pay the full amount called for by the same in cash upon delivery to him of the deed contemplated by the contract for a merchantable conveyance which was subject to record; that the plaintiff, failing to produce such a deed, proposed to the defendant that he release her from the contract, and that she could and would sell the premises to other parties; that thereupon the defendant assented to said release, and delivered to plaintiff the key to the premises, which she had theretofore handed to him, and also immediately thereafter, at the request of the plaintiff, duly executed and delivered to her a quitclaim deed to said premises, which deed was retained by the plaintiff and her attorney; that the contract for the sale and purchase of the property sued upon in this action was thereby rescinded and abandoned, and that neither of the answering defendants have or make any claim to any part of the premises in question; that, by reason of the foregoing facts, plaintiff has no right, claim or title to the money deposited in the Central National Bank, which

is the money in controversy, and that defendant Moritz Kohn is entitled to have said money repaid to him.

Plaintiff for a reply denied each and every allegation of new matter contained in the answer. The cause was tried to the court without the intervention of a jury, and on February 8, 1912, judgment was rendered in favor of the plaintiff and against the defendant Moritz Kohn for the sum of $650, with interest from October 26, 1911, together with the costs of suit; and it was further decreed that the written contract made between the parties on July 26, 1911, be canceled and set aside and held for naught. From that judgment the defendant Moritz Kohn has appealed.

Defendant contends that the evidence does not sustain the jugdment, and the decree should have been for the defendant. The testimony discloses that plaintiff was the owner of the lot in question, and her husband was absent in Austria; that they wished to sell their property, and plaintiff commenced negotiations to that end with the defendant Kohn. On the 26th day of July, 1911, plaintiff and defendant went to the office of F. A. Boehmer, plaintiff's attorney, in the city of Lincoln, where they made the contract, which is the basis of this suit. The plaintiff at that time claimed to have a power of attorney from her husband to sell and convey the premises. The contract, among other things, provided that plaintiff and her husband should convey to the defendant Kohn a good merchantable title. It also contained a clause that Kohn should deposit $650 in escrow in the Central National Bank, together with the contract, and if he failed to pay the plaintiff $7,000, the balance of the purchase price, by August 20, 1911, and take up the deed, he should forfeit the money so deposited in escrow. It appears that on August 20, 1911, Kohn was ready and willing to close out the contract in accordance with its terms, but plaintiff was not prepared to proceed, and on August 26 they met again at the office of Mr Boehmer, and it there developed that the power of attorney under which Mrs. Adler had been acting was written in the German language and the register of deeds of Lancaster county declined to record the

same, although it was accompanied by a purported translation. Thereupon, Boehmer, as attorney for Mrs. Adler, suggested that he make out a deed in English and have it sent to Mr. Adler in Europe for due execution. To this Mr. Kohn assented, and thereupon Boehmer prepared a deed in the English language conveying the property to Kohn in accordance with the terms of conveyances used in this country, and the same was sent to Mr. Adler for execution. It was agreed that the transaction be held in abeyance until the deed so prepared could be returned, which the parties thought would require about 30 days. Mr. Boehmer testified, in substance, that it was agreed at that time that the execution of the deed, including the acknowledgment, should be in the English language. He further testified that when the deed came back the acknowledgement written by him was not filled out; that there was another acknowledgement on the back of it which was in the German language, and was different from the form of acknowledgement which he had prepared in the English language; that it was different in language and form.

On September 22, 1911, Mrs. Adler and Mr. Kohn again met in the office of Mr. Boehmer, and Mr. Kohn was ready and willing to close the entire transaction. He produced a certificate of deposit for $7,000 on the bank, and was ready to proceed, but on examination it was found that the deed returned by Mr. Adler, signed and certified as above stated, was not in accordance with the usual practice and custom, and the register of deeds refused to record it for precisely the same reason that he had refused to record the power of attorney. Thereupon a consultation between the parties was had, in which attorney Strode and Judge Stewart participated. Mr. Kohn insisted upon a deed which he could have recorded; in other words, he insisted upon such a conveyance as is customary in this country. The only positive conclusion reached was that the officer would not record the so-called deed. Thereupon the plaintiff proposed to defendant that if he would release his contract she would sell the property to another,

and asked him to give her the key, which had been previously turned over to him. Mr. Kohn promptly agreed to this proposal, and on the suggestion of Mr. Boehmer executed a quitclaim deed to the premises in question in favor of the plaintiff, which deed was left with her attorney and retained by him, since which time Mr. Kohn has made no claim whatsoever to the property.

The testimony of Mr. Boehmer was corroborated by Doctor P. L. Hall, president of the Central National Bank, in which the deposit was made. On October 27, 1911, the plaintiff executed and acknowledged before her attorney, Frank M. Tyrrell, a deed to the premises, which Tyrrell took to the bank, evidently for the purpose of laying a foundation for this action. This deed was made more than a month after the rescission of the contract. There is no testimony in the record showing or tending to show that plaintiff ever tendered to defendant Kohn any deed conveying a merchantable title to the premises. It was not shown that she ever made any assignment or offer to assign the insurance policies mentioned in the contract.

As we view the evidence, it shows that Mr. Kohn was ready and willing at all times to carry out the contract until Mrs. Adler suggested that it be abandoned, and thereupon he duly quitclaimed the premises and delivered the quitclaim deed to plaintiff's attorney. We fail to find any evidence in the record showing or tending to show that Kohn, at any time, made default in the terms of his contract. The testimony as to the rescission and abandonment of the contract does not seem to be denied, and plaintiff produced no competent evidence to show that she received any damages by the failure to consummate the contract.

Some stress seems to be placed on the proposition that defendant's attorneys examined the abstract of title and approved of it, and it is contended that for that reason plaintiff was entitled to the $650 which had been deposited in the bank. But it was not the abstract that the defendant was purchasing. What he contracted for was the con-

veyance of a good merchantable title to the premises in question, fortified by a proper abstract, and until such conveyance was tendered to him he was not in default, and plaintiff was not entitled to the money so deposited.

In *Justice v. Button,* 89 Neb. 367, the court said: "Ordinarily there is an implied agreement on the part of the vendor in every contract for the sale of land that he will transfer a good title to the vendee, unless the contract relieves the vendor of that obligation." It was further said: "A good title is one that can be sold to a reasonably prudent man who might desire the property, or a title that can be mortgaged to a person of reasonable prudence as security for the loan of money."

We think that the rule thus announced is sustained by the great weight of authority in this country. The deed contemplated by the contract in this case was never executed and tendered to the defendant Kohn, and the testimony is without conflict that he stood ready and willing to complete the transaction on the delivery of the contemplated deed. He appeared at the time and place designated, having with him the money ready to be turned over to the plaintiff, and complete the transaction. On this proposition there is no dispute.

It is elementary that equity will relieve against forfeiture, especially where there is no evidence of any loss or damage. In *Eaton v. Redick,* 1 Neb. 305, it was held that, when the vendor exercised his option to rescind the contract, the parties stand as if no contract had ever subsisted between them.

In *Reiger v. Turley,* 131 N. W. 866 (151 Ia. 491), it was held: "The law abhors forfeitures, and will enforce them reluctantly and only when the right thereto has been clearly contracted for and when the party claiming it has complied with all the conditions imposed upon him by contract or statute. On rescission of a contract to convey land, vendor was bound to return an advance payment made."

As we view the record, the plaintiff was not entitled to the forfeiture, and the money in question should have been

returned by the Central National Bank to the defendant. The judgment of the district court is therefore reversed, and a decree will be entered in favor of the defendant.

JUDGMENT ACCORDINGLY.

REESE, C. J., and ROSE, J., not sitting.

ELIZABETH C. RHINE, ADMINISTRATRIX, APPELLEE, V. A. SCHALL COMPANY, APPELLANT.

FILED JUNE 23, 1914. No. 17,768.

1. **Master and Servant:** ACTION FOR DEATH: NEGLIGENCE OF MASTER: BURDEN OF PROOF. In an action against an employer to recover damages for the death of an employee alleged to have been caused by the negligence of such employer, the burden is on plaintiff to show some act of negligence as the proximate cause of decedent's death by a preponderance of the evidence.
2. ———: ———: ASSUMPTION OF RISKS. In such a case the decedent will be held to have assumed the ordinary risks incident to the business in which he was employed.
3. ———: ———: EVIDENCE: DIRECTING VERDICT. When in such a case the plaintiff fails to show, by some competent evidence, negligence on the part of the employer, it is the duty of the trial court to direct the jury to return a verdict for the defendant.

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

Smyth, Smith & Schall, for appellant.

Amos Thomas, Weaver & Giller and *Crofoot & Scott, contra.*

BARNES, J.

This action was commenced in the district court for Douglas county by the widow of Joseph Rhine, deceased, as the administratrix of his estate, for damages resulting from his death while employed by the defendant. The amount sued for was $10,000. A trial resulted in a ver-

dict and judgment for $1,500, and the defendant has appealed. It appears that at the conclusion of plaintiff's evidence the defendant filed a motion requesting the district court to direct a verdict in its favor. The motion was overruled, and thereupon the defendant introduced its testimony, and the motion was renewed, and was again overruled.

It is contended by the defendant that the court erred in overruling its motions, for the reason that the evidence is insufficient to sustain a judgment in favor of the plaintiff. The record discloses that the defendant is in the business of cutting, dressing, handling and dealing in stone, having a yard and factory in the city of Omaha, where heavy blocks of stone are received, sawed and planed, and where defendant employs a large number of men. The stones when they come to the yards are handled and moved by means of a large traveling crane, so arranged as to carry them to any part of the ground, and to the saws where they are cut into the desired shapes and dimensions, and from the saws to any place where it may be necessary to store them.

There is no conflict in the evidence as to the manner in which plaintiff's decedent met his death. Certain slabs or blocks of stone 4½ to 5 inches in thickness, 4½ to 5 feet wide, and 9½ to 11 feet long, of corresponding weights, were removed from the saws and placed on edge against the timbers of one of the piers or frames supporting the tracks on which the carriers ran in removing the stone from place to place as necessity or convenience required. When so placed against the uprights referred to, they rested upon stringers or timbers laid upon the ground, which were solid, being covered with chips, sprawls, and refuse of stone, and the dust accumulated from stone sawings. Some three or four of the slabs had been laid down on the stringers, and preparations were being made to transfer them to the saws. One of the slabs was left standing on its edge leaning against the timbers. There was some little space or distance between those lying down and the ones standing against the timbers. The decedent,

Mr. Rhine, went in between them for the purpose of adjusting the apparatus by which they were to be lifted, and was working with his back toward the standing stone when it fell upon him and crushed him so badly that he almost instantly died.

The evidence is without conflict that the decedent had been employed by the defendant for a long time as a hookman; that, when the stones were brought to the yard on flat cars, decedent, with his assistants, took charge of the moving of the large blocks from the cars to the yard. He selected the place where they were to be deposited, and, by the use of a whistle as a signal, directed the engineer, who was situated in a room on the elevated tracks, where and how the stones should be placed. He also had charge of the signals by which directions were given to the engineer in handling all stones in the yard, both before and after they had been to the saws, and he and his assistants followed the general orders and directions of the superintendent, but in all matters of detail decedent exercised his own judgment.

It was alleged in the plaintiff's petition that all of the slabs or stones were of great weight, and that for their proper support it was necessary that they should be placed on firm, solid ground; and, further, that they should be placed on suitable heavy, sound timbers of sufficient size and length to create a solid and stable foundation; that the defendant company negligently and wrongfully failed to supply the place with suitable, solid, stable ground on which to lay said timber, but, on the contrary, negligently and wrongfully filled the place where said slabs were to be located with soft dirt and refuse, and thereby negligently and wrongfully directed and instructed the said decedent to locate and place said slabs thereon. It was also alleged that defendant negligently and wrongfully failed and neglected to furnish sound and suitable timbers of adequate size and length on which to pile said slabs of stone, but, on the contrary, said defendant negligently and wrongfully furnished a place as a support for slabs to be placed thereon of short pieces of wood that were

rotten and unsound and of inadequate dimensions as to length, breadth, and thickness.

By its answer defendant admitted its corporate character, its line of business, that plaintiff was the widow of Joseph Rhine, that prior to his death Rhine was in the service of the defendant, and that he received the injuries from which he died. All other allegations of the petition were denied, and contributory negligence on the part of the decedent was alleged, as well as assumption of the risks incident to his employment. The reply was a general denial.

On the trial one John L. Jackson was called as a witness for the plaintiff, and testified, in substance, that he lived in Benson, Nebraska, had worked for the defendant nine years all told; that he was working for the company at the time of the death of Mr. Rhine; that it was his duty to look after the machine and saw the stone in the sawmill; that he was working under Mr. Foll, who is one of the firm, and who had charge of the yard as general manager; that Foll gave orders as to what was to be done in the yards when he was there, which was most of the time; that there was a traveling derrick which traveled both north and south and east and west, and covered a block one way, east and west, and in the neighborhood of 50 feet north and south; that there was a place provided for piling the stone, which included the uncut stone as well as the cut stone; that there were timbers provided to place the stone in order to keep them off the ground. Some of the timbers were as large as 12x12, some were 12 to 14 feet long, some were outside the frame work, and some were short ones. By outside the frame work was meant that they had some timbers out in the yard that reached from one pier to another. By one pier to another witness said he meant the piers that carried this traveling derrick. The piers were on a rock foundation and were in the neighborhood of 15 feet high. They were in the form of a trestlework for the traveling crane to run on. The stringers were placed on the ground for the stone to rest on; they were placed east and west lengthwise to the yard

and rested on the earth. Witness said, in substance: I was handling the saws. They took the stones out with this crane and placed them on the stringers; that was the way they were required to be set up there, and was the customary way of setting them. The stones were all very nearly 5 inches thick, I would say from 4 to 4½ feet wide, and in the neighborhood of 10 or 11 feet long. I should judge that one of them would weigh about 3,000 pounds. These stones were taken out from my place and put on the stringers. Four of the stones were laid down flat to be put over on the diamond saw. They were so placed on Saturday, some time in the afternoon, and were left there flatwise. I think there were four. I don't know how many were left standing edgewise. There might have been a rough back on the stone setting against the post, but there was only one of that same size that was set up on the edge; that was the stone that fell on Mr. Rhine; that was the stone that stood edgewise against the post standing on the stringers. I did not see the stone until after it fell. I went out as soon as I learned of the accident. Mr. Rhine had been extricated, and had been taken out before I got there. Stone had been handled day after day during the time he was working there with the hooks; that is the way the work was done.

On cross-examination the witness further testified that he did not work with Mr. Rhine, but knew him eight or ten years before the accident; that Baldwin, the engineer, would sit up there in his cabin on the traveling crane; that there was a side-track adjacent to the yards at the east end of the traveling crane; that when a car-load of the stone came in on flat cars it would land at the east end of the traveling crane; that Mr. Rhine had charge of taking the stones off, and doing all that kind of work; that decedent had some other men that helped him; that whenever they started to take one of the big stones off the flat car they would place a grabhook under it, and a signal was given to the engineer with a whistle; it was Rhine who gave that signal. Sometimes his helpers would signal, but ordinarily Rhine was the man that signaled, and then the

engineer would move the traveling crane. The stone would be carried over to some other part of the yard, and when the signal was given the engineer would lower it and place it on the ground there; that for two or three years before Rhine's death he had had that job, but sometimes it was done by John Kolar, but the work was done by Mr. Rhine a greater part of the time; that the timbers on which the stones were placed were of different sizes and dimensions, and they had enough timbers there for a man to get and use them if he thought it was necessary. If Mr. Rhine thought, in his judgment, it was necessary to take timbers to brace them or level them up, there were timbers there he could get to do that; that in handling the stone Mr. Kolar and Mr. Rhine had their work to do, and they just went ahead and did it. "When there was a block of stone to be put up to the mill or to the saw, and I wanted to get rid of it and wanted to have the slabs taken away, I went to either of the fellows who were running the hooks. I would tell them that they were ready and to take them when they wanted to. I would not bother to go to the office and notify Mr. Foll. We never did that. If Rhine and Kolar were running the hooks I would notify them, and tell them it was ready whenever they wanted it. They would come on that information and get it away."

John Kolar testified, in substance, that he and Rhine were both doing the same kind of work; that Rhine had one hook and he had the other; that Rhine had charge of the hooks and the whistles; that the witness did not use any whistle. He said he was working with Mr. Rhine when he was killed—about 4½ feet from him on the east side of the slabs. "The slab that fell on him stood on the west side of him right back of him. When the whistle was blown to lift the load, the stone raised and it was coming over against me. That is all I know. The whole load was being raised at once, about three or four tons. * * * When the stone fell against Mr. Rhine, it shoved the load against me. I got out owing to the fact that there was a block between me and the pile of stone on the other side. * * * I did not see the stone fall; I only heard

a noise, looked up from attending to the hold of my hook, and there he was caught by the hook, and I saw that slab and I started to holler, and then a couple of men came running over and lifted the slab off him. He was pinned in there between the slab that fell over and the four slabs that were in the load." When the slabs of stone came from the mill witness would help Mr. Rhine locate them in the yard; that "there was no particular place where we would pile them. We moved them around from one place to another. That was our work, mine and Joe's. By 'Joe' I mean Rhine. Rhine would find a place and locate them and take them off the car, and either stand them up or lay them down, put them wherever he thought best. When they came to pick out the particular place in the yard where we would pile the stones, we did not go and ask anybody with reference to that. Rhine would look in the yard and determine the place and put them there. We got Mr. Baldwin with his traveler, and picked them up (the stone in question) one at a time, and moved them about four to six feet west. The first one was a rough block. There was one leaning against the trestle work. When Rhine and myself went to work there on Saturday afternoon, we took one of the slabs and moved it about four or six feet west and leaned it up against the one that was already against the post. We took the next one and leaned it up against that. That was the last one we took over. When that was moved over Saturday afternoon we had trouble in making it stand. We took it up three or four times and let it stay leaning over, and it stood right there, and we went to work and laid the other four down and worked there all afternoon. The last one we set over we had some trouble in getting it to stand. It would not stand; it was kind of rough on the bottom, and we had to lean it. It was about eleven feet long, five feet high, and four inches thick." The witness and Rhine were the only ones working there, and Rhine had the whistle and gave the orders.

James R. Baldwin, the engineer in charge of the traveling crane testified: "No one, so far as I could see, touched

the stone at the particular time it toppled over. Mr. Kolar stood on one side and Mr. Rhine on the other. Rhine stood with his back toward the stone that toppled. There was nobody in the yard at that time of day only we three." Witness further testified that the stringers the stones were piled on were all good hard wood, all the way from three to six feet long and from three to six inches through; that there were a lot of them in the yard, and none of them were decayed that he had ever seen; that the ground down there, by reason of the chips of stone and the dirt that had been packed and tamped there in a good solid foundation and made very hard, had been in that condition for years. He further testified that "whenever one of those big stringers came in, 8x12 or 8 inches square, the hookers arranged for them as to where they would be placed. They would find a place to lower it down, and I let it down for them." He further testified that they did the work to suit themselves; that no one gave the orders, but they did it to suit themselves. The witness also testified that he had frequently heard Mr. Foll, the superintendent, talking to Mr. Rhine and the other hookman about being careful, and taking precautions to see that the stones that were placed on edge did not fall.

The witnesses for the defendant corroborated the testimony of the witnesses for the plaintiff, and it thus appeared that plaintiff's decedent understood his work perfectly, had been engaged in the same line of employment for a number of years, and had absolutely a free hand in moving and placing the large blocks of stone wherever he thought it best to place them in the yard. The evidence shows that Rhine himself placed the stone which fell on him, and no other person was at all negligent in handling it.

There is some evidence in the record tending to show that one of the stringers on which the stone was placed was somewhat rotten or decayed, but the stringers were selected by Rhine himself, and he alone was responsible for their selection. The testimony shows that there were sound

stringers in the yard which he could have selected, and if the stone fell because the stringer was unsound that was the fault of Rhine himself.

The plaintiff produced no competent evidence showing or tending to show that defendant had required Rhine to work in an unsafe place; but, of course, it is apparent from the evidence that great care was necessary in handling large heavy blocks of stone in the defendant's yards, and that Rhine knew that fact as well as any one, and assumed the necessary risk of performing his work.

It follows that the district court erred in refusing to direct the jury to return a verdict for the defendant both at the close of the plaintiff's testimony and after all of the evidence had been received. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

REESE, C. J., dissenting.

I find myself unable to agree to the majority opinion in this case, but have neither the time nor inclination to enter upon an elaborate discussion of the evidence, nor the merits of the case. As shown in the majority opinion, the superintendent of the work was one of the owners of the property. He was in the yards daily—practically all the time—superintending the work. It goes without saying that decedent was subject to his orders and directions in the management of the work in the yards. There is no evidence that Rhine assumed authority in the matter of the preparation of the safety appliances of, in, or about, the yards so long as they were under the inspection of the superintendent. True, decedent had worked for defendant for a long time, and in matters of detail under his immediate control often exercised his own judgment, but not when the superintendent was present and directing. In my opinion, the case turned upon the condition of the stringers or foundation upon which the heavy stone slabs rested. The evidence seems to me to be clear

and beyond question that there were two of those stringers upon which the slabs rested—one at either side. Under one side was a heavy piece of hardwood timber, which afforded a sure and safe foundation upon which the great weight of the stones rested. The one on the other side was made up of short pieces of timber of unequal lengths and sizes, and not of sufficient strength to bear the weight without springing and giving down, thus causing the standing slab to topple over and crush the life out of decedent. Added to this unquestioned proof, there was evidence that upon inspection made soon after the accident the pieces of timber composing the weaker side were decayed and rotten. Upon this subject the evidence was conflicting. Whose duty was it to pass upon the weight of the evidence upon this point? Clearly and unquestionably that of the jury. The evidence establishes the fact that the superintendent—one of the owners of the plant—had the fullest opportunity to know of these conditions. It was his duty to know. Is it at all surprising that, under the circumstances, Mr. Rhine should have relied upon him to furnish a place of safety? Who was negligent? The statute provides that all questions of negligence are for the jury. Under those circumstances, what right would the district court have had to step in, without allowing the jury to exercise their proper functions, take the case from them, and direct them how to decide? In my opinion, absolutely none. Then, what right has this court to exercise that power, usurp the functions of the jury, and pass upon the questions of fact? In my opinion, absolutely none. We have said so often, it is useless to repeat it, that all questions of fact are for the jury. The statute says that all questions of negligence are for them. Why not let these salutary rules stand?

GEORGE W. FRANCE, APPELLANT, V. DAVID LARKIN, APPELLEE.

FILED JUNE 23, 1914. No. 17,809.

1. **Execution:** RELEASE OF EXEMPT PROPERTY. Where property seized under an execution is claimed by the execution debtor as exempt, and the same is set off to him and is released by the officer, it is relieved from the lien of the execution.
2. **Replevin:** EXEMPT PROPERTY RELEASED FROM EXECUTION. In such a case the execution creditor cannot maintain an action in replevin against the execution debtor to recover the possession of the property.
3. ———: STIPULATION OF FACTS: TRIAL TO COURT. Where a demurrer has been sustained to plaintiff's petition in replevin, he may waive a jury and enter into a written stipulation fixing the value of the property and the amount of damages sustained by the defendant, and thus give the court the power and jurisdiction to render a judgment in accordance with the stipulation.

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

France & France, for appellant.

W. L. Kirkpatrick, contra.

BARNES, J.

Appeal from a judgment of the district court for York county in an action of replevin. It appears that on the 4th day of November, 1911, plaintiff filed his petition, in substance, as follows: That he has a special interest in a certain black mare, about seven years old, called Bessie; that the plaintiff recovered a judgment in the county court of York county, Nebraska, against the defendant on the 1st day of July, 1911, for the sum of $183.85, and costs of suit taxed at $——; that on the 12th day of July, 1911, he caused the judgment to be transcripted to the district court for York county, and on the 25th day of July, 1911, an execution was issued thereon and placed in the hands of the sheriff of said county; that the sheriff duly levied

the execution upon the property above described as the property of the defendant, David Larkin; that Larkin filed an affidavit in exemption, in which it was alleged that he was a resident of the state of Nebraska, and the head of a family, and said property was specified as exempt; that thereupon the sheriff, as by the statutes in such cases made and provided, delivered said property to the defendant. Plaintiff alleged that the affidavit was false, and that the said defendant is not the head of a family and not entitled to the exemptions provided by the laws of the state of Nebraska as such; that defendant wrongfully detains said property from the plaintiff, and from being applied to the payment of the plaintiff's judgment against the defendant; that plaintiff is entitled to the immediate possession of said property, and is entitled to have such property or the value thereof applied to the payment of his judgment; that the property was not taken in execution on any order of judgment against the plaintiff; or for the payment of any fine, tax or amercement assessed against him, or by virtue of any other order of delivery issued in replevin, or any mesne or final process. Plaintiff prayed judgment for the return of the goods and chattels, or the value thereof, if the same could not be returned, and for his damages and costs.

To this petition the defendant demurred, for the reason that it did not state facts sufficient to constitute a cause of action. The defendant's demurrer was sustained, and thereafter the parties stipulated as follows: "Comes now the parties by their attorneys of record, and hereby stipulate and agree, for the purposes of this suit, that the value of the property taken under the writ of replevin herein was $130 at the time it was taken under said writ, and that the damages to the defendant for the detention of said property is one cent." Thereupon the court rendered a judgment in favor of the defendant for the return of said property, and in case a return could not be had that defendant recover of the plaintiff the value thereof, with interest at the rate of 7 per cent. from the 26th day of July, 1911, amounting to the total sum of $134.95, and

that the plaintiff pay the costs of the action taxed at $35 40. The plaintiff excepted to the judgment, filed a motion for a new trial, which was overruled, and has brought the case to this court by an appeal.

The first question presented for our determination is: Can an execution creditor maintain replevin for property which has been released from the levy by the sheriff as property exempt to the execution debtor, where the creditor's only property in and right to the possession of the property replevied was acquired solely by virtue of the levy of the execution? The interest of an execution creditor in property levied on by the sheriff is not a legal one; but, if he has an interest at all, it is merely an equitable one. *Hicklin v. Nebraska City Nat. Bank,* 8 Neb. 463; Cobbey, Replevin (2d ed.) secs. 172-184. Where property seized under execution is claimed by the execution debtor as exempt, and the same is set off to him by the officer, it is relieved from the lien of the execution. 17 Cyc. 1120; *Hall v. Hough,* 24 Ind. 273.

It is contended, however, by the appellant, that "the law of replevin applicable to rights of mortgagees applies in this case; that, after the mortgagee has become entitled to the possession of the mortgaged property he may enforce such right and recover possession of the property in an action of replevin as against the mortgagor." That a mortgagee may maintain replevin for mortgaged property after condition broken is too well settled in this state to need any citation. But this rule is hardly applicable in the case at bar. A mortgage conveys an interest in the property to the mortgagee, while the mortgagor retains possession of it, and is entitled to such possession until the conditions of the mortgage are broken, and upon the happening of that event the mortgagee is entitled to maintain replevin to obtain possession of the mortgaged property. The levy of an execution, however, gives the officer who makes the levy a special interest in the property and the right to the possession of it, and he may maintain replevin as against third persons who have interfered with its possession; but the execution creditor has never been

held to be entitled to the possession of the property, and therefore he cannot maintain replevin.

It is contended, however, that unless the plaintiff can maintain the action he is without a remedy. We think that this is not the case. If the execution debtor has made a false affidavit it would seem that plaintiff has an effective and summary remedy under the provisions of the statutes providing for proceedings in aid of execution. Rev. St. 1913, secs. 8111-8128. Those sections provide for summoning the debtor to make disclosure as to his property, and provisions are made therein which it would seem are amply sufficient to enable the execution creditor to reach the property of the debtor, which as a matter of fact is not exempt by law, to be applied in satisfaction of the execution.

Finally, it is contended that the judgment of the district court is not sustained by sufficient evidence, for the reason that it is provided by section 7831, Rev. St. 1913, that "if the property has been delivered to the plaintiff, and judgment be rendered against him on demurrer, * * * the court shall * * * impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then, and in either case, they shall assess such damages for the defendant as are right and proper, for which, with costs of suit, the court shall render judgment for the defendant." It is argued that because no application was made on the part of the defendant for a jury, and none was impaneled, the judgment of the district court was void; that, in order to have a valid judgment in a replevin suit, the provisions and requirements of our statutes must be strictly followed. We think this contention is beside the mark. It appears that, when the defendant's demurrer to the plaintiff's petition was sustained, the parties, as it was their right to do, entered into the stipulation set forth at the outset of this opinion.

The plaintiff having entered into that stipulation, he is bound by its terms, and the court was thereby given the power to render judgment without the intervention of a jury. Finding no error in the record, the judgment of the district court is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

FRED L. NESBIT, APPELLEE, V. FRANCIS T. GIBLIN ET AL., APPELLANTS.

FILED JUNE 23, 1914. No. 17,823.

1. **Master and Servant**: RESIGNATION OF EMPLOYEE: ACCEPTANCE. Where one employed by the year as a traveling salesman is criticized for granting a minor concession to a customer of his employer, writes to such employer offering conditionally to resign his position, and the employer does not accept the offer but continues the salesman in his employment for more than 30 days, and accepts the benefits of his services, the employer cannot thereafter avail himself of the conditional offer to resign.
2. ———: DISCHARGE OF EMPLOYEE: DAMAGES. In such a case the employer cannot discharge the employee without responding in damages, unless the employee is guilty of some misconduct subsequent to the making of his conditional offer of resignation.
3. **Evidence** examined, and found insufficient to authorize the discharge of the employee.
4. **Instructions** given and refused examined, and found to be without reversible error.

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

Will H. Thompson and *Will E. S. Thompson*, for appellants.

McGilton, Gaines & Smith, contra

BARNES, J.

This action was brought in the district court for Douglas county to recover damages alleged to have been sustained by plaintiff for his wrongful discharge from his employment as a traveling salesman of the defendant company. The plaintiff's petition was in the usual form in such cases. By defendant's answer it was alleged that plaintiff had tendered his resignation as defendant's salesman on May 21, 1910, and that defendant had accepted plaintiff's resignation; that plaintiff had been guilty of unjust criticism and insolent conduct toward his employer; that defendant had been guilty of using part of his time in his own private affairs. The reply was in effect a general denial. There was a trial to a jury, which resulted in a verdict and judgment for the plaintiff for $1,054.13, and the defendant has appealed.

It appears that on the 21st day of December, 1909, defendant, Giblin & Company, employed the plaintiff as a traveling salesman for one year, at a salary of $2,100, payable in monthly instalments of $175 a month. The contract was in writing.

The bill of exceptions discloses that in May, 1910, certain differences arose between plaintiff and defendant out of a sale made by the plaintiff to the firm of Abel & Doyle of Indianapolis, Indiana. Plaintiff had been continuously in the employ of the defendant, with the exception of one year, for the ten years preceding the written contract of December 21, 1909. It is apparent that he had been a trusted employee, and had often advised with his employers in respect to their business affairs. When the plaintiff visited the firm at Indianapolis, known as Abel & Doyle, he took a certain order for furnaces, which was submitted to his employers under a blank form, and subject to their approval. The above mentioned sale was the subject of a letter to plaintiff from defendant, written May 16, 1910, which contained some very caustic criticisms of plaintiff's method of doing business. The letter contained this language:

"When all is said and done, we are the ones who are paying your salary and expenses, and we can only do so out of the profit we make on the goods we sell, and your inclinations are very strongly in the way of giving to customers everything possible that you can give them. * * * We wish you would bear this carefully in mind, and before making concessions to customers find out what we think about the matter before making these concessions. This refers particularly to what you have done for Haines and also what you have done for Abel & Doyle. During the past year we have sold Abel & Doyle our 7 series furnaces on exactly the same terms we sold the other furnaces, and never had any complaint about it, nor any suggestions that we should do any differently. We find that you have given them 5% additional on the 8 series furnaces and believe this 5% was given to them without any need whatever and is just so much thrown away. * * * We certainly are not at all pleased that you go to old customers and reduce prices to them which we consider wholly unnecessary, and it leads us to believe that it might be better not to have sent you there at all. On the order you have sent in, the difference is $63.19, an wholly unnecessary allowance."

When plaintiff received this letter, which seemed to reflect both on his ability as a salesman and his integrity, he wrote to his employers with respect thereto. The letter was written on May 20, and, among other things, contained the following statement:

"By thus making them this discount, I swung them over to the 8 series so that they will handle that instead of the 4 series, which they declared they would not handle more than to carry the sample at the old price. Now, by handling this in the way I did, they will use the 8 series and at a price which is an advance on the same size furnaces and the same size fire pots, with the same amount of iron of about 7½% over last year's price." The letter also contained the following: "After getting this much of an advance on this contract and handling it in this way, you tell me in your letter that I deliberately cut the price and

am not working to your interest. Any such thought or idea of my deliberately cutting the price and not working to your interest is as far from the truth as you are today from Halley's comet, and if there has ever been any deal made or transaction by me since I have been in your employ in which your interest has not been fully considered to the best of my judgment, it has been because my judgment has not been good, and not because my intentions were wrong. * * * While I have a contract with you yet for the balance of this year, I should feel guilty to accept the salary and have you feel as you intimate in this letter that you do feel, and if you have any such feeling, I would be glad to have you accept my resignation and I will remain here until I hear from you, for I do not feel that I could go to Minneapolis and put up the fight that is necessary—or any other place—in the interest of your business, with any such an insinuation resting against me as I infer from your letter."

It will be observed that this letter contains an offer to resign, coupled with the condition, however, that the writer will remain where he is until he receives a reply. The defendant did not answer this letter. In a few days the plaintiff went to Minneapolis and transacted business there for the defendant in the way of an adjustment of some former sales, and while there again wrote to the defendant. Meanwhile no intimation was made by the defendant that it intended to accept the plaintiff's conditional offer to resign, but defendant wrote again finding fault with plaintiff's sales at Indianapolis. Without quoting these letters, it is sufficient to say that they contained repeated faultfindings with plaintiff's conduct, and also were full of criticisms and somewhat insolent statements. On May 29, the plaintiff wrote the defendant as follows:

"I wish to say in the above paragraph you have assumed and said things that have not been proven, cannot be proven, and while I have no money to give away to any one, I will send you a check at any time for $100 if you can prove the above assertion, that they (meaning Abel & Doyle) intended to use all along the 8 series. You say

farther along in your letter, on page 3 of same, they had no intention of ordering 4 series furnaces and would not have done so in any case. They intended ordering just what they did order and they got from me $57.93 better price than they would have been willing to pay, and it was this action of which you complained. If this statement is true, as above stated, then what I have said to you is not true and I will not rest under the above accusation from you or any one else. Unless I hear from you immediately on receipt of this letter, retracting the above statements, which I defy you or any one else to prove, as soon as I am finished up with the transactions here in connection with the Gilmore deal, I will leave immediately for Indianapolis, Indiana, and procure affidavits substantiating my statements to you."

On June 4 defendant telegraphed to plaintiff that no answer would be given to his letter. The plaintiff then went to Indianapolis and procured some affidavits respecting the matter and forwarded the same to his employers. In pursuance of his employer's business, Mr. Nesbit went to Minneapolis and settled an old and complicated deal whereby he collected some $900 for his employers. It appears that plaintiff's wife had been ill and in the hospital since November, and in June he wrote to his employers to the effect that he wished to take his wife home, and it would be necessary to use one or two days in his affairs at Omaha in straightening out the house so his wife could live in it. The plaintiff returned to Omaha about June 8, and, with the exception of a day in straightening up his affairs, he was engaged in his employers' business, taking an order at Council Bluffs, Iowa, and likewise one at Onawa, which were sent to the defendant, who on June 20 wrote the plaintiff as follows: "In a letter addressed to us from Milwaukee, dated May 21, you tendered your resignation. We write you to say that we hereby accept this resignation to take effect immediately. Please send to us at once all books, letters of introduction, etc., belonging to us, and send statement of your expense account to date."

To this letter plaintiff replied as follows: "Answering your letter of June 20 with reference to my letter from Milwaukee on May 20 in reference to my tendering my resignation at that time, I did so, and would have been very much pleased to have had you accept it at that time which I asked you to do and said I would remain in Milwaukee until I heard from you. In your answer you did not accept my resignation. I therefore kept on at work. I would say at this time that conditions have changed and the opportunities I had at that time have been lost and under the present conditions I am still in your employ, working under contract of 1910, and am waiting here for your directions as to route, also expense money."

To this letter defendant replied on June 24 as follows: "Answering yours of June 22, your resignation was presented to us and accepted and your services with us are ended. * * * We have today inserted a notice in the trade papers, stating that you are no longer in our employment," etc.

It will thus be observed that the basis for the discharge of plaintiff in both of defendant's letters was that they had accepted his offer to resign on May 20. Notwithstanding this claim, defendant wrote to plaintiff on June 6 in relation to some advertising matter, and their letter contains the following: "We intend following up these with issues at frequent intervals until November, and will forward them to you as issued. You will probably run across them in the hands of some of the dealers you visit. We will keep you fully informed in regard to all inquiries in your territory so that you may follow them up closely and get sample orders."

This letter was written two weeks after the plaintiff made his conditional offer to resign, and it thus appears that defendant had no intention to accept his conditional offer of resignation, but on the contrary expected him to continue his work. Whether the plaintiff acted prudently or wisely in the matter of the contract with Abel & Doyle was not an issue in this case. He felt aggrieved at the caustic criticisms of his employers, and wrote them that he

was willing to tender his resignation, as he did not wish to continue in their service if they felt toward him as their letters seemed to indicate. Their answer to his letter clearly intimated that they would expect him to continue in their employ, and their telegram to the effect that no answer would be given to his letter informing them of his intended trip to Indianapolis implied that they did not object to his making that trip. The matter, however, is of minor importance, because the affidavits which he obtained in Indianapolis were forwarded to the defendants, and they did not write to him concerning it, and made no criticism in relation to it. When they discharged the plaintiff some two weeks later, they made no reference to the affidavits or his conduct in that matter, but based the reason for his discharge specifically upon the ground that they had accepted his resignation which had been tendered more than 30 days before. Having thus assigned a reason for the plaintiff's discharge, the defendant should not be now heard to urge any other or different reason.

Upon the testimony, which has been partially set forth in the opinion, the cause was submitted to the jury, and defendant contends that the court erred in instruction No. 6, given to the jury on his own motion. The instruction complained of reads as follows: "You are instructed the letter written by the plaintiff on the 20th or 21st day of May, 1910, was not of itself a letter of resignation, but was what might be termed in law a conditional resignation, and by the terms and conditions of said letter the defendants had the right to accept or reject the said resignation on or before the time fixed by the said letter of said date. And in this connection you are further instructed the defendants did not comply with the terms and conditions of said letter on that date, and, as a matter of law, had no right to accept said resignation at a later time than that fixed by the terms and conditions of said letter, unless you find from a preponderance of the evidence that the plaintiff was guilty of misconduct toward the defendants subsequent to the time he left Milwaukee for Minneapolis or unless you further find that the defendants had

discovered other misconduct of the plaintiff that occurred prior to the time they answered the letter written by the plaintiff at Milwaukee, Wisconsin, dated on the 20th or 21st day of May, 1910."

We think this instruction correctely stated the law. There was no conflict in the evidence, and, as we view the letters which passed between plaintiff and defendant, plaintiff's conditional letter of resignation was not accepted by the defendant, but plaintiff was deliberately continued in his employment for practically 30 days after he wrote the letter of May 21, 1910.

It is next contended that the court erred in refusing to give instruction No. 6, requested by the defendant, as follows: "The court instructs the jury that, in his letter of May 21st, the plaintiff tendered his resignation to the defendants, and that, unless you find that said resignation had been withdrawn prior to the 20th day of June, the defendants had the right to accept said resignation, and that after such acceptance said resignation could not be withdrawn." We think the court was justified in refusing this instruction, as it does not accord with the facts and is not applicable to the evidence contained in the record.

Numerous other errors are assigned in giving and refusing instructions. We have examined the instructions given and refused, and find the same to be without reversible error.

It is contended that the defendant was justified in discharging the plaintiff because he was guilty of disrespectful conduct toward his employer; that plaintiff was a man of superior ability and education, and that his conduct toward his employer was neither due to inadvertence nor ignorance, and therefore the defendant was justified in discharging him from its service. A careful examination of the correspondence discloses that the plaintiff treated the defendant in all of the letters written by him with reasonable courtesy and consideration. We find nothing in plaintiff's conduct which would justify the defendant in discharging him. It appears from the testimony that plaintiff, from the time he was discharged until the lat-

ter part of December, 1910, was unable to find profitable employment, and therefore the amount of the verdict is not excessive. In fact no serious complaint of that kind is made by the appellant.

As we view the record, the defendant had a fair trial, and, finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

LETTON, J., concurs in the conclusion.

ROSE, J., not sitting.

MARY BAKER, GUARDIAN, APPELLEE, V. NOBLE VAUGHN HARDY ET AL., APPELLANTS.

FILED JUNE 23, 1914. No. 17,825.

1. **Insurance:** CHANGE OF BENEFICIARY. One whose life is insured by a mutual benefit society has the right, before his death, to change the beneficiary named in his certificate without the consent of such beneficiary; provided, the beneficiary as changed is within the class of persons who, by the laws of the order, may be made a beneficiary.
2. ———: ———. Objection to such change can only be made by the association, and when the change is ratified by the society, and the money is paid without objection to a trustee named in such change, the former beneficiary has no just cause for complaint.
3. **Trusts:** DISTRIBUTION. It is the duty of the trustee who has accepted the trust, and collected the money due on the certificate, to distribute it according to the terms of the trust.

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

Stewart, Williams & Brown and *T. M. Wimberly,* for appellants.

C. C. Flansburg and *Leonard Flansburg, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Lancaster county, in favor of the plaintiff and against the defendant Noble Vaughn Hardy for the sum of $983.81. The judgment appealed from also subrogates the defendant to the rights of the mortgagee in a certain mortgage on lot 8, block 84, of University Place, in said county, to the amount of the plaintiff's judgment.

It appears that Rachel A. Hardy is the mother of Mary Baker, who prosecuted the action as guardian, and also of Columbus Hardy, deceased; that Mina I. Hardy was the wife of Columbus Hardy, and the defendant Noble Vaughn Hardy is their son.

In March, 1891, Columbus Hardy, now deceased, became a member of the National Union, which is a fraternal insurance company, and at that time took out a benefit certificate for the sum of $3,000, payable at his death to his wife, Mina I. Hardy. Between the deceased and his wife the payment of premiums on his benefit certificate were kept up. Shortly prior to his death, in February, 1910, Columbus Hardy, without the knowledge or consent of his wife, caused the beneficiary certificate to be made payable to his son, Noble Vaughn Hardy, as trustee for his wife and his mother, Rachel A. Hardy. At the same time he attached to the benefit certificate a slip of paper, by which he informed his son that he had been made trustee for the collection of the amount due on the policy, and directed that when collected he first pay to Rachel A. Hardy the amount of his indebtedness to her, as represented by certain notes, and thereafter to pay the remainder of the proceeds of the certificate to his wife, Mina I. Hardy.

It appears that for a number of years, beginning in 1898, and from that time to the date of the death of the assured, with the exception of about three years, Rachel A. Hardy roomed and boarded at the home of her son, Columbus Hardy. On Thanksgiving day, 1909, she left his home, and was not an inmate therein from that time; that during the years in which she was a member of the family of Columbus Hardy she paid the nominal sum of

$10 a month for her room and board, assisted Columbus Hardy in certain business ventures, made certain loans to him, which were represented by the notes above mentioned. After his death the defendant collected the full amount of $3,000, due upon his benefit certificate, and, instead of paying the amount to his grandmother, evidenced by the notes she held against the assured, and without any notice to her, defendant paid all of the $3,000 to his mother, Mina I. Hardy. When his grandmother, Rachel A. Hardy, ascertained that fact, she commenced this action against the trustee to recover one-half of the amount of the benefit certificate. The action was commenced in the name of the plaintiff, Rachel A. Hardy, but before a trial was had she was adjudged an incompetent, and the action was thereafter prosecuted by her daughter and guardian, Mary Baker. A trial of the issues resulted in a judgment by which the trustee was required to pay to Rachel A. Hardy the sum of $983.81, the amount of the notes above mentioned; and, it appearing that the money which had been turned over by the trustee to his mother had been used to pay off a mortgage on her home in University Place, it was decreed that the defendant be subrogated to the rights of the mortgagee to the extent of the money so used in payment of the mortgage. From that judgment both parties have appealed.

It is defendant's first contention that the plaintiff could not be named as a beneficiary, because she was not a member of the family of the deceased within the meaning of the laws of the order at the time of the change of beneficiary, and was not a dependent. It appears that the laws of the society nominate blood relations, members of the family, and dependents as proper persons to be named as beneficiaries. We think therefore that the contention of the defendant that the plaintiff could not be made a beneficiary is not well founded. No right-minded person would for a moment contend that the aged mother of the deceased was not within the class of persons who could be named as a beneficiary. She was a blood relation, and for many years had been a member of the deceased's family, and to

a certain extent was dependent upon him for support; that she was a blood relation alone would be sufficient to bring her within the class which could be named as a beneficiary. The testimony shows that during the life of the assured he changed the beneficiary by making his son, Noble Vaughn Hardy, a trustee to collect the money to become due under the beneficiary certificate for the benefit of his mother and his wife. This change was consented to by the National Union, and after the death of the assured the amount due on the benefit certificate was paid to the defendant, as trustee, by the society, without any objection whatsoever. The insurer having paid the amount of the certificate to the trustee, no other party can complain of the change, for that is a right which can only be taken advantage of by the insurer. 29 Cyc. 105-107; *Tepper v. Supreme Council Royal Arcanum,* 59 N. J. Eq. 321; *Young Men's Mutual Life Ass'n v. Harrison,* 10 Ohio Dec. 786; *Alfsen v. Crouch,* 115 Tenn. 352, 89 S. W. 329; *Grand Lodge, A. O. U. W., v. Brown,* 160 Mich. 437; *Johnson v. Van Epps,* 110 Ill. 551.

Having held that Rachel A. Hardy was a blood relation of the assured, and within the class which could be made a beneficiary, it is unnecessary to discuss the question as to whether or not she was a dependent within the meaning of the laws of the order.

It is next contended by the defendant that the attempted change in the beneficiary was not made because Rachel A. Hardy was the mother of the assured, or because she was a member of his family, or because she was a dependent upon him for support, but the change was made in order to pay off and discharge the indebtedness of the assured.

Plaintiff contends that by the change of beneficiaries Rachel A. Hardy was entitled to one-half of the amount of the certificate, because the change made no express provision for any other method of distribution; while it is contended by the defendant that Mina I. Hardy was entitled to the whole of the fund because the attempted change of beneficiary was void. We think neither of those conten-

tions is sound. As we have seen, the change of the beneficiary was not void, and the association having ratified the change and paid the money to the trustee, who received it, and thus ratified the direction of Columbus Hardy as to the manner of distribution, he was bound by the written terms of the trust.

It is asserted on the one hand that the deceased had no interest in the fund, and could not control its distribution; while on the other it is contended that the beneficiary had no vested right in the distribution of the fund. As we view the question, the deceased had the right to provide in what proportions the money should be divided among the beneficiaries, and, having specifically directed the trustee as to the amount to be paid to each, he was bound to carry out the directions of the deceased. The record shows that the amount of decedent's indebtedness to his mother was $983.81. The trustee was bound by the terms of the trust which he had accepted to pay her that amount.

It is also claimed that Columbus Hardy was insane and incapable of changing his beneficiary, and incompetent to make the distribution which the record shows he did make. But, as we view the evidence, that contention is without merit.

The judgment of the district court was right, and is

AFFIRMED.

REESE, C. J., and ROSE, J., not sitting.

VESTA CLARK, APPELLEE, V. BANKERS ACCIDENT INSURANCE COMPANY, APPELLANT.

FILED JUNE 23, 1914. No. 17,394.

1. **Appearance.** Where a defendant makes a special appearance to object to the jurisdiction of the court over the person, and in the same motion challenges the jurisdiction of the court over the subject matter, which latter conclusion is not well founded, this constitutes a voluntary appearance in the action.

2. **Insurance:** ACTION ON POLICY: VENUE. An action upon an insurance policy is transitory and may be brought against a foreign insurance

corporation in any county in the state in which there may be property of, or debts owing to, defendant, or where the defendant may be found or summoned, or in any county where the cause of action or some part thereof arose, or in a county where any contract or portion of a contract entered into by such insurance company has been violated or is to be performed. Rev. St. 1913, secs. 7616, 7619.

3. ———: ———: EXCLUSION OF EVIDENCE. In an action upon a contract of insurance to be evidenced by a policy to be thereafter issued, the policy (which was afterwards issued, but not delivered to the assured) if offered by defendant, may be admissible in evidence, and in this case it is *held* that it was error to exclude it.

4. ———: ORAL CONTRACT: AUTHORITY OF AGENT. Ordinarily it is within the power of an insurance agent to make an oral contract of insurance, or to agree that the insurance shall be in force after the application is signed, and the premium paid, and before a policy is actually written, unless the assured is, or should be held to be, apprised in some manner, either in the application or otherwise, that the insurance will not be in force until the application is approved at the home office and the policy issued and delivered.

5. ———: BURDEN OF PROOF: SUFFICIENCY OF EVIDENCE. The burden of proof in an action on an accident insurance policy is upon the beneficiary to show that the deceased was killed by an accident. Evidence examined, and *held* to sustain the verdict in this respect.

6. ———: CONTRACT FOR ISSUANCE OF POLICY: FORM AND AMOUNT: PRESUMPTIONS. Generally the parties to a contract of insurance by which a policy is to be issued later will be presumed to intend a policy customarily used for such risk, and the amount of the insurance contracted for will be taken to be that which may be procured at the rates specified in the application and policy, or otherwise published by the insurer.

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

Byron Clark, C. A. Rawls and *William A. Robertson,* for appellant.

Matthew Gering, contra.

LETTON, J.

This is an action to recover upon a contract of insurance. Plaintiff recovered judgment, and defendant appeals.

The deceased was a telephone lineman who lived at Fairbury. The defendant is an Iowa accident insurance company. One Hamilton, who was its duly authorized agent, was doing business in its behalf in Jefferson county. The testimony on behalf of plaintiff is to the effect that on October 27, 1909, C. W. Clark who was visiting his brother, Charles G. Clark, the deceased, had some conversation with Hamilton and with his brother with reference to the latter taking accident insurance. Deceased had some hesitation about doing so, when C. W. Clark inquired of the agent whether he could sign an application for Charles. He spoke to his brother again that night on the subject, and the next day he saw Hamilton and asked him if he had been to see his brother about the insurance; and he then told Hamilton he would pay for the first month's insurance. Hamilton filled out a blank application, to which C. W. Clark signed his brother's name, and for which he paid Hamilton $3. C. W. Clark was asked: "Was there anything said at that time how much the premium would be and the amount of the insurance? A. Well, I understood him to say the insurance was $1,000—there was $500 extra business on it. I didn't know just how that was to be fixed up. Mr. Hamilton said 'I will send this off this afternoon, and it will probably be right back.' I asked him, 'When is this good,' and he said 'Right now,' something to that effect. He gave me a receipt for the money." Afterwards on the same day C. W. Clark told his brother of his action and gave him the insurance receipt, which was accepted and retained until his death. The witness left Fairbury on the 29th about 9 o'clock in the morning, heard of his brother's death while he was in Lincoln, returned to Fairbury the same day, and saw the body at the undertakers. The wrist of the deceased was broken and "the side of his head was mashed." The application was sent to the head office at Des Moines, was approved, and a policy was executed and sent to E. L. Uhe, district manager at Beatrice, under whom Hamilton was working, for delivery to the insured. At this time the company had no information that Charles G. Clark

was dead. The next day they received a notice from Uhe to that effect, and the secretary immediately wired Uhe to return the policy at once. The policy was returned, and afterwards Uhe sent a check for $3 to the plaintiff, with a letter stating that as the application had not reached the home office, and had not been passed upon, the insurance was not in force. Plaintiff then wrote to the company demanding the delivery of the policy, claiming payment for the loss, and returning the $3 check.

This action was begun in Cass county, and a summons was issued and served upon the auditor of state in Lancaster county. Thereupon the defendant filed the following special appearance in the case:

"Now comes the defendant and, specially appearing only for the purpose of objecting to the jurisdiction of the court over it, moves the court to quash the summons and the return of the service thereon for the following reasons: First. The court is without jurisdiction over this defendant because neither the cause of action or any part thereof set forth in plaintiff's petition for specific performance arose in this county. Second. Neither the cause of action or any part thereof arose in this county as set forth in the cause of action in plaintiff's petition for the insurance claimed to be due on account of death by accident. Third. This court is without jurisdiction to issue a summons upon either of the causes of action set forth in plaintiff's petition and cause it to be directed to the sheriff of the county of Lancaster, Nebraska, because the petition was not filed in the proper county to recover upon either of said causes of action. Fourth. Because the petition shows that each of the causes of action arose in the county of Jefferson, Nebraska. Fifth. Because the petition shows that the defendant has a general agent at Beatrice, Nebraska, upon which service of summons in this action could be had in each of said causes of action. Sixth. Because there is no authority in law to serve a summons upon the state auditor in an action against this defendant, which is a foreign corporation, and has a general agent within the state, and by such service acquires no jurisdic-

tion over this defendant as to either of the causes of action in plaintiff's petition alleged. This special appearance is supported by the petition of plaintiff on file herein and the affidavit of Wm. A. Robertson hereto attached and made a part hereof."

The motion to quash the summons was overruled. In defendant's answer the objections to jurisdiction were repeated with greater particularity; and upon the merits it pleaded that Hamilton was only a soliciting agent; that the home office retained the exclusive right to reject or approve applications; that the application was not signed or ratified by the deceased; that when the application was received, approved, and the policy issued and mailed to the district manager for delivery, defendant was in ignorance of Clark's death; and that upon learning this fact, and that he had not authorized the application, the policy was recalled and canceled; that the application contained a series of questions required to be answered by the applicant and signed, and that the material answers were false and untrue; that the policy was for the sum of $500 in case of death by accidental means, and provided for a double indemnity if death occurred while traveling in a public conveyance or when in a burning building. The reply pleads ratification by the deceased, the truth of the answers in the application, its approval and the delivery of the policy by being sent to the district manager with directions to deliver, and pleads that the liability was for $1,000, with $500 additional in case of being killed in a public conveyance or in a burning building.

As to the special appearance, it consists (1) of an objection to the jurisdiction of the court over the person of the defendant based upon the fact that service was had upon the state auditor, and not upon an agent of the company; (2) of an objection to the jurisdiction of the court over the subject matter. The case is governed by the principles announced in *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 267: "An action upon a benefit certificate or insurance policy is transitory and

not local in its nature, and may be brought in whatever state the company issuing the policy can be found, without any regard to where the contract of insurance was made or the subject thereof was located. The appearance of a defendant, for the sole purpose of objection by motion to the jurisdiction of the court over his person, is not an appearance to the action; but, where the motion also challenges the jurisdiction of the court over the subject matter of the controversy and is not well founded, it is a voluntary appearance equivalent to a service of summons."

If the action were purely a local one, a general appearance would not confer jurisdiction over the subject matter; but, as pointed out in *Insurance Co. v. McLimans & Coyle,* 28 Neb. 653, section 55 of the code "is remedial and not restrictive in its nature," and such an action may be maintained wherever jurisdiction over the person of the defendant may be obtained. *Lillie v. Modern Woodmen of America,* 89 Neb. 1.

Defendant contends that the principles announced in these cases are not applicable here for the reason that the special appearance in this case "is not an objection to the jurisdiction of the court over the subject matter of the action, but is an objection to the jurisdiction of the court over the person of the defendant, and all of the statements of said motion are assignments of the reasons or grounds upon which such motion is based." We are unable to see a distinction in this respect between this and the *McLimans* and *Perrine* cases, and we are unable to distinguish any substantial difference between the motions filed in these cases and that filed in this. We conclude, therefore, that the court acquired jurisdiction over the person by the general appearance, and, the action being transitory, it had jurisdiction of the subject matter, and had, therefore, full power to try and determine the cause.

Defendant complains that the court erred in excluding the written policy, for the reason that as issued it was corroborative of the testimony of defendant's witness Hamilton. We are inclined to the view that the defendant was entitled to the production of this evidence, not only for

this reason, but also to aid the jury in determining what kind of contract the minds of the parties met upon. It is clear from the evidence of both Clark and Hamilton that a policy was to be issued to evidence the contract, and it is shown that this policy was actually issued and mailed to defendant's agent for delivery. The evidence as to the amount of the insurance contract on the part of C. W. Clark is vague and indefinite, and we are satisfied that the ordinary policy for which $2 a month was the regular charge was that which both parties had in mind when the contract was made. This subject will be referred to later.

The jury made special findings of fact to the effect that the application was mailed before the death of Clark, was received at the defendant's home office after the death, and that the officers at Des Moines did not know of the death at the time they mailed the policy for delivery. It is contended that the court erred in not setting aside the verdict and sustaining the motion for a new trial for the reason that the general verdict is contrary to these findings. The remaining assignments may be grouped and considered in connection with the complaint as to the instructions given and refused, and the contention of lack of authority in the agent to contract. In its instruction to agents it is said: "Policies are written at the home office of the company upon receipt of the written application, and take effect when such applications are passed upon, accepted, and policy actually issued." It is shown, however, that no knowledge of these limitations upon the agent's authority was given to either of the Clarks. His act in making the contract was within the apparent scope of his authority, so far as the application showed, and was binding. *Dayton Ins. Co. v. Kelly,* 24 Ohio St. 345. It is true that Hamilton denies that he told C. W. Clark that the insurance began from the time when he paid the premium, but the jury evidently believed Clark upon this point. That it is within the power of an agent to make an oral contract of insurance, or to agree that insurance shall be in force after an application is signed, and the premium paid, and before a policy is actually written un-

less the assured is or should be held to be apprised in some way, either in the application or otherwise, that the insurance will not be in force until the application is approved at the home office of the company and the policy issued, is too well settled to admit of dispute. See cases cited in note to *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 22 L. R. A. 768; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134, and note; *Relief Fire Ins. Co. v. Shaw*, 4 Otto (U. S.) 574; *Hubbard & Spencer v. Hartford Fire Ins. Co.*, 33 Ia. 325, 11 Am. Rep. 125; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, 19 Am. Rep. 305; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Phœnix Ins. Co. v. Ryland and Brooks*, 69 Md. 437; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 309; *Dayton Ins. Co. v. Kelly, supra*; 1 May, Insurance (4th ed.) sec. 22*a*.

The complaint that the verdict is not sustained by the evidence because it is not shown that the death of Clark was from an accidental cause, we think, cannot have been seriously made. Both C. W. Clark and Mrs. Clark testify to the bruises and marks upon the body. Defendant's counsel, on cross-examination of Mrs. Clark, brought out the fact that her husband was injured about 11 o'clock in the day, and that he died about 12 o'clock, or a little afterwards, that day. In letters to Mrs. Clark the district manager of defendant spoke of the "recent accident to your husband who had taken a policy in our company but a few hours before his death," and in another letter to her the secretary says, "We very much regret the accident." C. W. Clark testified that his brother had fallen from a platform upon a telephone pole. This evidence was stricken as hearsay. No doubt, the proof would have been stronger if the plaintiff had produced eyewitnesses of the accident, if such there were, or had proved it by circumstantial evidence. But this would only have entailed the production of evidence to establish a fact which seems to be practically admitted by all parties. Taking into consideration the admissions contained in the letters, and the

other facts in evidence, we think the proof sufficient to sustain the finding that the deceased came to his death by accidental means.

The complaint that the answers in the application as to Clark's health were false and were material to the risk cannot be sustained. No medical examination was required of an applicant. They were substantially true, and the risk was not affected thereby.

Much that is said in defendant's brief with reference to the contract is sound, provided that the evidence of defendant's witnesses had been found to be true by the jury. It is plain by the verdict that they believe the testimony of Clark and other witnesses for the plaintiff as to what occurred at the time the contract was made. For these reasons, we have taken the verdict as settling the facts to be as testified to by plaintiff's witnesses, and hold that the contract of insurance was complete when the application was approved and the policy issued for delivery. 1 May, Insurance (4th ed.) sec. 45*a*; *New York Life Ins. Co. v. Babcock, supra.*

With regard to the amount of insurance contracted for, the general rule is that, by an oral contract of this nature, the parties will be presumed to intend the policy customarily used for such risk, and that the amount of the insurance contracted for will be taken to be that which may be procured at the rates published in the application and policy. *Newark Machine Co. v. Kenton Ins. Co.,* 50 Ohio St. 549; *Sproul v. Western Assurance Co.,* 33 Or. 98. In this case it is shown that $1 of the $3 paid was for membership fee, and that $2 of the payment was the regular monthly rate payable in advance for $500 ordinary accident insurance, with a double liability if death occur while the assured is traveling upon a public conveyance or while in a burning building. The application shows the maximum liability is $1,000. Taking the evidence as a whole, including the excluded policy, the contract was evidently $500, with a double liability. The policy should have been admitted in evidence under the principle stated. However, since the only effect of the exclusion was to increase

the amount of the recovery in a definite sum, in order to avoid a new trial the judgment of the district court is affirmed, if the plaintiff within ten days remit the $500 excess, with interest from January 1, 1910, otherwise the judgment will stand reversed.

AFFIRMED ON CONDITION.

REESE, C. J., and FAWCETT, J., not sitting.

BERNARD GROSS, ADMINISTRATOR, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 23, 1914. No. 17,690.

1. **Street Railways:** NEGLIGENCE: QUESTION FOR JURY. As a general principle, a street car company is not liable for accidents as a result of horses becoming frightened by the usual operation of its business, provided that its employees are not guilty of any negligence. If through the operation of the street car after the frightened condition of the animal has become known, or should have become known, to the motorman if he is in the exercise of ordinary care, damage results, the proper test is whether those in charge of the car acted in the manner that persons of ordinary prudence would have acted in like circumstances. It is not the injury that creates the liability, but the fact that the street car company through its agents or servants has been guilty of some negligent act or omission to act, but for which the injury would not have occurred, and, where the evidence is conflicting, the question of negligence is for the jury.
2. **Evidence:** OPINION OF WITNESS. It is not erroneous to exclude opinion evidence as to ultimate facts which are for the jury to determine.
3. **Street Railways:** NEGLIGENCE: QUESTION FOR JURY. The question whether the defendant was negligent in failing to provide a motor car, which was being used to haul a work car, with a fender, *held* to be a matter for the jury to determine.
4. **Appeal:** ADMISSION OF EVIDENCE. A judgment will not be reversed because of an error in the admission of testimony, unless it is reasonably apparent that such testimony is prejudicial to the substantial rights of defendant.
5. **Street Railways:** SAFETY APPLIANCES. In operating a motor car and heavy trailer on the public streets of a city, a street car company is

bound to use the same degree of care with respect to equipment with safety appliances as is usual in the operation of passenger cars.

6. **Instructions** examined, and *held* not erroneous.

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

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

Charles S. Elgutter, contra.

LETTON, J.

Arthur Gross, a boy between 15 and 16 years of age, was killed in a street railway accident. This action is brought by his administrator for the benefit of his father. Plaintiff recovered, and defendant appeals.

It is alleged in the petition that the defendant was operating a work train, composed of a motor car and a trailer loaded with cinders, on Thirtieth street, in Omaha, at an excessive and dangerous rate of speed; that the motor and trailer were not supplied with proper brakes, guards and fenders; that the motor car was old, was without an emergency brake, and the brakes were defective and inefficient; that the deceased was driving a horse on the west side of the street; he had stopped at a point about 150 feet away from the approaching car, but the horse became frightened and unmanageable, and backed across the track in front of the car; that the motorman, when about 100 feet away, saw that the horse was frightened, that the driver had lost control and that he was backing the cart onto the track; that he knew that the car was not equipped with a fender, and that the brakes were defective, yet he negligently continued running his train at an excessive and unreasonable rate of speed, and failed to stop the same until the collision occurred; that if the car had been equipped with a powerful and effective brake, and if the motorman had exercised proper care, the accident would not have occurred.

The answer is a general denial, a plea of unavoidable accident on account of the sudden nature of the backing of the cart, and of contributory negligence on the part of the deceased.

As developed at the trial, the principal questions at issue were: Whether the car had a sufficient brake; whether defendant was negligent in not equipping the motor car with a fender; whether the motorman was negligent in not seeing that the pony was frightened, and in failing to stop the train in time to avoid the collision.

The first error assigned is that the court erred in refusing to permit the defendant to ask a witness on cross-examination whether the motorman had time or opportunity to stop the car, and whether he made a very quick stop under the circumstances. The witness had described fully all of the circumstances surrounding the accident, and had been cross-examined at length. He testified that before the car struck the cart the pony backed the cart almost instantly upon the northbound track; that when it crossed the rail of that track the motor car was only about 15 or 20 feet south, and was coming north; that the pony backed the cart about on a circle. He was then asked whether it gave the motorman any chance or opportunity to stop his car. The questions excluded were then asked and objected to as asking for a conclusion of the witness. There was no prejudicial error in the refusal to permit these questions to be answered. All of the facts concerning the accident had been minutely detailed to the jury both upon direct and cross-examination, and the jury were as able to draw their own conclusions as the witness was to form his. Another bystander was asked a similar question with a similar result. While it has been held that under similar circumstances it was not error to permit questions of this nature to be answered, this court has taken the view that opinion evidence as to the ultimate fact to be determined by the jury may not be received. *Chicago, R. I. & P. R. Co. v. Holmes,* 68 Neb. 826; *Read v. Valley Land & Cattle Co.,* 66 Neb. 423; *Lindgren v.*

Omaha Street R. Co., 73 Neb. 628; *Hankins v. Reimers*, 86 Neb. 307.

Complaint is made that the court erred in allowing the witness Anderson to testify on redirect that, if he had been running the train which caused the accident, he would have used a track brake. This was a mere conclusion, and the objection should have been sustained. The testimony of the same witness, however, on cross-examination was to the effect that such brakes were only used upon a steep hill on Dodge street, and that the track brake would be useless and impracticable for stopping a car where the track was level, or nearly so, and that in 21 years service as a motorman on all lines, including the Dodge street line, such brakes had only been used about 12 days. Taking the whole testimony, we think no prejudice could have occurred.

It is objected that the court erred in refusing to permit the defendant's master mechanic to testify that the brake was in good condition and reasonably safe and efficient when the car left the shops a short time before the accident. This witness, however, testified that in the fore part of November, 1909, this car was remodeled, and that it had not been out of the shop over two weeks before the accident; that it had been overhauled and the trucks and brakes repaired; that it was fixed up for service on the road; and that the brake was in good condition. He also testified that the brake was such as was originally and customarily used on street railway cars of this type; that the brake shoes applied to all four wheels alike with uniform and proper force, and were in good working order. It is true that an objection was sustained to one of the questions on this subject, but this did not prejudice the defendant, since in other portions of his testimony the witness fully covered the ground.

It is also contended that the court erred in submitting to the jury the question whether the defendant was negligent in not having the car equipped with a fender. An instruction directed the jury that, if they found from the evidence that it was reasonably safe to operate the car

without a fender, then they should acquit the defendant of negligence in that regard, but, on the other hand, if they found that ordinary care required the car to be equipped with a fender, and that it was not reasonably safe to operate the car without it, then they should find the defendant negligent, provided they further found that the absence of the fender was the proximate cause of the death of Arthur Gross. The claim is that this was error, because "fenders never have been and could not be, used upon a motor car used for construction work," for the reason that such cars have a drawbar projecting about 2½ feet from each end of the car, so that either end may be attached to a construction car, and that, on account of the sharpness of the curves at street intersections and other places, a trailer car could not be pulled or shoved around the curve unless the drawbar was of this length, and that it is impracticable to attach a fender where a drawbar is used of this length. The evidence of Mr. Wood, master mechanic, shows that motor cars used for construction purposes are usually operated without fenders; but he was asked this question: "That motor car that was attached to the construction train could have been operated, could it not, by using only one end of the drawhead to attach to the trailers? A. Yes, sir. Q. And the other end where you had a drawhead, that drawhead could have been taken away and a fender placed upon there the same as you have upon passenger cars? A. Yes, sir." There is further evidence as to the use and means of operation of fenders. We are convinced that, although the evidence shows it has not been customary to place a fender in front of such a car, it was entirely proper to submit to the jury whether the defendant was negligent in operating the motor car without a fender in front for the protection of persons upon the highway. While it was proper to show this was not customary, the question whether the use of such cars without fenders on the streets was consistent with reasonable care for the safety of the public was one for the jury. While it is not shown that the ordinances of the city of Omaha required fenders to be placed in front of street cars,

there is evidence to show that the passenger cars are all fitted with fenders, and that the character and means of operation of the fenders are such that, if the motor car had been equipped with one in front, the death of Arthur Gross would in all probability have been prevented. Under this state of the evidence, the question as to whether or not defendant was guilty of negligence in failing to provide a fender was proper to be submitted to the jury. 2 Nellis, Street Railways (2d ed.) sec. 376; *Henderson v. Durham Traction Co.,* 132 N. Car. 779, 44 S. E. 598; *Fritsch v. New York & Q. C. R. Co.,* 87 N. Y. Supp. 942; *Richmond R. & E. Co. v. Garthright,* 92 Va. 627, 32 L. R. A. 220; *Fisher v. Waupaca E. L. & R. Co.,* 141 Wis. 515. The evidence shows that fenders are about six feet wide and project four or five inches on the outside of each rail. Whether the boy fell directly in front of the car, or a little to the side, as the motorman testifies, there was sufficient evidence to go to the jury upon the point as to whether the existence of a fender would have prevented his death.

By instruction No. 5 the court instructed the jury: "It is the duty of the defendant to equip its cars with such appliances for stopping them as are in ordinary and customary use for such purposes. It is not required to furnish any particular appliance or such appliances as will absolutely prevent the happening of accidents, but its duty is fully met if the car in question was equipped with a reasonably safe and efficient brake, such as was in ordinary use on cars of that character." Defendant makes no complaint of this portion of the instruction. The court further said: "And in this connection the plaintiff claims that the car in question should have been equipped with a 'track brake,' while defendant claims that such a brake is not in ordinary use for the purpose of stopping the car, but only for controlling it on steep hills, and the evidence establishes that the only cars of defendant so equipped are those on the Dodge street line passing over the hill at Twentieth and Dodge streets. You are therefore instructed on this point that, even though you believe from

the evidence a quicker stop could have been made at the time of the accident in question, if the car had been equipped with a track brake, and the collision might thereby have been avoided, still you would not be justified in finding defendant negligent in not providing such track brake, if you find that the brake upon the car in question was reasonably safe and efficient and such as was in ordinary use." Defendant complains that this instruction permitted the jury to find that the defendant was negligent in not having a track brake, provided the jury found the chain brake was not reasonably safe and efficient; that the company was not bound to supply the car with the most effective brakes or to use the utmost care in keeping them in repair, but to use ordinary care in the selection of brakes and in keeping the same in order. Taking the instruction as a whole, and considering it in connection with the facts in the case, we can see no prejudice to defendant in its being given. The portion criticized amounts to saying that the real question for the jury to determine was whether the brakes upon the car were reasonably safe and efficient and such as were in ordinary use, and to negative or disparage the contention that it was its duty to have had a track brake on the car. We think the true rule to apply, in these days when heavier and more massive cars are used and greater speed is maintained than formerly, is that, while a street railway is only required to use ordinary care in the selection of its brakes and in maintaining and keeping them in repair, yet, in the exercise of ordinary care, it has a duty to use the best brakes and appliances in common use, and to use great care in keeping its appliances for stopping cars in good condition. *Mock v. Los Angeles Traction Co.*, 139 Cal. 616.

Upon the claim that there is no evidence of actionable negligence on the part of the motorman, and that the court should have directed a verdict for the defendant, it may be said that, as a general principle, a street car company is not liable for accidents as a result of horses becoming frightened by the usual operation of its business, provided that its employees are not guilty of any negligence. If

through the operation of the street car after the frightened condition of the animal has become known, or should have become known, to the motorman if he is in the exercise of ordinary care, damage results, the proper test is whether those in charge of the car acted in the manner that persons of ordinary prudence would have acted in like circumstances. It is not the injury that creates the liability, but the fact that the street car company through its agents or servants has been guilty of some negligent act or omission to act, but for which the injury would not have occurred. Under this principle, if the motorman in charge of the train saw, or should have seen by the exercise of ordinary care, that the pony was frightened and apparently unmanageable, and that there was a liability, in view of all the circumstances, that the cart might be backed or dragged upon the street car track, and if a man of ordinary prudence and carefulness would have stopped the car before the accident happened, then the failure to do so would be such an act of negligence as would render the defendant liable. Unless there is no evidence as to negligence, the question is for the jury, and there is sufficient in this case to justify the refusal to direct as prayed. *Gibbons v. Wilkes-Barre & S. Street R. Co.*, 155 Pa. St. 279; see, also cases cited in note on p. 646, vol. 2, Street R. Reports; *Marion Street R. Co. v. Carr*, 10 Ind. App. 200; *South Covington & C. Street R. Co. v. Cleveland*, 100 S. W. (Ky.) 283.

Strenuous complaint is made of a phrase in one of the instructions that it was the duty of the motorman "to employ all means at hand to avoid the collision." It may be said, however, that this phrase does not stand alone, but is qualified and modified by the direct statement, not only in the same instruction, but repeated in a number of others, that the test of the motorman's duty was the exercise of ordinary care. Moreover, the motorman said that he "used all the appliances he had to make the stop" as soon as he saw the pony backing. It may further be said this very language has been approved by other courts. *Gradyszewski v. Detroit U. R. Co.*, 173 Mich. 13; *Bectenwald v.*

Metropolitan Street R. Co., 121 Mo. App. 595; *Morgan v. Wabash R. Co.*, 159 Mo. 262, 60 S. W. 195; *Kaiser v. United R. Co. of St. Louis*, 155 Mo. App. 428, 135 S. W. 90; *El Paso R. Co. v. Kelly*, 109 S. W. (Tex. Civ. App.) 415; *Birmingham R., L. & P. Co. v. Morris*, 163 Ala. 190, 50 So. 198; *Birmingham R., L. & P. Co. v. Brantley*, 141 Ala. 614; *Fisher v. Waupaca E. L. & R. Co.*, 141 Wis. 515.

In conclusion, the thought that runs throughout defendant's argument seems to be that, in operating a motor car and heavy trailer on public streets, it is not bound to use the same degree of care with respect to equipment with safety appliances as is usual in the operation of passenger cars. This is not said in so many words, but it appears to be the basic idea. We cannot take this view. There is as much reason and necessity when heavy work trains are propelled through the streets of a city that the same be furnished with safety appliances as for supplying passenger cars with the same devices, and the greater the momentum of the moving mass, the more necessity there is for increased care and caution. The evidence shows that the motor car, if it had not been drawing a car loaded with four tons of cinders, and had the momentum of the heavy trailer to withstand, could have been stopped in a much shorter distance than it was. The motorman testified that "55 or 60 feet would be an extra good stop" of this train. There is testimony to the effect that an ordinary car traveling at the rate the motorman testifies this train was moving could have been stopped in less than half this distance. Whatever the standard of ordinary care may be that is required for the stoppage of passenger vehicles within a limited distance, the same degree of care is necessary in operating work or construction trains upon the streets.

Taking the record as a whole, we think the district court carefully guarded the rights of defendant, and that no prejudicial error has been shown.

The judgment of the district court is therefore

AFFIRMED.

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

RUDOLPH ZWEINER ET AL., APPELLEES, V. JAMES L. VEST, APPELLANT.

FILED JUNE 23, 1914. No. 17,717.

Adverse Possession. "If one by mistake inclose the land of another and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession for the statutory period will work a disseizin, and his title will be perfect." *Tex v. Pflug*, 24 Neb. 666.

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

H. M. Sinclair and *Fred A. Nye,* for appellant.

W. D. Oldham and *John A. Miller, contra.*

LETTON, J.

The controversy in this case is over the ownership of a wedge-shaped tract of land 105 feet wide at the base. The plaintiff asserts that it is a part of the northeast quarter of section 13, township 11, range 17, in Buffalo county. The defendant insists that the strip is within the boundaries of the southeast quarter of section 12, in the same township and range. The issues presented by the pleadings and the evidence are: First. What was the location of the government quarter corner between sections 12 and 13? Second. Has the defendant obtained the title and right of possession of the strip by virtue of adverse possession?

In substance, the evidence on behalf of plaintiff is that in 1911 he procured the line between sections 12 and 13 to be surveyed by one Edwards, who was then the county surveyor; that they were unable to find any government monument, and that the surveyor then placed a corner stone according to the rules for establishing a lost corner, which is the corner to which he claims. A number of witnesses who had lived in the neighborhood from 20 to 30 years testified that they never saw a government mound

either at the point where plaintiff claims it should be or at the point where defendant claims it is. Another witness for plaintiff testified there was nothing to indicate where the corner should be, except that Mr. Seiben, who formerly owned the southwest quarter of section 12, about 18 years ago plowed about as far south as Mr. Moore had placed his fence; that Mr. Moore built his fence at the disputed corner 15 or 18 years ago. Plaintiff's evidence also shows that, after the Edwards' survey was made, Mr. Vest moved his fence 25 feet north of the new corner, and that about a year afterwards he moved it back to its former location. For defendant, Mr. Moore testified that he homesteaded the northeast quarter and made a timber culture entry on the southeast quarter of section 12, in 1879; that he lived on the land until he sold it to Mr. Vest about 7 years ago; that soon after he entered the land he found the government corner, and that there was a flat cedar stake in the mound; that he showed it to Mr. Seiben, who broke out his land accordingly; that about 1890 he built a north and south fence which joined the fence on the south line at the disputed corner; that these fences were maintained until he sold the place to Vest. He also testified that he had put in two ash stakes at the corner before he sold the land to Vest, and that when he and Mr. Morey, the county surveyor, went to find the corner they found a piece of stake where he told Mr. Moore the corner was. Morey testified that in 1911 he went to the point where Moore said the corner was and found the rotton points of three stakes about six or eight inches under the ground. He also testified that he had considerable experience in surveying in Buffalo county, and that his experience with quarter corners had been that he had found very few of them upon a straight line. Another witness, who lived upon the section east for many years, testified that he saw an old stake at the government corner after Moore's fence was built; that it was 8 or 12 feet south of the corner of the fence. The evidence is sufficient to uphold a verdict in favor of either party. Upon cross-examination Mr. Moore testified that when he built his fence on the west and south

side of his land he did not intend to take any land that was not included in the government survey, and never intended to claim any land outside of section 12, and that this was all that he conveyed to Mr. Vest by the deed. On redirect, however, he stated that when he sold he told Vest where he would find the corners, and that at that time he claimed all the land included within his fences, and also an extra rod on the south of the south fence.

The court correctly instructed the jury that the government monuments control courses and distances, and generally as to adverse possession. But it then gave this instruction: "The court instructs the jury that, if they believe from the evidence that defendant's grantor, Moore, built his fence according to his opinion as to the location of the government corners, and only claimed to own to the corners, and that his fence so constructed extended beyond the government corners onto the land now owned by plaintiff, then such holding was not adverse to plaintiff, although it continued for more than ten years, and defendant cannot tack his holding to that of his grantor, Moore."

Defendant complains that the verdict is contrary to the instructions of the court, and especially complains of the giving of this instruction. This was evidently based upon the cross-examination of Mr. Moore. Moore's whole testimony is to the effect that from the time of making his entry he had always claimed title to the land as far as the government corner, which he says was there at that time; that he built his fences with reference to the same, and that he had always considered that this was the true corner.

It was said in *Tex v. Pflug,* 24 Neb. 666: "If one by mistake inclose the land of another and claim it as his own to certain fixed monuments or boundaries, his actual and uninterrupted possession for the statutory period will work a disseizin, and his title will be perfect." This rule was followed in *Levy v. Yerga,* 25 Neb. 764; *Obernalte v. Edgar,* 28 Neb. 70; *Baty v. Elrod,* 66 Neb. 735; and *Andrews v. Hastings,* 85 Neb. 548. It seems to be generally

so held. "Adverse Possession," 1 R. C. L., sec. 51, p. 733.

Plaintiff has cited a number of decisions from other states to the contrary, but we deem it sufficient to say that the rule in this state is otherwise. The instruction was erroneous and prejudicial to the defendant. The judgment of the district court is therefore

REVERSED.

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

HATTIE E. WELLS, APPELLANT, V. WILLIAM AUFRECHT, APPELLEE.

FILED JUNE 23, 1914. No. 17,755.

Parol Evidence: CONTRACT: CONSIDERATION: PAYMENT. The true facts as to the consideration set forth in a contract for the sale of real estate, where the sum expressed forms no part of a promise to pay, but is only the recital of a fact, may be proved by parol, and so also as to an acknowledgment of the receipt of such consideration.

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

R. J. Nightingale, H. S. Nightingale and *R. P. Starr,* for appellant.

J. S. Pedler, contra.

LETTON, J.

This action was brought to recover the sum of $400 alleged to be due plaintiff as a balance of the purchase money due and payable to her under the terms of a written contract for the sale of real estate sold by her to defendant. The contract recited that the plaintiff agreed to sell 320 acres of land, describing it, "for the sum of $9,600 on which the second party has paid the sum of $1,600." It further provided for the payment of $3,200 on May 1, 1911, and that the purchaser should assume a mortgage

of $4,800 against the land. Time was made the essence of the contract, and the contract further contained the usual and ordinary provisions of such agreements.

The defense is that the land was sold for $9,460, and that the purchase money has been paid in full. Defendant claims the transaction was that plaintiff listed the land for sale with William Aufrecht, Jr., the son of defendant, as her agent, and agreed to pay him $250 as a commission for the sale of the land; that in pursuance of this verbal agreement William solicited defendant to purchase the land; that defendant made an offer, and after some negotiations were had between the parties the land was finally sold to him for $9,460. The reply is a general denial. A jury was waived, and the case was tried to the court, which found generally in favor of the defendant and dismissed the action. Plaintiff appeals.

A number of assignments of error are made, which, in substance, amount to the complaint that the findings and judgment of the court are not supported by sufficient evidence, and are contrary to law. Plaintiff's position is that the contract recites the sale of the land was for the sum of $9,600, and that, since the evidence shows that only $9,200 has been paid, there is still due the plaintiff the sum of $400, unless the facts pleaded in the answer are established by the evidence, and constitute a legal defense to the action.

We are satisfied that though there is an irreconcilable conflict in the testimony, and the conclusion reached by the district court on the facts is not free from doubt, there is sufficient evidence to support the allegations of the answer. Defendant's evidence tends to prove that William Aufrecht, Jr., was employed by plaintiff to sell the land for $9,600; that he procured from his father an offer of $9,400 for the land; that when this was communicated to defendant she refused to sell at this price, unless William would throw off his commission; that William then offered to make the commission $250, and to give her two heifers worth $60 in addition to the cash; that the next day plaintiff went to defendant's home and said she would

accept the offer if he would pay the $60 in cash in place of the two heifers, and have the contract made at Arcadia, and that defendant agreed to this; that when the parties met at Arcadia plaintiff insisted upon the payment of $1,200, instead of $800, as agreed upon, and requested the scrivener to draw the contract to show the consideration to be $1,600, giving as a reason that she did not want Long, a real estate agent at Loup City with whom she had listed the property at $9,600, to know she had sold below that price, and it was agreed that she would accept for the land $1,200 in cash, $10 house rent, the commission of $250 to be paid by defendant to William, $3,200 on May 1, 1911, with interest, defendant to assume a mortgage debt of $4,800, and that she would incorporate in the contract a receipt in full of the $1,600 payment; and that the transaction was closed upon these terms and the contract drawn accordingly. Eleven months after, on May 5, 1911, defendant paid the balance due of $3,200 and received the deed. Receipt is therein acknowledged of the consideration of $9,600. About ten days afterwards this action was begun in the county court. A strong circumstance tending to support the views of the district court upon the evidence is the fact that nearly a year after this transaction occurred the plaintiff authorized the delivery of the deed to defendant by the banker who held it in escrow, upon the payment of $3,200 as expressed in the contract, instead of $3,600, which she claimed a few days later was the amount due. It is true she denies she did so, but the testimony of the banker, who apparently had no interest in the transaction, weighs strongly against her.

Plaintiff contends that the facts pleaded in the answer are insufficient in law to constitute a defense for two reasons: (1) A written agreement cannot be contradicted by proof of a contemporaneous oral agreement, in the absence of fraud or mistake; (2) a party cannot plead his own fraud as a defense, but only the fraud of the opposing party. These principles, of course, are sound, but the trouble is with their application to the facts in this case. The defendant is not attempting to contradict the written

agreement any more than the plaintiff is. Both parties acknowledge that the written contract does not express correctly the real facts. Plaintiff asserts that the sum to be paid is correctly expressed, but that the acknowledgment of the receipt of the sum stated is incorrect; that a receipt is always susceptible to parol explanation, but that the defendant cannot impeach the contract as to the amount.

The actual consideration which is expressed in a deed may be shown by parol testimony. 2 Devlin, Deeds (3d ed.) sec. 822; *Fall v. Glover,* 34 Neb. 522; *Wiltrout v. Showers,* 82 Neb. 777. This rule applies also to the consideration in a contract of sale of real estate, where there is no promise to pay depending upon the statement of the amount, but it is only a recital of an executed fact. The rule that the terms of a written contract cannot be varied by parol evidence is based upon the principle that, where parties have reduced to writing an agreement to do or refrain from doing a certain act, the writing will be taken as the best evidence of the terms of the agreement.

This principle is not applicable here. As to the payment and receipt of the $1,600, the contract merely recites a present condition. No agreement was made to pay any part of this sum in the future. A like rule to that permitting proof of the true consideration applies as to the recital that the consideration has been paid. 2 Devlin, Deeds (3d ed.) sec. 830; 1 Jones, Real Property, sec. 303. We conclude, therefore, that both the real consideration of the contract and whether it was actually paid may be shown by parol testimony.

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

AFFIRMED.

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

EDWARD E. PETERSON, APPELLANT, V. WEBB HULTZ ET AL., APPELLEES.

FILED JUNE 23, 1914. No. 17,762.

Vendor and Purchaser: CONTRACT: SUIT TO RESCIND: BURDEN OF PROOF. After the execution of a deed to a tract of land and part payment of the purchase money in pursuance of a contract of sale, an alleged defect in the title was discovered. The grantor and grantee then agreed that a suit should be brought at the grantor's expense to quiet the title against such alleged defect. The parties then estimated the time that would be necessary to procure a decree and to complete an abstract of title, and entered into another contract providing that, upon failure to furnish a good and sufficient abstract by October 29, 1910, the grantor would return all money paid and cancel all notes given by the grantee. The grantee took possession under his deed. Decree was rendered on October 29. The grantee on that day demanded the return of the money and notes, and soon afterwards brought this action to rescind and to recover the purchase price. *Held*, That, under the facts stated, time was not of the essence of the contract, and that the burden was upon plaintiff to show that the abstract did not set forth a marketable title.

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

J. G. Beeler, for appellant.

Muldoon & Gibbs and *Wilcox & Halligan, contra.*

LETTON, J.

This is an action to rescind an executed contract for the purchase of certain land and to recover the purchase money. The district court dismissed the action, and plaintiff appeals.

The petition alleges that on the 29th day of March, 1910, the defendant Hultz and plaintiff entered into a written contract whereby Hultz agreed to convey by a good and sufficient warranty deed clear of all incumbrance, a tract of land in Keith county for the sum of $3,200, $500 in cash, $500 within ten days, and the balance in two annual payments of $1,100 each; that Hultz further agreed to fur-

nish a good and sufficient abstract of title; that conveyances were executed by defendants to plaintiff on March 30, 1910, and filed for record by Hultz in the office of the county clerk of Keith county; that on the 11th of April plaintiff executed and delivered to Hultz his two notes for $1,100 each, having paid the $1,000 specified in cash, and executed a mortgage on the land to secure the notes; that on April 7 plaintiff discovered that the abstract showed a defective title to a portion of the premises, and that he refused to further carry out the agreement, and a new agreement was entered into that day between plaintiff and defendants; that by this contract defendants agreed to convey the land to plaintiff; that they would furnish a good and sufficient abstract of title on or before the 29th day of October, 1910; and that upon failure to do so they would return all money paid and would cancel all notes of plaintiff. It is also alleged that plaintiff paid the money and executed the notes and mortgage under the conditions of the latter contract only, and that defendants failed to furnish the abstract or to make and deliver a good title. Plaintiff then pleads that he demanded the return of the money and notes, and offered to return the premises to defendants. The prayer is for judgment for $3,200, with interest.

The answers, in substance, admit the making of the contracts, and the payment of the money and delivery of the notes; plead that a perfect and marketable title was conveyed to plaintiff. As to the contract dated April 7, it is alleged that after the deeds were delivered plaintiff and his attorney, H. A. Dano, stated a cloud upon the title was caused by the recording of a deed to one Radcliffe, and that, while defendants maintained there was no defect in the title, to accommodate and satisfy plaintiff, defendants agreed to pay the expense of bringing an action to quiet the title, plaintiff having stated he would be entirely satisfied if such suit was brought; that the second contract was executed without consideration in order to allow time to prosecute this suit to a final judgment; that action was brought and the title quieted, as agreed upon;

that a conveyance of the interest of the heirs of Radcliffe was also made to plaintiff, and that he has a good and perfect title; that the delay in quieting the title was caused by the plaintiff and his attorney, Dano, and that time was not of the essence of the contract; that the date October 29 was fixed in the second contract as allowing sufficient time for the next term of the district court for Keith county to be held and the decree procured, and was put in the contract upon the express representations of Dano; that on the 29th of October a decree was rendered in the action, and the abstract soon afterwards extended, and that plaintiff has a perfect and indefeasible title to the premises.

The district court made extensive findings, and, after stating the facts as to the execution of the contract of March 29, 1910, and the recording of the deeds on March 30, says: "On April 7, the defendant Hultz went to plaintiff Peterson's house to have their deal closed up, and together they went to the office of H. A. Dano, attorney. The defendant Searle was there, or came in soon after the arrival of Peterson and Hultz. The abstract of title was at Dano's office. By whom the abstract of title was obtained and taken to Dano's office the evidence fails to show. On examination of the abstract by all parties, Mr. Dano pointed out on the abstract the entry showing a conveyance on September 26, 1904, by quitclaim deed to F. P. Radcliffe, of the W. ½ of SE. ¼ of section 22, town 14 north, of range 39 west, recorded March 10, 1905, and stated that the same was a cloud upon the title, but that it could be easily removed by an action to quiet title. Some talk was then had as to when the next term of court would be held, and it was agreed that the next term was fixed for October 24, 1910. Mr. Dano was then asked if he would take the case and procure judgment at that term, on or before October 29, 1910, and Mr. Dano replying that it could be done, and that he would do so, the defendant Searle authorized Mr. Dano to proceed with the case and procure judgment, quieting title against said deed, agreeing to pay Mr. Dano for his services, and also to pay for the costs of

such action, which payments the defendant Searle has made.

"On the discovery of this defect, the plaintiff Peterson declined completing the deal between himself and defendant Hultz until the defect complained of was removed, or he had something showing that the defendant Hultz would clear the title of the defect complained of. Thereupon a new agreement for warranty deed was made.

"On the signing of said last contract, the plaintiff executed and delivered the two notes of $1,100 each, and the mortgage provided to be given by the first contract, and paid the $500 cash agreed to be paid. Plaintiff then took and went into possession of the lands. During the month of June, 1910, plaintiff paid to the county clerk the fees for recording of the two deeds conveying the land to him. Mr. Dano, as attorney for the defendant Searle, obtained a decree quieting title against the said quitclaim deed of Beardsley to Radcliffe in the district court for Keith county, Nebraska, on October 29, 1910. The abstract of title was not extended showing the title cleared of such defect, nor was there any abstract of any character furnished plaintiff on or before October 29, 1910, nor since that date, until during the progress of the trial of this cause, when defendant tendered abstract. Defendants' exhibit B.

"On October 29, 1910, plaintiff wrote a letter to the defendant Hultz, saying: 'As you have failed to deliver abstract of title of the S. ½ of the NE. ¼ and the NE. ¼ of the SE. ¼ of section 22, town. 14, range 39, I demand that you return all money paid by me to you on said land, and that you return notes at once.

"On January 3, 1911, the plaintiff began this action."

During the trial the plaintiff tendered a quitclaim deed conveying the land to defendant Hultz.

Plaintiff maintains that time was of the essence of the contract, and that upon the failure to furnish the abstract upon October 29, 1910, he was immediately entitled to the return of the purchase price. He further contends that the abstract tendered does not even now show a perfect title, and that he is entitled to rescind for that reason.

We are unable to take the view that time is of the essence of this contract. It is true that time may be the essence of a contract even without the use of an express stipulation to that effect. *White v. Atlas Lumber Co.*, 49 Neb. 82. "Ordinarily, therefore, the question is one of intention, to be ascertained from the construction of the contract as a whole and with reference to the circumstances surrounding the transaction; and in construing the contract due consideration is also to be given to the subsequent conduct of the parties tending to show how they themselves understood it." 39 Cyc. 1339. But the converse is also true, and where, considering all the facts and circumstances surrounding the execution of the contract, and the intention of the parties, it does not seem right, just, or equitable that the contract should be construed with such strictness, and it appears that the party seeking to enforce it according to its strict letter will receive no damage by reason of the failure to comply upon the day named, the courts will not ordinarily hold that time is essential.

The contract was made on April 7, 1910. The abstract was to be furnished by October 29 of that year. The essential thing in the contract was the furnishing of an abstract showing a marketable title within a reasonable time, and this date was fixed upon as being in all probability the earliest date at which a decree could be obtained in the lawsuit to be brought and abstract could be furnished. The parties must have had in view the well-known uncertainty of the speedy termination of a lawsuit. A case very much in point is *Beck v. Simmons & Kornegay*, 7 Ala. 71. In that case it was held that, where one has proceeded in a contract for the exchange of land so far as to obtain possession with knowledge of a defect in the title, he cannot afterwards object to the defective title as a reason for not completing the contract, unless there is unreasonable delay in curing the defect. If he knows the defect can only be obviated by judicial proceedings, the time stipulated for the completion of the contract will not be con-

sidered an essential ingredient. See, also, *Kemper v. Walker,* 32 S. W. (Ky.) 1093.

As to the contention that the abstract tendered does not show a marketable title: Forty acres of the land stood upon the record at one time in the name of "H. M. Beardsley." An action to foreclose a tax lien upon the same was brought by Keith county against "H. M. Beardsley" and others. Service was had by publication, and the action proceeded to decree, sale and sheriff's deed. The title conveyed to plaintiff by the defendants is based in part upon these proceedings. After the deed was made, "H. M. Beardsley" conveyed by quitclaim deed to F. P. Radcliffe. After the contract of sale was made, a quitclaim deed was procured from certain persons describing themselves as the sole heirs of F. P. Radcliffe, deceased, which deed inured to plaintiff's benefit. There is a deposition in the record to the effect that Radcliffe died in 1911, and that the grantors are his sole heirs. The objections made to this title by plaintiff are that "an abortive foreclosure for taxes sought to deprive" Beardsley of his title. No defect in the foreclosure proceedings has been pointed out. One who has taken possession under his deed, and who seeks to rescind for the reason that the title is defective or not a marketable one, has the burden of pointing out the defects, and a reviewing court will not of its own motion assume the labor of examining abstracts in the endeavor to detect or discover a defect which will vitiate the title. The cases cited by plaintiff applying to executory contracts do not apply to the facts in this case.

It is next objected that there is no showing that the estate of F. P. Radcliffe was ever probated, where he died, when he died, or whether his debts were ever paid. It is true these facts are not shown in the abstract, although supplied to some extent by other proof in this case; but if the foreclosure proceedings are valid, as we must presume they are, as the record stands, H. M. Beardsley had been divested of his title before he attempted to convey to

Radcliffe, and the latter took no title. Defects in conveyances from Radcliffe are therefore immaterial.

The judgment of the district court is

AFFIRMED.

[illegible], FAWCETT and HAMER, JJ., not sitting.

JOSEPH P. KREYCIK, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JUNE 23, 1914. No. 17,771.

Railroads: INJURY TO LIVE STOCK: EVIDENCE. The fact that an unfastened gate in a fence between a pasture and the right of way of a railroad company was opened by cattle may be established by circumstantial evidence, and in this an action for damages for the killing of cattle by a railroad train the evidence is examined and *held* to sustain the verdict.

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

A. A. McLaughlin, Edgar R. Hart and *Wymer Dressler,* for appellant.

M. F. Harrington and *John M. Tucker, contra.*

LETTON, J.

Plaintiff is a ranchman owning a pasture adjoining the right of way of the defendant railroad company on the south. A private crossing of the railroad with gates on each side of the right of way opened from the pasture. On March 4, 1910, plaintiff had between 300 and 400 head of cattle in the pasture. In the afternoon of that day a number of the cattle passed upon the railroad track through the gate on the south side of the right of way, and nine were killed by a train. This action is to recover damages for the loss of the cattle.

The petition alleges that defendant for a long time before March 4, 1910, had kept and maintained this gate

"in a shaky, loose, wobbly, unfastened, unsafe" condition, and "in such condition as not to resist the pushing or rubbing of cattle," and that the cattle killed pushed against the gate and passed through an opening made between the gate and post. The answer is a general denial.

The proof shows that the gate was old and somewhat rickety. It was not hung on hinges, but was held up by two posts at each side of the opening, and was opened by being pulled from between the posts at one end and then swung round. Several witnesses for plaintiff testify that it could be sprung from between the posts by pushing against it; while defendant's witnesses say that, while it had been broken and repaired, the gate was in fairly good condition. Two sectionmen who were on the train which struck the cattle say the gate was standing open, leaving a space of about four feet between the gate and the post, and that it was opened into the pasture. All witnesses who were present that evening and the next morning say that the ground was soft and muddy, and there were no tracks of any kind except cattle tracks at or near this gate, and that there were no wheel tracks, horse tracks, or human tracks near the corresponding gate on the north side of the track. It was shown that hunters and others sometimes passed through these gates with vehicles or on horseback, but there is nothing to show that any one had passed that day or had been seen in the vicinity. It was also shown that at this season of the year cattle are very apt to rub and push against gates, posts, and other structures. At the conclusion of plaintiff's evidence defendant moved for a directed verdict. This should have been sustained, as at that time the evidence was clearly insufficient to sustain a verdict. Defendant then produced witnesses. During their examination proof was made for the first time of the absence of any but cattle tracks at or near the gates. This was reinforced by the evidence of plaintiff when on the stand in rebuttal.

Defendant insists that the evidence is not sufficient to support a verdict, and that the court erred in giving certain instructions and in refusing others tendered. The

law of the case was practically submitted in two instructions, Nos. 4 and 5. The substance of No. 4 is that the burden of proof was upon plaintiff, and that before he could recover the jury must be satisfied from the preponderance of the evidence that the south gate was on the 4th of March, 1910, "in such a loose, unsafe, shaky, wobbly and unfastened condition as to permit plaintiff's cattle to open the same, and thereby get upon defendant's right of way and railway track where they were killed, and that on account of said gate being in the aforesaid condition the plaintiff's cattle did pass through said gate and onto the defendant's track," etc. Defendant claims that this instruction is erroneous, because it omits the necessary element that the cattle opened the gate. It is true the instruction would have been more accurate if this element had been included, but we think that, taking the instruction as a whole, that the cattle must have opened the gate before the plaintiff would be entitled to recover is clearly implied, and the instruction must have been so understood by the jury.

The next instruction tells the jury that, if they believe that on that day some person left the gate in question open, and by reason of it being left open by some person the cattle passed through, then their verdict should be for defendant. It seems to us these instructions submitted to the jury the only issue in the case, and that it was unnecessary to give those requested by defendant.

With respect to the sufficiency of the evidence, defendant calls our attention to the principle that circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved are of such a nature and so related to each other that the conclusion is the only one that can fairly and reasonably be drawn therefrom, and insists that from the manner of construction of the gate it would be impossible for the cattle to have opened it. The evidence as to the weak condition of the gate itself is not so satisfactory as to this being the cause of its being opened as that with regard to the lack of a fastening of even the simplest nature.

The gate was defective in that the posts were not provided with the crosspiece on which, as is customary in this type of farm gate, the gate might rest, and upon which a notch in one of the boards might engage as a fastening, to prevent it being pushed open without first lifting it from the crosspiece. The gate could easily have been pushed or pulled laterally beyond the post, depending, of course, upon how far it had been inserted when closed, and once beyond the posts it could easily have been pushed or pulled in either direction. The fact that it was opened into the pasture, and not out of it, showed that it must have been pulled, but it is not unreasonable to believe, since no other agency seems to have intervened, that it could have been and was done by an animal putting its head across the top of one of the other bars and rubbing and pulling. It was only open a few feet. The hypothesis urged by defendant that the gate was sprung from between the posts is not the only one on which plaintiff's case rests. The case is a close one on the facts, but, under the circumstances, we think that it is a fair conclusion that no other agency operated to open the gate than that of the cattle. The locality of the trial leads to the presumption that the jury were probably familiar with the habits of cattle, and they were probably better fitted to judge of the facts than this court is.

We are not convinced that the verdict is wrong, and the judgment of the district court is therefore

AFFIRMED.

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

PEOPLE'S TRUST & SAVINGS BANK, APPELLANT, V. L. W. RORK, APPELLEE.

FILED JUNE 23, 1914. No. 17,777.

1. **Bills and Notes:** DEFENSE OF FRAUD: BURDEN OF PROOF. Where, in an action on a promissory note by an indorsee thereof, the defense interposed is fraud in the inception of the note, the burden is upon the plaintiff to prove that he is a *bona fide* holder for value.

2. ———: ACTION ON NOTE: INDORSEMENT: EVIDENCE. In an action by an indorsee against the maker of a promissory note, a general denial puts in issue the allegation that the note was indorsed before maturity, and evidence to show that the note bore no indorsement after the time it was due is properly receivable as matter of defense.

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

Williams, Lawrence, Welsh & Green and *John Stevens*, for appellant.

Lambe & Butler, contra.

LETTON, J.

Action by the indorsee of a promissory note. Judgment for defendant, and plaintiff appeals.

The plaintiff is a banking corporation doing business in Illinois. The defendant is a resident of McCook, Nebraska. In November, 1909, defendant purchased from one J. L. Galloway certain real estate near Fort Morgan, Colorado, executed a contract of purchase therefor, and in part payment executed to Galloway his note for $500, due June 1, 1910, payable at the Bank of Oxford, Oxford, Nebraska. The petition alleges that Galloway, before maturity, sold, indorsed and delivered the note to plaintiff for value in the usual course of business. The answer admits the execution and delivery of the note, but denies the other allegations in the petition and pleads that the note was obtained by means of fraudulent misrepresentation as to the character and value of the land sold, and that defendant had rescinded the contract. The evidence shows that a gross fraud was perpetrated upon the defendant and justifies the verdict, unless the plaintiff is entitled to protection as a *bona fide* holder in due course of negotiable paper.

Plaintiff's contention is that in such a case an answer states no defense, unless it pleads that plaintiff at the time of acquiring the note had notice of the claimed defense, or received the note in bad faith, or after maturity,

and that the court erred in admitting evidence of the fraud and misrepresentations of Galloway. This is not the rule where a note is obtained by fraud. *Kelman v. Calhoun*, 43 Neb. 157. The established rule is: "Where fraud in the inception of a note is pleaded as a defense and supported by proof, in an action by an indorsee against the maker, the burden is on plaintiff to show he is a *bona fide* holder." This rule has been so often announced that it seems useless to cite authorities in support of it. *Central Nat. Bank v. Ericson*, 92 Neb. 396, where a number of other Nebraska cases are cited.

At the trial the plaintiff's evidence tended to prove that it took the note before due as collateral security for a loan made by it to Galloway, and that it was indorsed at the time of the transaction. This made a *prima facie* case, and, in the absence of any proof of the defense alleged, would have entitled plaintiff to a judgment. The question whether or not the plaintiff was a holder in due course depended upon the fact of indorsement before the transfer. Defendant introduced three witnesses who testified that, after the date of the maturity of the note, they examined it at the Fort Morgan bank, where it had been sent by plaintiff for collection, and that at that time it bore no indorsement. This evidence was properly receivable under the denial in the answer (*Donovan v. Fowler*, 17 Neb. 247; *Graves v. Norfolk Nat. Bank*, 49 Neb. 437), and was sufficient with the evidence as to the fraud to uphold the verdict. Under the provisions of section 30, negotiable instruments law (laws 1905, ch. 83, art. III; Rev. St. 1913, sec. 5348), "an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. * * * If payable to order it is negotiated by the indorsement of the holder completed by delivery." The provisions of section 49 of the act (Rev. St. 1913, sec. 5367) also apply: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had

therein, and the transferee acquires in addition the right to have the indorsement of the transferrer. But, for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made." The district court properly admitted evidence of the fraud, and the note was subject to all defenses that might have been made against the original payee.

Complaint is made of the giving and refusal to give a number of instructions. The criticism made is based upon the theory that it was incumbent on defendant to plead and prove notice or knowledge of the defense on the part of plaintiff before it took the note, as collateral security. This complaint is covered by what has been said, and will not be further discussed.

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

AFFIRMED.

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

PEOPLE'S TRUST & SAVINGS BANK, APPELLANT, V. F. A. BALLIET ET AL., APPELLEES.

FILED JUNE 23, 1914. No. 17,776.

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

Williams, Lawrence, Welsh & Green and *John Stevens*, for appellant.

Lambe & Butler, contra.

LETTON, J.

The questions of fact and of law involved in this case are substantially the same as in the case of *People's Trust*

& Savings Bank v. Rork, ante, p. 415, and the decision in that case rules this.

The judgment of the district court is

AFFIRMED.

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

WILLIAM BOWER, APPELLEE, V. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED JUNE 23, 1914. No. 17,574.

1. **Evidence:** JUDICIAL NOTICE. The courts of this state will take judicial notice of the fact that the "Black Hills" are in South Dakota, and of the further fact that the western terminus of the main line of the Chicago & Northwestern Railway Company, running from Omaha northwest through the city of Long Pine, Nebraska, is in the Black Hills, in the state of South Dakota.

2. **Master and Servant:** INJURY TO SERVANT: INTERSTATE COMMERCE. And where the evidence shows that the western division of said railway company is known as the Black Hills division, the term "through trains," when applied by railroad men to trains in such division, will be construed to mean trains running through the division from one terminal point to the other.

3. ———: ———: ———. Evidence examined and set out in the opinion *held* sufficient to show that at the time he was injured plaintiff was engaged in interstate business, and that his action was properly brought under the Federal Employers' Liability Act of April 22, 1908. 35 U. S. St. at Large, pt. 1, ch. 149, p. 65.

4. ———: ———: NEGLIGENCE: SUBMISSION TO JURY. Evidence examined and set out in the opinion *held* sufficient to justify the submission of the question of defendant's negligence to the jury.

5. ———: ———: ASSUMPTION OF RISK: SUBMISSION TO JURY. Record examined, and *held* not to contain any evidence to require the submission of the question of assumption of risk to the jury.

6. **Trial:** INTRUCTIONS: CONTRIBUTORY NEGLIGENCE. The instructions upon the question of contributory negligence examined, and *held* not to contain any error of which defendant can complain.

7. **Damages:** INSTRUCTIONS. In an action for personal injuries, where the evidence establishes without contradiction that plaintiff's in-

juries are permanent, a clause in the charge to the jury, on the question of the measure of damages, that the jury, if they find for the plaintiff, may allow him for "such prospective suffering and loss of health, if any, as the jury may believe from all the evidence before them in this case he will sustain by reason of such injuries," is not error, nor in conflict with the rule of this court that in such cases it is the duty of the court to instruct the jury that only such damages as are reasonably certain to result therefrom can be compensated by their verdict.

8. ———. Plaintiff was a locomotive engineer, 54 years of age. For three years prior to his accident he had been earning $157 a month. Within less than two months after the time of his injury he would have received a raise of salary to $175 a month. His injury resulted in the loss of an eye. Prior thereto he had been a man of robust health. *Held*, That a verdict of the jury for $11,500, which is sustained by the trial court, cannot be held to be so excessive as to call for a reversal of the judgment, or to warrant a reduction by this court.

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

A. A. McLaughlin, Edgar R. Hart and *Wymer Dressler*, for appellant.

M. F. Harrington, contra.

FAWCETT, J.

Plaintiff was a locomotive engineer in the employ of defendant. On November 28, 1910, while engaged in filling the lubricator upon his engine, a glass attachment to the lubricator, which was surrounded by a metal shield, exploded and blew off the shield, which struck plaintiff in the left eye, causing an injury which necessitated the removal of the eye, for which injury he obtained a judgment in the district court for Holt county. Defendant appeals.

Defendant complains that the court erred in refusing to instruct the jury that, "under the pleadings and evidence in this case, plaintiff is not entitled to recover, and your verdict will be for the defendant." A number of reasons are urged in the argument why this instruction should have been given, one of which is that by his petition plain-

tiff based his right to recover upon the Federal Employers' Liability Act of April 22, 1908, and that there is no evidence in the record that plaintiff at the time he received his injury was engaged in interstate commerce, nor any evidence to show that the train, to which he alleges his engine was about to be attached, was so engaged. While the evidence of the interstate character of trains "3" and "6" is not as clear and satisfactory as it could and should have been made, we think it was sufficient to take the case to the jury on that point. Plaintiff testified that he had been hauling trains 3 and 6 for about three years, "3" running west, and "6" running east. "Q. These were what they call the through trains? A. Yes, sir." The witness Mackey testified that he had been an engineer for defendant 20 years, running on the "Black Hills division;" that the headquarters for that division is Chadron. The witness Walford testified to the same facts. The witness Collins testified that he was a locomotive engineer in the employ of defendant. "Q. On what division? A. On what is called the Black Hills division; that is, west of Long Pine. Q. Where is the headquarters of that division? A. Chadron." He testified further that he had been employed on the Black Hills division as an engineer for 21 years. We take judicial notice of the fact that the Black Hills are in South Dakota. We think we may also take judicial notice of the fact, well known to every citizen of even ordinary intelligence in the state of Nebraska, that the western terminus of defendant's road which runs through Long Pine is in the Black Hills. With these facts established, and the further fact established by the evidence that Long Pine is a division point on the Black Hills division, of which Chadron is the headquarters, the testimony of plaintiff that trains 3 and 6 were through trains meant that they were trains running through the Black Hills division, which would be from Long Pine to the Black Hills. Being such trains, they were interstate trains, engaged in interstate business, and plaintiff, when running his engine hauling one of those trains, or when upon his engine preparing it to be attached to one of such trains for the pur-

pose of hauling it would be engaged in interstate business. We think the evidence sufficiently shows that at the time he was injured he was preparing his engine to haul train No. 3.

It is further urged that the court erred in overruling defendant's motion for an instructed verdict made at the close of all the testimony. The ground of this motion was that all of the evidence given upon the trial failed to establish the acts of negligence charged against defendant in the petition, and that the evidence shows without contradiction or dispute that whatever risk there was incident to the use and operation of the lubricator upon his engine was one of the ordinary risks incident to his employment and assumed by him. This is the most important point in the case. The evidence shows that attached to each locomotive engine is a lubricator, and that as a part of such lubricator there is a glass attachment which is called by the witnesses "the lubricator." At the time of plaintiff's injury defendant was using two kinds of lubricators, one called the "Nathan," and the other the "Bull's Eye." The Nathan is a hollow tube, while the Bull's Eye is flat and solid. Plaintiff's engine was equipped with a "Nathan." Both lubricators were so connected with the boiler of the locomotive as to permit the steam pressure to force the oil through the lubricator and into the parts of the locomotive for which the same was intended. This was necessary because the engineer must be able to see at all times that the oil is dropping and that the lubricators are performing their functions. When in full use, either lubricator was required to sustain the same steam pressure as the boiler. The Nathan lubricator had been in use for over 20 years, and had been used on all of the engines of the defendant down to between two to four years before the time when plaintiff received his injury, when the Bull's Eye made its appearance. The evidence shows that the Nathan lubricator was liable to and did frequently break. The three conditions under which it was most liable to break were: (1) When it was first installed and before it had been thoroughly "tempered;" (2) when subjected to a

sudden change of temperature; and (3) after it had been used for some time and had worn thin. Over each of the Nathan lubricators there was a metal shield, divided in the center by a spring which, by a simple movement of the hand, could be removed from the glass lubricator or replaced. This shield was evidently designed to serve a double purpose: (a) To prevent the glass from being broken if anything hard should strike it; and (b) to prevent injury to the engineer from flying parts of the glass when a break occurred. When one of these tubes would break it would be replaced by another, either by a man at the roundhouse or by the engineer himself, if upon the road. This, according to the evidence, would occasion a delay to the train of from 12 to 20 minutes. The witnesses all agree that the Bull's Eye is unbreakable; that is to say, none of the witnesses, including a number of old engineers and the foreman of defendant's roundhouse in Chicago, had ever heard of one breaking. Whenever one of the Nathan tubes broke it was the duty of the engineer to report the fact to the proper official of the defendant. The evidence shows that after the tube had been in use for some little time it would occasionally wear thin. When it became so worn the fact could be detected by the engineer, and it would then be his duty to call for a new tube. That plaintiff must have been a competent and careful engineer is shown by the fact that in 25 years' service as an engineer only three of these tubes had broken on engines being run by him; the one that caused his injury, one three weeks before that time, and the other seven years prior thereto. As a witness he was very frank and candid. He testified that he had never heard of any one being injured by the breaking of one of the tubes; that he at all times believed that the tube was strong enough to withstand the same steam pressure as the boiler of his locomotive; that he never thought there was any danger in using the tube; that he had no fear of it. He was asked: "Q. Now, Mr. Bower, can you think of anybody connected with the operating part of the railroad that would know more about that lubricator and the shield, and the danger connected

with the use of it on an engine, than an engineer that had been using it for 25 years? A. No; I don't know as I do. Q. And don't you think that at the time you got hurt you knew as much about this lubricator and as much about the danger of its use as any man in the service of the Northwestern railroad? A. Well, I thought—it was my understanding and I was always taught to believe the glass would stand the pressure of the boiler. Q. And it is a fact that this glass had been standing the pressure of the boiler for three weeks? A. Yes, sir; that is the fact." When Mr. Bower gave this testimony he gave it frankly, feeling that he in fact did know as much about this lubricator and the shield and the danger incident to the use of it on an engine as anybody connected with the operating department of the railroad; but the testimony of defendant's foreman of its roundhouse in Chicago shows that in this Mr. Bower was mistaken. The witness Harner, called by the defendant, testified that he lives in Chicago, and is foreman of defendant's roundhouse at Fortieth street in that city. On cross-examination he testified: "Q. When did they first begin using the Bull's Eye lubricator? A. To my knowledge about, I think pretty close to, three years ago. Q. Didn't they use them in 1906 at Chadron? A. Well, I wasn't (at) Chadron. Q. You weren't? A. No, sir. Q. Your own personal knowledge is about three years? A. Yes; about three years, or even less than that, if anything. Q. What kind or class of engines were they using them on? A. On the Q engines, when I first observed them. Q. To what extent are the Bull's Eye lubricators used on the Q engines now? A. Well, I don't know. Q. Well, are they using this old Nathan lubricator on many of the engines now? A. There is, I think, probably 25 per cent. Q. Of the engines that use the Nathan lubricator? A. Yes. Q. About 25 per cent. of all of them? A. I think so. You understand that is a rough estimate; I have no means of knowing what other divisions might have. Q. But in the division where you are at Chicago? A. We are changing them; probably 75 per cent. is changed. Q. That have the Bull's Eye lubricator now?

A. Yes; 50 to 75 per cent. * * * Q. When you say there is about 25 per cent. still using this old Nathan lubricator, that includes the big and little and all? A. Yes, sir. Q. Switch engines and everything? A. Switch engines, modern power, they have got Bull's Eye; they carry 185 pounds pressure. Q. Even the switch engines have the Bull's Eye? A. The new power all comes with Bull's Eye. Q. It is recognized as the proper appliance now, is it not? A. Yes, sir. Q. And has been for three or four years? A. I think so. Q. And this other class do explode —the Nathan? A. Well, they have been known to explode? Q. And hurt men? A. Sure. Q. And that is why you made the change. Isn't that the fact? A. Not necessarily so; that is one of the facts. Q. Another one is the breaking of the old class lubricator would delay the trains at times? A. Yes; that is another." On redirect he testified: "Q. All the new engines now are equipped with the new kind? A. Yes, sir; all our new modern power comes with Bull's Eye. Q. That has been true for several years? A. Yes, sir; ever since the Q came. Q. That was about three years ago? A. I think so; I think the Q engines came three years ago." This testimony by defendant's foreman establishes several important facts. It shows that the Bull's Eye is now recognized by the defendant as the proper appliance, and has been for three or four years; that all of the new engines of the class plaintiff was operating, engines of 190 pounds pressure, now come equipped with the Bull's Eye; that since the Bull's Eye made its appearance defendant had been changing this device on its engines by substituting the Bull's Eye for the old Nathan, and had made such substitution on about 75 per cent. of all of its engines, "big and little and all." A fair inference is that in making those changes they would devote their attention more particularly to the high-pressure engines, and if only 25 per cent. of all of their engines, "big and little and all," now have the old Nathan, it is, we say, a fair inference that by far the larger portion of that 25 per cent. would be low-pressure engines. It also discloses an important fact not

known to plaintiff when he said that he did not know of any one connected with the defendant who would know more about the danger incident to the use of the old style Nathan than himself. It shows that the company knew that the old Nathan would explode and "hurt men." When the witness testified that these old lubricators had been known to explode, and was asked, "Q. And hurt men?" he answered, "Sure." There is significance in the emphatic character of this answer. He further shows that that fact was one of their reasons for changing from the old Nathan to the Bull's Eye lubricator; the other fact being that the breaking of the old lubricators would delay the trains at times. It therefore appears that the defendant knew the old style lubricator, which it had been using for many years, was dangerous; that its employees who were using it were being injured by it; that there was another device in the market, which the defendant was using, that was absolutly safe, and yet it continued to permit plaintiff and other engineers in its service to use the dangerous device when it knew of and had in its possession a safe one, which could easily and cheaply be substituted. This does not come within the rule that a master is not obliged to use the best-known device. It presents the simple question whether a master may continue to use a dangerous appliance when it knows of and has at its command a perfectly safe one. This it cannot do. We therefore hold that the court did not err in submitting the question of defendant's negligence to the jury.

What we have above said disposes of the question of assumption of risk. The rule is now well established, not only in this state, but elsewhere, that a servant assumes only the dangers incident to his employment which are known to him, or which, by the exercise of reasonable care, he would know. The evidence in the record before us does not bring plaintiff within that class. He had used this device for many years; had never been injured himself, and had never heard of anyone else being injured. He "was always taught to believe" that the Nathan lubricator would withstand the same steam pressure as

the boiler of any engine he had used. He had never heard of a break when the metal shield did not afford protection. Had he known what the defendant knew, viz., that men were being hurt by the use of this device, and had then continued in the service without objection, there would be some foundation for a claim of assumption of risk. Complaint is made that the trial court by its instructions withdrew the question of assumption of risk from the jury. It is true that paragraph 4 of the instructions given by the court on its own motion failed to submit it, but it is also true that in other paragraphs the point was covered. But, even if not submitted at all, it would not be error, for the reason that there is nothing in the evidence which would sustain a finding that plaintiff assumed the risk of danger in using this device.

On the question of contributory negligence, the court went farther in favor of defendant than it should have gone under the Federal Employers' Liability Act, as it gave the defendant the full benefit of its plea of contributory negligence.

A number of assignments are urged against the rulings of the court in the giving and refusal of instructions. We have examined them carefully, and are unable to discover prejudicial error in any of them. The only one to which we deem it necessary to refer is instruction No. 4, requested by the plaintiff, which reads as follows: "If you find for the plaintiff you will allow him as damages such sum as will compensate him for the injuries he has sustained, not exceeding $31,750, which is the amount sued for. The elements entering into damages are as follows: (1) The value of his time during the period that he was disabled by the injuries; (2) if the injuries have impaired Mr. Bower's power to earn money in the future, such sum as will compensate him for such loss of power; (3) such reasonable sum as the jury shall award him on account of any pain and anguish he has suffered by reason of his injuries; (4) such prospective suffering and loss of health, if any, as the jury may believe from all the evidence before them in this case, he will sustain by reason of such

injuries; (5) such sum as the jury may deem proper for the inconvenience of his going through life with only one eye." Subdivision 4 is the one complained of. Defendant cites *Chicago, R. I. & P. R. Co. v. McDowell*, 66 Neb. 170, and *Nixon v. Omaha & C. B. Street R. Co.*, 79 Neb. 550, together with cases from other courts, to the point that it is the duty of the court in instructing the jury as to any future damages that only such as are "reasonably certain to result therefrom" can be compensated by their verdict. These authorities are eminently sound, but they do not fit the instruction under consideration. In the *McDowell* case the court instructed the jury that, if they believed that plaintiff had suffered permanent injuries, it was the duty of the jury to estimate, as well as it can be done, the damages which he had suffered since the time of the injury by reason thereof, as well as what "he may hereafter suffer, if any." In the *Nixon* case the instruction told the jury that in determining the damages they had a right to consider the testimony as to physical pain and suffering, if any, endured by the plaintiff, "or which she may endure in the future as a result of the injuries received at the time complained of." We reversed the judgments in both cases for the reason that permitting the jury to allow for such damages as the plaintiff "may hereafter suffer" is a departure from the rule of reasonable certainty and opens the door for unrestrained speculation. The instruction before us is not subject to this criticism. It did not tell the jury that they might allow plaintiff for such suffering and loss of health in the future, as the plaintiff "may sustain," but it told the jury that they could allow for "such prospective suffering and loss of health, if any, as the jury may believe from all the evidence before them in this case he will sustain by reason of such injuries;" not that they may allow for such suffering as the jury "may believe" he may sustain, but for such suffering as the jury may believe "from all the evidence before them in this case;" that is to say, for such suffering as the jury find from the evidence in the case he "will" sustain, not such as he "may" sustain. The language of the instruc-

tion is positive, clear, and explicit, that the jury must be governed by the evidence in the case before them and allow the plaintiff for such future suffering only as he will actually sustain by reason of his injuries.

In *Chicago & N. W. R. Co. v. De Clow,* 124 Fed. 142, the circuit court of appeals for the Eighth circuit held: "A charge that a plaintiff could recover compensation 'for any pain and suffering he may be called upon to undergo in the future—that is, in case you find that he will suffer pain and suffering in the future'—is not error, in the absence of any suggestion or request for a modification or explanation of the instruction before the jury retires." On page 145 Judge Sanborn in the opinion says: "If the instruction that the plaintiff was entitled to compensation 'for any pain and suffering he may be called upon to undergo in the future' stood alone, without qualification by any other part of the court's directions to the jury, it would undoubtedly be erroneous. The authorities cited for the defendant go no farther. But this sentence did not stand alone. The court was evidently conscious of the inherent error in the unqualified statement it contained the moment it was uttered, and it instantly added: 'That is, in case you find that he will suffer pain and suffering in the future.' It is clear that the court made this qualification of its first statement for the express purpose of conforming its charge to the established rule. * * * The jury have found under this charge that the plaintiff will endure all the future suffering for which they have given him compensation. In order to reach the conclusion that the court was guilty of prejudicial error in this instruction, the presumption must be indulged that the jury have found that the plaintiff will endure future suffering that it was not reasonably certain from the evidence that he would sustain; that they have found that he will suffer what they were not reasonably certain that he would suffer. This presumption is too violent and irrational for us to raise. There is no such legal presumption. An appellate court cannot and ought not to create it, and there was no prejudicial error in this part of the charge."

It is further urged that the verdict is excessive, appearing to have been given under the influence of passion and prejudice. The verdict was for $11,500. Plaintiff was 54 years of age. For three years preceding his accident he had been earning $157 a month. On the 1st of January following the time of the injury—a period of a month and three days—plaintiff would have received a raise in salary to $175 a month. His expectancy of life, as shown by the Carlisle table, was 18.28 years; but his appearance upon the witness-stand and his previous good health may have satisfied the jury that he might reasonably be expected to live a much longer period than that. The expectancy of life, as shown by the Carlisle table, is not conclusive upon the jury. It is simply evidence which they have a right to take into consideration in arriving at their conclusion as to the probable expectancy of plaintiff's life. His injury was of so grave a character that he is forced to abandon the profession of his lifetime. He can no longer hold a position as engineer. He must go through life with one eye. During all that time he must suffer the disfigurement, discomfort, and other handicaps thus forced upon him. The jury, who saw him, fixed the amount of his compensation. An experienced trial judge has refused to set aside their estimate. We must decline to go into a mathematical computation to determine with exact nicety just how much compensation should be paid to a man for such a terrible injury.

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

AFFIRMED.

RINNAH A. WELLS, APPELLANT, V. PETER B. BLOOM ET AL., APPELLEES.

FILED JUNE 23, 1914. No. 17,576.

1. **Taxation**: TAX SALE: RIGHTS OF PURCHASER: LAW GOVERNING. The rights of a purchaser of land at tax sale, at the time of applying for a tax deed, and the rights of the owner of such land at said time,

are to be measured by the provisions of the revenue law in existence at the time of the tax sale and the receipt by the purchaser of his tax sale certificate, and not by a different law enacted subsequent to the tax sale and prior to the application for a tax deed. Comp. St. 1903, ch. 77, art. I, sec. 242.

2. ———: ———: ———: ———. The record examined, and *held*, that the rights of the parties in this suit must be determined under the revenue law of 1901 (Comp. St. 1901, ch. 77, art. I) in force at the time defendant purchased the land in controversy at tax sale and obtained his tax sale certificate.

3. ———: TAX DEED: VALIDITY. A tax deed issued in 1904, upon a tax sale certificate issued on a treasurer's tax sale made in 1902, without a previous compliance by the purchaser with the requirements of section 124, art. I, ch. 77, Comp. St. 1901, is void and confers upon the grantee in such tax deed nothing more than color of title.

4. ———: TAX SALE: REDEMPTION. And in such case the owner of the land may proceed at any time within ten years to quiet his title as against such tax deed and to redeem his land from such tax sale.

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

J. G. Beeler, for appellant.

Wilcox & Halligan, contra.

FAWCETT, J.

Plaintiff instituted this suit in the district court for Lincoln county to quiet his title to the west half of section 25, township 12 north, of range 28 west of the 6th P. M., in that county, against an alleged void tax deed. Defendant demurred to the petition upon the grounds: (1) that it does not state facts sufficient to constitute a cause of action; and (2) that it shows upon its face that more than six years had elapsed since the time defendant obtained his treasurer's tax deed and went into possession of the land involved. The demurrer was sustained, and, plaintiff electing to stand upon his petition, the suit was dismissed. Plaintiff appeals.

The petition alleges that plaintiff is the owner in fee of the lands in controversy, under mesne conveyances from the United States to the Union Pacific Railway Company

and from the railway company to plaintiff; that defendant, under the name of P. B. Bloom, claims title to the land and is in possession of the same under and by virtue of a treasurer's tax deed, dated November 18, 1904; that the deed is void and conveyed no title to defendant, for a number of reasons, among which are that defendant purchased the land at tax sale on November 3, 1902, for the taxes of 1900 and 1901, for the sum of $14.55; that, at the time he obtained the tax sale certificate, section 124, art. I, ch. 77, Comp. St. 1901, which was then in force, provided: "Every such purchaser or assignee by himself or agent, shall, before he shall be entitled to a deed, make an affidavit of his having complied with the conditions of the foregoing section, stating particularly the facts relied on as such compliance, which affidavit shall be delivered to the person authorized by law to execute such tax deed, to be by such officer entered on the records of his office, and carefully preserved among the files of his office, and which record or affidavit shall be *prima facie* evidence that such notice has been given. Any person swearing falsely in such affidavit shall be deemed guilty of perjury, and punished accordingly." The "foregoing section," referred to in section 124, provided: "Hereafter no purchaser or assignee of such purchaser of any land, town, or city lot, at any sale of lands or lots for taxes or special assessments due, either to the state or any county or any incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this state, shall be entitled to a deed for the lands or lots so purchased, until the following conditions have been complied with, to wit." The conditions therein required to be complied with are the serving of notice of the expiration of the time for redemption, the persons to be served and the manner of service. The petition then, in detail, alleges an utter failure on the part of defendant Bloom to comply with any of the provisions of section 124, *supra*. The prayer is for an accounting as to the amount necessary to be paid by plaintiff in order to redeem from the tax sale and have his title quieted, and for an accounting by defendant of rents and

profits during the years he had been in possession of the land.

The point upon which this case turns is whether the rights of the parties are to be in all respects determined under the law in force in 1902, when the defendant purchased the land at tax sale and obtained his certificate, or under the law in force in 1904, when he obtained his tax deed. The courts of other jurisdictions are not harmonious on this point. We are relieved of the necessity of considering this conflict in the authorities elsewhere, for the reason that we think the question has been settled by this court in *Whiffin v. Higginbotham,* 80 Neb. 468. In the syllabus we held: "Section 242 of the revenue act of 1903 (Comp. St., ch. 77, art. I) saves to the parties purchasing land at tax sales held prior to the passage of that act all rights, vested or otherwise, extended to them by the statute in force when the purchase was made." The section of the statute there referred to is in the following language: "Nothing in this act shall be construed to release, discharge, or in any manner affect the validity or the collection of any tax heretofore assessed and levied under the revenue laws in force prior to the taking effect of this act, nor shall the same affect pending actions founded thereon or causes of action which may have accrued; but all rights in relation to such taxes and the collection thereof and all rights that may have accrued to persons under the revenue laws of this state are hereby saved and reserved." The opinion then states (p. 470): "Defendant argues that this section saves to the defendant nothing but vested rights, and that it does not cover or include the remedy for enforcing such rights or the time within which an action to enforce his remedy should be brought. The law has been well settled that the legislature cannot take away or affect vested rights, and this has been so long and well established that we cannot presume the legislature attempted by this section to reserve to a tax sale purchaser a right of which it had no power to deprive him. If the section is construed to mean that it

saves to the plaintiff or others having like claims only such rights as have become vested in consequence of his purchase, then the section would be meaningless and could have no effect whatever. We cannot presume that the legislature passed a meaningless statute, and the only force which this section can have is to save to the plaintiff and others in his position every right given him by the old revenue law, whether it related to his cause of action, or to the means of enforcing it and the time within which he should apply to the courts for his remedy. * * * (p. 471.) We are quite clear that the plaintiff's rights are to be measured by the provisions of the old revenue law under which his purchase was made, and not by the act of 1903." While the opinion refers constantly to the rights saved to the plaintiff, and saves to him the benefits of the law as it stood at the time of his purchase at the tax sale, it is equally applicable to the owner of the lands so purchased, and saves to him all of the rights he had at that time. This is made clear by the concluding clause of the section quoted, viz.: "But all rights in relation to such taxes and the collection thereof and all rights that may have accrued to persons under the revenue laws of this state are hereby saved and reserved."

We therefore hold that the rights of the parties in this case must be determined under the revenue law of 1901 (chapter 77, art. I) in force at the time defendant purchased the land in controversy at tax sale and obtained his tax sale certificate. This being true, then, under the facts pleaded in plaintiff's petition as above set out, which are expressly admitted by the demurrer, defendant's tax deed is void and conferred upon him nothing more than color of title. Plaintiff, therefore, had a right to proceed to quiet his title and to redeem at any time within ten years. Having proceeded within that period, the court erred in sustaining the demurrer and dismissing the suit.

The judgment is therefore reversed and the cause remanded, with directions to overrule defendant's demurrer, and for further proceedings according to law.

REVERSED.

CHARLES T. DICKINSON, RECEIVER, APPELLEE, V. JOHN J. KLINE ET AL., APPELLANTS.

FILED JUNE 23, 1914. No. 17,418.

1. **Corporations:** INSOLVENCY: SUIT TO DETERMINE LIABILITY OF STOCKHOLDERS: VENUE. The proceedings against the stockholders of an insolvent corporation by or in behalf of the creditors of the corporation to recover the full amount for which each stockholder is liable as fixed by his contract must be an action at law in which defendant is entitled to trial by jury. When the amount for which each stockholder is liable is unknown, but must be determined in the action, and depends upon equities to be adjusted among creditors or stockholders, or both, the action must be in equity. In such case there is a community of interest among them in the questions of law and fact involved, and the action may be brought in the county of the principal place of business of the corporation where the corporation itself can be served, and summons can be issued to other counties where other necessary defendants can be served.

2. ———: ———: LIABILITY OF STOCKHOLDERS. In such action, when the defendant stockholders have paid for their stock all that their contract with the corporation calls for, property of the corporation is the primary resource for the satisfaction of the claims of the creditors, and, until this resource fails, the creditors have no claim against such stockholders.

3. ———: ———: ———: CLAIMS: PARTIES: EQUITY. In an action in equity for the appointment of a receiver and to adjust and wind up the affairs of an insolvent corporation, a decree against stockholders for contribution is not final, nor is a decree allowing a claim of a creditor against the corporation final as to equities existing between such creditor and a stockholder who has paid the full amount of his subscription for stock. When the nature of the claims of creditors appears, and it also appears that stockholders who have fully performed their contract with the corporation ought not in equity to be required to contribute to such claims, all persons interested should be made parties to the proceedings, and the court should consider and determine the equities of the parties in allowing such claims.

4. ———: ———: ———. When subscribers have paid for their stock all that they have agreed to pay, nothing further can be recovered upon their contract. If their contract and dealing with the corporation of which they become members are such as to mislead *bona fide* creditors who have trusted the corporation, relying upon the assets

thereof, they may become liable to such creditors for further payments to the amount of the par value of their stock.

5. ———: ———: ———: FRAUD. An agreement that payment in full for stock at the par value thereof shall not be required is a fraud upon subsequent creditors who deal with the corporation on the faith of the capital stock being fully paid. A court of equity will, at the instance of such creditors, compel the holder of such stock to pay so much of the difference between the par value of the stock and what has been paid therefor as is necessary to satisfy the claims of such creditors. This, however, does not apply in favor of persons who dealt with the corporation with notice of the facts.

6. ———: ———: ———. Upon the evidence in this case indicated in the opinion, it is found that none of the creditors whose claims are contested in the answer was a *bona fide* creditor without notice of the equities of these defendants.

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

Sullivan & Rait, Charles G. Ryan, Charles P. Craft, Tibbets, Morey & Fuller, Mills, Mills & Beebe, L. S. Hastings, E. A. Coufal and *James C. Kinsler,* for appellants.

H. H. Bowes and *E. C. Page, contra.*

SEDGWICK, J.

In 1904 a corporation was organized under the laws of this state called the Omaha & Nebraska Central Railway, with an authorized corporate stock of $1,500,000. In 1908 John W. Ege, a stockholder of the company, began an action in the district court for Douglas county against the corporation, and, alleging gross misconduct on the part of the corporation and its officers, asked for the appointment of a receiver and an accounting. This plaintiff, Charles T. Dickinson, was by the court appointed as receiver for the corporation, and afterwards claims were allowed by the court in favor of certain creditors. The assets of the corporation were sold under the order of the court, and, the proceeds not being sufficient to satisfy the claims allowed, the court ordered this action begun by the receiver against these defendants as stockholders to recover their unpaid subscription for stock. The defend-

ants answered, denying their liability, and upon trial the court found in favor of the plaintiff against some of the defendants, and entered a decree fixing their liability as stockholders for unpaid subscriptions, and the defendants have appealed.

1. The first question presented is as to the jurisdiction of the court over the subject matter of the action, and especially over the persons of these defendants. This action was begun in the district court for Douglas county, and these defendants, who are very numerous, do not reside in Douglas county, but summons was issued against them to the sheriffs of the respective counties of their residence and was there served upon them. They object that there was no jurisdiction to issue summons to other counties in the state because there was no joint liability between these defendants and the defendants who resided and were served in Douglas county.

Whether the remedy against the stockholders of an insolvent corporation is by an action at law or an action in equity depends upon the nature and extent of their liability. The defendants cite and rely upon the decision of this court in *Burke v. Scheer,* 89 Neb. 80, and the decision of the supreme court of the United States in *Hale v. Allinson,* 188 U. S. 56, 78. In the latter case the question is discussed at large and numerous authorities are cited. The point discussed and decided, however, relates wholly to cases in which the amount for which each individual stockholder is liable has been determined and fixed. The court said: "In this case, from the complainant's own bill, the amount demanded is the full amount of the par value of the shares held by each defendant." And the court quotes from *Kennedy v. Gibson,* 8 Wall. (U. S.) 498, 505: "Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court, if such action should subsequently prove to be necessary, until the full amount of the liability is exhausted." This is the rule

that this court has sought to apply in *Burke v. Scheer, supra,* and in other cases. When the amount that each individual stockholder is liable for is unknown, but depends upon facts not yet ascertained and upon equities to be adjusted between creditors or stockholders or both, "there is a community of interest among them in the questions of law and fact involved in the general controversy," as said in *Hale v. Allinson, supra,* and they are properly joined in an action in equity. But a stockholder who is liable at all events for a definite fixed amount has no community of interest in questions of law or fact with any other defendant. When there is a community of interest, tested by the above rule, the action may be brought in the county of the principal place of the business of the corporation where the corporation itself can be served, and summons against others necessary as defendants can be issued to the county where they can be served. It will be seen from the subsequent discussion that these defendants were properly served with summons in the respective counties of their residence, and there is no doubt of the jurisdiction of a court of equity.

2. In the original action against the corporation by Mr. Ege as one of the stockholders it was alleged in the petition: "That said defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska for the purpose of operating an electric railway between Omaha, Nebraska, and Hastings, in the same state; that the promoters of the said concern in the past four years or more have failed to construct or operate said electric railway such as they pretended to construct; that said promoters and officers, during said time, by means of glaring advertisements in the newspapers of the city, advertised for the subscription of stock by making wilful, fraudulent and false representations, as shown by exhibit B, and hereby made a part of this petition; that said concern was authorized to operate an electric railway, whereas its charter permits it only to operate a steam railway. Said officers and promoters further represented in said advertisement that they would offer, as a

premium and inducement to the purchasers of the stock, gold watches of 14 carat, and further that 'an investment of $280 buys ten shares, or, in other words, $1,000 worth of stock. The dividends will be declared on the $1,000 and not on the $280. The dividend on a 10 per cent. basis on $1,000 would be $100 a year. Therefore you would get $100 a year on an investment of $280; in other words, 35 per cent. on your money. Do you want anything better?' * * * Your petitioner further represents to the court that said officers and promoters have during said times collected by means of the sale of stock the sum of $55,000 or more, and that the said promoters and officers have actually expended for the purchase of property, right of way, grading, etc., about $6,000; * * * that said sum of $49,000 said officers and promoters have fraudulently appropriated to themselves." There are many other allegations of misconduct on the part of the organizers and officers of the corporation and fraudulent sale of stock. The petition also alleges: "Your petitioner further represents to the court that said officers and promoters have regularly paid themselves the salaries as aforesaid, notwithstanding the fact that accounts payable as per statement in exhibit F represents $5,540.12 in the nature of bills, claims for work and labor, and other matters that still remain unpaid. Your petitioner further represents that said company is insolvent, and has preferred certain of its creditors, and, further, that the schedule of assets and liabilities as shown in exhibit F is a gross and false misrepresentation of its true condition." The prayer of the petition is as follows: "Plaintiff therefore prays that an accounting be had, showing the gross receipts of money and the proceeds of the sale of stock, and in what manner and to what purpose such money was invested or paid. Plaintiff further prays that a receiver be appointed to take charge and custody of said company's property, real and personal, books, accounts, etc., for the benefit of its creditors and stockholders. Plaintiff further prays for a writ of injunction against said officers, restraining said officers from the further sale of said capital stock, and further

restraining said officers from collecting any moneys due on unpaid subscriptions of stock sold. Plaintiff prays that he may have such other and further relief as equity may require, and that defendants pay the costs of this action."

This original petition stated a cause of action in equity, and when a receiver was appointed upon this petition, and the creditors whose claims were afterwards allowed had presented their claims to the receiver, it appeared from the record that the corporation had no property, real or personal, with which to satisfy the alleged claims of the creditors, and that if those claims were allowed, or any considerable part thereof, there would be no resources from which to satisfy them, unless it should be the liability of these defendants for the unpaid subscription to the stock of the corporation. It also appeared that by the terms of their contract with the corporation these defendants were not liable to the corporation for any further payments on their stock subscriptions. The liability of the corporation itself to the creditors and the tangible property which the corporation owned was the primary resource for the satisfaction of the claims of the creditors. Unless and until these resources fail, the creditors could have no claim against these defendants as stockholders. The liability of the stockholders, therefore, if any, to the creditors was a secondary liability, and rested not upon the same basis as the liability of the corporation itself. A finding that the corporation is indebted to certain of its stockholders and that their claims should be allowed is not necessarily a finding that the equities are such among the stockholders that certain of the stockholders should be required to contribute to a fund from which to pay such claims. In an action in equity of this nature, when it appeared to the court that the question of the liability of these defendants as stockholders was the principal question involved in the case, and that there might be equities in favor of these defendants as against the claims of these creditors which would not be available as a defense to the corporation itself, the court should have ordered these de-

fendants then to be made parties to the litigation, and should have determined all of the equities existing among all the parties interested.

After the receiver had sold all of the assets of the corporation in accordance with the order of the court, for which he received only the sum of $216, the court ordered the receiver to sue for the unpaid stock subscriptions, and thereupon the receiver began this action. In his petition, after alleging his appointment and the sale of the assets of the company, he alleged that the order had been made in the case in which he was appointed receiver requiring the creditors to file their claims, and that such proceedings were had therein, that certain claims were allowed against the corporation, and alleged the names of 29 of those claimants and the amount allowed to each, amounting in all to about $9,000. He attached to his petition exhibit A, in which he alleged the subscriptions of the defendants for the shares of stock, the amount paid and the amount unpaid upon the subscriptions, and alleged that the defendants were the owners of said shares of stock at the time he was appointed receiver, and that the defendants and each of them were and are liable to the receiver for the unpaid balance of the par value of the stock. He also alleged the general form of the application of the defendants for stock, which, omitting the date, amount, and name of the subscriber and the name of the agent, was as follows: "I hereby subscribe for——shares of the fully paid and nonassessable stock of the 'Omaha & Nebraska Central Railway' at $30 per share (par value $100) total amount $——— covered by one year note. The receipt of $——— as full payment on above subscription is hereby acknowledged and accepted. Send the stock certificate by mail to my address given below. The company hereby reserves the right to reduce the amount or decline any subscription, which is agreed to by the subscriber. Make checks, drafts or money orders payable to the order of the Omaha & Nebraska Central Railway. Omaha & Nebraska Central Railway. Name, ———. City, ———. State, ———. By ———, Agent. No., ———. Shares, ———, $100. Omaha

& Nebraska Central Railway (Incorporated), 320 First National Bank Bldg., Omaha, Nebraska." In some cases only a part of the agreed price to be paid for the stock was paid at the time of subscription. In such case a special contract was made as to the payment of the balance of the agreed price, but as the agreed price was afterwards paid in full these special contracts are immaterial to our present discussion. Several answers were filed by the defendants alleging, in substance, that "each of the defendants paid the full amount for said stock which he subscribed, and agreed with said railway to pay for said stock in accordance with the contracts entered into severally between these defendants and said railway; that said stock was issued and delivered to these defendants as fully paid and nonassessable." They admitted the subscription for the stock in the form stated by plaintiff, and alleged "that each respectively signed one of said blank forms of application for the amount of stock subscribed for by him and set opposite his name, and that in each case the subscriber agreed to pay and did pay for said stock the amount set forth in said exhibit A; but that the amount paid was full payment in each case for the stock subscribed for. And these defendants and each of them further say that, upon said payment being made, a stock certificate was issued in each case to each of these defendants for the amount of stock set opposite his name." The answer then alleges that "E. C. Page, whose name is set forth in the list of creditors, was the attorney for the said railway; that he organized or assisted in the organization of said corporation and in planning and conducting its operations and business and in the sale of its stock," and alleges that Mr. Page knew that some of the stock was being donated to the organizers of the corporation, and that the stock was being sold for less than its face value, and alleges other matters supposed to show the existence of equities between Mr. Page and these defendants. It also alleges equitable defense against the claims of 12 other creditors. The allegation as to the claim of Henry Fricke is as follows: "That Henry Fricke, whose name appears at No.

18 on said list, and whose claim was allowed for $243.45, was a stockholder of said corporation long before rendering the services for which he makes claim; that he paid only $25 a share for his stock; and that at the time of rendering said services, and long prior thereto, he well knew that the stock of said corporation was being sold for a price not exceeding $25 to $30 a share, and that several thousand dollars worth of the stock of said corporation had been given to the officers and promoters thereof without consideration, but only for alleged promotion services." The allegations as to the claims of the other creditors named are more or less similar to this.

As to the claims of Alice E. Long and Frank A. Schaaf, the court made the following findings: "The court finds in favor of the defendant T. E. Brady, and against the plaintiff. The court further finds that the creditors Alice E. Long and Frank E. Schaaf are not entitled to recover on their claims filed and allowed against the Omaha & Nebraska Central Railway, for the reason that said Alice E. Long, who is the widow of Eldon R. Long, who was the treasurer of said corporation, and promoted and assisted in the scheme or plan to sell said stock for less than par, and actually participated in the sale at the price for which said stock was sold, is estopped to claim payment from the stock subscribers, for the reason that said Eldon R. Long participated in the sale of stock to the defendants for less than par, to which finding plaintiff excepts."

As to the other defendants the court made the following finding: "The court further finds that there is an unpaid balance upon each of the subscription contracts of each of the following named defendants, which said receiver is entitled to enforce against each of the said defendants for the amount of the difference between the amount paid on said subscription contracts and the par value of the stock subscribed for, and each of the following named defendants are each individually indebted to the creditors and said receiver in the several sums set opposite their names as follows,"—setting out the names of the defend-

ants with the number of shares subscribed for by each and the unpaid balance on each subscription.

It is contended, on the one part, that the finding of the trial court allowing the claim of the creditors named is final, and that the defendants cannot now question the amount of such claims, nor interpose any equities between themselves and the creditors whose claims were so allowed. On the other hand, it is insisted that the findings of the court in allowing the claims of these creditors was only the adjudication of the rights of the creditors as against the corporation itself and the corporate property, and that such claims cannot in equity be enforced against the defendants who have paid to the corporation the full amount agreed by them to be paid for the stock for which they subscribed.

A decree for contribution is not final, but is interlocutory, as indicated by the supreme court of the United States in the quotation above. The decree allowing the claims of these creditors as against the corporation was not final as against these defendants who were not parties to the proceedings. When the nature and character of the claims of these claimants appeared, and also the nature of the liabilities of these defendants, the court should have considered the equities of the respective parties, and should have given all parties an opportunity to be heard. There are indications in the record that the trial court so considered. The claims of two creditors of the corporation were rejected in determining the amount of the liability of these defendants.

Should the court have also rejected the claims of the other creditors of the corporation contested by the defendants? The plaintiff relies upon section 4, art. XI*b* of the constitution: "In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." Creditors of a corporation have a

right to insist that subscribers for stock shall make good their subscriptions and make payment as agreed. A general subscription for stock includes payment therefor at par. When the subscribers have paid therefor all that they have agreed to pay, nothing further can be recovered upon their contract. If their contract and dealing with the corporation of which they became members are such as to mislead *bona fide* creditors who have trusted the corporation relying upon the assets thereof, they may become liable to such creditors for further payments.

The matter of the liability of subscribers for stock under such circumstances has been summarized as follows: "By the great weight of authority, in the absence of express charter, statutory, or constitutional provisions establishing a different rule, an issue of watered or fictitiously paid-up stock by a corporation, whether the issue was at a discount of its par value, or for property, labor, or services taken at an intentional overvaluation, or gratuitous, is binding upon the corporation, and as against all other parties, except in so far as it may constitute a violation of the rights of existing stockholders, or operate as a fraud upon subsequent subscribers for stock, or subsequent creditors of the corporation. To go more into detail:

"(1) The transaction or agreement cannot be attacked or repudiated by the corporation itself.

"(2) It cannot be attacked by the other parties thereto; that is, the subscribers for or purchasers of the watered or fictitiously paid-up stock.

"(3) It cannot be attacked by other stockholders who participated, consented, or acquiesced.

"(4) It may be attacked by dissenting stockholders.

"(5) It cannot be attacked by subsequent transferees of stock, if the transferrers could not attack it.

"(6) The transaction, or, rather, the agreement that payment in full at the par value shall not be required, is a fraud upon subsequent creditors who deal with the corporation on the faith of its capital stock being full paid in fact; and a court of equity, or, by statute in some jurisdictions, a court of law, will, at the instance of creditors,

compel the holders of such stock, or their transferees with notice, to pay up, notwithstanding their agreement with the corporation, the difference between the par value of the stock and what has been paid therefor. This does not apply, however:

"(a) In favor of persons who were creditors at the time of the transaction, or in favor of subsequent creditors who participated therein, or who dealt with the corporation with knowledge of the facts, or who have waived the right to complain by a special contract.

"(b) Nor does it apply as against subsequent purchasers of the stock without notice.

"(c) Nor does it apply where the stock had been once issued, and afterwards reacquired by the corporation, so that it had a right to sell the same at the best price obtainable.

"(d) Nor, by the weight of authority, does it apply where an embarrassed corporation increases its capital stock under legislative authority, and sells or issues the additional stock at the best price that can be obtained, although less than par, in order to pay debts or obtain money necessary to enable it to continue its business.

"In most jurisdictions, when stock is issued for property, labor, or services, at an overvaluation known to be excessive, the transaction is fraudulent as against dissenting stockholders and subsequent *bona fide* creditors, and they may compel payment of the difference between the par value of the stock and the actual value of the property, labor, or services. It is otherwise, however, if the valuation was made in good faith, and the overvaluation was due to mistake or mere error of judgment.

"In some jurisdictions the rules above stated do not apply to the full extent because of special statutory or constitutional provisions. Generally, however, they apply under such provisions." 2 Clark and Marshall, Private Corporations, sec. 389.

None of the creditors named in the answer was a *bona fide* creditor without notice of the equities of these defendants as against the claims of these creditors. Mr.

Page seems to have acted honorably in the matter; he protested against some of the proceedings of the promoters, and, when it was clear to him that they were acting improperly, he withdrew from all connection with them. He, however, knew that an unreasonable amount of stock was being donated to the promoters, and that stock was being sold to innocent parties at a discount, and was familiar with other circumstances which would naturally suggest such inquiries as would have informed him fully as to the equities of such subscribers. If these defendants subscribed for their stock after he had rendered the services for which he now claims, he must have known that innocent persons would in all probability do so, and must have known on what he would have to rely for compensation for his services. He ought not now to recover from these defendants. None of the other named creditors of the corporation is in a more favorable position.

The decree of the district court against these defendants is reversed and the cause remanded, with instructions to readjust the credits and liabilities in accordance with the views above expressed.

REVERSED.

PAUL SACCA, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JUNE 23, 1914. No. 17,702.

Street Railways: INJURY TO PEDESTRIAN: EVIDENCE. The evidence is examined, its general nature and effects stated in the opinion, and *held* insufficient to support a judgment against the defendant.

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

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

William P. Lynch and *Joel W. West, contra.*

SEDGWICK, J.

Paul Sacca, a little boy between five and six years of age, was injured by one of the defendant's cars, and Anton Sacca, as next friend, brought this action in the district court for Douglas county to recover damages caused by such injuries. He obtained a verdict and judgment in the district court, and the defendant has appealed.

It is contended that the pleadings and evidence are not sufficient to support the verdict and judgment. It appears that Paul was attending the kindergarten department of the school on Leavenworth street between Seventeenth street and Seventeenth avenue, in the city of Omaha. The schoolhouse fronts the south, and is located at about the middle of the block. The defendant maintains a double-track street car line along Leavenworth street in front of the school building and operates many cars thereon. There were 20 or 24 children in Paul's class in the school, and it was a common thing for them to cross the street car tracks upon leaving the school. It was therefore the custom of the teacher to keep the class together in regular order and "assemble them on the curb" until she gave them the signal to cross the street. It is suggested in the plaintiff's brief that the children as a class were not under the control of the teacher at this time, but "were rushing down the steps pell mell;" but this suggestion is not sustained by the evidence. One witness testified that he saw the children rushing down the steps "to the curb and then stop." This is in harmony with the testimony of Miss McGavock, who testifies that a little Hungarian child "started across before the signal was given. * * * This little Hungarian child broke away before Paul. Until the little Hungarian child broke away from the ranks and started across the street, there was not anything to indicate to me, or to the motorman coming down the grade, that any child would attempt to cross the track in front of that car." It appears that Paul followed immediately after the other child.

The east-bound car had just passed on the farther track, and another car following soon after passed a west-bound

car nearly in front of the schoolhouse. Paul ran across the track just behind the west-bound car, and, as seen by Miss McGavock, was struck by the fender of the car going east. "When it hit him, the child threw up his hands, fell, rolled up, and the projection over the wheel hit the child in the head." According to the testimony of another witness who saw the accident: "He (Paul) ran in the rear of the west-bound car. He started immediately. He seen the west-bound car coming by there, and, just as he got in the rear of the west-bound car, he apparently, to my notion, seen the car coming east and tried to stop himself, but he was running at such a terrific speed he could not stop himself. He ran right into the car. I stood there shocked, or I could have almost grabbed him."

The court instructed the jury: "Plaintiff bases his right to recover in this action upon two charges of negligence on the part of the defendant: First, that defendant at the time and place in question negligently and carelessly operated its car at a high and dangerous rate of speed; second, that at the time and place in question the defendant negligently failed to have its car which struck the plaintiff under proper control." Does the evidence establish either of these charges of negligence? In considering whether the car was being driven in an unreasonable and dangerous rate of speed, it should be remembered that it was immediately in front of the schoolhouse where there were many children of various ages who frequently had occasion to cross these tracks. The conditions, therefore, called for about the same degree of care that should be observed in crossing a street frequented by the public of all ages. Miss McGavock, their teacher, was in charge of these children, and was interested and active to protect them so far as she was able. She viewed the whole transaction, and she testified in behalf of the plaintiff that "both east-bound cars were running at the usual speed, which is quite fast sometimes. The second car, which struck the boy, was running at the usual rate of speed of cars going down Leavenworth. I could not tell the rate of speed. I

suppose it was a moderate rate of speed, and not a high rate of speed."

The witnesses generally estimate that the east-bound car was running about five or six miles an hour, and one witness estimates it as high as seven miles an hour. The child evidently was not aware of the coming of the east-bound car, the car going west obstructing his view, and, running across the first track behind the west-bound car, he ran directly into the other car. It is impossible that the proximate cause of the accident could have been the speed of the car.

It is likewise impossible to support the verdict on the ground that the "defendant negligently failed to have its car which struck the plaintiff under proper control." The evidence is somewhat conflicting as to how far the car ran after the accident. Some witnesses thought it ran a car length, about 40 feet, others estimated the distance at about twice that far. The motorman testified: "When I was proceeding down grade, coming east, before I met the west-bound car, I saw the children standing out on the sidewalk. This was an everyday occurrence. They had been in the habit of standing there every day when I made that trip. Just as I passed the rear end of the west-bound car, I saw this boy about two feet, not more than two feet, from the fender, side of the fender, and in his struggle to keep from running into the car, he fell." There is no evidence that he saw, or could have seen, the boy before he was within two feet of the car. The control of the car that this motorman may or may not have had, running as it was at from five to seven miles an hour, could not have affected the result. It is clear that there is no evidence of negligence on the part of the defendant, and that the instruction submitting these questions was erroneous.

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

REVERSED.

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