# REPORTS OF CASES

IN THE

# SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1914, JANUARY TERM, 1915.

## VOLUME XCVII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

COLUMBIA, MISSOURI.
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# SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

## JUSTICES.

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CONRAD HOLLENBECK, CHIEF JUSTICE.[1]
ANDREW M. MORRISSEY, CHIEF JUSTICE.[3]
JOHN B. BARNES, ASSOCIATE JUSTICE.
CHARLES B. LETTON, ASSOCIATE JUSTICE.
WILLIAM B. ROSE, ASSOCIATE JUSTICE.
JACOB FAWCETT, ASSOCIATE JUSTICE.[2]
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FRANCIS G. HAMER, ASSOCIATE JUSTICE.

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[1] January 7, 1915, Conrad Hollenbeck succeeded Manoah B. Reese as Chief Justice.
[1] January 21, 1915, Chief Justice Hollenbeck died.
[2] January 21, 1915, to January 25, 1915, Jacob Fawcett was Acting Chief Justice.
[3] January 25, 1915, Andrew M. Morrissey was appointed Chief Justice.
[4] Until January 7, 1915.
[5] January 7, 1915.
[6] January 16, 1915.
[7] January 26, 1915, Dexter T. Barrett succeeded Andrew M. Morrissey.
[8] January 26, 1915.

# 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. |
| | | William A. Redick... | Omaha. |
| | | Willis G. Sears..... | Tekamah. |
| | | 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. |
| Eighteenth... | Gage and Jefferson..... | Leander M. Pemberton..... | Beatrice. |

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Admitted Since the Publication of Vol. XCVI.

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IN THE

# SUPREME COURT OF NEBRASKA

## SEPTEMBER TERM, 1914.

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JOHN E. DENOON, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,785.

1. **Appeal:** FINDINGS: CONFLICTING EVIDENCE. In an action at law and upon a trial by a jury, all questions of fact upon conflicting evidence, upon which reasonable minds might differ, are for the consideration of the jury, and their finding will ordinarily be considered as final.

2. **Street Railways:** INJURIES TO PEDESTRIANS: NEGLIGENCE: QUESTION FOR JURY. Plaintiff sought to cross a street upon which there was a double line of street car tracks. As he started across the street and tracks, a street car was slowly approaching, crossing another street, with the evident purpose that the car should be stopped for receiving and discharging passengers. Another street car was approaching the same crossing on the track nearest to plaintiff. Plaintiff, supposing that the car first referred to would make its stop in the usual way, leaving the crossing clear so that he could safely cross both tracks to the opposite side of the street, proceeded on his way, safely crossing the first track, but the car stopped and stood across his way, and, in order to cross, it became necessary for him to wait for the car to move on, or change his course and pass into the cross street around the rear of the car. At that time the car going in the opposite direction was close upon him, pursuing its way toward the opposite side of the cross street, or further on if not flagged. The space between the passing cars was some 15 or 16 inches in width. He stood close to and against the car which had stopped on the crossing, but the passing car struck him, inflicting injuries. In an action by him for the resulting damages, it is *held* that, under the circumstances, the questions of defendant's negligence and of plaintiff's contributory negligence were questions of fact to be passed upon by the jury.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

*C. S. Allen, F. E. Bishop* and *O. B. Clark,* for appellant.

*Morning & Ledwith, contra.*

REESE, C. J.

This is an action against the Lincoln Traction Company for personal injuries alleged to have been received by plaintiff by being struck by one of defendant's cars, and injured, at the street crossing on Twelfth and O streets in the city of Lincoln. The pleadings are in the usual form, plaintiff charging negligence on the part of defendant, and defendant denying negligence, but charging contributory negligence on the part of plaintiff. As no question is raised on the pleadings, they need not be stated. The prayer of the petition asks judgment for $10,000. There was a jury trial, which resulted in a verdict and judgment in favor of plaintiff for $1,000. Defendant appeals.

The facts, as alleged by both parties and substantially proved, are that there is a double street car track running east and west on O street crossing Twelfth street, and a single track running north and south on Twelfth street, the tracks being in the middle of the streets. Plaintiff was walking south on the east side of Twelfth street, approaching O street for the purpose of crossing to the south side. As he entered O street on the foot crossing, there was a car going east just crossing Twelfth street, and which would, and did, stop at the farther or east side for the purpose of receiving and discharging passengers. At the same time a street car, going west, was approaching from the east about one-half block away. Plaintiff, supposing the car going east, and which was in the act of stopping, would pass the foot walk in the usual way, and thinking he would have ample time to cross the tracks before the west moving car would reach the crossing, started to cross the street, but, after crossing the north track, discovered

that the east moving car had stopped directly on the crosswalk, so that in order to pursue his way he would have to walk around the rear end of the car into Twelfth street. Just then he observed the west moving car was approaching at what he alleges and testifies was a high rate of speed, and which would not give him sufficient time to retrace his steps or to pass around the rear of the other car. He stopped, and crowded up to the standing car in order that the west running car might pass by without striking him. The passing car struck him, rolling him between the cars to the rear of the car headed to the eastward, when he was thrown to the ground and rolled on the pavement some distance by the west moving car, receiving the injuries complained of.

With the exception of the question of the rate of speed of the west moving car at the time it struck plaintiff, there is little conflict in the evidence. It is conceded that, had the car headed for the east not stopped upon the crosswalk, and thus prevented plaintiff from passing, he would have had sufficient time to cross both tracks to safety, but it is insisted that the fact that the car stopped on and across the crosswalk is no evidence of negligence. The distance between the two tracks is about 4½ feet, and the distance between the two cars in passing is about 15 or 16 inches. There are few questions of law presented. As the case was submitted to the jury, it presented the issues: Was the westbound car, which struck plaintiff, running at a high or dangerous rate of speed, under the circumstances? As we have seen, there was a conflict in the evidence as to this, and the question was for the jury. Was defendant guilty of negligence in stopping its eastbound car as it did, with about the middle of the car over the crosswalk, those in charge knowing that another car would pass it in going in the opposite direction, and that persons would be crossing the street at that time? This question was also for the jury. Was plaintiff guilty of contributory negligence in presuming that the crosswalk would be cleared, and in trying to cross the street as he did? If the court could not say that his act was so

reckless as to render him guilty of contributory negligence as matter of law, the question would also be for the jury under proper instructions by the court. These propositions are too well-settled to require the citation of authorities in their support. All questions of fact upon which reasonable minds might differ must be solved by the jury. *McLean v. Omaha & C. B. R. & B. Co.*, 72 Neb. 450. This we take it is the settled law.

Defendant asked the court to instruct the jury as follows: "You are instructed that the operation of the east-bound car was not negligent under the circumstances in the case. Whether the car stopped with the rear platform over the crossing or west of the crossing is immaterial, and you will find for the defendant on the issue of negligence in the operation of this car." The court refused to give the instruction, and the refusal is assigned as error. It is argued with considerable force that the fact of stopping at the point named cannot be held to be negligent; that defendant has the right to stop its cars "at any place on the track." As an abstract proposition, this is probably true, but, when considered in the concrete, the circumstances must be taken into consideration. As an extreme case, suppose a fire department is called out in an emergent case, and in making the run it is necessary to cross a street car track, has the street car company the right to stop its cars directly in the way of the fire department, standing its car directly in the road, thus preventing the department from crossing? The argument claims too much. While a car "may be lawfully stopped at any place on the track," as a general rule, yet the rights and safety of others must be considered. While, by a segregation and division of the evidence, we might conclude that defendant had the *right* to stop and hold its car as it pleased, without negligence, and, if the testimony of the motorman is true, there was no negligence in the speed of his car, we might consider that defendant was free from negligence, but, if all the circumstances chargeable to defendant in the management of both cars are to be considered, different conclusions might be arrived at, and that defendant should

be held liable; all of which goes to demonstrate that the questions presented were for the consideration of the jury. The court, therefore, did not err in refusing to give the instruction asked.

So far as the record discloses, the case was properly submitted to the jury, under proper instructions, and we are unable to detect any error prejudicial to defendant.

The judgment of the district court is therefore

AFFIRMED.

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LOUIS FINK V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1914. No. 18,617.

**Assault:** SUFFICIENCY OF EVIDENCE. The evidence, substantially set out in the opinion, is examined, and *held* insufficient to sustain a conviction of assault.

ERROR to the district court for Gage county: LEANDER M. PEMBERTON, JUDGE. *Reversed.*

*A. D. McCandless,* for plaintiff in error.

*Grant G. Martin, Attorney General, Frank E. Edgerton* and *Jean Cobbey, contra.*

REESE, C. J.

A complaint was filed in justice court in Gage county charging that plaintiff in error, who will hereafter be referred to as defendant, on the 6th day of November, 1913, "unlawfully and maliciously did assault and threaten in a menacing manner to shoot and kill one Anna Harms." A trial was had before the justice, who found defendant guilty as charged, and imposed a fine of $50, with $46.60 costs, and adjudged that he stand committed until the fine and costs were paid. He appealed to the district court, where a trial was had in which the court instructed the jury in effect that the prosecution was for an assault only. The jury found defendant "guilty as charged." Af-

ter the filing of a motion for a new trial and the overruling of the same, the court sentenced the defendant to pay a fine of $25, and the costs of prosecution, taxed at $82.30. Defendant brings error.

It is contended that the court, in its instructions, and after the introduction of the evidence, erred in limiting the prosecution to a simple assault. We can see nothing in this which could be of any prejudice to defendant. So far as the instructions of the court to the jury are concerned, we can see no cause for complaint.

The principal contention of defendant is that the evidence is insufficient to sustain a verdict of guilty of even an unlawful assault. At the time of the alleged assault, defendant was between 82 and 83 years of age. He owned a farm near Wymore, upon which were two houses, barns, etc., some distance apart, in one of which houses defendant resided, the other being occupied by Harms, who was his tenant. Defendant procured his son-in-law Mr. Betting, who resided in Kansas, to come upon the farm, take charge of its management to some extent at least, and remain thereon. On the day before the alleged assault, defendant and his son-in-law Betting met Harms, and defendant informed Harms that Betting was there looking after defendant's interests on the farm, and to which Harms assented by saying, "All right." Many of the material statements of the state's witnesses were contradicted by witnesses for the defense, but the testimony of the witnesses for the state alone will be here considered. Those witnesses were Harms, his wife, and their hired man, Lewis. Mrs. Harms testified that on the day before the altercation, Betting came to where she was digging potatoes. As what there occurred constitutes the basis for what followed next day, we copy the essential portion of Mrs. Harms' testimony: "Q. When did you first see him on that day? A. I seen him cross the yard in the morning, and about an hour and a half before or right after dinner I seen him go down towards our house, and in about an hour and a half I seen him standing right behind me. Q. You were busy digging potatoes at that time? A. Yes,

sir. * * * Q. Did you hear him approach? A. When I looked up and saw him, he said, 'How do you do,' and I said, 'How do you do,' and he said, 'Getting any potatoes?' and I said, 'No,' and he asked me whether I tried to raise potatoes on that ground before, and I told him, 'No,' and he began and examined the potatoes in the bucket, and he said, 'Late potatoes?' and I told him I didn't know what kind of potatoes they were. He examined the potatoes in my bucket, and he said, 'Yes, they are late potatoes,' and I told him I didn't know what kind they were, and he talked on, and said, 'Is this all the potatoes you have got?' I didn't answer that, and he walked off to the creek bank, and he stood there 10 or 15 minutes with his hands in his pockets and his cap pulled over his eyes doing nothing in particular; he was looking down the creek." She states that it frightened her when she first saw him. "I told Mr. Harms that evening that if that fellow was coming around every time I went outside and follow me around I wasn't going to stay there." It must be observed that no word was spoken by Mr. Betting, nor was there any act upon his part, which could give the least offense to any lady, nor did he, by word or act, violate the most stringent rules of decorum and politeness. When we consider that he had but a day or two before entered upon his duties to take charge of the management of the farm, it was but natural that he should examine the land and learn what he could as to its quality and what it could produce. It may be that at that time Mrs. Harms may not have known of Betting's relation to Fink, or to the land, but her husband did, and if she made the complaint to him that evening, as testified by her, it would be but natural for him to give to his wife the information which he possessed. There is a presumption that he did, but that is not material, for he well knew of the fact. There is a small artificial lake upon defendant's farm, which, as was his daily custom, defendant visited morning and evening. The next morning early, and without any knowledge of what had passed between Harms and his wife the evening before, he and Betting started to the lake, and, as

ducks sometimes visited its waters, he took his gun with him for the purpose of shooting, if any ducks were there. The road passed by the part of the farm occupied by Harms, his tenant, and the two men were walking orderly on their way. Mrs. Harms saw them approaching and went to where her husband and Lewis were. She says in her testimony: "I knew that Mr. Harms was going to ask this fellow who he was and what business he had around there." Harms did know who he was and his business there. Mrs. Harms knew that an altercation was to be had, and of which defendant and Betting were wholly ignorant. When their approach was discovered, Harms waited for them to come to where he was, when he stepped toward Betting, and asked him, whose slave driver he was, and to explain what business he had there. It appears from the evidence that Betting was an invalid, and defendant presented his gun and said, "Stand back, or I will shoot." Lewis ordered him to "put up" the gun, and he pointed it at Lewis. Mrs. Harms appears to have been standing behind her husband, and at that time she stepped around and said: "What do you mean by hiring strange men to follow me about the place?" when defendant presented the gun toward her. Just then Lewis spoke up and said, "Fred, that is plenty. You can have him pulled for that." Nothing further was said or done. Mrs. Harms testified that, when Harms walked up to Betting and asked him whose slave driver he was, he was shaking his finger at Betting. There can be no possible doubt, from the actions of the Harms party, that the three were there for an unlawful purpose, viz., that of assaulting a man over 82 years of age and his invalid son-in-law, but with no possible excuse therefor. The first salutation, "Whose slave driver are you," was calculated to provoke trouble, and was no doubt intended for that purpose. Mrs. Harms testified that the episode in the potato patch was the only time Betting had ever accosted her, and that he had never at any other time "followed her around." Defendant, no doubt realizing his inability at his infirm age to cope with the three, scared them off with the only weapon he is

shown to have had, and when they retreated, or as Mrs. Harms expressed, "backed off," he passed on his way, Lewis remarking "That is plenty. You can have him pulled for that." It is not contended that defendant made any attempt to shoot any one. His act was at all times purely defensive. He did not seek the quarrel and never at any time sought to prolong it. The witnesses say he used rough language to them as he presented the gun. The two combined seem to have had the intended effect of scaring off his assailants, which was all he ever tried to do. The testimony on the part of the defense presented a different contention, but we do not base our conclusion upon any conflict in the evidence. If every word stated by the witnesses for the state is true, there was nothing more than an effective defense offered by defendant, and there was nothing upon which a conviction can rest.

The verdict and judgment are set aside, and the cause is remanded.

REVERSED.

ROSE, J., not sitting.

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## ALFRED E. HAYWARD V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1914. No. 18,645.

1. **Burglary:** SUFFICIENCY OF EVIDENCE. The evidence, the substance of which is stated in the opinion, is *held* insufficient to sustain a conviction of burglary.
2. **Instructons** 6 and 7, copied in the opinion, *held* to have been erroneously given.

ERROR to the district court for Lancaster county: P. JAMES COSGRAVE, JUDGE. *Reversed.*

*Morning & Ledwith* and *Bruce Fullerton* for plaintiff in error.

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

REESE, C. J.

An information was filed in the district court charging plaintiff in error, who will hereafter be referred to as defendant, with the crime of burglary, by breaking and entering into a public building in the city of Lincoln, known as the "Young Men's Christian Association Building," with the intent to steal property of value therein. A jury trial was had, which resulted in a verdict of guilty, when he was sentenced to pay a fine of $300 and the costs of prosecution, and that he be imprisoned until the fine and costs were paid. He brings the case to this court by proceedings in error; his principal contentions being that the court erred in certain instructions, and that the evidence is insufficient to sustain a conviction.

The evidence shows that there is a telephone booth situated in the office or the lobby of the building referred to, and that the first that was noticed of defendant being present was when he applied to the person in charge, at the clerk's counter, and asked that the fan, which was running in the booth, be turned off, which was done, and the fan stopped. The defendant entered the booth as though for the purpose of telephoning to some one. The money drawer in the booth cabinet was connected by a secret wire to an instrument, termed a "buzzer," at the clerk's desk, so as to set in motion said buzzer upon the opening of the money drawer. The buzzer gave an alarm, when two of the men in charge hastened to the booth and found defendant therein, apparently in the act of telephoning to some one, the money drawer open with a key protruding from the keyhole in the lock therein. The contention on the part of the state is that defendant must have broken into the main building, as all the doors by which an entry could have been made were equipped with strong springs, which automatically closed the doors upon any one passing through and releasing the open doors. There were no locks nor latches on the doors, they being held closed by the springs. While there is no direct evidence as to how or by what method defendant gained access, it is contended that he must have pushed open one

of the swinging doors, and thus made his entrance to the lobby; the assumption being that such entry was with felonious intent. There was evidence that another drawer of the same kind, in another building, was opened that afternoon, a short time before defendant's appearance in the lobby, and money extracted; certain marked coins having been taken therefrom and found on his person at the time of his arrest. This evidence was competent for the purpose of showing, as a circumstance, his intent to steal. It is fundamental that, in order to prove burglary, there must be evidence tending to prove the unlawful breaking and entry, and that such unlawful acts were with felonious intent, as described in section 8643, Rev. St. 1913. The act of breaking may be shown by proof, either direct or circumstantial. The breaking may be by the mere pushing open of a closed door, even though unlatched or unlocked; but there must be proof of the breaking. The breaking must be accompanied by an unlawful intent; if not, it is not burglary. This intent may also be proved by direct or circumstantial evidence. If the criminal intent or purpose is not formed at or before the entry, it is not burglary. The intent must be accompanied by the act of breaking and entry. These rules are fundamental and well understood, are included in the statute, and the citation of authorities in their support is not necessary. It is also well understood that every material element of a crime charged must be proved beyond a reasonable doubt. The jury were so instructed in this case.

The Young Men's Christian Association Building is a public building. In a sense it is similar to a hotel. The public is invited to enter. Meals are furnished at specified rates for all who may desire them. While nothing was stolen, it is contended that an attempt to rifle the money drawer was made, and that defendant was frustrated in the attempt. This might be true, and yet he may have been innocent of the breaking. The evidence shows that defendant was within the booth about 7 o'clock P. M.; that he had prior to that time asked to have the fan turned off, and no one testified to any knowledge of when or how

he entered the building. It is to be presumed that it was some minutes before he entered the booth. The evidence is that from 6 to 7:30 o'clock in the afternoon about 500 people enter the building, passing through the doors. It must be that, in such a rush, many pass through an open doorway, the spring door being held open by those passing through. The evidence tends to show that defendant entered during that time. Did he open the door to make the entry, or did he pass through an open doorway? There is no hint in the evidence upon this subject. When two equal presumptions—one in favor of innocence, the other in favor of guilt—are presented, the one in favor of innocence is to be preferred and applied. In this regard the evidence fails to establish defendant's guilt beyond a reasonable doubt.

Complaint is made of instructions numbered 6 and 7, given to the jury by the court. They are here copied.

No. 6. "It is a familiar principle that a 'breaking' necessary to constitute the crime of burglary may be any act of physical force, however slight, by which the obstruction to the entering is removed. The lifting of a hook with which a door is fastened, or the opening of a closed door in order to enter a building, is 'breaking' within the accepted definition of burglary, although the entry might have been effected through a door already open."

No. 7. "The jury are further instructed that, if in this case you believe beyond a reasonable doubt that the accused, Hayward, entered the building without unlocking the door, or without using force in opening a door so as to enter, then you will find defendant not guilty, and will acquit him of the crime charged."

The principal objection to the sixth instruction is to the closing or last clause thereof, to wit, "although the entry might have been effected through a door already open." It must be conceded that the language might tend to leave one in doubt as to its meaning. If it meant that defendant would be guilty if he entered through an open door, the instruction is clearly wrong, for in that case there would be no "breaking." If it meant that the fact the

other doors were open and defendant broke in through a closed door it would be breaking, the instruction would not be objectionable. In any event the instruction is ambiguous, and should not have been given in the form adopted.

The seventh instruction was, no doubt, an oversight on the part of the court, for it reverses the rule of law applicable to the case. It was not necessary for the jury to believe beyond a reasonable doubt that defendant had not done the things charged in order to acquit him. The instruction is clearly erroneous. *Flege v. State,* 93 Neb. 610.

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

REVERSED.

ROSE, J., not sitting.

FAWCETT, J., dissenting.

There is nothing in the point that the Young Men's Christian Association Building was a public building and that from 6 to 7:30 in the evening a large number of people passed through the doors into the building. People who so pass into the building do so by invitation of the Young Men's Christian Association for lawful purposes. This invitation does not extend to one who desires to enter for the commission of a larceny. That the defendant entered the building for the purpose of committing a larceny is established beyond a reasonable doubt. The uncontradicted testimony shows that on the afternoon and evening in question the doors of the building were closed. Defendant entered the building through the door. There was no other way he could enter. In order to gain an entrance through the door, every reasonable probability is that he opened the door himself. No one saw him enter, and so it is held, in the majority opinion, that there is no proof of a forcible entry, so as to make the crime burglary. In order to reach this conclusion, the improbable presumption is drawn that some one, who was lawfully entering, may have preceded the defendant into the building and

held the door open for him to enter. While such a circumstance is possible, it is too remote a probability to warrant the setting aside of the conviction of a man who, the evidence shows beyond a reasonable doubt, upon any reasonable hypothesis, is guilty of the crime charged. If criminals can thus escape their just deserts, then verily the proverb, "The way of the transgressor is hard," is reversed.

Instruction No. 6 could not by any possibility have prejudiced the defendant.

Instruction No. 7, quoted in the opinion, standing alone, might be held to have been prejudicial; but, when taken in connection with No. 8, which immediately follows it, it is idle to claim that the defendant was prejudiced. Instruction No. 8 reads: "The jury is further instructed that, in order to find the defendant guilty of the charge of burglary, it is necessary for the state to establish that, at the time that defendant entered the Young Men's Christian Association Building, he had an intention of stealing property from said building, and that he forcibly broke into said building for the purpose of carrying out his intention to steal property from said building." This instruction clearly and properly told the jury what the state must prove to warrant a conviction, and, it following immediately after instruction No. 7, the jury could not have been misled.

The doors of the penitentiary should swing evenly. The outward swing is easy these days, and the inward swing should not be made too hard.

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EMMET HILEMAN, APPELLEE, V. CHARLES H. MAXWELL, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,840.

1. **New Trial**: EVIDENCE. A new trial should be allowed, when it is clear that material uncontradicted evidence has been disregarded by the jury, and which, if considered and given due weight, would have required a different verdict from that returned.

2. **Compromise and Settlement:** CONSIDERATION. "Where there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co.*, 91 Neb. 396.

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

*R. E. Evans,* for appellant.

*J. J. McAllister* and *W. V. Steuteville, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Dakota county, in a suit brought by one Emmet Hileman against Charles H. Maxwell to recover the sum of $334.05, alleged to be due the plaintiff for work and labor by himself and team from the 3d day of April, 1907, to January 5, 1910. To plaintiff's petition defendant filed an answer, setting out certain payments made to plaintiff during the time he was employed, amounting to $559.15, and a claim against plaintiff for $430 alleged to be due defendant for feeding and housing certain domestic animals belonging to plaintiff during the time he was employed by defendant, and the cost of keeping plaintiff's team when it was not working. Defendant denied that plaintiff worked for him during all of the time mentioned in his petition, and alleged that during that time there were ten days in which the plaintiff performed no labor for the defendant. As a further defense defendant pleaded a settlement between himself and the plaintiff on January 5, 1910, in which it was found and agreed that the defendant owed the plaintiff the sum of $47.35; that plaintiff then and there paid defendant in full, by giving him $20 in cash and a check for $27.35, which plaintiff accepted, retained and cashed in full payment of all of his demands and claims against the defendant. The reply

put in issue the allegations of the answer. On the issues thus joined a trial resulted in a verdict and judgment for the plaintiff for the sum of $326.35, and the defendant has appealed.

It is defendant's contention that the verdict and judgment are not sustained by the evidence. It appears from the record, without dispute, that on the 3d day of April, 1907, the parties entered into an agreement whereby defendant employed the plaintiff to work for him about his place in town and on his farm near-by for $50 a month when he used his team, and $40 a month when he worked without his team; that plaintiff accepted such employment, and in a day or two commenced to work for the defendant. Shortly thereafter plaintiff asked the defendant if he could turn his domestic animals into defendant's yards and sheds, and defendant replied that he could do so, provided he would pay for the feed consumed by them. Some talk was had as to what such feed would be worth, and it was agreed that whatever the neighbors would say it was worth the plaintiff should pay the defendant. There is no disagreement as to the terms of the contracts. The testimony shows that there was a partial settlement between the parties on June 3, 1908, at which time the defendant owed the plaintiff $63. The parties were not agreed as to what plaintiff should pay defendant for feeding and housing his stock, and that matter was left open for further consideration. The plaintiff testified that he worked for defendant from June 3, 1908, to January 5, 1910, and that a greater part of that time he worked with his team. This defendant admitted, but showed that plaintiff lost ten days during that time, doing no work at all, and that for five months during his employment his team was not used in working for the defendant, and those facts were not disputed by the plaintiff. So it may be said that it was fairly established that plaintiff's wages for himself and his team amounted to the sum of $983, including the $63 due him at the June settlement of 1908. The testimony shows, without dispute, that defendant had paid the plaintiff the sum of $559.15, without allowing

anything for the feed and care furnished plaintiff for his stock. This would leave defendant indebted to plaintiff in the sum of $422.85.

It appears from the testimony that plaintiff had in defendant's yards two cows all of the time of his employment, three head of horses about two months, a mare and colt about 45 days, one colt from May 9, 1909, to January 5, 1910, two calves for November, 1909, two colts from October 20 to December 26, 1907, one mule for a month and a half, in April and May, 1907. Plaintiff's animals were fed hay, alfalfa, kafir-corn, grain, corn, and straw. In fact, they were fed and cared for the same as was defendant's own stock. In addition to this, defendant fed plaintiff's team five months during which time plaintiff did not work them for the defendant. Plaintiff by his own testimony fixed the value of the feed furnished his stock at the sum of $146.50. This would leave as a balance due him the sum of $276.35, while the verdict and judgment in his favor was for $326.35. We find from the bill of exceptions, however, that plaintiff furnished no competent evidence of the value of the feed and care furnished by defendant for his stock. No witness testified for him on that question, and his own evidence was clearly incompetent. He testified at first that he did not know what the feed was worth, and after an adjournment he stated he knew what some of it was worth, and so the only competent evidence on that point was the testimony of the defendant's witnesses, who were farmers, and knew the value of the feed and care for such animals as plaintiff testified had been kept and fed in defendant's yards, barns, and sheds. The lowest amount, according to the testimony of defendant's witnesses, which the plaintiff should pay the defendant, was $348.75. This, if the jury had regarded the evidence, would have entitled the defendant to a verdict of something like $72.40. It thus appears beyond all question that the verdict and judgment were not sustained by plaintiff's own evidence. We are therefore constrained to hold that defendant's contention on this point should be sustained.

On the question of the final settlement between the parties, the evidence shows that plaintiff asked the defendant for a settlement. They took their books and went over the matter, and it was found that defendant owed the plaintiff $47.35. Defendant testified that he asked the plaintiff if he wanted his money, and he said he did; that he thereupon paid the plaintiff by giving him a $20 bill, which he had in his pocket, and a check on the bank for $27.35, on the face of which he plainly wrote "Bal. in full to date;" that plaintiff accepted the check, retained it some little time, and cashed it. This the plaintiff admitted, and the check was introduced in evidence; but the plaintiff claimed that he did not read the check, and did not see the plainly written statement thereon that it was the payment of the balance due him in full.

Defendant produced one J. P. Rockwell as a witness in his behalf, who testified that he was well acquainted with both parties to the transaction, and that soon after the 5th day of January, 1910, the plaintiff told him that he had quit working for Maxwell. He said he was somewhat disappointed; that he did not get as much money as he expected; that he expected to do some things that he could not do because he did not get as much money as he expected when they settled; that Maxwell did not owe him as much, according to the settlement, as he expected; that he did not think the settlement was right; that he was not satisfied with it; and that he was not going to stand by it. On cross-examination witness said, in substance, that plaintiff stated that Maxwell charged him too much for keeping his stock. The plaintiff testified that no such conversation occurred between himself and the witness Rockwell. His only explanation of why he retained the check and cashed it was that he did not see the indorsement of "payment in full" which appeared upon the face of the check itself. Upon this branch of the case it is clear that the jury paid no attention whatever to the evidence.

It is contended by the defendant that, plaintiff having received and accepted the check and the $20 in cash, such

payment should be held to be a complete satisfaction of the matter in controversy. In support of this contention counsel for the defendant cites a large number of cases, among which is found *Partridge Lumber Co. v. Phelps-Burruss Lumber & Coal Co.*, 91 Neb. 396, *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334, and *Treat v. Price*, 47 Neb. 875.

In the first of these cases it was said: "Where a certain amount of money is tendered by a debtor to a creditor on condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary." It was further held in that case: "When there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." This rule was also announced in *Chicago, R. I. & P. R. Co. v. Buckstaff*, 65 Neb. 334.

In *Treat v. Price*, 47 Neb. 875, it was said: "The rule that when a certain sum is due from one to another, the payment of a lesser sum is no discharge as to the remainder, notwithstanding an agreement to that effect, is founded upon the fact that the latter agreement is without consideration. Such rule does not apply where the amount due is disputed or unliquidated." It was further held: "Where a certain sum of money is tendered by a debtor to a creditor on condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made, subject to the condition. If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary."

This rule seems to be well settled by the great weight of authority. In opposition to this rule the plaintiff has directed our attention to *Rapp v. Giddings,* 4 S. Dak. 492. In that case it was said: "Where payment is made by check, which recites on its face, 'in full of all demands,' such words will constitute a receipt in full, as against the payee, only when it is shown that he had knowledge of the presence of such words, or facts are shown which in law would charge him with such knowledge." Counsel also cites *National Life Ins. Co. v. Goble,* 51 Neb. 5. In that case it was held: "In the absence of an express agreement or other circumstances avoiding the operation of the rule, the remittance of a bank draft is not a payment in fact until the draft has been received, presented, and honored. A written acknowledgment or receipt of payment is not conclusive, when the medium of the remittance upon which it is based has failed." Defendant's counsel also cites 30 Cyc. 1223, and 9 Ency. of Evi. 728. These authorities are not directly in point, and it is difficult for us to see, in the light of the evidence, how the plaintiff could have been mistaken or have failed to observe the plainly written words "Bal. in full to date," which are found upon the face of the check which he accepted, held for some little time, and finally cashed at the bank. As we view the evidence, it was sufficient to require the jury to return a verdict for the defendant. It is not necessary to consider the rest of the errors assigned.

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

REVERSED.

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

## SUNDERLAND & SAUNDERS, APPELLANTS, V. FRANK B. HIBBARD, APPELLEE.

FILED OCTOBER 16, 1914. No. 17,861.

1. **Gaming**: INTENT: ACTION FOR COMMISSION. In an action by an agent against a principal to recover for alleged commissions and money advanced for the principal in transactions involving alleged purchases of grain on the Chicago board of trade for future delivery, the question is whether the intention was that the principal should become the actual buyer of grain through the agency of the commission merchants, or whether they expressly or impliedly agreed to act as the principal's agents in gambling purchases of grain which the principal had no intention of receiving.
2. ———: TRANSACTIONS OF BOARD OF TRADE: EVIDENCE. Evidence examined, and *held*, that the only conclusion to be reached from the testimony is that the contract was based on a wagering transaction; that there was in fact no intention on the part of the parties to engage in a *bona fide* purchase, to be followed by an actual delivery of the commodity in which they nominally dealt; that such transaction was a gambling venture and speculation in the fluctuation in the price of wheat in the market, and was a violation of the provisions of section 8816, Rev. St. 1913, and contrary to public policy.
3. ———: ENFORCEMENT OF CONTRACT. In such a case the courts of this state will not aid either party to the transaction.

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

*Duncan M. Vinsonhaler,* for appellants.

*George A. Magney, contra.*

BARNES, J.

Action in the district court for Douglas county to recover the sum of $5,593.75, with interest thereon at the rate of 7 per cent. per annum from June 1, 1910, alleged to be due from defendant to plaintiffs for money paid and commissions earned for him by plaintiffs in dealing in wheat on the Chicago board of trade from the 16th day of June, 1908, to the 31st day of May, 1910. Plaintiffs'

amended petition set out the several transactions in full. To this petition the defendant filed an answer, denying every allegation contained therein, except such as were specifically admitted, and as one of his defenses to the action it was alleged that on the date set forth in the petition the plaintiffs were in the commission business in Omaha, Nebraska, and Chicago, and during all of said time dealt and traded in what are known as options on 'change in Chicago and Omaha in grain and provisions by selling and putting in the market on 'change certain grain for future delivery, when in fact no delivery was ever intended and demanded, and no grain was bought or sold or intended to be bought or sold; that on the dates stated in said petition the defendant took an option of said plaintiffs on grain as aforesaid for future delivery, when in fact no delivery was ever intended or demanded, and no grain was bought or sold or intended to be bought or sold, and that the same is true in every instance whether the defendant bought grain for future delivery or sold grain for future delivery, as stated in said petition. Defendant further alleged that all the transactions referred to in said petition were ventures and speculations on margins depending for profit or loss on the fluctuations of the market, and were purely fictitious and gambling transactions, and that in all of said transactions no consideration was received or paid, and that the amount claimed in said petition is for a pretended loss in said dealings in said options at the time stated in said petition, and is without consideration and wholly void, and in violation of the law and contrary to public policy, all of which the said plaintiffs well knew. As a further defense it was alleged that it was understood and agreed between plaintiffs and defendant, in reference to all of said transactions set forth in said petition, that whenever the margins paid to the plaintiffs by defendant in said transactions were exhausted by the raising or falling of the market the plaintiffs were to close out the deal before there should be any loss; that defendant never in any manner authorized plaintiffs to pay or be responsible for any sums of money whatever for the

defendant. Plaintiffs filed a reply which, in substance, was a special denial of the facts alleged in defendant's answer. The cause was tried to a jury, and resulted in a verdict and judgment for the defendant, and the plaintiffs have brought the case to this court by an appeal.

On the trial plaintiffs called one M. P. Miller as a witness, who testified, in substance, that he was employed by the plaintiffs; that plaintiffs were engaged in the grain, commission and provision business, and acted as commission merchants between parties who bought or sold through them; that he had been acquainted with the defendant for five years; that the defendant had been a customer for fully three years, and that he had frequently received orders from the defendant in plaintiffs' office, either in person or by telegraph; that upon receipt of the orders plaintiffs would telegraph the same at once over their wire to Bartlett, Patten & Company, their correspondents, who would thereupon wire back that they had executed the order, and he would enter it on plaintiffs' books and notify defendant, sending him a confirmation by mail addressed to defendant at Irvington, Nebraska. The witness identified exhibits 1, 2, and 11 as having been sent to Mr. Hibbard by plaintiffs over the Western Union Telegraph. Exhibit 11 reads as follows: "5/27/10. F. B. Hibbard, Irvington, Neb. Market very weak. Please come in if possible." The witness then testified that the next day after sending this telegram Mr. Hibbard called at the plaintiffs' office; that Hibbard stood by the desk of the witness watching the market reports; that the market was still going down; that witness said to defendant, "What do you wish to do?" and defendant replied, "I will go down and see Carl first (that meant his son at South Omaha)," that defendant went down, and the witness expected him to come back in the afternoon and fix the matter up; that the defendant at that time had purchased through plaintiffs 130,000 bushels of September wheat; that at the time the defendant was in the office he had told him that his margin was just about exhausted, and that plaintiffs needed more margins; that defendant did not return, and he heard noth-

ing from him; that on the 31st day of May plaintiffs wired their Chicago correspondents to sell the 130,000 bushels of September wheat, and that their correspondents wired back that they had done so; that thereupon he mailed to defendant exhibits 4, 5, 6, 7, 8, 9, 10 and 12; that the loss as a result of this sale was $17,087.56. Plaintiffs thereupon offered in evidence exhibits 3 to 12, inclusive, to which defendant objected as being irrelevant, immaterial and incompetent. The objection was overruled, and the exhibits were received in evidence. A copy of one of them will be sufficient for the consideration of this appeal. Leaving out the letter-head, exhibit 10 reads as follows:

"F. B. Hibbard, Omaha, Neb., May 31, 1910. Subject to the rules, regulations and customs of the board of trade of the city of Chicago, or the exchange in which this order is executed; and any rules, regulations and requirements of its board of directors, and all amendments that may be made thereto, we have this day sold for your account and risk through Bartlett, Patten & Company 10 Sep. wheat 90¼. Sunderland & Saunders."

The witness explained that the item of commissions appearing on exhibit 12 was a charge made by the plaintiffs of one-eighth of a cent a bushel for all grain bought and sold, and of this commission plaintiffs received one-half and their Chicago correspondents one-half; that the plaintiffs were required to keep and deposit with their Chicago correspondents a sufficient margin to protect all their trades made through that correspondent, and that the plaintiffs had paid to Bartlett, Patten & Company the loss resulting from this transaction with Hibbard, and of that loss the sum of $5,593.75 had never been repaid by defendant or any one in his behalf.

On cross-examination Miller further testified that he had been in the employ of plaintiffs since the 25th day of May, 1907; that he was at present the manager having general supervision of the business; that the orders for purchases and sales were handled by him; that he handled all of the orders of defendant during the year 1909, and from 1909 up to date; that the plaintiffs required a deposit

of one cent a bushel at the time of placing the order, and at the time of the conversation with defendant on May 28 defendant's margins were exhausted, but previous to that time he had had a margin; that he had told defendant that his margin was about exhausted, and in response to the question, "So that it was not entirely exhausted when you talked with him at that time? A. It may have been; it may have been a little more than exhausted. * * * Q. Well, now, then, what did you mean a while ago when you said it was about exhausted? A. Because, when we accept an account which is nearly exhausted we notify the party to that effect, and we would expect him to put up more margin to protect us in case the market goes further down." Without quoting further from the testimony of the witness, it is sufficient to say that he testified, in substance, as follows: When the plaintiff purchased wheat for the defendant it was always for future delivery; that all of defendant's transactions were in the future; that when they telegraphed an order to Bartlett, Patten & Company in Chicago they would go on the board of trade and buy or sell; and that Bartlett, Patten & Company would wire them of the execution and the same day mail them confirmation; that plaintiffs did not notify the defendant of the name of the party who bought or sold the wheat; that when they bought or sold wheat for defendant they did not inquire where the wheat was, and that defendant never asked, nor did they ever tell him, where it was; that they did not give him any receipt for it; that the only thing they gave him was a written confirmation; that they had never during all of the dealings with the defendant delivered a bushel of wheat to him; that, in regard to the 130,000 bushels of wheat sold to defendant Hibbard, they did not know that the wheat was in a warehouse in Chicago, and did not give Hibbard anything showing where it was, because they could not until it was delivered; that the transactions of the plaintiffs for the defendant were executed in the pit of the board of trade in Chicago; that all defendant ever paid on the transaction, or all that he was ever asked to pay, were

margins; that as a rule two cents a bushel is all the margin required for wheat, and that they always aimed to keep in defendant's account about one cent a bushel ahead of the market.

It must be observed that of the 130,000 bushels of wheat above referred to there never was a word said by either party about where the wheat was or where it was to come from. The plaintiffs did not know where the wheat was or whether it would be in existence or not when September came. They never gave the defendant a warehouse receipt, and all they ever required him to pay was margins, and all the transactions were executed in the pit of the board of trade in Chicago.

The defendant Hibbard testified, in substance, that in all of the transactions set out in the petition he had never received any of the grain purchased; that there never was anything said about receiving or delivering the grain at any time; that he never asked, nor was he ever told, where the corn was; that he never had any of the grain that he sold, and that they never gave him any warehouse receipt, or ever spoke to him about a warehouse receipt; that he was never told where the wheat or corn was stored or where it would come from; that he was never told where they got their market report, except from Chicago; that the statements that were furnished in each instance showed that whatever was done was done on the Chicago board of trade; that he had not raised any kind of grain for years; that he was never asked by plaintiffs to pay for any grain he bought, nor did he ever receive pay for the grain he sold, except where there were margins in his favor, and that the only money he was required to pay was to keep up the margins at two cents a bushel.

The foregoing statements from the testimony of Mr. Miller and the defendant Hibbard cover practically all of the evidence on this branch of the case, and there is no testimony given by any other witness that contradicts their statements. It therefore seems clear that neither party to these transactions ever intended the actual delivery of a single bushel of wheat or corn supposed to be involved

in the transactions set out in plaintiffs' petition. Usually when men actually buy and sell 130,000 bushels of wheat within a short time, it is expected to be delivered and paid for. They usually say something about where the grain is, and where and how it is to be delivered, and business men who buy and sell in good faith are not likely to close transactions of such magnitude and importance without a thorough understanding as to all of such details. Sutherland & Saunders never expected to be called upon to deliver this wheat, and certainly the defendant Hibbard never dreamed of such a thing. The question therefore is: Were the transactions within the inhibition of sections 8816-8819, Rev. St. 1913?

Section 8816 provides, among other things: "Every person who shall, as principal or as agent of any corporation or person or persons, set up and carry on a bucket-shop, or any person who shall accept employment from any person or persons or corporation engaged in the carrying on of a bucket-shop, and shall, under such employment in any manner or capacity, assist in carrying on a bucket-shop * * * shall be guilty of a felony. A 'bucket-shop' is defined to be an office, store, board-of-trade room, or other place wherein the proprietor or keeper thereof, or other person or agent, either in his or its own behalf, or as an agent or correspondent of any other person, corporation, association or copartnership within or without the state, conducts the business of making or offering to make contracts, agreements, trades or transactions respecting the purchase, or purchase and sale, of any stocks, grains, provisions, cotton or other commodity or personal property wherein said proprietor or keeper or patron contemplates or intends that the contracts, agreements, trades or transactions shall be, or may be, closed, adjusted or settled according to or upon the basis of the market quotations or prices made on any board of trade or exchange where there is competitive buying and selling, and upon which the commodities or securities referred to in such contracts, agreements, trades or transactions are dealt in, and without a *bona fide* transaction on such board

of trade, or wherein such keeper, proprietor or patron shall contemplate or intend that such contracts, agreements, trades or transactions shall be or may be deemed closed or terminated, when the market quotations of prices made on such board of trade or exchange for the articles or securities named in such contracts, agreements, trades or transactions shall reach a certain figure, and also any office, store or other place where the keeper, person or agent or proprietor thereof, either in his or its own behalf, or as an agent as aforesaid therein, makes or offers to make, with others, contracts, trades or transactions for the purchase or sale of any such commodity, wherein either party thereto do not contemplate or intend the actual or *bona fide* receipt or delivery of such property, but do contemplate or intend a settlement thereof based upon differences in the price at which said property is or is claimed to be bought and sold."

Considering the testimony in the light of the statute above quoted, it seems clear that the transactions in question in this case were inhibited by law. The same question was before this court in *Sprague v. Warren,* 26 Neb. 326, where it was held that no recovery could be had on like transactions. The same question was again before the court in *Rogers & Bro. v. Marriott,* 59 Neb. 759. The testimony in that case was very like the evidence in this case, and it was there held that the only conclusion which could be reached from the plaintiffs' evidence was that the contract was based on a wagering transaction, and that there was in fact no intention on the part of the parties to engage in a *bona fide* purchase, to be followed by an actual delivery of the commodity in which they nominally dealt, and that such transaction was a gambling venture and speculation in the fluctuation in the price of wheat in the markets, and was void as being contrary to public policy. In *Boon v. Gooch,* 95 Neb. 678, it was held: "The enactment of this statute did not affect the previous doctrine of this court, and that an action to recover the amount paid to a bucket-shop as margins cannot be maintained." It was said in the body of the opinion: "It will

be seen that this view has prevailed for more than 35 years, and that the courts of this state have consistently refused to lend their aid to either party in such transactions. The enactment of the statute of 1907 imposing a penalty upon the bucket-shop keeper in nowise operated to change the nature of the contract or the relations of the parties. * * * The transaction was illegal wherever conducted."

We think it is needless to review the cases from other states, and we are constrained to hold that the plaintiffs were not entitled to recover in this case. This view renders it unnecessary for us to discuss or determine the question of the giving of instruction No. 5.

The judgment of the district court is

AFFIRMED.

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FRED BENSON, APPELLEE, V. CHARLES OLSON, APPELLANT.

GIDEON PETERSON, APPELLEE, V. CHARLES OLSON, APPELLANT.

FILED OCTOBER 16, 1914. No. 18,674.

1. **Intoxicating Liquors**: PETITION FOR LICENSE: SUFFICIENCY: BURDEN OF PROOF. In an application for a license to sell intoxicating liquors, to which a remonstrance was filed, wherein it was claimed that the petition was not signed by the requisite number of freeholders, the burden of proof is upon the applicant to establish, by competent evidence, the fact that a sufficient number of the petitioners were freeholders at the time they signed the petition.

2. ———: ———: QUALIFICATION OF PETITIONERS: EVIDENCE. The evidence of each of 35 of said petitioners that he was a freeholder in the village where the license is sought to be obtained, together with a proper deed conveying to each petitioner real estate in fee simple, bearing date prior to the filing of the petition, together with the oral evidence of each petitioner that he owns the real estate conveyed to him, and is in possession thereof at the time of the hearing, is sufficient *prima facie* evidence to qualify him to sign such a petition.

3. ———: APPLICATION FOR LICENSE: CHARACTER OF APPLICANT: EVIDENCE. Evidence taken at the hearing on the application for license

that the applicant was a man of respectable character and standing sufficiently establishes that fact.

4. ———: ———: PROOF OF PUBLICATION. The affidavit of the publisher of a newspaper accompanying and annexed to a notice of the filing of an application for a license for the sale of intoxicating liquors, after giving the name of the paper, which states that said newspaper has the largest circulation in the county in which the application is made, that the printed notice attached was to his personal knowledge published daily in such newspaper for two weeks prior to the time of the hearing on the application, is *prima facie* evidence of the publication of the notice, and that the same was inserted in the proper newspaper.

5. ———: ———: ———: IMPEACHMENT. Such affidavit may be impeached by competent evidence, but, where no evidence is offered for that purpose, it will be sufficient to authorize the board to act on the application.

6. ———: ———: DISQUALIFICATION OF BOARD. The remonstrator offered to prove by a member of the board, before whom the application was pending, that he had formed an opinion respecting the character and standing of the applicant prior to the filing of the petition, and that he had expressed his opinion in that respect, and has the same opinion still. Counsel for the applicant withdrew his previous objections to such offer, and the offer was not renewed. *Held*, not sufficient to establish the fact of the disqualification of the member of the board.

7. ———: ———: EXISTENCE OF CITY ORDINANCE: PRESUMPTION ON APPEAL. Where, on the hearing of an application for a license to sell intoxicating liquors in an incorporated village, the remonstrator makes no claim of the nonexistence of an ordinance authorizing the issuance of such a license, on appeal the existence of such an ordinance may be presumed.

8. ———: PETITION FOR LICENSE: IDENTITY OF PETITIONERS. Where one testifies at the hearing that he signed the petition for a license, and produces a deed showing his full name to have the same initials as those affixed to his surname as signed to the petition, such testimony is sufficient *prima facie* to identify him as being the same person who signed the petition.

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

*William V. Allen* and *William L. Dowling*, for appellant.

*H. C. Vail, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Madison county affirming the action of the board of trustees of the village of Newman Grove in granting licenses to Fred Benson and Gideon Peterson to sell malt, spirituous and vinous liquors in said village for the license year of 1914.

It appears that on the 24th day of May petitions were presented to the board of trustees, in the usual form in such cases, each signed by some 40 persons, who alleged therein that they were resident freeholders of said village; that the applicants were each of them men of respectable character and standing, and praying that a license be issued to each of them. To the petitions one Charles Olson filed remonstrances, denying that the petitioners were resident freeholders, and alleging, among other things, that no proper notice of the filing of the petitions had ever been given; that the notices and affidavits or proofs of service of the notices were not sufficient to confer jurisdiction on the board of trustees to act on said petitions. A collateral attack was also made on the previous election, which was held in said village, at which the question as to whether licenses for the sale of intoxicating liquors for the current year should be granted, and many other reasons were set forth as to why the licenses should be refused. The board fixed the 10th day of June, 1914, for the hearings on the applications, at which time there was a trial before the board, and licenses thereafter were granted to the applicants. The remonstrator appealed to the district court, where, as above stated, the action of the board of trustees was affirmed.

The denial of the qualifications of the signers to the petitions put that fact in issue, and the applicants were of course required to establish the qualifications of the signers. The record discloses that, in order to establish that fact, the applicants brought at least 35 of the petitioners before the board, and each of them testified that he resided in the village of Newman Grove, and was the owner of real estate in said village, that he signed the petitions;

and a part of them testified that they had known each of the applicants for several years, and that they were men of respectable character and standing. The following, in effect, is what each of the signers testified to on the hearing: "Q. Where do you live, Mr. Witt? A. Newman Grove. Q. What do you do? A. Sell prunes and calico—general store. Q. How long have you been in the business here? A. About 21 years. Q. Have you got a deed to your land? A. I have one here. I have three or four others. Q. What does it purport to be? A. That is a deed from Clara C. Krogh and husband to B. F. Witt and J. L. Witt. The corner building over here—store building. Q. What sized building is that? A. It is 90 feet long and the width of the lot; that is, about 24 or 25 feet. Q. Do you occupy that building now? A. Yes, sir. Q. Do you own it now? A. I do, my wife don't. I own everything in my name. My brother Jake has an interest in this lot. Q. You and your brother own it together? A. Yes, sir. Q. Jointly? A. Yes, sir. We have two or three other properties." Thereupon a deed conveying the property, which is situated in Newman Grove, to the witness in fee simple was introduced in evidence over the objections of the remonstrator, and the witness was asked: "Q. Do you own it (the property) now? A. I do."

Witt's deed, introduced in evidence, bore date of the 27th day of February, 1899. As above stated, the testimony of at least 35 of the petitioners was taken, and each of them testified that he was the owner of real estate in the village of Newman Grove at the time of the hearing. Each of them introduced in evidence his deed conveying certain real estate from the grantors named therein to himself. Each of the deeds bore date prior to the time when the applicants filed their petitions, and each testified that he owned the property conveyed thereby at the time of the hearing.

Counsel for the remonstrator contend that the evidence was insufficient to authorize the board of trustees to act on the petitions of the applicants; in other words, that the signers to the petitions must each show that he was a

freeholder in the village of Newman Grove, and establish his title to his freehold with as much particularity as would be required in an action of ejectment. In support of this contention counsel cite *Rosenberg v. Rohrer,* 83 Neb. 469. In that case it was held that neither the certificates of the register of deeds nor the testimony of the deputy assessor was competent evidence that the petitioners were freeholders. It was further held that the introduction of deeds of conveyance to the signers ranging in dates from 1879 to 1907, taken alone, did not establish the fact of their ownership at the time of signing the petition; no other competent proof of present ownership being offered. It was not decided, however, that the introduction of deeds of conveyance, together with proof that each of the signers was the present owner of the premises described in his deed, as was done in this case, was not sufficient to establish such ownership, at least by *prima facie* evidence.

In *Starkey v. Palm,* 80 Neb. 393, it was held, in substance, that the statutory qualification of a freeholder as a petitioner upon an application for a saloon license does not require evidence so conclusive as would be requisite to enable him to recover in ejectment against an adverse claimant, but it is sufficient if he has shown that fact by record or documentary evidence, or both, and in good faith claims and believes himself to have a freehold estate in lands within the prescribed district within which he resides. We think this is the correct rule.

The several deeds introduced in evidence show that the signers were freeholders prior to the 24th day of May, 1914, which was the date on which the petitions were signed and filed. The oral evidence of the signers show that each of them owned the real estate described in his deed at the time of the trial before the board, and was in possession thereof at that time. This necessarily shows *prima facie* that they were freeholders on May 24, 1914.

Again, the evidence of 35 of the signers shows that each of them signed the petitions, and there was considerable evidence showing, or tending to show, that the petitioners

were men of respectable character and standing. This fact was amply proved at the hearing before the board, and, as we view the case, was sufficient evidence of the qualifications of the signers to authorize the board to act on the petitions of the applicants.

It is next contended that the licenses should have been refused because the notice published in the Norfolk Daily News was insufficient to confer jurisdiction on the board to act. No objections were made to the form of the notice, but it is claimed that it was not published a sufficient length of time before the board took action on the applications. Section 3845, Rev. St. 1913, provides: "No action shall be taken upon such application until at least two weeks' notice of the filing of the same has been given by publication in a newspaper published in the county having the largest circulation therein." By the proofs of publication attached to each of the notices, it appears that it was first published on the 26th day of May, 1914, and the last publication was on June 8, 1914, thus making 14 consecutive publications. It thus appears that the notices were published for two weeks prior to June 10, which was the date on which the hearing on the applications was commenced.

In *Rosewater v. Pinzenscham,* 38 Neb. 835, it was said: "Notice of an application for a license to sell intoxicating liquors must be published at least two weeks in a newspaper published in the county having the largest circulation therein, before any action can be taken on the application. When the notice is inserted in a daily paper, it must be published daily for the statutory period."

In *State v. City of South Omaha,* 33 Neb. 876, it was decided that a notice of an application for a license to sell intoxicating liquors must be published for two weeks in each issue of the paper. Where the paper containing the notice is a daily, the notice must be published daily; but, in case the paper having the largest circulation in the county is published weekly, the notice must be published therein in every issue of such paper for two weeks.

The proof of publication in this case shows that the notices were published daily in the Norfolk Daily News for

14 days, and no action was taken on the applications until two days after the date of the last publication. We are therefore of opinion that the notice was sufficient, and the board had jurisdiction to act on the applications.

It is further claimed that there was no competent evidence before the board that the Norfolk Daily News was the paper having the largest circulation in Madison county. That fact, however, was clearly set forth in the affidavit attached to the notice, and, while it may be conceded that the contested facts in a remonstrance are not as a general rule to be proved by affidavits, yet the code provides that certain things may be proved by affidavit. Section 7936, Rev. St. 1913, provides: "An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law." The affidavit of the publisher is *prima facie* evidence of the publication of the notice, and that the same was inserted in the proper newspaper.

In *Rosewater v. Pinzenscham, supra,* it was said: "The affidavit of the publisher of a newspaper, accompanying and annexed to such a notice, stating, after giving the name of the paper, 'that said newspaper has the largest circulation in Douglas county, and that the printed notice hereto attached was, to his personal knowledge, published daily in the said daily newspaper from the 15th day of December, 1892, to the 28th day of December, 1892,' is *prima facie* evidence of the publication of the notice, and that the same was inserted in the proper newspaper. The affidavit may be impeached by competent evidence." But no evidence was offered in this case impeaching, or tending to impeach, the statement in the affidavits that the Norfolk Daily News was the paper having the largest circulation of any newspaper in Madison county. It follows that the proof of publication was sufficient, and this contention of the remonstrator was properly overruled.

It is further contended that the district court erred in sustaining the rulings of the village board refusing the remonstrant the right to show that the several members of the board were disqualified to act on the petitions. It appears that counsel for the remonstrator put the following questions to Mr. Gustafson, a member of the board: "Q. Mr. Gustafson, you know Mr. Fred Benson and Mr. Gideon Peterson, do you not? A. Yes, sir. Q. And had you formed some opinion as to their character and standing before the case was tried?" This question was objected to as immaterial, and the objection was sustained. Counsel for the witness then made the following offer: "I offer to show by the witness on the stand that he had formed an opinion respecting the character and standing of each of the applicants prior to the filing of the petitions in this case and prior to the filing of the remonstrances thereon, and that he entered this case with such an opinion and has prejudged the case, and that he has at different times expressed his opinion in that respect, and still has such an opinion, and to that end I propound the following question: Had you formed an opinion of the character and standing of the applicants Gideon Peterson and Fred Benson at and prior to the filing of the remonstrance against said petitions by Charles Olson, in this case?" Thereupon the counsel for the petitioners stated: "The petitioners withdraw any objection to any question that goes to the question whether he has expressed any opinion before the hearing in this case, but, as to whether he has formed an opinion, the petitioners object to it as irrelevant and immaterial, and as trying to impeach the judgment of the board before they have passed on the question. The petitioners make no objection to asking any member of this board any question about any opinion he has expressed previous to this hearing." No further offer was made of any evidence impeaching, or tending to impeach, the qualifications of the members of the board. This offer was clearly incompetent, and, if the evidence had been received, it would not have been sufficient to accomplish that purpose.

It is further contended that the licenses should have been refused because of the testimony of the applicants as to their preparations for opening saloons in case the licenses were granted. It is claimed that Peterson bought the stock of liquors of a former proprietor of a saloon in Newman Grove before he had obtained his license, but the testimony shows that neither Peterson nor Benson had completed such purchase, and we are of opinion that, if they had made such a purchase contingent upon their obtaining a license to sell intoxicating liquors, it would not have disqualified them from obtaining their licenses, and the board would not have been justified in refusing to grant them licenses on that account.

Again, it is claimed that the licenses should have been refused because the applicants had tentatively agreed to employ certain bartenders, who in 1913 had worked for persons who it was alleged had sold liquors in violation of the law. There is no statute in this state that prohibits a board from granting a license to an applicant because he may employ a bartender who had worked during the previous year for a man who had violated the liquor law. The general right of opposition to the granting of a license must be limited to the cases specified by law.

It is also contended that the board had no authority to grant licenses to the applicants, for the reason that it does not affirmatively appear that there was an ordinance authorizing them to grant the licenses. In the absence of any contrary showing, it will be presumed, on appeal, that the village of Newman Grove had enacted such an ordinance, and that it conferred upon the board the right to grant liquor licenses. 89 Am. Dec., note, p. 669.

Finally, the fact that the attorneys for the remonstrator have devoted some six pages of their brief to the contention that the persons who testified did not identify themselves as the ones who signed the petitions by their initials, and therefore the petitions were not sufficient, has not been overlooked. We are of opinion that, where a man who has signed a petition by his surname and the initials of his Christian name, testifies that he signed the same, and in-

troduces a deed in evidence by which real estate is conveyed to him, which shows that the initials of his full Christian name are the same as those signed to the petition, this *prima facie* sufficiently identifies him as having signed such petition.

In conclusion, it appears that there was no attempt to show that there were not 30 *bona fide* freeholders who signed the petitions, and the evidence is at least sufficient *prima facie* to establish the qualifications of the signers. It sufficiently appears that the notices of the filing of the applications were published in the Norfolk Daily News, a paper having the largest circulation of any newspaper in Madison county. The notices served their purpose, for the remonstrator appeared before the board and urged all of the objections he could find to the issuance of the licenses. The hearing before the board was fairly conducted, and, as we view the record, no error was committed by the district court in affirming the judgment of the board by which the licenses in question were issued. The judgment of the district court is therefore

AFFIRMED.

ROSE, J., not sitting.

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ALBERT T. KENNEY ET AL., APPELLEES, V. JOSEPH F. KRAJICEK, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,555.

Rehearing of case reported in 95 Neb. 259. *Judgment of affirmance adhered to.*

LETTON, J.

This case was heard before a department of the court and opinion handed down (95 Neb. 259), but has been reargued before the full court. On rehearing the defendant vigorously complained that the opinion suppressed the de-

cisive facts of the case; that it ignored the undue influence of the agent, Sinkula; that it misrepresented the actions of the wife and sons of defendant; and that it erred in holding that the retention of the property by the appellant and his efforts to sell the same through Sinkula amounted to an election and confirmation of the transaction. There is some merit in the complaint, especially as to the implication with respect to the wife and sons. It seems clear that Mrs. Krajicek wanted the younger son, Louis, to go with his father the first day to see that he did not drink, and that the next morning she asked the older son to go with her to prevent a purchase of the land. As to the transaction in Kenney's office in Stanton the evidence is in direct conflict. The Krajiceks say that the wife and son objected to the whole transaction at that time. Mr. Kenney testifies that he met the party on the farm the day before the contract was made; that Krajicek and the others went over the land, and that he himself walked over the pasture with him, which was the poorest part of the farm; that they discussed the sandy condition of the land, and defendant stated that he would go home and come out and see it again and bring his wife; that on that day he seemed perfectly sober; that the next day, when the wife and son were in his office, they objected to buying the place at $16,800, that Krajicek offered $16,000, and that finally they agreed upon $16,500 for the farm and a team of mules, harness and wagon, and that the wife and son made no objection when this conclusion was reached. The evidence does not sustain the charge that Sinkula had plied Krajicek with liquor; furthermore, we find absolutely no proof of any misrepresentations as to the quality of the land, and no more than ordinary representations were made as to its value.

The testimony of the scrivener who executed the contract in Kenney's office is to the effect that he noticed nothing out of the ordinary in the demeanor or actions of Krajicek, and heard nothing of the wife objecting to the making of the contract; the only dispute he heard being between Kenney and Krajicek with respect to the rate

of interest, Kenney wanting 5½ per cent. and Krajicek insisting that 5 per cent. was enough. There is evidence that Sinkula told Krajicek that each of two other men would buy the land if Krajicek did not, and that he procured one of them to say this to Krajicek on the first day that he was at the farm. This, however, apparently had little effect upon Krajicek, because his testimony is as follows: "Q. Did you have any talk with Mr. Judiker there that day? A. We didn't talk very much with Judiker; if he did, I don't remember anything. Q. Nothing Mr. Judiker said had any influence on you buying that land, did it? A. I don't know. * * * Q. You don't remember a thing he said there that day? A. I don't remember any talk."

It was nearly two months and a half after the defendant signed the contract and took the personal property home before he indicated in any manner that he was dissatisfied with the trade. At that time he stated in a letter as the ground for rescission: "The other day in looking over my papers I found that I had bought 280 acres of land from you. Now I was drunk at that time and did not know and understand what I was really doing." The fact is that some days after the transaction he sent for the team and had it at the time he wrote this letter. The evidence shows that Sinkula told him that he thought he could dispose of the land for him at an advanced price, and that he got permission to do so. Sinkula failing to find a purchaser to whom the land could be sold at a profit, defendant undertook to rescind by this letter.

The evidence shows that land of the best quality in Stanton county is worth from $100 to $125 an acre. This land was sold at about $57 an acre. It is apparent, therefore, that the buyer could not expect, and did not anticipate, that he was getting land worth much more than half the value of good farming land in that locality. It is possible that the judgment of Mrs. Krajicek and the oldest son was better than that of the father, and that it was a foolish contract on his part, but even a court of equity cannot act as guardian for all men

who make improvident purchases. With respect to the conflict in the evidence in regard to what occurred at Stanton, the district court had the witnesses before it, observed the demeanor of Krajicek and his family as compared with that of the other witnesses, and found against him. Our view of the testimony coincides with that of the district court upon this point. The case is not entirely free from doubt, and, had the trial judge set the contract aside, we should probably have given consideration to the fact that he had the great advantage of seeing and hearing the witnesses, adopted his view as to their credibility, and affirmed the judgment. Taking all the facts into consideration, we must adhere to our former judgment.

AFFIRMED.

FAWCETT, J., not sitting.

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L. C. SHARP, APPELLANT, V. NATIONAL FIDELITY & CASUALTY COMPANY ET AL., APPELLEES.

GEORGE J. S. COLLINS, APPELLEE, V. L. C. SHARP, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,814.

1. **Contracts:** BUILDING CONTRACTS: CONSTRUCTION. The building contract involved in this controversy considered, and *held* to be a contract by the defendant Collins to "order all the material, and superintend all the work for the building," and not to be an ordinary building contract.
2. ———: ———: ACTION FOR DAMAGES: SUFFICIENCY OF EVIDENCE. Evidence set forth in the opinion *held* to justify the finding of the district court that the principal delays in the construction of the building and sidewalk were due to acts of the owner, and that he is not entitled to recover damages from the contractor therefor.

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

*P. A. Wells,* for appellant.

*Stout, Rose & Wells, B. N. Robertson* and *Alvin F. Johnson, contra.*

LETTON, J.

This action was brought against the defendant Collins for failure to fully perform a contract to erect a building, and against the National Fidelity & Casualty Company upon the bond given to secure the faithful performance of the contract. The petition charges that the cost of the building exceeded the amount stipulated, that the building was not completed at the time stipulated, and claims damages for loss of rents, loss of profits in the business which Sharp expected to carry on in the building, and for defective construction. Collins admitted the execution of the contract and bond, denied the other allegations of the petition, and counterclaimed that there was due him for extras on the contract $1,729, with interest. Collins afterward brought an action against Sharp to foreclose a mechanic's lien for labor performed and material furnished in the erection of the building. A number of subcontractors and materialmen were parties to this suit and filed cross-petitions praying for foreclosure of their liens. By consent the latter action was consolidated with the first for the purpose of trial. A jury was waived and the case tried to the court, which found in favor of Collins, dismissed Sharp's petition in the law action, and rendered a judgment in favor of Collins for $1,809. In the equity suit it ordered the foreclosure of Collins mechanic's lien for $1,739 of this amount, and established and foreclosed the liens of the other defendants. Sharp has appealed in both actions.

The facts seem to be that, some time previous to the meeting of Sharp and Collins, Sharp had procured from Fisher & Lawrie, architects, plans and specifications for a brick machine-shop building. Collins was not called upon until it was found that bids could not be procured for the construction of the building, as specified, for the amount of money which Sharp desired to expend. These plans and specifications were gone over by Collins and

changed in a number of material particulars, and certain blue-print plans differing in some respects from those submitted by Fisher & Lawrie were made by Collins and submitted to Sharp before the contract was finally entered into. In drawing up the contract between the parties the ordinary printed form of builder's contract was used, but a number of the printed paragraphs were erased as not applicable to the actual understanding. By article 1 it was provided: "The contractor shall and will provide all the materials and perform all the work" for the building "as shown on the drawings and described in the specifications prepared by Fisher & Lawrie and George J. S. Collins." It was provided in article 6: "The contractor shall complete the several portions, and the whole work comprehended in this agreement, by and at the time or times hereinbefore stated, to wit, as soon as practicable, say November 1st, 1909." Article 8: "The owner agrees to pay for all labor and materials essential to the conduct of this work." Article 9: "It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work shall be $800. * * * Should the total cost of the building, as specified in article 13, be less than $8,200, the contractor shall be entitled to 25 per cent. of such saving, but shall pay all cost in excess of that amount, subject to additions and deductions as hereinbefore provided." By article 13 the contractor agreed to furnish a bond "that the cost of all materials and labor for the building, exclusive of the sum mentioned above, shall not exceed $8,200." The Casualty Company bond recited: "Whereas said principal has entered into a written article of agreement dated the 31st day of July, 1909, with said owner to order all the materials and superintend all the work for (describing the building). But the owner shall pay for all labor and material; said building to be constructed in accordance with the plans and specifications signed by the parties hereto."

There is a direct conflict in the evidence with respect to the identity of the specifications which formed part of the contract. Sharp produced the specifications prepared

by Fisher & Lawrie. These bear the genuine signatures of Collins and Sharp, which Sharp testifies were signed at the time the contract was entered into. Collins testifies, on the other hand, that no specifications were signed at that time, but claimed that the changed specifications were delivered to Sharp, and have never since been seen by him; that the specifications produced were signed nearly five months after the contract was signed, Sharp having produced them and stated that this was the copy which had been altered; and that he (Collins) signed them without examination. Collins keeps a diary in which he notes many facts with respect to his business. By reference to the diary he testified that this occurred on January 24, 1910, and that he only discovered that he had signed the wrong specifications on January 28, 1910, after he was told that Sharp had taken the specifications away. Whether this is the fact or not, it seems apparent that the signed specifications were not adhered to in the construction of the building, because in a number of important points neither the Fisher & Lawrie plans nor these specifications were followed. Moreover, many of the provisions of these specifications are not at all applicable to a contract of the nature of that actually entered into between these parties. Even if these actually are the specifications that were identified before using and which were used, it is evident that neither party treated many of their provisions as effective, and that Sharp is not entitled to insist upon their strict interpretation now. This being so, a large part of the complaint with respect to a departure from the specifications must fail.

The evidence also conflicts as to the time that the contract was signed. This is only material with respect to the time of completion, and, incidentally, as throwing light upon the actual understanding of the parties. The duplicate contracts bear date of August 31, 1909. Upon the back of the copy which Collins retained that date is also shown. The bond recites that the contract was dated July 31. The bond itself is dated August 7, 1909. Collins testified by the aid of his diary that he presented the drawings,

as changed by him, to Sharp on August 10, that negotiations continued until the 20th, but the contract was not actually signed until August 31. The agent for the insurance company testifies that at the time the bond was applied for it was his recollection that Collins had a copy of the contract. Upon cross-examination, however, it developed that in the copy of the agreement which was then furnished to the insurance company, which was produced at the trial and from which the provisions in the bond were drawn, the date is July 31, and the printed clause, "the contractor shall and will *provide* all the materials and *perform* all the work," had been so changed that it read, "that the contractor shall and will *order* all the material and *superintend* all the work for the building." In a few minor particulars, also, this contract differed from the actual contract which was signed. We are satisfied that the contracts which were actually signed were not executed until the day they bear date, and that this copy and the recital in the bond more nearly express the actual contract between the parties, as afterwards construed by the action of the parties themselves, than does the written contract, and that by an oversight the printed forms were not changed accordingly when the contracts were afterwards signed.

We are also of opinion that the clause, "as soon as practicable, say November 1st," should be taken to mean as soon as practicable, all things considered, and as near November 1st as can reasonably be expected, and that the fact that the contract was not signed until August 31 is of much weight in determining whether the building was completed within a reasonable time and whether the freezing of the concrete was due entirely to the fault of Collins. We cannot detail the evidence with respect to the causes for delay. It appears that the delay in the erection of the superstructure was largely owing to the fact that Sharp desired to order the steel from a Chicago dealer in second-hand material, and that through a mistake in the shipment the steel for the second floor did not arrive until November 1. That he interfered in this respect is denied by

Sharp; but, in any event, considerable delay was occasioned by the mistake of the Chicago concern. The delay in the construction of the sidewalk also seems to have been caused by a change with respect to glass to be imbedded in the concrete to light the area below. As to this, we think it clear that Sharp directed Collins to order this particular kind of glass. When the glass came it did not fit the metal frames in which it was to be placed, and this occasioned another delay, so that freezing weather came on before the concrete could be placed, and artificial heat was used in the attempt to preserve the work. There is no doubt that the sidewalk concrete work is not equal to what it should be, or what it would have been if it had been laid in warmer weather. We think the fault was not with Collins in either of these matters.

By the terms of the contract any delay occasioned by the act of Sharp operated to extend the time for completion to the extent of the time lost by the delay. Much of plaintiff's claim for damages is for loss of rents, for loss of use of that portion of the building intended to be occupied by his own business, and for loss of profits occasioned by his inability to fill orders for machinery on account of being unable to occupy the building. The latter item charged we think is too remote and speculative. It was not specially called to the attention of Collins at the time the contract was entered into, and could not reasonably have been anticipated within the contemplation of the parties when the contract was made. Under the rule in *Hadley v. Baxendale,* 9 Welsb. H. & G. (Eng.) *341, it is not a proper element of damages. As to the other items, we are of opinion that the delay was largely, if not altogether, occasioned by Sharp himself, and that he is not entitled to recover any damages for loss of rent and loss of use.

Items which Collins claims as extras, 53 in number, are set forth in detail in the pleadings, and evidence offered in support by him. The district court made specific findings upon each of these items, allowing some in full, reducing the amount of others, and finding in favor of Sharp as to others. The evidence as to many of these items is in

direct conflict. A discussion of the evidence as to each is impracticable within the proper limits of this opinion. It is sufficient to say that, considering the evidence upon the whole list, and also with regard to the extra compensation claimed by Collins, we have come to the conclusion that the amount awarded Collins should be reduced to the extent of $249.22. While Sharp is not justified in many of his contentions, he had reasonable cause for complaint in a number of respects, and the compensation to be awarded Collins should therefore be reduced in some degree.

We cannot refrain from saying that in our opinion the parties were most unbusinesslike and indefinite in entering into the contract and in their dealings afterwards, and that if either of them has not obtained full justice in this matter it is largely owing to his own careless methods.

The judgment of the district court awarding Collins a mechanic's lien is therefore reduced $249.22, with interest from the time allowed by the district court, and also the general judgment. It is further ordered that the costs in this court be equally divided between the parties.

JUDGMENT MODIFIED.

ROSE, J., not sitting.

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## JOHN HUDSON V. STATE OF NEBRASKA.

FILED OCTOBER 16, 1914. No. 18,632.

1. **Rape:** SUFFICIENCY OF EVIDENCE. Evidence *held* to support the verdict.
2. ———: EVIDENCE OF OTHER ACTS: ADMISSIBILITY. In a prosecution for rape with consent, proof of other acts of intercourse occurring shortly after the time of the act charged is admissible, and the weight of such evidence as matter in corroboration is for the jury to determine.
3. ———: ———: CORROBORATION. While the prosecuting witness alone cannot furnish corroboration by her statements or testimony as to such

other acts, still, if her testimony in connection with other facts and circumstances in evidence convinces the jury that such took place, the whole of the proof is proper to be considered, and it is not erroneous to admit the testimony of the prosecutrix as to such acts and to allow it to go to the jury under a proper instruction.

4. **Criminal Law:** REFUSAL OF CAUTIONARY INSTRUCTION. A cautionary instruction as to the testimony of a sheriff *held* properly refused. *Keezer v. State*, 90 Neb. 238.

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

*George A. Adams,* for plaintiff in error.

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

LETTON, J.

Plaintiff in error, a young man about 21 years old, was convicted of the offense of rape without violence upon one Anna Weise, a girl of 14 years of age. He was convicted and sentenced to a term of seven years in the penitentiary.

1. It is contended that the evidence is insufficient to sustain the verdict. The argument is that the story of the prosecuting witness is so uncertain that no reliance should be placed upon it, and that it was induced by pressure upon her mind and by statements made by the prosecuting officers. An examination of the testimony clearly shows that this assignment cannot be sustained. The girl told a plain and connected story as to how she became acquainted with the defendant and as to the occasion upon which the sexual intercourse took place. It is true that upon cross-examination, apparently under a misapprehension of their purport, she gave affirmative answers to a number of leading questions propounded by counsel for defendant as to what was said to her by certain prosecuting officers, and which replies were somewhat inconsistent with her original testimony; but these she corrected afterwards. Taking her testimony as a whole, corroborated as it is by the testimony of the defendant himself as to their first meeting, and to the fact that she

was in his room several times at about the time when the act is charged to have been committed, and considering the further corroboration furnished by his voluntary admissions, the evidence seems amply sufficient to sustain the verdict.

2. It is complained that instructions 7, 8 and 14 were erroneously given. It is unnecessary to set these forth in this opinion, since the language used in each of them has repeatedly been approved by this court.

3. Error in permitting the state to prove by the prosecuting witness that the accused had had sexual intercourse with her at other times than that at which the charge in the information is laid is also assigned. There can be no doubt that proof of facts and circumstances tending to show other acts of intercourse about the time charged in the information is properly admissible in cases of this nature. *Leedom v. State,* 81 Neb. 585; *Woodruff v. State,* 72 Neb. 815. This evidence, in order to be corroborative in character should proceed from other sources than from the prosecutrix alone. If a witness testifies that criminal intercourse was had upon one day, the fact that she testifies that a like act was had upon another occasion does not corroborate her testimony. *Boling v. State,* 91 Neb. 599. The evidence was admissible as a part of the proof of other acts, but its value as matter of corroboration was for the jury. The court instructed the jury that the prosecuting witness could not corroborate herself by statements of other acts, and thus the interests of the defendant were protected. If, taken with the other evidence as to such acts, the jury believed that such intercourse occurred, it was proper to be taken into consideration.

4. Complaint is also made that the court erred in refusing to give instruction No. 5 asked by defendant. This was a cautionary instruction with respect to the testimony of police officers, detectives, constables, and sheriffs. The court properly refused to instruct as requested. No policeman, detectives or constable had testified, and the refusal

to so instruct was entirely proper. *Keezer v. State,* 90 Neb. 238.

We have considered each of the errors assigned and feel convinced that the defendant was rightfully convicted. His own testimony convinces us of this when viewed in connection with the other facts in the case.

The severity of the sentence is complained of. The defendant is only 21 years of age, and while in the argument and in the brief of the state, statements are made as to defendant's character, which, if disclosed by the record, might perhaps justify the sentence, we are convinced that the term of seven years is too severe a punishment when all the facts in this case are considered and when the immaturity of mind and the mental traits of the defendant are borne in mind. We believe that the ends of justice will more properly be subserved by reducing the term of sentence of the defendant to three years. The judgment of the district court is so modified, and as modified is affirmed.

AFFIRMED AS MODIFIED.

ROSE, J., not sitting.

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OMAHA WOOL & STORAGE COMPANY, APPELLEE, V. CHICAGO GREAT WESTERN RAILROAD COMPANY ET AL., APPELLANTS.

FILED OCTOBER 16, 1914. No. 17,628.

**Corporations:** CONTRACTS: EXECUTION: PRESUMPTION. A contract pertaining to the business of a corporation, when formally executed in its name by its president, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporation, and the presumption is not necessarily rebutted by mere failure of the directors' record to show affirmatively that such authority had been given.

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

*W. D. McHugh, Greene, Breckenridge, Gurley & Woodrough, W. H. Herdman* and *Joline, Larkin & Rathbone,* for appellants.

*Brome & Brome, contra.*

ROSE, J.

This is a suit for the specific performance of an option to purchase at the agreed price of $7,500 a warehouse site in Omaha on the right of way of the Mason City & Fort Dodge Railway Company, defendant, the agreement having been inserted in a lease providing for the payment of an annual rental of $441 for the same premises. Charles Henry King was lessee and assigned the lease to plaintiff. The railroad company named held title to the leased land. Its corporate stock, except five shares, was owned by the Chicago Great Western Railway Company which, under a lease, operated the lines of the Mason City & Fort Dodge Railroad Company. The property and rights of the former, through a receiver's sale, were acquired by the Chicago Great Western Railroad Company, defendant. The lease for the warehouse site on the railroad's right of way was executed by A. B. Stickney and Charles H. F. Smith, receivers of the Chicago Great Western Railroad Company, and by the Mason City & Fort Dodge Railroad Company, by A. B. Stickney, president. The Central Trust Company of New York, defendant, had a mortgage on the property of the Mason City & Fort Dodge Railroad Company, before the lease for the warehouse site had been executed. By the terms of the mortgage, however, mortgagee obligated itself to release from its lien warehouse sites sold by the mortgagor. Under its lease plaintiff constructed at great expense, and afterward operated, a warehouse on the demised premises, paid the stipulated rentals, attempted to exercise its option to purchase the leased land for warehouse purposes, tendered the purchase price and demanded a deed. Performance on part of defendants was refused. The substance of the defense interposed is that the lease containing the option is not the

contract of the Mason City & Fort Dodge Railroad Company, because it was never authorized by the board of directors of that corporation. From a decree in favor of plaintiff defendants have appealed.

In assailing the decree for specific performance defendants argue: "That, where a corporation, situated as was the Mason City & Fort Dodge Railroad Company in this case, seeks to sell a part of its lands, the transaction must be carried out through its duly authorized board of directors; that its legal separate entity continues unimpaired in spite of the fact that it has mortgaged its property for a large amount and leased it subject to the mortgage."

Plaintiff, in conducting its warehouse business, patronized the railroad as a carrier. The warehouse inured to the carrier's benefit. The selling of portions of the right of way for warehouse purposes was not only within the power of the carrier, but was part of its general business. This right was protected by a contract requiring the mortgagee to release from its lien warehouse sites subsequently sold. It is insisted, nevertheless, that the option was never authorized at a meeting of the board of directors of the Mason City & Fort Dodge Railroad Company, and that therefore the agreement was void. The formal record of the proceedings of the board of directors does not affirmatively show specific authority for the sale. A witness testified that the agreement was never authorized at a board meeting. A by-law of the corporation, however, provides: "The executive power of the company shall be vested in the president, who shall preside over meetings of the board of directors and shall have the power and control over the affairs of the company when the board is not in session, subject to the approval of the board."

The lease on its face appears to be formal and valid, having been signed by the holder of the title as follows: "Mason City & Fort Dodge Railroad Company, By A. B. Stickney, President. Attest: G. F. Philleo, Asst. Secretary." There is nothing to indicate that Stickney attempted to act in his private capacity or for his in-

dividual profit, or that he did not act for the sole benefit of the corporation of which he was president. While there is some diversity of opinion, the weight of modern authority, as well as the better reasoning, supports the general principle that a contract pertaining to the business of a corporation, when formally executed in its name by its president, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporation. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548; *Chicago Pneumatic Tool Co. v. Munsell*, 107 Ill. App. 344; *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352; *White v. Elgin Creamery Co.*, 108 Ia. 522; *Little Saw Mill Valley Turnpike or Plank Road Co. v. Federal Street & P. V. P. R. Co.*, 194 Pa. St. 144; *Lloyd & Co. v. Matthews*, 223 Ill. 477, 7 L. R. A. n. s. 376; *Patterson v. Robinson*, 116 N. Y. 193; *Davies v. Harvey Steel Co.*, 6 App. Div. (N. Y.) 166; *Patteson v. Ongley Electric Co.*, 87 Hun (N. Y.) 462; *United States Nat. Bank v. Homestead Bank*, 18 N. Y. Supp. 758.

When the executive power of the president to control the affairs of the company is considered, as shown in the by-law quoted, together with the undisputed facts narrated, the presumption that he had authority to execute the lease containing the option is not rebutted by mere failure of the board's record to show affirmatively that such authority had been given. *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548. Want of authority is not otherwise shown.

On the record made, therefore, the option is enforceable. This conclusion makes the discussion of other questions unnecessary. Since the contract to sell the warehouse site is binding on the parties to it, mortgagee cannot defeat specific performance, because it bound itself to release from its lien warehouse sites subsequently sold.

AFFIRMED.

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

FURNAS COUNTY, APPELLANT, V. CHARLES M. EVANS ET AL., APPELLEES.

FILED OCTOBER 16, 1914. No. 17,775.

1. **Trial:** DIRECTING VERDICT. Where there is no evidence to sustain a judgment for plaintiff, the trial court should, in a case tried to a jury, direct a verdict in favor of defendant.
2. **County Treasurers:** LIABILITY FOR INTEREST. "A county treasurer is not liable on his bond for interest which he has not collected and has been unable to collect upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest." *Hamilton County v. Cunningham*, 87 Neb. 650.

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

*John Stevens*, for appellant.

*W. S. Morlan, J. F. Fults* and *Lambe & Butler, contra.*

ROSE, J.

This is a suit on the official bond of a former treasurer of Furnas county to recover $1,296.65, a sum alleged to be due the county under the depository law as interest at the rate of 3 per cent. per annum on the average daily balances of public funds in depository and other banks during the years 1902 and 1903. Comp. St. 1901, ch. 18, art. III, secs. 18-23. The case was here before. At the first trial below the lower court sustained a demurrer to the petition and dismissed the action. In this court the petition was sustained and the action was held to be one to recover interest received and retained by the county treasurer on county funds deposited by him in depository and other banks. *Furnas County v. Evans*, 90 Neb. 37. After the case reappeared in the district court, defendants filed answers amounting to a general denial. Upon a trial of the issues, the trial court directed a verdict for defendants. From a judgment of dismissal plaintiff has appealed.

A reversal is sought for assigned error in directing a verdict for defendants. There is no dispute in the evidence about any material fact. Proof that the treasurer turned over to the county all interest received by him on the public funds described in the petition is uncontradicted. It follows that the verdict for defendants was properly directed, treating the action as one alone to recover interest received and retained by the county treasurer on public funds deposited by him in depository or other banks.

Plaintiff argues, however, that the treasurer is liable for negligence in failing to collect and turn over to the county, according to the terms of the depository law, the full amount of interest due on public funds deposited by him in depository and other banks. Assuming, but not deciding, that the petition is sufficient in this respect, plaintiff failed to make a case, when the depository law, as construed by this court, is considered with the undisputed facts. The treasurer deposited county money in four banks. Two of them were properly designated, bonded depositories. The others did not qualify under the depository law. The latter paid no interest on deposits of public funds. The county treasurer kept in the two regular depositories public funds in excess of the amounts contemplated by statute and by the depository bonds. On this excess no interest was paid. It is the unpaid interest on such excess and on the funds deposited in banks not qualified as depositories that plaintiff is seeking to recover from the treasurer. There is no evidence that any act or neglect of the treasurer prevented the selection or qualification of adequate depositories for all of the public funds or hindered or delayed the collection of interest. The rules of law applicable to the undisputed facts seem to be settled. In *Hamilton County v. Cunningham,* 87 Neb. 650, it is said: "A county treasurer is not liable on his bond for interest which he has not collected and has been unable to collect upon the public funds in his care, unless it appears that some act or neglect of his has prevented or hindered the collection of such interest."

In a suit by Hamilton county against the Aurora National Bank, which had not qualified as a depository, to recover interest on public funds deposited therein by J. B. Cunningham, county treasurer, this court said: "If this transaction of depositing the money in the bank by Cunningham was in violation of law, as claimed, both Cunningham and the bank were parties to such violation, and would be equally liable therefor; and if the transaction, being in perfect good faith, were such that by its ultimate result either of the parties thereto was released, we see no escape from holding that both were released." *Hamilton County v. Aurora Nat. Bank,* 88 Neb. 280.

These precedents require an affirmance in the present case.

AFFIRMED.

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## LUCY BELLE CILEK, APPELLEE, V. NEW YORK LIFE INSURANCE COMPANY, APPELLANT.*

FILED OCTOBER 16, 1914. No. 18,275.

1. **Insurance:** CONTRACT. The policy of insurance and the application therefor examined together, and *held* to constitute the contract between the company and the insured.

2. ———: FORFEITURE. The application signed by the insured was dated June 13, 1899. The application was approved and policy issued at the home office of defendant on June 23. The premium was to be paid annually. The premium due in June, 1906, was not paid. The application contained a clause that the company would incur no liability until the application had been received and approved by the company at its home office and the premium had actually been paid to and accepted by the company or its authorized agent during the lifetime and good health of the applicant. The policy contained a stipulation that "A grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first." The insured died July 23, 1906. *Held,* That the contract of insurance did not go into effect prior to the issuance of the policy on June 23, 1899; that the payment of premium for each

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*Rehearing denied, decree entered. See opinion, p. 60, *post.*

succeeding year extended the life of the policy for an additional year from June 23, and that, with the month's grace added to that date in 1906, the policy in suit had not lapsed, but was in full force and effect at the time of insured's death.

Rehearing of case reported in 95 Neb. 274. *Former judgment of reversal vacated and judgment of district court affirmed.*

FAWCETT, J.

On June 13, 1899, Henry H. Rye signed a written application on one of defendant's forms for $5,000 insurance. On June 23 the application was approved and the policy in suit signed by the officers of the defendant at its home office in New York City. A few days later, probably June 26, the policy was delivered to Mr. Rye. The assured paid the annual premiums thereon to and including the one due in June, 1905. He died July 23, 1906, without having paid the premium for that year. The defendant denied liability, and action was brought upon the policy in the district court for Sheridan county. Plaintiff had judgment, and the case was appealed to this court, where the judgment of the district court was reversed and the cause remanded. *Rye v. New York Life Ins. Co.*, 88 Neb. 707. Another trial was had, and plaintiff, who had subsequently remarried, again recovered. A second appeal was prosecuted to this court, where the judgment of the district court was again reversed. *Cilek v. New York Life Ins. Co.*, 95 Neb. 274. A rehearing in the second appeal was granted, additional briefs were filed, a reargument had, and the case is before us for reconsideration.

Plaintiff now relies for an affirmance of her judgment on the point that, at the time of the assured's death, on July 23, 1906, by the terms of the application and the policy, construed together as the contract of the parties, the policy had not lapsed for nonpayment of the premium. This point was not argued at the bar nor considered in either of our former opinions. The reason for this failure evidently was that counsel relied upon the other points then argued. It will be seen, therefore, that neither of

our former opinions can be treated as the law of the case. Indeed, if this point had been properly presented at the first hearing, neither of those opinions would have been written. If this were a matter in which counsel alone were concerned, we would now decline to consider the point at all, but plaintiff should not be required to suffer because her counsel had such confidence in other points upon which they relied that they overlooked the one now urged.

The application which the assured signed June 13 contained a clause that the company would incur no liability under the application until it had been received and approved by the company at the home office and the premium had actually been paid to and accepted by the company or its authorized agent during the lifetime and good health of the applicant. The application was not received and approved by the company at its home office until June 23, and, in the absence of proof as to when the premium was paid, we must assume that it was not paid until the policy was delivered some days later. The contract of insurance was, therefore, never a contract binding upon both parties prior to, at the earliest, June 23. The policy contains this stipulation on the part of the company: "A grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of 5 per cent. per annum." If the contract of insurance did not become binding until June 23, the death of the assured on July 23 was within the month of grace allowed, and the policy had not lapsed. This very question was before the supreme court of the United States in McMaster against this same defendant, and the company was held liable by a united court in a very clear opinion by Mr. Chief Justice Fuller, which is reported in *McMaster v. New York Life Ins. Co.*, 183 U. S. 25. We had occasion once before to cite this case with approval. *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 692. In the *McMaster* case the application was dated December 12, 1893, and the policies December 18. The policies were delivered December

26. In the course of the opinion (p. 41) it is said: "The truth is the policies were not in force until December 18, and as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the twelfth to the eighteenth. And, as the policies could not be forfeited for nonpayment during that time, the month of grace could not be shortened by deducting the six days which belonged to McMaster of right. In our opinion the payment of the first year's premiums made the policies nonforfeitable for the period of thirteen months, and, inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defence to the action."

In *Stramback v. Fidelity Mutual Life Ins. Co.*, 94 Minn. 281, a similar question was before the court. In that case the assured made his application August 25, 1902. The policy was issued September 8, and delivered September 24, 1902. The second semiannual payment in March, 1903, was paid, but the next premium due in September, 1903, was not paid. The assured died September 11, 1903. The trial court held that the policy became forfeited September 8, 1903, for failure to pay the premium due on that date. The application, like the one in the case at bar, stated that "the policy to be issued should not become binding on the company until the first payment due should have been actually received by it, or its authorized agent, during the lifetime and good health of the insured." The policy provided for the payment of subsequent premiums "upon the eighth day of the months of September and March in every year until the premiums for fifteen full years shall have been duly paid to the said company." The court say: "The primary question to be determined is, from what date did the insurance commence to run? Was it from date of payment of the first premium and delivery of the policy to the insured, September 24, or was it from date of issuance of the policy, September 8, or from date of the application, August 25?" The opinion then cites and quotes at length from the *McMaster*

case, *supra*. The judgment of the district court was reversed and judgment ordered for the plaintiff.

Little could be added to what has been said by these two eminent courts in their opinions above cited. Their reasoning meets our entire approval. We therefore hold that the contract of insurance in the case at bar did not go into effect until June 23, 1899; that the payment of premium for each succeeding year down to and including the payment in June, 1905, extended the life of the policy for an additional year from June 23, and that with the one month's grace added to June 23, 1906, the policy had not lapsed, but was in full force and effect at the time of Mr. Rye's death.

Prior to the death of the assured he had obtained from the company a loan of all of the accumulations on his policy up to and including the payment of June, 1905. The trial court found generally in favor of the plaintiff, "and that the policy in suit was delivered to the insured, who received it in due course of mail on June 26, 1899, and that the policy loan was paid in full on the death of the insured from its accumulation, and on that day there was also an excess of said accumulations amounting to $194.63 which was applicable toward the payment of premiums; that there is now due and owing from the defendant to the plaintiff, who is beneficiary under said policy, upon the cause of action set out in the pleadings, the full sum of $7,362.50," for which amount the court allowed judgment. We are unable to approve that part of the court's findings that there was an excess of accumulations amounting to $194.63. That question was disposed of adversely to plaintiff in our former opinions, which are now the law of the case upon the points therein decided.

Our former judgment is vacated, and the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

The following opinion on motion for rehearing was filed December 18, 1914. *Rehearing denied, decree entered.*

FAWCETT, J.

This case is before us on a motion for rehearing, or, if a rehearing is denied, for a modification of our opinion and judgment, *ante*, p. 56. After due consideration of the case, we are satisfied with our former opinion upon the merits.

Our judgment should, however, be modified, as claimed by defendant. In arriving at the judgment reached in our former opinion, we overlooked the fact that the decedent was indebted to the defendant in the sum of $1,365 on a policy loan, in the application for which plaintiff as his beneficiary had joined. In January preceding his death the decedent had applied for a loan for the full amount of the reserve under his policy, which was the sum above named. The loan was made. The policy, by its express terms, provides: "Any indebtedness to the company, including any balance of the premium for the insurance year remaining unpaid, will be deducted in any settlement of this policy, or of any benefit thereunder." The trial court found "that the policy loan was paid in full on the death of the insured from its accumulation." This was a plain error and directly contrary to our holding when the case was first before us (*Rye v. New York Life Ins. Co.*, 88 Neb. 707), where we held: "The policy provides in express terms: 'If the insured is living on the 13th day of June, 1919, which is the end of the twenty-year accumulation period of this policy, and if the premiums shall have been duly paid to that date, and not otherwise, the company will apportion to the insured his share of the accumulated profits.' It appears that no surplus or profits could be ascertained or credited to this policy until the date of its maturity, which is the 13th day of June, 1919." The district court evidently confounded accumulation with reserve. The amount of the loan made to the decedent was the full amount of the reserve then held by the company under the policy in suit. It did not represent profits or accumulations. By the terms of the policy the assured had the right, at any time after two years, to obtain from the company a policy loan equal to the full

amount of the reserve, but there was no condition in the policy which conferred upon him, at any time prior to the expiration of the full 20-year period, a right to any accumulations or profits, either by loan or otherwise. On the contrary, the condition of the policy was, as above shown, that he should not participate in the profits of the company unless he was living at the expiration of the 20-year period. The company, under the terms of its similar contracts with its other policy-holders, could not, prior to that time, lend or pay to the insured or his beneficiary any profits. The profits were not determinable or ascertainable until the expiration of the full 20-year period. The trial court treated the reserve, which formed the basis of the loan, as an accumulation, and gave judgment for the full sum of $5,000, with interest at 7 per cent. per annum from the date of the assured's death until the date of the judgment. This was contrary to the express terms of the policy. The court should have deducted from the $5,000 the $1,365 loan, plus interest thereon for one month and ten days, viz., from the date on which the interest had been paid on the loan to the date of the assured's death, in the sum of $7.57, and rendered judgment for $3,627.43, plus interest, which would have made the gross amount for which judgment should have been entered $5,397.37. The judgment is so palpably and grossly excessive in amount that, regardless of the ordinary rules of procedure on appeal, we cannot permit it to stand.

Motion for rehearing overruled. Our former opinion on the question of defendant's liability adhered to. Our judgment of affirmance vacated, and judgment ordered in this court in favor of plaintiff for $5,397.37.

JUDGMENT ACCORDINGLY.

STATE, EX REL. OTTO W. MILLER, APPELLEE, V. THEO H. BERG, CITY CLERK, APPELLANT.

FILED OCTOBER 16, 1914. No. 18,538.

1. **Municipal Corporations:** RECALL OF OFFICERS: PETITION. When a petition is filed for the removal of a councilman or commissioner under section 5308, Rev. St. 1913, in a city where registration laws are in force, the city clerk, in determining whether or not the petition is signed by the requisite 30 per cent. of the qualified electors, is limited to the voters' register of such city.
2. ———: ———: ———: VERIFICATION. Where a petition filed for the removal of a commissioner under section 5308, Rev. St. 1913, is made up of a number of papers, and through oversight any of such papers have not been verified by the oath of one or more of the signers of the same, as required by section 5305, Rev. St. 1913, the city clerk should, on request, permit the attaching of such oath of verification, even after such petitions have been filed.
3. ———: ———: "HIGHEST VOTE CAST." The words "highest vote cast," as used in section 5308, Rev. St. 1913, mean the highest vote cast both for and against any candidate for office or proposition voted for at the last preceding general city election of such city.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, ALBERT J. CORNISH and P. JAMES COSGRAVE, JUDGES. *Reversed and dismissed.*

*Fred C. Foster, D. H. McClenahan* and *John S. Bishop*, for appellant.

*Frank M. Tyrrell, contra.*

*John L. Webster, amicus curiæ.*

FAWCETT, J.,

The city of Lincoln adopted the provisions of article V, ch. 52, Rev. St. 1913, and is now under the commission plan of government. Ornan J. King is one of its commissioners. The defendant, Theo H. Berg, is its city clerk. A petition and supplemental petition for the removal of Commissioner King, under the provisions of section 5308,

Rev. St. 1913, were filed. The city clerk certified that he had examined the petition and supplemental petition which had been filed in his office on December 5 and December 24, respectively, "and have compared the names on said petition with the voters' register of said city to ascertain whether or not the requisite number of qualified electors to call such an election have signed the same." He further certified: "I further find that said petitions contain 2,544 names; that 64 thereof are duplications; that 75 are illegible; that 1,146 are not registered; that 25 should not be counted because of proof that signatures are not genuine; that 267 were registered at addresses different than shown on petition; and that 967 were registered at addresses given; that the total number of qualified electors on said petition, as shown by the voters' register of said city, is 1,234. I further certify that 1,234 is not 30 per cent. of the highest vote cast at the last general city election held in Lincoln, Nebraska, on May 6, 1913." It was agreed that demand was made upon the city clerk that he use other satisfactory evidence than the registration books of the city of Lincoln, in order to determine whether the names found upon the recall petition were qualified electors of the city of Lincoln and authorized to sign such petition. It was also agreed that the highest vote cast on any proposition or office at the last general election was 7,962, and that the highest vote cast for any candidate, or for or against any proposition, was 5,236. The clerk took 7,962 as "the highest vote." Relator insists that he should have taken 5,236. If the clerk was right in excluding all signers whose names did not appear on the voters' register, the petition was insufficient under either theory. After the clerk had made his certificate, as above set out, relator instituted this action in the district court for Lancaster county, to secure a writ of mandamus ordering the clerk to recount the names on the recall petitions referred to and accept evidence of the qualifications of the signers thereof to vote whose names do not appear on the voters' register of the city, to permit relator to amend the recall petitions by attaching verifications thereto required

by section 5305, Rev. St. 1913, and to find that the meaning of "highest vote" under section 5308, *supra,* is the highest vote cast for any candidate or for or against any proposition submitted at the last general city election. The district court found on all three of these points in favor of the relator, and ordered: "It appearing that the clerk has by mistake of the law not counted and certified the petition in accordance with these findings of law, he is ordered, adjudged and decreed to proceed, count the names on the petition and determine their sufficiency, and report the same to the council, in accordance with the findings herein made." Respondent appeals.

The first point is decisive of the case. The journal entry in the court below states: "This cause came on for hearing and was submitted to the court on the pleadings and evidence. In answer to the question, 'shall the city clerk count the names of qualified electors found upon the recall petition, whose names are not found upon the voters' register of the city of Lincoln for the year 1912?' it is agreed that the city clerk rejected the names found on the petition and not found on the voters register. The court finds that the right of the voters to petition under the initiative, referendum, and recall law is the same as his right to vote at the election petitioned for. The clerk should in the first instance reject the names of petitioners, whose names do not appear upon the voters' register; if, however, and petitioner produces sufficient proof to the clerk that he is a qualified elector, entitled to vote, showing a satisfactory excuse, under the law, for not having registered, then in such case his name should be counted as a petitioner." We are unable to concur in this construction of the act. Section 5308 provides: "Any of such councilmen may be removed at any time from office by the qualified electors of any such city. The procedure to accomplish the removal of any incumbent of such office shall be as follows: A petition signed by such electors equal in number to at least thirty *per centum* of the highest vote cast at the last preceding general city election de-

manding an election of a successor to the person sought to be removed, and naming the candidate or candidates proposed for election to succeed him, shall be filed with the city clerk, which petition shall contain a general statement of the grounds upon which the removal is sought. Within ten days from the date of filing such petition, the city clerk shall examine it and from the voters' register, if the petition be filed in any city where registration laws are in force, or if not, then from such source as may be available to such clerk, ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the council shall allow such clerk extra help for that purpose, and the clerk shall attach to said petition his certificate showing the result of such examination." It then provides that, if the clerk's certificate shows that it is insufficient in point of numbers signed, it may be amended within ten days from the date of the clerk's certificate, by the filing of a supplemental petition signed and sworn to as in the case of the original petition, "and the clerk shall, within ten days after such supplemental petition be filed, make a like examination of the supplemental petition, and if the certificate shall show the supplemental petition, together with the original petition, to contain the requisite number of signatures, the clerk shall submit such original petition and supplement together with his certificates, without delay, to the council," etc. This statute appears to us to be very plain, and, if the case were before us as a case of first impression, we would not hesitate to hold that, when a petition of recall is filed for the removal of a public official under the act in question, in a city where registration laws are in force, the clerk, in determining whether or not the petition is signed by the requisite 30 per cent. of the qualified electors, is limited to the voters' register of such city. But we are not left to the necessity of deciding the case as one of first impression. Other eminent courts have passed upon this question, under statutes almost identical with ours, and we now have the benefit of their holdings and of their reasoning in support thereof. *State v. Russell,* 124

Wis. 548; *Davenport v. City of Los Angeles,* 146 Cal. 508; *Chesney v. Jones,* 31 Okla. 363; *Floyd County v. State,* 112 Ga. 794, which also holds in accordance with *Gavin v. City of Atlanta,* 86 Ga. 132, that "the authorities generally concur that, where the law prescribes how the majority or two-thirds shall be ascertained, that method prevails." See, also, 2 Dillon, Municipal Corporations (5th ed.) sec. 468, where it is said: "When the terms under which the power of a motion is to be exercised are prescribed, they *must be pursued with strictness.*"

Other authorities are cited, strongly sustaining the rule announced in these cases, but we will not burden this opinion with a citation of them, for the reason that it appears to us that the construction given statutes like the one under consideration, by the courts above cited, is the only reasonable construction which can be given them. This construction of the act under consideration in no manner violates section 22, art. I of the constitution, that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." The section of the act under consideration does not assume to place any hindrance or impediment in the way of a qualified voter to exercise the elective franchise. It is not dealing with the question of election. It simply is determining who shall have the right, after an election has been held and an official, who was elected at such election has taken his office, to petition for the removal of such official before the expiration of his term of office. The right of any citizen, whether a voter or not, to petition for the removal from office of a public official is not a right guaranteed by the constitution. It is simply a privilege granted by the legislature, and it cannot be doubted that the legislature in granting any privilege may impose such conditions on the exercise of it as it sees fit. And so, in the act under consideration, the legislature has said that a qualified elector, whose name appears upon the voters' register, may, if he pleases, petition for the removal of a public official from office, and if he can secure the signatures of enough other qualified

electors, whose names appear on the voters' register, to join with him, he may then have the question submitted to the voters generally, at an election called for that purpose, at which election the act does not attempt to hinder or disfranchise any legal voter. At such election all may vote. *State v. Babcock,* 21 Neb. 187. The legislature, in the act granting the privilege of petitioning for the removal of a public official, has prescribed the procedure to be followed in exercising the privilege in language which is not ambiguous or uncertain. That procedure, as stated by Mr. Dillon in the quotation above given, *"must be pursued with strictness."* The conclusion we have reached on this point renders it unnecessary to consider any of the others; but, for the guidance of city clerks in the future, we will consider the second and third points.

The second point involves a consideration of section 5305, *supra,* which provides that the signatures to the petition for a recall need not all be appended to one paper, but requires that at least one of the signers of each paper shall make oath that the statements in the petition are true, as he verily believes, that the signers were at the time of signing legal voters of the city, and shall also state in the affidavit the number of signers in the petition or part thereof sworn to by him, at the time he makes such affidavit. The petition filed with the city clerk consisted of a number of separate papers, several of which were not verified by the oath or affidavit of any of the signers of the same. The district court found that these parts of the petition did not comply with the law, but further found "that, if relator asks leave to attach such verification to such paper within a reasonable time, he should be permitted to do so, if he can." Respondent argues that, as this finding of the court confirmed his contention that the petition as filed was not a compliance with the act, the court should have dismissed the action, and cites *State v. Weston,* 67 Neb. 175, and other Nebraska cases, in support of his contention. As a general proposition, respondent's contention is sound. It must be conceded that the holdings of this court have been that in mandamus the

right of a relator to relief must be clear and exist at the time the relief is sought, or his action cannot be maintained; but we hardly think the rule is applicable here. What the relator was complaining about was that the clerk was refusing to permit him to attach the verifications after the papers had been filed. We think if petitions are filed in a case of this character, which the voters have signed, they should not be deprived of their right to have their petitions considered because of the fact that the circulators of them neglected, through mere oversight, to attach the oath of verification. In such case we think the clerk should permit the formality to be observed even after the petitions have been filed.

The third point involves the construction of the language in section 5308, *supra,* that the petition shall be "signed by such electors equal in number to at least thirty *per centum* of the highest vote cast at the last preceding general city election." What is meant by the words "highest vote cast?" It is shown by the record that at the last city election, on May 6, 1913, the total number of persons voting was 8,549; that the total vote cast on the excise amendment was 7,962; that the highest vote cast for or against any proposition or person was 5,236, which were cast for commissioner Dayton. The clerk found that "the highest vote" was that cast both for and against the excise amendment, while relator contends he should have taken the highest vote cast for *or* against any proposition or office, which would be the vote cast for Mr. Dayton. The district court sustained relator's contention. This we think was error. The language used by the legislature appears to us to be clear and unambiguous: "A petition signed by such electors equal in number to at least thirty *per centum* of the highest vote cast at the last preceding general city election." If the legislature had meant to say the highest vote cast at such election for or against any candidate for office or proposition submitted, it would have been easy to have said so. On the other hand, if it had intended to say that the petition should be signed by electors equal in number to 30 per cent. of all votes cast

at the election, it would have been easy to have said so; but the legislature did not use either of these terms. It used the expression "the highest vote cast." What was the highest vote cast at this election? It was the vote cast on the excise amendment, which was 7,962. The city clerk was right in using that number as the basis for his computation.

It clearly appearing that the respondent was acting well within the provisions of the act under consideration, and that the petition did not contain 30 per cent. of the qualified electors of the city, as shown by the voters' register, he was without authority to do otherwise than certify that the petition was insufficient.

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

REVERSED AND DISMISSED.

ROSE, J., not sitting.

REESE, C. J., concurring in part.

I concur in the judgment rendered in this case, but do not concur in the construction given to section 5308, Rev. St. 1913, as to the meaning of the words "the highest vote cast." The contents of the section need not be here copied, as it is sufficiently set out in the majority opinion. The procedure requires a petition signed by electors equal in number to at least 30 *per centum* of the highest vote cast at the preceding election, in order to confer authority upon the city officers to call the election. I cannot read that section in any other way than as requiring 30 *per centum* of all the votes cast at the election. That certainly would be "the highest vote" cast, and that is what the statute says in plain language. The clear purport of this provision is to prevent constant agitation at the expense of the city, when persons are dissatisfied with the official action of some officer. "At least thirty *per centum*" of the voting strength of the city must show their dissatisfaction before the expense and agitation of an election shall be submitted to by the city government.

# BRIDGET MCLAUGHLIN, APPELLEE, V. SOVEREIGN CAMP, WOODMEN OF THE WORLD, APPELLANT.

FILED OCTOBER 16, 1914. No. 17,710.

1. **Death: PRESUMPTION.** "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." *Holdrege v. Livingston*, 79 Neb. 238.
2. ———: ———. In such case the presumption is that the absentee died during the first seven years of his unexplained absence. There is no presumption that his death occurred at any particular time during said period.
3. ———: ———. In such case an insurer cannot avoid its contract of insurance on the life of such absentee because of an alleged violation by the insured of a by-law adopted by the insurer during such unexplained absence, without evidence that the insured was living when the by-law was adopted.

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

*Brome & Brome* and *A. H. Burnett,* for appellant.

*M. F. Harrington, contra.*

SEDGWICK, J.

This is an action on a fraternal beneficiary certificate for $1,000 issued by defendant to James W. McLaughlin. Plaintiff is the mother of assured, and is named in the certificate or insurance contract as beneficiary. In the petition it is alleged that assured is dead, and that he and plaintiff performed all of the conditions of the contract on their part. These allegations and the liability of defendant are denied in its answer. From judgment in favor of plaintiff for the full amount of her claim, defendant has appealed.

1. There is no direct evidence that assured is dead. To establish that fact and the resulting liability of defendant, plaintiff relied on proof of assured's absence without tidings for more than seven years. The beneficiary certificate became effective as an insurance contract May 2, 1900. At that time assured was an unmarried man, about 24 years of age, and resided with his father and mother and other members of their family at O'Neill, Nebraska. Shortly afterwards he went to Park City, Utah, and worked in a mine. While there he wrote and posted family letters regularly and sent money to his mother. Early in 1904 he left Utah and went to Lima, Peru. His father and mother received from him a letter dated at that place March 30, 1904, in which he said he had changed his residence because he thought he could do better down there, and stating: "I am going up to a place called Cerro de Pasco, so I cannot give you any address with letter, but will write you when I get settled." A companion, who went with him to Lima, but who promptly returned to Park City, wrote to assured's father as follows: "We stayed in the city of Lima, Peru, a couple of weeks and I, not seeing any favorable chances for work and not liking the climate, started for home. Jim refused to come with me, saying that he would try the mines first. On the day that I left there I saw him at the train starting for the mines of the Cerro de Pasco Mining Company which are located about sixty miles from the city." Assured has never since been heard of.

The first question is whether the evidence entirely fails to establish the presumption of death of the insured. The findings of the trial court in actions at law, like the verdict of a jury, will not be disturbed, if the evidence is substantially conflicting. The rule now thoroughly established and always acted upon is that the verdict of the jury or findings of the court in jury cases will be sustained by this court upon appeal, unless upon the whole record found to be clearly wrong. Other forms of expression sometimes adopted in opinions are not intended by the court to vary

or modify the rule now so well established and uniformly acted upon.

The best authorities, with substantial unanimity, hold that whether seven years' continued absence from one's usual place of residence will raise the presumption of death must depend largely upon the circumstances and conditions of each particular case. Upon this point the supreme court of Kansas, which has perhaps required as strict proof to raise this presumption as has any court in this country, said: "It is conceived, however, that the character of the inquiry, the persons of whom it must be made, and the place or places where it must be made are all to be determined by the circumstances of the case." *Modern Woodmen of America v. Gerdom,* 72 Kan. 391. In that case and in *Renard v. Bennett,* 76 Kan. 848, the court appears to adopt the rule that, when a young unmarried man leaves the home of his parents and goes from place to place for some time, corresponding regularly with his parents, and suddenly ceases corresponding, and nothing is heard from him for more than seven years, inquiry must be made at all places and of all people where there was any probability that information might be obtained. But, in general, the courts of this country have held, as did the supreme court of Wisconsin, that it "does not require proof of diligent search and inquiry in order to establish the presumption of death when a person has absented himself from his home or place of residence for seven years." *Miller v. Sovereign Camp, W. O. W.,* 140 Wis. 505. The supreme court of Minnesota approved this instruction: "If you find from the evidence that on the 17th day of July, 1901, Behlmer (that is, Fred) left his home, wife, and children, and that he has never returned, and that no tidings from him have ever been received by his family, a presumption arises after seven years that he is dead." *Behlmer v. Grand Lodge, A. O. U. W.,* 109 Minn. 305; *Magness v. Modern Woodmen of America,* 146 Ia. 1; *Oziah v. Howard,* 149 Ia. 199.

This question has frequently been before this court, and, so far as its application to the case at bar is concerned,

seems to have been definitely settled by our former decisions. In *Cox v. Ellsworth,* 18 Neb. 664, it was held: "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." In *Holdrege v. Livingston,* 79 Neb. 238, it was held: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." This seems to be in line with the holdings of the Wisconsin, Minnesota, and Iowa decisions above cited. The evidence in this case was that the assured was a young unmarried man. He had no home or fixed place of residence other than with his family at O'Neill, Nebraska. Soon after he was insured he was employed in Utah, but his sister testified, as quoted in the defendant's brief: "He was home about twice or three times a week." Several years after he was insured he went to Lima, Peru, with a young companion, and, after they had remained there about two weeks, he concluded to go into the mining regions prospecting or to find some occupation. He had been in the habit of writing home to his family once each month during all of this time, and had regularly and monthly sent money to his parents, who were very aged and apparently needed his assistance. When he concluded to go into the mining regions, he wrote a letter to his parents, telling them of his intention, and saying that as soon as he had located he would write and give them his address. This was the last that was ever heard in regard to him. His parents caused letters to be written addressed to him at Lima and also letters addressed to him in care of the mining corporation which he intended to visit, and these letters were returned uncalled for. If he had established a residence in Utah or in some foreign country, it might have been necessary to make further inquiries in such places of residence. His statement in his letter that "you

will see by the postmark on this letter that I have changed my place of resedent" was plainly not intended as a declaration that he established a residence there, which the evidence shows beyond question was not the fact.

In *Thomas v. Thomas,* 16 Neb. 553, it was held that a wife could not rely upon the presumption of the death of her husband because of his absence from her for a period of seven years, when she, after he had left her, removed from state to state, establishing new places of residence, and had made no inquiry at her place of residence at the time her husband left her. And, when the same case was before this court upon a subsequent appeal (19 Neb. 81), the court held that the fact that the husband had been seen alive within the seven years overcame the presumption of his death. But upon the first appeal it was definitely decided that, if he had been absent for a period of seven years, and during that time had not been heard from "by those who, were he living, would naturally hear from him," this was sufficient to raise the presumption of death. Surely it cannot be said that, under the evidence in this case, the finding of the trial court is so unsupported that we must say, as matter of law, that it is clearly wrong.

2. The defendant contends that under its by-laws the insured has forfeited his certificate. His original contract of insurance contained the provision that the assured should comply with the laws, rules and regulations in force when he became a member, or which might thereafter be enacted. In July, 1907, when the insurance had been in force more than seven years, and about three years after the assured was last heard from in Peru, the defendant alleges that it adopted the following by-law: "Any member who shall abscond, remove or depart from his home or last place of residence, and remain away for a period of one year, and not report to the clerk of his camp, or, if a member at large, to the sovereign clerk, of his location, with post office address, shall thereby forfeit his membership, and his beneficiary certificate shall become null and void. The absence or disappearance of a member from his last known place of residence for any

length of time shall not be sufficient evidence of the death of such member, and no right shall accrue under his certificate or membership to a beneficiary or beneficiaries, nor shall any benefits be paid until satisfactory proof has been made of the death of the member while in good standing. No beneficiary or other person shall have the right to pay assessments and dues for a member who has been absent for one year and whose location is unknown, but in such case the clerk of the camp shall notify the person offering to make such payments that no further payments will be accepted until proof of the member's location and residence is made within the time hereinafter provided, and such clerk shall record such member as suspended and report such action to the sovereign clerk, together with the residence and post office address of the beneficiary or beneficiaries and the last known address of the member; also such further information respecting the absence of the member as he possesses. Upon satisfactory proof of the member's whereabouts, the sovereign commander may order him reinstated in his camp upon payment of all arrearages in assessments and dues. In case of the failure of the member, his beneficiary or other persons interested in his certificate, to make proof of the member's whereabouts within six months after such notification by the clerk, his suspension shall remain and become permament and binding, and he cannot be reinstated except as above provided, and neither the member, his beneficiary, nor any other person shall have any right to benefits under his beneficiary certificate."

About three months after the adoption of this by-law, the clerk of the local camp notified Thomas McLaughlin, the father of the assured, in writing, as follows: "I hereby notify you that I must refuse any more money in payment for your son J. W. McLaughlin as assessments on his certificate, No. 15326, W. O. W., on account of his disappearance over one year ago, and will send him in suspended in my Oct. '07 report, by instruction from Sov. Camp. Am sorry, but can't help it." During the seven years prior to that time the mother of the assured, who

had received regular remittances from her son, paid regularly the dues as they matured, and afterwards, until the full seven years had expired, she tendered, or caused to be tendered, to the clerk of the local camp all dues and assessments. These tenders were refused and were afterwards kept intact by the assured's mother and brought into court on the trial.

It sometimes happens that one whose life is insured abandons his home and parents for more than seven years, and afterwards returns, or is known to be living. Insurance companies, no doubt, may adopt reasonable regulations to guard against payment of unjust claims in such cases. Whatever may be thought of the reasonableness of the rule adopted by defendant, as a general proposition, it cannot have the effect claimed for it in this case. When the assured went to South America, there was no such provision in his contract. If he lost his life in the mining regions within two weeks after he arrived there, it would, of course, not be insisted that several years thereafter a by-law could be adopted which would cancel his certificate. It is alleged as a defense in this case that he has violated this by-law. Unless he was living when the by-law was adopted, he could not violate it. This the defendant has wholly failed to prove. There is no presumption that he was then living. In Lawson, Law of Presumptive Evidence (2d ed.) p. 255, the author states that the rule in this country is different from the rule in England, and that in this country he is presumed to be alive until the end of seven years. The text and the notes seem to be in conflict on this point, and the authorities cited appear to be very conflicting.

In *Coe v. National Council of K. & L. of S.*, 96 Neb. 130, there is a quotation from the opinion of Sanborn, J., in *Northwestern Mutual Life Ins. Co. v. Stevens*, 71 Fed. 258, in which it is said: "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." The question

whether the presumption related to the particular time of death was not involved either in the case in the federal court or in our decision in which the language was quoted. In both cases the question was whether, under the special circumstances involved, the presumption of death arose before the expiration of seven years. The language used by the eminent jurist was apparently inadvertent. He intended to express the same idea which he stated in the syllabus, where the points of law are supposed to be accurately stated. "Seven years is the period at which the presumption of continued life ceases." The quotation in our decision discusses somewhat at large the special circumstances under which the presumption will arise in less than seven years, and it is that part of the quotation which applied in our case and which is approved. The federal court also cited Minnesota and Iowa decisions, where it is held that there is no presumption of the particular time of death, and in the *Coe* case we also cited *Winter v. Supreme Lodge K. of P.*, 96 Mo. App. 1, in which the law is stated in the syllabus: "The presumption of death, arising from unexplained absence for seven years, does not necessarily imply that the person died at the end of that period." This case was again before the appellate court (101 Mo. App. 550), and from both opinions it appears that it was determined upon the special circumstances in the case, and the question now before us was not necessarily determined or considered.

In 4 Ency. of Evi. 47, 48, the rule is stated "that the date on which the death of such an absentee occurred is a matter of proof," and "the burden of proof is on the party asserting that death occurred on a particular time." This statement of the law is well supported by authorities there cited. It is peculiarly applicable to this case. There is a strong probability that, if he had lived to adopt a post office address in Peru, he would have informed his parents of that fact, as he promised in his last letter that he would do. Even if the law were otherwise, and if the presumption ordinarily were that the absentee lived to the end of the seven years, the circumstances of this case are

such that we could not say that the trial court erred in not finding from the evidence that the assured lived until this by-law was enacted, and that he so violated the same and forfeited his beneficiary certificate. It is alleged that he was subject to this by-law, and that he has violated it. This could not be true unless he was living when the by-law was enacted, and this defendant has not proved.

The findings and judgment of the trial court are not so unsupported by the evidence that we can say they are clearly wrong. The judgment is therefore

AFFIRMED.

ROSE, J., dissents.

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## W. T. GIBSON, APPELLANT, V. SHERMAN COUNTY ET AL., APPELLEES.

FILED OCTOBER 16, 1914. No. 17,729.

1. **Appeal:** SUFFICIENCY OF PLEADINGS. Upon appeal to this court in a law case, when there are no special findings, no motion for new trial, and no bill of exceptions, the only question presented is as to the sufficiency of the pleadings to support the judgment.
2. **Counties:** CLAIMS: DEFENSES. The statute provides that claims against a county must be filed with the county clerk, who is also the clerk of the board of supervisors. If the record shows that a claim was before the board and acted upon, it is no defense upon appeal to the district court that the record fails to show that the clerk indorsed his filing upon the claim.
3. ———: ———: PLEADINGS. Formal pleadings are not necessary in presenting a claim to the county board. The statement in the claim before the county board of the contract to furnish materials, and that they were furnished and accepted and not paid for, would be all the pleading that would be necessary.
4. **Constitutional Law:** REMEDIAL LEGISLATION: CLAIMS AGAINST COUNTIES. If one sells articles to the county, necessary for the public use, and the same are received and used by the county, such sale, although prohibited by chapter 55, laws 1905, there being no money in the county treasury with which to pay for such articles when such contract of purchase is made, is not *malum in se*.

A subsequent act of the legislature authorizing the county to pay for the same is not void as an exercise of judicial power; nor is such statute a violation of section 15, art. III of our constitution, nor the fourteenth amendment of the federal constitution.

5. ———: ———: RES JUDICATA. Such subsequent act of the legislature is not a review and reversal of a judicial decision previously rendered disallowing the claim because of the bar of the former statute, its purpose and scope being to remove the claimant's disability to prosecute his claim; and such former decision is not an adjudication of the claim prosecuted under the subsequent statute.

6. **Limitation of Actions:** CLAIMS AGAINST COUNTIES. Such claim is not barred by the statute of limitations until four years from the subsequent act authorizing the county to pay the same.

7. **Counties:** CLAIMS: APPEAL. If the county recognizes its moral liability for the property so taken and used, and the county board allows the claim, such action should not be set aside upon appeal of a taxpayer.

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

*E. C. Strode* and *M. V. Beghtol,* for appellant.

*R. J. Nightingale, H. S. Nightingale* and *R. P. Starr, contra.*

SEDGWICK, J.

This is an appeal from a judgment of the district court for Sherman county. It appears from the partial record before us that in the year 1906 plaintiff furnished materials for the construction of a bridge for Sherman county at the agreed price of $512.24. Afterwards he presented his claim to the county board for allowance, and it was allowed in full. From the action of the board a taxpayer took an appeal to the district court, where the action of the county board was reversed and the claim disallowed. The plaintiff has appealed to this court.

There is no bill of exceptions in the case. Two days after the final adjournment of the court, but within three days of the entry of the judgment, a motion for new trial was filed, which was afterwards stricken from the files be-

cause filed after the adjournment of the term. The statute provides: "The application for a new trial must be made at the term the * * * decision is rendered." Rev. St. 1913, sec. 7884. The record recites that the case was taken under advisement upon the evidence and typewritten briefs, and it was decided afterwards on the 26th day of March, 1912. The plaintiff insists that there was no regular continuance of the case to that day, and that there was no regularly adjourned session of court then held, and that neither he nor his attorneys had any notice that the case would be then decided, and so the plaintiff was unlawfully deprived of his right to file his motion. If these facts were fully shown in the record, we might be called upon to determine whether such action by the court was reversible error, or plaintiff should proceed by proceedings in equity, or was without remedy, but no sufficient facts are shown to present the question. There were no special findings. Under these circumstances the question presented by this record is whether the plaintiff was entitled to recover upon the pleadings. The petition alleged: "That on or about the 13th day of October, 1906, this plaintiff furnished to the defendant, county of Sherman, the following articles at an agreed price, which articles, together with the agreed prices thereof, which prices are the reasonable worth and value of said articles, were:

"1 span 40 ft. long, under truss at $7.63 per ft...$305.20
"2 " 32 ft. long piling and stringers at $6.47 per ft. .....$207.04

$512.24

"That said articles, known as the Reinertson bridge, were furnished at the special instance and request of the defendant Sherman county, and were furnished and delivered in every manner according to the directions of said county of Sherman at the point and place directed and requested by said county. That said Reinertson bridge has been accepted and used daily by the said county of Sherman and the taxpayers thereof, and that the said county

of Sherman has never objected to the building, erection, or use of said bridge." The answer admits these allegations and sets up specially alleged defenses. In the briefs it is conceded that the petition states a cause of action. The question then is whether the answer states a defense.

The only defenses relied upon in the brief are want of jurisdiction, the statute of limitations, former adjudication, and the unconstitutionality of the special act of the legislature upon which plaintiff relied.

1. The reason the court had no jurisdiction is stated to be that the record does not show that the claim was filed with the county clerk, but the record shows that the claim was acted upon by the county board, which could not have been done unless it was filed before them, and that is a complete answer to that objection. It appears from the answer that in March, 1907, the plaintiff filed this claim with the county board for allowance, and the board allowed the same, and upon appeal to the district court by a taxpayer the action of the county board was reversed and the claim dismissed.

On April 3, 1909, the legislature passed an act authorizing the county board to pay the debt. Laws 1909, ch. 178. On the 16th of November, 1910, plaintiff again presented his claim, which was again allowed, an appeal taken therefrom by the taxpayer, and the order of the county board again reversed, from which judgment of reversal this appeal is prosecuted.

The plaintiff alleges this act of the legislature in the petition, but the claim as filed with the county board did not contain such allegation. The defendants' attorneys insist that the plaintiff cannot now rely upon this act because of his failure to allege the same before the county board. As we understand it, this objection is substantially that the plaintiff is now prosecuting a different cause of action from that presented to the county board. Formal pleadings are not necessary in presenting a claim to the county board. The statement in the claim before the county board of the contract to furnish these materials,

and that they were furnished and accepted and not paid for, would be all the pleading that would be necessary.

2. The defendants admit in their brief that, "if the special act had been pleaded in the proceedings before the county board, and had been shown to apply to this particular claim, then the bar of the statute would be removed." The cases cited seem to hold that such an act is valid, and it appears that this court and the supreme court of the United States have also held that in Nebraska such an act is valid. *Commissioners of Jefferson County v. People,* 5 Neb. 127; *Read v. Plattsmouth,* 107 U. S. 568.

3. Chapter 55, laws 1905, is entitled "An act to prevent the illegal expenditure of public funds," and section 3 of the act provides: "No judgment shall hereafter be rendered by any court against any such county in any action brought to recover for any article, public improvement, material, service or labor contracted for or ordered in contravention of any statutory limitation, or when there are or were no funds legally available at the time, with which to pay for the same, or in the absence of a statute expressly authorizing such contract." The district court upon appeal from the first allowance of the plaintiff's claim by the county board reversed the order of the county board allowing the claim, because there were no funds with which to pay the claim legally available at the time the plaintiff entered into the contract with the county, basing its decision upon the provision of the statute above quoted. The taxpayer who resists the claim now insists that the act of 1909 was invalid, because it attempted to reverse the judgment of the district court, and so was an attempted exercise of judicial powers; and, second, because it violated section 15, art. III of the constitution; and, third, because it "contravenes the fourteenth amendment to the federal constitution, which provides that no state shall deprive any person of property without due process of law." In *Ewell v. Daggs,* 108 U. S. 143, the action was to foreclose a real estate mortgage and the defense was a plea of usury. The contract was usurious under the law of Texas at the time it was entered into. Afterwards, the

usury law was abolished. The court said: "A distinction is made between acts which are *mala in se,* which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them; and acts which are *mala prohibita,* which are void or voidable, according to the nature and effect of the act prohibited. *Fletcher v. Stone,* 3 Pick. (Mass.) 250. It was accordingly held in Massachusetts that a mortgage or assurance given on a usurious consideration was only voidable, notwithstanding the strong words of the statute. *Green v. Kemp,* 13 Mass. *515. And, in such cases, the advance of the money, although the contract is illegal for usury, is a meritorious consideration, sufficient to support a subsequent liability or promise, when the positive bar of the statute has been removed. 'A man by express promise may render himself liable to pay back money which he had received as a loan, though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt.' *Flight v. Reed,* 1 H. & C. (Eng.) 703. The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. * * * And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri,* and not realized by having passed into a completed transaction, may, by a subsequent

statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court."

In the case at bar the plaintiff furnished to the county full value for the amount of his claim. The county accepted, retained, and still has and is using the property so obtained. The statute at the time deprived the plaintiff of any remedy, and the district court so held. The subsequent act of the legislature was not a determination that the district court was in error in so holding, but its purpose and effect was to remove the bar to the remedy. The county has received full value, which, if the contract is invalid, still imposes a moral obligation to remunerate plaintiff, and there is no doubt, under the authorities, that it was competent for the legislature to remove the technical bar of the statute, and, in doing so, would not exercise any judicial function. It is equally clear that this statute does not deprive the county of property without due process of law. The county has not resisted the payment of this claim. By its constituted authorities it has always recognized its moral obligation to pay the value of the goods received from the plaintiff and used by it for the public benefit. The legislature has removed the only legal impediment to so doing, and it ought not to be prevented from doing what justice and equity require. The right of a taxpayer to appeal from the allowance of claims by the county board was not given by the legislature for such purpose.

As to the defense of former adjudication, it appears that the act of the legislature itself recites that the reason of the former adverse judgment of the district court was that there was no money in the treasury with which to pay the claim. No other ground for the decision appears in the record, and the claim being just, and it being con-

ceded that it is wholly unpaid, the act of the legislature would be as competent to remove this objection as any other. None of the matters relied upon amount to a defense, and it appears that the plaintiff was entitled to a judgment upon the pleadings.

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

REVERSED.

ROSE, J., not sitting.

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LETTON, J., dissenting.

While the result in this case is probably desirable from a moral and equitable standpoint, it seems to me that the decision is in direct conflict with law. Chapter 55, laws 1905 (Rev. St. 1913, secs. 1104-1106), is entitled "An act to prevent the illegal expenditure of public funds." Section 3 of the act, as far as material, provides: "No judgment shall hereafter be rendered by any court against any such county in any action brought to recover for any article, public improvement, material, service or labor contracted for or ordered in contravention of any statutory limitation, or when there are or were no funds legally available at the time, with which to pay for the same, or in the absence of a statute expressly authorizing said contract."

The material was furnished to Sherman county after this act took effect. It seems to me that the district court obeyed this statute, and that this court has no authority to ignore it and virtually direct a verdict for the plaintiff. The special act authorizing the county board to pay the claim could not repeal, amend, or affect the mandatory provisions of this act which apply to the duty of courts, since none of the constitutional provisions with reference to the repeal or amendment of laws were followed in its enactment.

The act of 1905 was evidently designed to put upon inquiry every person who thereafter dealt with a county board or board of supervisors as to the legality of the proposed contract. It was a direct notification that, un-

less the contract was authorized, was not in contravention of any statutory limitations, and there were funds legally available at the time, it should be "wholly void as an obligation against said county." The purpose of the statute is beneficial. In my opinion it should be obeyed by this court, as well as by all other courts in the state. For these reasons, I dissent from the opinion, and think the judgment of the district court should be affirmed.

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REX SANITARY CLOSET COMPANY, APPELLANT, V. ALBERT DUSTER, APPELLEE.

FILED OCTOBER 30, 1914. No. 17,868.

1. **Sales:** ACTION FOR PRICE: FALSE REPRESENTATIONS: BURDEN OF PROOF. Where, in a suit to recover the purchase price of an appliance, the defense is a rescission of the contract, consented to by the plaintiff, and the reply is that such consent was obtained by false and fraudulent representations, the burden is upon the plaintiff to establish the fact that such representations were made, and that it relied upon them when it consented to the rescission.
2. ———: ———: DIRECTING VERDICT: SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to sustain the action of the district court in directing a verdict for defendant.

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

*Reeder & Lightner,* for appellant.

*W. M. Cornelius, contra.*

LETTON, J.

Action to recover the purchase price of one oak cabinet closet, with disinfectants and pipe, sold upon a written contract which provided for 30 days' trial, and a guarantee that the closet was odorless and sanitary. The answer admits the purchase and alleges that the closet, when installed, was not sanitary and odorless, as guaranteed, of

which defendant notified plaintiff within 30 days from the time it arrived; that plaintiff requested time in which to send an expert to inspect it, but failed to do so, and afterwards notified him that he need not accept the same, asked him to sell it, and agreed to pay him for his services if he made a sale. In reply plaintiff pleads that defendant falsely represented that he had set the closet up, had given it a fair and reasonable trial and that it failed to comply with the representations, that these statements were false and untrue, and that the directions as to resale were induced by these false representations. After the evidence was adduced, the court directed a verdict for defendant, and the cause was dismissed.

By these pleadings the sale to defendant upon trial was admitted; and it was admitted that the plaintiff consented to the rescission of the sale by the defendant. The only issue remaining is as to whether this consent was procured by the false representations of defendant that he had installed and used the closet and that it was not satisfactory, and that plaintiff relied thereon. The burden was upon plaintiff to prove the falsity of these representations. It made no attempt to do so, except by testimony that numerous sales had been made and no complaints received from purchasers, and by whatever inference might be drawn from the fact that in his first letter of complaint defendant stated he had tried the closet, and in later letters he stated he had not used it.

The defendant testified that he purchased the closet from an agent to whom he described the room in which he expected to use it, which was a lean-to next to his house; that the agent directed him how to arrange the pipe; that when the closet came he set it up in accordance with these instructions, and tried it, using the chemicals which were sent with it according to directions, but the closet was not odorless or sanitary. The evidence also shows that after the defendant had tried the closet he complained that it was not satisfactory; that plaintiff promised to send a man to install it properly, but did not do so; that afterwards defendant wrote, offering to return the closet, and

saying, "I have it all ready, nicely packed without a scratch, not being used at all on account of not finding a proper place for it downstairs," and that after the receipt of this letter plaintiff accepted the offer to return it, and asked him to sell it as their agent if he could. This action shows that a trial of the closet was not considered by the plaintiff as essential to or as a condition of its return.

An inspection of the descriptive pamphlet or folder which is said to contain the instructions shows that its directions are not clear and specific, and do not exclude the idea that the closet may be installed with the outlet of the vent pipe placed otherwise than in a chimney flue or stovepipe. And the letter of defendant stating that he did not use the closet may be explained by his testimony that, in order to keep it clean, the receptacle sent with it had not been used.

A number of assignments of error are made; but, since the trial judge gave a peremptory instruction for defendant, it must have been on the theory that there was not sufficient evidence in the record to support a verdict for plaintiff under the issues made. Unless this is the case, the evidence should have been submitted to the jury. In our opinion plaintiff has not established the fact that the representations made by defendant, which induced plaintiff to consent to the rescission of the sale, were false and fraudulent, or that plaintiff relied thereon, and therefore the defendant was entitled to a directed verdict.

The judgment of the district court is

AFFIRMED.

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

JOHN HUGHES, EXECUTOR, ET AL., APPELLEES, V. SARPY COUNTY, APPELLANT.

FILED OCTOBER 30, 1914. No. 17,886.

1. **Arbitration and Award.** Submissions of controversies to arbitration are to be liberally construed so as to give effect to the intention of the parties. It is the policy of the law to encourage the settlement of disputes without litigation, and awards are favored in law.
2. ———: IMPEACHMENT OF AWARD: BURDEN OF PROOF. An award, when regularly made and published, is *prima facie* binding upon the parties thereto, and the burden of alleging and proving the contrary is upon the party seeking to impeach it.
3. **Counties:** ARBITRATION. County boards are vested with authority to submit matters in dispute to arbitration either under the provisions of the statute or the principles of the common law.
4. **Arbitration:** AWARD: CONCLUSIVENESS. In a common law submission an award was agreed upon by the arbitrators. It was written out, signed, inclosed in a sealed envelope, and given to one of the arbitrators for delivery. He failed to deliver it, but produced it in court upon an order being made to that effect. *Held*, That the intention at the time the award was signed was that it should be final, that it was not thereafter revocable, by either party alone, and that the mere failure to deliver it did not operate to set it aside.
5. ———: NOTICE. Where the evidence discloses that no hearing was contemplated, but that it was the intention of the parties that the arbitrators should meet at the proposed location of a road, view the premises, and award damages, and the arbitrators met in this manner upon a day fixed by one party, the other consenting thereto, the award is not void for want of notice of the time and place of the meeting of the arbitrators.

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

*E. S. Nickerson* and *A. E. Langdon*, for appellant.

*John W. Parish* and *Edward M. Martin*, *contra.*

LETTON, J.

Proceedings were taken by the county authorities of Sarpy county to locate and open a road along the west line of a certain tract of land belonging to one Barney Hughes. A claim for damages was filed by him in the sum of $2,500. Appraisers were duly appointed who awarded him damages in the sum of $211. This was reduced to $121.25 at the hearing before the board of county commissioners. Hughes died, and an appeal was taken to the district court by his successors in interest.

While the proceedings on appeal were pending in the district court one of the plaintiffs had a conversation with one of the county commissioners with respect to submitting the question as to the amount of damages to arbitration. Afterwards the board of county commissioners passed the following resolution: "Francis Fricke is appointed arbitrator for Sarpy county in the matter of the damages on the Barney Hughes place by reason of the location of the public road on the west side thereof." Afterwards John Hughes, as executor, and representing the other heirs, selected one Stickley as arbitrator for defendants. Fricke and Stickley met, made an examination of the land and of the Osage orange hedge and fences along the line, and wrote out and signed the following document:

"We, the arbitrators appointed to place a valuation on hedge and wire fence on Hughes' property, place value as follows: Hedge, $900. Building fence on same 40 a., $75. Removing old fence and building new fence on next 40 a. north, $95. Next 40 a. north same, $95 if desired.

"J. F. Stickley, Arbitrator for Hughes.

"Francis Fricke, Arbitrator for County."

This paper was then placed in an envelope addressed to the county commissioners of Sarpy county and given to Fricke to file with the commissioners. He did not do so, but kept it in his possession until ordered to produce it by the court at the trial. The petition pleads these facts, and also pleads that the value of the Osage orange hedge was $1,000, and that the land actually taken was worth $1,500.

The answer is a general denial. At the trial plaintiffs waived any rights to damages by virtue of the taking of the land, and admitted that the findings of the arbitrators for $1,070 is in full of all damages claimed by plaintiff against the county of Sarpy. At the close of the testimony the plaintiff moved for a directed verdict, which motion was sustained, and the jury were directed to return a verdict for $1,070, the amount of the award. The county of Sarpy has appealed.

The usual assignments of error are made, and, in addition, that the court erred in receiving the alleged award, and in striking out the evidence of certain of defendant's witnesses who testified with respect to the value of the land before and its value after the opening of the road. The principal question involved is as to the weight to be given to the alleged award. The district court evidently treated the amount fixed in the award as a final determination of the value of the hedge, and, construing this in connection with the waiver by the plaintiff of all damages for the taking of the land, held it to be a final adjudication of the matters in controversy and as fixing the total damage at $1.070, the amount of the award. Whether this was correct depends upon the weight to be given to the finding of Fricke and Stickley as an award. It is clear that what was done did not constitute a binding arbitration under the provisions of the statute. Rev. St. 1913, secs. 8218-8235. The submission was not in writing, it was not acknowledged, nor was it made by order of court in a pending suit. None of the essential elements to an arbitration under the code appear in the record. Was this award final and binding under the common law?

In *Grcer v. Canfield,* 38 Neb. 169, the facts were that by an oral agreement a certain dispute was left to be settled by arbitrators. The testimony as to the form of the submission was indefinite, but one of the arbitrators said he understood that they were to decide all matters of difference between the parties. The arbitrators considered the statements of the parties with reference to each item, and as to some of them heard evidence and arrived at a conclu-

sion, though no oath was administered to any witness. The validity of the award was attacked, but this was held to be a good common-law arbitration. "This is a common-law award, and a submission made by either party, either by word or deed, is sufficient. If the submission is by word, there is no remedy to recover on the award except by action; but the award, if fairly made within the scope of the matters submitted, will be valid and binding. *Tynan v. Tate,* 3 Neb. 388." In the absence of fraud or mistake an award, whether at common law or under the statute, when regularly made and published, is *prima facie* binding upon the parties thereto, and the burden of alleging and proving the contrary is upon the party seeking to impeach it. The right to revoke a common-law submission must be exercised before the making and publication of the award. *Bentley v. Davis,* 21 Neb. 685; *Fox, Canfield & Co. v. Graves,* 46 Neb. 812; *Connecticut Fire Ins. Co. v. O'Fallon,* 49 Neb. 740. We conclude that there is no evidence to show any invalidity in the arbitration and award.

It is contended that a county through its board of commissioners cannot become a party to an arbitration. While the matters involved in this controversy were not submitted under the statute, we are of opinion that sections 8218, 8219, Rev. St. 1913, with reference to statutory submissions, settle the question of power in the board to enter into either form of arbitration. Section 8218 provides: "All controversies, which might be the subject of civil actions, may be submitted to the decision of one or more arbitrators as hereinafter provided." Section 8219: "The parties themselves, or those persons who might lawfully have controlled a civil action in their behalf, for the same subject matter," may proceed as directed. We think it was not the intention to limit the power to arbitrate to any narrower limits than the power to bring an action, and that the county board is vested with this authority under these provisions and the general statutory provisions granting a county the power to sue and to be sued and making the county board the managing agents for county affairs.

It is contended that, since Fricke refused to produce the award voluntarily, it was not complete, and that it was a mere report back to the county commissioners for their consideration. We are convinced that the intention at the time the award was signed was that it should be final. It was not thereafter revocable by either party. *Connecticut Fire Ins. Co. v. O'Fallon,* 49 Neb. 740. The mere failure of Fricke to deliver it to the county commissioners before the trial could not operate to set it aside.

It is also complained that there was no notice of the time and place for hearing served on the county commissioners. As a matter of fact there was no hearing. The proof is that one of the commissioners called upon Fricke after the meeting, gave him instructions, and told him the arbitrators would meet on a certain day and go over this hedge and land and award damages. The arbitrators proceeded to the locality where the proposed road had been established, examined the hedge, and fixed their own estimate as to damages. This seems to have been the intention of the parties as to the manner of proceeding, and no notice seems to have been contemplated or to be necessary. It is an elementary rule that submissions of controversies are to be liberally construed so as to give effect to the intentions of the parties. It is the policy of the law to encourage the settlement of disputes without litigation, and where no fraud or undue means are shown awards made are favored in law.

It is also claimed that the valuation of the hedge and the judgment are excessive. Osage orange timber is very durable and is peculiarly valuable for use as fence posts. There is evidence that about 1,200 posts were cut from the hedge, most of which were sold by the road supervisor. While we are inclined to think that the damages awarded on account of the hedge were too high, all damages for taking of the land, being afterwards waived, had the same effect as a remittitur, for it is clear that plaintiffs were entitled to from $300 to $350 for the value of the land actually taken. Viewed in this light, we think the award

should be upheld. While the proceedings at the trial were somewhat irregular, we find no prejudicial error.

The judgment of the district court is

AFFIRMED.

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

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LANCASTER COUNTY, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED OCTOBER 30, 1914. No. 18,634.

1. **Limitaton of Actions:** ACTION AGAINST STATE. The statute which permits an action to be brought against the state by permission of the legislature or either house thereof provides: "The court in which such action may be brought shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require." Rev. St. 1913, sec. 1180. Under this direction it is the duty of the court to brush aside technical defenses and to act in like manner as if the parties were seeking to amicably settle their controversy. Under these provisions and the circumstances of this case as set forth in the opinion the statute of limitations should not be held to be a defense to the action.
2. **County Treasurers:** LIABILITY FOR DEPOSITS. Where a county treasurer has deposited money received by him for taxes "belonging to the several current funds of the county treasury" in a depository bank which has given bond as specified in the depository statute (laws 1891, ch. 50), he is not liable for the safe-keeping of the funds.
3. **Taxation:** LOSS OF STATE TAXES: LIABILITY OF COUNTY. Where the county treasurer is relieved from liability upon his bond for the loss of funds deposited in such banks, the county itself (in the absence of extraordinary circumstances, such as fraud, bad faith, or gross negligence in the selection of a depository or the approval of its bond) is free from liability to the state for money collected as taxes in the capacity as trustee for the state and deposited by the county treasurer in such depository bank.

4. ———: ———: ———. A county is not an insurer of the safe-keeping of funds derived from the collection of state taxes in its capacity as trustee for the state.

5. ———: ———: ERRONEOUS PAYMENT TO STATE: RECOVERY BY COUNTY. Where a county treasurer, under the mistaken idea that a county was the insurer of money received by it from taxes for the benefit of the state, paid to the state treasurer from other money belonging to the county an amount equal to the proportion which the state owned of the money deposited in a depository bank, which was lost on account of the failure of the bank without the fault of the county, an action may be maintained, under the permission of the state senate, to recover back such money erroneously paid, and the fact that certain entries were made in the county books by the treasurer charging the money lost to certain county funds, under the same mistaken idea, is no defense to the action.

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

*Grant G. Martin, Attorney General,* and *George W. Ayres,* for appellant.

*Jesse B. Strode, Strode & Beghtol* and *George E. Hager, contra.*

LETTON, J.

The following states plaintiff's cause of action in substance: In January, 1893, the Capitol National Bank of Lincoln was an authorized county depository. The treasurer of Lancaster county had on deposit therein $39,660.62, public money derived from the payment of taxes. Upon the 21st of that month the bank failed, and over $32,000 of the amount deposited was lost. The county treasurer, acting upon his own judgment, shortly afterwards paid to the state treasurer out of county funds the amount of $10,348.27 for taxes collected by Lancaster county for the state and lost by the failure of the bank. This action was taken under the belief that Lancaster county was an insurer of money collected for the state until it was delivered to the state treasurer. In 1903 an action was brought by Lancaster county against the state under permission of the legislature to recover this amount. A demurrer to the

petition was sustained and the action dismissed. On appeal the judgment of the district court was reversed and the cause remanded to the district court. Afterwards, through mistake and inadvertence and without the knowledge of Lancaster county officials, the case was dismissed. After this was done the senate passed a resolution, which recited the fact of the dismissal of the case through inadvertence, authorized the county to prosecute another action for the same purpose, directed the attorney general to defend the suit on behalf of the state, and also provided: "Be it further resolved that no alleged inattention or failure to prosecute the said claim or suit heretofore instituted shall be urged to the prejudice of any claim, action, or suit that may be filed and instituted by the said county of Lancaster." The prayer is for a judgment for the money paid to the state by mistake. The answer denies that any part of the money deposited in the Capitol National Bank was state money; that any part of the money paid to the state treasurer was paid through inadvertence or mistake; and that it was through inadvertence or mistake that the former action was dismissed. It is further pleaded that at the time the money was paid there was due the state for state taxes collected over $46,000, and that this sum was paid by the county treasurer on the day alleged, without any knowledge or notice on the part of the state that the payment or any part thereof was made or claimed to be made from county funds. It is also pleaded that after the failure of the bank the county treasurer charged certain specific funds of the county with an amount equal to the amount lost, and that his action in charging said funds with the loss was known to the county board, and approved and ratified by acquiescence for more than nine years, and that all dividends paid by the receiver were applied as county money. At the close of the trial the court instructed the jury to return a verdict in favor of the plaintiff for the full amount of the claim. Judgment was rendered, and the state appealed.

The state contends that the petition shows on its face that the statute of limitations had run when the action

was begun; that the resolution of the senate pleaded in the petition does not in express terms waive the running of the statute of limitations; and that, even if it had done so, the senate was without power to waive this defense, since it is only one branch of the legislature; that under section 1177, Rev. St. 1913, either branch of the legislature may waive the defense of sovereignty, but that neither house acting alone can waive other defenses. We cannot take this view. Section 1180, Rev. St. 1913, provides: "The court in which such action may be brought shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require." Under this express direction it is the duty of the court to brush aside technical defenses and to act in like manner as if the parties were seeking to amicably settle their controversy, and "as upon the testimony right and justice may require." Under the circumstances of this case, it seems to us that the lapse of time ought not to defeat a just claim.

It is next contended that the verdict is not sustained by sufficient evidence. The testimony shows that the total amount of money on hand with the county treasurer on January 1, 1913, was $192,275.16; that of this amount $60,964.60 had been collected for the state, which was 31.7 per cent. of the whole amount of money on hand. It is shown that all money in the treasurer's hands was deposited in the different depository banks in the city in the name of S. W. Burnham, Treasurer; that when deposited it was not divided into funds, and that the interest upon deposits was credited to the county. There is also testimony that it is impossible in the collection of taxes from day to day to separate the amount paid by each taxpayer into separate funds or to trace to each taxpayer the origin of the money deposited; but, in order to show that this fund contained both state and county taxes, the county showed the payment of all his taxes by an individual by check in 1892, the deposit of this check in the Capitol National

Bank, and that the money represented by this particular check was on hand in the bank at the time of the failure, and further proved that the custom was to deposit state, county, city, village, and other municipal district money received by the payment of taxes in gross, and to keep the funds separate by proper entries upon the books of the county treasurer. The state contends that since on the day of the bank failure there was due and on hand more than $150,000 over and above the amount on deposit in the Capitol National Bank, and since there was no provision in the statute for depositing state funds in a county depository, there is nothing to show that any part of the money deposited at that time was state money. The county takes the position that, since it is shown that the proportion of state funds on hand to the whole amount is 31.7 per cent., applying this proportion to the funds deposited in the Capitol National Bank, the state money in the bank at the time of the failure was $10,348.27. Section 6 of the depository statute (laws 1891, ch. 50) then in effect required the county treasurer to deposit in depository banks the money received by him "belonging to the several current funds of the county treasury." By section 11 the county treasurer is not liable for deposits made if the bank had given a bond as specified in the act. There can be no doubt that state, county, and other taxes collected by the county treasurer were "current funds belonging to the county treasurer," and were the funds which the law required him to deposit. We think there can be no question but that, where the county treasurer is relieved from liability upon his bond for the loss of funds deposited in such banks, the county itself (in the absence of extraordinary circumstances such as fraud, bad faith, or gross negligence in the selection of a depository and the approval of its bond) is free from liability to the state and to the various municipalities or districts for which it has collected taxes in the capacity of trustee. There is nothing in the statute which makes the county an insurer of such funds. Our attention has not been called to any decisions which hold to that effect.

We think it is immaterial whether all or only a part of the current funds of the county treasurer was deposited in the Capitol National Bank. We are of the opinion that, the treasurer having deposited one portion of the county funds in this particular bank and being relieved from liability to the county for the amount so deposited, the county having become unable by law to collect the money from the county treasurer, the state in the capacity of *cestui qui trust* could not require the county to pay that which it was unable to collect. Lancaster county was only bound to use the means provided by law for the safe-keeping of state funds in process of collection. At this time it had fulfilled its duty to the state as trustee by making the semiannual settlement with the state treasurer as required by the statute. The state insists that the books of the county treasurer's office show that the funds lost in the bank were charged to certain specified accounts, such as the general fund, bridge fund, insane fund, etc., and that by acquiescing in this charge the county is barred from commencing this suit. The testimony shows that these entries were made by the deputy county treasurer under the mistaken idea that the county was an insurer of state money. Under the generous provisions of the statute we think this does not constitute a defense. The county authorities followed the directions of the depository law with regard to the disposition of current funds collected by taxation. Through no fault of Lancaster county a portion of these funds was lost. By mistake, and without the knowledge of the county board, the county treasurer paid a portion of other county money to the state treasurer. In justice, equity, and good conscience, which is all that the statute authorizing this suit requires, that amount should be returned by the state to the county, and thus indirectly to the taxpayers of Lancaster county, who in the last analysis are the persons who suffer by the action of the state in retaining money to which it is not entitled.

The judgment of the district court is right, and is

AFFIRMED.

ROSE, J., not sitting.

JOHN SHLIK, APPELLEE, V. ARMOUR & COMPANY ET AL., APPELLANTS.

FILED OCTOBER 30, 1914. No. 17,711.

**Trial:** REFUSAL OF PEREMPTORY INSTRUCTION. Where the evidence is insufficient to support a judgment in favor of plaintiff, it is error to refuse a peremptory instruction for defendant.

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

*Mahoney & Kennedy,* for appellants.

*Dysart & Dysart, contra.*

ROSE, J.

While plaintiff was engaged in icing refrigerator cars for Armour & Company he fell from a plank used as a bridge over a sidetrack between an elevated platform of the icehouse and the top of a refrigerator car on a parallel track. This is a suit to recover resulting damages in the sum of $20,000. The negligence imputed to the master is the furnishing of a plank from which a tapering splinter two inches wide at one end had been split off at one corner, leaving the plank seven inches wide at the narrow end; it being alleged that plaintiff used it under a promise to replace it with a good one. The master and its foreman are defendants. In addition to a general denial, except the employment and injury of plaintiff, defendants pleaded that he was guilty of contributory negligence, and that his injury resulted from obvious risks assumed by him. From judgment on a verdict in favor of plaintiff for $1,000 defendants appeal.

The controlling question on appeal is the sufficiency of the evidence to sustain the verdict. It is argued that all of the proofs are insufficient to sustain a finding that the use of a defective plank under a promise to furnish a new one was the proximate cause of the injury. Lines of refrigerator cars, with their tops about as high as the ice-

house platform, stood on parallel side-tracks. The materials for icing were carried in heavy iron buckets suspended from grooved wheels running on overhead metal rails which approached the side-tracks at right angles and ran up and down the lines of refrigerator cars. The buckets were pushed by hand from the platform, and were turned toward the cars to be iced by means of switches under the control of the icers, who walked from the platform onto the top of cars, and from one side-track to another, and from one car to another. When there was no car adjacent to the platform, a plank was used as a bridge therefrom to the top of a car on the second track. At the time of the accident plaintiff was using a plank for that purpose, when the bucket fell and struck the plank, plaintiff falling to the track below. He testified that the plank was defective in the manner already described, and that he used it under a promise by defendants to furnish a good one. He argues that it was weakened by the defect, and that it was thus narrowed at one end to such an extent that it oscillated, throwing him off when the bucket fell upon it, thus causing the injury of which he complains. His own testimony, however, shows that he had seen the switch, which was under his control. The only proper inference from all of the evidence in the record as now presented is that he pushed the overhead wheel through an open switch under his own control, the bucket consequently falling. There is no pleading or proof that defendants were guilty of any negligent act in connection with the falling of the bucket. There is no evidence to support a finding that plaintiff would have been injured, had the bucket not fallen on the plank, or that negligence on part of the defendants in furnishing a defective plank or in failing to furnish a good one, under all the circumstances proved, was the proximate cause of the injury. There is nothing but conjecture to indicate that the negligence pleaded was the proximate cause of plaintiff's injury. Into that field the jury should not have been permitted to go. In this view of the record, the verdict is not sustained by the evidence. Instructions based on evidence

of the negligence pleaded are, therefore, necessarily erronous. There should have been a peremptory instruction for defendants.

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

REVERSED.

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

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JAMES MCWHORTER, APPELLANT, V. CHARLES SCHRAMM, APPELLEE.

FILED OCTOBER 30, 1914. No. 17,834.

1. **Elections**: CONTEST: COMPLAINT. When the complaint in a contested election case alleges the reception of illegal or the rejection of legal votes, the contestant, on motion, will be required to set out the names of the persons who so voted or whose votes were rejected, if known.
2. ———: ———: BURDEN OF PROOF. A contestant in a contested election case is required to prove the material allegations in his complaint, whether the incumbent has formally answered or not, and upon failure to furnish any proof of such allegations his action should be dismissed.

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

*M. H. Leamy,* for appellant.

*O. S. Spillman, contra.*

FAWCETT, J.

Contestant brought suit in the district court for Pierce county to contest the election of incumbent as school district treasurer of district No. 30, in that county. From a judgment dismissing his action, he appeals.

Only one point need be considered. The substance of the complaint is that the incumbent was elected at the annual

school district meeting by a *viva voce* vote; that the officers in charge of the school election failed to make or keep any record of the proceedings, and failed to give notice of the time and place of holding the election; that "there was malconduct, fraud, and corruption" at the meeting on the part of the director and moderator; that incumbent was not eligible to the office; that eleven illegal votes were cast; that five legal votes, which would have been cast for contestant, were rejected; that the director and moderator made an error against contestant of five votes in counting the votes cast; that the incumbent had failed, neglected and refused to qualify as treasurer; and that contestant had filed his bond and had in all respects duly qualified. Incumbent appeared in the action, and upon his motion contestant was ordered to set out in his complaint, within ten days, the names of the voters who he claimed had voted illegally. Rev. St. 1913, sec. 2114. This order was not complied with.

The allegations in the complaint, or at least some of them, were material allegations, which it was incumbent upon contestant to prove at the trial, whether incumbent had formally answered or not. Notwithstanding the fact that this burden rested upon him, when the case was regularly called for trial, he, through his counsel, announced that he had no evidence to offer. The court therefore properly dismissed his action.

AFFIRMED.

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

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SIDNEY S. MONTGOMERY, APPELLEE, V. QUINTILLA M. DRESHER; DUNCAN M. VINSONHALER, INTERVENER, APPELLANT.

FILED OCTOBER 30, 1914. No. 17,863.

1. **Mortgages: FORECLOSURE: DEFICIENCY JUDGMENT: APPLICATION OF FUNDS.** When it is made to appear to the court that there is money of a defendant in the hands of its clerk sufficient to pay a

judgment entered against him for deficiency in a foreclosure suit, and that if the fund is not applied to the satisfaction of such judgment plaintiff will be left without means of obtaining satisfaction thereof, the court is not required to look further than to ascertain that there are no liens of third parties upon the fund which would forbid such application. Having ascertained that fact, the court then, under the practice in this state which does not look to the form of actions, has the power to order the fund applied to the payment of such judgment.

2. Judgment: SATISFACTION: ORDER TO PAY MONEY INTO COURT. Where a judgment plaintiff has secured the payment into court of a sum of money, belonging to the defendant, amply sufficient to pay the full amount of his judgment and costs, it is error for the court to require the payment into court of further sums of money owing to defendant from third persons.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed in part, and reversed in part and remanded, with directions.*

*Duncan M. Vinsonhaler, pro se.*

*McGilton, Gaines & Smith* and *William Baird & Sons, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county to foreclose a mortgage securing two notes, given by defendant to one Becker, for $1,200 and $500, respectively. This was a second mortgage. Default having been made, plaintiff brought suit to foreclose the mortgage. Defendant appeared and defended the suit. Judgment went in her favor on the ground that plaintiff had not acquired the note and mortgage for a valuable consideration in due course of business, and for other reasons not necessary to repeat. On appeal to this court that judgment was reversed and the cause remanded, with directions to the district court to enter a decree of foreclosure. *Montgomery v. Dresher,* 90 Neb. 632. While the appeal was pending in this court, plaintiff applied to the district court for leave to commence an action at law against defendant on the notes, giving as a reason that defendant was a non-

resident; that she had obtained a judgment against one Brennan and one Becker, for $3,500; that defendant had no other property in the state except the lot described in the mortgage; that there had already been a foreclosure of a first mortgage by the National Life Insurance Company against the property, and the property was about to be sold under an order of sale therein; that defendant was about to collect her judgment, and that, if she succeeded in collecting her judgment and the property should be sold under the first mortgage, plaintiff would lose his debt. Leave was granted to commence the action at law. A separate action at law was thereupon commenced and garnishment process served upon Brennan and Becker. They answered, admitting their indebtedness to defendant under the judgment referred to. The court thereupon ordered them to pay into court $2,500, to abide the further order of the court, which was done. When the mandate from this court went down in *Montgomery v. Dresher, supra,* plaintiff applied to the district court in this suit for a deficiency judgment upon the notes, representing to the court that the property covered by the mortgage had all been consumed in the foreclosure suit upon the first mortgage. The court thereupon entered judgment in favor of plaintiff for the full amount of the two notes and interest, in the sum of $2,047.54, and awarded execution therefor. Execution was issued and returned *nulla bona.* Prior to the commencement of the law action intervener, who was attorney for defendant in her action against Brennan and Becker, had filed an attorney's lien for $1,250 upon the judgment which he had obtained for her in that action. After the garnishment proceedings in the law action and the filing of the answer of Brennan and Becker, admitting their indebtedness to defendant, and before the application for a deficiency judgment in this suit, intervener obtained from defendant an assignment of her judgment against Brennan and Becker, of which plaintiff had full notice. No further steps were ever taken by plaintiff in the law action, although he could have obtained full and complete payment of his notes in that action. The amount of his

claim was $2,047.54. He had secured the payment into court of $2,500 of defendant's money. Instead of pursuing his remedy at law in that action, which he had commenced by leave of court, he came back into this suit and obtained a judgment for deficiency upon the notes, as above set out. After an execution on the judgment had been returned *nulla bona,* he had garnishment process again served upon Brennan and Becker for the balance of their indebtedness to defendant upon her judgment against them, and the court in this suit ordered Brennan and Becker to pay that balance of $800 into court. With that payment in court, plaintiff would then have $2,500 in the hands of the clerk, as a result of his garnishment in the law action, and $800 as a result of his garnishment in this suit, a total of $3,300, plus a large amount of interest upon the Brennan and Becker judgment, from which to secure payment of a judgment of $2,047.54. See Mrs. Means' admonition to her husband *in re* "Congress land," in The Hoosier Schoolmaster.

Plaintiff then made application to the court in this suit, in which he showed the entry of the personal judgment for $2,047.54; alleged that no appeal had been taken from the judgment; that nothing had been paid by defendant on the judgment; set out the commencement of the law action; alleged that the notes, upon which the law action was based, were the same notes upon which the judgment in this suit was entered; set out the garnishment of Brennan and Becker, and the payment into court by them of $2,500, which sum he alleged was then in the hands of the clerk; alleged that the obligation on which judgment was entered in plaintiff's favor in this suit and the obligation set up as the cause of action in the law action are one and the same, and that the parties to the two actions are one and the same; that the only service in the action at law upon defendant was constructive service, and that she had not appeared therein; and moved the court that the money held by the clerk under the garnishment in the law action be applied in satisfaction of the judgment entered in this suit; that the clerk be ordered to pay

to plaintiff out of the $2,500, referred to, the amount of plaintiff's judgment, interest and costs, and to pay any surplus of said sum to defendant, and that upon such payment the law action be dismissed. Intervener thereupon filed his petition of intervention, in which he set out the facts substantially as we have already recited them, and alleged that, for the services rendered by intervener for defendant by reason of the numerous suits growing out of the above transaction, for which he has received no compensation, defendant assigned to him the judgment against Becker and Brennan; that plaintiff at all times was advised of the existence of intervener's lien for attorney's fees, and that when he caused garnishment to be issued in this suit plaintiff knew that intervener was the owner of the Becker and Brennan judgment. Wherefore he prayed for an order vacating and setting aside the writs of garnishment issued in this suit and enjoining and restraining plaintiff from further interfering with or delaying intervener in the collection of his judgment from Becker and Brennan, and for general equitable relief.

By its decree the court found that the judgment for $2,047.54 remains wholly unsatisfied, and that there is due plaintiff thereon the said sum, with interest and costs of suit, including the costs of the former appeal in this court; that $2,500 had been paid into court by Brennan and Becker in the law action; that there remained a balance due from Becker and Brennan on their judgment to defendant of $800, with interest from June 3, 1911, and that there is due interest on the $2,500 from June 3 to October 10, 1911; that intervener had a contract with defendant, by the terms of which he was entitled to one-third of the amount he should collect on her claim against Brennan and Becker; that intervener filed his lien against that judgment for $1,250; that subsequent thereto, to further secure intervener, defendant executed and delivered to him an assignment of her judgment against Brennan and Becker; that intervener had received, to apply on said indebtedness, $456.86; that prior to the entry of judgment in this suit plaintiff commenced the law action and ob-

tained the payment into court of $2,500; that defendant had failed to appear and answer in that action, and was served therein by publication only; that the proceedings in the law action were not abated by the rendition of the judgment in this suit, and that plaintiff's cause of action in said proceeding was on the same notes and cause of action as in this proceeding; that the right of plaintiff to a judgment on the notes had been fully determined in this suit, and that the $2,500 garnished and paid into court in the law action, or so much thereof as necessary, should be applied in satisfaction of the judgment, interest and costs of plaintiff entered in this suit; and decreed that Brennan and Becker pay into court the balance of $800 remaining unpaid on defendant's judgment, with interest; that the clerk "out of the funds in his hands, to wit, the sum of $2,500 garnished and attached in and by virtue of the proceedings in docket 114, page 231 (the law action), and the $800 and interest to be paid by the said Becker and Brennan, pay to this plaintiff, Sidney S. Montgomery, the amount due on his judgment, interest and costs of district and supreme court, heretofore rendered in this action, and the accrued costs in said case in docket 114, page 231 (the law action), and that after such payment said clerk pay over the funds so remaining in his hands to Duncan M. Vinsonhaler" (intervener). Intervener appeals.

Intervener in his brief states: "The only question for determination in this appeal is: 'Could the district court, upon motion of the plaintiff herein, order money to be paid in satisfaction of a judgment herein which had been paid to the clerk under attachment and garnishment proceedings in a suit at law where service was constructive, when judgment had not been entered in the suit at law?'" At first blush, the impulse would be to answer, "No," but under the facts shown in the record we are constrained to answer the query, as applied to those facts, in the affirmative. The parties to this suit and the parties to the action at law, when that action was instituted and the money paid into court, are the same, except that when the order was made, applying the money deposited with

the clerk in the law action to the payment of plaintiff's judgment in this suit, intervener had become a party to this suit and was asserting for himself, under an assignment from the defendant, the interest which defendant had in the litigation at the time the money was paid into court in the law action. If he were now in court as an innocent holder for value of defendant's interest in the judgment against Brennan and Becker, there would be great force in his contention, but the trouble is, when he took his assignment of the judgment from the defendant, whether he took it merely as additional security for his attorney's fee, as found by the court, or took it as an absolute assignment, as contended by him, he took it with full notice and knowledge of plaintiff's demand against the defendant. It is true there is force in his contention that, as to the $800 which the court ordered paid in by Brennan and Becker after he had obtained his assignment from defendant, his rights were superior to those of the plaintiff, but that question we are not called upon to decide, for the reason that it is entirely immaterial. The $2,500 paid into court under the garnishment proceedings in the law action is ample to pay plaintiff's demand in full, so that the only question we need determine is the simple question stated by intervener in his brief. As we have already stated, after the money was deposited with the clerk in the law action, plaintiff took no further steps therein. He did not prosecute that action to final judgment, and, as intervener contends, he probably obtained nothing more than an inchoate lien upon that fund. But the fund had been paid into court to be held for the satisfaction of any judgment which plaintiff might obtain against defendant upon the notes he held against her and which constituted the cause of action in each suit. To the extent of plaintiff's demand against defendant, no one can complain of the application the court is making of that fund except the defendant, with this exception, that, as to the extent of his attorney's lien, intervener had a claim to that fund which was prior to plaintiff's right under his garnishment proceedings. If the record now showed that by ap-

plying a portion of that fund to the payment of plaintiff's notes intervener would suffer a loss of any part of his attorney's lien, then to the extent of that loss he might object to such application being made. But the evidence shows that intervener will not suffer any such loss by reason thereof. The surplus of the $2,500 over and above the amount of plaintiff's judgment, added to the $800, which is still owing by Brennan and Becker, is ample to pay intervener all that is due him under his attorney's lien. We think, therefore, that when the court, in this suit, became advised of the fact that there was money in the hands of its clerk, sufficient to pay plaintiff's demand, and that, if it were not so applied, plaintiff would be left without any means of obtaining satisfaction of his judgment, it was not required to look further than to ascertain that there were no liens of third parties upon the fund which would forbid such application. Having ascertained that fact, the court then, under our practice which does not look to the form of actions, had the power to order the fund applied. That plaintiff had reached this point by a circuitous and expensive route could not affect the right of the court to enter the judgment; but we think the court should have inquired into the matter and ascertained whether or not plaintiff had made a lot of unnecessary costs by instituting the action at law and then switching back to the suit in equity, and should have taxed all such unnecessary costs to plaintiff. That unnecessary costs were made is clear. As already intimated in this opinion, plaintiff could have obtained full payment of his demand in the law action. He had procured the payment into court of a sum of money ample to satisfy his demand, and he should have obtained it there. When he came back into this suit, all costs subsequently made herein, except the entry of judgment on the notes, were unnecessary costs, which he should pay.

The judgment of the district court, as to the application of the funds in the hands of the clerk, is affirmed. In so far as it orders the garnishees to pay an additional $800 into court, it is reversed. The cause is remanded to the district court, with directions to tax all costs in this suit,

subsequent to the entry of judgment upon the notes, to the plaintiff.

JUDGMENT ACCORDINGLY.

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

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SIDNEY S. MONTGOMERY, APPELLEE, V. QUINTILLA M. DRESHER; DUNCAN M. VINSONHALER, INTERVENER, APPELLANT.

FILED OCTOBER 30, 1914. No. 17,862.

**Parties: INTERVENTION: DISMISSAL.** Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, may become a party to such action, and when he has become a party thereto it is error for the court to dismiss his petition of intervention prior to the final determination of the action on the merits. Rev. St. 1913, secs. 7609, 7610.

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

*Duncan M. Vinsonhaler, pro se.*

*McGilton, Gaines & Smith* and *William Baird & Sons, contra.*

FAWCETT, J.

This is the action at law to which reference is made in *Montgomery v. Dresher ante,* p. 104. The only judgment entered in this action was one dismissing intervener's petition of intervention, with prejudice. The one question to be determined, then, is: Can such judgment be sustained? In the findings upon which the judgment is based the court finds that there is a fund of $2,500 in the hands of the clerk which has been paid in under garnishment proceedings as the money of defendant, and which is being held to abide the further order of the court; that the

amount of plaintiff's demand against the defendant is $2,047.54; that intervener had a lien upon the judgment of defendant against the garnishees who paid the fund into court, and that the attorney's lien had been filed before the garnishment proceedings were had. It is clear from these findings that intervener has an interest in the matter in litigation which he is entitled to have adjudicated in the final determination of the action. It was therefore error for the court to dismiss his petition of intervention. Other questions are discussed in briefs of counsel, but, as the judgment dismissing the petition of intervention is the only judgment which was entered, such discussion is beside the mark.

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

REVERSED.

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

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

FILED OCTOBER 30, 1914. No. 17,666.

Opinion on motion for rehearing of case reported in 96 Neb. 154. *Rehearing denied.*

SEDGWICK, J.

The opinion in this case is reported in 96 Neb. 154. A motion for rehearing and a brief in support thereof has been filed. These are evidently based upon a misapprehension of the meaning and scope of the opinion. Defendant concedes and asserts, as in its original brief, that "the jurisdiction to affect the service, whether it should be on Twelfth street or Fourteenth street, resided entirely with the commission. * * * This part of the decision is manifestly right."

The contention is that the defendant company had the power and right to change the routing of its cars on its own initiative, and was not required to obtain permission of the state railway commission so to do. The brief in behalf of plaintiff based his contention mainly on the proposition that a street railway company, after it has obtained the permission of the city, and has constructed its lines and inaugurated its service, cannot abandon those lines and refuse to render the service, citing numerous authorities sustaining that position, among them our decision in *State v. Sioux City & P. R. Co.*, 7 Neb. 357, and *City of Potwin Place v. Topeka R. Co.*, 51 Kan. 609, *State v. Bridgeton & Millville Traction Co.*, 62 N. J. Law, 592, and *Loader v. Brooklyn Heights R. Co.*, 35 N. Y. Supp. 996. In our decision, above cited, it was held that, where a railroad company has received a grant of land from the state, upon condition that it would build a railroad from one town to another, it has no authority whatever afterwards to abandon any portion of such line and take up and remove the track. In the Kansas case it was said: "By the provisions of the ordinance, the Rapid Transit Company obtained the right to construct its roadway in the public streets, to maintain and operate it, to transport passengers and parcels by means of electrical power, to collect charges and tolls therefor. These privileges were not granted to the company solely for the company's benefit, but rather that the citizens of the plaintiff city might have the benefit of an improved mode of travel—that they might enjoy the benefits of one of the inventions of the age. * * * The company accepted the provisions of the ordinance, and constructed its road under the leave thereby obtained. May it now disregard the obligations imposed on it by its terms?" In these and many other cases the companies were compelled to maintain the service which had been established. We have not decided in this case that the defendant company cannot establish new lines of service upon such streets as the city may permit, nor that it cannot initiate necessary changes in the management of its business. It is not essential that every minor change in

the conduct of the traffic, or in the service rendered, or in other matters of detail concerned with the operation of the line, should be preceded by an application to the railway commission for permission to make the change. The opinion does not so hold. The point decided is that the company cannot make such changes in the routing of its cars as the evidence in this case shows were made or contemplated, without first obtaining the approval of the commission. South street is an important street of the city, and College View an important suburb. The travel between those localities and the residences and business places on Twelfth street is also important. Direct intercourse of that kind must be abandoned if this change is made. This would amount to an abandonment of a substantial part of the service upon that line. When the inconvenience of the patrons of the road directly interested is considered, and the effect upon property values, and similar considerations, the defendant company must have known that many people would be interested, some perhaps favoring, and others opposing, the change. The officers of the company, being principally concerned for the accommodation of its patrons, and not being interested in the changes of property values, would, it is to be supposed, naturally look for some disinterested authority to satisfactorily arrange the matter, preserving, as far as possible, the rights of all parties interested. This is the peculiar function of the state railway commission. Being administrative in its nature, this function is not within the province of the courts, and the law has wisely confided it to that body, instead of leaving it to the company itself, whose officers might under some circumstances have interests and motives not entirely in harmony with the best interest of the general public, or even with a majority of those more directly affected.

If we should assume in this case to define in general the precise limits of the authority of the railway commission even in the matter of routing cars over the tracks of the defendant company, such definitions would be worthless as a future guide, since they would be dicta only. Much

less can this court, as suggested, lay down general rules for the railway commission in the regulation and control of common carriers.

The motion for rehearing is therefore

OVERRULED.

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HAMER, J., dissenting.

I think the opinion gives the railway commission more power than is contemplated by the constitution and the statute, and that it permits the invasion of private rights by such commission and is an abdication by the courts of the state of the power conferred upon them by the people.

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WALTER B. PRUGH, APPELLANT, V. MARY P. SEARCY ET AL., APPELLEES.

FILED OCTOBER 30, 1914. No. 17,757.

**Adverse Possession:** SUFFICIENCY OF EVIDENCE. The evidence, indicated in the opinion, is found to be sufficient to establish the defense of open, exclusive and adverse possession for more than ten years prior to the commencement of the action.

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

*Hoagland & Hoagland, James T. Keefe* and *Leavitt & Hotz,* for appellant.

*Wilcox & Halligan, contra.*

SEDGWICK, J.

In May, 1894, the Union Pacific Railway Company conveyed the quarter section of land in controversy in this case to one John Long. There is no evidence that Mr. Long ever took actual possession of the land, or that he ever paid any taxes thereon after he received his deed. In

September, 1910, Long conveyed the land to one Jankee, and a few days later Jankee conveyed it to this plaintiff. The plaintiff began this action on the 20th day of March, 1911, to quiet his title and cancel an alleged tax deed. The trial court found in favor of defendants, and plaintiff has appealed.

In January, 1894, Albert B. Persinger purchased this land at sheriff's sale upon foreclosure of tax liens in behalf of Deuel county. This is the same foreclosure involved in *Armstrong v. Johnson,* p. 119, *post.* Afterwards Mr. Persinger conveyed the land to the defendant Mary P. Searcy, his daughter. The defendant Mary P. Searcy insists that she has valid title to the land through the said sheriff's deed, and also that she and her grantor have had exclusive, adverse possession of the land for more than ten years prior to the commencement of this action. In this case the defense of adverse possession is clearly proved. Mr. Persinger testified that when he purchased this land, in January, 1894, he was the owner of the quarter section of land lying immediately south thereof and the quarter section of land immediately east thereof, and held the section north under a lease from the state, so that this land was surrounded on three sides by the plaintiff's lands. He also testified that at the time he purchased it there was a fence on two sides of this land, enclosing the school section north and the three quarter sections above stated, including the quarter section in controversy, and that immediately after he purchased this quarter section, in January or February, he built another fence, so that these lands were all enclosed on three sides, and that he kept his cattle and horses, a large herd, upon these lands, and that he employed a herder continually to prevent them from escaping on the unenclosed side. He was asked if there was no land in this enclosure that he did not own, and answered, "There was very little I did not own or lease," and explained that there was one tract for which he had no deed or lease, but had the written consent for its use of the owner, who was a nonresident, so that it appears beyond question that he had for

more than ten years prior to this action continuous, open, exclusive and adverse possession of this land.

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

AFFIRMED.

ROSE, J., not sitting.

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ANNA B. JANKEE, APPELLANT, V. SAMUEL ROBB ET AL., APPELLEES.

FILED OCTOBER 30, 1914. No. 17,758.

**Adverse Possession:** SUFFICIENCY OF EVIDENCE. The evidence, indicated in the opinion, is found to be sufficient to establish the defense of open, exclusive and adverse possession for more than ten years prior to the commencement of the action.

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

*Hoagland & Hoagland, James T. Keefe* and *Leavitt & Hotz,* for appellant.

*Wilcox & Halligan, contra.*

SEDGWICK, J.

The plaintiff brought this action in the district court for Duel county to quiet title to a quarter section of land in that county. The defendants claimed title under the same foreclosure proceedings involved in *Armstrong v. Johnson,* p. 119, *post.* The trial court found for the defendants and dismissed the action, and plaintiff has appealed.

It is not necessary in this case to discuss the validity of the foreclosure proceeding relied upon by the defendants, since the defendants have alleged and proved a complete defense by adverse possession. In 1898 the defendant Samuel Robb was the owner of and resided upon a quarter sec-

tion of land adjoining the land in dispute, and also controlled by lease several other adjoining quarters, and in that year, or the following year, he enclosed the said quarter sections of land so owned and leased by him, and also this quarter section in controversy, with a fence, and has ever since that time had exclusive adverse possession of all the lands so enclosed, including this quarter. In January, 1901, one or two years after he had so enclosed and taken possession of this land, he purchased the quarter in controversy at sheriff's sale, and has since paid the taxes thereon. Since this action was not begun until in March, 1911, the defendants had been in open, exclusive and adverse possession under claim of ownership for more than ten years when the action was begun.

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

AFFIRMED.

ROSE, J., not sitting.

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MARTIN ARMSTRONG, APPELLANT, V. SWAN P. JOHNSON ET AL., APPELLEES.

FILED OCTOBER 30, 1914. No. 17,759.

**Adverse Possession:** SUIT TO QUIET TITLE. An action to quiet title to real estate is barred by the statute of limitations, when the defendant has been continuously in open, exclusive and adverse possession of the land for more than ten years prior to the commencement of the action; the plaintiff not having been under any disibilitv during that time.

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

*Hoagland & Hoagland, James T. Keefe* and *Leavitt & Hotz,* for appellant.

*Wilcox & Halligan, contra.*

SEDGWICK, J.

This plaintiff contracted with the Union Pacific Railway Company, for the purchase of the land in controversy, and afterwards, in 1894, made his final payments and obtained the deed. While he held the land under contract, he paid two years' taxes thereon; but after 1894 he paid no taxes, and, never having seen the land, gave no attention to it until one of the attorneys now acting for him in the case called his attention to it some 16 or 17 years after he had received the deed. In March, 1911, he began this action in the district court for Deuel county to redeem from tax sales and quiet his title. The trial court found the issues in favor of defendants and dismissed the action, and the plaintiff has appealed.

In January, 1901, the defendant Johnson bought the land at sheriff's sale upon foreclosure of tax liens in an action brought by Deuel county. The defendant relies upon his sheriff's deed as conveying good title, and also alleges that he had been in open, exclusive and adverse possession of the land for more than ten years before this action was begun. The tax deed is assailed on various grounds; but, if the defense of adverse possession is established, it becomes unnecessary to discuss the validity of the tax deed. It appears from the evidence that when the defendant purchased this land he owned a contiguous quarter, lying northwest of this land, in section 14. He had resided upon his quarter section in section 14 with his family for many years. His residence was within less than 40 rods of the land in controversy. He held the east half of section 13 under lease, so that the land in dispute lay between his residence and the half section which he held under lease. From the time he bought this land he used it, as he did his own and the land which he had leased, for haying purposes and for herding his cattle and horses thereon. He also used in the same way the northwest quarter of section 13, but it does not appear whether he had leased that quarter, or upon what ground he appropriated its use. He notified his neighbors to keep their stock off from this land, and asserted his right to the ex-

clusive use thereof. He had paid all taxes on the land since he purchased it, and testifies that he considered it as his land from the time he purchased it at sheriff's sale. He paid something over $100 for the land, and the evidence is that at that time the amount he paid was nearly the full value of the land. Neither this plaintiff nor any one else had ever questioned defendant's right to this land until this action was begun. This evidence is not contradicted, and there is no evidence in the record that any one else has used or could use this land in any way since the defendant purchased it. The evidence as to open, exclusive and adverse possession of this land was given by witnesses in open court. The trial judge saw these witnesses and heard their testimony, and we conclude that the trial court was right in believing these witnesses and in his construction of their testimony.

The plaintiff, to support his contention that the defendant's possession was not so exclusive and adverse as to defeat the plaintiff's action, cited *Lanning v. Musser,* 88 Neb. 418; *Schwartz v. Anderson,* 92 Neb. 603; *Delatour v. Wendt,* 93 Neb. 175; *Risher v. Madsen,* 94 Neb. 72; *Moler v. Castetter,* 94 Neb. 106. Some of these cases support the conclusion that we have reached in this case, and others are so easily distinguished in their facts that it seems unnecessary to discuss them.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., dissents.

ROSE, J., not sitting.

# OMAHA, LINCOLN & BEATRICE RAILWAY COMPANY, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED OCTOBER 30, 1914. No. 18,255.

1. **Municipal Corporations:** CONTROL OF STREETS: USE BY RAILROADS. Section 5942, Rev. St. 1913, should not be construed to authorize a railway company to select any street of the city it may choose for its right of way, and obtain control thereof by condemnation proceedings or by contract with the city. The city cannot, by contract or in any other way, deprive itself of the power to control its streets and to establish and maintain the grades thereof.
2. ———: ———. The city authorities have control of its streets, and have power "to compel railways to conform tracks to grades at any time established." When the city has established the grade of a street, the courts will not interfere with such action unless it clearly appears that thereby the rights of others have been seriously injured, and that such injuries are so wholly unnecessary that no reasonable mind could entertain a contrary belief. The provisions of section 5942, Rev. St. 1913, do not alter this rule.
3. ———: ———: GRADING: INJUNCTION. It is the duty of the city authorities, with the assistance of their engineers, to plan and adopt a sewerage system. When the evidence is conflicting as to the advisability and practical working of the system planned and adopted by the proper authorities, the courts will not enjoin the grading and paving of the streets pursuant to that plan, nor restrain the city authorities from requiring railway tracks along such streets to conform to such grade, on the ground that the streets and adjacent properties will not be properly drained.
4. ———: STREETS: USE BY RAILROAD: CONFORMITY TO GRADE. When a city of the first class, having more than 40,000 and less than 100,000 inhabitants, enacts an ordinance granting a railway company the right to construct its road in a street of the city, and provides in that ordinance that the railway company shall conform its tracks to grade then existing or that shall afterwards be established, and afterwards enacts an ordinance establishing for the first time the grade of the street upon which the tracks have been laid pursuant to the first ordinance, no other ordinance requiring the railway company to conform its tracks to the grade so established is necessary.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Reversed and dismissed.*

*F. C. Foster* and *D. H. McClenahan,* for appellant.

*C. C. Flansburg* and *Leonard A. Flansburg, contra.*

*T. S. Allen, amicus curiæ.*

SEDGWICK, J.

In March, 1904, the city of Lincoln enacted an ordinance granting to this plaintiff, the Omaha, Lincoln & Beatrice Railway Company, the right to use Y street in the city of Lincoln for its tracks. The ordinance required the plaintiff to pay an annual occupation tax, and to conform its tracks to the grades which were then established or which might thereafter be established, and to accept in writing the ordinance as a contract, and give bond in the sum of $10,000, guaranteeing a compliance with the terms of the ordinance. The ordinance was duly accepted by the plaintiff and the bond given. At that time no grade had been established on Y street between Eighteenth and Twenty-seventh streets, and the maps and profiles filed by the plaintiff with the city authorities showed an elevation of its tracks at Twenty-first and Y streets of 1 7/10 feet above the natural grade. The plaintiff then filled the right of way at Twenty-first and Y streets about 16 inches above the natural grade and constructed its road accordingly. In August, 1911, the city council enacted an ordinance which provided for the paving of Y street from Twenty-first to Twenty-seventh streets and by ordinance established the grade thereon. The grade so established was about an inch above the natural grade of the street, but the ordinance contained no provision requiring the plaintiff to lower its tracks to conform with the grade so established. Afterwards, in May, 1912, the council ordered the street paved, and the contract for paving the street was entered into by the city with the Ford Paving Company on August 19, 1912. Pursuant to the contract the contractor began the work of paving the street and paved Twenty-first street from the south to the south side of Y street. On the 21st of October, 1912, the plaintiff filed a petition in the district court for Lancaster county against

the city and the contractor, asking for an injunction restraining the defendants "from interfering with the rails, ties, or grade of plaintiff's said railway on said Y street," and from interfering with the operation of the plaintiff's railway over and upon said Y street. Summons thereon was served on the 23d day of October. No temporary injunction was allowed or asked for. A motion was filed by the defendant on the last day of December, 1912, to require the plaintiff to attach to its petition a copy of the alleged agreement between the plaintiff and the city. There was no ruling upon the motion, and, the attorneys who had begun the action for the plaintiff having withdrawn from the case, other attorneys filed an amended petition in April, 1913. This petition asked for a temporary injunction against the defendant, but it does not appear that the same was allowed or that any hearing was had upon the application. A general demurrer was filed to this amended petition, which was overruled, and the city filed an answer immediately. Thereupon still another attorney, who had been employed by the plaintiff, filed a second amended petition, which also asked for a temporary injunction, but the case immediately proceeded to trial and no temporary injunction was allowed. On the 26th day of May, 1913, the district court made special findings and entered a decree enjoining the defendant, the city of Lincoln, substantially as prayed, and the defendant has appealed.

The court found that Y street from Eighteenth to Twenty-third street is low ground and subject to overflows from flood-waters, and especially from back-waters from the Antelope creek, and that the plaintiff's tracks have been interfered with at times thereby; that the plaintiff, relying upon the profile and its right to maintain the elevation as shown therein, constructed its road and tracks, and has been operating the road and serving a portion of the city and the outlying districts, carrying 1,100 passengers a day, and that the track is in the "low pocket in the Antelope valley between Twenty-second and Twenty-third streets, west to beyond Twenty-first street, is boggy and

marshy," and that plaintiff's track is some 18 inches above the natural surface of the ground, and the plaintiff has placed cinders and other material under the ties in the embankment and roadway, and that the street has been little used for travel except on plaintiff's trains; that the track of the Missouri Pacific Railway crosses Eighteenth street, and that the elevation of their tracks has not been fixed or established by any ordinance, and they have not been required by ordinance to conform to the established grade, and their tracks are several feet above the natural surface and the established grade of the street; that the ordinance, enacted in March, 1910, would require the lowering of plaintiff's tracks in the intersection of Twenty-first and Twenty-second streets with Y street about 18 inches, "to the natural surface of Y street at said intersection;" that the ordinance establishing the grade of Y street will make that street the lowest street "from Dudley on the north and X street on the south, and will cause the surface waters to flow into said Y street," and that to compel the plaintiff to bring its track down to the proposed grade "will remove and destroy the foundation for its embankment," and that a large proportion of the property owners, some 40 in number, abutting on or adjacent to said street have protested against the lowering or fixing of the grade below the profile and elevation of plaintiff's tracks.

Of course, if the plaintiff constructs the paving between its rails as the law requires it will first lay a concrete foundation therefor, and so will not be damaged by substituting this foundation for the cinder foundation it now has. If the city can in ordinary cases only require a railway company to conform its tracks to grade by ordinance duly enacted, and if, after an ordinance is duly enacted, as in this case, fixing the grade and requiring the streets to be paved, a second ordinance is necessary to require the railway company to place its paving upon the grade, we have that second ordinance in this case, since the original franchise ordinance under which the plaintiff laid its tracks provides that the plaintiff shall conform its tracks

to the grades then existing or to be established, and there is a general ordinance of the city requiring this to be done. It would seem that no further ordinance of the city could possibly be necessary for that purpose.

The court also found that in seasons of freshet when waters collect it will be impossible to maintain and operate the track at such grade, and will prevent the operation of cars over and upon said track at such times, and that "no adequate provision has been made for taking care of said flood and surface waters, or securing their discharge from said track, and, by reason of said grade, no proper arrangement or sewer connection can be put into effect to carry off said water or relieve said flood condition, thereby rendering that portion of its roadbed useless at such times, depriving the people of its service; * * * that the establishment of the grade on Y street below the profile and elevation of the plaintiff's track will not benefit any one, and such grade is unnecessary, is contrary to the public interest," and that "the construction of the railroad aforesaid in accordance with the profile and the maintenance of its railroad with the approval and consent of the defendant vested in plaintiff the right to operate and maintain its said line of railway on the grade as established by said profile, and that said defendant city is estopped to question or interfere with the same, except for the public good and by an ordinance duly enacted; and the court finds that no ordinance whatever has been enacted by the city, instructing or directing the plaintiff to remove its track on said Y street to the established grade; and, by reason of the aforesaid, the plaintiff is entitled to a permanent injunction." These findings suggest the vital question in this case. There is no contention that to require the plaintiff to lower its tracks at Twenty-first street so as to conform to the established grade of the paving is in itself an unreasonable hardship. It is only because the plan of the drainage and sewerage system is supposed to be defective and because of the results anticipated in that respect that complaint is made.

"The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety is inherent in the sovereignty of the state, and cannot be bartered away by contract or otherwise. Such power may be asserted directly by the legislature, or may, in the absence of constitutional restrictions upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The power of the legislature over private property is not absolute. But, while it cannot at will impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the courts will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the lawmaking power of the government respecting the wisdom or necessity of particular measures." *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549. These principles are peculiarly applicable to the case at bar. This court cannot say as matter of law that, by establishing the grade of the proposed paving at the natural grade of the surface of the ground, the city authorities have exceeded their power, unless it so clearly appears that thereby the rights of others have been seriously injured and that such injuries were so wholly unnecessary that no reasonable mind could entertain a contrary belief. If the sewerage system is sufficient to carry off the water and substantially prevent it from accumulating on the plaintiff's tracks, as it is required to construct them, no substantial injury has been done the plaintiff. The case then resolves itself into the question as to the plan and construction of the drainage system.

The paving district organized by the ordinance, known as No. 217, includes Twenty-first street from Vine street to Y street, and Y street from Twenty-first to Twenty-seventh streets. The plaintiff's complaint is in regard to the conditions existing by the established grade at the intersection at Twenty-first and Twenty-second streets with Y street. At this point the established grade is only a fraction of a foot above the natural surface. The only evidence

on that point that we have found in the record is in the testimony of the assistant engineer, who testifies that it is from 1/10 to 4/10 of a foot above the natural surface. The tracks of the plaintiff, if the action of the city is upheld, will have to be lowered to about the natural surface at that point. It is contended by the plaintiff that the grade at that point is low, and ascends both toward the east and toward the west, thus forming a "pocket" at that place that will, in times of even ordinary rains, be filled with water so as to cover the tracks of the plaintiff, as well as a considerable section of the surrounding territory, and that this will be so great an injury to the plaintiff and to lot-owners as to make the action of the city in so establishing the grade so unreasonable as to be void. The plaintiff produced and examined five expert witnesses, and the case rested upon their testimony. The principal question investigated was whether the city had adopted a proper and feasible sewerage system for that locality. Mr. Towl, an engineer of some considerable experience, who is now employed in that capacity in the city of Omaha, and who examined the situation here on two different days before he testified, stated that the system adopted by the city in that locality is not practicable or feasible; that Y street at the intersection of Twenty-first street ought to be elevated, so as to make a continual slope from east to west. He stated his reasons and his conclusions quite at large, and his evidence no doubt seems quite plausible to a lawyer who is not an expert in those matters. His principal objection is to the openings into the sewer. He testifies that they are not large enough, not in the right shape, and are not properly located. His evidence is supported emphatically by Mr. Hicox, who seems to be a very competent engineer, and who looked the situation over just before he testified. He is also supported in a general way, but not so emphatically, by other competent engineers. On the other hand, Mr. Bates, the assistant city engineer of Lincoln, testified fully in regard to existing conditions, and in regard to the plan and conditions of the present system of sewerage, and also to some

extent as to proposed or contemplated changes and additions to the sewerage system. He has been in his present position as assistant engineer for some time, and shows in his evidence a thorough knowledge of the conditions existing and of the sewerage system as it is already constructed, as well as contemplated additions thereto. His evidence as to the elevations of the natural surface throughout that part of the city and of the established grade in question was very full and complete, and is the evidence upon these points in this case without contradiction. It appears from his evidence that the natural surface of Y street descends gradually from the east to Twenty-first street, and then rises for more than 200 feet. At 475 feet west of Twenty-first street the elevation is about three feet above Twenty-first street. This rise of ground, called a knoll in the evidence, extends about 100 feet north and about 200 feet south of Y street.

There is an 8-inch sanitary sewer on Y street at the crossing of Twenty-first street, and a 15-inch storm sewer, which empties into a 21-inch sewer about a half block west of Twenty-first street. This sewer continues west to Seventeenth street, and connects with the main sewer, which runs north to Salt creek. It also connects at Seventeenth street with an 18-inch sewer, which runs south 200 feet to Antelope creek. The fall of the sewer is one foot to a thousand. If the city authorities and the engineer are making the mistake that some of this evidence would indicate that they are making, it is indeed a very serious matter. If their sewerage system is wrongly planned and improperly constructed so as to unnecessarily overflow the paving of this street when completed and cover the tracks of the plaintiff and the surrounding lots with water, and if these mistakes and defects cannot be remedied by the city, it would seem that such a construction would subject the city to damages that it is well worth while for the authorities to pause and consider.

In *City of Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379, the supreme court of that state, after stating the

facts in the case, said: "Under such a state of facts, we think the well-settled rule of law is that the city's right to graduate its streets or alter the grades thereof is not an absolute one, to be exercised at its option, regardless of its effect upon others, but it is a power which must be reasonably exercised with reference to the rights of parties interested." In that case the city raised the grade of the street where the railroad company's tracks were located to such an extent, as stated by the court in the opinion, "as to absolutely destroy the franchise." The city raised the grade above the natural surface, and "at the same time the city raised the grades of other streets in the vicinity which were crossed by the railroad tracks aforesaid to such an extent as to make it impossible for the railroad companies to reconstruct their tracks upon said right of way." The purpose of the city appears to have been to compel the railroad company to entirely abandon its location, without providing any other location for its tracks.

There might be a case in which it could be so clearly demonstrated that the plan adopted was so absolutely impracticable that a court would be justified in interfering, but planning and adopting sewer systems is not a judicial matter, and the law leaves such matters to the city council as they may be advised and assisted by their engineers. If the property owners are damaged by the change of grade, the law affords them a remedy, but not by injunction. The evidence is conflicting as to the feasibility of the plan of drainage which the city had adopted. If it should prove inadequate, the mistake will undoubtedly be corrected and the damages caused thereby liquidated.

Section 5942, Rev. St. 1913, provides: "If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley or public way or ground of any kind, or any part thereof," the public authorities and the company may "agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if such parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such

road, street, alley or other public way or ground, such company may appropriate" the same by condemnation. The plaintiff construes this statute in these words: "If no contract had been made at that time, plaintiff could, by condemnation proceedings, have taken so much of Y street as was necessary, upon making compensation to the city and abutting owners, and as thus condemned, under the statute quoted, and so far as it took for its own purposes, the city would lose the power or control of the location of the road and its grade."

Plaintiff says: "Even now plaintiff (if it cannot 'agree' with the city) can condemn and maintain its tracks at the elevation sought, under the statutes of the state, although the physical conditions were not sufficient to justify the maintenance of its present elevation. Wherever an elevation is reasonably necessary for the maintenance and operation of the road, that elevation may be secured, first, by contract, if possible, but, failing, in that, by condemnation. For, when plaintiff has once condemned a right of way in the street and paid for that right, the city is powerless to prevent the maintenance of the very right it has paid to secure; and its right under the contract is precisely the same. The purpose of this legislation was to confer added power upon the municipality. Without it, the city could have regulated the entrance of a railroad and the occupation of its streets, over which it had full control. The legislature therefore intended that the city should have power by 'agreement' to surrender control of the streets, or, failing to agree, the railroad should have the right to condemn, regardless of the city's control. The statute therefore authorized the city to surrender its control."

It seems strange that any one should so construe the statute. Can it be supposed that a railway company can select any street of a city it may choose and by condemnation or any other process obtain control thereof? Can it place any tracks and grades therein it may see fit, and maintain them? The city under the statutes has entire control of the streets. If the statute authorizing condem-

nation of a street by a railway company means anything more than to give it the means of having the pecuniary damage to the city and property owners fairly adjusted when agreement is impossible, it cannot, when considered with other statutes, or when considered in the light of the general policy of the state, be intended to allow a railway company to select at will the street or streets of a city upon which it will lay its tracks, or to give it any right in any street, except subject to the control and regulation of the city, and subject to the equal right of the public in the use of the street.

The statute also provides that the city shall have power: "To regulate levees, depots, depot grounds and places for storing freight and goods, and provide for and regulate the passing of railways through the streets and public grounds of the city, reserving the rights of all persons injured thereby." Rev. St. 1913, sec. 4422.

"To compel railways to conform tracks to grades at any time established, and if lengthwise in a public way to keep them level with street surface, to compel railways to keep streets open, construct and keep in repair ditches, drains, sewers and culverts along or under their right of way or tracks, and lay and maintain paving of their whole right of way on paved streets." Section 4471.

"To make all such ordinances, by-laws, rules and regulations not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this section granted, maintaining the peace, good government, and welfare of the city, its trade, commerce and manufacturies." Section 4473.

"The mayor and council shall have supervision and control of all public ways and public grounds within the city, and shall require the same to be kept open, in repair and free from nuisances." Section 4475.

"The mayor and council shall have power by ordinance to provide for grading or repairing of any street or public way, construction, renewal or repair of bridges, culverts and sewers." Section 4523.

Under these statutes a railway company cannot select any street of a city that it chooses and grade its tracks to any extent it may desire. The city has general control of its streets and of the grades thereof. It is not necessary to determine in this case the exact limits of the rights and powers of a railway company under section 5942. The franchise ordinance under which the plaintiff laid its tracks on Y street itself provides that the tracks shall conform to grades established or which might thereafter be established. Establishing the grade of Y street at or near the natural surface of the street is not necessarily unreasonable. That the plan of drainage adopted leaves Y street lower than adjoining streets does not necessarily make the plan impossible or impracticable. If the sewers already laid or contemplated are improperly constructed or are insufficient, it does not necessarily follow that these defects cannot be remedied. The presumption is that the city will provide ample drainage for its streets. We cannot say from this evidence that the plan adopted is so clearly impossible as to require the courts to interfere with the discretion and judgment of the city authorities.

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

REVERSED AND DISMISSED.

ROSE, J., not sitting.

BARNES, J., dissenting:

I cannot concur in the majority opinion. The findings contained therein and the evidence show beyond question that Y street from Eighteenth to Twenty-third is in low ground and is subject to occasional overflows from flood-waters, especially back-waters from Antelope creek, which have interfered with the operation of the plaintiff's track at that point; that, in reliance upon the profile and its right to maintain its track at the elevations shown thereby, it has extended its road beyond the city limits seven miles, has expended a large sum of money in so doing, and since 1906 has operated its road, serving a portion of the city and outlying districts not reached or served by any other

railway, and has been carrying about 1,100 passengers daily; that there is a low pocket at Twenty-first and Y streets which is boggy and marshy; that the plaintiff built its track across such marsh according to its profile, some 18 inches above the natural surface of the ground, and placed cinders and other material under the ties in the embankment and roadway to give it sufficient stability to make its operation safe and possible.

It further appears that fire hydrants have been inserted on Y street upon a grade level with the top of the plaintiff's track, and under the track is a sewer connection with manholes on a grade level with its surface; that Y street has been little used except for travel on plaintiff's trains; that the tracks of the Missouri Pacific Railway, on what would be X street if the same was opened, and those of the Chicago, Rock Island & Pacific Railway cross the plaintiff's tracks in a northerly direction along Eighteenth street a part of the way; and the elevations of said roads and tracks are not fixed or established by any ordinance, nor are said roads or the tracks of either of them required by ordinance to conform to the established grades of the streets where they intersect, but are several feet above the natural surface and the established grade of said streets; that the grade which requires the lowering of plaintiff's tracks 18 inches at the intersection at Twenty-first and Y streets will make Y street the lowest street from Dudley on the north to X street on the south, and will cause the surface waters to flow into and stand in Y street; that the defendant is about to interfere with the tracks of the plaintiff at Y street, and tear up and destroy and lower the same about 18 inches, and thus compel the plaintiff to bring its tracks down to the proposed grade, which will remove and destroy the foundation of the plaintiff's embankment; that in seasons of freshet when waters collect it will be impossible for the plaintiff to maintain and operate its track and railroad at such a grade.

It clearly appears that no adequate provision has been made for taking care of the flood and surface waters or securing their passage from plaintiff's track; that a por-

tion of the plaintiff's roadbed will thereby be rendered useless, and the public will be deprived of its train service; that the establishment of a grade on Y street 18 inches below the profile and elevation of the plaintiff's track will not benefit any one; that such grade is unnecessary, is contrary to the public interest, and a large portion of the property owners, some 42 in number, abutting on or adjacent to said street, have protested against the lowering or fixing of the grade below the profile and elevation of the plaintiff's tracks; that the defendant should be estopped to interfere with the plaintiff's grade, except for the public good and by an ordinance duly enacted in that behalf, and it appears that no ordinance whatever has been enacted by the city instructing or directing the plaintiff to lower its tracks on Y street to the grade thus established.

As I view the record, the foregoing facts are established by a preponderance of the evidence. The district court made certain findings which accord substantially with the foregoing, and I am unable to see how its findings could have been otherwise.

The supreme court of California in *Pacific Telephone & Telegraph Co. v. Eshleman,* 166 Cal. 640, 663, said: "But in the exercise of the police power in the regulation of public utilities, while each case which is rested upon the exercise of that power must be subject to its own individual consideration, there are certain fundamental principles which are not disputed and which govern all. The first of these is that this power goes merely to the *regulation* of the public utility, and that when an order passes beyond proper regulation it amounts to a taking of the property, and the order is then referable, not to the police power, but to the power of eminent domain. * * * Another principle, quite as important and quite as fundamental, is that 'taking' of property within the meaning of the constitution is not restricted to a mere change of physical possession, but includes a permanent or temporary deprivation of the owner of its use."

The police power can never be exercised to do more than to regulate the owner's use, and cannot extend to the taking of his property from him or dispossessing him of its use and control. A street is for the use, convenience, comfort, and safety of all the people of the city—for all the users of it. Therefore, before the rights of the users of a city can be interfered with, there must be some necessity for the interference of the police power by the state. After enumerating the extent and authority of the police power, the supreme court of the United States in *Lawton v. Steele,* 152 U. S. 133, said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. The facts of this case show that the plaintiff carries more than 1,100 passengers daily, not accessible to other roads; that the street is little used for travel or traffic aside from such use; that the interests of the public generally, as well as the abutting owners, have been disregarded and have not been considered; that the grade established at Twenty-first and Y streets will make a cesspool in floods and freshets. This is not only unduly oppressive upon individual lot-owners abutting upon said street, but upon the general public as well, and it is shown by the testimony that the accomplishment of that purpose is destructive and will defeat every purpose for which the paving is laid. The testimony discloses that to lower the grade of the plaintiff's railroad to the proposed street grade is an arbitrary interference with its private property. This should not be done under the guise of the exercise of police power.

In *City of Seattle v. Columbia & P. S. R. Co.,* 6 Wash. 379, the railroad was given the power of condemnation in

a public street, similar to that conferred upon railroads by the statutes of this state. The city of Seattle had authority to establish grades and regulate the laying of railways thereon, or to prohibit the same entirely. From the facts in that case it appeared that the railroad tracks had been destroyed by fire, and after such destruction the city undertook to raise the grade of the street. The court, in speaking of the power to improve and grade streets, said: "A city's power to improve and graduate its streets is undoubtedly a continuant power, not exhausted by its first exercise, and inalienable by the corporate authorities, and such authorities are the ones to judge of the expediency or necessity of its exercise. * * * That under this power the city's right to establish and execute a new and higher grade on Columbia street at the place in dispute follows as a matter of course must be taken with some degree of limitation." The court after saying that the raising of the grade would greatly impair the usefulness of the tracks, and thereby destroy the franchise and make it impossible for the railroad company to perform certain duties imposed upon it, the opinion proceeds as follows: "Under such a state of facts, we think the well-settled rule of law is that the city's right to graduate its streets or alter the grades thereof is not an absolute one, to be exercised at its option, regardless of its effect upon others, but it is a power which must be reasonably exercised with reference to the rights of parties interested. It cannot be exercised to the extent of working a destruction of such a franchise previously granted. This would amount to an unauthorized taking of property; and none of the cases cited by appellant, in our opinion, support such contention, as none of them go to the extent of holding that the city may so alter and change the grades of its streets as to work a destruction of a valuable property under such circumstances, but the right to change the grades of streets is sustained upon the ground that the same may be done consistent with the preservation of rights previously acquired by others."

In *Houston & T. C. R. Co. v. City of Dallas,* 98 Tex. 396, 419, 70 L. R. A. 850, 863, the court sums up the question

as follows: "If it be true that there is to be no benefit to the public from the proposed change, or a benefit which is inconsiderable when compared with the detriment to be suffered by the respondent, who will say that it is just and reasonable to subject respondent to such expense and loss as is averred? * * * When it is found that a proposed action is to be fraught with such consequences as those averred in the answer, a public exigency correspondingly great and urgent should be required in its support."

It is said in the majority opinion that the city had no power, by contract or otherwise, to alienate its right of control over its streets. It must be remembered, however, that, when the plaintiff sought to enter the city of Lincoln with its railroad and construct its tracks therein, the statutes of this state gave the plaintiff the right to condemn its right of way through the streets of the city in case no agreement in relation thereto could be made with the city council. Recognizing this fact, the council entered into an agreement with the plaintiff by which it was authorized to construct its tracks along Y street, and while the city could not, by contract or otherwise, wholly abandon its right to the control of its public street, still it had the power to contract with relation to the reasonable use thereof, and, having entered into such a contract, it should be required to abide by its terms, unless there has been a change of conditions such as requires it to abrogate the contract and resume the exercise of its power of control over the street in question.

As I view the record, no such public necessity has been shown, and it not appearing that the district court erred in its findings and decree, but on the contrary it appearing by the findings set forth in the majority opinion, and by the undisputed evidence, that the judgment of the district court was right, I am of opinion it should be affirmed.

# KEARNEY WATER & ELECTRIC POWERS COMPANY, APPELLEE, v. ALFALFA IRRIGATION DISTRICT ET AL., APPELLANTS.*

FILED OCTOBER 30, 1914. No. 18,355.

1. **Waters: IRRIGATION: APPROPRIATION.** Prior to the irrigation statute of 1889 (laws 1889, ch. 68), our law provided no method of making a claim of appropriation of water except the construction of works in which to divert the water and diverting the same or applying it to a beneficial use, and the appropriator was not required to otherwise declare the amount of his claim until his right was challenged.

2. ———: **APPROPRIATION.** After the act of 1889 an appropriator whose right was established by the completion of his works for appropriation, and who desired to increase the amount of his appropriation, must proceed under that act. The amount of his prior appropriation was limited to the capacity of his works as completed when the act of 1889 took effect and diverting and applying the water within a reasonable time.

3. ———: ———: **PRIORITIES: ESTOPPEL.** Subsequent appropriators, and all persons claiming under them, were bound to take notice of the rights of prior appropriators which accrued before the act of 1889. If subsequent appropriators proceeded to construct their works for the diversion and use of water, prior appropriators might assume that such works were intended to be subject to their prior appropriation, and they would not, by their silence while subsequent works were being constructed, be estopped to assert the priority of their appropriation.

4. ———: ———: ———. The act of 1895 (laws 1895, ch. 69) required the state board to proceed and determine all appropriations of water recorded under prior acts, and the act of 1911 (laws 1911, ch. 153) extended that provision to all appropriations whether or not recorded. An appropriation under the act of 1877 (laws 1877, p. 168) which had not been determined by the board was not affected by adjudications of subsequent appropriations.

5. ———: ———: **"REASONABLE TIME."** Under the act of 1911, as amended in 1913 (Rev. St. 1913, sec. 3412), one who has constructed a canal for the purpose of carrying water for hire to be used upon the lands of others, and is ready and willing to furnish the water to such landowners as will take it, has made the only application of water to a beneficial use that he can make, and his right to an appropriation continues as a developing right for a

*Opinion modified. See opinion, p. 119 post.

reasonable time to enable the landowners to apply it to all lands along the canal for which the water was originally appropriated. What is reasonable time will depend upon the conditions and circumstances of each particular case.

6. ———: ———: ———. This appropriation having been made under the law which permitted appropriations without actually applying it in any specified time, the plaintiff should be regarded as having appropriated water, within the limits of the capacity of its works, for lands under its ditch to which the water was applied within a reasonable time.

7. ———: ———: NOTICE. Appropriations of the water of the state can only be made of water not previously appropriated; and when an appropriation of water has been legally made, and the law at the time fully complied with, subsequent appropriators must take notice thereof. It is not necessary that a prior appropriator should personally notify such subsequent appropriators of his prior rights.

8. ———: ———: VESTED RIGHTS. The act of 1877 (laws 1877, p. 168) made no distinction between the use of water for irrigation and its use for power purposes. Both were equally protected under the act of 1889. Appropriations for power which were completed under the act of 1877 became vested rights and could not be taken for any purpose without compensation.

9. ———: ———: ADJUDICATION. The provision of the act of 1911 (laws 1911, ch. 153, sec. 21) that "no permit to irrigate any land shall be allowed unless the owner or owners of such land shall give consent to the same in proper form" should be applied by the state board when adjudicating appropriations under prior acts; and in this case, begun soon after the act of 1911 took effect, the state board was right in allowing the applicant to obtain and file the consent of the owners of land under the ditch while the proceedings were pending before the board.

10. ———: ———: REGULATION. The use for which water is appropriated must be a reasonable use. The right to use the water so appropriated must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use without any benefit to any one. The state board will by regulations from time to time allow subsequent appropriators such use of the water as will not substantially deprive the prior appropriator of his beneficial use thereof.

11. ———: ———: ———. The determination by the state board of the amount and priority of an appropriator is without prejudice to such subsequent rules and regulations as will insure a proper use of the rights so determined.

12. ———: ———: APPEAL: EVIDENCE. The evidence is found to sustain the findings and decision of the state board.

APPEAL from the State Board of Irrigation. *Affirmed.*

*C. C. Flansburg, Beach Coleman, A. W. Lane, G. J. Hunt, Morrow & Morrow, Hazlett & Jack, E. C. Hodder, E. A. Cook, J. G. Beeler* and *Wilcox & Halligan,* for appellants.

*John N. Dryden* and *Warren Pratt, contra.*

SEDGWICK, J.

The irrigation act of 1895 (laws 1895, ch. 69, sec. 16) required "the state board at its first meeting to make proper arrangements for beginning the determination of the priorities of right to use the public waters of the state, which determination shall begin on streams most used for irrigation, and be continued as rapidly as practicable until all the claims for appropriation now on record shall have been adjudicated." It seems that the legislature of 1911 amended this section and reenacted the requirement so that the board should proceed with the determination of priorities of rights in the public waters of the state, whether of record or not. Laws 1911, ch. 153, sec. 15.

It does not appear that the rights of the plaintiff, Kearney Water & Electric Powers Company, had been adjudicated before the 27th day of December, 1911. There is attached to the record a paper purporting to be a notice to plaintiff to file its claim with the board for adjudication. It is dated September 19, 1911, but is not signed, nor has our attention been called to any evidence that it was served upon plaintiff. On the 27th day of December, 1911, the plaintiff filed with the state board its petition, alleging an appropriation of water from the North Platte river of more than 500 cubic feet per second, and asking that its priorities of right be determined, protected and enforced. The appropriators of water in that water division were notified, and a hearing had before the state board of irrigation, highways and drainage. The board found

that the plaintiff had appropriated 140 cubic feet per second for water-power purposes under a 55.5 feet head and 22 cubic feet for irrigation purposes, and "that the priority of the appropriation dates from the 1st day of September, 1886, on or before which date the works were completed and the appropriation perfected by reason of applying the water to beneficial use." None of the parties to the litigation was satisfied. Nearly all have taken appeals or cross-appeals to this court.

It is contended that the plaintiff is estopped to claim priority of appropriation because: (a) It did not comply with the act of 1889 by posting notice; (b) it never had its claim adjudicated under the act of 1895; (c) it has never asserted any right to the waters of these streams until it filed this claim; (d) these objectors have been continually operating their canals, and communities live and subsist by reason of irrigation, extending 250 miles along the North Platte and 100 miles along the South Platte; (e) the North Platte river runs sometimes as low as 50, 20 or 32 cubic feet, and all of this would be lost by absorption or evaporation before it could reach plaintiff's ditch. In such case this order would prevent defendants from using the water and no good would result to plaintiff. The brief of the Tri-State Land Company assigns error as follows: "(1) The board erred in granting any water for irrigation purposes, as no water rights have ever attached to any specific land, nor has any landowner consented thereto, nor any land, except 14 acres belonging to the state, been irrigated successively prior to the year 1902. (2) The proof shows that only 66 2/3 cubic feet per second were employed for power purposes prior to 1889, and the board erred in granting anything in excess of that amount for power purposes. (3) The board erred in granting any water for power, with a priority superior to that of irrigation-users higher up the river."

In 1877 a statute was enacted giving corporations organized "for the purpose of constructing and operating canals for irrigating, or water-power purposes, or both," the right of eminent domain. The act declared such

canals "to be works of internal improvement." Laws 1877, p. 168. In 1889 a statute was enacted entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes, and to repeal (the act of 1877)." Laws 1889, ch. 68. This act provided: "A person, company or corporation desiring to appropriate water must post a notice in writing in a conspicuous place at the point of the intended diversion." Article I, sec. 8. A failure to comply with this and other requirements "deprives the claimant of the right to the use of the water as against a subsequent claimant who complies herewith except as provided in the next section." Article I, sec. 12. Sections 13 and 14, art. I, are: "(13) All ditches, canals and other works heretofore made, constructed or provided by means of which the waters of any stream have been diverted and applied to any beneficial use must be taken to have secured the right to the waters claimed to the extent of the quantity which said works are capable of conducting and not exceeding the quantity claimed without regard to or compliance with the requirements of this chapter. (14) Persons who have heretofore claimed the right to water and who have not constructed works in which to divert it, and who have not diverted it nor applied it to some useful purpose, must, after this title takes effect, and within ninety (days) thereafter, proceed as in this title provided, or their right ceases." Section 11, art. II, provides: "Nothing in this chapter contained must be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this chapter." Under these provisions of the act of 1889 one who had before that time "claimed the right to water," and had "constructed works in which to divert it," and had diverted and applied it to some useful purpose, was given the right of an appropriator. The act provided no other means of determining and fixing the extent and limitations of those rights. The policy of the act was to encourage the construction of works in which to divert water for irrigation and power

purposes. The capacity of the works constructed would afford evidence of the amount of the appropriation.

As the statute prior to the act of 1889 prescribed no method of making a claim of appropriation except the construction of the "works in which to divert" the water and diverting it or applying it to some beneficial use, the appropriator was not required to do more until his right was challenged. If he then claimed the amount which the works which he had constructed were capable of diverting to a beneficial use, and which he had diverted or so applied, his appropriation of that amount of water was complete. It does not appear that the plaintiff's rights were challenged until these proceedings were begun before the state board. The amount of plaintiff's appropriation then was the amount which the works which it had constructed before the act of 1889 were capable of so diverting, and which it had diverted or applied. If the plaintiff desired to increase its appropriation after the act of 1889, it would be required to comply with that act. It does not appear that the plaintiff ever made any appropriation under the act of 1889. The amount of its appropriation is therefore limited to the time when that act took effect. But, as to that amount, its right was already fixed, and it was not necessary to take any action under the act of 1889. The construction of its works and diversion and application of the water was all the notice of rights which the act of 1877 required, and was a sufficient assertion of its rights until those rights were challenged.

In *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121, it is said in the first paragraph of the syllabus that, before the act of 1911, "one who has constructed a canal for the purpose of carrying water for hire to be used upon the lands of others, and is ready and willing to furnish the water to such landowners as will take it, has made the only application of water to a beneficial use that he can make, and his right to an appropriation continues as a developing right until all lands along the canal for which the water was originally appropriated use the same; provided, formerly, that the water be applied to the land

within a reasonable time, and, now, within the time limited by statute." The rule that it must be applied within a reasonable time is principally for the benefit of the landowners and to prevent fraudulent appropriations of water. It would often happen, as in this case, that such lands could not be watered from any other source. In some cases the circumstances and conditions may require a longer time to apply the water to all the land for which it is appropriated, and in other cases a shorter time would be reasonably sufficient. This appropriation having been made under the law which permitted appropriations without actually applying it in any specified time, and this proceeding having been begun within a few months after the act of 1911 took effect, the plaintiff should be regarded as having appropriated water, within the limits of the capacity of its works, for lands under its ditch to which the water can be applied and was applied within a reasonable time. These defendants, and all persons contracting with them, were bound to take notice of the appropriation of the plaintiff so far as it had been perfected under the act of 1877. Those rights were expressly preserved by the act of 1889, and any one interfering with them did so at his peril.

The objection that plaintiff saw defendants constructing ditches, etc., and did not notify them of its claim was raised and disposed of in *McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 115. The court say: "As heretofore indicated, the inference is warranted that the defendants were seeking to obtain a right to the use of the water as appropriators under the law as then existing, subject, of course, to the plaintiff's prior right. This of itself, we think, disposes of the question of estoppel."

There is no merit in the objection that plaintiff never had its claim adjudicated. Under the statute of 1895 any appropriator might have his claim adjudicated by the state board. In such a proceeding all appropriators in the same water division should be made parties. No appropriator who has neglected to have his claim adjudicated, or has

failed to make other appropriators in the same water division parties thereto, can obtain any rights as against other appropriators whose rights have not been so adjudicated. The act of 1889 (laws 1889, ch. 68, art. I, sec. 7) provides: "As between the appropriators the one first in time is first in right." This, of course, would apply to all appropriators at that time either under that act or the prior statute. Those who appropriated water from the same source of supply, after the plaintiff had perfected its appropriation, did so knowing that the appropriator first in time is first in right. And those who contracted with such subsequent appropriators, either individuals, corporations or communities, could take no prior right.

The act of 1877 made no distinction between the use of water for irrigation and its use for power purposes. An appropriation for power purposes was regarded as favorably as for irrigation purposes. It was made in the same way, and an appropriation under that act for power purposes was recognized and protected by the act of 1889 equally with appropriations for irrigation. Our present statute declares that water for irrigation is "a natural want" (Rev. St. 1913, sec. 3369); and that, "when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes." Rev. St. 1913, sec. 3372. It is not necessary to determine in this case how these provisions of the statute are to be applied by the state board when conflicting applications for appropriation are pending. In any view, it must follow that vested rights of completed appropriations cannot be destroyed without compensation, and no condemnation proceedings have been attempted in this case. The state board in this case was not called upon to grant water for power. Its duty was to determine the validity and extent of an alleged completed appropriation. Under the present statute appropriations may be abandoned, and

the plaintiff's appropriation for power purposes should be regarded as abandoned, except so far as it had equipped itself to utilize it for that purpose when the act of 1889 took effect, or did so equip itself within a reasonable time thereafter. Its appropriation for irrigation purposes should be considered as abandoned, except so far as it was completed by the water being applied to the land in a reasonable time.

The act of 1911 provides: "No permit to irrigate any land shall be allowed unless the owner or owners of such land shall give consent to the same in proper form, duly acknowledged before some officer legally qualified to take acknowledgments." Laws 1911, ch. 153, sec. 21. It would seem that this provision is as effective when adjudicating prior appropriations as upon applications to appropriate. The plaintiff, while this proceeding was pending before the state board, procured the consent of certain landowners whose lands, it is claimed, can be watered from plaintiff's ditch, and it was the duty of the board to allow and confirm plaintiff's valid appropriation of water for the lands of owners so consenting. Before the act of 1895 water could be appropriated without applying it to any specified land; that is, one could appropriate water for irrigation, and afterwards "may use the same to irrigate such lands, as he may see fit." *Farmers Canal Co. v. Frank,* 72 Neb. 136. Since the act of 1895, in order to appropriate water for irrigation, the land to which it is to be applied must be specified. *Idem.* Frank's application was filed in 1902 and described no land. For this reason, the judgment of the district court, allowing his application, was reversed, but the district court was directed to remand his application to the state board with leave to amend. The state board correctly gave plaintiff opportunity to procure the consent of the owners of lands under the plaintiff's irrigation ditch as it was completed when the act of 1889 took effect, and confirmed its appropriation for the irrigation of the lands whose owners so consented, as well as its appropriation for power purposes.

The irrigation works of some of the defendants are located hundreds of miles above the intake of the plaintiff's canal. It is said that frequently during the summer months the river is dry at the plaintiff's intake, and to allow the water to pass the works of these defendants which could never reach the plaintiff's ditch would, in such case, be a vain thing. It would render thousands of acres of valuable irrigated land entirely barren and useless and without any benefit to the plaintiff. The question so presented is worthy of the most careful consideration of the state board. The use for which water is appropriated must be a reasonable use. The supreme court of the United States in *Basey v. Gallagher,* 20 Wall. (U. S.) 670, say: "Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." There is no doubt that this principle applies under our statute, and that it is the duty of the state board to prevent a wanton waste of the public waters of the state. This is a matter of administration. The board has determined the amount and priority of the plaintiff's appropriation. When nature supplies the water to satisfy such appropriation it must not be taken by subsequent appropriators to the injury of plaintiff. The state board should by regulations from time to time allow subsequent appropriators such use of the water as will not injure the plaintiff. The board should exercise a reasonable discretion. It is the policy of the state to preserve the public waters for the greatest benefit of all the people. A prior appropriator has the prior right to a reasonable use of the water so appropriated. But the plaintiff obtains that

right from the public for the use of the people, and must so use it as not to unreasonably injure the rights of another. Subsequent appropriators should not be refused the use of their appropriations unless such use substantially deprives the prior appropriator of his beneficial use thereof.

Such questions are not included in the findings and decision of the state board as contained in this record. As we have already observed, the board, as disclosed by this record, has only determined the amount and date of the appropriation of the applicant. The evidence upon the questions determined by the board is not as clear as might be desired. This court upon appeal cannot disturb the findings of the state board upon conflicting evidence unless it is clearly wrong. The statute allowing this direct appeal expressly declares: "The procedure to obtain such reversal, modification or vacation of any such decision or order upon which a hearing has been had before said board, shall be governed by the same provisions now in force with reference to appeals and error proceedings from the district court to the supreme court of Nebraska." Rev. St. 1913, sec. 3408. The plaintiff was a pioneer in attempting to develop the irrigation and water powers of the state. It, and those through whom it claims, had expended hundreds of thousands of dollars before these objectors entered the field. This, of course, will not excuse plaintiff for any failure to comply with the law. But the evidence is not so clear as to require us to interfere with this determination of the matter. The decision of the state board is therefore affirmed without prejudice to an application to the state board by any party for such further regulations as may be necessary to secure a just and reasonable use of the rights determined by this decision.

AFFIRMED.

LETTON, J., dissenting in part.

With the general principles stated in the opinion, I concur. My objection to the opinion is that it does not consider the evidence, but assumes that the state board decided the matter upon conflicting evidence, and that therefore

its decision should not be disturbed. What the board evidently did was to confirm the claims of the Kearney company to the amount of water which the evidence shows it was using at the time of the hearing. As I read the record, the evidence does not conflict in regard to the essential facts: That the construction of the canal was begun in 1882 and the first two miles were completed that year; that the first 12 miles were completed by September 1, 1883, and the canal entirely finished in or before June, 1886; that from 1886 until 1890 no more than 66 2/3 cubic feet per second was actually used for power purposes, and at no time until very recently more than 5 cubic feet per second for irrigation purposes in any one year. In the meantime the Minatare, Mutual, Winters Creek, Enterprise, Mitchell, Castle Rock, Tri-State, Belmont, and Logan Canal Companies and Irrigation Districts made approriations and diverted water to a beneficial use from the North Platte river many miles above the intake of the Kearney canal. In 1890 additional turbine wheels were placed in the Kearney canal for the development of power which, with these first installed, required 140 cubic feet of water per second.

The evidence shows, however, that the use of this increased power had been long contemplated before the actual installation of the latter wheels, and that the purpose to use the water necessary to develop the power from both sets of wheels had never been abandoned.

Soon after the completion of the canal, and continuously for a number of years thereafter, a fourteen-acre tract of land belonging to the State Industrial School was irrigated. There is no proof that more than 160 acres of land were irrigated during any one year until about 1900, when for five years about 350 acres in all were irrigated. From that time on water was sparingly used, until shortly before the hearing. The canal company had a reasonable time after the completion of the ditch wherein to use the water for irrigation. For 20 years that company failed to apply in any one year more than about 5 cubic feet per second to a beneficial use for irrigation purposes, and most

of the time a much smaller quantity. The most vital principle in the law of irrigation is that all appropriated water must be made to perform its full duty, and that no one shall fail to apply it and at the same time prevent those who seek and are ready to use it from applying it to a beneficial use. Having failed to apply more than this quantity of water to the land for such a length of time, the right to the use of water in excess of that amount for irrigation purposes ceased.

Applying the principles stated in the opinion to the undisputed facts, the appropriation for irrigation purposes should not have been confirmed for more than 5 cubic feet of water per second of time. The excess appropriation is of water enough to irrigate nearly 1,200 acres of land, and its effect may be to reduce the amount of cultivatable land under the appropriations of the appellants to that extent. The works of the appellants water an arid region as compared with that in which the Kearney canal is situated, and, if any doubt exists, it should be resolved in their favor. I, therefore, dissent from that portion of the opinion which allows such excess appropriation.

BARNES, J., joins in the dissent.

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## JOHN JONES, ALIAS WILLIAM STANSER, V. STATE OF NEBRASKA.

FILED OCTOBER 30, 1914. No. 18,638.

1. **Criminal Law**: CONFESSIONS: ADMISSIBILITY. In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made.
2. ———: INVOLUNTARY CONFESSION: ADMISSIBILITY. An involuntary statement or confession is not competent against the defendant for any purpose.
3. ———: ORDER OF PROOF: ADMISSIONS. Evidence that defendant has admited guilt or important facts should not be received for im-

peachment or rebuttal, but should, if material and competent, be offered in chief.

4. Witnesses: CROSS-EXAMINATION: IMPEACHMENT. A defendant cannot be cross-examined, and afterwards contradicted in respect to matters that are not admissible as part of the case.

5. ———: ———: INVOLUNTARY CONFESSION. If the defendant has signed an involuntary written confession, it is erroneous to allow him to be cross-examined, for the purpose of impeachment as to the contents of that confession.

6. *Taylor v. State*, 37 Neb. 788, disapproved.

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

*Carroll H. Wright, Will N. Johnson* and *John A. McKenzie*, for plaintiff in error.

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

SEDGWICK, J.

The defendant, who is the plaintiff in error here, was found guilty of murder in the first degree in the district court for Douglas county, and his sentence was death. The case appears to have been carefully tried, but there are two serious questions presented by the record.

1. The evidence shows that, when the defendant was arrested for the crime, he was taken to the county jail and there in the presence of three officers he signed a written confession or statement. After the defendant had testified in his own behalf, he was questioned by the attorney for the state in regard to statements he was supposed to have made at that time to these officers, which statements were supposed to be inconsistent with his testimony in his own behalf, and, having denied that he made such statements, the officers were examined in rebuttal, and testified to certain admissions or statements made to them by the defendant. There was no proof that the alleged statements were voluntary on the part of the defendant. Counsel for the defendant insist that this amounted to proof of an alleged confession by the defendant while he was in cus-

tody on the charge of murder in the first degree, and that to receive such evidence was erroneous and prejudicial. It is contended by the state that the evidence tended only to prove an admission of a material fact inconsistent with the evidence of the defendant, and that, the proper foundation for impeaching testimony having been laid, the evidence of the officers was competent. The evidence that had been offered by the state in chief tended to prove that the defendant shot and killed the deceased in the pool hall, which was kept by the deceased, that the defendant had been playing a game of pool with certain parties, and that after the game a dispute arose between the defendant and the deceased in regard to paying for the game, and after a few words had passed between them the defendant left the hall, and in a few minutes thereafter returned, and, standing in the door by which he entered, asked the deceased to return the money which he had paid, and, being refused, he immediately shot and killed the deceased. The defendant admitted that he shot and killed the deceased, but insisted that it was during a quarrel and was in self-defense. After the defendant had testified to circumstances tending to support the defense, the following appears in the record:

"Q. Now, Mr. Jones, do you remember after you were arrested and brought back to the city of Omaha and taken to the city jail that you had a conversation in the presence of Stephen Maloney, W. T. Devereese, and Thomas Ring, with reference to this shooting? A. Conversation, no, I didn't have a conversation. Q. You had a talk with them? A. No, sir. Q. You had no talk with them at all? A. No, sir. Q. Do you remember signing anything at that time? A. Yes, sir. Q. In the presence of Steve Maloney, Thomas Ring and W. T. Devereese? A. Yes, sir. Q. And was that statement in your handwriting? A. No, sir. Q. It was read over to you, was it not? A. Yes, sir. Q. Do you remember stating to the officers at that time—

"Mr. McKenzie (defendant's attorney): I object to that as immaterial, irrelevant, and incompetent, and not the

proper way to examine a witness in reference to the contents of a statement he has signed.

"The Court: The form of your question is not proper. If you are laying foundation for impeachment you ought to ask him if he did not make a certain statement. To which ruling the state excepts.

"Q. Did you not at that time make this statement, with reference to the manner in which the shooting occurred at the pool hall at 1004 Capitol Avenue on the night of the 18th of October, 1913, did you not make this statement with reference to that: 'I stepped outside the door and asked again for my money, and he would not give it to me, and I went down to my room, 922 Capitol Avenue, and got my pistol from Mrs. Callia, and came back to Sam's pool hall; then I asked him for my hat and money, and he gave me my hat, but kept the money, and told me to go out as quick as I could.' Did you make that statement?

"Mr. McKenzie: I object to that as immaterial and irrelevant and incompetent, and not the proper way to examine a witness with reference to a statement which he is presumed to have made. Objection overruled. The defendant excepts.

"Q. Did you make that statement on December 11, 1913?

"The Court: I do not understand you are calling for the contents of a written instrument now, are you?

"Mr. Piatti (prosecuting attorney): Yes; he made that statement, and it was placed in writing and he signed it afterwards.

"The Court: I do not think that is right.

"Mr. Piatti: I am asking first if he made the statement to the officer.

"The Court: That is a different thing.

"A. No, sir.

"The Court: With the understanding you are not calling for the contents of a written document, but simply for a part of a conversation that occurred, I will permit the witness to answer.

"Mr. McKenzie: I understand counsel is reading from a statement.

"Mr. Piatti: That is simply to refresh my memory with reference to the statement.

"The Court: He can formulate the question to suit himself. The defendant excepts.

"Q. Did you make that statement in the presence of these officers on that date? A. No, sir. Q. In the city jail, city of Omaha? A. No, sir.

"The Court: Let us see what the state of the record is. (Record read by reporter.)

"The Court: If you are going to follow this up by way of impeachment, they would be entitled to that statement on the examination of the officers."

The most important question of the case was as to the grade of the guilt. If the crime was done with deliberation and premeditation as well as malice, it would be murder in the first degree and would justify the extreme penalty of death by electrocution. If it was done in the excitement of a quarrel and without premeditation and deliberation, the penalty of death could not be imposed. If, after the dispute between the defendant and deceased, the defendant left the hall to procure a revolver, and, after having procured it, returned and without further controversy killed the deceased, the fact of deliberation and premeditation would be established. The question, therefore, propounded to the defendant was in regard to an alleged admission that the crime was murder in the first degree. These officers, while the defendant was in their custody and in the jail, had caused this admission to be reduced to writing and had induced the defendant to sign the same. This writing, it is conceded by all, was a confession of guilt, and, holding this confession in his hand to refresh his memory, as he stated, the prosecuting attorney repeated to the defendant a part of the substance thereof and asked him if he made such statement in the presence of these officers. There was no evidence that this was a voluntary confession. Indeed, it would be difficult to establish it as such under the circumstances. If it was

intended to use the statement or confession as evidence against the defendant, it should have been offered as evidence in chief, and a confession cannot be used as evidence, unless it is first shown that it was voluntarily made. If the confession was competent, the writing itself would be the best and only admissible evidence.

"The reason for the rule excluding involuntary confession is not based on the thought the truth thus obtained would not be acceptable, but because confessions thus obtained are unreliable. The rule is in the interest of safe and reliable evidence. * * * The essence of the rule is that when the confessions are made the conditions as to hope or fear are such as to make them unsafe as evidence." *State v. Novak*, 109 Ia. 717, 729.

Mr. Wigmore says: "The ground of distrust of confessions made in certain situations is, in a rough and indefinite way, experience. There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported; but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence." 1 Wigmore, Evidence, sec. 822.

An involuntary confession of guilt is incompetent for any purpose. The reason of this rule of law is well stated by the supreme court of Wisconsin in these words: "When the defendant was asked if he made that confession, and denied it, the same witnesses who extorted the confession, and whose testimony was disallowed on that account, are allowed to testify to the confession, however wickedly or wrongly it was obtained, on the exceedingly narrow theory that it is not admitted *as a confession*, but merely to *contradict* the witness. The confession is allowed to go to

the jury, and have its effect in convicting the defendants, and override the ruling of the court that it was inadmissible as evidence against him, and for such a petty reason. The confession is just as objectionable as evidence, and as incompetent and hurtful, when offered in one way as in another. If no other evidence on the ground of contradicting the defendant as a witness could be found, he had better have gone uncontradicted than that his legal rights as a prisoner should be so violated and his conviction obtained by such unlawful testimony. The object is to get the confession in evidence. It cannot be done *directly,* but it can be done *indirectly.* It cannot be used to convict, but it can be used to *contradict,* the defendant, and in that way it is used to convict him all the same. We cannot adopt such a principle or practice in the administration of criminal law. It is unreasonable as well as unjust. This evidence was inadmissible on the familiar ground that a witness cannot be cross-examined and contradicted in respect to matters not admissible in evidence as part of the case. Wharton, Criminal Evidence (10th ed.) sec. 484. That confession first went to the jury and produced its effect as evidence, before it was excluded by the court, and finally goes to the jury as competent evidence by way of contradicting the defendant. It seemed impossible to keep it out, however objectionable or incompetent it was as evidence against the accused." *Shephard v. State,* 88 Wis. 185.

The brief of the attorney general admits that a confession of guilt not shown to be voluntary is inadmissible in evidence, but contends that the statement proved was not a confession of guilt, but merely the admission of an important fact which tended, in connection with other evidence, to show the guilt of the accused. This contention is well answered in the brief of the defendant's attorney as follows: "The state admits that a confession was made, but seems to distinguish between the oral and written expression of it. There appears this statement in the brief of the state: 'He went further, as is shown by the cross-examination of the officers who wrote out a complete con-

fession of the crime; this confession was not introduced in evidence because it was not necessary in establishing the man's guilt.' If the writing was a confession, then surely the preliminary statement that was incorporated in that writing was also a confession. If any part of it was a confession, then the whole story would be, and it would all receive the same taint and all be subject to the same strict rules of proof. The mental attitude of the accused is the same throughout the entire story, whether the story is given orally or in writing, and all the statements are equally untrustworthy. Counsel for the state at the trial below seemed to have a similar attitude. They considered that this statement was part of a confession to the police officers and refrained from putting any part of this statement in evidence as direct testimony. They were acting under an erroneous assumption that a confession could be used indirectly for purposes of impeachment without any preliminary proof of its voluntary character."

In *Walrath v. State,* 8 Neb. 80, the law is said to be: "Any circumstance tending to establish the prisoner's guilt may be *proved,* although it was brought to light by an admission of the prisoner, inadmissible, *per se,* as having been obtained by improper influence."

This case is cited in *Taylor v. State,* 37 Neb. 788, as tending to justify the conclusion reached in the latter case, but, of course, this statement of the law had nothing to do with the proof of admissions or confessions as such, but only as to the proof of facts that may have been discovered because of such admissions, and that are capable of being proved by other and competent evidence. In *Taylor v. State, supra,* the sheriff testified that, while he had the defendant in custody, he told the defendant: "I thought if he had committed this murder and made a clean breast of it, and if there were others implicated, and if he would tell all about it and all he knew about it, that I did not think he would be hung." He then testified, among other things that the defendant said and did, that he, the defendant, "told him, Curtis, in my presence, that he delivered the gun to him at his gate after he had done the job;

that he started out and said to him, 'You started east with the gun from your gate.' " The words "had done the job" plainly related to the commission of the murder, and the court, in the opinion by Mr. Commissioner RAGAN, which seems to have been concurred in by the other commissioners of the court, said: "It is true that in the statement made by Taylor to Curtis the prisoner voluntarily admitted the killing of Woods with the gun; but this confession, if it should be called that, was not made to the sheriff." After the defendant had made several statements tending to implicate himself in the crime, which statements were made pursuant to the proposal of the sheriff to protect him against the death penalty, he, the defendant, while explaining facts to the sheriff which would show how the crime was committed, made the statement to Mr. Curtis, in the presence of the sheriff, which was plainly a confession that the defendant had committed the crime. If it was intended to decide that this evidence was competent because the statement was addressed to Curtis, instead of being addressed to the sheriff, we cannot approve of the decision nor follow it as a precedent.

In *McLain v. State,* 18 Neb. 154, the defendant was charged with larceny, and, when arrested, a part of the stolen property was found on his person. It appears from the opinion that the evidence objected to as proof of the confession was simply that the defendant gave the officers some information by means of which they found one of the stolen articles. The defendant had pawned a watch in Chicago, and, without telling the officers who had placed it there, he gave the officers "the name of the shop where it might be found." Of course, it was rightly held that the proof of this fact was not proof of a confession of guilt.

In *Burnett v. State,* 86 Neb. 11, it was held that certain statements made by the defendant did not amount to either confessions nor admissions of guilt, and it was held that they were improperly treated by the court in its instructions as admissions of guilt. The opinion, perhaps, does not make the distinction between "inculpatory statements"

and a confession or admission of guilt very clear and definite, but it is manifest that the statements of the defendant which were proved related only to facts which were not important of themselves but might help explain other circumstances involved in the case.

In the case at bar the prosecuting attorney held the written confession in his hand and read therefrom to the witness a very important part thereof, and asked the witness, "Did you make that statement?" When this was objected to, the court asked the prosecutor if he was "calling for the contents of a written instrument," and the prosecutor answered, "Yes; he made that statement, and it was placed in writing and he signed it afterwards." The court said that was not right, but said, "With the understanding you are not calling for the contents of a written document, but simply for a part of a conversation that occurred, I will permit the witness to answer." The defendant's counsel suggested that the prosecutor was "reading from a statement." The prosecutor admitted that he was, but said it was only to refresh his memory, and the court decided that "he can formulate the questions to suit himself." Counsel considered, and the court seems to have also, that the prosecutor could use any part of the confession he saw fit for impeaching the defendant as a witness, although the confession itself was incompetent as evidence. In this the court was clearly wrong. The evidence, aside from that erroneously admitted, is sufficient to sustain the conviction. In a case where the jury is not vested with the power to decide whether the punishment shall be death or life imprisonment, we would consider that the error was not prejudicial, but where it is impossible to determine the effect which this had in causing the jury to decide upon the extreme penalty of the law, rather than the lighter punishment, such an error must be rejected as prejudicial. Reversals for mere mistakes in trials which do not affect substantial rights are not favored, but where the balance sways between life and death every such right of the accused must be protected.

2. The court instructed the jury: "Malice is that state or condition of mind indicated by a wicked and malicious purpose which characterizes the perpetration of a wrongful act intentionally committed, and without lawful excuse or justification. It is that quality or frame of mind which prompts the unlawful act. This frame or condition of mind is denominated express or actual malice, and its existence, if it does exist, is to be inferred or found by the jury as any other material element in the case,—beyond a reasonable doubt." In reading this instruction the punctuation suggests that the words "beyond a reasonable doubt" limit "inferred" as well as "found by the jury," so that the two expressions are equal, and "inferred" is merely iteration, that is, has no real force or meaning in the sentence. If the comma were placed after the word inferred, and the subsequent comma and dash omitted, it might be understood to mean that malice could either be inferred or found as a fact by the jury, and that in the latter case it must be proved beyond a reasonable doubt. It is dangerous to give the jury instructions, the meaning of which may depend upon the position of a comma. When the instruction is read to the jury they might be given a wrong impression by emphasis and pause at the word inferred. As that word is capable of a wrong construction and meaning as used in this sentence, and adds nothing to the meaning if rightly understood, its use in this instruction was erroneous. As the judgment must be reversed for the reasons first discussed, it is not necessary to consider whether, in the light of the whole evidence, and the other instructions given, the error in this instruction was without prejudice to the defendant.

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

REVERSED.

BARNES and FAWCETT, JJ., dissent.

ROSE, J., not sitting.

# D. S. GILES & SON, APPELLEE, V. WILLIAM HORNER, APPELLANT.

FILED OCTOBER 30, 1914. No. 17,674.

1. **Fraud:** ACTIONABLE FRAUD. Ordinarily, where a vendee has an opportunity for the inspection of personal property, representations by the vendor as to the value of the same are regarded as mere expressions of opinion, and afford no basis for an action of fraud and deceit; but where such representations are based on special knowledge of the vendor, which he obtained or pretended to have obtained by invoicing the property, and are believed by the vendee, and acted upon by him to his injury, they amount to actionable fraud. *McKibbin v. Day*, 71 Neb. 280.

2. **Trial:** INSTRUCTIONS: PREPONDERANCE OF EVIDENCE. Where the plaintiffs sued the defendant for damages, and the court instructed the jury as to the amount of proof necessary to establish fraud: "You are instructed that, where a party alleges fraud or fraudulent representations in an action or trade, he must produce a stronger proof than would be sufficient to establish a mere debt. Every party is presumed to act and deal honestly, and it is incumbent on him who alleges such fraud or dishonesty to furnish proof sufficient to overcome the presumptions of honesty," *held*, that the instruction is erroneous because it requires more than a preponderance of the evidence to establish fraud.

3. **Fraud:** INSTRUCTIONS. Where the defendant set up fraudulent representations upon the part of the plaintiffs, who were seeking to recover damages in an action for an alleged breach of contract, and the court instructed the jury: "You are instructed that, if you find from the evidence that the defendant in this action had an opportunity to examine the stock of hardware, and that the was well acquainted with the same, having been in and about said stock every day and a number of times during the day, and that it was so located as to be convenient for him to observe the same, and that he could easily have ascertained the value of said stock, then and in that case you are instructed that it would not constitute any fraudulent representations in behalf of the plaintiff, if he had made statements relative to the value of said stock, and under such circumstances it will be your duty to find for the plaintiff and against the defendant," *held*, that the instruction was misleading and prejudicial, because it took from the jury the consideration of whether the plaintiffs represented to the defendant that they had made an invoice of the stock of hard-

ware, and by such representations induced the defendant to trade properties with the plaintiffs, when otherwise he might not have done so.

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

*Wilcox & Halligan* and *J. G. Mothersead,* for appellant.

*J. W. James, contra.*

HAMER, J.

The defendant, William Horner, appeals from a judgment of the district court for Lincoln county rendered against him and in favor of the plaintiffs, D. S. Giles & Son, in the sum of $625.44. The defendant in his brief alleges that the plaintiffs, who were partners, agreed in writing with the defendant to transfer to the defendant their stock of hardware at Wallace, Nebraska, in exchange for nine head of horses and colts, a piano, and a saddle and bridle, all to be furnished by the defendant and delivered to the plaintiffs, and, in addition, the defendant agreed with the plaintiffs to pay $660, bills against the business of the plaintiffs for goods sold and delivered to them. The defendant took possession of the stock of hardware, but he refused to take up the bills against the business, and claims that when the plaintiffs made the agreement with him they fraudulently represented the stock of hardware to be of greater value than it actually was; that the defendant and his wife, after the defendant got possession, took an invoice of the stock of goods and found it to inventory only $1,180; that Giles, in the presence and hearing of Horner, stated that he had inventoried the stock of goods the night before the trade was made, and that it inventoried about $2,200, not including some wire and other things in the implement shed; and that if these things were counted the inventory would amount to about $2,300. The plaintiffs deny making any representations concerning the amount and value of the goods in the store, but say that the night before the trade was made an *estimate*

was made of what the stock on hand was. After the defendant, Horner, took possession of the store and found, as he claims, that the goods inventoried less than he understood their value to be, he refused to pay the outstanding bills against the business, and he so notified the plaintiffs. There was a bill of $200 for woven wire. There was some dispute about the bargain concerning the woven wire, but it is undisputed that the defendant paid for it. If the plaintiffs represented that the stock would inventory $2,300, it would leave the defendant damaged in the sum of $1,120, less a remainder of $460 yet to be paid on the bills against the defendant, after taking out the item of $200 paid for the woven wire. In the answer of the defendant it is alleged that the plaintiffs had just taken an inventory of the stock and that they knew that the inventory then taken amounted to $1,300, and no more, and that, when the plaintiffs made their representations to the defendant that the stock was of the value of $2,300, they knew said representations were false, and that the inventory only amounted to $1,300; that the defendant believed the representations of the plaintiffs that the stock of goods was of the value of over $2,200, and, relying upon the truth of said representations, signed the agreement, which he otherwise would not have done. In the reply the plaintiffs deny that they represented the stock of goods to be of the value of $2,300, deny that they ever stated that they would guarantee the stock to be of the value of $2,300, and deny that they ever represented that an inventory of the stock had been taken. It is further alleged in the reply that the plaintiffs were about the store every business day during many months, and knew the condition of the stock, and knew its value, and that the plaintiffs were also familiar with the trade.

The first error alleged is the giving of instruction No. 9, which is as follows: "You are instructed that, where a party alleges fraud or fraudulent representations in an action or trade, *he must produce stronger proof than would be sufficient to establish a mere debt.* Every party is presumed to act and deal honestly, and it is incumbent on him

who alleges such fraud or dishonesty to furnish proof sufficient to overcome the presumptions of honesty." It is contended by defendant that "fraud is but one of the elements of a civil action, and as such it is established by a preponderance of the evidence."

In *Patrick v. Leach,* 8 Neb. 530, the court was requested to instruct the jury that they "will not be justified in finding that Patrick was guilty of fraud, unless the evidence on that subject shall satisfy their minds thoroughly. Evidence which might satisfy them in any ordinary action of debt is not sufficient. But the evidence which produces in the minds of the jury a clear, distinct, and positive conviction, in which they rest in confidence that they are right, will alone be sufficient to justify the jury in finding Patrick guilty of the alleged frauds." This instruction was refused and the plaintiff excepted. This court held that it was calculated to mislead, and that it was properly refused. This court said: "But the degree of proof required in an action for damages is merely a clear preponderance of the testimony establishing the fraud."

In *Kline v. Baker,* 106 Mass. 61, the syllabus states the point as follows: "In an action in which the plaintiff sought to rescind a sale on the ground that it was induced by the defendant's fraudulent representations, the defendant requested the judge to rule that stronger proof was required to prove the representations false than to prove an ordinary agreement. The judge declined to do so, and ruled that the rule of evidence was the same as in other civil cases; that fraud was not to be presumed, but fairly found on the evidence; and that the burden was on the plaintiff to prove his case by the fair preponderance of testimony. *Held,* That the defendant had no ground of exception."

"Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him." *Davidson v. Crosby,* 49 Neb. 60.

"Where fraudulent representations are relied on as a defense to an action, the same must be proved by a clear

preponderance of the evidence." *Ish v. Finlay*, 34 Neb. 419.

"Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced upon him." *Clark & French v. Tennant*, 5 Neb. 549, citing *Howe v. Howe*, 99 Mass. 89.

In *Tootle & Maule v. Dunn*, 6 Neb. 93, it is said in the syllabus: "Fraud is never presumed, but must be proved, and the degree of proof necessary to establish it is the same in equity as at law."

In *Hough v. Dickinson*, 58 Mich. 89, it is said in the body of the opinion: "In the twenty-third request, as stated in the record, and which was given by the court, the jury was told: 'The proof of fraud should be so clear and conclusive as to leave no rational doubt of its existence.' Such is not the rule in civil cases. It applies only in criminal proceedings. Fraud, like any other fact, may be proved by any facts or circumstances which satisfy the mind by a preponderance of the evidence in any given case of its existence, and many times it is inferred, and properly so, from circumstances, and often cannot be proved in any other way. *O'Donnell v. Segar*, 25 Mich. 367. Mr. Justice Campbell, in discussing this question in *Watkins v. Wallace*, 19 Mich. 57, where the language used by the court was, 'The proof must be clear and conclusive,' says: 'No such rigid rule prevails in any such civil case. Common sense teaches every one to be cautious in arriving at conclusions which are prejudicial to character and honesty, but if the testimony produces a rational belief, a civil jury cannot be required to discard it because it is not conclusively established.' In these views I fully concur. The charge was erroneous, and it is difficult to say the jury were not misled by it."

In *Watkins v. Wallace*, 19 Mich. 57, it is said in the syllabus: "It is error for a court to charge a jury, so as to mislead them into the belief that more stringent proof was necessary than the law requires. In civil cases a jury cannot be required to discard testimony which produces a

rational belief, because it does not conclusively establish the fact to be proved."

In *Turner v. Younker,* 41 N. W. 10 (76 Ia. 258), the third point in the syllabus reads: "It is erroneous to charge that fraud may be proved by showing circumstances from which the inference of fraud is natural and irresistible, as it is only necessary that the circumstances should lead naturally and fairly to the conclusion sought to be established." In the body of the opinion it is said: "On the issue of fraud the court gave the following instruction: 'The burden of proving fraud is upon the party alleging it. Fraud is not to be presumed without proof. Yet fraud, like any other fact, may be proved by proving circumstances from which the inference of fraud is natural and irresistible; and if such circumstances are proved, and they are of such a character as to produce in the mind of the jury a conviction of the fact of fraud, then it must be considered that fraud is proved.' The doctrine of this instruction is that the circumstances relied on to establish that the transaction was fraudulent must lead irresistibly to that conclusion, or they are not sufficient. We think it is erroneous. * * * In civil actions the parties are required to establish their allegations by a preponderance of testimony only."

In *Foley v. Holtry,* 43 Neb. 133, this court held: "The elements necessary to sustain such an action (to rescind) have been recently summarized by this court as follows: (1) It must be alleged and proved what representation was made; (2) that it was false; (3) plaintiff believed the representation to be true; (4) relied on and acted upon it; (5) and was thereby injured."

The instruction concerning fraud requires too high a degree of proof, and is therefore prejudicial to the defendant, because it probably led the jury to reach the verdict rendered.

Instruction No. 10, given at the plaintiffs' request, reads as follows: "You are instructed that, if you find from the evidence that the defendant in this action had an opportunity to examine the stock of hardware, and that he

was well acquainted with the same, having been in and about said stock every day and a number of times during the day, and that it was so located as to be convenient for him to observe the same, and that he could easily have ascertained the value of said stock, then and in that case you are instructed that it would not constitute any fraudulent representations in behalf of the plaintiff, if he had made statements relative to the value of the said stock, and under such statements relative to the value of said stock, and under such circumstances it will be your duty to find for the plaintiff and against the defendant."

Where both parties have an equal opportunity of ascertaining the value of the goods, any opinion concerning the worth of the property expressed by the vendor may not be objectionable; but if the information as to the value of the goods is information peculiarly within the knowledge of the vendor, and to ascertain the value of the goods it would require a special examination on the part of the vendee, then the vendee, as a matter of law, has a right to rely upon the representations of the vendor. The objection to the above instruction is that it overlooks the plaintiffs' statement concerning the making of the inventory.

The defendant testified that he sometimes saw the stock of hardware every day, but that he would average once a week, and then again he might not be in for two weeks; that he did not know what stock the plaintiffs had there. There is apparently nothing in the evidence to justify the court in giving the instruction above given. The defendant could not know anything concerning the goods shown by an inventory. Before he could know what goods were in the store, the defendant would have to make an independent investigation on his own account; that is, he would have to make an inventory. He had a right to rely upon the peculiar and exclusive knowledge of the plaintiffs.

The defendant testified that the plaintiffs took an inventory in the evening before the trade was made. He remembered that they went through the stock; that it was in the evening; that they took the inventory after

dark; that there were three Spencers there, and a Mr. Stevens, who used to clerk for the Spencers in the lumber yard; and that Stevens kept one book while Giles was keeping the other. The plaintiff Giles denies that an inventory or invoice was made. He was asked the question whether anything was said about an invoice, and he answered, "No, sir." Although Mr. Giles denied that any invoice was taken, he testified: "We did not take any invoice; *we took an estimate.* Q. When was that taken? A. A night or two before I made the trade with Mr. Horner." It was for the jury to determine in the conflict of testimony between these witnesses. It was their province to find whether the defendant had a right to rely upon the plaintiffs' representations to the effect that he had taken an invoice. The above instruction seems to be objectionable. This instruction was no doubt prejudicial to the defendant under the evidence given. *Foley v. Holtry,* 43 Neb. 133; *Olcott v. Bolton,* 50 Neb. 779; *Perry v. Rogers,* 62 Neb. 898; *Berge v. Eager,* 85 Neb. 425; *McKibbin v. Day,* 71 Neb. 280. In the last named case the effect of possessing information touching the value of goods sold, and being peculiarly within the knowledge of one of the parties, and requiring a special examination on the part of the other party, is discussed, and the effect of such condition is considered and stated. The plaintiff in that case purchased certain land and a stock of hardware. The defendant represented the land to be of certain value, and said that he had invoiced the stock of hardware, and that it was of a certain value. The court instructed the jury that, where the parties had an equal chance of examining the goods, such representations were merely expressions of opinions, but on appeal to the supreme court the judgment of the lower court was reversed. The supreme court held that the representations did not apply with respect to the land, but that they did apply to the stock of hardware. It was held that the knowledge of the defendant as to the value of the stock of hardware was peculiarly within the knowledge of the seller and that to ascertain the truth or falsity of the statements made

would require an independent or special examination, and that the purchaser had a right to rely upon the statements and representations of the seller concerning the value of the stock of goods. It will be noticed that the instant case and the case cited have a close resemblance. In the instant case the defendant, Horner, would be required to make a special inventory of the goods in order to ascertain the truth of the plaintiffs' representations. When the court instructed the jury in effect that the defendant had no right to rely upon those representations, there was prejudicial error to the defendant.

The judgment of the district court is

REVERSED.

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

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PHILIP H. KOHL, APPELLEE, V. COLUMBUS R. MUNSON ET AL., APPELLANTS.

FILED OCTOBER 30, 1914. No. 17,804.

1. **Statute of Frauds: PAROL EVIDENCE: JOINT UNDERTAKING.** Where the plaintiff and two other men endeavored in association with each other to procure a purchaser for a certain tract of land at a price satisfactory to the seller, and he accepted their services, and each contributed time and labor to the common plan and assisted in its execution, in an action by the plaintiff against the other two to recover his share of the profits of the transaction, the relation of the parties may be established by parol, and the provisions of section 3, ch. 32, Comp. St. 1911, do not apply to such persons, or determine the relations between them. *Stewart v. Mather*, 32 Wis. 344.

2. **Appeal: CONFLICTING EVIDENCE.** In such case, where the parties failed with their first proposed customer to consummate a sale, but succeeded with their next one, and there is a conflict of testimony as to whether the plaintiff participated in making the sale to the second customer, it is for the jury to find the facts, and their verdict will not be disturbed if there is evidence to support it.

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

*I. J. Dunn,* for appellants.

*A. R. Davis* and *F. S. Berry, contra.*

HAMER, J.

There was a verdict for the plaintiff for $1,000, and judgment thereon against all the defendants. The defendant Munson appeals. The plaintiff, Philip H. Kohl, alleged in his amended petition, filed in the district court for Wayne county, that he was an experienced real estate man living at Wayne, Nebraska, in the year 1906; that he was acquainted with real estate values in Hand county, South Dakota, and with persons in that territory; that one Robert Fullerton owned a tract of 2,740 acres of land in that county; that at the request of the defendants he entered into an agreement with them, whereby they and he were to attempt to secure from said Fullerton authority to sell said land; and that in case of the sale thereof, or any part of it, the profits were to be divided between the plaintiff and defendants each to receive one third; that in case only a part of the land was sold, and it should be found necessary in order to consummate the sale, the plaintiff would take an equal share in the remainder of the land with each of said defendants; that the plaintiff and defendants secured authority from Fullerton to sell the land, Fullerton to receive $15 net an acre, and the plaintiff and defendants to have all over that amount; that Fullerton agreed to take back a mortgage on the land in case of a sale for $20,000, the same to be prorated over it in small tracts; that thereafter plaintiff and defendants sold two-thirds of the land to one Charles Shultheis for $18 an acre, whereby they made a profit of $5,480, which sum was paid to and received and retained by the defendants; that the defendants without any sufficient cause refused to pay one third of this sum, or any part of it, to the plaintiff; that the plaintiff performed his part of the agreement; and that it was not found necessary to take any interest in any part of the

land in order to consummate the sale to Shultheis; that two-thirds of the said land had been conveyed to said Shultheis by said Fullerton, the owner, and by warranty deed which had been recorded. A demurrer to the said amended petition was interposed by the defendants and was overruled.

The defendants then answered, setting up: (1) A general denial; (2) that the contract set up was void under the statutes of Nebraska and South Dakota, and in contravention of the statute of frauds of each of said states; that no contract in writing was ever made or executed by either the plaintiff or the defendants between themselves, or between themselves and the owner of the land in controversy. Sections 1311 and 1770 of the civil code of South Dakota are pleaded. The following facts are also stated in said answer: That Munson obtained Fullerton's price for said land, being $15 an acre net; that Fullerton then agreed with Munson that he could have all he could make above that sum; that Munson and the plaintiff talked about said land and the price therefor, and agreed orally to try and interest one Henry Kellogg and R. Phileo of Wayne, Nebraska, in buying said tract jointly with them; that said Kohl agreed to buy a one-fourth interest for the purpose of inducing the said third party to engage in purchasing said land; that plaintiff and defendant Munson went to South Dakota, and there saw Fullerton and arranged with him to ask $18.50 an acre for the land in pricing it to the said parties, and the plaintiff and defendant Munson agreed that, if the land was sold, the difference between $15 and $18.50 an acre, $3.50, should be applied by them and by said Kellogg as a partial payment upon their several interests in said tract; that said Fullerton refused to enter into a written contract to sell an option on the land; that when Phileo and Kellogg looked over the land they refused to buy it; that all parties to this suit then stated to Fullerton that they would not buy the land; that thereupon Fullerton withdrew his offer to sell the land, and said that he would sell it to other parties who were then waiting to buy; that no other agreement or

arrangement was ever had concerning said land between plaintiff and defendants; that the plaintiff had nothing to do with the sale of the land to Shultheis, and did not offer to take any interest in the same, and it was not taken by Shultheis; that Shultheis did not offer to pay any share of the money necessary to buy the remaining one-third of the land, and that he did no act of performance whatever concerning the said sale; that about 30 days after the parties saw Fullerton, defendant Munson learned that said land had not been sold, and thereupon he showed said land to Mr. Shultheis, who bought one-half thereof; that defendants Munson and Kellogg bought the remaining one-half, and without Kohl's knowledge or cooperation; that the sum of $3 an acre received from Shultheis above the price to Fullerton was applied by defendants as a part payment upon said lands received by them. There was a reply, which is substantially a general denial, and alleges no new matter which is material.

On the trial it was objected by the defendant Munson that the petition failed to state a cause of action against him; also, that there was a misjoinder of causes of action, for that the plaintiff contended that he entered into a partnership contract with the defendants and was entitled to one-third of the commission, and that if the plaintiff had any cause of action it was against *each defendant* for his *individual share,* and not a joint cause of action against the two defendants, and that Munson should pay no part of Kellogg's share. Kellogg made the same sort of objection. Both objections were overruled.

When the plaintiff rested, the defendants each moved for an instructed verdict, because (1) the contract between Munson, Kellogg and Kohl was that each should acquire an undivided interest in the land if they should sell or secure the sale of less than the title interest to a third person; that the sale to Shultheis and Kellogg was for a title consideration of $50,000, $41,325 being the net price which it was agreed should be paid to Fullerton; that under the contract Kellogg did purchase from Fullerton one-half or one-third of the land, and took in his

own name a deed for an undivided one-third interest; (2) no commission payable in cash resulted from the transaction, even under the testimony of the plaintiff; that neither Munson nor Kellogg was financially indebted to the plaintiff, and the only right of either was an interest in the land or in that portion of it which was deeded to Kellogg; (3) that the contract was an oral contract for the acquisition of an interest in the land, and void under the statute of frauds, and not enforceable under the laws of Nebraska or South Dakota. Each motion was overruled.

The plaintiff testified to living in Wayne about 21 years; that his occupation was real estate and loans, in which he had been engaged about 12 years; that he was acquainted with the defendants, Columbus R. Munson and Henry Kellogg, having known them about 20 years; that Munson was engaged in what is known as "curbstone real estate;" that Kellogg was a retired farmer and also a dealer in real estate; that the plaintiff had had dealings with them in real estate prior to the present transaction; that in September, 1906, the plaintiff had talked with the defendants with reference to a tract of land in South Dakota; that his first conversation was with Kellogg alone, and about three months later he talked with Kellogg and Munson together; that Kellogg informed him that C. R. Munson, through one L. C. Tredway of Huron, had located a tract of land in the western part of Hand county, South Dakota, some 2,740 acres; that this land was owned by Robert Fullerton; that it could be bought for $15 an acre, and that a good sized mortgage could be "carried back" on the land; that Kellogg at that time had in view Mr. Phileo, to whom they expected to sell a one-half interest at $17 an acre, and that they wanted to know of the plaintiff, Kohl, if he would go in with them and help them to carry the other half interest. Kohl testified that he figured the matter over, and then said he would not go into the deal unless he could raise the price of the land to $18.50 an acre; that they could afford to go into it then if that was done; that they talked the matter over, and finally all agreed that they would try to get the price of

the land raised to $18.50 an acre; that the outcome of the whole talk was that they were to carry a half interest together, or whatever interest it was necessary to carry, provided they could make a sale; Kohl testified that after they agreed to go in on this deal at $18.50 an acre Kellogg said he would go and get Mr. Munson. Munson testified that Kellogg said to him what he thought of the deal and how to handle it. Kohl testified that he told Munson the only way would be to raise the price of the land; that after the talk Munson was just as willing as Kellogg, and that they agreed to go to Wessington in advance of Mr. Phileo and *get the price of the land raised,* which was done. The plaintiff testified that it was agreed to divide the profits so each would receive a third, and that Kellogg said, "You had better go, Phil; take time; you understand these things a little better than Munson does; you can go along and explain matters, and Munson will be there as a witness;" that they then went to Wessington, and out to the Fullerton ranch, where they took dinner with Fullerton, and Fullerton agreed to raise the price of the land to $18.50 an acre, and also agreed that the land should be taken with a $20,000 mortgage against it, the same to be proportioned off on the different quarter sections or half sections. After this Kohl and Munson had certain negotiations concerning the details of the transaction, all the parties participating. All the parties testifying agreed that Tredway was to have $500, and Fullerton understood this arrangement. Fullerton testified that when Munson came to his ranch with the plaintiff he "introduced him as a partner of his interested in this deal, and they came out to see it." The evidence was conflicting. The jury found in favor of the plaintiff, and there is sufficient evidence to sustain the verdict. It must be considered, therefore, that the allegations of the petition have been established as the true facts in the case. It is therefore unnecessary to detail the evidence at length.

It is contended by the defendants that this case is ruled by *Norton v. Brink,* 75 Neb. 575. We have carefully read the entire bill of exceptions, and there is a substantial dif-

ference between the cases. In the *Norton* case there was a rehearing. The first opinion, *Norton v. Brink,* 75 Neb. 566, held that, when an agreement for the purchase and sale of land is fully performed, an action may be maintained against the person holding the title to compel an accounting for the profits realized. On the rehearing it was held that a parol agreement between two persons to purchase a single tract of land together or "in partnership," where the purchase is finally made by one of them, and he pays the whole of the purchase price and takes the title to himself, the other simply agreeing to pay him one-half thereof on demand, does *not* create a partnership between such persons. The evidence in that case shows Mrs. Norton was ready to furnish her share of the purchase price, but was never allowed to pay it, and the sole heir of the purchaser sold the land and refused to account to the plaintiff, Mrs. Norton, for her alleged share of the profits. C. D. Brink purchased the land through Warren Pratt. Pratt dealt with C. D. Brink alone, and Mrs. Norton had no part in the negotiations for the property, and she was not mentioned in connection with the deal. C. D. Brink paid for the land out of his own funds by a check and obtained a deed from the owner. C. D. Brink died seized of the land, and the defendant Jay H. Brink, who was his sole heir at law, subsequently sold the land for $6,400, less the commission. There was no memorandum between C. D. Brink and Mrs. Norton concerning any joint interest in the land or the purchase of it. There was no settlement between Mrs. Norton and C. D. Brink, and he did not refuse to carry out the contract according to the oral agreement, because he died without making any demand for the payment of one-half of the purchase money by Mrs. Norton, and before she had reimbursed him, and before any settlement between them. An action was brought by Mrs. Norton against Jay H. Brink, sole heir of the deceased. She was defeated in the district court for Buffalo county, and on appeal the judgment of the district court was reversed; but on a rehearing it was affirmed and the former judgment of this court was overruled. In the

instant case the plaintiff, Kohl, actively participated in the transaction. The first thing to do was to get an agreement of some kind out of Fullerton, so that the three parties operating together could handle the land. Kohl went along to see Fullerton. The first trip which Munson, Kohl, Kellogg and Phileo made resulted in Fullerton agreeing to such terms as would enable them to handle the land and make a profit out of it if they were successful. Fullerton testified that, when Munson and Kellogg came back to see him, he told Munson that the land could be sold the same as under the original agreement. This original agreement the plaintiff Kohl helped to get. It is not denied that the plaintiff went to see Fullerton, and that the plaintiff and Munson got Fullerton to agree that they might fix the price at $18.50 an acre so far as the purchaser was concerned. Fullerton was only to get $15 an acre for himself. The three of them, the plaintiff, Kohl, Munson and Kellogg, started out to get a purchaser for Fullerton's land. The three of them were all actively in it. The plaintiff Kohl assisted in procuring the consent of Fullerton to cut up the proposed $20,000 mortgage and to place a part of it on the land; each quarter was to carry such an amount as it would conveniently sustain. This made the deal possible. Otherwise it was not possible. The proposed purchaser of the land to be bought of Fullerton was any man with money enough to buy that the three of them could find and get into the deal. Munson testified as to what the arrangement was, $18 an acre, less 50 cents commission and 50 cents an acre commission that Tredway was to get. There is no dispute between the plaintiff, Kohl, and Munson and Fullerton that Tredway's name was on this paper. The plaintiff Kohl sold the interest in the land which Kellogg got to Kellogg himself. Kohl testified that he agreed with Kellogg to take half of Kellogg's interest, and that Kellogg made a settlement with him concerning the half before the deed was executed. Kellogg did not testify, and therefore there was no testimony from him supporting Munson's evidence, that there was no

arrangement with the plaintiff, Kohl, about the division of the profits. Kellogg paid the plaintiff for his interest in the land. Would Kellogg have been willing to pay the plaintiff anything if there was no agreement that the plaintiff should participate in the profits? The conduct of Kellogg seems to support Kohl's evidence. Munson remembered that he handed the memorandum to Fullerton. He does not appear to have known whether Fullerton signed it or not. He did not want Shultheis to know that there was any memorandum, and very naturally under the circumstances. There is a conflict in the evidence, yet enough evidence to sustain the verdict, and for this reason it ought not to be disturbed.

A careful examination of the case of *Norton v. Brink, supra,* seems to be required. It is said in the body of the opinion in that case that Mrs. Norton's contention is that the contract established a partnership between herself and the deceased, and therefore comes within the rule announced in *Dale v. Hamilton,* 5 Hare (Eng.) *369, *Richards v. Grinnell,* 63 Ia. 44, *Pennybacker v. Leary,* 65 Ia. 220, and other cases, which hold that a contract entered into for the purpose of speculating in lands is not within the statute of frauds, and need not be in writing; that where the parties have contracted to engage in the business of buying lands which are to be held in trust for both of them, and they are to have equal interests and shares in the common speculation, such agreement constitutes a partnership, and the action by one partner against the other for an accounting as to the partnership transactions may be sustained, although the partnership funds may be invested in lands. The appellant in *Norton v. Brink, supra,* did nothing upon her part. She contributed nothing. She did not receive anything.

Section 4, ch. 32, Comp. St. 1911, reads: "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." Section 4 contemplates the danger

of doing wrong under section 3, and endeavors to forbid and prevent the perpetration of such wrong. Section 3 reads: "No estate or interest in land, other than leases for a term not exceeding 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 a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." Because of the existence of section 4 it is made clear that it is within the power of a court of equity to fasten a constructive trust upon property where it is obtained by commission of a fraud, actual or constructive. Section 4 expressly provides that section 3 shall not be construed to prevent any trust from arising or being extinguished by implication or operation of law. This provision includes resulting and constructive trusts which are not created by the express terms of a contract. An agent instructed to purchase property for his principal will not be permitted, without his principal's knowledge and consent, to become the purchaser of the same property for himself.

In *Pollard v. McKenney,* 69 Neb. 742, it was held, as stated in the syllabus: "Where a wife prevails upon her husband, who is fatally ill, to convey certain of his property to her by promising to make a certain disposition thereof among his heirs at law, it will be presumed from her wilful failure to make such disposition that her promise was made without any intention of performing it, and was therefore fraudulent." Another paragraph of the syllabus in the same case reads: "Where a person obtains the legal title to real estate belonging to another by means of fraud, actual or constructive, a court of equity will fasten a constructive trust upon the property, and convert the grantee or those claiming under him, by descent, into trustees of the legal title, and enforce the trust for the benefit of the grantor or those claiming under him." There was a rehearing in this case, and another opinion was delivered. The former opinion was adhered to, and the syl-

labus was further enlarged by adding to it: "A decree establishing a constructive trust should not be limited to a cancelation of the conveyance whereby the constructive trustee acquired title to the land; the trust should be ascertained and enforced."

We adhere to the views expressed in *Norton v. Brink, supra.* We do not consider that the evidence shows the establishment of a partnership, but does show that an arrangement was made by which certain stipulated profits were to be divided among the three persons who engaged in the transaction; that each contributed something, and that all solicited the making of the terms which enabled them to carry out the transaction; that all worked at the common purpose, and that all are rightfully entitled to the division contemplated.

The judgment of the district court appears to be right, and it is

AFFIRMED.

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ARTHUR J. ROGERS V. STATE OF NEBRASKA.

FILED OCTOBER 30, 1914. No. 18,511.

**Criminal Law:** EVIDENCE: HEARSAY. Where the plaintiff in error, who was convicted upon the charge of obtaining money by false pretenses, obtained the money by means of a check given on a bank at El Paso, Texas, and the bank refused payment of the check, and sent a telegram to another bank characterizing the defendant as a fraud who had never had an account in the bank on which he had drawn his check, and requesting that the defendant should be apprehended, such telegram is not admissible in evidence. It will be regarded as a communication between third parties and as mere hearsay, made by one who speaks without the sanction of an oath and without opportunity for cross-examination.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Reversed.*

*Sterling F. Mutz* and *Harold M. Noble,* for plaintiff in error.

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

HAMER, J.

The plaintiff in error, Arthur J. Rogers, was tried and convicted in the district court for Lancaster county. He was charged with the crime of obtaining money under false pretenses. There is evidence tending to show that he represented to the cashier of the First National Bank of Havelock, H. R. Frank, that he had money on deposit in the Union Bank & Trust Company of El Paso, Texas, subject to check and more than sufficient to pay his check for the sum of $50, being the check which he presented to the bank at Havelock, and on which that bank paid the money.

Several errors are assigned by plaintiff in error; but, as at least one of the assignments must be sustained, we will content ourselves with a consideration of that assignment. The evidence shows that after the check had been paid by the bank at Havelock, July 30, 1913, that bank sent the check to its correspondent, the Central National Bank of Lincoln, Nebraska, and that in due course of business it reached the Union Bank & Trust Company at El Paso, Texas, on or about August 7, 1913. Payment was refused. Upon the trial a telegram addressed to Central National Bank was identified by the agent of the telegraph company as having been received by its Lincoln office in due course of business, and by an officer of the bank to which it was addressed, and as having been received in the regular course of business by the bank. This telegram, over the objection of plaintiff in error that it was irrelevant, immaterial, and not the best evidence, was received in evidence. It was also objected by plaintiff in error that it was not shown that it was original, and that no sufficient foundation had been laid, and that it was hearsay. The body of the telegram offered in evidence reads: "El Paso, Texas, Aug. 7, 1913. Central National Bank, Lincoln, Neb. Items totaling seventy-five dollars signed Arthur J. Roger on us. Yours July thirtieth cleared today. Party bank fraud. Never an account here and un-

known to us and request you have apprehended and report at once American Bankers Association for action. Has been operating this game for the last six months. If we can assist you command us further. Union Bank & Trust Co."

The matter contained in the telegram was the statement of one not under oath and not attending the trial. Its introduction offered no opportunity to cross-examine touching the matters contained in it. The statement is clearly that of a person not before the court, and not subject to cross-examination, and it was a communication by one third party to another. In *Bedford v. State,* 36 Neb. 702, there was consideration of the same sort of question. The court say: "These letters were not written to the plaintiff in error, nor in answer to letters sent by him, nor are they in any way connected with this case. Upon what theory they were admitted we are at a loss to know. Letters of third persons are receivable in evidence as merely collateral, introductory, or incidental to or in illustration of the testimony which the witness gives. 1 Chitty, Criminal Law, *368, *369; 1 Phillips, Law of Evidence (4th Am. ed.) 170. As, where a witness testified that he was induced to institute proceedings by letters of a third party. *Lewis v. Manly,* 2 Yeates (Pa.) 200. But the letters could not be received as evidence of the facts stated in them. 5 Am. Law Register, 468. 'All acts, declarations, etc., made by third persons are obnoxious to two objections: (1) That they are *res inter alios acta,* and therefore irrelevant. (2) That they are mere hearsay, the assertions of parties without the sanction of an oath and opportunity for cross-examination.'" No case has been cited where a communication of this kind between third parties has been admitted. The telegram was highly prejudicial, and it was clearly error to admit it.

The bill of exceptions shows that special counsel appeared in the case to assist the county attorney. He examined the most important witnesses for the state, among others Mr. Moye, the secretary of the bank at El Paso. He also examined Mr. C. E. Sapp. When T. R. Sapp was

recalled he conducted his examination. He closed the argument to the jury. He was anything but mild in his manner and in his language, and was such a prosecutor as is not contemplated by the statute. Section 5599, Rev. St. 1913, provides that the county attorney may procure assistance in the trial of any person charged with the crime of felony. The statute contemplates that he shall be paid by the county board for his services. The theory of the statute is that an impartial prosecutor will be selected to assist the county attorney "under the direction of the district court." The purpose of the statute is to exclude counsel employed by private capital or procured by persons who seek their own self-interests, or who wish to gratify personal animosities. This method of selecting assistant counsel is not to be used as an engine of oppression. The employment of the prosecutor is not to be placed in the hands of wealth. The object of the statute was to put these interests out. The statute looks to the employment of an assistant who shall stand evenly balanced between the accused and the state. Special counsel seems to have been crisp in his temper and incisive in his speech. He resented the necessary interruptions of counsel, and his remarks are not free from the suggestion of personal violence.

In *McKay v. State,* 90 Neb. 63, the act in question was discussed. It is said in the opinion cited: "We are not unmindful of the fact that in many cases, particularly in sparsely settled counties, young lawyers of little experience are ofttimes, from necessity, elected to the office of county attorney, and, if the prosecution of felony cases were left to such a county attorney alone, crime might go unpunished. * * * It has not left it to outside parties to select the assistant counsel. It has imposed that duty upon the county attorney and district court, and has provided that the county attorney may, under the direction of the district court, procure such assistance. Counsel thus procured will not be actuated by sordid motives. * * * It is just as much the duty of a county attorney to see that an innocent man is not convicted as to see that the

guilty receive their just deserts. * * * Counsel called to assist in the prosecution should govern his actions in like manner."

When counsel are brought into the case to assist the county attorney, all the reasons that require fair treatment of the accused upon the part of the county attorney apply to his assistant. The judgment of the district court is reversed.

REVERSED AND REMANDED.

SEDGWICK, J., concurs in the conclusion.

ROSE, J., not sitting.

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CHARLES BELANGEE V. STATE OF NEBRASKA.

FILED NOVEMBER 12, 1914. No. 18,424.

1. **Contempt: JURISDICTION: AFFIDAVIT.** "An affidavit alleging material facts on information and belief does not give a court jurisdiction of a contempt proceeding." *Freeman v. City of Huron*, 8 S. Dak. 435.

2. ———: ———: INFORMATION. "Proceedings for contempt not committed in the presence of the court are instituted by filing an information under oath stating the facts constituting the alleged contempt. The charge should be stated in a positive manner, and it is not sufficient for the affiant to allege that he 'is informed and believes' certain material facts." *Ludden v. State*, 31 Neb. 429.

3. ———: ———: AFFIDAVIT. "The statements must be as of the personal knowledge of the affiant. They may not be on information and belief." *Herdman v. State*, 54 Neb. 626.

4. ———: ———: ———. "The affidavit in such a proceeding is jurisdictional." *Herdman v. State*, 54 Neb. 626.

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

*Benjamin S. Baker*, for plaintiff in error.

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

REESE, C. J.

This is a proceeding in error to the district court for Douglas county in a case where plaintiff in error, who will hereafter be referred to as defendant, was found guilty of contempt of court in an attempt to corrupt a juror in a case on trial in said court. As shown by the transcript, the proceeding was inaugurated by the filing of an information by the county attorney charging the accused with the specific offense. The charge contained in the information constitutes a constructive criminal contempt; that is, that the act, consisting of an attempt to bribe a juror, was not committed in the presence or hearing of the court, nor near the court when and where it was in session. The information was filed without any previous proceedings. It is in the exact form of an information in a criminal prosecution, with the exception that at its close it is alleged that the acts committed were "contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska, *and in contempt of said district court and its dignity;*" a phrase not essential to the validity of a charge either in an ordinary criminal prosecution or a prosecution of this character. It is claimed that the verification of the information is not sufficient, for the reason it is not positively sworn to; the recital in the affidavit being that "the facts set forth in said information are true, to the best of my knowledge and belief." After the filing of the information, defendant raised the question of jurisdiction by proper motions, objections, and exceptions, all of which were overruled, when he entered his plea of not guilty, with a general denial of the allegations of the information. A trial was had to the district court resulting in finding defendant guilty as charged in the information. A motion for a new trial was filed and overruled, also a motion in arrest of judgment was filed, and which also was overruled, when defendant was sentenced to pay a fine of $500 and to be

imprisoned in the county jail for a period of six months and to pay the costs of prosecution. The case is now here for review; one of the contentions being that the court was without jurisdiction to hear the case or render any judgment.

Upon the question as to the verification of the information, it has been held in this state that the affidavit required in cases of contempt is jurisdictional. *Gandy v. State,* 13 Neb. 445; *Ludden v. State,* 31 Neb. 429; *Hawthorne v. State,* 45 Neb. 871; *Herdman v. State,* 54 Neb. 626. In this case the information, filed by the county attorney, must be taken as the affidavit upon which the jurisdiction depends. There were two other affidavits presented to the judge, which he delivered to the county attorney, as shown by the bill of exceptions, but they do not constitute any part of the basis of the prosecution. In fact, in so far as the information is concerned, they are ignored. The affidavit of verification was made by the county attorney. We know of no rule of law *requiring* the affidavit to be made by him, nor do we find any provision or decision making it his special duty so to do. The affidavit must be treated the same as if made by any private person. It is the settled law that "the affidavit must state positive knowledge; if on information and belief, it is insufficient." *Herdman v. State, supra,* citing *Ludden v. State, supra, Gandy v. State, supra; Freeman v. City of Huron,* 8 S. Dak. 435; *Thomas v. People,* 14 Colo. 254; 4 Ency. Pl. & Pr. 779, 780. As we have seen, the affidavit, or information, was not sworn to in the positive form. In other words, it did not state "positive knowledge" of the facts charged in the body of the information. To state that the facts are true to the best of one's "knowledge and belief" falls far short of the statement that the affiant knows them to be true, which is essential in a charge of contempt. This want of jurisdiction was urged from the beginning to the end of the proceeding. The law governing the verification of informations in criminal prosecutions is upon an entirely different basis. It is required that the charge be made by the prosecuting attorney, after a pre-

liminary examination in which the facts are established, often by a great number of witnesses testifying to separate and distinct facts consisting of circumstances, which would be impossible if personal knowledge by the prosecutor was required. In such cases the accused party is entitled to a jury trial, the jury, and not the court, deciding all questions of fact, but this is not true in contempt proceedings. The law seeks to protect the citizen from such prosecutions unless some one make the charge upon his personal knowledge, when the case is brought before the court, heard and decided by the court, not by a jury, and in a summary way disposed of. The law upon that subject, as declared by the courts, is reasonable—a necessary and just protection to the person charged. The statement in an affidavit of verification refers to the charges contained in the body of the affidavit, and by which they are modified to the same extent as if the same language accompanied each statement of fact. Under averments and affidavits of the kind before us, it would be difficult, if not impossible, to convict any one of perjury in making the affidavit and charge, however false they might be. The defense that the affiant believed the statement to be true according to the best of his knowledge would be an absolute defense in a prosecution for perjury. As said by Judge Maxwell in *Ludden v. State, supra*: The court is not informed "upon what grounds" the affiant "based his belief. His informant may have been a 'busy-body' who meddled in the affairs of others without knowledge or judgment, and his belief may have been based on the idle statements of those who knew nothing of the matter." It is very clear that the charge made against the defendant was not sufficient, and the objection to the jurisdiction should have been sustained.

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

REVERSED AND DISMISSED.

ROSE, J., dissents.

SEDGWICK, J., dissenting.

The opinion assumes that the evidence is sufficient, and disposes of the case on the insufficiency of the informa-

tion. The statute makes the acts charged a crime that may be punished by indictment or preliminary examination and information and jury trial, or as a contempt of court. Section 8238, Rev. St. 1913, provides that punishment for contempt shall not be a bar to indictment and trial by jury.

In this case there was no indictment nor preliminary examination. The information states the facts constituting the contempt of court, and then says: "In contempt of the said district court and its dignity," it is a proceeding for contempt. It contains some allegations that would be necessary in an indictment, and probably some other surplusage, but this would, of course, not invalidate the information, if otherwise sufficient. The allegations of the information are positive, but the verification by the county attorney is upon belief. The opinion holds it void because of the form of the verification. The question naturally arises: How can a prosecution for contempt in such case be instituted? It will rarely, perhaps never, happen that any one person will of his own knowledge know all the facts necessary to constitute the offense. It would seem that the statute which provides that "the party, upon being brought before the court, shall be notified of the accusation against him, and have a reasonable time to make his defense" (Rev. St. 1913, sec. 8237), does not contemplate any very formal proceeding. This statute seems to be all that there is in the statutes in regard to information or proceeding for constructive contempts. It may be that this court in some earlier cases has gone too far in adding formalities. The cases cited in the opinion, *Ludden v. State,* 31 Neb. 429 (violation of an injunction), the prosecution was to enforce property rights, and neither the affidavits nor evidence showed that the defendant had anything to do with violating the injunction; *Herdman v. State,* 54 Neb. 626 (injunction); *Gandy v. State,* 13 Neb. 445 (attempt to bribe witness); and *Hawthorne v. State,* 45 Neb. 871—all hold that the information must state the facts positively; that is, the "accusation" against the defendant, of which he must be notified and have time to

make defense (section 8237), must be in direct and unequivocal terms, and not guesswork. None of them holds that it must be positively verified, and in one of them (*Gandy v. State*) it would seem there was no verification at all, but that fact is not discussed.

If knowledge of an attempt to bribe jurors comes to the court, it may, and should, direct the prosecuting attorney to investigate, and, if sufficient evidence is found, prosecute. The county attorney cannot make the verification under this decision, and there is no provision to compel witnesses who knew the facts to make complaint. It would seem, then, that proceedings for contempt in such cases are done away with by the opinion. There remains the slow and doubtful prosecution by indictment or preliminary examination, but this leaves the court helpless for the time being. He might adjourn the term until a grand jury or examining magistrate could act. When a prosecution for constructive contempt is instituted for the purpose of enforcing a property right, or some similar purpose, the facts ought to be plainly and directly stated so that the court may know that the prosecution is in good faith. Perhaps, in such case the court might require that the statement of facts be positively verified, though this court has never so held. But when the contempt is a public crime, and the court requires the public prosecutor to formulate the "accusation" against the defendant so that he can be notified thereof when he is "brought before the court," as the statute requires, and the prosecutor makes the information stating all the facts plainly and fully, there is no statute requiring such information to be positively verified. The majority opinion seems to me to introduce an unnecessary technicality not imposed by the statute.

LETTON, J., concurs in this dissent.

ALBERT W. JOHNSTON ET AL., APPELLANTS, V. WILLIAM FRANK ET AL., APPELLEES.

FILED NOVEMBER 12, 1914. No. 17,833.

1. **Executors and Administrators:** SETTING ASIDE ADMINISTRATOR'S DEED: FRAUD: BURDEN OF PROOF. In an action to set aside an administrator's deed for fraud and conspiracy, the burden of proof is on the plaintiff to establish the alleged fraud and conspiracy by a preponderance of the evidence.

2. ———: SALE OF LAND: CLAIMS. The land, which is not the family homestead of an intestate, may be sold by the administrator when necessary to pay the debts of the decedent; and a claim by his widow for money advanced by her in paying a portion of such debts may be properly allowed as a claim against his estate.

3. **Homestead:** SUIT TO SET ASIDE ADMINISTRATOR'S DEED: SUFFICIENCY OF EVIDENCE. The testimony examined, and found sufficient to establish the fact that the land in question was not the homestead of the decedent at the time of his death.

4. **Executors and Administrators:** APPOINTMENT: VALIDITY: BURDEN OF PROOF: PRESUMPTIONS. Where the plaintiff alleges that the appointment of the widow as administratrix of the estate of her deceased husband was void because her appointment was not made at the time fixed by the published notice, it is incumbent upon the plaintiff to establish that fact by a preponderance of the evidence. The county court being a court of record, there is a presumption in favor of the regularity of its proceedings; and the introduction of only a part of the proceedings in evidence will not rebut the presumption of regularity.

5. ———: SUIT TO SET ASIDE ADMINISTRATOR'S DEED: SUFFICIENCY OF EVIDENCE. Where it appears from the evidence that the administratrix filed a petition in the district court of the county where the land was situated; that notice of the hearing of the application was duly served on all persons interested in the estate; that on the hearing of the application the license was granted, and was filed with the clerk of the court; that the administratrix thereafter filed the bond and the oath required by law in such cases, and after giving proper notice sold the land at public sale for its full value, for the purpose of paying the debts of her deceased husband; that the sale was examined and confirmed, and a deed made to the purchaser under the order of the court; that the license was recorded in the complete record; all of the proceedings

being regular, the deed of the administratrix will not be declared void.

6. **Dicta Disapproved.** The dicta in *Stack v. Royce*, 34 Neb. 833, and *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, pointed out in the opinion, disapproved.

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

*Williams & Williams* and *Hoagland & Hoagland,* for appellants.

*G. J. Hunt, F. A. Wright* and *J. G. Mothersead, contra.*

BARNES, J.

Action by the heirs of William Johnston, deceased, to set aside an administrator's deed and quiet their alleged title to a part of the west half of the southwest quarter of section 26, township 21 north, of range 52 west of the 6 P. M., situated in Morrill county, Nebraska.

Plaintiffs' petition set out the title of William Johnston to the land, his death, and their heirship. The petition further set forth the probate proceedings and administrator's sale of the land in question to the defendant William Frank, and the conveyance by him to his codefendant, the Tri-State Land Company. The petition specifically pointed out the objections which plaintiffs contend render void the title acquired by Frank. They are, in substance, as follows: First. That the land was the family homestead of William Johnston at the time of his death, and therefore exempt from sale for the payment of his debts. Second. It charged fraud and conspiracy by the defendants to defraud the plaintiffs of their title. Third. The petition set forth certain defects in the notice of application for letters of administration, and alleged that the hearing was not had on the day set. Fourth. It was alleged that there were no debts against the estate of William Johnston, deceased. Finally, it was alleged that the license to sell was void because of an alleged failure to serve a copy of the notice to show cause on the infant heirs.

Defendants in their answer admitted that the title to the premises was formerly in William Johnston. The relationship of the plaintiffs to William Johnston, and the appointment of the administratrix, the procuring of the license to sell, the administratrix's sale, and the conveyance of the land by Frank to the Tri-State Land Company were also admitted. Defendants denied that the land was the family homestead of William Johnston, deceased, and denied all allegations as to fraud and irregularities in the probate proceedings and the sale of the land by the administratrix. The trial resulted in a judgment for the defendants. From this judgment the plaintiffs have appealed.

The evidence discloses that William Johnston died intestate some time in the year 1904; that at the time of his death he was running a hotel in Bayard, Nebraska, and had left the land in question some five years before his death. It also appears that he was indebted to several persons, including bills for lumber, money due a building and loan association, grocery bills, meat bills, and other debts, some of which his widow, Anna C. Johnston, had paid by money advanced by herself. Mrs. Johnston testified that she was desirous of paying these debts, and she therefore concluded to sell the land to William Frank, who was at that time purchasing large amounts of land in that vicinity. Frank testified as follows: "I stated that I would purchase the land, and we (meaning himself and Mrs. Johnston) agreed upon the price. But on looking up the record I told her that it would be necessary that the land be sold at judicial sale and asked her if there was any reason for a judicial sale, and she said that there were debts to be paid, and they had to sell something to pay them; and I explained, and we agreed, that it would have to go through a judicial sale and be sold, the estate to pay all the costs, and that I would bid $400 for the land at that sale. This agreement was carried out, and the land was purchased by me for $400." It appears from the evidence that Mrs. Johnston, after her talk with Frank, proceeded to have the estate of her deceased husband pro-

bated. She employed L. L. Raymond of Scottsbluff, Nebraska, to act as her attorney. Mr. Raymond was neither the attorney for the Tri-State Land Company nor for Mr. Frank. There was no attorney at Bayard, and Mr. Frank asked Mrs. Johnston who she desired to act for her, and suggested that she might employ Mr. Raymond. She thereupon employed him. It appears that proper probate proceedings were had, and claims were filed against the estate, among others was one for Mrs. Johnston for the bills which she had paid that the estate owed. It is suggested in appellants' brief that if she paid any bills it must have been with money belonging to the estate. There is no evidence to support this statement, and Mrs. Johnston herself testified that the bills were paid with money she earned in the hotel. The amount of the claims which were allowed against the estate were something like $700. License to sell the land was granted. The sale was duly advertised, and at the sale the land was purchased by William Frank for $400. The testimony of both William Frank and the witness Raymond was that Mr. Raymond, at the request of the administratrix, cried the sale in her presence. It is contended, however, that fraud was shown because the widow did not understand the proceedings, and that there was a fraudulent conspiracy between Frank and Raymond to secure title to the land. These claims are conclusively rebutted, not only by the testimony of Mr. Raymond that she understood the proceedings, but also by letters which she wrote him showing clearly that she understood all the proceedings and cheerfully signed such papers as were presented to her, and understood the whole transaction. It appears that she went alone to Sidney, the county seat, and transacted a large part of the business herself. The testimony shows beyond question that she desired to have the land sold for the purpose of paying the debts of her deceased husband. It also appears that the land, at the time it was sold, brought its full value, to wit, $400. The plaintiffs introduced no evidence to contradict this testimony, but assert in their brief that the value must be too

low, because in that vicinity lands later sold for $35 an acre. It is also stated in appellants' brief that the $400 was paid to Mrs. Johnston at the time she gave a quit-claim deed, and that nothing was paid at the administratrix's sale. The record is void of any evidence that would justify this assertion. The testimony shows that Mr. Frank was engaged in purchasing thousands of acres of land in the vicinity of Bayard, and it is unreasonable to suppose that he would pay his money for the land without investigating the title. Mrs. Johnston testified that the money was left in the bank at Bayard, Nebraska, and it is reasonable to suppose that it was left there to be paid over if Frank bid the $400, as was expected.

It is further contended by appellants that fraud was established, because Frank agreed to bid $400 at the administratrix's sale. If this was a fact many of the judicial sales in the state of Nebraska are fraudulent. It is often the practice of parties interested to get some person to agree to bid a certain amount before they offer lands at a public sale. In the case of *Norman v. Olney*, 64 Mich. 553, the validity of an administrator's sale was in question. It was urged that, because the purchaser agreed to bid $40 an acre, and the land was sold to him, the sale was fraudulent. The court disposed of this contention as follows: "There was absolutely no evidence tending to show that Born and the defendant were not purchasers in good faith. On the contrary, they paid for the land all that it was considered to be worth, and the only thing urged against the *bona fides* of the transaction on their part is the fact that they agreed to bid $40 an acre if the executor would obtain license from the court to sell it. The sale, however, was properly noticed according to law, and such agreements to bid are often secured before sale by executors and others at judicial sales. Such an agreement could not and did not interfere with others bidding higher if they so desired."

As we view the evidence, plaintiffs failed to establish any of the allegations of fraud.

It is further contended that the land was the homestead of William Johnston, deceased, and therefore could not be sold for the payment of his debts. The testimony shows beyond question that Johnston and his family had removed from the land, and had been living in the hotel at Bayard some five years prior to his death; at that time he was running the hotel, and had never decided to change his occupation. His family lived in the hotel with him. The part of the land occupied by Johnston and his family when they lived on it was not the west half sold by the administratrix to the defendant William Frank. After Johnston left the land and moved to the hotel he sold the part of the land on which was situated the house and improvements to a third party, and it was owned by such third party at the time of his death. It is true that Mrs. Johnston afterwards repurchased it. The testimony clearly shows that the land in question herein was not the family homestead of William Johnston at the time of his death.

The appellants also challenge the validity of the appointment of Mrs. Johnston as administratrix of the estate of her deceased husband, for the alleged reason that her appointment was not made at the time fixed by the published notice. It appears, and the plaintiffs alleged in their petition, that letters of administration were issued to Mrs. Johnston by the probate court of Cheyenne county, and that fact was admitted by the defendants. It further appears that her petition was filed in the county court on the 20th day of May, 1904; that a hearing on the petition was ordered by the county judge, the date of the hearing being fixed on the 16th day of June; that notice thereof was published in the Bayard Transcript, a weekly newspaper published in the county, for four successive weeks prior to the day of the hearing. It is evident that the hearing was continued; that service was had upon the minor heirs; and that Mrs. Johnston was appointed administratrix of the estate of her deceased husband. The testimony shows that the proceedings were recorded in Book No. 2 of the records of the county court, on pages 247-254, and pages 604-605. Of these records plaintiffs produced in evidence

only the order to show cause, service thereof, and the affidavit of the publisher of the Bayard Transcript that the order was duly published for four consecutive weeks prior to the hearing. It must be observed that the county court is a court of record; that all presumptions will be indulged as to the regularity of its proceedings, and, in the absence of proof to the contrary, such presumptions are conclusive. It follows that the plaintiffs failed to show that Mrs. Johnston's appointment was void.

The bill of exceptions shows that all of the proceedings in the district court for a license to sell the land in question at administratrix's sale were regular. But it is contended that the sale was void because the license was not recorded in the journal of that court prior to the day on which the land was sold. This fact, however, does not clearly appear from the evidence.

Section 1451, Rev. St. 1913, provides: "In all cases where the judge shall order a sale of any real estate, while sitting at chambers, he shall make out in writing a copy of such order, and cause the same to be filed in the office of the clerk, who shall thereupon record such order, before any sale shall be made as aforesaid."

It appears from the evidence that the judge of the district court made out the order, which was filed by the clerk long before the sale was made, and the complete record, which the defendants introduced in evidence, shows that the order was recorded, but it was not shown when it was recorded in such record. In the absence of any evidence to the contrary, it may be presumed, however, to have been recorded before the sale.

In *Stack v. Royce,* 34 Neb. 833, the question here presented was discussed, and, while the language of the court as contained in the opinion indicates that the filing and recording of the order was jurisdictional, still the syllabus of the case, which is supposed to cover all of the points decided, reads as follows: "Such petition and the license must be filed in the office of the clerk of the district court of the county in which administration was granted."

The question was again considered in *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, where, after a lengthy discussion, it was held: "An order or license, to an administrator to sell real estate of an intestate, granted by a judge sitting at chambers, must be filed in the office of the clerk of the district court of the county in which letters of administration are issued, before the administrator is empowered and authorized to sell such real estate."

The exact question here presented was not involved in either of these cases, and it must be observed that the provision in the statute, "who shall thereupon record such order," seems to relate alone to a duty imposed upon the clerk of the court, and not to what the administrator is required to do. It must be further observed, however, that the administratrix in this case filed the order with the clerk of the district court in ample time, and we are not willing to hold, where the evidence is uncertain as to whether the order was in fact entered on the record by the clerk before sale, it is sufficient to render the sale void. It may be conceded that the clerk ought to have recorded the order, but it is equally true that the administratrix complied with all of the requirements of the law, so far as she was concerned, and it is not believed that the failure of the clerk to perform his duty in the premises will require the court to set aside an administrator's deed, and we hereby disapprove of the dicta found in the opinions in the cases above mentioned, which would seem to establish a different rule.

It clearly appears from the evidence that the license was issued to the administratrix; that due notice of the sale was published in the Bayard Transcript a sufficient length of time; that all of the heirs of the decedent acknowledged service of the notice by personally signing their names thereto; that the administratrix gave the bond required by law, which was duly approved by the court; that she took the oath which she was required to take in such cases; that the sale was properly conducted, and the land was sold to the purchaser, who paid the administratrix therefor the

sum of $400, which was the full value of the land at that time.

It further appears that the court examined all of the proceedings; that the sale was confirmed, and a deed was made by the administratrix to the purchaser under the order of the court. The complete record contains all of the proceedings, including the license granted the administratrix to sell the land for the payment of the debts of the deceased, and it may be presumed, in the absence of positive evidence to the contrary, that it was recorded in proper time.

As we view the record, the plaintiff failed to establish such a state of facts as would require us to set aside the deed made by the administratrix to the purchaser. The judgment of the district court is therefore

AFFIRMED.

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

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UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. CITY OF LINCOLN, APPELLEE.

FILED NOVEMBER 12, 1914. No. 17,848.

1. **Railroads:** USE OF STREETS: INJUNCTION. Where a railroad company, acting under the terms of an ordinance which was adopted as an inducement to the company to build its line to and through a city, constructed its tracks in a street of the city in compliance with all of the terms of the ordinance, it will be protected against the threatened action of the city to unnecessarily, unreasonably, and oppressively move its tracks.

2. ———: FORECLOSURE OF MORTGAGE: SALE: RIGHTS OF PURCHASER. A master commissioner's deed, executed under a decree in a foreclosure suit, will convey to the purchasing company the rights acquired by the company in whose favor the original ordinance was adopted.

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

*Edson Rich, A. G. Ellick* and *B. W. Scandrett,* for appellant.

*F. C. Foster* and *D. H. McClenahan, contra.*

BARNES, J.

Action by the Union Pacific Railroad Company, in the district court for Lancaster county, to enjoin the city of Lincoln from compelling the plaintiff to move its west extension track on Fourth street 35 feet east of its present location opposite block 135 in said city, and to prevent the officers of the city from interfering with the plaintiff in its maintenance and use of said track. The trial in the district court resulted in a judgment refusing the prayer of plaintiff's petition and a dismissal of the action. The plaintiff has appealed.

It appears from the bill of exceptions that in the year 1879 the city of Lincoln, by an ordinance duly passed and approved, granted to the Omaha & Republican Valley Railroad Company the right to occupy Fourth street in said city (which is 100 feet wide) from R street south to the city limits, by its railroad tracks, in consideration of certain improvements to be made by said company for the benefit of the city and the traveling public. It appears that the railroad company accepted the city ordinance according to its terms, and as soon as possible constructed its tracks on Fourth street, located and constructed its depot, freight houses and other improvements mentioned in the ordinance, and within a short time fully complied with all of its provisions; that said company constructed its line of railroad into and through the city from north to south on said street, and it and its successor, the Union Pacific Railroad Company, have ever since operated said line of railroad as was contemplated by the terms of said ordinance; that in 1881 another ordinance was passed and approved by the city, granting said first named company additional rights and privileges on the east half of Fourth street, but the ordinance of 1881 in no manner repealed the original ordinance of 1879, and in no way interfered with

the terms of said first named ordinance. It also appears that on the 4th day of October, 1898, all of the rights, immunities and privileges granted to the Omaha & Republican Valley Railroad Company were, by a special master commissioner's deed, conveyed to the plaintiff, the Union Pacific Railroad Company; that said company has filed its articles of incorporation in the office of the secretary of state of the state of Nebraska, and has thus become domesticated, and is entitled to all of the rights, privileges and immunities of such a corporation; that the plaintiff is operating the railroad, constructed and used since the year 1881 by its predecessor, the Omaha & Republican Valley Railroad Company.

The record discloses that on the 28th day of November, 1904, the city council of the defendant city passed and approved the following ordinance:

"Whereas, the Union Pacific Railroad Company maintains a spur track within the sidewalk space along the east line of block one hundred and thirty-five of the original plat of the city of Lincoln; and whereas, by reason of the location of said spur track, Fourth street, between H and J streets, is unnecessarily closed to travel; therefore, be it ordained by the mayor and council of the city of Lincoln, Nebraska:

"Section 1. That the said Union Pacific Railroad be and is hereby instructed and required to remove said spur track and all other tracks owned or controlled by it on said described part of Fourth street to a distance of not less than thirty-five feet east of said block one hundred and thirty-five (135) within thirty days after the passage, approval and publication of this ordinance.

"Section 2. That the city engineer is hereby instructed and required to remove said spur track in default of compliance with the provisions of this ordinance on the part of the said Union Pacific Railroad Company.

"Section 3. All ordinances and parts of ordinances in conflict herewith are hereby repealed.

"Section 4. This ordinance shall take effect immediately upon its passage, approval and publication."

To prevent the enforcement of this ordinance the plaintiff brought this action. It is contended that the ordinance is unreasonable, unjust and arbitrary upon its face; that there was no public necessity for its passage, and its enforcement would serve no general public interest, but would destroy the plaintiff's power to properly serve its patrons and the public. It appears from the evidence that the plaintiff's main line of railroad runs along the center of Fourth street from R. street south to the city limit; that commencing at about the middle of the blocks between K and J streets, and running thence south to about the middle of the blocks between G and F streets, are located the extensions or side-tracks of the railroad company. The west extension track runs along blocks 135 and 140 at a distance of about three feet from the lot lines. It appears, however, that the railroad company has ballasted its tracks, which are laid on a level with the grade of the streets, with crushed stone, so that the entire space between J and G streets is a level and hard-beaten surface or roadway which the public uses for the purpose of travel by teams and by pedestrians; that J street is open across the plaintiff's tracks, and sidewalks are maintained on each side of said street, so that there is an open roadway for the use of the traveling public from the west side of plaintiff's tracks to the main part of the city of Lincoln. It appears that H street is partially closed by an elevator, situated partly on the lot and partly in the street, at the southeast corner of block 134, which is east of block 135, and that G street is partially closed by the coalhouse of one George Bauer; that there is only one house on lot 1, in block 135, and the persons residing therein have access to the main part of the city on J street, on each side of which sidewalks are maintained, as above stated; that there are no other persons residing on any part of block 135; that in the vicinity of that block are the Burlington Railroad tracks and other railroad properties, and the Burlington Railroad Company has purchased that block, with the exception of lot 1, on which the residence above mentioned stands, and has removed all of the houses

that before the purchase stood on that block. It further appears from the evidence of the defendant's witnesses that G street is open from Third street east to the main part of the city, and there is plenty of room to travel on the sidewalk from G to F streets on the west side of plaintiff's track; that the persons living on the northeast corner of lot 1, in block 135, have a street and a sidewalk direct from their place to the business part of the city; that there are no residences in block 113, and none in block 112; that no one lives west of block 135, and that the ground in that vicinity is all occupied by railroad yards; that all the persons residing west of the Union Pacific tracks have free access to the city on G and F streets, but there is no crossing established on G street. It appears, however, that there is a hard, solid track or roadway on that street across the Union Pacific tracks, and there is ample room between the tracks of the Union Pacific Railroad Company, called B and C, on Fourth street, for the passing of any number of teams and pedestrians; that it is a hard, solid crushed stone pathway, and leads straight up to J street, where there are sidewalks, as above stated. It also appears that there is no reason why H and G streets should not be opened for travel if the public necessity requires it. It further appears that to require the railroad company to remove the track in question 35 feet east of its present location opposite block 135 will require the company to place that track on the top of its extension track B, and thereby destroy the use of both of said extension tracks, with no corresponding benefit to any one. It must also be observed that the ordinance in question does not require the railroad company to remove its west extension track at any other point, except opposite block 135, and to make such removal would in effect segregate a part of that track and destroy its use.

The record shows that the track in question is necessary for the use of the company in serving the public and its patrons in the city of Lincoln, and to enforce the ordinance in question would result in no benefit to any one.

We are therefore of opinion that the city should be enjoined from enforcing the ordinance in its present form, and thus destroy the use of the west extension track on Fourth street. It is not the purpose, however, of the court in this case to prevent the city from assuming proper control of Fourth street when public necessity requires it.

The right to exercise the police power by the city cannot be surrendered or abridged, and, when a franchise is granted to use the city streets for railroad purposes, the grantees accept the right subject to the reasonable and necessary exercise of the police power; but, if any regulation is adopted by the virtue of that power, it must be reasonable, and must not defeat the purpose of the grant. The basis for the exercise of the police power is the protection of human life and the promotion of the public convenience and welfare, and the privilege of the railroad company is subject to the duty of the city to repair, alter or improve the streets in such a manner as the city may deem reasonably proper for the public benefit. The construction of a sidewalk on the west side of Fourth street would be a proper exercise of this duty, and the city would have the right to compel the company to move its sidetrack far enough so that the sidewalk space could be used for that purpose. But it is our view that the enforcement of the ordinance in its present form is unreasonable, unnecessary and oppressive, and should be enjoined.

The judgment of the district court is therefore reversed, and plaintiff is granted an injunction permanently restraining the enforcement of the ordinance in question, and judgment will be rendered accordingly.

JUDGMENT ACCORDINGLY.

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

HENRY F. SCHEVE, APPELLEE, V. W. E. VANDERKOLK ET AL., APPELLEES; KOENIG & COMPANY, APPELLANT.

FILED NOVEMBER 12, 1914. No. 17,894.

1. **Fraudulent Conveyances:** REMEDY OF CREDITORS: BULK SALES. Where the owner of a stock of implements sells his stock in bulk without complying with the provisions of section 2651, Rev. St. 1913, commonly called the "Bulk Sales Law," and immediately thereafter dies intestate and insolvent, a creditor of the seller, as soon as he ascertains the facts, may proceed in a court of equity for the appointment of a receiver to impound the stock of goods, have the same sold, and the proceeds applied to the payment of his claim.
2. ———: ———: ———. In such a proceeding the other creditors of the seller may intervene, and the court may distribute the proceeds of the sale *pro rata* among the several creditors according to the amounts of their claims.
3. ———: ———: ———. In such case the creditors of the decedent will not be required to reduce their claims to judgment and have executions returned *nulla bona*, nor file them in the probate court for allowance, before they can proceed to impound the stock of goods and subject it to the payment of their claims.
4. ———: BULK SALES: PURCHASER A TRUSTEE. In such a case the purchaser in possession of the stock of goods who has not complied with the bulk sales law will be held to have received the property in trust for the benefit of the creditors.
5. ———: ———: CREDITORS' SUIT: PARTIES. The person in whose possession the goods are found is a necessary party to the proceedings, but other purchasers through whose hands the goods have passed, and who are shown to have no creditors and no present interest in the property, are not necessary parties, and the action may be dismissed as to them, when they seek no affirmative relief.

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

*John C. Hartigan* and *E. A. Wunder,* for appellant.

*Hinshaw & Hinshaw, Heasty, Barnes & Rain, F. N. Prout, E. A. Coufal, Mills & Beebe, L. S. Hastings* and *C. H. Denney, contra.*

BARNES, J.

This action was commenced by a creditor of one George Lightbody, deceased, for the appointment of a receiver, and for the disposal of a stock of goods, wares and implements which had been sold in violation of the provisions of section 2651, Rev. St. 1913, commonly called the "Bulk Sales Law," against the purchase of the stock at bulk sale, in possession. A receiver was appointed, all of the creditors of Lightbody intervened, and by proper pleadings asked for the same judgment which the original plaintiff had prayed for. On the final hearing the district court found that the sales were void, found the amount due each of the creditors, ordered the stock of implements sold, and distributed the proceeds among the several plaintiffs according to the amounts of their claims, dismissed the action as to the defendants Vanderkolk and Milligan, and the copartnership, composed of Sandman, Koenig and Bishop, has appealed.

It appears that George Lightbody of Harbine, which is a small village in Jefferson county, on October 25, 1911, sold his stock of implements to W. E. Vanderkolk, without complying with the bulk sales law; that within five days thereafter Vanderkolk sold the stock to William Milligan, without complying with said law, and on November 1, 1911, Milligan sold the stock to Charles Sandman, Lewis B. Koenig and William T. Bishop, partners doing business as Koenig & Company, without complying with the provisions of the section above mentioned. It further appears that Sandman, one of the partners, was the president of the State Bank of Harbine, and at all times from July 21, 1911, until after November 2, of that year, knew that the plaintiff was surety for Lightbody on a note for $2,000 due the bank, and which the plaintiff was obliged to pay. On November 2, 1911, Lightbody died intestate and insolvent. On November 23, 1911, and before the appointment of an administrator of his estate, the plaintiff brought this action, asking for a receiver to take charge of said goods, sell the same, and apply the proceeds to the payment of the debts of decedent. The goods were

sold by order of the court, and a decree was entered that all the sales were fraudulent and void as having been made in contravention and defiance of the bulk sales law. The court rendered a judgment in favor of the several creditors, and ordered the proceeds of the sale to be distributed *pro rata.*

It is the contention of the appellant that the creditors' claims must have been reduced to judgment and executions returned *nulla bona* before this action could be maintained; and it is argued that a creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim. Neither is he entitled to a decree canceling fraudulent transfers already made. That this is the rule in ordinary cases must be conceded. But this rule, like all others, has its exceptions, and the transactions, of which complaint is made, seem to be within the exception. Smith, Equitable Remedies of Creditors, sec. 167.

It is further contended that the claims of the creditors should have been filed and allowed in the probate court before this action could be maintained. It must be observed, however, that this is not a probate proceeding. Lightbody had parted with his interest in the property before his death, and immediately died insolvent. His heirs had no interest in the property, and could not have invoked the provisions of the bulk sales law. The creditors were the only parties who could complain. The insolvency of Lightbody was alleged in the petition and was admitted by the answer. An execution would not run against the administrator of the insolvent estate. *Kennedy v. Creswell,* 101 U. S. 641; Smith, Equitable Remèdies of Creditors, sec. 167; *Steere v. Hoagland,* 39 Ill. 264; *Smalley v. Mass,* 72 Ia. 171.

The courts, wherever this question has been presented, have held that the creditors would not be required to do a vain thing. In *Merchants Nat. Bank v. McGee,* 108 Ala. 304, it was said: "A simple contract creditor may file a bill to subject property alleged to have been fraudulently

conveyed by his deceased debtor, while in life, on an averment of deficiency of legal assets." It was further said: "The theory on which the bill proceeds, in such cases, is that the fraudulent donee stands in the relation, and is chargeable, as an executor *de son tort;* and he is allowed to make any defenses, which the debtor in life, or the rightful personal representative, could have made. * * * It does not follow, where a deceased debtor who had fraudulently conveyed his property in his lifetime, and dies insolvent, and there is a deficiency of legal assets out of which a creditor's claim can be satisfied, and there has been no administration on his estate, that a simple contract creditor is debarred on that account to file his bill against the fraudulent grantee for the purpose of reaching and subjecting the property fraudulently conveyed to the satisfaction of his claim." We think that in the light of the foregoing authorities appellant's contention cannot be sustained.

The constitutionality of the bulk sales law is not assailed in this case. But it is contended that a second purchaser takes the property without regard to the provisions of the statute, and therefore the creditors in this case cannot maintain an action against the defendant Koenig & Company to subject the property to the payment of their claims.

A like question was before the supreme court of Michigan in *Humiston, Keeling & Co. v. Yore,* 148 N. W. (Mich.) 266. It was there said: "The admitted violation of the bulk sales law (Pub. Acts 1905, No. 223), declaring the sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of business void as against creditors, gives a court of equity jurisdiction of a bill by a creditor, joining other creditors of the seller, to reach and apply the property by declaring the purchaser a receiver in trust for creditors, and by an injunction and an accounting."

The question was again before that court in *Coffey v. McGahey,* 148 N. W. (Mich.) 356. That was a case very like the one at bar. There the creditor had sold his

merchandise in bulk without a compliance with the bulk sales law, and the purchaser had sold and delivered the property to another. It was there said: "Under the bulk sales act (Pub. Acts 1905, No. 223), providing that creditors, upon knowledge that the requirements of the act have not been followed, may apply to have the purchaser become a receiver and account to creditors, the rule that a creditor must obtain a judgment at law before resorting to equity does not apply; and, apart from the statute, the rule is subject to exceptions, where a judgment cannot be had because the debtor is dead, has absconded from the state, and has no property therein." It was further said: "Under the bulk sales act, * * * a bill in behalf of complainant and all other creditors of the seller upon the theory that the statute made the debtor's sale absolutely void, and that his creditors could apply the property to their claims, by receivership, injunction, and an accounting, and not on the theory of a creditor's bill or a bill in aid of execution, the complainant would not be denied equitable relief, on the ground that he had an adequate remedy at law, though the equitable remedy is not exclusive." It was said in the opinion in that case: "Any and all creditors may, as soon as knowledge comes to them that the requirements of the statute have not been followed, proceed immediately, not to set aside the sale, but to impound the property or its proceeds. Upon application of any of the creditors, 'any purchaser shall become a receiver and be held accountable,' etc., is the reading of the statute, and for this reason the judgment creditor rule does not apply."

The supreme court of Michigan has also held that in such cases it is optional with the creditor to proceed by garnishment or to ask to have a receiver, and it is immaterial that the purchaser of the stock was ignorant of the requirements of the statute; that such sale is void, and the purchaser is a trustee for the creditors. It may be observed that the provisions of the Michigan statutes are but declaratory of the equity provisions which are usually enforced by courts of equity in this country.

It appears, in the case at bar, that the several purchasers of the stock of implements in question were ignorant of the existence of the bulk sales law, but that fact can avail them nothing, because no one will be presumed to be ignorant of the law. While it may seem a hardship to deprive Koenig & Company of the stock of implements in question, we fail to see how the courts could grant them any relief. It is quite apparent that the decree of the district court, which declared the sales void, and that the defendant Koenig & Company, who purchased and had possession of the stock of implements in question, were trustees for the benefit of the creditors, was right, and it was not error to dismiss the action as to Vanderkolk and Milligan, who had parted with the possession of the stock of implements in question.

The judgment of the district court is

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

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MACK C. GOODWIN, APPELLEE, V. FRANK L. HALLER, APPELLANT.

FILED NOVEMBER 12, 1914. No. 17,914.

1. **Brokers:** RIGHT TO COMMISSION. Where the owner of personal property employs several agents to sell the same, but gives neither of them an exclusive agency, the agent or broker who actually effects the sale is entitled to the commission.
2. ———: ACTION FOR COMMISSION: SUFFICIENCY OF EVIDENCE. The evidence is found to be sufficient to sustain the verdict.

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

*Charles W. Haller* for appellant.

*A. S. Ritchie* and *Charles L. Fritscher, contra.*

BARNES, J.

This was an action to recover the sum of $150 as a commission on the sale of an automobile. The suit was commenced on the justice side of the county court of Douglas county, and after trial was appealed to the district court, where, on a trial to a jury, a verdict was returned in favor of the plaintiff, on which a judgment was entered, and the defendant has brought the case to this court by an appeal.

It appears that the defendant was the owner of an automobile, and, desiring to sell it, sent a circular letter to several persons, the plaintiff included, which reads as follows:

"April 16, 1909. I have decided to sell my last year's Mitchell automobile for $1,200, instead of waiting to get $1,500 for it. This is a great bargain because I paid $2,500 for it last year and it has only been run about four months. It is in A 1 condition. All slightly worn parts have been replaced by new. There is $150 in it for the man who sells this car for me.

Yours truly,

F. L. Haller."

The testimony clearly shows that the plaintiff sold the automobile to a man by the name of Cornelius for $1,250, and that the defendant received all of the proceeds of the sale. It also appears that three other parties were attempting to make a sale of the machine, but the sale was in fact effected by the plaintiff, and none of the other persons made any claim for compensation for the sale, which the plaintiff actually made. The plaintiff showed that he had demanded payment from the defendant, which was refused. The evidence was amply sufficient to sustain the verdict; but it is contended that the trial court erred in giving the third paragraph of his instructions to the jury. The instruction complained of reads as follows:

"Where the owner of personal property authorizes or employs several agents to sell the same, but gives neither an exclusive agency, the agent or broker who actually effects the sale is entitled to a commission. The agent under

such contract who negotiates with the purchaser, but does not effect the sale, cannot recover a commission; and, before the plaintiff in this cause can recover, he must show you by a preponderance of the testimony that he actually effected the sale of the automobile, and, if he has failed to do so, he cannot recover."

This instruction seems to accord with the rule announced in *Lewis v. McDonald,* 83 Neb. 694, and the same rule has been approved in other jurisdictions. *Byers v. Williams,* 175 Mich. 385; *Fenton v. Miller,* 153 Ia. 747; *Whitcomb v. Bacon,* 170 Mass. 479; *Votaw v. McKeever,* 76 Kan. 870.

It thus appears that the only issue presented by the pleadings in this case was properly submitted to the jury, and, the evidence being found sufficient to sustain the verdict, it will not be set aside by a reviewing court.

It is claimed, however, that the sale was not made according to the terms of the contract. On this point it appears that the defendant only asked $1,200 for the automobile, while it was sold by the plaintiff for $1,250, which the defendant received, and therefore has no cause of complaint on that score.

It also appears that, in order to effect a sale, the plaintiff agreed to sell a buggy for the purchaser for the sum of $70, and that he made such a sale. We are unable to see how this, in any way, was prejudicial to the rights of the defendant. As we view the record, the proceedings were without error, the judgment of the district court was right, and it is therefore

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

JOHN H. CREIGHTON, APPELLANT, V. ALFRED KEENS ET AL., APPELLEES.

FILED NOVEMBER 12, 1914. No. 17,887.

1. **Master and Servant:** INJURY TO SERVANT: ASSUMPTION OF RISK. An experienced workman left to his own discretion as to the manner of performing a task under a general order, who selects a dangerous method of doing the work instead of a safe method, which is equally open to him, cannot recover from his employer for consequent injury.
2. ———: ———: NEGLIGENCE. An employer has the right to assume that a man of mature years is possessed of the usual powers of observation, and such knowledge and judgment as is acquired by common experience.

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

*Guile & Guile,* for appellant.

*J. B. Strode, contra.*

LETTON, J.

After a former judgment for plaintiff in this case had been reversed on appeal, a new trial was had upon the same pleadings. The essential parts of these are set forth in the former opinion by Sedgwick, J., 89 Neb. 637. At the trial, at the close of the testimony on the part of plaintiff, defendants moved for a directed verdict. The motion was sustained and the cause dismissed. From this judgment plaintiff has appealed.

The main facts are detailed in the former opinion. Much stress is laid by plaintiff on the fact that, at the time he went with Mr. Keens to look at the work in the church, he suggested that the scaffolding ought to be erected by carpenters, and that Keens then told him to use the appliances they had. It appears, however, that the walls of the main body of the church were about 40 feet high, while those of the Sunday school room, in which the ac-

cident occurred, were much lower, and there is no proof that permanent scaffolding erected by carpenters was necessary or usual in painting walls of the height of those where the accident occurred. Plaintiff testified that the scaffold consisted of a single plank resting upon a trestle at one end and a ten-foot stepladder at the other, with a short stepladder of six or seven feet reaching from this plank to the wall; that the reason he could not have a wider scaffold was because the stepladder upon which the plank rested was not wide enough; that there was another trestle in the church that he could have used; that he helped another workman prepare this scaffold; that he supposed he spoke to him about getting the other trestle, but the other man's shoulder was dislocated, and he could not carry it from the other part of the church. He did not call one of the other men to bring it, although he could have done so. He admitted that at the former trial he testified as follows: "Q. If you had used the two trestles, instead of one trestle and a stepladder, would the scaffolding have fallen? A. It might not. * * * Q. Isn't it your judgment now, Mr. Creighton, that if you had used the two trestles to build up your scaffolding instead of using one stepladder and a trestle this accident would not have happened? A. Yes, sir." Furthermore, while admitting he could have done the work by using an ordinary ladder, his explanation why one was not used instead of the dangerous appliance is unsatisfactory.

Other witnesses for plaintiff testified that the use of the stepladder to support one end of the plank and the trestle to support the other was not as safe as if both trestles had been used, and that, if so used, the arrangement would have been as safe as most scaffolds. There is testimony that a small stepladder should not be used on the top of a ten-foot scaffold, but we cannot see its relevancy to the vital question in the case.

The plaintiff, who had some measure of direction of the work, though not a foreman, assisted in the erection of a defective and dangerous scaffold. This condition was so apparent that it would seem that almost any man of rea-

sonable understanding would have realized its precarious and unsafe nature. At the same time the means were at his disposal and near at hand with which to provide a safe one. He obviously assumed the risk of using the defective structure.

We think he was also guilty of contributory negligence. The principles are clearly stated, as follows: "An experienced servant left to his own discretion as to the manner of performing a task under a general order, who selects a dangerous method of doing the work instead of a safe method, which is equally open to him, cannot recover from the master for consequent injury. * * * The master has the right to assume that an experienced servant of mature years is possessed of ordinary mental faculties, the usual powers of observation, and such knowledge as is acquired by common experience." *Illinois C. R. Co. v. Swift,* 213 Ill. 307.

It is also said: "Where, however, the employee is not directed to do the work in a specific manner, but is given a general order to perform the task, and is himself left to use his own discretion as to the manner in which the work shall be done, and there exists a safe way and a dangerous way, which are equally open to him, if he selects the unsafe method through heedlessness or because it involves less exertion on his part, and injury to his person results, he cannot recover. *Pennsylvania Co. v. Lynch,* 90 Ill. 333; *Illinois C. R. Co. v. Sporleder,* 199 Ill. 184."

The district court did not err in directing the jury to find for defendant, and its judgment is therefore

AFFIRMED.

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

ARTHUR B. WOOD, TREASURER, APPELLEE, V. MCCOOK WATER-WORKS COMPANY, APPELLANT.

FILED NOVEMBER 12, 1914. No. 17,845.

1. **Taxation:** ASSESSMENT OF PERSONAL PROPERTY. The revenue law as to the assessment of personal property examined, as set out in the opinion, and construed to mean that such property shall be listed and assessed with reference to the quantity held or owned on the 1st day of April in the year for which the property is required to be listed.
2. ———: ———: EVASION. One who owns personal property subject to taxation at the time when it is returnable for assessment and taxation for any year cannot escape liability for the tax for such year by subsequently devoting the property to a purpose which would thereafter render it not subject to taxation, nor by a sale of such property to a municipal or other corporation, in whose hands such property thereafter would not be subject to taxation.

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

*Frank E. Bishop, John E. Kelley* and *C. E. Eldred,* for appellant.

*W. M. Somerville* and *C. D. Ritchie, contra.*

FAWCETT, J.

This action was brought by plaintiff in his official capacity, in the district court for Red Willow county, to recover taxes upon personal property assessed against the defendant for the year 1911. A general demurrer to the petition was overruled, and, defendant declining to plead further, judgment was entered for plaintiff for the amount of the tax. Defendant appeals.

The petition alleges substantially: That on April 1, 1911, defendant was a corporation, with its principal office and place of business and all of its property, upon which the tax was assessed, located in the city of McCook, and also in school district No. 17; that on that date defendant was engaged in selling water to the city of McCook and its

inhabitants, was the owner of a valuable plant and of a franchise permitting it to engage in such business in that city; that on or about May 20, 1911, defendant, for the purpose of listing its franchise and personal property for taxation, made out a sworn statement and delivered the same to the assessor; that by such statement the company listed and valued all tangible personal property owned by it on the 1st day of April, 1911, at the sum of $43,550; that thereupon the assessor duly fixed and made a valuation of such property on the 1st day of April, 1911, at the sum named and fixed and made the assessed valuation thereof at the sum of $8,710; that on or about the 27th day of July, 1911, there was levied against the property a tax of 6.5 mills for state purposes, and on the 3d day of August, 1911, there was levied a tax for county, state and school district purposes aggregating 41.1 mills; that by reason of such listing, assessing and levying of taxes there became due and owing from defendant to plaintiff, as treasurer, the sum of $811.77 personal tax, no part of which has been paid; that on October 30 the said assessments were duly transcribed into the tax list of the county clerk, and on or about that date the county clerk attached a warrant to such tax list commanding the treasurer to collect the same; that on the 1st day of July, 1911, the defendant sold and delivered its water-works plant and all property connected therewith to the city of McCook, for the sum of $65,000; that on February 1, 1912, plaintiff issued a distress warrant directed against defendant for the amount of the tax and interest, and on February 8 the warrant was returned unsatisfied. Wherefore the plaintiff prays judgment for $811.77, with interest at the rate of 10 per cent. per annum from the 1st day of December, 1911.

The assignments of error are that the court erred in overruling the demurrer and in rendering judgment against defendant. The contention of defendant is that the sale and delivery by defendant of its property to the city of McCook on July 1 was prior to the completion of the assessment for 1911, and prior to the levy of any tax for that year; that the property was exempt from taxation

as soon as it became the property of the city; that the assessment was not completed and did not become final until after the value, as found by the local assessor, had been corrected by the county assessor and equalized by the county and state boards of equalization; that the levy of tax was not made and did not become a lien until after the property had been transferred to the city; that "the principal question involved then is: The property having been transferred into the hands of the city of McCook, where it was exempt from taxation, prior to the time the assessment was completed, and levy of tax made, and prior to the time when the tax would become a lien upon the property, was the attempted taxation void?" The district court answered this question in the negative.

In a typewritten memorandum, submitted by counsel for defendant by leave of court after the arguments at the bar, it is claimed that the statute does not fix any definite date when personal property shall be assessed either as to valuation or ownership; that the whole matter of assessment is progressive, and is not concluded until the work of the assessor, the county board and the state board is completed in the final levy made after all their work is done, which was August 3 in this case.

Prior to 1903, section 6, art. I, ch. 77, Comp. St. 1901, of the revenue law, provided: "Personal property shall be listed between the first day of April and the first day of June of each year, when required by the assessor, with reference to the quantity held or owned on the first day of April in the year for which the property is required to be listed." By an act approved April 4, 1903 (laws 1903, ch. 73), the legislature provided a system of public revenues, and repealed all of article I, chapter 77, as it had existed prior thereto. In the new act section 6, art. I of the prior act, above quoted, seems to have been omitted, but that the legislature did not intend to change the rule that assessments of personal property are based upon the amount of property owned by the taxpayer on April 1 is shown by the oath which the taxpayer is required to make to the schedule furnished him by the assessor, which is:

"I, ————, being duly sworn, say that the foregoing statement and schedule is true and contains a full and complete list of all property held by or belonging to me on the first day of April. * * * I further swear that, since the first day of April of last year, I have not directly or indirectly converted or exchanged any of my property temporarily, for the purpose of evading the assessment thereof for taxes, into nontaxable property or securities of any kind." Laws 1903, ch. 73, sec. 52. This oath has ever since been required of all taxpayers, and is now provided for in section 6339, Rev. St. 1913.

That the revenue law as to the assessment of personal property has been so construed by all taxing officers and taxpayers of the state since the act of 1903, the same as prior thereto, is a matter of common knowledge. Such being the fact, the courts will so construe it until the legislature has further spoken on the subject. The petition alleges that, after defendant made and delivered its schedule to the assessor on or about May 20, the assessor thereupon "duly fixed and made a valuation of all the tangible personal property belonging to said corporation on the first day of April, 1911." If the assessor "duly" fixed and made his valuation, he did so on or before the 1st day of June, 1911. Comp. St. 1909, ch. 77, art. I, sec. 116. It appears, therefore, from the allegations in the petition, that, at the time defendant sold the property covered by the schedule which it filed May 20, such property had been duly assessed by the county assessor a full month prior to the time of such sale. Conceding the defendant's contention that the assessment did not become final until after it had been acted upon by the state and county boards of equalization, we do not see how that can aid it. It knew that it had been assessed by the county assessor in the sum of $8,710, and that any tax levied upon that assessment would impose upon it a personal liability therefor. If any change in conditions had occurred after it had returned its schedule and an assessment had been made thereon by the assessor, which would have authorized the county board of equalization to give it any relief, it should have

applied to that board when it met on or about July 27, and if the board had denied any relief to which it was entitled, the statutes provided a plain and adequate remedy by appeal to the district court.

Did the sale of the property on July 1 to the city, cancel defendant's liability upon the assessment because of the fact that after the property passed to the ownership of the city it thereafter would not be liable to taxation? We think the answer to this question must be adverse to defendant. The case is not different from what it would be if, after defendant had filed its schedule and the assessor had made the assessment, and while still owning the property, it had changed the use of it to a purpose which would relieve it from taxation. Such a change would not relieve it from liability. *People v. Commissioners,* 104 U. S. 466. In that case the relator was assessed for taxation as of January 1, 1876, upon his personal estate, to the amount of $60,000. He made application, supported by affidavit, for a reduction or remission of his assessment upon the ground that the value of all his personal estate on January 1 did not exceed $125,000, and that as to all except $5,500 it consisted of money which "was continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the customs department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different states of the United States, and actually exported by deponent in said business, and for the payment of all the expenses of shipping the same as such exports." The reduction and remission were both denied. Upon writ of *certiorari* the proceedings of the tax commissioners were affirmed in the supreme court of the state of New York, and its judgment was affirmed by the court of appeals, whereupon relator prosecuted error in the supreme court of the United States. In the opinion by Mr. Justice Harlan it is said: "The plaintiff in error was assessed, upon his personal property, as of January 1, 1876. If the capital, which he claims was uniformly and continuously employed in the business of purchasing cotton for exportation from

the United States to foreign countries, through the customs department, was, in fact, in money on the 1st day of January, 1876, he could not escape a subsequent assessment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries." (If it had been so invested on the 1st day of January, it would not have been subject to taxation.) It will be observed that the court expressly holds that one who owns property subject to taxation at the time when it is returnable for assessment and taxation cannot escape liability for the tax by subsequently changing the character of his property by investing it in other property which would render it not subject to taxation. Suppose defendant, on July 1, had sold its property which had been assessed, and with the money obtained from the sale had purchased United States bonds, could it have escaped the payment of taxes? Clearly not. The fact that the assessment and the tax subsequently levied thereon had not become a lien upon the property, so as to make a purchaser thereof liable for the tax, is entirely immaterial. The city, of course, took the property free from any lien of the tax, but this did not relieve the defendant of its liability therefor.

The demurrer was properly overruled.

AFFIRMED.

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

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DANIEL A. HANEY, APPELLANT, V. VILLAGE OF HYANNIS, APPELLEE.

FILED NOVEMBER 12, 1914. No. 17,849.

**Municipal Corporations:** SUIT TO DISCONNECT LAND: SUFFICIENCY OF EVIDENCE. The evidence examined and set out in the opinion, *held*, ample to sustain the judgment of the district court.

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

*Sullivan & Squires,* for appellant.

*Boyd* and *Barker, contra.*

FAWCETT, J.

Plaintiff instituted this action in the district court for Grant county, for the purpose of having certain land disconnected from the village of Hyannis. Upon a full hearing after issues joined, his petition was dismissed for want of equity. From this judgment he appeals.

The statute under which plaintiff proceeded is section 8978, Ann. St. 1911, which provides that, if "justice and equity require that such territory, or any part thereof, be disconnected from such city or village," the district court shall enter a decree accordingly. The law upon the question involved is well settled in this state. In *Village of Wakefield v. Utecht,* 90 Neb. 252, we held: "In an action to annex additional territory to a village, the burden is upon the village to establish by sufficient averments and evidence that the territory sought to be annexed will be benefited by the annexation, or that justice and equity require that such territory be annexed." By analogy the holding must necessarily be that, in an action to disconnect territory, the burden is upon the petitioner to establish by sufficient averments and evidence that justice and equity require that such territory be disconnected. In *Chapin v. Village of College View,* 88 Neb. 229, we held that a judgment of the district court in a proceeding to exclude territory from the boundaries of a municipal corporation will not be set aside on appeal, unless it is made to appear that the trial court committed an important mistake of fact, or made an erroneous inference of fact or of law. On page 231 will be found a citation of former decisions of this court to the same effect.

Plaintiff purchased the land, which he now seeks to have disconnected, about five years prior to the commencement of this action, which was several years after the incorporation of the defendant, so that he purchased it with full knowledge that it was within the limits of the village.

By his own testimony he shows that he is the owner of a stock ranch about 30 miles from the village, upon which, at the time of the trial, he had between 500 and 600 head of horses and cattle; that he had upon the ranch a dwelling-house and barn and sufficient accommodations for his wife and five children, and that his family had lived upon the ranch prior to the purchase of the village property; that his purpose in purchasing the village property was "to get close to a school;" that at the time of the trial he had four children of school age, one of whom was in the eighth grade and would pass into the high school the next year; that, with one possible exception, the high school in Hyannis is the only high school in the county; that he is not engaged in any business in Hyannis, but spends the major portion of his time upon his ranch, his family living in the home which he has established upon the property in controversy; that all of the 50-acre tract in controversy, except some five or six acres on which he maintains his home, is rough land and used by him for pasture; that all of the stock he keeps in the village is a cow and one team for the use of his family; that he occasionally has four horses there when he is "freighting." He testified that he farmed from four to six acres of the land in connection with his village home. On cross-examination he shows that that is all the land there is fit to farm. "Q. And where you raise a garden? A. Raise some corn and potatoes and garden. Q. And that was for you and your family there, wasn't it? A. Yes, sir. Q. And corn for your team? A. No; I didn't raise any corn to speak of. Q. When you told the court you were farming it, you meant to say you were gardening it? A. I have it in alfalfa, some of it. Q. How much? A. Two or three and a half or four acres." He further testified: "Q. Do you make any of your living off of this place, with the exception of what you raise in your garden and what alfalfa you raise for your team? A. No. Q. You make your living from your ranch? A. Principally, yes. * * * Q. All that you farm there or use for any agricultural purposes is a little over five acres? A. About five or six. Q. And that's the

part you just use for your home purposes, and don't attempt to make a living there, do you, simply a little side issue with you there, isn't it? A. Yes, sir. * * * Q. State what benefit anybody else off Main Street enjoys that you haven't enjoyed during the last six years. A. Well, I don't call any to mind now." A short time prior to the commencement of this action the village voted $8,800 for the construction of a water-works system. Prior thereto it is evident that plaintiff was entirely satisfied with conditions existing in the village, but the issuance of water bonds did not meet his approval. He testifies that he voted against issuing the bonds. When asked why he did so, he answered: "I didn't feel able to pay the tax. Q. You felt you were too far away to get the use of this water at first? A. Yes, sir. Q. You didn't think you were going to get any of this water? A. I don't think I am." Outside of the indebtedness about to be incurred upon the water bonds, the village seems to have been in a very prosperous condition, so much so that it had no bonded indebtedness, and during the year 1911 no taxes were levied for any purpose whatever. Plaintiff's reason for thinking that he would not derive any benefit from the water-works about to be installed is based upon the fact that on the initial instalment of water-works the plans contemplate only the extension of mains through the main street and the main part of the village; plaintiff's land being on the eastern limits of the village. This fact is far from showing that extensions will not be made in course of time as fast as the funds and necessities of the village will warrant the making of such extensions.

In the light of the above facts, the district court very properly dismissed plaintiff's petition for want of equity.

AFFIRMED.

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

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

FILED NOVEMBER 12, 1914. No. 17,670.

1. **Nuisance:** ABATEMENT: PURPOSE OF ACT: CONSTRUCTION. Chapter 63, laws 1911, is entitled "An act to enjoin and abate houses of lewdness, assignation and prostitution, to declare the same to be nuisances," etc., and it is designed to provide means of suppressing houses devoted to such purposes. A house maintained as a place for lewd men and women to congregate for immoral purposes is within the terms of the statute.

2. ———: ———: ENFORCEMENT OF ACT. The statute is strenuous; there should be proof that the place complained of is in fact a house of lewdness, assignation or prostitution. When that fact is satisfactorily established, the statute should be liberally construed in applying the remedy given.

3. ———: ———: EVIDENCE: "GENERAL REPUTATION." The general reputation of the house and of the people, men and women, who frequent it may be shown, but it must be the general reputation among people who are in the position to form an opinion. Proof of such general reputation is received as other evidence in the case, and is not of itself necessarily conclusive.

4. ———: STATUTE TO ABATE DISORDERLY HOUSE: VALIDITY: QUÆRE. The fourth paragraph of the syllabus of our former opinion in this case (96 Neb. 123) is withdrawn, and the question whether section 8782, Rev. St. 1913, providing for a tax of $300, and the payment of a fraction thereof to the attorney prosecuting the case, is unconstitutional is not decided.

5. **Quære.** Whether that part of section 8779, Rev. St. 1913, which provides that, if the existence of a nuisance is established in a criminal proceeding (see Rev. St. 1913, secs. 8783, 8845), an order of abatement shall be entered the same as in the action in equity provided for in preceding sections, is constitutional and valid, *quære.*

6. **Constitutional Law:** NUISANCE: VALIDITY OF STATUTE. Our former decision in this case as to the constitutionality of chapter 63, laws 1911, except as above indicated, is adhered to.

7. **Nuisance:** SUIT TO ABATE: SUFFICIENCY OF EVIDENCE. The evidence indicated in this and our former opinion herein is found insufficient to support the decree.

Rehearing of case reported in 96 Neb. 123. *Former judgment vacated, and judgment of district court reversed.*

SEDGWICK, J.

On the former hearing in this case we found that the portion of the decree "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," and 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." 96 Neb. 123. The record is large and somewhat complicated, but upon further consideration we think it ought to be considered that the appeal has brought up the whole case for consideration.

The defendants strenuously contend that the statute under which these proceedings are brought (laws 1911, ch. 63) is unconstitutional and void. Upon the former hearing it was practically conceded that section 8 of the act (Rev. St. sec. 8782) is unconstitutional, and it was so considered accordingly. Very soon after our former decision the supreme court of Minnesota, in *State v. Ryder*, 126 Minn. 95, 147 N. W. 953, had occasion to consider the constitutionality of a very similar statute. The discussion in that case covers all objections raised in the case at bar, unless it is the one which will be herein separately considered. The discussion by the Minnesota court of the constitutionality of their statute corresponding to our section 8 is quite full and complete, several authorities being cited, and the court concludes that the statute is constitutional and valid. The reasoning seems satisfactory, but it is not necessary now to decide as to the constitutionality of section 8 of our act, and we content ourselves with withdrawing what was said upon that point in the former decision of this case.

As we have already said, the opinion of the Minnesota court in the case above cited, and the opinion in *State v. New England F. & C. Co.*, 126 Minn. 78, decided at the same time by that court, seem to satisfactorily dispose of all

questions as to the constitutionality of such legislation, except one which is perhaps peculiar to our statute.

Section 5 of the act (Rev. St. sec. 8779) provides: "If the existence of the nuisance be established in an action as provided in this act, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and effectual closing of the building or place against its use for the purpose, and so keeping it closed for a period of one year, unless sooner released." Section 8783 (208) Rev. St. 1913, is as follows: "Every house, building, tent, boat, wagon or other vehicle, or any other structure, situated in this state, used and occupied as a house or place of ill fame or for purposes of prostitution, shall be held and deemed a public nuisance; and any person owning, or having the control of, as guardian, lessee or otherwise, such house, building, tent, boat, wagon or other vehicle, or any other structure, and knowingly leasing or subletting the same, in whole or in part, for the purpose of keeping therein a house or place of ill fame, or knowingly permitting the same to be used or occupied for such purpose, or using or occupying the same for such purpose, shall for every such offense be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not to exceed three months." This was section 210 of the criminal code prior to the revision of 1913, as amended by ch. 173, laws 1907. The amendment included other buildings and structures than those named in the original act and increased the penalty. It is insisted that the act under which this prosecution was brought is unconstitutional because it amended sections 8783(208) and 8845(270) Rev. St. 1913. It would seem that section 5 of the act, by the words "or in a criminal proceeding," attempts to amend section 210 of the criminal code (Rev. St. 1913, sec. 8783(208)) by adding an additional penalty upon conviction under that

section. If this should be considered as an amendment to that section within the meaning of section 11, art. III of the constitution, it would not necessarily render the whole act invalid, since those words are separable from the act and may be omitted without affecting the remainder of the act.

Except as herein noted, we are satisfied with our former conclusion as to the constitutionality of the act. This requires us to consider whether the evidence justifies the finding that the building in question is used for the purpose of lewdness, assignation, or prostitution, within the meaning of the act. It is entitled "An act to enjoin and abate houses of lewdness, assignation and prostitution, to declare the same to be nuisances," etc. Laws 1911, ch. 63. Section 3 of the act provides: "Evidence of the general reputation of the place shall be admissible." This does not contemplate receiving testimony as to the opinions of personal enemies of the proprietor, nor their declarations, though publicly made, but contemplates proof of what is generally reported among those who are in a position to form an opinion of the character of the house. Mr. Bishop says: "There must be the keeping of a house. For a woman to be a common bawd, or merely to live alone and receive one man or many, is not to keep a bawdy house. And more women than one must live or resort together to make such a house. Therefore permitting a single act of illicit intercourse will not alone constitute the offense." 1 Bishop, Criminal Law (7th ed.) sec. 1085. It has been held that the reputation of the keeper of the house, and of the people, both men and women, who frequent it, may be proved, but it is generally held that the reputation of the house alone is not sufficient, and in an early case in Wisconsin it was held: "Proof that the reputation of the house, or of its frequenters and the defendant was bad in that respect, is not *conclusive* of defendant's guilt." *State v. Brunell,* 29 Wis. 435. This case was cited with approval by this court in *Drake v. State,* 14 Neb. 535. This was a prosecution under section 210 of the criminal code; Rev. St. 1913, sec. 8783(208). In discussing the evidence nec-

essary to establish the charge, the court emphasized the fact that the evidence was that the house was not used for any other purpose. "No family lived in it." In a note under *Beard v. State*, 4 L. R. A. 675, it is said that "general reputation is not sufficient evidence," and many authorities are cited as supporting that proposition. Other authorities are cited as holding that the character of the house may be proved by common reputation, but in such case "the proof must directly implicate the person charged with keeping it." The title of the act reminds us that it is houses of lewdness, assignation and prostitution that are to be dealt with, and in determining the character of the house in question it is of great, if not controlling, importance to inquire whether it is principally devoted to a legitimate purpose.

The object of the statute is to provide an efficient and prompt means for suppressing the so-called "red light district" in communities that are unwilling to tolerate such a nuisance. The statute is not intended as a means of regulating the morals of private individuals, nor to prevent immorality in hotels, mainly devoted to the accommodation of families and moral, well-behaved people. Of course, if a hotel becomes "a house of lewdness, assignation and prostitution," it will not escape the ban of the statute because some innocent people are deceived and patronize the house in good faith as a hotel. It is not necessary to prove that the owner of the property knew that it was being used for the prohibited purposes; if the proprietor, that is, the person in control and management of the house, has such knowledge it is sufficient.

The general character of the evidence is stated in our former opinion (96 Neb. 123) and it was there said: "The evidence as to the hotel having an evil reputation was conflicting. * * * 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." It might be further suggested that much of the evidence intended to show the reputation of the house is indefinite, and some of it incompetent. The witnesses were

not always confined to general reputation, but were allowed to state their belief and how they individually regarded the use of the hotel. The evidence of "paid decoys or informers," referred to in our former opinion, related mostly to the doings of vile persons sent to the hotel for that purpose, after this action was begun. The statute is a wholesome one. It ought to be liberally construed to enable virtuous communities to protect themselves against public places kept for lewd purposes. It may be that the authorities of Omaha have begun with the most shameless bawdy house within that city, but the evidence taken at the trial does not convince us that such is the fact. If this hotel is devoted to such purposes, that is, if it is a house of lewdness, assignation, or prostitution, the prosecutor will undoubtedly be able to establish that fact.

Our former decision is therefore set aside, and the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J. I dissent from the order setting aside our former decision. I think it should in all respects be adhered to.

ROSE, J., not sitting.

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W. F. H. ARMSTRONG, TRUSTEE, ET AL., APPELLEES, V. DAVID C. PATTERSON, APPELLANT.*

FILED NOVEMBER 12, 1914. No. 17,384.

1. **Limitation of Actions:** QUESTION FOR COURT. When the pleadings show, without dispute, the time that has elapsed since the cause of action accrued, the question whether the action is barred by the statute of limitations is a question of law for the court.

2. **Judgment:** ACTION ON JUDGMENT. When the federal court for this district has rendered a judgment for deficiency in an action of foreclosure of a real estate mortgage, an action upon such judg-

*Reversed on rehearing, see opinion, p. ——, *post*.

ment may be maintained in the courts of this state without first obtaining leave to bring such action.

3. ———: ———: LIMITATIONS. The statute of limitations does not apply to actions upon domestic judgments.

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

*David C. Patterson, pro se.*

*William Baird & Sons, contra.*

*A. S. Churchill, amicus curiæ.*

SEDGWICK, J.

This plaintiff obtained a deficiency judgment against the defendant in the circuit court of the United States for this district in June, 1897, and in July, 1911, he brought this action upon that judgment in the district court for Douglas county. He alleged in his petition the foreclosure of the mortgage and sale of the property and the deficiency judgment. The defendant answered, admitting the judgment as pleaded, and alleged the statute of limitations, and that no permission had been given by the court in which the judgment was rendered to bring an action thereon. No reply was filed, and upon plaintiff's motion the court entered a judgment in his favor upon the pleadings. The defendant has appealed.

These pleadings show that more than 14 years had elapsed after the entry of the judgment before the commencement of this action, and the allegation that no permission had been given by the court to bring an action upon the judgment not being denied, the question is also presented as to whether such permission is necessary.

1. Upon the first proposition the plaintiff relied upon *Snell v. Rue,* 72 Neb. 571, in which it was held: "The provisions of sections 10 and 16 of the code, known as the statute of limitations, do not apply to actions upon domestic judgments." The defendant attacks that decision as unsound. He points out that it is predicated largely upon *Tyler's Ex'rs v. Winslow,* 15 Ohio St. 364, and says

that that decision is wrong, and has since been discredited by the Ohio court. He also calls attention to *Stockwell v. Coleman,* 10 Ohio St. 33. It is true that in *Tyler's Ex'rs v. Winslow* it is held that a judgment of a court of that state is not a specialty, within the meaning of their statute, and that the decision is substantially placed upon that holding, and in *Stockwell v. Coleman* it was held that a foreign judgment is a specialty, which appears to be recognized by the Ohio court as inconsistent with the holding that a domestic judgment is not a specialty. In the later case the holding in the *Stockwell* case is limited, "so far as it conflicts with the holding that the domestic judgment is not a specialty." In *Todd v. Crumb,* 5 McLean (U. S.) 172, the circuit court of the United States decided that "the statute of limitations of Ohio does not bar an action on a judgment. A judgment is not an agreement, contract, or promise in writing, nor is it in a legal sense a specialty." The statute construed in that case was "that all actions upon the case, covenant, and debt founded upon a specialty, or any agreement, contract, or promise in writing, must be brought within fifteen years," which is, so far as this question is concerned, identical with ours, except that ours applies the limitations specifically to foreign judgments, and so tends to raise the presumption that it was not intended to include domestic judgments in the limitation. In *Fries v. Mack,* 33 Ohio St. 52, which was decided in 1877, the supreme court of that state appears to discredit the decision in *Tyler's Ex'rs v. Winslow, supra,* although it expressly refuses to overrule it. Speaking of that case and the case of *Stockwell v. Coleman, supra,* the court said: "The two cases may well stand together, although it must be conceded that the reasons upon which the latter decision (*Stockwell v. Coleman*) is placed by the judge delivering the opinion are not in harmony with the views expressed in the former case, and strongly tend to weaken its authority."

It is not entirely clear why the legislature should limit actions upon foreign judgments to five years, and limit proceedings to revive dormant domestic judgments to 10

years, and provide no limitation upon actions upon domestic judgments. It is to be expected that, when the attention of the legislature is called to this matter, there will be further legislation. The decision in *Snell v. Rue, supra,* was rendered more than 10 years ago. It is not wholly without reason to support it, and it has been emphatically approved by this court in an important action in which it was a vital question. *Young v. City of Broken Bow,* 94 Neb. 470. In the opinion in that case the court said: "One of the defenses interposed by the city is that all of the judgments are barred by the statute of limitations. Counsel for defendant abandons this contention in his brief, and concedes that under the authority of *Snell v. Rue,* 72 Neb. 571, this defense must fail." There have been five sessions of the legislature since the decision was pronounced, and in 1909 the statute providing for the revival of dormant judgments was amended so as to place an absolute limit upon such proceedings (laws 1909, ch. 154), and the legislature has not seen fit to establish any limitation for actions upon domestic judgments. To establish such a limitation now would be legislation, and is not within the province of the courts.

2. Section 8257, Rev. St. 1913, provides: "After such petition (for the foreclosure of a real estate mortgage) shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." We have seen that it is conceded that no such permission was granted by the court by which this deficiency judgment was rendered. It is insisted by the defendant that this permission is necessary after a deficiency judgment is rendered, as well as while the proceedings for foreclosure are pending, but in this we think that the defendant is wrong. A decree of foreclosure of the mortgage becomes a final decree when the sale thereon is confirmed, so that the statute contemplates two decrees, and the words in the statute, "after a decree is rendered thereon," must be construed to mean the decree of foreclosure, rendered

on the mortgage. When we consider the purpose of the statute requiring the permission of the court in which the action is pending, this construction of the statute becomes necessary. Section 8259 requires the plaintiff in foreclosure to allege and prove that no proceeding at law has been had to recover the debt, or if such proceeding is had it must be finally determined and disposed of before an action for foreclosure can be sustained. These two sections of the statute, construed together, are plainly intended to protect the defendant against the pendency of two actions at the same time, one for the foreclosure and the other for the recovery of the debt. The reason of these provisions has no application whatever to a deficiency judgment. After the decree on the foreclosure proceedings until the sale is made and confirmed by the court, the defendant is protected against any action in another court for the recovery of the debt. The judgment for a deficiency is a final and independent judgment upon the debt itself, and when such judgment is entered all questions in regard to the indebtedness are settled and the defendant is no longer in litigation in regard thereto.

3. It appears that the plaintiff applied to the United States court to revive the deficiency judgment, but afterwards dismissed that application, and it cannot therefore affect the question presented here.

The judgment of the district court is in harmony with the views above expressed, and is therefore

AFFIRMED.

FAWCETT, J., not sitting.

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PETER L. WEBER, APPELLEE, V. WILBER W. TOWLE, APPELLANT.

FILED NOVEMBER 12, 1914. No. 17,885.

1. **Chattel Mortgages: BILL OF SALE: EVIDENCE.** A bill of sale, although purporting on its face to convey the property absolutely, may be shown to have been given as security only.

2. ———: ———: ———. When the maker of the bill of sale is indebted at the time, and such indebtedness forms the consideration for the contract, it is important to know whether the indebtedness was canceled and the evidence thereof surrendered when the bill of sale was made.

3. ———: ———: QUESTION FOR JURY. If, however, the value of the property is much greater than the amount of indebtedness so surrendered, and the proof is clear and satisfactory that the bill of sale was induced by promises to allow the maker thereof to redeem by paying the amount of the indebtedness and interest thereon, it is for the jury to find, in the light of the circumstances of the transaction, whether the transaction was an absolute sale or security only.

4. **Appeal:** CONFLICTING EVIDENCE. When the evidence as to the value of the property, and upon the general issue tendered, is substantially conflicting, the verdict of the jury will not be disturbed as unsupported, unless, upon the whole record, it is clearly wrong.

5. ———: INSTRUCTIONS: ISSUES. The trial court should, as far as practicable, simplify the issues in instructions to the jury, but if the parties concur in the method of trial, and the jury is instructed in harmony therewith, and the instructions contain no erroneous statement of law prejudicial to the party complaining, the judgment will not be reversed upon appeal because matters are submitted to the jury which were actually tried by the parties, but which should have been eliminated from the case if either party had desired.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

*George A. Adams,* for appellant.

*A. F. Moore, Tibbets, Anderson & Baylor* and *Holmes & DeLacy, contra.*

SEDGWICK, J.

In November, 1911, this plaintiff appears to have been conducting a cabinet business on O street, in the city of Lincoln. He had some machinery, tools, a little lumber, some mantels, and other stock. This property was mortgaged in the sum of $490. The mortgage was past due, and the plaintiff had waived publication of notice of foreclosure, and the mortgagees were insisting upon a sale of

the property. The defendant Deahl was interested as mortgagee, and the defendant Towle was acting as his attorney or adviser. They went to the plaintiff's place of business in the forenoon and insisted upon a sale of the property to pay the indebtedness. At the plaintiff's request the matter was continued until afternoon, when the defendants were again at the place of business, and the plaintiff executed to the defendant Towle a bill of sale of the property. Towle took possession of the property, and the keys to the room in which it was situated were turned over to him. Towle paid the mortgages on the property and turned them over with notes they secured to the plaintiff. He also gave the plaintiff receipts for certain claims which he held for collection against the plaintiff, and afterwards paid the rent for the room. A few days later the plaintiff offered to redeem the property by paying the amount which the defendant Towle had paid for the same, with interest at the rate of 10 per cent. from the time of the payment. This the defendant Towle refused, insisting that the transaction was an absolute sale to him. The plaintiff brought this action in the district court for Lancaster county to recover the value of the property, alleging that the defendant Towle had converted it to his own use, and that the defendant Deahl had assisted him in the conversion. Deahl was afterwards discharged from the case, and the jury found a verdict in favor of the plaintiff in the sum of $732. The court required the plaintiff to remit $232 from this verdict, which was done, and judgment entered against the defendant Towle in the sum of $500, from which he has appealed.

The principal question presented and argued in the brief is whether the transaction was an absolute sale or was merely a transfer of the title as security. Although the question was a simple one, the parties succeeded in putting in evidence covering something over 400 pages of typewritten matter, much of it immaterial, consisting of evidence of prior transactions, and of extensive cross-examination, more or less irrelevant. It has been frequently held in this and other states that a bill of sale of personal prop-

erty, although in form without any condition, may be shown by parol evidence to have been given as security only. When the maker of a bill of sale is indebted at the time, and such indebtedness forms the consideration for the contract, it is generally considered that it is very important to inquire whether the indebtedness was extinguished by the contract or was continued and existed concurrently with the bill of sale. In this case the defendant testified that, when he took the bill of sale, he surrendered the notes and mortgage to the plaintiff, and also gave him receipts in full for claims which he held against him for collection. From the plaintiff's evidence it appears that he had possession of the notes and mortgages at the time of the trial, and there is no suggestion in the briefs that the defendant's evidence upon this point is anywhere contradicted in this voluminous record. The plaintiff alleges that the defendant was to return him the property upon payment of $500, and did not allege, or even admit in his pleadings, that he agreed at the time to repay the defendant the full amount which was paid for the property and interest thereon.

From these and other circumstances that appear in the record, if the question had been submitted to us to determine the fact, we should probably have found that the transaction was an absolute sale, but it is the duty of the jury to determine the questions of fact, and, where there is a substantial conflict in the evidence, the finding of the jury upon such questions cannot be disturbed, unless, upon the whole record, it appears that it is clearly wrong.

The plaintiff testifies, and there were circumstances indicating that he was correct in testifying, that he was laboring under some compulsion when the bill of sale was made, and that, before agreeing to execute the bill of sale, he obtained from the defendant Towle a promise that, if he would execute the bill of sale, he would hold the property for 10 or 12 days, and would reconvey it to the plaintiff upon payment to him of the amount which he had advanced for the plaintiff. There was other evidence tending to corroborate the plaintiff in this, and, while it was contra-

dicted by the defendant and by some other evidence, we cannot say that the jury were so clearly wrong as to require that the verdict be set aside. If the value of the property was much greater at the time than the amount which the defendant paid out for the plaintiff, that fact would tend to corroborate the plaintiff's testimony upon this point. The evidence in regard to the value of the property was very conflicting, and it would be impossible to determine with any degree of accuracy its true value at the time the bill of sale was made. There was some evidence tending to show that the property was worth as much as $2,000, and it would not have been entirely beyond reason to have found its value to be $1,000, and perhaps more.

The defendant criticises some of the instructions given by the court. If the defendant had confined the investigation to the real issue of the character of the bill of sale, and had consistently insisted that the plaintiff's evidence be also so confined, the defendant would be in a better position to complain of these instructions. We have not found that the instructions misstate any abstract proposition of law, and the court, in submitting the question to the jury, followed substantially the theory of the parties as to the manner of trial. The defendant requested no instruction submitting the issue as he seems to insist now that it ought to have been submitted. When we consider the method of both parties at the trial, we cannot say that the court has unfairly submitted the issue. We have not found any error in the record, of which the defendant is in position now to complain, which requires a reversal.

The judgment of the district court is therefore

AFFIRMED.

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

# WILLIAM BOYD, JR., APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,800.

1. **Change of Venue.** "An application for a change of venue in a civil action should be denied, unless it is made to appear to the court that a fair and impartial trial cannot be had in the county where the action is pending; the fact that there are numerous persons in the county that are biased and prejudiced against a party to a suit will not justify a court in granting a change of venue, on the application of such party, if it appears that a fair and impartial jury can be had, and a fair trial had therein." *Northeastern N. R. Co. v. Frazier*, 25 Neb. 42.
2. ———: APPEAL: DISCRETION OF COURT. "Unless an abuse of discretion is shown, this court will not disturb the ruling of the lower court upon a motion for a change of venue." *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835.
3. ———: ———: ———. "In passing on a motion for a change of venue the district court is vested with a sound legal discretion, and his ruling thereon will not be disturbed unless it appears that he has been guilty of an abuse of such discretion." *Smith v. Coon*, 89 Neb. 776.
4. **Trial:** QUESTIONS FOR JURY: DIRECTING VERDICT. In jury trials all questions of fact upon conflicting and material evidence must be submitted to and decided by the trial jury. In such case, the trial court has no authority to withdraw such evidence from the jury and direct the return of a verdict in favor of either party.
5. **Case Distinguished.** This case distinguished from *Albers v. Chicago, B. & Q. R. Co.*, 95 Neb. 506.
6. **Instructions** given and refused are examined, and no error requiring a reversal of the judgment is found.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

*Byron Clark, Jesse L. Root, Strode & Beghtol* and *Barton L. Green*, for appellant.

*A. G. Wolfenbarger* and *George W. Berge, contra.*

REESE, C. J.

This is an action to recover damages alleged to have been sustained by the destruction of growing crops in the Middle creek valley on August 29, 1910, by reason of the same having been flooded with high water by which, it is alleged, plaintiff's crops were destroyed. It is alleged and contended by plaintiff that the proximate cause of the flooded condition of plaintiff's land and crops was the faulty construction of certain embankments thrown up by defendant in the building of its track yards in said valley, which changed the flow of the surface water in flood times from its former habit of spreading out over the valley to and confining it to the south side of said embankments, thereby greatly increasing the flow upon that side to the extent of overflowing plaintiff's land, which is upon the south side, and destroying his crops thereon, as aforesaid. The amount claimed in the petition was $1,000. A jury trial was had, which resulted in a verdict in favor of plaintiff for the sum of $500. A motion for a new trial was filed and overruled, when judgment was entered upon the verdict. Defendant appeals.

The first question for consideration is the ruling of the district court on a motion for a change of venue filed by defendant in the case of William Albers against this defendant, *Albers v. Chicago, B. & Q. R. Co.*, 95 Neb. 506, but which by stipulation of the parties was considered on the hearing of this case. As shown by the opinion in the *Albers* case, the motion was supported by the affidavits of 113 persons, and opposed by the affidavits of 250 persons. It is stated in plaintiff's brief that there were about 140 affidavits supporting the change and 245 affidavits in opposition thereto. Whether the affidavits presented on the hearing in this case are the same in number as in that case we have no means of knowing, except as is furnished by the stipulation and the acts of the parties, but we will assume that they are substantially the same, some additional affidavits having, probably, been filed after the hearing of the *Albers* case. It is said in defendant's brief that "the showing made by the defendant and by the respective

plaintiffs in all of the cases is identical." It is quite probable that this is substantially correct, although the number of affidavits filed by defendant was 113, instead of 140 as stated by plaintiff. Upon the first consideration of this part of the case, we were strongly inclined to adopt defendant's view that "the instant case, therefore, is ruled by the decision in the cited case (*Albers v. Chicago, B. & Q. R. Co.*, 95 Neb. 506), and the appellant's right to a judgment of reversal, with a direction to grant a change of venue, is absolute." But, upon reflection, and in view of the apparent confusion as to the affidavits, and the further fact that that case was not connected with this one, the parties plaintiff being different persons, the property in dispute being entirely different, and the averments and evidence referring to different property, one separated from the other a considerable distance and upon a different stream, and the alleged construction of defendant's improvements being different from that attacked in the *Albers* case, and the further fact that the damage alleged in this case is said to arise from an overflow in 1910, and in that case in 1908, we have concluded that the question requires an independent investigation, but not forgetting to give due and respectful consideration to the holding in that case, by a majority of the court, to the effect that there was an abuse of discretion on the part of the district court in overruling the defendant's motion for a change of venue in that case.

In defendant's brief much stress is placed upon the affidavit of one Gottfreid Herzog. We have examined his affidavit with care for the purpose of determining the weight to which it is entitled upon this question in this case. The affidavit is quite long, and cannot be set out here in full. It is largely composed of the conclusions of the affiant, instead of the statements of fact within his knowledge, and of matters which do not throw any light upon the views of the people of Lancaster county with reference to this particular suit. He says that continuously since the flood of July, 1908, it has been the topic of conversation among those owners, friends and lawyers in the

city of Lincoln and county of Lancaster, and affiant has repeatedly heard conversations between the owners and claimants when they were alone and also when their attorneys or agents were present, and it was a matter of frequent comment and argument that juries of the county would find for the claimants and that the railway company could not win; that meetings have been held in said neighborhoods by numbers of said owners, aggregating as many as 200 at one time and other times 75 or 50, and in those meetings the question of defendant's liability was discussed, and property owners would agree to testify for each other in their claims for damages and suits, and written memoranda would be made as to what each one would testify to for the other, and those meetings are regularly held upon the last Tuesday of each month, and sometimes special meetings are called at other dates; that affiant is informed that at one meeting a lawyer was present and talked to the claimants and told them why they should commence suits; that he does not remember the name of the lawyer, but heard several property owners discuss the matter afterward; that the 400 owners having claims in the salt basin are scattered over a territory covering 60 blocks in the city of Lincoln and its additions; that at the time of the flood affiant read descriptions in the newspapers published in Lincoln detailing the flood and the loss of property and life and the accompanying exciting events; that affiant was a witness in one of the cases tried. A consideration of this part of the affidavit must satisfy any fair-minded person that, if true, it could have no possible bearing upon the question of the mental attitude of the public in Lancaster county so far as this particular case is concerned, for it must be observed that practically all he says has reference to the flood in 1908, two years before plaintiff's alleged cause of action arose, and with reference to conditions in the salt basin, far removed from plaintiff's land. That there was a disastrous flood in the salt basin in 1908 all admit. As bearing upon the matter of bias and prejudice in the minds of the people of the county,

he says that he is well acquainted with men living in the county outside of the city of Lincoln, and has heard 10 or 15 different parties say that they thought that the railroad company should pay and ought to pay the claims for damages, referring to the salt basin flood of 1908; that from numerous conversations he has heard between different men, both in the city of Lincoln and out over the county, there is a general prevailing prejudice against the railroad company on account of the flood damages, and that he does not believe that the railroad company can have a fair and impartial trial before an unprejudiced jury in Lancaster county. Other parts of the affidavit are of like tenor. He closes the affidavit by saying that "he has no personal interest in the subject matter at this time, nor has he had any such personal interest since about four months ago," which is at least suggestive, but this has no reference as to the case now in hand. He gives his business as that of a carpenter, his age 44 years, that he has resided in Lincoln about seven years, and now resides on what is known as the "salt basin," where he has resided for six years. Even were the subject of the meetings of the complainants a material matter upon the question of the change of venue in the *Albers* case, he gives no hint that he attended or was present at any of them. An unusual feature of his action in this case is shown by the affidavit of one Weingarten, who testifies that he presented to Herzog an affidavit for signature that 26 persons who made affidavits in resistance to the motion for the change of venue were interested in claims growing out of the flood of 1908, a part of which had sued and others threatening suit, when he declined to sign the affidavit "for fear they would kill him." Without further attention to the affidavit of this person, we are persuaded that the district court rightfully cast it aside, having little, if any, application to this case, and as of no probative value therein. It is no evidence of local bias or prejudice in this case that the parties having similar causes of action, based upon facts entirely different from this case, should meet and confer together in their preparation for trial.

Many affidavits were filed descriptive of the floods of 1907-1908 in the salt basin, and some of that of 1910, showing the curiosity of the people of Lincoln, to the extent that the viaduct and shore of the water were thronged with people observing the same, in the salt basin; but there is a dearth of proof that there was any excitement or prejudice expressed against defendant with reference to this case. It is true that practically all of the 113 affidavits filed by defendant contain the statement of bias and prejudice, and the belief of the affiants as to the minds of the people of the county, and that defendant could not obtain a fair and impartial trial in the cases referred to therein; but much of the contents of those affidavits was not material upon the question of the proposed change of venue in this case. It may be possible that, taken alone and uncontradicted, there was sufficient to justify a change of the place of trial in this case; but when we consider the affidavits presented by plaintiff, bearing upon this case, in which many of the assertions of those presented by defendant were contradicted, we are well convinced that the case appealed to the judgment and discretion of the district court, and we cannot say that there was an abuse of that discretion in overruling this motion. If there is not an abuse of discretion, the order of the district court overruling the motion must be affirmed. The order overruling the motion was "without prejudice to a second application, provided, it should hereafter appear from trial in other actions or otherwise that defendant cannot have a fair trial in this county," to which defendant excepted; but we find no renewal of the motion in the transcript or bill of exceptions, except that before the jury were impaneled the defendant resubmitted to the court the former motion, which was overruled, no new facts or evidence being introduced.

In *Northeastern N. R. Co. v. Frazier,* 25 Neb. 42, we said in the syllabus: "An application for a change of venue in a civil case should be denied, unless it is made to appear to the court that a fair and impartial trial cannot be had in the county where the action is pending; the fact

that there are numerous persons in the county that are biased and prejudiced against a party to a suit will not justify a court in granting a change of venue, on the application of such party, if it appears that a fair and impartial jury can be had, and a fair trial had therein." In the body of the opinion we said: "In civil cases it is rare that the people of a whole county become biased and prejudiced against a party to an action. The reason is, they ordinarily take but little interest in the controversy, hence have no feeling in the case. There is a marked difference in this respect between a civil and criminal case, particularly where the offense charged is an atrocious one. * * * A plaintiff properly bringing an action in a county in which he resides is entitled to have the cause tried in such county, unless it is clear that a fair and impartial trial cannot be had therein."

In *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835, we held: "Unless an abuse of discretion is shown, this court will not disturb the ruling of the lower court upon a motion for a change of venue."

In *Smith v. Coon*, 89 Neb. 776, it was held in the syllabus: "In passing on a motion for a change of venue the district court is vested with a sound legal discretion, and his ruling thereon will not be disturbed unless it appears that he has been guilty of an abuse of such discretion." In the body of the opinion it is said: "It has been frequently held, where this question has been fairly submitted to and determined by the trial court, that, unless it clearly appears that there has been an abuse of discretion in refusing to grant a change of venue, the ruling of that court will not be disturbed. From a careful examination of the record in this case, we are of opinion that the order of the district court in refusing to grant a change of venue was the proper one. Finally, it appears that defendant had a fair and impartial trial; that his contentions were fully considered, and his matters of defense were submitted to the jury under proper instructions; that the evidence is amply sufficient to sustain the verdict; and the judgment of the district court is therefore affirmed."

The rule applicable to motions for change of venue is as strictly held in this state in criminal cases. *Jahnke v. State,* 68 Neb. 154; *Goldsberry v. State,* 66 Neb. 312; *Simmerman v. State,* 16 Neb. 615; *Sweet v. State,* 75 Neb. 263; *Taylor v. State,* 86 Neb. 795.

After a careful examination of the affidavits applicable to this case, submitted to the trial court, we are unable to detect any abuse of discretion on the part of the court in this case in overruling the motion under consideration.

Quoting from appellant's brief: "The instant case is one involving a charge of negligent construction in elevating the natural surface over a considerable area on the north side of Middle creek, by depositing earth, raising embankments, and constructing railway tracks thereon. No openings were made in this grade, which is from 200 to 1,000 feet in width and 3½ miles in length."

As bearing to some extent upon the question of the bias and prejudice of the jurors, we have examined the evidence as to the amount of plaintiff's loss, and find that the lowest average estimate of the witnesses exceeded the amount sued for. The verdict, being for $500, does not show any bias or prejudice on the part of the jury, and, so far as that feature of the case is concerned, defendant cannot claim that it did not "have a fair and impartial trial."

At the close of plaintiff's evidence, defendant moved the court for a peremptory instruction to the jury to return a verdict in favor of defendant. The motion was overruled, to which exception was taken. Again, after all the evidence was taken, the motion was renewed and overruled, with a like exception. Both rulings are now assigned for error. This requires a consideration of the evidence. The land upon which plaintiff's crops were growing is situated in the valley of Middle creek, principally on the south side of the creek bed. When in a state of nature the bed of the stream was quite crooked, and, except at times of unusually high water and floods, carried the stream within its banks. On occasion of excessive floods the water spread out more or less over the entire valley. The general direction of the stream is nearly east and west, its waters emptying into

Salt creek, which runs from south to north through the western part of the city of Lincoln, the streams meeting at nearly right angles, except that near the mouth of Middle creek its channel turned toward the northeast and its waters emptied into Salt creek farther down the stream within the city. A line of defendant's railroad was constructed within and along the Middle creek valley on the north side of the stream. In the years 1906, 1907, 1908, defendant constructed a system of car tracks along the north side of the stream, cutting it in places, filling up the bed, and making new channels along the south side of its tracks. The embankment upon which the tracks were placed was from 200 to 1,000 feet in width and 3½ miles in length, and located practically in the center of the valley. The land upon which plaintiff's crops grew is situated on the south side of this embankment, and it is alleged that by its construction the flood waters, which had formerly spread out over the whole width of the valley, were turned to and confined on the south side of the structure, and were thus forced onto and over plaintiff's crops, and by which they were largely destroyed. It is conceded that no openings were left in this whole embankment, and that when the flood waters were upon the south side thereof there was no escape therefrom but by passing down the whole distance to and through a newly cut channel into Salt creek just above a bridge across that stream, the new channel entering that creek at about right angles with its bed. It is contended by plaintiff, and testified to, that prior to the construction of the embankment when the stream was flooded and overflowed the water spread out over the whole width of the valley at small depth, and that by its escape into Salt creek valley to the northeast, as well as being held by certain depressions or ponds, the injury to the growing crops was not so serious, only a small part of the land being overflowed, but that by being confined and held upon the south side of the embankment its depth was greatly increased and the crops submerged and destroyed, and that at the time the crops were being destroyed in 1910 there was no water on the north side of the embank-

ment, except what was carried by the drainage from the hills and ravines on the north. Upon this there was a conflict in the evidence, as some testified that at the time of the flood in question there was a large body of water on the north side, and also that in the earlier times and before the construction of the embankment more water was on the south side of the creek, when floods came, than upon the north side. This conflict was submitted to the jury. There was sufficient to sustain the contention of plaintiff, if believed by the jury, and therefore their finding on that part of the case must be accepted as final. It is also true that the question of the negligent construction of the embankment, the changing of the channel of the stream, the impounding of the water, confining it to the south side of the valley, if it was so confined, the failure to make openings through the embankment for so long a distance and thus allowing the flood water to escape to the northeast, but preventing the same, as claimed by plaintiff, if the former floods did so escape, would necessarily require the decision of the questions of defendant's negligence by the jury. There is no contention that plaintiff's crops, some of which were practically matured, were not injured and a large part thereof totally destroyed by the flood waters. Neither is there any contention that, if defendant is liable at all, the verdict is excessive. The refusal of the trial court to direct the jury to return a verdict in favor of defendant is strongly urged by counsel for defendant as being erroneous. When we consider the whole case, with conflicts in the evidence, we are persuaded that the court did not err in declining to give the peremptory instruction to the jury directing a verdict in favor of defendant. In effect it would have been the withdrawal of all contested material facts from consideration by the jury, and the assumption of a decision thereon by the court, which, under our system of judicial practice, can never be allowed.

It is contended that "the court erred in refusing to permit the defendant to prove, on the plaintiff's cross-examination and that of his witness Harris, that in 1909 and

1910 the conditions in Middle creek valley were such that the plaintiff should have in reason anticipated a flood of the character he encountered in 1910." The argument is that the improvements made by defendant are permanent in their character; that they were not unnecessary when considered from a railroad standpoint, or that from an engineering standpoint they could have been constructed other than they were and at the same time provide a safe way for the use of the railroad company and its patrons; and it is claimed that under the rule stated in *Harris v. Lincoln & N. W. R. Co.*, 91 Neb. 755, defendant could not be held liable for the subsequent destruction of crops because the existence of the railway embankments deflected the flood waters over and upon the premises; that defendant was entitled to prove by plaintiff on his cross-examination that he knew before planting his crops that they were liable to be destroyed by high water; that, if plaintiff is entitled to recover at all, his measure of damages would be "the difference between the rental value of the property with the defendant's improvements in the shape they are in and its value if no such improvements existed. In other words, the plaintiff cannot gamble upon the chance he takes by renting the land at a depreciated rental so that he will profit largely should the floods not come, and, on the other hand, attempt to hold the railroad company for the damage such floods will work in the event they appear." The case of *Willitts v. Chicago, B. & K. C. R. Co.*, 88 Ia. 281, is cited in supporting this contention. In that case it was stated that, if "it was fully evident to the plaintiff at any time that it was useless to plant any crop * * * because it was certain to be flooded and destroyed," then the value of the crop was not an element in estimating damages. This might be the correct rule when it is *plainly useless* to plant the crop *"certain to be flooded and destroyed,"* but that is not the case in hand. Other crops had been raised upon this land, and there was no *certainty* that such a flood might ever return. No one can say that it is "certain" that such a flood will return during this or any subsequent year. Such a ques-

tion would be beyond the power of any finite mind to determine. Should an action be brought for "rental value" and it appear that there was no flood, as will probably often be the case, the defense that, had plaintiff planted and cultivated his crop, he could not recover, would have to be sustained. If the oft-repeated rules that one must so use his property as to inflict as little damage upon his neighbor as may be, and that the neighbor should so utilize his own as to reduce the injury, are to be applied, the contention on this part of the case cannot avail. In this view the court did not err in refusing to give the ninth instruction asked by defendant that, "if the plaintiff *knew* before he leased the land" that it would be overflowed, so as to destroy the crop, he could not recover. It must be sufficient to say that there was no proof that he "knew," nor could any one know what the future might produce.

Other criticisms are made upon the action of the court in refusing to give, as well as in giving, instructions, but we are persuaded that so far as the instructions go, whether given or refused, the case was fairly submitted to the jury, and we can discover no prejudicial errors occurring during the trial.

The judgment of the district court is therefore

AFFIRMED.

ROSE and FAWCETT, JJ., not sitting.

SEDGWICK, J., dissenting.

If this action was pending when the circumstances stated in Herzog's affidavit occurred, and parties interested in this case were present at the conferences therein described, I think the opinion in this case does not satisfactorily distinguish between this case and the *Albers* case on the question of change of venue. If the land in question in this case adjoins the land mentioned in *Harris v. Lincoln & N. W. R. Co.*, 91 Neb. 755, and is no higher, I think that this opinion does not satisfactorily distinguish between this case and the *Harris* case on the question of defendant's liability. For these reasons, I do not concur in this opinion.

# FRANCIS THOMAS DORE, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,830.

1. **Trial:** VERDICT. The verdict of a jury finding generally in favor of a party to the suit is equivalent to a finding in favor of such party upon all the issues and evidence submitted to them.
2. **Carriers:** CHILDREN AS PASSENGERS: CARE REQUIRED. A street railway company is a common carrier of passengers and is subject to the rules of law governing such carriers. The degree of care and responsibility is greater when transporting children of tender years than when transporting adults and persons capable of caring for themselves.
3. **Appeal:** EVIDENCE: FUNCTION OF JURY. The jury are the judges of the credibility of witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested.
4. **Carriers:** INJURY TO PASSENGER: NEGLIGENCE: QUESTION FOR JURY. It cannot be said to be negligence, as matter of law, for a child of the age of seven years, after the giving of the signal for a street car to stop at the next street crossing, to leave his seat as the car approaches the desired crossing and stand in the doorway preparatory to leaving the car, when the car should stop at the indicated point for stopping.
5. **Damages:** PERSONAL INJURIES: EVIDENCE. It is not error for the court to permit the parents of an injured child to describe his sufferings, while confined to his bed, the length of time he was sick, and his habits and conduct before and after the injury, which might throw light upon the permanence and duration of the effects of such injury.
6. **Trial:** INSTRUCTIONS: CONSTRUCTION. In considering and construing instructions given by the court to a trial jury, the whole of the instructions given should be considered together.
7. **Damages.** The verdict for $1,500 *held*, under the evidence, not to be excessive.
8. **Trial:** INSTRUCTIONS. Instructions to the jury asked and refused are examined, some of which correctly state the law, but which were included by the court in those given upon its own motion. Those not given were properly refused.

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

*John L. Webster* and *W. J. Connell,* for appellant.

*Arthur H. Murdock* and *Arthur C. Pancoast, contra.*

REESE, C. J.

This is an action for personal injuries. Plaintiff being an infant sues by his next friend, John J. Dore. The uncontested facts are that on or about December 31, 1908, at the hour of about 4 o'clock in the afternoon, the plaintiff, a boy seven years of age, with his sister, a girl nine years of age, boarded a street car of defendant at Twenty-fourth and N streets, in South Omaha, to ride north to F street, in the vicinity of their home. They paid their fare and took seats near the rear door of the car. By some means the boy fell or was thrown from the car to the street, and received the injuries of which he complains. The street car was stopped. The conductor, with the help of others, picked up the boy and carried him into a nearby saloon. The girl started at once to notify their mother, and returned with her but met a physician and others taking the boy home, where he was placed on a bed, and the family physician sent for, who appeared in a very short time and ministered to plaintiff. The foregoing facts are substantially alleged in the petition, with the further averments that, after the children had proceeded to and passed G street and were approaching F street, the point of their destination, the sister arose from her seat, signaled and notified the conductor, who was in the forward part of the car, of their desire to disembark at F street, which they were approaching, but that the conductor paid no attention to said signal and notification and failed and refused to stop the car at the usual and proper place after crossing F street; that, as they came near the stopping place of the car, plaintiff left his seat, walking to the door, which he opened, and stood in the doorway preparatory to alighting from the car; that the conductor "recklessly, negligently and carelessly disregarded the safety of

said infant, Francis Thomas Dore, well knowing that said infant was standing in the rear of said car and was desirous of alighting therefrom at F street, refused and neglected to signal the car to stop, and when said car arrived at F street the employee of defendant herein, unmindful of the safety of said child, Francis Thomas Dore, negligently applied greater power to said car, thereby causing the car to give a sudden lurch forward, and by reason thereof the said Francis Thomas Dore lost his hold of the car as he was standing in the doorway of the car and was thrown violently out of said car, striking the guard-rail thereof, and onto the pavement of the street," receiving great and lasting injuries. Negligence is alleged in the failure to stop the car and in failing to exercise any care for the protection of said child. The negligence of the motorman is alleged by reason of his act in greatly increasing the power causing the car to give a great lurch, whereby plaintiff was injured by being thrown upon the pavement of the street striking his head and side, causing concussion of the brain, as well as internal injuries; that the injuries received are permanent; that before receiving them plaintiff was a strong, healthy and intelligent child, but that by reason thereof his health has greatly declined, and he has suffered both physically and mentally to his great and permanent damage, to the extent of $15,000, for which judgment was demanded.

The answer of defendant contains a number of specific denials, among which are that the sister notified the conductor that she and plaintiff desired to alight from the car at F street, that the conductor neglected plaintiff in any way, that he refused or neglected to signal the car to stop at F street, that the car gave a sudden jerk forward, and that by reason of any jerking of the car plaintiff was thrown out of the car and injured. The answer set up the facts of the entry and passage of the children on the car substantially as above stated; alleged that they appeared familiar with riding on street cars; that there was nothing in their conduct or appearance to indicate that they would attempt to leave the car while in motion; that with-

out any notice or warning given to the conductor, who was then engaged with other passengers, plaintiff suddenly left his seat in the car, went out onto the platform, and, while the car was in motion at its usual rate of speed, wilfully and knowingly stepped from the car to the pavement; that the accident was the result of the wilful act of plaintiff in leaving his seat and stepping from the moving car. There is also a general denial of the averments of the petition. The reply is a general denial of the allegations of the answer. There was a jury trial, which resulted in a verdict in favor of plaintiff for $1,500. A motion for new trial was filed, overruled, and judgment rendered on the verdict. Defendant appeals.

As is usual in such cases, there was a sharp conflict in the evidence bearing upon the facts of the cause of the accident. The plaintiff's evidence depended largely upon the testimony of the little girl and that of a lady who sat near them in the car, and upon the testimony of others, which in some degree, though slight, tended to corroborate certain portions of their evidence. As is well understood, these questions of conflict are solely for the consideration of the jury, and, where there is sufficient to sustain the verdict, it cannot be reviewed by the courts. There was sufficient, if believed by the jury, to sustain a finding that the ages of the children were as stated; that they boarded the car at Twenty-fourth and N streets, paid their fare, and were seated in the car near the rear door without any inquiry by the conductor as to their destination or where they desired to leave the car; that as the car approached F street, after passing G street, they both arose in their places, and the girl signaled to the conductor to stop the car at F street; that the conductor was looking at her at the time, but failed to signal to the motorman to stop the car; that, as the car approached F street, plaintiff went to the door, opened it, and was standing in the doorway, holding to the sides of the doorway, apparently waiting for the car to stop in order that he might leave it; that while he was thus standing, by a sudden increase of power, or otherwise, the car gave a lurch or jerk, by

which plaintiff was thrown to the rear platform, striking his head against an iron guard-rail, and thrown from the car upon the pavement, striking upon his head and side, by which, it seems, he was rendered unconscious and helpless; that the car was stopped after running a short distance, when the conductor went back to where he was lying, and, with the assistance of others, picked him up, carried him into a nearby saloon, where the conductor left him in charge of others and proceeded on his way with the car; that the child was assisted to his home, where he complained of his head and the soreness of his body, was at times delirious, was for a long time confined to his bed and room; that since his apparent and partial recovery he has lost in weight and mental power, and has never entirely recovered from the effects of the accident.

It was assigned in the motion for a new trial that the amount of the verdict was excessive. We cannot so conclude. Assuming, as we must, that the facts found by the jury are correct, we are unable to see that the verdict could have, rightfully, been for less.

The brief of appellant is exhaustive, and many cases are cited with extracts from the holdings of the various courts. The particular point to which those cases are cited is to the effect that a jerk or lurch of the car is not of itself evidence of negligence. The most, if not all, of the cases refer to the ordinary passenger being thrown from a car by reason of the jerk or jolt. Some of those cases seem to have been ignored by this court with refusal to follow them. *Omaha Street R. Co. v. Loehneisen,* 40 Neb. 37; *Stewart v. Omaha & C. B. Street R. Co.,* 83 Neb. 97. But, were such not the case, the rule of the cases cited could not be applied here. If the verdict of the jury is the equivalent to finding that the story stated by the little girl is true, which it must be conceded is the case, there is nothing upon which to found a contention that plaintiff was guilty of contributory negligence, even if the law would permit such a finding against one of his age, which is quite doubtful. *Richardson v. Nelson,* 221 Ill. 254; *Chicago City R. Co. v. Tuohy,* 196 Ill. 410; *Walbridge v. Schuylkill E. R.*

*Co.*, 190 Pa. St. 274; *Rolin v. Tobacco Co.*, 141 N. Car. 300; *Huff v. Ames*, 16 Neb. 139; *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657; *Love v. Detroit, J. & C. R. Co.*, 170 Mich. 1. The strict rules of contributory negligence cannot be applied to a child of the age of plaintiff at that time. The facts necessarily found by the jury fail to show any negligence on his part, even could his age not excuse or exempt him from that charge.

It is insisted that the little girl's testimony was not entitled to belief, because unreasonable. That question was for the jury. They saw her upon the witness-stand, heard her testimony, and were impressed with the truth of her statements.

It is also claimed that the mere fact of the lurching or jerking of the car is no proof of negligence on the part of defendant. This, however, is not the whole case. The children boarded the car, rode to their destination, signaled the conductor, while standing, that they desired to alight. He looked at them, therefore saw them, but made no effort to stop the car. Defendant is a common carrier of passengers, and is under all the obligations of such carriers. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672. When the conductor was notified to stop the car at F street, it was his duty to do so and to see that the children safely alighted therefrom. This was a failure of duty, a want of care, therefore negligence.

Objection is made to the ruling of the court in permitting the parents of plaintiff to testify to his condition before and after the accident, on the ground that no sufficient foundation was laid for such testimony. The physician had testified that he saw the boy in bed, bruises on his head, seemed numb and dazed and like he was suffering some pain, that there was a stiffness, and the bumps and bruises were on the back of his head and along his back; saw him the next day, he was still sore and stiff all over, complained of quite a lot of pain, still dazed, still kind of smoky. The parents knew the boy, had watched over him from his birth, before and and after the accident. It would seem that there was foundation sufficient to en-

able them to testify as to his mental and physical condition before the accident and the change therein thereafter. His mother testified that, after the doctor made the examination and bandaged his head, the boy lay upon the bed moaning until he went out of his head; was out of his head until the next morning, and was down sick for three months. The evidence of these witnesses was not so much their opinions or conclusions, as the statements of facts, which they observed. We can find no error in the ruling of the court upon this subject.

The trial court gave 12 instructions to the jury upon his own motion, 3 asked by defendant, and refused to give 19 of the 22 asked by defendant. Some of the instructions given to the jury are sharply criticised by defendant. We have carefully examined all the instructions given the jury, and are satisfied that the objections are more technical than otherwise. The sixth instruction is as follows: "You are instructed that the defendant is what is known in law as a common carrier for hire, and it is the duty of defendant to use the greatest amount of human care and skill consistent with the operation of its cars to prevent injury to its passengers while they are being transported from one part of their system to another. It is also the duty of defendant to use greater care and caution in transporting passengers of tender age than when carrying adults or passengers of mature years; but in this case there is no presumption of negligence from the mere fact that said Francis Thomas Dore was a passenger and received an injury while being carried on the cars of said defendant." It is true that the language used, in the comparison of the duties of a common carrier of adult passengers and children of tender age, is to some extent a little extravagant; but, when considered in connection with other instructions, the ground for just criticism largely vanishes, and no prejudice could result.

Finding no error requiring a reversal of the judgment of the district court, it is

AFFIRMED.

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

HENRY OWINGS, APPELLLEE, V. FIRST NATIONAL BANK, APPELLEE; HENRY SCHMIDT ET AL., APPELLANTS.

FILED DECEMBER 4, 1914. No. 17,838.

**Deeds:** DELIVERY. Plaintiff's wife was the owner of a certain tract of land near Johnson, in Nemaha county. She was taken sick with an incurable disease at Sterling, Colorado. During her illness, and something over a month before she died, she gave to her husband a deed to the land, executed about six months before that time, with written instructions to deposit it in a local bank, and upon her decease to have it recorded. She never countermanded the instructions. After her decease, plaintiff received the deed from the bank and recorded it. *Held* a sufficient delivery to pass title to him.

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

*E. A. Wunder, F. G. Hawxby* and *John C. Hartigan,* for appellants.

*Quackenbush & Neal* and *Kelligar & Ferneau, contra.*

REESE, C. J.

This is an action brought by plaintiff, Henry Owings, against the First National Bank of Johnson, Nebraska, to recover the sum of $5,129.67, the proceeds of the sale of a tract of land, described in the pleadings, but the description of which need not be stated here. The land was formerly owned by Lizzie E. Schmidt, who was later married to Henry Owings. They went to the state of Colorado, and after their marriage there located in the city of Sterling, in that state. Mrs. Owings' health failed, and it became apparent that she was in a precarious condition. On the 28th day of June, 1911, Mrs. Owings executed a warranty deed to her husband, conveying the land in question to him, and placed it in a trunk in the house, and kept it until the 2d day of December, of the same year. At that time it was apparent that she could not recover, and that

the date of her dissolution was not far distant, her malady being consumption. She was confined to her bed, and called for the deed to be brought to her. She then obtained pencil and paper and wrote the following instructions: "Sterling, Colorado, Dec. 2, 1911. In case of my death, give this deed to my husband, Henry Owings, to be recorded so my property is his. I am in poor health and no hopes of ever getting well. He is the only provider I have got. Mrs. Lizzie Owings, Sterling, Colo." She handed the deed and the above described memorandum to her husband, requesting him to place them in a local bank at Sterling, which he did. Mrs. Owings died on the 7th day of January, 1912. The second day after her death, plaintiff called at the bank and received the deed and memorandum of instructions, above copied, as well as some money on deposit, and made preparations for returning to Johnson, Nebraska, with the remains of his deceased wife. Prior to her decease, she, with her husband, had negotiated the sale of the land to one J. George Hahn for the sum of $5,640, and on the 11th day of December, 1911, with plaintiff, executed a warranty deed to the purchaser, which was deposited in the First National Bank of Johnson, in this state. Prior to this time, and on the 2d day of December, 1911, a written contract of sale was made with Hahn for the sale of the land at the price of $5,640, $400 of which was paid in cash, the remainder to be paid on the 1st day of March, 1912, or $2,500 to be then paid, and the remainder on time at the option of the purchaser. Instead of accepting the time option, Hahn paid into the bank the whole amount, and accepted the deed, with another one executed by plaintiff.

Mrs. Owings left no child, nor father, nor mother, surviving her, but she had two brothers, Henry Schmidt and Charles J. Schmidt, who demanded one-half of the money in the bank as the heirs of Mrs. Owings. The bank refused to pay the money to either claimant, when this action was brought against it by plaintiff for the whole amount. The bank filed the statutory affidavit to the effect that it held no claim on the money, but that it was

demanded by the claimants, and asked to be protected. The court ordered the brothers to intervene and set up their claims by a day fixed by the court, which they did, contending that the deed from Mrs. Owings to her husband did not convey any title to him for want of delivery; that the sale of the land to Hahn was of her property, and by reason of their relationship to her they were entitled to one-half of the fund under the provisions of the statutes of descent in this state. It appears that Henry Schmidt held a note against his sister, Mrs. Owings, for the sum of $1,019.25, growing out of the settlement and adjustment of an estate to which the land formerly belonged, and which note Mrs. Owings directed should be paid at the time she handed the deed to plaintiff at Sterling. There is no question as to this sum of money, plaintiff having agreed at the trial that Henry Schmidt should receive it out of the fund. The cause was tried to the court without the intervention of a jury, when a finding and judgment was entered, giving the $1,019.25 to Henry Schmidt, and the residue to be paid by the bank to plaintiff. Defendants, interveners, appeal.

The real, and indeed the only, question presented is: Was the deed from Mrs. Owings to plaintiff so delivered to him as to pass the title? The negotiations for the sale to Hahn had so far progressed that the contract of sale to the purchaser was signed on the day the deed was handed to plaintiff for deposit in the Sterling bank, but the contract and conveyance to Hahn were both signed by Mrs. and Mr. Owings. Considerable testimony was taken at the trial showing what occurred at the time the deed was sent to the Sterling bank, as well as declarations made to others by Mrs. Owings after the execution of the deed and before the 2d day of December, the day it was sent to the bank. The written memorandum was made by Mrs. Owings while on her sickbed, and she never was "down town" after that date and prior to her death. She never made any effort to countermand those instructions, but, so far as is shown by the record, she was at all times thereafter entirely pleased with what she had done. Had

she been able to go to the bank and deposit the deed with oral instructions as written, the case would fall within the rule of *Roepke v. Nutzmann,* 95 Neb. 589, and we are unable to see why, under her written instructions to the bank, they would not be of equal force. That case and *Brown v. Westerfield,* 47 Neb. 399, are decisive of this one, and it is not necessary that the law of those cases be further examined. We are satisfied therewith, and that the judgment of the district court is right and it is

AFFIRMED.

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

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JACOB HERTER ET AL., APPELLEES, V. LOUISE HERTER ET AL., APPELLANTS.

FILED DECEMBER 4, 1914. No. 17,847.

1. **Courts:** COUNTY COURTS: JUDGMENT: PRESUMPTION. "In probate proceedings the county court is a court of record and of exclusive original jurisdiction, and in such actions its judgments and the recitals therein are entitled to the presumptions that attach to the records of other courts of that character." *Kolterman v. Chilvers,* 82 Neb. 216.
2. **Wills:** CONSTRUCTION. The object and purpose of a court in construing a will is to carry out and enforce the intention of the testator, as shown by the language of the will, and considering the circumstances under which it was made.
3. ———: ———. The use of the word "comp," occurring in the later clause of the will, is *held* to mean "company" and to include all the heirs of the testator.
4. ———: ———: DISINHERITANCE. Heirs will not be disinherited by conjecture, but only by express words or necessary implication and the actual disposition of the estate to another person.
5. ———: ———: PRESUMPTION. In the absence of anything in a will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent.

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

*John M. Stewart, Guardian ad litem,* for appellants.

*Lincoln Frost* and *Morning & Ledwith, contra.*

REESE, C. J.

This is an action for the construction of the last will and testament of Abraham Herter, late of Lancaster county, deceased. The suit is brought by the alleged devisees under the will against the grandchildren of decedent and their mother, the one time daughter-in-law of the testator. The will is quite informal, but it has been admitted to probate by the county court of Lancaster county, due notice of which proceeding was given, and from the decree of probate no appeal was taken. Those proceedings must be treated as final and conclusive, and cannot be attacked in this collateral way. *Kolterman v. Chilvers,* 82 Neb. 216; *Byron Reed Co. v. Klabunde,* 76 Neb. 801; *Brown v. Webster,* 87 Neb. 788; *Loosemore v. Smith,* 12 Neb. 343. We must therefore examine the will, as a legally established instrument, and endeavor to ascertain its meaning.

The family of the testator originally consisted of his widow, Katherine Herter, two sons, Jacob Herter and Frederick C. Herter, and a daughter, Catherine Herter, now Catherine Faulhaber. Prior to the making of the will Frederick C. Herter died, leaving a widow, Louise, and two children, Louise and William J. Herter, surviving. Within about one year after the death of Frederick C. Herter his widow intermarried with her deceased husband's cousin, Henry C. Herter. Testator and wife resided upon a farm consisting of 160 acres of contiguous land, described as the southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter, of section 10, township 9, range 8, which is referred to as his homestead; he and his family having resided upon it for many years. He had also accumulated a considerable quantity of other

land in Lancaster county, as well as a farm of 160 acres in Hitchcock county. Probably for the purpose of securing and retaining a safe living for himself and wife in their advanced age, and possibly for the purpose of trying out and testing the capacity of his three children, all of whom were married, he leased to each one a quantity of land for the rental of one dollar an acre annually, the homestead of 160 acres being leased to Frederick, who was his youngest living child, other children having died in infancy and without issue. Frederick and wife became members of the family, living with his parents until about one year before his decease, when he built a new house upon the premises, and which he and his family occupied. After the marriage of Louise, his widow, to Henry C. Herter, they continued to reside upon the premises for a time, but, owing to some disagreement, Henry and his family, consisting of his wife and the two minor children, above named, removed from the farm and resided elsewhere. Some time before the making of testator's will, but after the death of Frederick and the marriage of Frederick's widow to Henry C. Herter, testator conveyed the leased land to Jacob and Catherine, and on the 29th day of May, 1905, he and his wife executed a trust deed to Jacob W. Herter, conveying to him the said homestead of 160 acres in trust for Louise and William J.; the grantors reserving the use and possession of the premises during their lives. This deed was executed and delivered to the trustee at or about the same time; other lands of approximately the same value were conveyed to the two surviving children, Jacob Herter and Catherine Faulhaber. Jacob put his deed upon record, but has withheld the trust deed therefrom until during the trial, notwithstanding he testified that his instructions from his father were to record all at the same time. We do not question his motives, but assume his failure to be a mistake of duty, as he was required to record that deed with his own.

The will is in two parts, the first dated June 9, 1905, signed by the testator, but not witnessed. The second is dated November 1, 1905, signed, and witnessed by two wit-

nesses. They were both admitted to probate as constituting the last will and testament of the testator. It was evidently prepared by the testator, and is given here in full:

"Bennet Neb. June 9, 1905.

"This is my last will.

"When I am passed away, I want that you take the Drexler Bros., to furnish coffin and coach and furnish all the stuff what you need at such an occation. I want to be buried at the side of our beloved Fritz and Eddy and Katies and Philips Baby girl if possible. If the Church doesn't allow it, then you burry me at home some place in the garden. After this you go and divide all the moneys and notes, amongst you, Katherine, Jakob and mother and all other things what mother don't want. Jakob will be a trusty administrator for the two grandchildren Louise and Willy. This estate will make a good deal trouble, to make things go the right way. That Henry & Louise can not get a hand in your fees what the law allows you must get from the rent the farms brings in. For a tomstone I want you to buy a Granit, about the shape of the stone that is on Eddys grave. Get it if possible made by a German, for I want the inskription made in German. I do not care what people will say. A fifty dollars tomstone is all you must get for me, the engravings may be like this

"Hier ruhet in Gott
"Abraham Herter geb Aug 20, 1831.
"gest Dan und dan
"Ruhe im Frieden samft und wohl

"The eighty acre farm in section twelf (Grand Pr.) you get it in comp, and make the best of it.

"The rent you will pay to Mother as long as she lives, or as long as she wants it. The farm in Hitchcock County you get it in comp also and make the best of it.

"My wish is also, do not give morgage on your farms.

"Abraham Herter.

"November 1, 1905.

"If it should happen, that one of them two children would die, before it were on age, the eastate would in this

case to go to the other. And in the case that both should die then the eastate shall go back to J. W. Herter and Katie Herter Faulhaber. Not to their mother Mrs. Louise, wife of Henry Herter, and that J. W. Herter the administrator shall have the power to tend to this affair, according he thinks it best, and that nobody shall have the right to interfer with him in this case & it is my wish & will that he need not give bonds.

"Abraham Herter.

"Witness,

"Henry Fetzer.

"I. George Oberle."

It will be observed that the will is written in the second person. In the first paragraph the direction is to "devide all the moneys and notes, amongst you, Katherine, Jakob and mother and all the other things what mother don't want. Jakob will be a trusty administrator for the two Grandchildren Louise and Willy. This estate will make a good deal trouble, to make things go the right way. That Henry & Louise cannot get a hand in your fees what the law allows you must get from the rent the farm brings in," etc. It is also to be noticed that in the last paragraph it is provided if one of the two children should die the estate would go to the other, if both die "then the eastate shall go back to J. W. Herter and Katie Herter Faulhaber. Not to their mother Mrs. Louise, wife of Henry Herter." These provisions show, in the light of the evidence adduced upon the trial, that the personal property is to be divided between the two living children, Jacob and Catherine, and their mother, and that the "you" is mainly directed to Jacob, whom he designates as the administrator of the will, except that part devising the 80-acre farm in section 12 in "Grand Pr." and the farm in Hitchcock county which it is claimed are devised to his widow and Jacob and Catherine as joint tenants, and that it was the clear intent and purpose to absolutely exclude Henry Herter and wife from all participation in his estate, so far as receiving any part therein by virtue of the will is concerned.

The pleadings are too long to be set out here. It must be sufficient to say that the findings and decree followed the averments of the petition. A guardian *ad litem* was appointed for the minor children, who answered for them and their mother, Louise Herter, their guardian, first, by a general denial; second, alleging the relationship of the minors to Frederick C. Herter, deceased, and his relationship to the testator, and that his decease was long prior to the decease of the testator; third, alleging their ownership of the homestead of 160 acres by virtue of the trust deed given to J. W. Herter for their use and benefit; fourth, that Jacob and Catherine are the only surviving children of Abraham Herter, deceased, and that the decedent had given to Jacob 200 acres and to Catherine 160 acres of valuable land in Lancaster county, and that all the remainder of the real estate and personal property was intestate estate and descended to plaintiffs and defendants, minors, in the manner provided by law for the descent of intestate property. On the trial, the district court by its decree granted to plaintiffs the relief demanded, and so construed the will as to quiet the title to the 80 acres in section 12 (Grant Pr.) and the land in Hitchcock county, by proper descriptions, in the plaintiffs, Katherine Herter and Jacob Herter and Catherine Faulhaber. The guardian *ad litem* appeals.

The object and purpose of the court in construing a will is to carry out and enforce the intention of the testator. It is quite apparent from the action of the testator (prior to the making of the will) that he sought to make final and full division of his land among his children and the two grandchildren, but deferring the possession of the minors until after the decease of his widow and the expiration of a lease to plaintiff J. W. Herter and Philip Faulhaber, which lease would expire March 1, 1918, the rent payable to Katherine Herter, testator's widow, so long as she lived. It is evident that, should she depart this life before the termination of the lease, the rent would be payable to the two grandchildren. The title to the land in Grant precinct in Lancaster county and the 160 acres in

Hitchcock county were acquired by the testator subsequent to the execution of the deeds to the other lands, and, if they are not transferred by the will, they are intestate property and would vest in the heirs according to the law of descent. What was the intention of the testator upon that subject? There is nothing in the will specifically devising those two tracts of land to any one. The only reference to them is found in the following clause: "The eighty acre farm in section twelf (Grand Pr.) you get it in comp, and make the best of it. The rent you will pay to Mother as long as she lives, or as long as she wants it. The farm in Hitchcock county you get it in comp also and make the best of it." It sufficiently appears from the evidence and from the will itself that the word "comp" must be construed to mean "company," and the question is: To whom does the word refer? Is it the widow, Katherine Herter, Jacob Herter and Mrs. Faulhaber, or to his heirs, including the two grandchildren, Louise and William J., the children of the deceased son Frederick? If to the latter, the surviving widow of testator Jacob Herter, and Mrs. Faulhaber and the two surviving children of Frederick, deceased, representing what he would have taken had he been living, each receives one-fourth interest, the rental to go to the support of the widow of the testator so long as she might live. If to the former, the widow of testator and the two living children, Jacob Herter and Mrs. Faulhaber, receives each one-third, with the rental to the widow during life. It is clear that all the personal property was given to the three last named, by the provisions of the first paragraph of the will. No reference is made to the grandchildren, but that part of the estate is specifically conferred upon the three named. The only reference to the two grandchildren in that part of the will dated June 9, 1905, is "Jakob will be a trusty administrator for the two grandchildren Louise and Willy." There is nothing in the will specifically conferring any property, real or personal, upon these two grandchildren, nor is there anything excluding them from participation in the estate, nor is the 80-acre farm in Lancaster county or the

160-acre tract in Hitchcock county specifically devised to any one by name. It seems that at the time the deeds were executed Mr. Herter sought to make as near an equal distribution of the land he then owned as he could, and, to carry out that purpose, he gave the two grandchildren the home farm, which he had rented to their father, evidently with the design of giving him the title at a future day. Frederick died, but his children were given by the trust deed what he was to receive. At the time of making the will the two tracts were undisposed of. We think it fair to presume that his mind had not changed to the disadvantage of the grandchildren, and that he intended them to receive what their father would have inherited had he been living, and that the use of the word "comp" could just as well include all as any part of his heirs. It is shown by the testimony that he had never entertained any ill will toward the two minor children. The spirit of fairness shown throughout his dealings with his blood kin supports rather than repels this presumption.

As held by us in *Heilman v. Reitz,* 89 Neb. 422, it is fundamental that heirs will not be disinherited by conjecture, but only by express words or necessary implication, and that the actual disposition of the estate to another person is necessary to deprive the heir of the property of his ancestor. We deem it also fundamental that, in the absence of anything in the will to the contrary, the presumption is that the ancestor intended that his property should go where the law carries it, which is supposed to be the channel of natural descent. To interpret or distract the descent or direct it in a different course should require plain words to that effect. *Wright v. Hicks,* 12 Ga. 155. See, also, 30 Am. & Eng. Ency. Law (2d ed.) 668. And that evidence of the declaration of the testator is inadmissible to establish his testamentary intention, or to aid in the interpretation of his will. *Zimmerman v. Hafer,* 81 Md. 347; 40 Cyc. 1433.

We can find nothing in the will, which, with any clearness, evinces a disposition on the part of the testator to disinherit the grandchildren or exclude them from the

"comp" named in the clause of the will under consideration. As we view the language of the will, in the light of the authorities and the circumstances under which the will was made, we are forced to the conclusion that it was not the purpose of the testator to exclude his grandchildren from any participation in the two tracts of land referred to.

The decree of the district court should be so modified as to permit the children of Frederick Herter to participate in the titles of the lands described as the west half of the southeast quarter of section 12, township 9, range 7, in Lancaster county, and the southwest quarter of section 4, township 4, range 32, in Hitchcock county, to the extent of one-eighth interest each therein, and Katherine Herter, the widow of Abraham Herter, and Jacob Herter and Catherine Faulhaber, each one-fourth, the incomes therefrom to be paid to Katherine Herter during her natural life, and at her decease or waiver of her right to the rent the land to be held as joint tenants, and that the title be quieted accordingly.

The cause is remanded to the district court, with directions to enter a decree in accordance herewith.

REVERSED.

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

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JOE HILGER, APPELLANT, V. CITY OF NEBRASKA CITY ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,854.

1. **Municipal Corporations:** GRADING OF STREETS: INJUNCTION. The pleadings and evidence examined, and found to sufficiently support the decree of the district court.

2. ———: ———: RIGHT TO DAMAGES. The mere establishment of a grade of the streets in a city does not damage the property which would be affected by the change in the physical grade of the streets. It is the change in the surface of the streets which

creates the damage, if any, and for which the allowance of damages must first be provided. If no change is ever made or undertaken, there is no damage.

3. ———: ———. Where the grade of the streets of a city has been established and the level of the street reduced in part to the grade, and only a limited expense would be incurred in finishing the grade, the work may be completed by the city authorities without the formality of requiring an estimate to be made by the city engineer, bids advertised for, assessment of damages made, and special taxes levied. Where the work to be done is so slight, it may be done by the city under the direction of the proper officer thereof and payment therefor made from the proper revenues of the city.

4. ———: ———: DAMAGES: LIMITATIONS. The statute of limitations will not begin to run against a lot owner suffering damage from the establishment of the grades of adjacent streets until some action is taken by the city to change the streets to the grade.

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

*W. F. Moran,* for appellant.

*Andrew P. Moran* and *John C. Watson, contra.*

REESE, C. J.

Action for an injunction to restrain the defendant city from grading a portion of Tenth street to what is known as the "Rosewater grade" thereof, and by which it is alleged plaintiff's property will be seriously damaged. It is alleged in the petition, in substance, that the city is a municipal corporation having a population of between 5,000 and 25,000, and is being governed under the commission form of government, provided by the statutes of the state, and that defendant Hawley is one of the commissioners; that plaintiff is the owner of lots 1 and 2, in block 94, in said city; that Tenth street extending between First and Second corsos adjoins said property on the east (First corso adjoining it on the north), and that said property is improved, buildings erected thereon, sidewalks built, and shade trees planted with reference to the surface grade of the street; that the surface of the street had been es-

tablished by user and common consent for many years; that defendant Hawley, claiming to act as one of the commissioners under the authority of said city, is attempting to grade said street, lowering the surface thereof to what is known as the said "Rosewater grade," cutting down and threatening to lower the street more than three feet; that no ordinance nor resolution was passed by the commissioners of said city directing the grading or lowering of the grade of said street, no petition having been filed therefor; that no estimate of the expense of lowering the grade was made, nor any provision made for the payment of the same; that no bids had been advertised for, and no appraisement of plaintiff's damages had been made nor the amount of damages tendered; that the lowering of the street would destroy plaintiff's shade trees, render his alley inaccessible, and leave his sidewalk on a high bank; that plaintiff's property would be greatly damaged, and for which he had no remedy at law. A restraining order was issued by the county judge, which continued in force until the trial of the cause.

The defendant city answered, objecting to the petition as failing to state facts sufficient to constitute a cause of action; alleging that plaintiff had an adequate remedy at law; admitting that plaintiff was a citizen and taxpayer of the city, and was the owner of the property described in the petition; that the city is operated under the commission form of government, with a population as stated in the petition, and denying all other averments thereof; alleging that the grade of the street had been established long before plaintiff's purchase of the property involved and before any lasting improvements were made thereon; that the improvements were made with full knowledge of the existence of the established grade; that plaintiff and his grantors had waived any right to damages by their failure to demand compensation when the grade was established; that the street had been used by the public for more than 40 years, during which time it had been worked and graded as occasion required. The defense of the stat-

ute of limitations is also presented. Plaintiff replied by a general denial.

The school district of Nebraska City applied for leave to intervene upon the ground that the question involved was one of interest to the district. Its intervention was permitted by the court, over the objections of plaintiff. By its pleadings it is alleged that on the 25th day of May, 1891, the city council enacted an ordinance creating grading districts, plaintiff's property being included therein, "having previously passed ordinance No. 122 establishing the general grade throughout said city;" that defendant Hawley, as one of the city commissioners, had charge of the streets and alleys of the city; that Joseph Walker, a defendant, is only an employee of the city in reducing the grade under the directions of commissioner Hawley; that the school district had erected a valuable high school building on the side of the street opposite plaintiff's property, and it was the desire of the district that the walks be brought to grade to protect the high school grounds from water draining upon and over said grounds and injuring the school building; that plaintiff, being a recent purchaser of his lot, had full knowledge of the existence of the ordinance establishing the grade at the time of his purchase, and his grantors had waived any claim for damages; that by the long use of the street by the city and public an easement and the right to grade was created.

The cause was tried to the court, the trial resulting in a finding and decree that plaintiff was not entitled to all the relief demanded, but that he was entitled to an injunction against defendants restraining them "from grading plaintiff's property on the west side of Tenth street between First and Second corsos within the curb line thereof, being 12 feet from the lot line," with the proviso that the space may be graded after the city shall have made provision for the payment of the damages for such grade between the curb and lot lines. The restraining order was vacated, but the decree stands in plaintiff's favor as above indicated. Plaintiff appeals, and defendant city and intervener schoool district file a cross-appeal.

It is quite clear that the used part of Tenth street has on prior occasions been worked down to the extent of a few feet, with the intent to finally bring it to what is termed the "Rosewater grade," established in 1887. First corso has been brought to said grade. The declared purpose of defendant Hawley at the time he began the work, and from that time on, was to bring Tenth street to that grade, but no lower. The street, having been partially brought to grade, required an expenditure of only $120 to complete the leveling process. This seems to have been necessary for the protection of the public library and high school property, situated on the east side of Tenth street and opposite plaintiff's property, from the drainage and overflow from the street. It is claimed by plaintiff that the provisions of section 8601, Ann. St. 1911, should be applied. The section is an unusually long one and cannot be set out here, but we cannot agree with plaintiff in this particular. That part of the section which provides for the filing of petitions, the assessment and payment of damages to the lot owners refers to the creation, opening and improvement of streets, and is to be applied to new and constructive work, and, in order that there might be no misapprehension upon that subject, it is specifically provided that those provisions "shall not apply to ordinary repairs of streets or alleys," and provision is made for the payment of expenses growing out of such repairs without the levying of special taxes. The statute must receive a reasonable construction and application, and it would be unreasonable to hold that where a grade had been long established, as in this case, the street had been previously worked down to near the grade, and it is not deemed necessary to levy a special tax upon abutting property to pay the slight expense of bringing a portion of the street to such grade, the formalities provided by the section should be observed. In such light cases much is left to the judgment and discretion of the commissioner having the matter in charge. The order of the court protecting the rights of plaintiff in the matter of the space between the curb and his lot line is equitable, and will not be dis-

turbed. We have examined the cases of *Shewell v. City of Nebraska City,* 52 Neb. 138, and *Hurford v. City of Omaha,* 4 Neb. 336, and cannot see that they are in point, or that they control this case.

The contention by cross-appellants that plaintiff had an adequate remedy at law, if any remedy at all, and that he has mistaken his remedy, cannot be sustained. As it was correctly found that plaintiff was entitled to protection as against the invasion of his sidewalk space, which had never been molested by the city authorities, and that he was entitled to damages in case of such invasion, to be provided for prior thereto, it gave plaintiff a sufficient standing in a court of equity.

It is also claimed that plaintiff's right to damages is barred by limitation of time. This claim cannot be sustained. The mere establishment of the grade did not give plaintiff or his grantors a cause of action. His property may never have been molested. The cause of action, if one is created, is by the physical invasion of the property, and before that can be done his damage must be provided for.

While the decree may be said to be somewhat unusual in some respects it is equitable, and is

AFFIRMED.

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

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## H. K. BLACK ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1914. No. 18,742.

1. **Criminal Law:** APPEAL: AFFIRMANCE. The record submitted, and on which a reversal of the judgment of the district court is demanded, does not affirmatively show any prejudicial error committed against plaintiffs in error.
2. **Game Laws:** VALIDITY. The unconstitutionality of certain sections of the game laws of this state is alleged, but no sufficient reason is pointed out to justify the contention.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

*Allen G. Fisher* and *William P. Rooney,* for plaintiffs in error.

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

REESE, C. J.

This is a proceeding in error to the district court for Dawes county. The record before us shows that plaintiffs in error, who will hereafter be referred to herein as defendants, were arrested upon a warrant issued by the county judge of Dawes county upon a complaint filed by W. W. Naylor; the first count thereof charging the defendants with going upon the lands of the complainant in said county on the 10th day of May, 1914, and unlawfully fishing and angling for fish with rods, lines, and hooks, with the intent to capture the same, they not having the consent of the said Naylor so to do. The second count of the complaint is to the effect that the defendants and one Ed. Czerney did go upon said lands in said county on said day and wrongfully did take and kill two trout on the land of said W. W. Naylor, the same not being public land, and without the consent of said Naylor; said taking and killing of said trout being done with rods, lines, and hooks. There is also a complaint copied into the county judge's transcript, made by one Ed. P. Butler, deputy game warden of said county, charging that defendant Johnson was guilty of fishing on said day without a license so to do; but just what was the purpose of that complaint is not made clear. Whether it was intended as a second and independent prosecution, or was intended as a part of the main case, is past finding out from the record. The defendants were tried before the county judge, found guilty, and fined in the sum of $5 each. The cause was removed to the district court, where, it is recited, a jury trial was had, it being stipulated that the trials should be had at the

same time to the same jury, but the record fails to show what the verdicts were. There is a kind of running history of the proceedings, presumably prepared by counsel, in which it is said a trial was had, when the jury returned into court the verdicts "in words, letters and figures following: (To Clerk: Here copy verdicts, with indorsements)—which are received and recorded by the court," etc.; but the clerk failed to "copy," and there is no record of the "verdicts" anywhere in the transcript. There were probably separate verdicts, but what they were we are unable to say; the record giving no information upon that subject. In this condition of the transcript, it is impossible for us to say what the proceedings were, and, all presumptions being in favor of the regularity of the acts of the district court, we will presume that court did its duty.

It is shown by the record that each defendant was fined $5 upon the joint complaint, and Johnson was fined $10 for fishing without a license. As the record shows there was more than one verdict, it may be that more than one trial was had, although to the one jury by agreement as per stipulation, or otherwise. Upon this part of the case no prejudicial error affirmatively appears, which must be the case before this court can reverse a judgment.

It is claimed that, for various reasons, the law under which this prosecution arose is unconstitutional, but we are unable to discover any infraction of the constitution in the substance or passage of the section referred to.

The judgment of the district court is

AFFIRMED.

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COLUMBIA RIVER DOOR COMPANY, APPELLANT, V. H. F. CADY LUMBER COMPANY, APPELLEE.

FILED DECEMBER 4, 1914. No. 17,952.

1. **Sales:** ACCEPTANCE. Where the purchaser of lumber, who is known to the seller to be a jobber, after an inspection and rejection of the shipment, attempts to sell the lumber to other purchasers, while acting under the order of the seller to "use to best advantage," his attempts will not amount to an acceptance.

2. ———: REFUSAL TO ACCEPT: SUFFICIENCY OF EVIDENCE. Evidence examined, and found sufficient to justify the defendant in refusing to accept the shipment.

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

*Montgomery, Hall & Young,* for appellant.

*DeBord, Fradenburg & Van Orsdel, contra.*

BARNES, J.

This was an action to recover the price of a car-load of lumber shipped by the Columbia River Door Company to the H. F. Cady Lumber Company in August, 1907, and billed by plaintiff to Tidball & Company at Morefield, Nebraska. The defendant refused to pay for the shipment, alleging that it did not accept the lumber because it was not what was ordered; that it was defective in kind and quality, and in fact was not merchantable. The cause was tried to a jury, and a verdict was returned for the defendant. Judgment was rendered on the verdict, and the plaintiff has appealed.

It appears that the defendant, a jobber of lumber, on the 2d day of September, 1906, sent an order to the plaintiff for three car-loads of common spruce 2x4's. The first car was shipped to the defendant soon after it made the order; the second car was shipped about six months later, while the third car was not loaded and shipped until a year later, to wit, August 16, 1907. The first car of lumber was received and paid for, but the testimony shows that there was some trouble with the plaintiff about the second car. This car appears to have been loaded with a bad lot of irregular dimension stuff, which contained bad knots, wanes on the corners, was of irregular thickness, and was in fact generally a car of culls. When the second car was shipped the Columbia River Door Company knew that it contained a lot of lumber not up to specifications. By the testimony, as to this car, it was practically admitted that it was not up to standard, and the plaintiff agreed to

deduct $75 from the price of the car, as billed, in order to affect a settlement with the defendant.

Respecting the last car of lumber, the one in controversy, it appears that defendant ordered it shipped direct to Tidball & Company at Morefield, Nebraska, for the reason that it had sold the car to that company. It appears that Tidball & Company had a lumber yard at Morefield and one at Curtis, Nebraska, which is the first station on the Burlington road east of Morefield. The testimony shows that Tidball & Company stopped the car at Curtis and inspected the lumber. John E. Tidball, Jr., testified that it was his duty to inspect lumber before letting it into their stock. He said that upon inspecting the lumber in question he found there were knot holes in some of the sticks as big as half across the 2x4; that he got up and looked on the top of the pile and pulled out a dozen or more of the sticks; that they proved to be knotty, and some were so thin that the planer had not surfaced them; that they were of various thicknesses, and many of the sticks were crooked; that he at once notified the Burlington railroad that they refused the car, and also at once notified the Columbia River Door Company that the lumber was bad, and that they would not accept it. The Cady Lumber Company telegraphed the plaintiff immediately that the lumber would not be accepted, and on receipt of this telegram the plaintiff replied that the lumber was just like the preceding cars, except that part of it was fir instead of being all spruce, and saying, "Use to best advantage." The railroad company subsequently unloaded the lumber on its right of way at Curtis. Neither the Cady Lumber Company nor the Tidball Lumber Company received possession of the lumber, or ever accepted it, and, so far as it appears from the evidence, the lumber is now in the possession of the railroad company or of the plaintiff.

Plaintiff's witness Stucker by his testimony explained why they put fir into the car when only spruce was ordered. He said there was not quite enough spruce in stock to fill it. Mr. White of the Cady Lumber Company testified that his company never consented that the plaintiff might

put any fir lumber into the car. The testimony shows without dispute that the Cady Lumber Company ordered the car in question to fill an order which it had from the Tidball Lumber Company, and that the Tidball Lumber Company ordered a car of spruce. It appears that there was no means whatever by which the Cady Lumber Company or the Tidball Lumber Company could have inspected the lumber before it reached Curtis.

Mr. Stephenson, who was in the employ of the defendant, went to Curtis and viewed the lumber. He testified, in substance, as follows: "I measured perhaps 150 to 200 pieces. Measured them at both ends, in the middle, and on the sides, so as to make sure just what there was of it. I found 2x4's as they would run according to measurement $1\frac{5}{8}$ by $3\frac{5}{8}$. I would find them lacking sometimes as to being as thick as that, having been shaped and ordered as trimmed surfaces on both sides and one edge, which would be surfaced on one side all through the length, and would be surfaced on one edge all through the length; when they were too thin they would not surface. For instance, one edge would be thick enough to surface, and as you got out further it would not surface, and consequently you would have a 2x4 that was surfaced part of the way and rough on the other part. They were thicker on one end than on the other, and you would find the same on the edges instead of being $3\frac{5}{8}$ inches thick, so when you used them for studding or rafters, if you stood them to a line, you could not rafter the other side of them, for they would not surface. If you put a 2x4 under this $3\frac{3}{8}$ at one end, and a $3\frac{1}{8}$ at the other, you can see where your side would be; that is where you were throwed out, because they are not suitable for studding." Stephenson further testified that the 2x4's varied in width as much as one-half an inch. There were very large coarse knots, large knot holes, and some very crooked; the ends not square, broken pieces; some were not the full length for which they were counted, that is 16 feet lengths were not 16 feet long; knot holes would run clear across the 2x4's, or occupy two-thirds of the width of the 2x4. There was other testimony which

showed that only about 60 per cent. of the lumber contained in the car would grade No. 2; that it was poorly manufactured, uneven in thickness and width, exceedingly knotty, and contained more or less bark. It also appears that the Columbia River Door Company had for its principal business the manufacture of doors, and had some lumber which they could make into 2x4's which were not suitable to be used for that purpose; that they made the sale of the three car-loads of lumber to the Cady Lumber Company, intending to use the accumulation of 2x4's made by them out of lumber, which on account of its various widths or otherwise could not be made into doors, and that it took them a year to produce the three car-loads of lumber sold to the defendant out of such material. After the refusal of the car, it appears that the defendant, acting on the direction of the plaintiff to "use to best advantage," spent considerable time in trying to sell the lumber to other parties, but failed in its attempt.

The issue as to acceptance raised by the pleadings was submitted to the jury under the instructions of the court, and a verdict was returned for the defendant, as above stated. It is plaintiff's contention that the defendant accepted the car-load of lumber by attempting to sell it to other parties. We think this contention is not sustained by the evidence or the authorities.

*Wolfe Bros. Shoe Co. v. Bishop,* 72 Kan. 687, was a case where the dispute arose over the quality of certain shoes and their acceptance. It was there said: "Plaintiff's attempt to sell some of the shoes that were salable while waiting for defendant's agent to adjust plaintiff's claim that the consignment was defective, held not to amount to an acceptance of the entire lot."

In *Schwartz v. Church of the Holy Cross,* 60 Minn. 183, plaintiff sought to recover for the value of certain altars which had been ordered constructed and placed in the church. It was held that the use of some of the altars, after defendant's refusal to accept them because they were not manufactured according to specifications, did

not amount to an acceptance, and a judgment for the defendant was affirmed.

In *Lenz v. Blake,* 44 Or. 569, the court said: "The defendant had a reasonable time to inspect the goods after their receipt, and, if they did not correspond with those ordered, the warranty in respect thereto might have rendered that part of the contract tantamount to a condition precedent, thereby authorizing the defendant to repudiate its agreement."

In *Creighton v. Pacific Coast Lumber Co.,* 12 Man. (Can.) 546, it was said: "A purchaser of goods ordered to be sent by railway does not lose his right of rejecting the goods by unloading them from the cars on arrival and teaming them to his own premises, if he then finds them to be inferior to what he had ordered and so notifies the vendor within a reasonable time."

In *Armstrong v. Columbia Wagon Co.,* 66 Atl. 366 (22 Del. 274), we find the following language: "In an action for the price of a car-load of lumber, it was not material whether defendant knew that it came from plaintiff or not before unloading the lumber, as he had the right to unload and inspect it for the purpose of determining the quality and quantity." *Graves v. Morse & Co.,* 45 Neb. 604, and *Bryant v. Thesing,* 46 Neb. 244, are in line with this rule.

The evidence seems clear that defendant was justified in refusing to accept the lumber in question. An examination of the cases cited by counsel for the plaintiff on the question of the right of inspection and the waiver of that right shows that the goods in most of those cases were delivered to the nominal possession of the buyer and held without question or rejection.

From a careful inspection of the record, we are of opinion that it contains no reversible error, and the judgment of the district court is

AFFIRMED.

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

# LAIN MCKENNAN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,698.

1. **Street Railways**: USE OF STREETS. The general public has an equal right with a street car company upon a public street of a city, but has not at all times the same right upon the track of the street car company. The public has a complete right to cross or drive upon the street car tracks, but not so as to hinder or interfere with the cars operated thereon.
2. ———: OPERATION OF CARS: DUTY TO AVOID COLLISIONS. The motorman of a street car is not necessarily obliged to stop his car when he sees a man driving in a vehicle along the line of railway ahead of the car; but he may continue to run the car in a proper manner until it appears that the driver is in danger and is unaware or heedless of his danger. It is then his duty to use all reasonable care and diligence to avoid a collision. Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car, but he cannot rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle.
3. ———: ———: CARE REQUIRED. In such a case the motorman in charge of the car should use the care and diligence which an ordinarily prudent person would use under the circumstances.
4. ———: ———: COLLISIONS: LIABILITY. It is equally the duty of any person driving upon or across a street car track not to unnecessarily hinder, delay or impede the operation of cars thereon at the proper rate of speed at that time and place, and if he negligently does so, and by reason of such negligent act he is injured, he cannot recover, unless those in charge of the street car failed to exercise ordinary care to avoid a collision after they knew, or in the exercise of ordinary care should have known, his dangerous situation. *Omaha Street R. Co. v. Larson*, 70 Neb. 591.
5. **Evidence**: OPINIONS. Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, better evidence cannot be obtained; and this principle is applicable to indications of pain and suffering, even though observed some time after an injury.
6. **Appeal**: ADMISSION OF EVIDENCE: REVIEW. If testimony not properly admissible is brought out by a proper question, and no motion

to strike it out is made at the trial, the error is not subject to review.

7. **Instructions**, the substance of which are set forth in the opinion, *held* to be inconsistent with the main issue as stated by the court, and to be prejudicial to defendant.

8. **Damages**: PERSONAL INJURY: IMPROPER EXHIBITIONS. Exhibitions to the jury of scars of bodily injuries should not be permitted, unless they furnish evidence material to the issues to be determined.

9. **Appeal**: REQUESTED INSTRUCTIONS: REVIEW. A party, after having requested the giving of an instruction, cannot afterwards complain that it was erroneous.

Opinion on motion for rehearing of case reported in 95 Neb. 643. *Former opinion modified. Rehearing denied.*

LETTON, J.

In the former opinion in this case (*McKennan v. Omaha & C. B. Street R. Co.*, 95 Neb. 643), it was held that, there being a conflict in the evidence with relation to the circumstances surrounding the injury and also with reference to the extent of plaintiff's injuries, these questions were proper to be submitted to the jury. It was also held that the first paragraph of instruction No. 7 was incorrect as applied to the facts in this case. The language of this part of the instruction was not applicable, since the statement "that teamsters have the legal right to cross the street at any point thereon" had no relevancy to the issues. It was also said that this instruction is correct as to the rights of the street car company and plaintiff at intersection or cross-streets, but that it failed to properly distinguish their respective rights at other points in the street. We think the latter statement and the further criticisms of the instruction should be withdrawn.

In *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, this court said: "Street railways are constructed and operated on public highways under grants of that right by municipal corporations. The grant is of a privilege to occupy and use these streets in conjunction with, and not to the exclusion of, the general public."

In *Olney v. Omaha & C. B. Street R. Co.*, 78 Neb. 767, it is said: "The right to use the streets of a city by the driver of a horse and the manager of a street car company are equal, and each must use it with reasonable regard for the safety and convenience of the other."

In *Stewart v. Omaha & C. B. Street R. Co.*, 88 Neb. 209, it is said: "Whatever the rule in some states may be with respect to the rights of pedestrians and street cars upon the streets of a city, the law in this state is settled that neither the street car nor the pedestrian has any priority or privileged right over the other; that an electric street railway company and an ordinary traveler upon the street are required to observe an equal degree of care to prevent accidents, and that neither has a right of way superior to that of the other. *Omaha Street R. Co. v. Cameron*, 43 Neb. 297; *Mathiesen v. Omaha Street R. Co.*, 3 Neb. (Unof.) 747; *Omaha Street R. Co. v. Mathiesen*, 73 Neb. 820; *Olney v. Omaha & C. B. Street R. Co.*, 78 Neb. 767."

Under ordinary circumstances, one who negligently attempts to cross a street railway track or to drive upon it in front of an approaching car cannot recover for injuries caused by a collision therewith, unless those in charge of the car fail to exercise ordinary care to prevent the accident after knowledge of his probable danger. *Omaha Street R. Co. v. Larson*, 70 Neb. 591; *McLean v. Omaha & C. B. R. & B. Co.*, 72 Neb. 447, 453; *Lindgren v. Omaha Street R. Co.*, 73 Neb. 628; *Chunn v. City & S. R. Co.*, 207 U. S. 302, 28 Sup. Ct. Rep. 63; 2 Nellis, Street Railways, sec. 462.

There was no intention to change the established rule in this state by the opinion in *Harris v. Lincoln Traction Co.*, 78 Neb. 681, in which case it was not quite accurately said that in such a case the defendant would not be liable, unless those in charge of the car "wilfully or wantonly" produce the collision. The words "wilfully" and "wantonly" being used disjunctively, the word "wantonly" evidently was not meant to express the idea of intentionally or wilfully, but that of "carelessly" or "negligently." *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Cleveland, C., C. & St.*

*L. R. Co. v. Tartt,* 64 Fed. 823. It may be noted that this is the thought expressed in the instructions tendered by defendant.

A good statement of the proper rule is found in *Fujise v. Los Angeles R. Co.,* 12 Cal. App. 207, 216: "The sum of the adjudicated cases bearing upon the relative rights of street cars and citizens traveling in vehicles drawn by horses or other animals is that both have a right to use the street, but neither has the exclusive right. The motorman of a street car is not necessarily obliged to stop his car when he sees a man driving in a vehicle along the line of a railway ahead of the car; but he may continue to run the car in a proper manner until he is conscious of the fact that the driver is unaware or heedless of his danger. When he is thus conscious, it is his duty to use all reasonable care and diligence to avoid running the car into the vehicle. Seeing a man driving along the track, the motorman may assume that he will turn aside and out of the way of the car, but he cannot rest on the assumption so long as to allow his car to reach a point where it will be impossible for him to control his car or give warning in time to prevent injury to the man or vehicle." See, also, *Callahan v. Boston Elevated R. Co.,* 205 Mass. 422, 18 Am. & Eng. Ann. Cas. 510; *Indianapolis Traction & Terminal Co. v. Kidd,* 167 Ind. 402, 5 Street R. Rep. 204; *Acton v. Fargo & M. Street R. Co.,* 20 N. Dak. 434, 7 Street R. Rep. 499; *Greene v. Louisville R. Co.,* 119 Ky. 862, 7 Am. & Eng. Ann. Cas. 1126.

In the former opinion it was held that the refusal to give instructions Nos. 15 and 16 requested by defendant was erroneous. It appears, however, that instruction No. 15 was embodied in the charge of the court upon its own motion, though marked as refused when tendered by defendant. Instruction No. 16 was refused for the reason that it was not tendered to the court within a reasonable time. We considered this reason not adequate. Upon a critical examination of the language of the instruction, we are of the opinion that the court properly refused to give it. This instruction makes the standard of care the exercise of the

best judgment of the individual motorman. The rule is laid down by the supreme court of the United States in *The Germanic,* 196 U. S. 589, as follows: "But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The motion that it 'should be coextensive with the judgment of each individual' was exploded, if it needed exploding, by Chief Justice Tindal in *Vaughan v. Menlove,* 3 Bing. N. C. (Eng.) *468, *475." In the case referred to, Chief Justice Tindal said: "Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." The motorman was held to use that care and diligence which an ordinarily prudent man would use under the circumstances of the particular case. "The standard is universal, unless in those cases where the law imposes an absolute liability." 1 Shearman and Redfield, Law of Negligence (6th ed.) sec. 9*b; Daily v. Burlington & M. R. R. Co.,* 58 Neb. 396; *Harrington v. Los Angeles R. Co.,* 140 Cal. 514; *McIntyre v. Orner,* 166 Ind. 57; *Barnes v. Danville Street R. & L. Co.,* 235 Ill. 566.

A number of assignments of error were made by the appellant which were not considered in the former opinion. The first point urged is that the court erred in permitting nonexpert witnesses to testify to their conclusion or opinion that McKennan was sick and hurt and suffered pain. It is said that this invaded the province of the jury. We think there is no merit in this contention. In 2 Jones, Commentaries on Law of Evidence, sec. 366, it is said, quoting from a New Hampshire case (*Hardy v. Merrill,* 56 N. H. 227): "'But without reference to any recognized rule or principle, all concede the admissibility of the opin-

ions of nonprofessional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness and health, questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention.' Admittedly difficult as the task of framing a rule on the subject is, Foster, Chief Justice, in the New Hampshire case referred to, formulated a rule, which, if properly applied, will serve as a useful instruction. *Opinions of witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained.*" See, also, 3 Wigmore, Evidence, sec. 1974; *Hewitt v. Eisenbart,* 36 Neb. 794; *Western Travelers Accident Ass'n v. Munson,* 73 Neb. 858.

It is next claimed that there was error in permitting Dr. Pepper to testify relative to finding the plaintiff in a convulsive condition six months after the occurrence of the injury without connecting this incident as a result of the accident. The court probably admitted this testimony upon the theory that it would be connected up afterwards, which it was within its discretion to do. The question which brought out the testimony only had reference to the appearance of McKennan when the physician was called, and it could not be foreseen by the court what the answer would be. The question was not improper. No motion was made either at that time or in any later part of the trial to strike out this testimony upon the ground that it had not been connected with the accident. In order to save the point for review this was necessary.

Objection was also made to the reception of evidence relative to the expectoration or vomiting of blood by the plaintiff without showing that it was the natural or probable result of the accident. The testimony of plaintiff's

surgeon was that such bleeding would be improbable, but not impossible, as a result of the injury. Other physicians testified much to the same effect. The court, at the request of defendant, gave an instruction to the effect that defendant should not be held responsible for any spitting or vomiting of blood by the plaintiff that is not shown by the evidence to have been caused by the accident of January 20, 1911, and that it is the probable and not the possible cause that should be considered by the jury. The evidence may not have been of much weight, but it was for the jury to determine whether there was sufficient evidence to justify a conclusion that the spitting of blood resulted from the injury.

Complaint is made that the court erred in submitting to the jury whether the speed of the car was the proximate cause of the accident, whether the failure to have the car under control was the proximate cause, and whether the failure to exercise ordinary care in striking the wagon was the proximate cause. By instruction No. 6 the jury were told: "That under the pleadings and evidence in this case the only charge of actionable negligence that you are required to consider is that after the plaintiff started to turn upon the street railway track on which the south-bound car was running, or while he was in a position of peril or danger by reason of having his wagon upon such track, the defendant, in the exercise of ordinary care, should and could have so reduced the speed of said car or stopped the same as to avoid striking or colliding with his wagon." By instruction No. 7 the jury were told, among other things: "If you believe from the preponderance of the evidence that an ordinarily prudent man would not have been running the car at the rate of speed which you find from the evidence that the car was running at the time the operator of the car discovered the plaintiff on the track, and that the rate of speed was the proximate cause of plaintiff's injury, then you should find the defendant was negligent in that particular." By the ordinances of the city the car might lawfully be operated at any speed up to 15 miles an hour. The testimony is that

before the collision the car was moving at the rate of from 8 to 12 miles an hour, as variously estimated by the witnesses. The court further instructed the jury: "If you find from a preponderance of the evidence that defendant did not have his car under such control at the time the motorman discovered plaintiff on the track as an ordinarily prudent person operating a car under like circumstances would have done, and that such failure was the proximate cause of plaintiff's injury, then you should find the defendant negligent in that particular."

These directions are inconsistent with instruction No. 6, tended to confuse the jury, and were prejudicial. As long as there were no indications that the track would be obstructed, the defendant was not negligent in operating its car within the legal rate of speed, and, if it was so doing at the time the plaintiff turned to go upon the track, the rate of speed could not constitute negligence. As the court had said, the only ground of actionable negligence was whether the defendant might have slowed down or stopped the car in time to avoid the injury after the plaintiff's wagon was upon the track.

Complaint is made that plaintiff was allowed to exhibit scars on his body made as the result of certain surgical operations; one of them being from an operation for appendicitis. "It is a too well-settled rule in this court to call for further discussion that the plaintiff in an action for damages for personal injuries may be permitted to exhibit to the jury, if he can do so, the contusions and wounds of which they consist." *Felsch v. Babb,* 72 Neb. 736. But the scars here exhibited were not from wounds occasioned at the time of the accident, and it would seem that the exhibition was unnecessary. We are not convinced that the error was prejudicial, since the amount of the verdict is not so great as to indicate that the passions of the jury were inflamed or their sympathy aroused. Such exhibitions, however, are not to be encouraged, and, unless they furnish evidence material to the question to be determined, should not be indulged in.

One of the paragraphs of instruction No. 11 is severely criticised by defendant for alleged erroneous statements therein contained. We are relieved from critically considering these alleged mistakes, for the reason that this particular portion of the instruction was specifically requested to be given by the defendant itself in No. 15 of its requests. The court having given the instruction, defendant cannot now complain that it was erroneous.

Upon the whole case, we think that errors prejudicial to defendant occurred at the trial. The former opinion is modified in the respects mentioned, but the conclusion was correct and is adhered to.

The motion for rehearing is

OVERRULED.

HAMER, J., dissenting in part and concurring in the conclusion.

I regret my inability to fully agree with the majority opinion. The case is here on the motion of the plaintiff for a rehearing for the purpose of having us overrule our opinion reversing the judgment of the district court (95 Neb. 643), and it also has been heard upon certain assignments made by the defendant. There was a verdict and judgment in the court below for $3,900 in favor of the plaintiff. The plaintiff was driving his wagon on the street car track, and was going south over the west line of said track on Twenty-fourth street in Omaha. His excuse for being on the street car track with his wagon is alleged to be that there was another wagon on the west side of the street going in the same direction which he was going, and that he went upon the street car track for the purpose of going around this wagon. Witnesses testified at the trial that there was no such wagon. The plaintiff's testimony was not corroborated in full by the testimony of any witness. Paul Meek, a boy, testified for the plaintiff that he saw McKennan go around a *standing team*, but could not see whether the team was hitched or had a driver. I am unable to find testimony showing that any other witness

saw this team. Mary Meek, Reynolds, the motorman, Edward Galloway, Dean Berlin, J. A. Nichols, and Edgar F. Doyle, all testified that they saw no other team there. Paul Meek's testimony does not support the plaintiff's testimony and is unreasonable. If the plaintiff had gone around the team which he speaks of, it would have been behind him. This team is alleged to have been going south. If traveling in that direction, it would have been penned in when the accident occurred, and would have been there with the wagon, the street car, and the accident, and *everybody would have seen it.* In discussing the case we should not lose sight of its circumstances.

It was prejudicial error for the court to instruct the jury: "That defendant had the legal right to operate its cars over and upon its tracks at the time and place in question, and that teamsters have the legal right to cross the street at any point thereon, and their rights in this respect are equal and reciprocal, that is, each has the right to the use of the street in the ordinary and usual manner, and in doing so it is necessary for each to take into consideration the rights of the other." As the plaintiff had not crossed the street, but was driving along it on the street railway track *between the intersections,* the instruction was misleading, for the reason that it calls attention to an alleged state of facts not shown to exist. I am not satisfied with the paragraph in the syllabus of the majority opinion relating to this matter. It is not, as it seems to me, specific enough, and is objectionable for that reason. The body of the opinion touching the same matter is objectionable in the same way, although it shows research and many decisions.

Where the driver of a wagon drives along the street on the street car track, it is unfair to the public that he should be allowed to compel the street car to reduce its rate of speed to the same slow pace which he takes. The street car should be allowed to run at such a rate of speed as will accommodate the public. The better right of the street car company to the use of its tracks does not give it the right to exclude travelers from the street, and

such travelers should be allowed to move along the tracks or across them at any time and place where the same does not interfere with the progress of the cars, but of necessity, and in the interest of the public, where there is a conflict, the individual traveler must subserve the public convenience by yielding the right of way. *Hot Springs Street R. Co. v. Johnson,* 64 Ark. 420, 42 S. W. 833.

In *Laufer v. Bridgeport Traction Co.,* 68 Conn. 475, the court approved of the following instruction: "In the actual use of a common and public highway every person has an equal right to use it for his own best advantage to suit his own convenience or pleasure, but at all times with a just regard to the like rights of every other person. So far as rendering himself liable to damages is concerned, a man may drive fast or slow, with a light wagon or with a loaded team, with a well-broken horse or with an ill-broken one, along a crowded thoroughfare as well as a vacant street, provided he does not interfere with the just rights of any other person. If a man wishes to drive fast, he must do so with respect to the rights of those who drive slow. If he desires to drive slow, he must do so with respect to those who desire to drive fast. The loaded team and the light wagon must each pay a due regard to the rights of the other. If one drives in a crowded street he must exercise reasonable care not to endanger other travelers. If he drives an ill-broken horse, he must keep it so well in hand as not to expose others to unreasonable hazard."

Since the application of electric power to the running of street cars, it may be said that they have a common right in the streets with travelers, but they must be so managed as not to interfere unreasonably with the rights of persons who are passing along the streets. The street railway company and the traveler should each use the street in view of the rights of the other and to avoid inflicting an injury, and each is bound to exercise reasonable care. *Rapp v. St. Louis Transit Co.,* 190 Mo. 144; *Hall v. Ogden City Street R. Co.,* 13 Utah, 243.

In *Harris v. Lincoln Traction Co.*; 78 Neb. 681, the plaintiff crossed the tracks in the middle of a block. This court held that, "having contributed to the accident by his own negligence, there is no principle of law which will allow him to recover, unless he shows that he was wilfully and wantonly run down by those in charge of defendant's car." The writer does not indorse the statement here made. The street railway company should exercise reasonable prudence to avoid injury to those who occupy its tracks under all circumstances.

The above duty of the street railway company should not bar the right of the public to be served by the application of modern motive power to their means of transportation. It is the duty of persons, whether on foot or in vehicles, to give unobstructed passage to the cars. *Ford's Adm'r v. Paducah City Railway*, 124 Ky. 488, 99 S. W. 355; *Ehrisman v. East Harrisburg City P. R. Co.*, 150 Pa. St. 180, 17 L. R. A. 448.

Subject to the rule that he must exercise ordinary care for his own safety and not obstruct the passage of the cars, a person may drive upon the tracks of a street railway company laid in a public street without becoming a trespasser, but it is his duty to leave the track whenever his presence there serves to impede the passage of cars. *North Chicago E. R. Co. v. Peuser*, 190 Ill. 67.

Between street crossings a street railway company has a paramount right of way over its tracks whenever its right conflicts with the rights of a traveler on the street, and such traveler must reasonably give way to an approaching or passing car. The duty to exercise reasonable care and prudence in order to avoid injury rests alike upon the street railway company and the traveler. In an emergency, where the motorman in charge of the car honestly attempts to avoid injury to the occupant of the street, he should not be required to exercise the best judgment that may be applied to the subject after the event has gone by. If one acts with ordinary prudence in view of the situation and does his best then to avoid accident and consequent injury, he is not to be held to have been negligent, even

though his acts may not have been wise as determined afterwards in the light of all the surrounding facts.

I concur in the conclusion stated in the majority opinion that the former opinion should be modified and the motion for a rehearing overruled.

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EVA BELLE HAIGHT, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 4, 1914. No. 17,889.

1. **Appeal:** CONFLICTING EVIDENCE. A verdict rendered upon conflicting evidence will not be set aside unless it is manifestly wrong.
2. ———: PRESUMPTIONS. All presumptions are in favor of the regularity of the proceedings of the district court. Error will not be presumed, but must be affirmatively shown.
3. ———: JURY PANEL. Where it is asserted that the district court erred, in a county of over 30,000 population, in directing the sheriff to fill the panel of jurors instead of by requiring the clerk to draw the names of sufficient jurors from the jury box or wheel, it is incumbent upon the appellant to show that the list of names of persons competent to serve as jurors placed in the wheel as required by statute had not been exhausted at the time such direction was made by the court.

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

*Weaver & Giller*, for appellant.

*John L. Webster, W. J. Connell* and *William R. King, contra.*

LETTON, J.

This is an action to recover for personal injuries which it is alleged were caused by the sudden and negligent starting of a street car in the city of Omaha while the plaintiff was in the act of alighting therefrom. The jury returned a verdict for defendant. Plaintiff appeals.

Two reasons are urged for the reversal of the case: (1) That the verdict is not supported by the evidence; (2) that the jury which tried the case was illegally constituted.

As to the first point: Plaintiff's testimony was to the effect that, when the car stopped at Yates street, three passengers left the car in front of her; that the conductor did not give her time to alight, and that as she was stepping off the car it lurched forward and she fell striking the pavement with great force and was severely injured. On the other hand, the conductor, the motorman and four passengers testified that the car stopped to allow some passengers to take the car; that after these had entered the conductor pulled the bell cord and the car started; that the plaintiff then arose and informed the conductor she wanted to alight at that place; that the conductor pulled the bell cord, and that while the car was moving slowly, and before it had completely stopped, which it did within a few feet, the plaintiff stepped down, fell, and was hurt. In this state of the evidence it was for the jury, and is not for this court, to determine whether the plaintiff or these other witnesses were telling the truth, and there was sufficient evidence to support the verdict.

The district court for Douglas county consists of several judges. While one of the judges was conducting the trial of a criminal case, the regular panel of jurors became exhausted, and the district court made the following order: "The regular panel of petit jurors now having been exhausted and the jury in this case being incomplete, it is by the court ordered the sheriff summon from the body of the county twelve (12) men having the qualifications of jurors, from which to fill the panel in this case, or such other case as may be assigned for trial during the remainder of the third three weeks of the October, 1910, term of the district court." Talesmen were accordingly called to fill the panel, five of whom participated without objection in the trial of this case. The trial judge evidently proceeded under the provisions of section 8143, Rev. St. 1913, which is the general statute formerly applicable to every county in the state. In 1905 a statute was

enacted providing for the summoning of jurors in counties of 30,000 inhabitants or more. Rev. St. 1913, secs. 8148-8159. This statute provides for the selection by the county board each year of a definite number of names of qualified persons to serve as jurors in that year. These names are placed in a box or wheel, and on the first day of each trial term the clerk of the court draws 30 names of persons for each judge sitting with a jury, who shall act as jurors for the first three weeks of the term, and like proceedings are had for other periods of three weeks as needed. Section 8156, in substance, provides that jurors may be called by the sheriff, when directed by the court, when a vacancy in the panel exists and before the panel is filled, as in that section prescribed, for the trial of a case then pending, but that, "if for any reason the panel of petit jurors shall not be filled at the opening of such court, or at any time during the term, the clerk of such court shall, when ordered by the judge, again repair to the office of the clerk, and draw in the same manner as at the first drawing such number of jurors as the judge shall direct, to fill such panel." If there were names left in the jury box or wheel at the time the order was made, the proceeding was irregular; but there is no showing by the plaintiff that the regular list of names selected by the officers of the court under the statute and placed in the jury wheel had not been exhausted at the time this order was made.

The presumption always attaches that the proceedings of the court were regular, and the burden is upon any one attacking the validity of the same to establish his contention affirmatively.

In *Clawson v. United States,* 114 U. S. 477, 5 Sup. Ct. Rep. 949, it was held by the supreme court of Utah and by the supreme court of the United States, where the facts were that the names of 200 persons in a jury box as provided for by the acts of congress governing courts in the territory of Utah were exhausted, and the jury in a case on trial was only partly impaneled, that even without a statute the power of the court to issue an open venire directed to the sheriff to summon talesmen existed; that

such power was inherent in the court, was not forbidden by any statute, and still remained. Giving the presumption of regularity due weight, it must be presumed that at the time the order in this case, in the absence of evidence to the contrary, was made the names in the jury box or wheel had been exhausted, and the court had power to order the panel filled by the sheriff.

Furthermore, the general rule is that one cannot wait until after a jury has returned an adverse verdict before raising objections to the qualifications of jurors. The mere fact that he had no knowledge at the time is not sufficient to waive the requirement that the qualifications must be examined into before impaneling the jury. The means of knowledge were as easily accessible before the jury were in the box as they were after the verdict had been rendered. *Turley v. State,* 74 Neb. 471; *Reed v. State,* 75 Neb. 509; *Embry v. State,* 138 Ga. 464; *Faulkner v. Snead,* 122 Ga. 28; *Beals v. Cone,* 27 Colo. 473.

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

AFFIRMED.

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

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JOHN W. POWELL, APPELLANT, V. E. B. DEUCHLER, APPELLEE.

FILED DECEMBER 4, 1914. No. 17,910.

1. **Evidence.** Admission of evidence complained of *held* proper under the statutory rule that, "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. * * * And when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence." Rev. St. 1913, sec. 7907.

2. **Evidence** examined, and *held* to support the verdict.

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

*Sackett, Brewster & Spafford, E. A. Wunder* and *John C. Hartigan,* for appellant.

*Heasty & Barnes, contra.*

LETTON, J.

Action by the indorsee of a promissory note against the maker. The note counted upon purported to be signed by E. B. Deuchler. It was dated November 4, 1909, due September 1, 1910, for $1,800, payable to the Columbian Hog & Cattle Powder Company. It is alleged that it was sold on August 1, 1910, to plaintiff in this case, and is indorsed in blank. The defense is a general denial. The instructions of the court properly submitted the issues raised to the jury, which returned a general verdict for defendant. It also found specially that the defendant did not sign the note; that he did not deliver it to the Columbian Hog & Cattle Powder Company; and that that company did not transfer the note to plaintiff. Plaintiff has appealed.

The contentions of appellant are that the court erred in permitting the cross-examination of the witness Cook concerning matters not covered by the examination in chief; that it erred in the admission of testimony of Deuchler and his wife concerning matters outside of and foreign to the issues, and in overruling motions to strike out such testimony. It is also contended that the verdict is not sustained by sufficient evidence.

The witness Cook, in his examination and cross-examination, detailed at length the circumstances under which he testifies that the note was signed by Mr. Deuchler. In substance, he testified that he was a salesman for the Columbian Hog & Cattle Powder Company; that Deuchler signed the note in his presence. On cross-examination he testified, without objection, that he had known Deuchler for more than ten years before this transaction, having lived near him and been on particularly friendly terms with him in Richardson county, his former home; that on

the date the note was signed he went to Deuchler's farm in Jefferson county, about three or four miles from Diller, to sell him some stock powder; that he asked Deuchler to represent the company in that territory, and tried to sell him a car-load of stock powder; that he had sold him a small amount the spring before, for which he did not take a note; that he went into the house and made his regular canvass to sell goods; that he carried with him a note book and an order book; that in Mrs. Deuchler's presence he wrote out a note and an order, both of which Deuchler signed, Mrs. Deuchler being in the room when the papers were signed. Plaintiff then introduced the note and rested. The brief of appellant does not point out specifically any errors in the cross-examination of Cook, and does not refer to the pages of the bill of exceptions where they may be found. Taking all of his evidence together, we find no prejudicial error in any ruling of the district court.

Defendant, Deuchler, testified to his former acquaintance with Cook, and that he had bought stock food from him previously, detailed the conversation with Cook up to the time that he says Cook produced an order book, filled out an order blank, and the witness signed it for $1,800 worth of stock food. He denies that he ever saw more than one paper at that time, and asserts that he never signed a note. On cross-examination Deuchler manifested considerable uncertainty when the signatures on the note and on several other documents actually signed by him were shown to him in such a manner as to show nothing of the paper but the portion which contained the signatures, and said that the signature on the note looked very much like his, but that he never signed such a paper.

The contention that the testimony of Deuchler was erroneously admitted with respect to what took place at the time Cook testified the note was signed cannot be upheld. Part of the transaction having been given in evidence, the defendant was entitled to show the remainder as far as it tended to throw light upon the disputed point. This is also true with respect to the testimony of Mrs. Deuchler, which was confined to what took place at the same time.

We find no error, therefore, with respect to the admission or rejection of evidence.

Upon the point that the verdict is not sustained by sufficient evidence, there were circumstances proved which, if believed, warranted the jury in finding that the plaintiff was not a *bona fide* purchaser of the note. The only matter in which there was room for a substantial difference of opinion was as to whether the defendant actually signed the note. The instrument itself is in the record. The signature, when compared with other signatures of his in evidence, seems to the writer to be his genuine handwriting; but, on the other hand, there is the direct testimony of himself and wife to the contrary. We are reluctant to set our judgment on this question of fact against that of the jury, to whom by law the determination of such questions is submitted. We think, therefore, there is sufficient evidence to sustain the verdict.

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

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

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WILLIAM R. HOMAN, APPELLANT, V. OAK C. REDICK ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,918.

1. **Principal and Agent:** CONTRACTS: POWER COUPLED WITH INTEREST. Where an office is furnished to an agent employed to manage property and collect rents, rent free, as a part of the compensation for his services, the relation of landlord and tenant does not exist, the occupancy is merely ancillary to the service, and the agent does not take his power coupled with an interest.
2. **Contracts:** PERSONAL SERVICES: TERMINATION BY DEATH. As a general rule a contract for personal services is dissolved by the death of either party.
3. ———: ———: BREACH: LIABILITY OF REPRESENTATIVES. If the contract is so far personal that the representative of one of the

parties to it is not responsible in damages for refusing to complete its performance, the representative of the other party is not responsible for a like failure.

4. ———: ———: ENFORCEMENT: RATIFICATION BY EXECUTORS. A contract was made that A should manage and control a number of parcels of improved real estate belonging to B for the term of five years, should collect the rents, and make repairs, and pay the money remaining in his hands on the 15th of each month to B. It contained the provision: "That the covenants in this contract shall succeed to and be binding upon the respective heirs, executors, administrators and assigns of the parties hereto." After A had entered upon the performance of his duties, B died, having by will devised the property to his executors and trustees. *Held*, That since such a contract could not be enforced as against the heirs, executors and assigns of A, it was equally unenforceable against the personal representatives of B. *Held*, further, that the fact that the executors permitted A for some time after the death of B to manage the property and collect the rents did not constitute a ratification and adoption of the contract.

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

*Morsman, Maxwell & Thompson* and *Will E. S. Thompson,* for appellant.

*Francis A. Brogan, contra.*

LETTON, J.

Action to recover for breach of a contract for personal services. A demurrer to the petition was sustained and the cause dismissed. Plaintiff appeals.

In substance, the petition alleges that the plaintiff is engaged in the real estate and rental business at Omaha; that John I. Redick in his lifetime was the owner of a large amount of real estate in the city, which was rented to various tenants; that on December 8, 1904, an agreement was made between plaintiff and Redick, whereby plaintiff was employed for five years from January 1, 1905, to look after this real estate, collect the rents, make repairs, pay bills, and have the general supervision of the property, and as compensation for his services he was to receive 3 per cent. of the rents collected and, in addition,

office rent free at 1517 Farnam street, Omaha; that plaintiff under the contract proceeded to take charge of the property and carry out its terms; that the total rentals received during 1904 amount to $29,000. It is further alleged that Redick died on April 2, 1906, leaving a will by which the defendants were constituted trustees and executors of his estate, and the entire title, control and management of the real estate passed to them for the purposes of the trust; that after Redick's death plaintiff continued in charge, control and supervision of the property and collected rents as before, making monthly reports to the trustees until August 1, 1908, when they attempted to cancel the contract, and took the charge, control and supervision of the property away from him, and refused to allow him to collect the rents and compelled him to vacate his office. The amount of money then collectable for rents is alleged; that plaintiff was fully able and willing to continue and carry out the obligations of the contract on his part; that 3 per cent. is below the general and customary fee for such services; that he accepted the contract at that price on account of the length of time it would run and the volume of business; that at the time the property was taken from his control the rent amounted to $5,800 a month; that if the contract had not been broken he would have collected that sum, and his compensation would have been $174 a month; and that his office rent was reasonably worth the sum of $60 a month. He prays judgment for $4,000 as damages. A copy of the written contract is attached. This contains the further agreement "that the covenants in this contract shall succeed to and be binding upon the respective heirs, executors, administrators and assigns of the parties hereto."

Appellant bases his right to a reversal upon three propositions: (1) Under the terms of the contract the plaintiff was vested with an agency or authority coupled with an interest in the subject matter. (2) If the contract did not create an agency coupled with an interest, yet it was binding upon the defendants to the extent that, if they re-

fused to be bound by it and discharged the plaintiff, they were liable in damages. (3) Defendants ratified and adopted the contract.

1. It is a general principle of the law of agency that upon the death of the principal the contract of agency comes to an end, since the agent, who is merely acting for another, cannot act for the principal when he has ceased to exist. This rule, however, is subject to various exceptions and modifications growing out of the facts in each case. It is claimed that the facts alleged with reference to the occupancy of an office, rent free, brings the case within one of these exceptions, for the reason that the agent took the power to act coupled with an interest in the premises by reason of his right to the possession of real estate. The contract recites that the right to occupy the office, rent free, is merely compensation for the agent's services in addition to the 3 per cent. specified. It seems clear that upon the termination of the service the right to occupancy ceased; that the contract did not create the relation of landlord and tenant; and that no interest in real estate passed to plaintiff by reason of the agreement. The relation between the parties was principal and agent, and not landlord and tenant. Contracts for services allowing the occupancy, rent free, of premises to the person employed are very common, and courts generally take the view stated. *School District v. Batsche,* 106 Mich. 330, 29 L. R. A. 576; *Davis v. Williams,* 130 Ala. 530, 54 L. R. A. 749; *McQuade v. Emmons,* 38 N. J. Law, 397. An exhaustive discussion of this point may be found in note to *Bourland v. McKnight & Bro.,* 4 L. R. A. n. s. 698, 707 *et seq.* The real test seems to be whether the occupation of the premises is connected with the purposes of the service and was obtained by reason of the contract for the purpose of facilitating the business of the principal. *Mitchell v. Morris Canal & Banking Co.,* 31 N. J. Law, 99. There is a clear distinction between the facts alleged and the facts in *Volk v. Stowell,* 98 Wis. 385, cited by plaintiff. The defendant in that case was to receive a certain sum per month

besides 15 per cent. of all increase of stock born on the farm, and also 15 per cent. of the farm products, and the court was of the opinion that the contract was somewhat of the nature of a lease and conferred upon the plaintiff many of the rights of a tenant.

2. Is the contract binding upon the executors and trustees to the extent that, if they failed to carry it out, they are liable in damages? The compensation of plaintiff was fixed at 3 per cent. of the amount collected. The contract required him to render a monthly statement to Mr. Redick "showing in detail rents collected, bills paid, and turn over to said first party on the 15th of each month all moneys remaining in his hands at that time belonging to said first party." The compensation for services performed was evidently deducted each month, so that, both at the time of Mr. Redick's death and at the time the trustees refused to allow the plaintiff to continue further to manage the property and collect rents, he had been fully paid for services to that time rendered. The claim in the petition is for compensation which he might have earned under the contract, if he had been permitted to carry it on until the expiration of the five-year period.

The principle which applies is laid down in *Babcock v. Goodrich*, 3 How. Pr. n. s. (N. Y.) 52: "As a general rule, if a contract is so far personal that the representative of one of the parties to it is not responsible in damages for refusing to complete its performance, the representative of the other party is not so responsible for a like failure, in the absence of evidence of intention to bind the representative. Evidence of such intention may be furnished by the terms of the contract, or implied from its nature." In the present case, would the death of plaintiff have bound his "heirs, executors, administrators or assigns" to carry on the stewardship, or could they insist upon such right against the wishes of the other party? Would a court compel specific performance of the contract upon their part? If these queries must be answered in the negative, and the personal representatives of the plaintiff

would not be bound to perform in case of his death, how can it be said that in case of the death of the other contracting party his representatives are bound? Could it have been the intention of Mr. Redick to entrust the care of his valuable property and the collection of a large sum of money each month to unknown persons, who might perhaps be of doubtful business ability or integrity? Are not the relations so purely personal that the death of either party puts an end to them? Must not the contract be mutual? These questions are discussed in *Lacy v. Getman,* 119 N. Y. 109, 6 L. R. A. 728, and it is held that the death of the servant dissolved the contract, and that the death of the master had the same effect. See, also, note to *Mendenhall v. Davis,* 17 Am. & Eng. Ann. Cas. 179 (52 Wash. 169).

Considered without relation to the agreement in the contract that its terms should be binding upon the representatives of the parties, the death of Redick terminated and dissolved the relation of principal and agent, and no recovery could be had against his executors and trustees for failure to permit the plaintiff to carry on the contract until its expiration. 2 Woerner, American Law of Administration (2d ed.) sec. 328, p. *688; *Kimmell v. Powers,* 19 Okla. 339; *Campbell v. Faxon,* 73 Kan. 675, 5 L. R. A. n. s. 1002. Does the fact of this express stipulation change the situation of the parties? Suppose that Mr. Redick had died intestate and his property had been distributed to a number of heirs, would each of the heirs take it subject to the provisions of the contract? Could they involuntarily be made principals and the plaintiff their agent? Is such a contract in the nature of a charge against an estate so that whoever takes it by descent, or by purchase, takes it burdened with the obligation to employ the plaintiff? Or, in case of plaintiff's death, must the then owners employ his heirs, executors, administrators or assigns to manage the property and collect its revenues? These queries suggest the impracticability of applying such a provision to a contract for services. The very nature of the contract

does not permit of the enforcement of such an agreement. No doubt it may be carried out voluntarily by the consent of the parties; but, in such case, it is virtually the making of a new contract. If the agent dies, the owner of the property may accept as a new agent one of the classes of persons named in this clause; or, if the principal dies, his heirs, executors or assigns may be willing to accept the services of the agent, upon the same terms and conditions as specified in the contract. In such case the person so accepted is vested with authority by virtue of a new relation entered into, and not by reason of the survival of the contract. We have examined the cases cited by the plaintiff upon this point, but we find features in each one which clearly distinguish it from the facts in this case. Where such recovery is allowed, the contract has usually been partly performed without compensation, and has been of such a nature that the peculiar knowledge or skill of the agent has been exerted for the benefit of the estate to such an extent as to increase its corpus or enhance its value, and loss would occur if he had ceased to act. *Wylie v. Coxe,* 15 How. (U. S.) 415, and *Hawley v. Smith,* 45 Ind. 183, are typical cases.

3. What has just been said in the discussion of the second point answers the contention that the defendants, by allowing the plaintiff to continue to collect the rents and manage the property for them for a portion of the time after the death of Mr. Redick, have ratified and adopted the contract. The trustees, by accepting the services of plaintiff, did so, not because they were bound to do so by any provision in the contract, but voluntarily. They allowed him to retain payment for his work to the same extent and in the same manner as specified in the contract. If they had accepted the service and refused to pay, they would have been liable upon an implied contract for the reasonable value thereof. Both parties tacitly seemed willing to consider the terms named in the contract as a proper remuneration. We cannot take the view that the fact that the trustees continued to allow plaintiff to act had the

effect to cause them to ratify or adopt the contract so as to bind the trustees to accept plaintiff's services until the time of its expiration.

The judgment of the district court is

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

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CHARLES G. JONES, APPELLEE, V. CHICAGO GREAT WESTERN RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,721.

1. **Railroads:** RECEIVER'S SALE: LIABILITY OF PURCHASER. A decree, requiring the purchaser of a railroad at a receivers' sale to pay, in addition to the bid, all liabilities incurred by the receivers in their operation of the road, includes the damages recoverable in an action at law for personal injuries to one of their railroad employees.

2. ———: ACTION FOR INJURY TO EMPLOYEE: PETITION: SUFFICIENCY. In an action for personal injuries, a petition pleading facts which entitle plaintiff to relief under the doctrine of the last clear chance will not be *held* insufficient on appeal, because the principle of law under which he is entitled to a recovery is not stated.

3. **Trial:** INSTRUCTIONS. An instruction, stating the law applicable to an issue of fact established in plaintiff's favor by the evidence without dispute or contradiction, is not erroneous, because it fails to require a finding on that issue as a condition of granting him relief.

4. **Contributory Neligence:** QUESTION FOR JURY. Where the evidence on a controverted issue of contributory negligence in an action for personal injuries is sufficient to sustain a verdict for plaintiff, the disputed question of fact is one for the jury.

5. **Railroads:** INJURY TO SWITCHMAN: NEGLIGENCE: EVIDENCE. In the switch yards of railroads the speed of an engine on a track upon which switchmen stand at regular times and places daily, pursuant to a known custom, for the purpose of giving signals, may be evidence of negligence where such engine approaches without signal or warning of any kind.

6. **Evidence:** ANNUITY TABLES. In an action for personal injuries resulting in the permanent impairment of plaintiff's earning capacity, annuity tables are admissible in evidence and may be considered by the jury in connection with other competent proofs.

7. **Damages.** A verdict for $16,000 for personal injuries, under the facts disclosed by the record, *held* not excessive.

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

*William D. McHugh* and *W. H. Herdman,* for appellant.

*Mahoney & Kennedy, contra.*

ROSE, J.

Plaintiff brought this action to recover damages in the sum of $30,000 for personal injuries. From a judgment on a verdict in his favor for $16,000, defendant has appealed.

Plaintiff was the head brakeman and a switchman on a local Union Pacific freight train running regularly between Omaha and Columbus. While he was watching this train as it ran southward on a Union Pacific track at a switch near South Omaha, where he was required to signal the engineer for switching purposes, an engine running backward in the same general direction on the Chicago Great Western track ran against him. He had gone upon that track at the regular time and place pursuant to a daily custom known to a switching crew in charge of the engine which struck him. He was knocked down, but clung to the engine and was dragged beneath it. As a result he lost a foot and three fingers and was severely shocked. At the place of the injury tracks of the two railway systems run side by side in a curve, the Chicago Great Western track being four or five feet west of the nearest Union Pacific track. The side of the cab occupied by the engineer to whom plaintiff gave signals was on the convex of the curve. Plaintiff dropped off his own train and went westward onto defendant's parallel track, where the engineer on the Union Pacific engine was within the line of

vision. In a foreclosure suit brought by bondholders in a circuit court of the United States, the Chicago Great Western Railway Company went into the hands of receivers, January 8, 1908. Plaintiff was injured about 9 o'clock in the forenoon, August 27, 1909, during the existence of the receivership. The property and interests of that corporation and of the receivers were sold to the Chicago Great Western Railroad Company, defendant, August 29, 1909. Plaintiff pleaded facts and adduced proof tending to show, in substance, that he was in the necessary discharge of his duties, acting pursuant to a long-established custom, when injured; that he exercised due care and caution; that there was no negligence on his part; that, while he was giving signals at the time and place mentioned, the receivers, without notice or warning, without ringing a bell or blowing a whistle, with full knowledge of his customary presence, carelessly and negligently backed their switch engine against and over him; that the injury was inflicted in broad daylight when the sun was shining; that the receivers, by the exercise of ordinary care, could have seen plaintiff for a distance of several hundred feet before running him down; that, though the engine which struck him could have been stopped in ten feet, the receivers negligently and wantonly refrained from stopping it, but continued to run it about 142 feet, dragging and crushing him; that the damages which the receivers caused in their railroad operations are recoverable from defendant. The answer, in addition to denying negligence, contains a plea of contributory negligence, and alleges that in becoming the purchaser at the receivers' sale defendant did not incur any liability for injuries to plaintiff.

The first assignment of error is directed to the giving of an instruction containing the following language: "When plaintiff was injured the railroad, which was mentioned in the testimony in this case as the Chicago Great Western Railway was being operated by receivers appointed by the United States circuit court. Shortly after plaintiff's injury said railroad property was, pursuant to a sale made by said United States circuit court and cer-

tain orders and decrees in connection therewith, turned over to the defendant herein, Chicago Great Western Railroad Company as the purchaser thereof. In buying said railroad property the defendant herein, under the orders and decrees of the United States court, obligated itself to pay all liabilities that were incurred by the receivers in the operation of the Chicago Great Western Railway Company. You are therefore instructed that if, under the evidence and instructions of the court, you should find that plaintiff's injuries were inflicted under circumstances that would have entitled plaintiff to recover damages from said receivers of the Chicago Great Western Railway Company, then the defendant herein would be liable to plaintiff for the amount of such damage."

The orders and decrees to which reference is thus made impose upon the purchaser the following obligations:

"As a part of the consideration for the property purchased, the purchaser shall take the property and shall receive the deed therefor upon the express condition that, in addition to the sum bid therefor, the purchaser shall pay and discharge all the following claims which are not paid by the amount bid: * * * (a) All indebtedness, obligations or liabilities which by such receivers shall have been contracted or incurred in the operation or on account of the property of the said Great Western Company at any time before the same shall have been delivered to the purchasers, or in the discharge of their duties as receivers at any time before they are finally discharged. * * * The purchaser shall pay any of the claims described in clauses 'a' and 'b' which are established or unquestioned, and any disputed claims when allowed by the master, without objection, or by the court, and they shall pay to the master or into court the moneys required to discharge the same from time to time as the court may direct."

It is argued that the instruction is erroneous, because defendant, in purchasing the property of the Chicago Great Western Railway Company and of the receivers on the terms fixed by the decrees and orders of the federal court,

did not incur any liability to plaintiff for the injuries pleaded in the petition. Defendant states its position as follows: "Under the plain language of the decree of sale defendant assumed and agreed to pay, first, claims which are unquestioned or established; and, second, any disputed claims when allowed without objection by the master or by the court. As to disputed claims defendant's assumption of payment thereof was conditional on the same being first allowed by the master, without objection, or by the court." It is asserted by defendant that plaintiff's claim is not within either class.

On the other hand, plaintiff takes the position that the last clause quoted from the decree does not impose a condition of liability, but merely sanctions an equitable remedy which is not exclusive, and insists that damages caused by the receivers in the operation of the railway are recoverable in an independent action at law against the purchaser.

The decree on its face shows that payment of the bid is not the full measure of the purchaser's liability. Provision is made in direct terms for the payment of other liabilities and obligations. Is plaintiff's claim one of them? In the management of the railroad the liabilities created by the receivers, except for individual or personal misconduct, were official, and a valid claim or a judgment against them in their representative capacity is in effect a liability against the property under their control. In directing receivers the federal courts keep these principles in mind. It will not be presumed, in construing a decree directing a sale by receivers, that the federal court intended to relieve railroad property from a lawful and just claim growing out of the operation of the railroad while in their hands. Such claims may exist at the time of the sale, though there has not yet been an opportunity to adjudicate or to allow them in any judicial proceeding. Under the orders of the court the earnings of the carrier may be put into improvements, while liabilities created by the receivers remain unpaid. The decree was not intended to wrong those having legal claims or to devise means for re-

leasing corporate property from just burdens. The methods of adjustment provided by the court of equity were not intended to be exclusive. Remedies at law were not cut off. The terms of the decree show a purpose to hold the purchaser responsible for liabilities incurred by the receivers in the operation of the railroad. These observations are in harmony with the decisions of the federal courts and are prompted by justice and the integrity of judicial proceedings wherein railroad property is managed and sold by receivers. *Hanlon v. Smith,* 175 Fed. 192; *Thompson v. Northern P. R. Co.,* 93 Fed. 384. In these respects the trial court, therefore, did not err in giving the instruction criticised by defendant.

The next assignment of error challenges an instruction submitting to the jury an issue as to the right of plaintiff to recover damages under the doctrine of the last clear chance. Defendant insists that facts authorizing a recovery based on that rule of law are not pleaded, and that therefore the trial court erroneously submitted an issue not tendered by the pleadings. On the record presented the point is too narrow and technical. That issue was tried. There was evidence on both sides. While plaintiff in his petition did not plead in legal phraseology the principle on which he seeks relief, he pleaded facts showing that he was negligently injured after his peril had been discovered. The grounds on which plaintiff sought relief were not only understood by defendant and tried by the parties, but the facts on which plaintiff based his right of recovery were stated in the petition. For these reasons, the assignment is overruled.

Further argument is directed to the point that the trial court erred in permitting a recovery under the doctrine of the last clear chance after plaintiff was struck, without requiring a finding that the switching crew on the Chicago Great Western track had actual knowledge of that fact. Such actual knowledge was shown by defendant's witnesses without dispute or contradiction, and a statement to that effect to the jury would have been proper. It follows that defendant was not prejudiced by the instruc-

tion assailed, and that reversible error in this particular is not shown.

An instruction on the duty of plaintiff to look and listen before going onto defendant's track and on the law applicable to proof of contributory negligence on his part is also criticised as erroneous. On those subjects the trial court, among other things, said:

"As to just what time he should look and listen before going on the track is for you to determine from all of the facts and circumstances in evidence before you. In this case if you believe from a preponderance of the evidence that plaintiff did not take such precautions as to his own safety as an ordinarily prudent person would have done under like circumstances and surroundings, and if you further find that such failure on the part of plaintiff caused or contributed to his injury, then you should find that he was guilty of contributory negligence. If, on the other hand, you believe that he did take such precautions as to his safety as an ordinarily prudent person would have done under like circumstances and surroundings, then you should find he was not guilty of contributory negligence."

In this connection defendant assigns error in the refusal of the trial court to give the following requested instruction:

"Plaintiff, in going upon the track of the defendant company without looking for the approach of the engine after he dropped off his train at the main-line switch, was guilty of negligence."

Whether there was error in these rulings depends upon the evidence. There is proof tending to show: Plaintiff dropped off his engine at what is called the "inside switch," lined it, climbed onto a ladder on the side of one of the cars of his train while it was running southward, rode about 125 feet to a place described in the record as the "main-line" switch, again dropped off and went upon the Chicago Great Western track to give signals at the place of the injury. This was a repetition of what had occurred regularly at the same hour for a long time. The custom was

familiar to the switching crew on the Chicago Great Western engine. When plaintiff was injured his attention was directed to his own train, it being his duty to signal the engineer thereof when the last car passed over the main-line switch. When he got off at the inside switch he looked and saw no engine on the Chicago Great Western track, though he could see backward along it 300 or 400 feet. While he was clinging to the ladder he again looked, with the same result. At the main-line switch his train was running five or six miles an hour. The distance from the place where he alighted at the main-line switch to the center of the Chicago Great Western track, where he was struck, was about twelve feet. The engine which struck him was backing southward as fast as 12 or 15 miles an hour and ran 152 feet after the collision. There is evidence from which a higher rate of speed may be inferred. Of the approach there was no warning by bell or whistle. Plaintiff's own train necessarily made considerable noise. From the circumstances narrated, when considered in connection with other proofs, it may fairly be inferred that plaintiff looked for an approaching engine a few seconds before he went upon defendant's track, and saw none. Though the evidence is conflicting in many respects, there is proof tending to establish the facts narrated. It follows that the evidence is sufficient to sustain a finding that plaintiff was not guilty of contributory negligence. That issue, therefore, was properly submitted to the jury, and the rulings of the court thereon were not erroneous.

The trial court refused, on request of defendant, to give an instruction that a speed of 12 or 15 miles an hour was not unreasonable or excessive, and that the jury had no right to find defendant guilty of negligence solely on proof of that rate of speed. This ruling is also assigned as error. The point is not well taken. There is testimony which, if believed, tends to show that the engine on the Chicago Great Western track ran faster than 12 or 15 miles an hour. Besides, the custom, facts and circumstances proved made the requested instruction, in the form submitted to the trial judge, inapplicable to the condi-

tions existing in the switch-yards at the time and place of the injury. Other rulings in refusing instructions are criticised, but they do not contain prejudicial error.

Another assignment of error presented is the admission in evidence of annuity tables issued by the National Life Insurance Company. The judgment cannot be reversed on this ground. It was shown by other proofs that plaintiff was 36 years old at the time of the collision and that he was permanently injured. His expectancy of life and his earning capacity before and after the injury were also shown. It is a well-established rule of evidence that, in an action for personal injuries resulting in the permanent impairment of plaintiff's earning capacity, annuity tables may be admitted in evidence and considered by the jury in connection with other competent proofs. *Vicksburg & M. R. Co. v. Putnam,* 118 U. S. 545; *Baltimore & O. R. Co. v. Henthorne,* 73 Fed. 634; *McKeigue v. City of Janesville,* 68 Wis. 50; *Reynolds v. Narragansett Electric Lighting Co.,* 26 R. I. 457; 17 Cyc. 422. Defendant asserts, however, that the document introduced by plaintiff shows the prices at which the National Life Insurance Company offers annuities for sale, without proof that such prices are fair and reasonable, and draws the conclusion that the evidence was erroneously admitted. According to the proofs applicable to this question, the tables introduced in evidence show the lowest rate at which annuities can be purchased. They were therefore at least as favorable to defendant as rates proved according to the standards demanded by it. When all the testimony relating to these tables is considered, error in admitting them does not affirmatively appear.

Under the final assignment of error the verdict for $16,000 is vehemently assailed as excessive, but the reasons urged by defendant for setting it aside on that ground do not seem to be sufficient to warrant an interference with the work of the jury. There is no definite rule for measuring some of the damages inhering in the verdict. The injuries inflicted by defendant were distressing, and the amount allowable for pain and suffering cannot be com-

puted on any exact basis. Plaintiff was 36 years old, and it cannot be asserted that the prospect of increasing his earnings had passed. Whether his physical condition as indicated by the evidence gave promise of a longer life than the expectancy shown by mortality and annuity tables is a perplexing problem on appeal. He lost time and incurred expenses when he was helpless. The evidence is sufficient to sustain a finding that his earning capacity was at least $1,200 a year before he was injured and not over $400 a year at the time of the trial. The jury may have found that his earnings would have increased, except for his injuries, and that hereafter they will decrease. When all of the damages are considered in connection with the discretion of the jury in measuring indefinite though substantial elements of recovery, where there is no exact method of computation, excess in the verdict is not affirmatively shown.

AFFIRMED.

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

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JOHN PREDIGER, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,843.

1. **Trial**: VERDICT: INSTRUCTIONS. Where a verdict does not disregard an instruction, when interpreted with the entire charge, it will not be set aside on appeal merely because it may seem to be inconsistent with an isolated paragraph.
2. **Master and Servant**: INJURY TO SERVANT: ACTIONABLE NEGLIGENCE. In an action for personal injuries, a foreman's peremptory order to an employee in a trench to raise alone with his hands the end of a heavy iron pipe may be given under such circumstances as to amount to actionable negligence.
3. **Negligence**: QUESTION FOR JURY. Issues of negligence are questions for the jury, where the evidence is sufficient to sustain a verdict in favor of plaintiff.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

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

*Wilmer B. Comstock* and *H. A. Reese, contra.*

ROSE, J.

The action is one to recover damages in the sum of $10,000 for personal injuries. Plaintiff and others in the employ of defendant were engaged in laying a line of pipe in a trench. Beginning at defendant's power-house three separate pieces of the pipe, each at least 16 feet long, were laid lengthwise and united at the ends by flanges and bolts. While plaintiff was in the trench attempting alone to lift with his hands the open end of the pipe he was severely injured. The negligence imputed to defendant arises from alleged acts of its foreman in peremptorily ordering plaintiff, under the existing circumstances, to lift a weight which was too heavy for him, and in threatening to discharge him, if he did not proceed to do so, though plaintiff had previously said the pipe was too heavy for him to lift, and had asked without avail for permission to use a lever. The answer contained a general denial and a plea of contributory negligence. Assumption of risk was also pleaded as a defense. The reply was a general denial. From a judgment on a verdict in favor of plaintiff for $2,872.25, defendant has appealed.

A reversal is asked on the alleged ground that the jury disobeyed an instruction that the foreman, "If he had seen plaintiff voluntarily lift the pipe, just before the accident occurred, a distance of six inches, he would be justified in directing him to lift it again an inch or two higher." Defendant insists that the testimony of plaintiff shows that he had once willingly lifted the pipe immediately before he was hurt, and that therefore the verdict in his favor was a violation of the instruction mentioned. An instruction immediately following the language quoted modified it and directed the attention of the jury to testimony that plaintiff, after first having lifted the pipe, told the fore-

man it was too heavy for one man, and asked permission to use a lever, but was ordered to lift it with his hands on penalty of dismissal. The entire charge left the question of negligence, under all of the circumstances, to the jury. When the instructions are considered as a whole, as they should be, the verdict is not contrary to any one of them.

The judgment is also assailed on the ground that the verdict is not sustained by sufficient evidence. It is contended by defendant that plaintiff had already safely lifted the pipe; that by the exercise of ordinary care he could have repeated the task without injury to himself; that he was accustomed to lifting, but failed to take the proper position; that he did not prepare the ground under his right foot for a heavy lift; that the weight of the pipe, as shown by the evidence, was not beyond his strength; that he assumed the risk and was injured through his own negligence. It does not necessarily follow from the evidence that the weight, when plaintiff first lifted the open end of the pipe, was the same as when he again attempted to lift it. After it had been raised six inches at the open end it was not level. It may fairly be inferred from the proofs that it would require greater strength to raise it higher on account of the increased rigidity of the flanges uniting it at the other end. There is proof tending to show: The walls of the trench were uneven. Under plaintiff's right foot there was loose earth which gave way. The weight was too heavy for one man to lift. It was heavy enough for two or three men. Plaintiff had already lifted the pipe six inches, and had asked the foreman without avail for permission to use a lever. The trial court submitted to the jury requests for special findings in answer to the following questions:

"1. After lifting the iron pipe the first time, did the plaintiff tell the foreman, in substance, that it was too heavy for him to lift?

"2. Did the defendant's foreman tell the plaintiff, in substance, to lift the iron pipe or quit and go home?"

The jury answered both in the affirmative, and the findings are sustained by the evidence. Under the circumstances shown by the proofs, the issue of negligence was a question for the jury, and their verdict is amply sustained by the evidence.

Further criticisms upon the giving and the refusing of instructions are sufficiently met by the discussion of the evidence and the law applicable thereto. Complaint of the verdict as excessive is clearly without merit.

AFFIRMED.

REESE, C. J., not sitting.

SEDGWICK, J., concurring.

I concur in the conclusion, but I do not think that the instruction, "If he had seen plaintiff voluntarily lift the pipe, just before the accident occurred, a distance of six inches, he would be justified in directing him to lift it again an inch or two higher," is consistent with the charge as a whole. Under that instruction and the evidence the jury must have found for the defendant. The instruction, however, is wrong, and is absolutely inconsistent with the whole charge, and the jury did right in disregarding it.

HAMER, J., concurs in the above.

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## EASTERN BANKING COMPANY V. EPHRAIM W. ROBBINS, APPELLANT; DOMINICK PROHASKA ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,871.

1. **Mortgages:** FORECLOSURE SALE: EXHAUSTION OF REMEDY. For the purpose of collecting the amount due on a real estate mortgage, mortgagee's equitable remedy by foreclosure, in absence of a deficiency judgment, is exhausted by a valid judicial sale of the mortgaged property under a decree foreclosing the mortgage.

2. ———: FORECLOSURE: DEFICIENCY JUDGMENT. After realty has been sold under a decree foreclosing a first and a second mortgage thereon, the junior mortgagee is entitled to a deficiency judgment for any unpaid debt due on his mortgage, and this remedy is

not lost, because the entire purchase price at the judicial sale was applied to prior liens.

3. ———: ———: REVIVOR OF DECREE. A decree foreclosing a mortgage on realty is not a judgment subject to revivor after the mortgaged property has been legally sold and the sale duly confirmed under a decree of foreclosure.

4. ———: ———: DEFICIENCY JUDGMENT. On the ground of laches a court of equity may decline to enter a deficiency judgment in a suit to foreclose a mortgage on realty, where that remedy was open and uninvoked without excuse for more than 14 years after the property had been sold under a decree of foreclosure.

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

*M. A. Hartigan,* for appellant.

*John M. Ragan, contra.*

ROSE, J.

In form the petition appears to be an application for the revivor of a judgment. The material facts established by the record without dispute are: The Eastern Banking Company commenced a suit in the district court for Adams county, December 15, 1896, to foreclose the first mortgage on a tract of land; Dominick Prohaska and wife being mortgagors and defendants. In the foreclosure suit the petitioners herein, Ephraim W. Robbins and wife, had been joined as defendants, and they filed a cross-petition for the foreclosure of a second mortgage on the same land, their codefendants being the mortgagors. The cross-petition contained a prayer for the sale of the mortgaged land, for the payment of prior liens out of the proceeds of the sale, for the application of the surplus to the indebtedness secured by the second mortgage and for a deficiency judgment for any unpaid balance. Under a decree of foreclosure the mortgaged land was sold and the proceeds applied to the costs, the taxes and the debt secured by the first mortgage. There was no surplus to apply on the second mortgage, the debt amounting to $1,015.95, with 8 per cent. interest per annum from March 5, 1897, no part of which

has been paid. The foreclosure sale was confirmed March 10, 1898. Petitioners in the present proceeding never recovered the deficiency judgment for which they had prayed in their cross-petition in equity, but filed, June 17, 1912, their petition for the revivor of the executed decree of foreclosure, more than 14 years after the judicial sale thereunder had been confirmed. The trial court refused to revive the executed decree of foreclosure, and they have appealed.

Did the trial court reach the right conclusion? Petitioners are demanding equitable relief in some form. Are they defeated by laches? The suit to foreclose the mortgage afforded a remedy by seizure and sale of the mortgaged land to pay the debt owing to petitioners herein. The decree of foreclosure was not a lien on any other property. An execution thereon to seize other property of mortgagors could not legally have been issued. There was no personal or general judgment against them in favor of petitioners. The remedy of the latter under the decree was exhausted by the judicial sale of the land on which they had a lien.

The statute gave petitioners herein a remedy by means of a deficiency judgment against mortgagors personally or generally. This remedy was available to them as early as March 10, 1898, "on the coming in of the report of sale." Rev. St. 1913, sec. 8256. Notwithstanding their prayer for a deficiency judgment in the foreclosure suit, they did not invoke or obtain such relief "on the coming in of the report of sale," or at any subsequent time. That the proceeds were insufficient to pay any part of the debt due on the second mortgage did not defeat their right to a deficiency judgment. The statute granted the trial court power "to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises." Rev. St. 1913, sec. 8256. It would be trifling with statutory terms to hold that mortgagees were not entitled to a deficiency judgment because no part of the proceeds of the sale of the mortgaged premises could be applied to the second mortgage. The legislature made provision for a

remedy, and it applies where the entire debt remains unpaid after a foreclosure sale, as well as where there is a partial payment by that means.

After the remedy by foreclosure was exhausted without payment of any part of the debt due on the second mortgage, no personal or general judgment subject to revivor remained.

The granting of the relief demanded in the petition for a revivor would require the entry of a deficiency judgment for the amount due petitioners after the remedy had been open to them more than 14 years. During that time no effort was made to invoke this remedy. On the face of the record the delay is inexcusable. Petitioners are defeated by laches. In this case a court of equity in the exercise of its inherent power to deny relief on account of laches, independently of the statute of limitations, should refuse to enter a deficiency judgment. *Hawley v. Von Lanken,* 75 Neb. 597. Referring to the power to perform the act of entering a deficiency judgment after expiration of the term at which the judicial sale was confirmed, it was remarked in *Sawyer v. Bender,* 4 Neb. (Unof.) 304: "We think that the power to perform it would not lapse until the obligation, if valid, should be satisfied or become barred by the statute of limitations." This expression, however, is dictum in an unofficial opinion and is not binding as a precedent. There is nothing to revive, since a deficiency judgment should not be entered on account of laches. For these reasons the proceeding was properly dismissed.

AFFIRMED.

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

JOHN W. KANALY, APPELLANT, V. ORA BRONSON, ALIAS ORA KANALY, APPELLEE.

FILED DECEMBER 4, 1914. No. 17,874.

1. **Marriage:** ANNULMENT: EVIDENCE. In a statutory proceeding to annul a marriage on the ground that "the consent of one of the parties was obtained by force or fraud," evidence proving that there was "no subsequent voluntary cohabitation of the parties" is essential to plaintiff's case. Comp. St. 1911, ch. 25, sec. 2.
2. **Appeal:** AFFIRMANCE. A proper judgment under the pleadings and the evidence will not be reversed on appeal, merely because the trial court did not give the right reason for the decision.

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

*A. F. Moore,* for appellant.

ROSE, J.

This is a statutory proceeding to annul plaintiff's marriage to defendant on the ground that it was procured by force or fraud. The ceremony was performed in Sioux City, Iowa, January 29, 1912, when plaintiff was a resident of Havelock, Nebraska. Defendant entered her voluntary appearance in the case, but made no defense, and was not present in person or represented by counsel at the trial. Plaintiff testified, among other things, that a minister from Sioux City accosted him at Havelock in presence of the city marshal and told him he would have to go back to Sioux City or go to the penitentiary, and that under threats of this nature the ceremony was performed. The trial court declined to grant plaintiff any relief and dismissed the proceeding. He has appealed.

The correctness of the decree depends upon the evidence. In addition to showing that the consent of plaintiff to the marriage "was obtained by force or fraud," he was required to prove that there was "no subsequent voluntary cohabitation of the parties." Comp. St. 1911, ch. 25, sec.

2. The testimony of plaintiff himself shows that he voluntarily returned alone to Havelock after the marriage ceremony had been performed, that defendant came later, and that they cohabitated together there for a few days. In attempting to show by his testimony that he did not cohabit with her within the meaning of the statute, he gave the following reasons for his cohabitation: "It was because I did not know the law at that time, and they said it was the law and I thought I had to," and "I was threatened with being sent to the penitentiary, for not doing as a man should towards supporting her." When or by whom this threat was made is not shown. There was no attempt to repeat any threatening language which coerced him into cohabiting with defendant. He does not intimate that she personally threatened him. The testimony as to the threat on this branch of the case is a conclusion. He was 29 years old and had previously been divorced. Defendant was 22. There is no evidence that he made any protest against cohabiting with her, or cried for help or called upon friends or counsel for advice, or that he did not have time or opportunity to do so. The state is interested in the marriage relation, and courts of equity in administering the law are not obliged to accept testimony of this nature as sufficient proof that admitted cohabitation after marriage was involuntary, within the meaning of the statute authorizing the annulment of marriages. For insufficiency of the evidence in this respect the proceeding was properly dismissed.

The trial court gave a different reason for the decision below; but, since his judgment is free from error, the reason given for rendering it is immaterial on appeal.

AFFIRMED.

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

GIRARD TRUST COMPANY, APPELLEE, V. HENRY NULL ET AL.; W. V. HOAGLAND, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,878.

1. **Judgment:** MODIFICATION AFTER TERM. The statutory remedy for correcting a judgment after expiration of the term at which it was rendered is limited to the grounds enumerated in the statute. Code, sec. 602 (Rev. St. 1913, sec. 8207).
2. ———: ———. A motion to correct a decree by allowing interest at 10 per cent. per annum after maturity of the debt, instead of a lower rate for that period, as originally fixed by the trial court, should be overruled on a record showing that the decree was entered as pronounced; that the term at which it was rendered was allowed to pass without any effort to correct it; that it had been affirmed by the supreme court; that there had been no attempt to correct the error on appeal; that the journal entry of the decree disclosed no error in the rate of interest; that the motion required a judicial inquiry into evidence outside of the decree itself.

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

*Hoagland & Hoagland* and *W. B. Comstock,* for appellant.

*Albert Muldoon, contra.*

ROSE, J.

The purpose of the appeal is to reverse an order correcting a decree. The suit was brought to foreclose a mortgage. In the entry of the decree, which was in favor of plaintiff, the unpaid debt with the interest due, as computed by the trial judge and as stated in his findings, was $986. From a decree of foreclosure to collect that sum, defendants appealed to the supreme court. An affirmance followed. After the mandate had been received below, the affirmed decree was, on a motion by plaintiff, changed by the district court at a subsequent term to show that the amount due plaintiff was $1,127.97 instead of $986, as origi-

nally decreed. The increase is the difference between interest at the rate of 7 per cent. per annum for the entire period and that rate until maturity of the debt, with interest after maturity at the rate of 10 per cent. per annum until the date of the decree. From this modification defendant W. V. Hoagland prosecutes the second appeal in this case.

Plaintiff attempts to justify the modification after expiration of the term at which the decree was rendered, on the ground that the trial court had statutory power to make the correction: "For mistake, neglect, or omission of the clerk." Code, sec. 602 (Rev. St. 1913, sec. 8207). On this proposition it is argued that a clerical mistake of a judge in computing interest is similar to that of a clerk, and that power to correct an error of either exists, even after the erroneous judgment has been reviewed and affirmed by the appellate court. It is well settled by repeated decisions that relief under the statute cited is limited to the grounds enumerated therein, and that the statutory remedy does not extend to errors of law or to judicial acts. *Dillon v. Chicago, K. & N. R. Co.*, 58 Neb. 472; *Ackerman v. Ackerman*, 61 Neb. 72; *Hitchcock County v. Cole*, 87 Neb. 43; *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385.

On the face of the decree, as it appears on the journal of the district court, error in the amount of interest recoverable does not appear. Neither the note nor the mortgage is copied on the journal. The entry made thereon contains nothing to indicate that interest was payable at an increased rate after maturity. Plaintiff does not assert that the clerk made any mistake. The decree of foreclosure includes an opinion of the presiding judge, findings of fact, and the final order itself. It expresses without omission the entire judicial action taken at the time it was rendered. Plaintiff could have asked the trial court to make the correction any time before expiration of the term at which the decree was rendered, while jurisdiction for that purpose existed. The mistake was subject to correction in the appellate court on cross-appeal. There

was no clerical error in computation. Plaintiff's motion presented a judicial inquiry into the rate of interest mortgagors had agreed to pay after maturity of the debt. The determination of that question required the trial judge to go beyond his former findings and judgment and to consider evidence not appearing in his minutes or on the journal. At the proper time, plaintiff should have either presented a form of decree or have examined the one rendered. In these respects the trial court was entitled to plaintiff's assistance. The power to correct a journal entry to record the judgment actually rendered is not involved. The error in controversy was not within the enumerated remedies created by the statutory provisions invoked by plaintiff.

The modification of the affirmed decree is therefore reversed and plaintiff's motion overruled.

REVERSED.

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

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MCLAUGHLIN BROTHERS, APPELLANT, V. BENJAMIN W. HILLIARD ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,856.

**Appeal in Equity.** "Where the examination of the record on appeal in a suit in equity leaves an appellate court in doubt as to the equities between the parties, the doubt depending solely upon the credibility of material witnesses who testified orally upon the trial, such doubt will, ordinarily, be resolved in favor of the correctness of the judgment of the trial court." *Langmann v. Guernsey*, 95 Neb. 221.

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

*Morning & Ledwith*, for appellant.

*Claude S. Wilson* and *Hainer & Craft, contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Lancaster county, to foreclose a mechanic's lien for lumber furnished defendant Mellor, a contractor, and used by him for the improvement of a dwelling-house belonging to defendant Hilliard. During the trial defendant Mellor brought into court $60 and tendered the same to plaintiff, which tender was refused. The findings were in favor of defendant Hilliard, and as to him plaintiff's lien was canceled and his petition dismissed. The court found due from defendant Mellor to plaintiff $56.30, and ordered that the same be paid to plaintiff out of the money which had been deposited by Mellor. Plaintiff appeals.

It is not disputed that plaintiff furnished the material for which relief is sought, nor is there any dispute that Mr. Hilliard paid the contractor in full. The case turns upon the credibility of the witnesses as to a certain check for $622.34, given by Mellor to plaintiff. When this check was given, Mellor informed plaintiff that he did not then have money in the bank to pay the check, and requested that it be held until a date named. On that day the check was deposited by plaintiff in its bank, and shortly thereafter was returned to plaintiff, not paid for want of funds. Mellor's attention was called to the fact that his check had been dishonored. He testifies that about two days later he went to the office of plaintiff and paid to the secretary (who was also treasurer) the $622.34 in cash and obtained the return of his check. The secretary positively denies that any such payment was made. He testifies that the check was taken up on October 5 by the payment by Mellor of $250 in cash, and the giving of another check for $372.34, which check was post-dated October 25. Mellor positively denies that he paid $250 in cash either at that or any other time, and explains the giving of the check for $372.34 as follows: "I said: 'Here is a check for $372.34; $11.34 to apply on the Conway job, and the balance on the Hilliard job.'" On the back of the check was noted in pencil: "Conway & 1305 N 25." "1305 N 25" is shown to have meant 1305 North Twenty-fifth street, which is the

property upon which Mellor was doing the work for defendant Hilliard. We have examined and re-examined the record, in an effort to determine which of these two witnesses is the better corroborated by the other evidence in the case, but we are unable to decide that question. There are some circumstances shown which seem to corroborate the secretary, and others which seem equally to corroborate Mr. Mellor. In such a state of the record, we have no alternative but to apply the rule announced in *Langmann v. Guernsey*, 95 Neb. 221, where we held: "Where the examination of the record on appeal in a suit in equity leaves an appellate court in doubt as to the equities between the parties, the doubt depending solely upon the credibility of material witnesses who testified orally upon the trial, such doubt will, ordinarily, be resolved in favor of the correctness of the judgment of the trial court."

We believe that rule to be sound, and, being unable from the cold record before us to determine the question of credibility of the witnesses in this case, the judgment of the district court is

AFFIRMED.

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

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FRITZ SCHWEPPE, APPELLEE, V. HENRY UHL ET AL., APPELLANTS.

FILED DECEMBER 4, 1914. No. 17,897.

1. **Torts:** JOINT AND SEVERAL LIABILITY. An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.
2. **Highways:** OPERATION OF AUTOMOBILES: CONCURRENT NEGLIGENCE. Evidence examined, and set out in the opinion, *held* sufficient to establish concurrent negligence on the part of the defendants, which rendered them jointly and severally liable therefor.

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

*Livingston & Heinke,* for appellants.

*H. G. Wellensiek* and *Paul Jessen, contra.*

FAWCETT, J.

From a verdict and judgment of the district court for Otoe county, awarding plaintiff $261.50 damages for the negligent and careless operation of automobiles owned by defendants, defendants severally appeal.

The petition alleges, in substance, that on August 18, 1911, plaintiff was traveling along a public highway driving a team of horses attached to a wagon; that while so traveling, and at a narrow place in the road, the defendants approached him from the rear, each driving an automobile; that as they approached they carelessly and negligently sounded horns and made unusual and unnecessary noises with their automobiles and other instruments; that they were each traveling at an excessive rate of speed, to wit, 15 miles an hour; that as they approached from the rear, making the noises and confusion noted, and at the rate of speed stated, plaintiff's team became frightened, and he requested defendants to cease said noise and reduce their speed until he could get his horses under control and reach a point of safety; that defendants each disregarded his request and ran their automobiles by his team in a careless and negligent manner, at a place where the same was approaching a bridge and where the road was too narrow to allow plaintiff to turn out; that each of defendants in passing turned into the road immediately in front of plaintiff's team and less than 30 feet therefrom; that, by reason of the careless and negligent acts of defendants, plaintiff's team became frightened and unmanageable and ran away, throwing plaintiff out and permanently disabling his right arm; that in all of such acts defendants were acting in concert and their automobiles formed a part of one procession. Defendants answered separately, by general denial.

The grounds upon which defendants assail the judgment are: (1) That the evidence shows there was no concert

of action in the acts of negligence alleged to have been committed, nor any concurrent negligence at the different intervals of time when the several automobiles passed plaintiff; that, regardless of the acts of negligence by the defendants who owned the first five cars that passed, plaintiff suffered no injury or damage resulting therefrom; (2) that defendants were lawfully upon the road; that there was no concert of action or common purpose or understanding to injure plaintiff, or to do the negligent acts complained of, shown; that no one of defendants had authority over the others to direct their movements; that if negligent acts were committed, as alleged, they were several and individual, and not joint; (3) that a joint tort is necessary to the maintenance of a joint action; and (4) that the court, on the questions of law reserved at the time the verdict was received, should have entered judgment for the defendants. It will be seen from this statement that the sole question to be determined is: Are the defendants jointly liable for their wrongful acts, which the evidence clearly shows caused plaintiff's injury?

The evidence shows that on the day in question the defendants, with a number of other persons, in 16 automobiles, formed a procession at the town of Talmage, and proceeded from there, in procession, to several adjoining towns. The purpose of this tour was to advertise the town of Talmage, and especially a picnic which was to be held at that place within a few days thereafter. The trip was prearranged, the details thereof provided for, and defendants, with the other persons who accompanied them, participated in all the matters in relation thereto. They formed a procession and proceeded as such during the entire trip after leaving Talmage until after the occurrence upon which this action is based. The several cars which comprised the procession moved in the same direction, at the same time, at substantially the same rate of speed, for the same purpose, and with the same end in view. The car of defendant Uhl headed the procession. Second came the car of Henry Bischof, who was made a defendant in the action, but in whose favor a verdict was di-

rected, so that he is no longer in the case. Then came the cars of defendants Gritzka, Kuse, Young, Kohrs, and Ritter, in the order named. When the procession left the town of Syracuse, it proceeded south toward the next town on its schedule, as previously arranged and agreed upon. The procession in the order named overtook, the first six cars passed, and the seventh attempted to pass, plaintiff at a point near to a bridge across the Nemaha river. It is clearly established that the procession moved with unusual noise, and that nothing was done by the defendants, or any of them, to avoid danger from frightening plaintiff's team as they passed him. Plaintiff testified that, when the first car came up to him, "they said give them some more road; there is 16 more coming. And I said, 'You better stay back and let me cross the bridge, and then I will give you more room.' It was plowed around, and there was no chance at all so I could get out of the way." He further testified that they did not "stay back," but went on by; that as the first car went by it turned back into the road so abruptly that he had to jerk the team quickly to the right or it would have been struck by the car; that when this happened his horses "looked up and got kind of scared. They didn't run. I got control of the horses that time." When asked how far ahead of him they turned back into the road, he answered that the first one turned "just as close as he could, and the rest of them did that, too." He fixed the distance ahead of his team at which the first car turned back into the road at less than five feet, and the rest at less than ten feet. After testifying as to the first car, he was interrogated about the others, and answered: "Well, I know about four cars; that is what I know that passed. I held my horses all right then, because they were getting scared from the first time on; but I held them all right. And then, after that, they got scared so much they started at a gallop; and just as soon as they started out they made more noise, the automobiles did, than they did before." He further testified that, after the horses started to run, he knew of at least one car that passed him; "and then, after that, that

one car came behind, and the team run just as fast as the car then, and I didn't have any control of the team, and I couldn't hold them at all, and they run to the Nemaha bridge. And when the wagon struck the bridge it broke the axle on the wagon—it was a new wagon—and broke the coupling pole, and the team run off with the front part of the wagon, and the box tipped over nearly on top of that bridge and upside down, and I laid under it. I was all under the wagon bed except my arm, and I had the wagon bed on my elbow on the bridge. Q. Now, at the time that your team was running, as you have told the jury, you may state whether or not there was any car on the side of you racing with you on this road? A. Well, a short time there was a car with me, together, and the team and the car one of them runs just as hard as the other. The team got ahead and the car stayed behind. * * * Q. While you were racing along with this car, what noises, if any, did you hear back of you? A. Well, I don't know what it was besides the horns, but they made some noise besides the horns they had on the cars. Q. Were they making lots of noise? A. Yes." He then testified as to the good disposition of his horses. He further shows that there was a ditch on his side of the road, so that he could not turn out farther than he did. He then shows that he had ridden in automobiles and watched the speedometers, and that in his judgment the cars that passed him were running from 20 to 25 miles an hour.

Herman C. Gruenther, a young man 20 years of age, was called as a witness. His testimony shows that he was traveling along this road with a motorcycle; that he had some trouble with this motorcycle, and had stopped for the purpose of putting it in order; that while he was there plaintiff passed, driving his team; that within five minutes thereafter "the Talmage boosters" came along; that when they passed him they were making a noise with rattles, horns and whistles; "they made all kinds of noise;" that they were blowing horns with their mouths, in addition to blowing their automobile horns; that their mufflers were off, and they were making so much noise as they passed

he could not hear the noise of his own motor; that they were running "25 to 30 miles an hour anyway;" that after they had passed he heard a different noise, "or a scream of some kind;" that he looked up and saw the team and wagon were having trouble, with the cars racing side by side; that they were not very far from the big bridge; that he watched the team until it reached the bridge; that when the team struck the bridge the man was thrown out, and then the cars stopped.

It is needless to quote any more of the testimony. It is very clear that the defendants, not only carelessly, but recklessly, passed the plaintiff when he was in a place of danger, at a high and reckless rate of speed. According to the plaintiff, instead of stopping the noise, they made more as they drove by. The evidence shows that plaintiff's horses were not easily frightened. It is clear that, even with the noise the cars were making, no one of them, passing as they did, would have caused the runaway; but, rushing by as they did, one after another, in rapid succession, proved to be too great a strain for even this reliable team. The horses "looked up and got kind of scared" as the first car whizzed by. They became more and more frightened as each succeeding car passed, until the strain became more than they could bear, and when the seventh car attempted to pass their fright reached a point where plaintiff was unable to longer control them. This result was, therefore, not caused by the single act of any one of the defendants, but by the combined acts of all. Their actions show a disregard for the rights, and even the life, of the plaintiff, for which the jury held they should answer, and they should consider themselves very fortunate that the jury dealt with them as leniently as the verdict shows.

The contention that no concurrent negligence on the part of the defendant is shown is without merit. If the cars were running at the rate of speed testified to by plaintiff and the witness Gruenther, and they were traveling about 25 yards apart, as shown by the evidence, less than half a minute's time would elapse between the passing of

the first and the seventh car, and not more than three or four seconds between each car and the one following. The driver of each car as he approached could see the dangerous situation of plaintiff. None of them tried to lessen his danger, but all proceeded in the same manner and with the same unusual noises. This is not a case where several different cars were each running independently of the other and without any concert of action or agreement as to the manner of their running. It was one single procession, made up of the several cars as units of that procession. It was running as a procession by agreement, the speed of each car being regulated by the speed of the leader. If ever a case of concurrent negligence could be made out, it seems to us that it has been done here. The law in such a case is plain. As said by Judge Cooley in the third edition of his work on torts (1 Cooley, Torts (3d ed.) p. 247): "The weight of authority will, we think, support the more general proposition that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action." The rule announced by Judge Cooley is cited with approval in *Walton, Witten & Graham v. Miller,* 109 Va. 210. The same doctrine is also held in *Cleveland, C., C. & St. L. R. Co. v. Hilligoss,* 171 Ind. 417; *Cuddy v. Horn,* 46 Mich. 596; *Flaherty v. Minneapolis & St. L. R. Co.,* 39 Minn. 328, and *Corey v. Havener,* 182 Mass. 250. In the last case cited, two defendants, each mounted on a motor tricycle, with a gasoline engine making a loud noise, came up behind the plaintiff, who was driving slowly in a wagon, and passed him at a high rate of speed, one on each side, causing his horse to shy so that his wagon wheels struck another wagon, and plaintiff and his wagon were injured. He brought a separate action against each defendant and obtained a verdict against each: "Held, that, both of the defendants having been found to be wrongdoers, it made no difference that there was no concert between them, or that it was impossible to determine what portion of the injury was caused by each, that if each con-

tributed to the injury both were bound, and that whether each contributed was a question for the jury." In the opinion, on p. 252, the court say: "It makes no difference that the defendants were sued severally and not jointly. If two or more wrongdoers contribute to the injury, they may be sued either jointly or severally."

At the time of the trial the defendants severally moved the court to reserve "questions of law involved in this case for decision as affecting the judgment proper to be entered." The court did as requested, and answered the questions adversely to defendants. In this the court was fully sustained by the evidence and the law applicable thereto.

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

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MARTIN LANGDON, APPELLANT, V. ELIZABETH WITHNELL ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,917.

**Appeal: CONFLICTING EVIDENCE.** The verdict of a jury, based upon evidence so conflicting that it would have sustained a verdict either way, will not, ordinarily, be disturbed on appeal.

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

*W. H. Herdman, Martin Langdon* and *H. H. Bowes,* for appellant.

*E. C. Hodder, contra.*

FAWCETT, J.

Action in the district court for Douglas county, to recover attorney's fees. Verdict and judgment for defendants, and plaintiff appeals.

The first assignment of error is that the court erred in giving instruction No. 5. We deem it unnecessary to set

it out. We are unable to discover anything in it prejudicial to plaintiff. It is as favorable to him as his pleadings would warrant.

The second assignment is that the court erred in not instructing the jury on the question that under the evidence there might be a finding of an implied contract on the part of defendants to pay the reasonable value of plaintiff's services. Plaintiff's petition counts upon an express contract of employment, and the measure of his recovery, if it should be found that he was entitled to recover, was correctly explained to the jury by instruction No. 7.

Assignment No. 3 is that the court erred in the admission, over plaintiff's objection, of certain evidence. When the defendant Elizabeth Withnell was on the stand, counsel for plaintiff, on cross-examination, asked her: "Q. Did you ever ask any one what he (plaintiff) was doing in the case? A. Yes; I did. Q. And did you ever hear any of the heirs objecting to Mr. Langdon being in the case? A. No; I couldn't say that." She was then asked, on redirect examination: "Q. You say you heard how Judge Langdon came to be in the case: What did you hear?" (Objected to and objection overruled.) "A. Mr. Bellis told us that Judge Langdon had met him in the elevator and offered his services free on account of old friendship, old friends, that is what he said; said he wasn't going to charge a cent for his services." We cannot say that it was error to permit this explanation, on redirect examination, of the situation in which counsel for plaintiff had placed the witness in the closing questions of his cross-examination.

The remaining assignment is: "The judgment seems to be the result of passion and prejudice, and the judgment is contrary to the evidence." As to this assignment, the evidence is squarely conflicting, so much so as to make the question purely one for the jury. Plaintiff testified that he was employed by one Bellis, the husband of one of the defendants, to appear with their previously employed attorney, Mr. Knabe, for all of the defendants, and that his "recollection is" that as to some of the cases

the defendants Eliza and Elizabeth Withnell also told him they wanted him to appear. This testimony is flatly contradicted by Mr. Bellis and the two defendants named. Bellis, the only person with whom plaintiff is positive he talked about employment, testified that, as he (Bellis) was leaving the office of Mr. Knabe one morning, plaintiff accosted him and volunteered his services as counsel with Knabe, on the ground of personal friendship for the family, and stated that he would not charge "one cent" therefor; that he told plaintiff he would communicate his offer to Mr. Knabe; that after doing so he told plaintiff that Mr. Knabe had no objections to him, and also told him that he (Bellis) had no authority to employ any one, "that the heirs had made a contract with Mr. Knabe." All this is denied by plaintiff. In view of the large amount of work done and time spent by plaintiff in assisting Mr. Knabe in an effort to obtain for defendants the rights for which they were contending, and for which equity and good conscience would seem to call for some compensation, had the writer been the trier of fact, his finding would have been different from that returned by the jury; but that fact alone is not sufficient to warrant us in disturbing the verdict.

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

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

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HERMAN E. PANKONIN, APPELLANT, V. FRED H. GORDER ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,920.

1. **Landlord and Tenant**: CONTRACT: LEASE. The contract of sale and contract of lease, and the contract supplemental thereto, set out in the opinion, construed together as constituting the contract of sale and lease between the parties.

2. **Damages: LIQUIDATED DAMAGES: GOOD WILL.** The good will of an established business is a merchantable commodity, and where the same is expressly sold with the business to which it applies, and the measure of damages for a breach of the sale thereof is agreed upon and stipulated between the parties at the time, such agreement will be sustained by the courts unless it is made to appear that the amount so agreed upon is so excessive as to constitute a penalty, rather than compensation.

3. **Judgment: RES JUDICATA: OCCUPANCY OF PREMISES.** The decree of the district court, affirmed by this court in *Gorder & Son v. Pankonin*, 83 Neb. 204, examined, and *held res judicata* as to the question of the right of defendants to occupy the premises involved, for the period of time in controversy, on the same terms and conditions under which they entered into the possession of the same.

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

*D. O. Dwyer* and *A. L. Tidd,* for appellant.

*Rawls & Robertson* and *Jesse L. Root, contra.*

FAWCETT, J.

Plaintiff instituted this action in the district court for Cass county, to recover rent for certain premises in the village of Louisville, in that county. The jury returned a verdict in favor of defendants, upon which judgment was entered, and plaintiff appeals. The issues joined by the pleadings and necessary to be considered will sufficiently appear in the discussion of the case.

In February, 1901, plaintiff was a dealer in implements and harness in the village of Louisville. On the 13th of that month he entered into a contract to sell to defendants, or to the firm of Fred Gorder & Son, of which firm the defendants are surviving partners, his stock of goods, with certain exceptions which need not be noted, and in and by the same instrument contracted to rent the buildings, and all warerooms in which the business had theretofore been conducted, to the defendants for a term of one year, with the privilege of five years or more, at a monthly rental of $22, and contracted "to stay out and

not engage in the implement or harness business in Louisville, Neb., so long as the first party (the defendants) rents said building at above rent." Two days later, on February 15, the parties executed a formal lease for a term of five years, from February 20, 1901, with an option to defendants to have a renewal of the lease at the expiration of that term for a period of one year or more, up to five years. In these contracts a reservation was made by plaintiff of office room in one of the buildings. On September 12, 1902, the parties entered into another agreement, which purported to be additional and supplemental to the agreement of February 15, 1901. This supplemental agreement recited that it was made in consideration of the settlement of certain differences which had arisen between the parties, on account of a breach by plaintiff of the conditions of the lease entered into on February 15. It stipulated that, in addition to the covenants in the former contract contained, plaintiff was to have the use of one-half of the building on lot 294, and an increase of the monthly rental to $23.50 a month. The lease executed February 15 recited: "Also in consideration of the covenants and agreements hereinafter specified to be done and performed by second party, first party agrees to, and hereby does, sell and assign to second party his good will in the business of general harness store and implement store, excepting that of pumps and windmills, which he is now carrying on in said buildings, located on said property; and agrees not to engage in the same business in the village of Louisville, during the continuance of this lease. In consideration of the leasing of said premises from said first party, and of the agreement on the part of the first party to remain out of the general harness and implement business in the village of Louisville as above specified during the term of this lease, second party hereby agrees with the first party to pay said first party the sum of twenty-two ($22) dollars per month, payable monthly in advance. It is further stipulated and agreed between the parties that in case first party, at any time during the period of this lease, carries on or engages in the general harness and

implement business such as he is selling to second party, that second party is to have the use of said buildings from such time until the expiration of this lease free of charge without the payment of any rent. It is further mutually understood and agreed between the parties hereto that, at the expiration of the term of this lease, second party has the option of leasing said buildings for a period of one year or more up to five years for the same consideration, and upon the same terms and conditions as are in this lease named." In the agreement of September 12, 1902, in which the rental is increased to $23.50 a month, plaintiff again agreed in express terms that he would not engage in the general harness and implement business, such as he had sold to defendants, in the village of Louisville, either on his own account or in partnership with any other person either directly or indirectly, and that, in case he did so engage in that business, defendants were to have the use of the buildings from such time until the expiration of the lease free of charge, without payment of rent, "and that such rental value is hereby fixed and agreed between the parties hereto as liquidated damages which said second party will sustain by reason of any breach of said contract and lease by the said first party. The intention of the first party being as it was in said former agreement and lease, to sell and assign to second party his good will in the business of general harness store and implement store, which he sold to second party."

It will be seen from an examination of these three instruments that they should be taken and construed together as constituting a contract of sale and leasing by plaintiff of his business and buildings to the defendants. In due time, prior to the expiration of the five-year period, defendants notified plaintiff of their election to continue for another five years and requested the execution of a new lease. This plaintiff refused; whereupon defendants brought suit in the district court for Cass county, for specific performance of their contract, in which suit the three contracts of sale and leasing above referred to were set out. In that suit the plaintiffs (defendants here) also

prayed for an injunction restraining the defendant there (plaintiff here) from again engaging in the business, the good will of which he had sold, during the five years' extension which plaintiff in that suit claimed they were entitled to. Upon a hearing the district court entered a decree in which it found generally in favor of the plaintiffs, except in so far as plaintiffs prayed for an injunction enjoining defendant from engaging or continuing in the business which he had sold. As to that the court found: "That plaintiffs have an adequate remedy at law for liquidated damages provided for in the contract of lease involved herein." The court further found that the plaintiffs were entitled to a decree of specific performance "of the option given to plaintiffs in said former lease and contract for five years from February 20, A. D. 1906 (the expiration of said former contracts and lease), upon the same terms and conditions, and for said terms and conditions reference is hereby made to said former contracts and leases, which are also set forth in plaintiffs' petition," and adjudged and decreed that the defendant execute to plaintiffs a lease of the premises "upon the same terms and conditions as set forth in the contracts and leases under which plaintiffs held the premises for the five years terminating in 1906, and that, in default thereof, this decree stand in lieu thereof, and for the several provisions reference is hereby made to the above findings and said original contracts and leases as set forth in plaintiffs' petition, and said lease shall be for the term commencing February 20, A. D. 1906, and terminating February 20, A. D. 1911, except in said lease there shall be no provision for an option to extend said lease for any further period after February 20, A. D. 1911."

It will be seen from this decree that the district court treated the contract of February 13, the lease executed February 15, and the supplemental agreement of September 12, as constituting the contract under which defendants were occupying the premises, and decreed to defendants the right to continue such occupancy for a further period of five years. From that decree the defendant

(plaintiff here) appealed to this court. On a hearing of that appeal the decree of the district court was affirmed. *Gorder & Son v. Pankonin,* 83 Neb. 204. The five years' extension covered by that decree are the five years for which plaintiff is seeking to recover rent in this action.

It appears, therefore, that the question of the right of defendants to occupy the premises for that period of time for a rental of $23.50 a month provided plaintiff did not reengage in the business which he had sold to them, or without rent in case he violated his agreement and did reengage in such business, is *res judicata.* That plaintiff did, on or about February 20, 1906, the date of the expiration of the first five-year period, engage in this business, contrary to the terms of his contract, and that he continued so to do during the whole period of time for which he now seeks to recover rent, is undisputed, and that he should now be held liable for the liquidated damages for such breach which had been agreed upon between the parties should not now be questioned. It was one of the conditions upon which defendants purchased his business. It constituted a part of the consideration which defendants paid for the business and use of the premises. Defendants paid plaintiff $4,200 for his business, consisting of his stock and good will, on the conditions named in the contract, as above set out. The good will of an established business, for which a party was paying such a sum of money, was unquestionably of great value. The parties themselves fixed the value of a loss of the good will so sold at $23.50 a month during all of the time defendants continued to occupy the property after they had been deprived of such good will. It was not a forfeiture, and the authorities cited upon that point do not apply. It was a sale of a merchantable commodity—good will—for a definite period of time, at a fixed value per month. It was in every respect fair and should be enforced by the courts.

This so completely disposes of the merits of the controversy that nothing more really need be said. We will, however, refer to the objections to the refusal of the court to give two instructions requested by plaintiff, viz., in-

structions 2 and 3. Instruction No. 2 was to all intents and purposes a direction for the jury to return a verdict for the plaintiff. It was properly refused. By instruction No. 3 the court was asked to tell the jury that the provision for "forfeiture and liquidated damages in the leases dated February 13, 1901, February 15, 1901, and September 12, 1902," were limited to the period from February 20, 1901, to February 20, 1906, and did not run with the renewal. This instruction was properly refused. It did run with the renewal and had been so adjudicated in *Gorder & Son v. Pankonin, supra.* Exhibit J was properly admitted. It was not an offer of compromise. It was an offer to purchase from defendants, for $100, their right to the use of the premises for the unexpired term of their lease as fixed by the decree in *Gorder & Son v. Pankonin, supra.*

Plaintiff had a fair trial, the verdict is amply sustained by the evidence, and we find no error in the rulings of the trial court.

AFFIRMED.

REESE, C. J., SEDGWICK and HAMER, JJ., not sitting.

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STATE, EX REL. JAMES C. MCNERNEY, APPELLANT, V. ALVIN H. ARMSTRONG ET AL., APPELLEES.

FILED DECEMBER 4, 1914. No. 17,864.

1. **Municipal Corporations:** AREAS IN SIDEWALKS: DISCRETION OF COUNCIL. Under the statutes governing cities of the first class having more than 40,000 and less than 100,000 inhabitants, the matter of allowing and regulating entrances to basements through sidewalks is within the reasonable discretion of the mayor and council.

2. ———: ORDINANCE: CONSTRUCTION: AREAS IN SIDEWALKS. The sections of the sidewalk ordinance of the city of Lincoln quoted in the opinion cannot be construed to prohibit all openings in the sidewalk for stairways, and basement ways, in view of the statute

requiring the mayor and council to regulate such openings, and the practical construction of those provisions for many years.

3. ———: AREAS IN SIDEWALKS: DISCRETION. Under the circumstances in this case, indicated in the opinion, permitting the construction and use of the stairway in question was not an abuse of discretion.

4. ———: ———: ———. Although such stairway somewhat restricts the free and unembarrassed use of the sidewalk for pedestrians, such use may be justified on the ground that the general interest is served by making available valuable property, increasing business facilities, and encouraging improvement.

5. ———: ———: AUTHORIZATION BY RESOLUTION. Such permission may be given informally by resolution and without a formal ordinance.

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

*James C. McNerney,* for appellant.

*Fred C. Foster, D. H. McClenahan, F. M. Hall* and *Meier & Meier, contra.*

SEDGWICK, J.

In August, 1910, the First National Bank of Lincoln asked the mayor and city council for "a permit for the erection of the new First National Bank building, to be located at the southeast corner of Tenth and O streets, Lincoln, Nebraska." It was stated in the application that "the drawings call for an areaway, same being forty-five feet long by five feet wide in the clear. This areaway would be located twenty-five feet from alley line on the Tenth street side of the building." The permit was granted as requested and the building was erected. It was understood that this areaway was for the purpose of constructing a stairway to the basement of the building. Afterwards the relator began this action in the district court for Lancaster county against these defendants, who are the mayor and council of the city of Lincoln, to compel them to cause the "open areaway in the public sidewalk in Tenth street, adjacent to the west line of lot 12, in block

55 of the original plat of the city of Lincoln, to be closed, the iron fence and the concrete footing upon which the same stands on the public sidewalk inclosing the side and end of said open areaway to be removed, and each and every part of the public sidewalk space adjoining the said west line of aforesaid lot 12 to be made safe and unobstructed for public travel thereon." The district court found the issues in favor of the respondents and dismissed the proceedings. The relator has appealed.

Section 4475, Rev. St. 1913, provides: "The mayor and council shall have supervision and control of all public ways and public grounds within the city, and shall require the same to be kept open, in repair and free from nuisances."

Section 4418 gives the city authorities power "to remove all obstructions from the sidewalk, curbstones, gutters and cross-walks at the expense of the owners or occupants of the grounds fronting thereon, or at the expense of the person placing the same there; and to regulate the buildings of bulkheads, cellars and basement-ways, stairways, railways, windows and doorways, awnings, hitching posts and rails, lamp posts, awning posts, and all other structures upon or over adjoining excavations through or under the sidewalks of the city."

The sidewalk ordinance of the city of Lincoln provides:

"Section 1. Hereafter there shall be reserved on each side of every street in the city of Lincoln, for sidewalks and for the cultivation of trees and grass, a space equal to one-fourth of the street from abutting lot lines: Provided, that on streets in paving districts, said space shall extend from the lot line to the curb line.

"Section 2. All sidewalks * * * in front and alongside of any building in any part of the city where areaways or cellars are in use under any sidewalk, and also in front of any lot used for any business purpose shall extend from the line of the abutting lot to the curb line.

"Section 3. Sidewalks on business streets or portions thereof shall be constructed so as to incline upwards from the outer edge of the sidewalk toward the building or

boundary of the lot at the rate of not less than one inch nor more than one and one-fourth inches in three feet; the outer edge of said walk to rest on the top of the curb; and no part of said walk shall be taken for private use by lowering or cutting down the same next to the building; and said walk shall be built up to the building on a uniform grade."

"Section 7. No person shall be allowed to keep or use for vaults, areas, or other purposes, the space beneath the sidewalk included within the sidewalk lines of any street in this city, unless a permit therefor shall have been obtained from the city council; such permits, heretofore granted or hereafter to be granted, shall continue, or to be issued, only upon condition that the party receiving the same shall, as a consideration for such use and such privilege granted, build, maintain, and keep in repair a sidewalk over such space intended to be used for vaults, areas, or other purposes, and pay all damages that may be sustained by any person by reason of said sidewalk being in a defective or dangerous condition."

"Section 9. Areas about windows opening through the sidewalk immediately adjacent to the buildings to admit light and air to a basement, shall be protected and covered by strong iron grating, the bars of which shall not be more than one inch apart, and so constructed that the same may be walked upon with safety, and of sufficient strength to hold any weight that would come upon the walk at this point. In order to prevent accidents, all hatchways, coal holes, or openings of any sort through sidewalks shall be provided with strong iron or iron and glass coverings, with rough surface, and the entire construction of said areas, hatchways, entrances and opening shall be subject to the direction and supervision of the city engineer."

"Section 11. It shall be unlawful for any person, firm or corporation to leave open any opening in any sidewalk, or suffer the same to be left or kept open, or suffer any sidewalk in front of his or its premises to become or continue so broken or otherwise defective as to endanger life or limb."

The relator contends that these statutes and these ordinances require that there shall be no openings in the sidewalk, and that the city council has no power to allow such openings for stairways to the basements of buildings under any circumstances. The statute evidently leaves the matter with the city council. They are given express power to "remove all obstructions from the sidewalk, * * * and to regulate the building of bulkheads, cellars and basement-ways, stairways, * * * and all other structures upon or over adjoining excavations through or under" sidewalks. The power to "regulate" basement-ways, and stairways and excavations through sidewalks, of course, does not imply that such things are forbidden by statute; conferring such powers rather implies that, under some circumstances, such basement-ways, stairways, and cellars and excavations through sidewalks will be appropriate and necessary and ought to be regulated by ordinance.

In *City of Plattsmouth v. Nebraska Telephone Co.*, 80 Neb. 460, it was contended that a city or incorporated town had no power to grant a telephone company the use of its streets, alleys and public grounds, but the court held that such power existed, and in the opinion it was said: "That the city may order the removal of poles which endanger the citizens because of a rotten condition, and protect its inhabitants against any conduct of the business which endangers the public health or safety, is not a question open to dispute; but nothing of the kind appears in the record before us. As before stated, Main street is 100 feet in width. There is no evidence of a congested condition of the street or of any necessity from other causes for removing the defendant's poles."

The statute of Iowa requires the city authorities to keep the streets open and free from nuisances, and does not expressly authorize areaways and stairways through sidewalks, but the supreme court of that state decided: "Areas for light, and basement windows, and descents are necessary, in order to carry on business in a city, and, if such excavations are properly guarded, * * * they do not, in themselves, constitute a nuisance." *Keyes v. City of Cedar*

*Falls,* 107 Ia. 509. In a later case that court has quoted with approval from the case last cited, and said: "In view of these expressions, the interpretation put on the statute for many years, and the universal use of the streets close to buildings for areas and cellar stairways, we are not ready to say that the power to permit them is not included in the sections of the code quoted." *Perry v. Castner,* 124 Ia. 386. These cases have been frequently cited with approval by decisions of that court. In *Jorgensen v. Squires,* 39 N. E. 373 (144 N. Y. 280) the court of appeals of New York decided: "A city authorized 'to regulate the use of sidewalks' (Consolidation Act 1882, sec. 86) may authorize the building by property owners of openings for cellarways in the sidewalk." In *Wendt v. Incorporated Town of Akron,* 142 N. W. (Ia.) 1024, it was decided: "Despite code, sec. 5078, declaring the obstructions to public streets to be nuisances, a municipal corporation may, under section 753, giving such corporations the care, supervision, and control of all public highways in the city, authorize an abutting owner to use the street for areaways and cellar stairways when it does not cause injury to others."

The relator relies upon *Chapman v. City of Lincoln,* 84 Neb. 534, in which it was held: "Whatever space in a public street of a city is set apart for the use of the public as a sidewalk, the public have a right to use in its entirety, free from any and all unauthorized obstructions, and it is the duty of the mayor and city council to see that it is kept in that condition." That was a correct statement of the law as applied to the facts in that case. An ordinance was enacted making it "unlawful for any person, persons or corporation to erect or maintain any booth, shed, stand or other obstruction upon the streets, sidewalks or sidewalk space of the city of Lincoln for the sale of fruit, books or other merchandise, or any article or thing of value, or to erect or maintain any shed or booth or stand thereon to be used for shining boots and shoes." Chapman sought to enjoin the enforcement of this ordinance, and this court affirmed the judgment of the district

court holding that it was within the discretion of the city authorities to prohibit such use of the sidewalks. The fact that the location involved was "on the opposite side of the same street and less than 100 feet" from the stairway in question here does not make that a case "similar in many respects to the case at bar." The plaintiff's tenants erected an "inclosed shed or booth" on the sidewalk in which they were "handling fruits, cigars, tobacco, and like subjects," and there was no doubt of the jurisdiction of the city authorities to enact and enforce an ordinance preventing such use of the sidewalk.

The question, then, is upon the construction of this sidewalk ordinance. As applied to the question before us, it must be conceded that the ordinance is not as clear and definite as might be desired. The evidence shows a practical construction of the ordinance by the city. It appears that there are many basements in the business part of the city with entrances by basement-ways through the sidewalk, and that for 40 years this bank has maintained a bank building, with basement and a basement-way through the sidewalk at this place which required a superficial opening in the sidewalk much larger than the one now in question. The word "area" has a somewhat elastic meaning. We find from Webster's New International Dictionary that it originally meant "a broad piece of level ground." In modern use it may mean: "(1) Any plane surface. * * * (2) The inclosed space on which a building stands. (3) The sunken space or court giving ingress and affording light to the basement of a building. (4) A particular extent of surface."

The word "areaways" in section 2 of the ordinance is plainly the equivalent of cellar or room under the sidewalk; such rooms must not interfere with the public use of the sidewalk. Section 7 requires that a permit shall be obtained before the space beneath the sidewalk shall be used for private purposes. The covering which constitutes the sidewalk over such rooms must be built and kept in repair by the owners of the rooms so used. By section 9 openings may be left around a window in a basement to

"admit light and air," and in such case such openings must be covered with an "iron grating," which will form a part of the sidewalk. The same section requires that "hatchways" and openings through the sidewalk "shall be provided with strong iron or iron and glass coverings." The relator construes this literally, and concludes that it prohibits "basement-ways and stairways" for entrances to basements. A hatchway is not a stairway or basement-way; hatch is a nautical term and generally signifies an opening in the deck of a ship. Webster. In view of the fact that basement-ways through the sidewalks have been in use in connection with at least 100 buildings in the business part of the city, and particularly at the place in question for more than 40 years, we cannot presume that it was intended by these various regulations, the purpose of which is plain, to change this policy and forbid all basement-ways through sidewalks, without specifically mentioning them. No section of this ordinance, as disclosed in this record, applies specifically to basement-ways or stairways. The rental value of this basement is $1,000 a year. The sidewalk at this place is 25 feet wide. O street is the principal business street of the city. The entrance to this stairway begins about 70 feet south from O street, and extends about 45 feet south. It is about 5 feet wide, and is surrounded on the west and south by an iron railing of "3-inch pipe," one top rail about 3 feet high, and another "between that and the ground about equal distance." The entrance is guarded by a similar railing on the north "out four or five or six feet from the entrance," so that one must enter from the west and then turn to the south to go down the stairway.

The matter of allowing and regulating entrances to basements through sidewalks is within the reasonable discretion of the city authorities. The evidence in this case does not show an abuse of discretion on the part of the mayor and council.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., took no part.

LETTON, J., concurring in conclusion only.

It is elementary that an ordinance of a permanent character cannot be amended by a mere resolution of a temporary nature. It seems clear to me, therefore, that the permit granted by the council attempted to allow a violation of the ordinance of June 10, 1910. While there are many open areaways in the city, there is no proof that any have been constructed since the ordinance went into effect. The ordinance changed the policy of the city and showed the intention of its authorities that no uncovered openings should be thereafter allowed in sidewalks within prescribed limits. The evidence shows that a number of like applications have been denied since it went into effect, and that the permit to the First National Bank is the only one that has been issued.

An areaway is not usually considered a nuisance *per se*. It is permitted by the statute. In the absence of this ordinance, the city authorities would have power to permit it by resolution. The fact that a much longer areaway had been used in connection with the old bank building on the lot for many years, no doubt, had much weight with the city council in passing the resolution; but in my judgment the council should have amended the ordinance if it desired to grant the permit.

The relator shows no special injury peculiar to himself independent of and different from that, if any, suffered by the public at large. No property right of his is affected, and there is ample space on the sidewalk at this point for public travel. The rule applies that one seeking a writ of mandamus to compel action by a public officer must show a special interest in the relief sought and a clear right to the writ, or it will not be granted.

I therefore concur in the conclusion.

# LUCY E. WILLIAMS, APPELLEE, V. WESTERN TRAVELERS ACCIDENT ASSOCIATION, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,865.

1. **Insurance:** ACTION: LIMITATIONS: QUESTION FOR JURY. A mutual accident association could limit the time within which suit might be brought against it "on any claim based upon its policies or certificates of membership * * * to a period of (not) less than one year from the time such right of action accrues," under section 17, ch. 53, laws 1903. The defendant's by-laws provided that no right of action should accrue "within ninety days after the receipt of proof of loss at the office of the association." Under the circumstances in this case, stated in the opinion, it became a question of fact for the jury to determine as to when the proofs of loss were received by the company.

2. ———: ———: ———: REVIEW. In such case, when no special instruction or finding is requested as to when proof of loss should be considered as received by the association, and the evidence is substantially conflicting as to the receipt of such proofs at a time within one year before the commencement of the action, a general verdict for the plaintiff will not be set aside on the ground that the cause of action accrued more than one year before the commencement of the action.

3. **Compromise and Settlement:** CONCLUSIVENESS. Ordinarily one who receives and signs a written instrument is presumed to know and agree to its contents, and mere negligence or carelessness on his part will not relieve him of this responsibility. But one who knows that the party with whom he is dealing will probably be careless in examining papers presented for signature, and purposely attempts to induce such carelessness, and so obtains the signing of the papers, which would not be signed if fully understood, will not be allowed to urge the carelessness of such party who signs the papers without knowing the contents thereof.

4. **Insurance:** ACTION: CAUSE OF DEATH: VERDICT. The defendant's by-law provided that, for "death resulting from cerebral hemorrhage * * * or heart failure caused by accidental injuries," the amount payable shall be limited to $500. *Held*, That the evidence, indicated in the opinion, is sufficient to support a general verdict, which includes the finding that death was not the result of either of those causes.

5. ———: ———: RETURN OF MONEY PAID. It is also considered that, under the circumstances in this case, the plaintiff could maintain

this action without returning the amount advanced by defendant before suit was brought.

6. **Appeal:** CONFLICTING EVIDENCE. This case requires the application of the rule, so often announced, that the verdict of a jury upon substantially conflicting evidence will not be reversed as unsupported, unless, upon the whole record, it appears to be clearly wrong.

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

*Brome & Brome,* for appellant.

*Stewart, Williams & Brown, V. A. Crum* and *L. R. Slonecker, contra.*

SEDGWICK, J.

The defendant is a mutual accident insurance company, organized under the laws of this state. It issued its policy of insurance upon the life of one Dan N. Williams. Afterwards, in January, 1910, Williams died in the city of Portland, Oregon. This action was brought by his widow, Lucy E. Williams, in the district court for Douglas county, upon the certificate of membership. The plaintiff recovered a verdict and judgment in the sum of $5,462.10. The defendant has appealed.

The defendant contends that the evidence is not sufficient to support the verdict; that the action was barred by the contract of limitation, not having been begun within one year from the time of making of proof of death; that the claim was settled and adjusted by the defendant before the commencement of the action; that the trial court erred in giving certain instructions to the jury, and also erred in refusing to give an instruction requested by the defendant.

1. The certificate of membership was issued in July, 1902. At that time agreements in contracts as to the time in which actions might be brought were contrary to public policy and void. This had been declared in several decisions of this court. *Miller v. State Ins. Co.,* 54 Neb. 121.

In the following year the legislature enacted a statute regulating such companies, which provided: "Any corporation, association or society organized or operating under this act may limit the time within which suit may be brought against it on any claim based upon its policies or certificates of membership, and after the expiration of the time thus limited shall not be liable thereon; provided such limitation shall be incorporated in, and form a part of the contract between the company, association or society and the assured or its members; and provided further that such limitation shall not be limited to a period of less than one year from the time such right of action accrues." Laws 1903, ch. 53, sec. 17. The act also provided that corporations, associations or societies before that time incorporated and doing business in the state might avail themselves of the provisions of the act by filing a certificate with the auditor of state, with the following proviso: "Provided this act shall not relieve any corporation, association or society now doing business in this state from the fulfilment of any contract heretofore entered into with its members under its policies or certificates of membership, nor shall any member be relieved thereby from his or her part of the contract." Laws 1903, ch. 53, sec. 3. The defendant company availed itself of these provisions and afterwards, in 1907, amended its by-laws by adding the following provision: "And no legal proceedings for recovery under any certificate of membership shall be brought within ninety days after the receipt of proof of loss at the office of the association, nor at all, unless begun within one year from the time that right of action accrues, as above stated." It is contended that this amendment of the by-laws was unreasonable as to the insured and not binding upon his beneficiary, but, without deciding this question, we prefer to place our decision upon the construction of the by-law, as amended, and its application in this case.

This action was begun in July, 1911, about 18 months after the death of the insured. The by-law, as amended, provides that no action could be begun more than a year after the cause of action accrued. It also provides that

no action shall be begun "within ninety days after the receipt of proof of loss at the office of the association." The controversy upon this point is as to the time when the proof of loss was received at the office of the association, within the meaning of this contract.

The defendant's by-laws provide that it shall be the duty of the executive board to "decide on all proofs of accident and of death by accident." It seems that the secretary was not empowered to decide those matters. The plaintiff claimed that the death of the insured was caused by an accidental fall while alighting from a street car, on the 25th day of December, 1909, and that he died on the 3d day of January, 1910. The company's by-laws required that written notice of the accident must be received at the office within 15 days from the date of the accident, and that proof of death should be filed in that office within 30 days from the date of death. On the 18th of January, 1910, the plaintiff sent the defendant a formal statement showing the death of the insured. This statement was upon a blank furnished by the company, and was entitled "Claimant's preliminary statement," and stated that it was "made for the purpose of giving information to the said association to obtain benefits therefrom under final proofs to be hereafter furnished by me." Several affidavits were also submitted with the statement with a letter referring to the papers as "Claimant's preliminary statement," and requesting the defendant to correspond concerning the matter with Lee Meyers, of Portland, Oregon, who was plaintiff's nephew. Upon receipt of this letter Mr. Butts, the defendant's secretary, wrote to Mr. Meyers, stating that he had received a letter requesting the company to address Mr. Meyers. In this letter the secretary made no reference to the papers which he had received, and made no objection to the delay in furnishing what was to be considered as final proof, but said: "In connection with this matter will say that the evidence at hand indicates that Mr. Williams' death was due to natural causes."

About a month later the plaintiff wrote Mr. Butts a letter in which she said: "I received through Mr. L. H.

Meyers your statement saying you found that my husband Dan N. Williams died from natural causes. I just want to tell you that I would like to have you try the fall he had and see how many could live he fell on the back of his head hard enough to be heard on the other side of the street was picked up and brought to the house by one delivery man Mr. Gehr and his son both saw him fall. He was hurt so badly he could not see to read the next day and complained constantly of his head. He never laid down fifteen minutes after he got here until after he died. The poor man would look at me and say I tell you Mamma that did hurt my head then he would jump up and pull his clothes off and fight us but did not have any fever any time during the nine days he lived. He had come here to rest and spend the holidays. * * * How many times I wanted him to drop it he would always tell me it might do us some good some time perhaps it has. * * * When we get to be as old as I am 53 years it is quite hard to start out to earn a living. Please don't think silly for I am so full of trouble I don't know what to do sometimes, but I have always put my trust in Him who knows all things and cares for the widows and orphans."

Mr. Butts answered this letter as follows: "This will acknowledge receipt of your letter of the 18th inst. It is with deep regret that we learn of your unfortunate circumstances as the result of the death of your husband, Mr. Dan N. Williams, whom we have always highly esteemed as a prominent member of this association. As an expression of our kind feeling on account of the circumstances so plainly stated in your letter, we are inclosing you herewith our check for $100, which will more than reimburse you for the amount paid into the association by Mr. Williams. This is not the practice of our association, but we feel that this amount will be acceptable and appreciated. It is customary where a membership is terminated to surrender the certificate, and if certificate No. 9823 is in your possession, please return to us by early mail when you acknowledge receipt of this letter. By this letter we waive none of our rights in the premises."

The plaintiff cashed this check. The consequences of her so doing will be considered in another connection.

Afterwards the plaintiff employed Mr. Crum, an attorney, who wrote to the defendant April 26, 1910, stating that he had the policy in question, and that "Mr. Williams accidentally fell on the 25th day of December, 1909, striking his head on the pavement. He died on or about the 3d day of January, 1910, as a result of his injury. On being notified of the accident you forwarded Mrs. Williams a check for $100, which leaves a balance due her of $4,900. Kindly let me hear from you." He received no answer, and afterwards wrote another letter, and still received no answer. He again wrote on the 15th of July, 1910, inclosing formal proof of the death of Mr. Williams as a result of the accident. August 9, 1910, Mr. Butts wrote a letter to Mr. Crum, in which he acknowledged the receipt of "various letters," and stated: "We made no response to these letters as final settlement had been made with Mrs. Williams direct, and her receipt dated February 23, 1910, is as follows:" He then set out a copy of the proviso which he had written in the check which he sent to Mrs. Williams, and said: "We therefore consider the matter closed."

Bearing in mind that the plaintiff under the defendant's by-laws could not maintain an action until 90 days after final proof had been received by the company, and that the company by furnishing her with formal blanks had induced her to suppose that her first proofs which she sent were preliminary only, and that the company had not up to this time acknowledged the receipt of the proofs contemplated in the contract, and that the proofs already submitted had not been considered by the executive committee, which alone was qualified to pass upon them, it must be conceded that the defendant's conduct would naturally, if not so intended, mislead the plaintiff in regard to the completeness of the proof. The company received and retained the formal proofs sent them July 15, 1910. No objection was made to the delay as a ground for contesting the claim. Indeed the delay may well have been caused

by the evasive and noncommittal attitude of the secretary. If the proofs of death were completed and received by the company as such after the 15th of July, 1910, the time limited by the by-laws had not expired when this action was begun. The question as to when the complete proof was received by the company, under the circumstances, was a question of fact for the jury, and it cannot be said that the finding in that regard was wholly unsupported by the evidence. No special instruction upon this point was given, but, as none was requested, the defendant cannot now complain on that ground.

2. The defendant strongly argues that the receipt of the check above recited, and receiving and keeping the money thereon, operates as a compromise and full settlement of the plaintiff's claim against the defendant. It is true that the language contained in the check, if agreed to by the parties, would amount to a compromise and settlement, as contended. The plaintiff testifies that, on account of the condition in which she was left by the death of her husband, she did not give such attention to the transaction as she would ordinarily have given to transactions of this nature; that she did not read the check, had never before received but one check in her life, and that she understood that the purpose of the check was solely to enable her to get the money from the bank, and not for the purpose of expressing the condition upon which the check was given. It is urged that the plaintiff was careless in not examining the check and not knowing its contents. Ordinarily such a suggestion would have great force. The letter which she wrote to the company, however, would indicate that she might not be as careful in examining financial transactions as business men are generally supposed to be, and the letter of the secretary in which he inclosed the check indicates that he realized that fact and supposed that she might not comprehend the force of the words which he had put in the check, and also indicates that he expected that she would not agree to such a compromise if fully understood by her, and designed to take advantage of that fact. He says that the check is sent her "as an expression

of our kind feeling on account of the circumstances so plainly stated in your letter. * * * This is not the practice of our association, but we feel that this amount will be acceptable and appreciated." We think that the company ought not now to accuse this plaintiff of negligence in not more carefully examining the check. It is urged that the request in this letter that the certificate of membership be returned to the company was an indication in the letter itself that the check was sent as a complete settlement, but the secretary upon the witness-stand testified that it was customary to demand a return of the certificate upon the death of a member, without regard to whether the claim was acknowledged or contested by the company. The court instructed the jury that, if she did not know that there were words in the check reciting that it was in full settlement of her claim, she was not bound by it, and, under the circumstances in this case, we think that the instruction was correct.

3. The by-laws of the company contained the provision that, for "death resulting from cerebral hemorrhage, cerebral paralysis, apoplexy or heart failure caused by accidental injuries," the amount payable shall be limited to $500. The defendant contends that the death of the insured was caused by cerebral hemorrhage, and therefore the court should have instructed the jury that in any case they could not find a verdict for more than $500. The evidence was that the deceased fell heavily, striking the back of his head on the frozen ground. Some of the witnesses testified that the covering of the brain was discolored; and it would appear from the evidence that the blood vessels were bruised and partly broken in the covering of the brain, and perhaps in some parts of the brain itself, so that some blood escaped among the tissues. The expert witnesses described it as ecchymosis, caused by the blow. Ecchymosis, according to Webster's New International dictionary, is: "A livid or black-and-blue spot, produced by the extravasation or effusion of blood into the areolar tissue. It is caused by a contusion and generally attended by swelling." So far as the evidence in the record shows, a

severe blow of this kind on the back of the head must have produced this condition in the immediate vicinity of the blow. It is an entirely different thing from a cerebral hemorrhage, which suffuses the brain and causes death. Of course, in one sense this accident caused heart failure. Death, no matter what the cause, is always accompanied by the failure of the heart, but it is not conclusively shown by this evidence that death was caused either by heart failure or the escape of blood into the brain.

The contention that the $100 received by the plaintiff should have been returned before the commencement of this action is without merit, under the circumstances in this case. It is not necessary that the evidence should be so conclusive upon the various questions of fact presented that the court must have found the issues as the jury did. When the evidence is substantially conflicting, such questions are for the jury, and their verdict will not be disturbed, unless, upon the whole record, it appears that it is clearly wrong.

The judgment of the district court is

AFFIRMED.

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

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CHARLOTTE H. RICHELIEU, ADMINISTRATRIX, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED DECEMBER 4, 1914. No. 17,660.

1. **Master and Servant:** DEATH OF SERVANT: EMPLOYERS' LIABILITY ACT: "DEPENDENT." Under section 1, ch. 149, pt. 1, 35 U. S. St. at Large, a sister of the decedent, who sues as administratrix of the estate, and upon the trial establishes that the decedent contributed to her support by the gift of money, by the payment of her board, and otherwise, will be considered a dependent, and entitled to recover damages because of the injury suffered, even though possessed of property and having a clerical position which in part supports her.

2. New Trial: CONTINUANCE: ABUSE OF DISCRETION. Where the district court refused to allow the defendant a continuance, and the defendant was thereby prevented from presenting its theory of its defense to the court and jury, and was denied a fair trial, the action of the court will be deemed to be an abuse of discretion, for which a new trial will be granted. Laws 1911, ch. 39, sec. 1.

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

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

*Nelson C. Pratt, contra.*

HAMER, J.

Under the federal employers' liability act (35 U. S. St. at Large, pt. 1, ch. 149, sec. 1), the plaintiff, as administratrix of the estate of Harry E. Richelieu, deceased, sued the defendant, the Union Pacific Railroad Company, in the district court for Douglas county to recover damages for the death of her brother, alleged to have been caused by the negligence of the company. There was a verdict in her favor of $12,000, and, on an order of the court in overruling the motion for a new trial, the plaintiff remitted from $12,000 down to $8,000, and a judgment was rendered for the latter sum against the defendant, and the defendant appeals.

The deceased was one of a crew of six men operating local freight train No. 57, west-bound between Council Bluffs, Iowa, and Columbus, Nebraska. On this run it was customary for the members of the crew, while at Waterloo, to consider what work was to be done at Valley, and it was the intention of the crew, while on this particular run, to transfer a certain flat car occupying a position next to the engine to the rear end of the train, immediately in front of the caboose, and to place a private car, standing at the depot east of Valley, onto the extreme end of the train. As the train passed the depot at Valley on the west-bound main line and entered the station from the east, Justison, the rear brakeman, got out on the platform of the caboose or way car, and uncoupled it from the train,

and brought it to a stop about opposite the depot. The main train continued west past the cut-off switch leading to the passing track on the north. Boynton, who had been on the engine since leaving Waterloo, dropped off on the ground, alighting opposite the station, for the purpose of securing from the agent there the switching list. Richelieu got off at a point further west to let the train in on the north passing track. The cut-off switch was thrown by Richelieu, and he then walked down to the next switch further east, which connected up with the passing track proper, and threw that switch also. Boynton passed back of the train, and while with Richelieu directed him to throw the switch on the passing track. The train was then shoved in on the passing track, and while it was backing up Boynton told Richelieu what the conductor had said was to be done. While the train was moving slowly eastward, Richelieu stepped between the first and second cars from the engine and turned an angle cock off on the train with his right hand, and then turned it off on the left on the flat car with the same hand, and at the same time he reached for the pin-lifter, and after taking a few steps, perhaps not more than six feet, he stepped from between the cars and stepped down into the frog with his left foot, and the wheel had his foot almost instantly. The train appears to have been moving about two miles an hour, and it went about twelve feet after the engineer commenced to apply the emergency brake. The wheels of the car ran over Richelieu's left leg and arm.

It is contended that the frog over which Richelieu was compelled to go to perform the duties of uncoupling the cars was not properly blocked, and that the defendant would have been free from harm but for the defective condition of the frog. There is some evidence tending to show that the frog had previously been blocked, but that it had worn out. We are confronted with the question as to whether the defendant was permitted to submit to the jury its theory of the case. Unless the frog was in such condition when the deceased stepped out from between

the cars that it caught his foot and held him, there is no liability.

The bill of exceptions shows that, to permit argument of counsel, the jury were excused until 9:30 A. M. Monday, May 29, 1911, at which time the following proceedings were had: "The court: The motion to direct a verdict is overruled. To which ruling the defendant excepts. The court: The court having intimated to counsel during the trial of the case, or after the plaintiff had introduced her proof, that it was apparent to the court that the only question that would be submitted to the jury would be the question of the negligent order of the conductor or the man in charge of the train, and the court being now of the opinion that the court should submit *the defective condition of the track,* together with the orders made by the conductor or the man in charge of the train, and the court *having surprised counsel for the defendant, the court now offers to open up the case and give the defendant two days to produce any evidence* defendant may have as to whether or not the unblocked switch was defective and dangerous, considering the orders that were made by the conductor or man in charge of the train, and the character and nature of the work that was required to be done by the deceased." To the foregoing offer there was a response by Mr. Sheean. The defendant claimed surprise because at the conclusion of plaintiff's case, and after the motion to direct a verdict on the part of the defendant was made, the court permitted the plaintiff to open up its case for the purpose of amending *its petition to allege a negligent order,* and, if they deem fit, introduce testimony showing negligence in the giving of an order of that character, and ruled that there was no other issue to submit to the jury. The defendant was then prepared with witnesses coming from Denver and other points to maintain the proposition that there was no question of negligence to go to the jury as to the condition of the frog in question, and "by reason of the intimation made by the court along the lines above suggested this defendant introduced no testimony along that line and permitted its witnesses to return home; that the defend-

ant is now unprepared to introduce this testimony, and will not be able to do so by day after tomorrow, which is Wednesday." The response further gives as a reason for the continuance that the witnesses reside at distant points; that the affiant is himself engaged to try other cases for the Union Pacific Railroad set for hearing on May 31, and also on June 2. The response of Mr. Sheean is supported by Mr. Sheean's affidavit that he had the sole charge of the case, being the only attorney representing the railroad company who is familiar with the details of the case; that defendant made elaborate preparations to meet the issues presented in the original pleadings; that the pleadings contain only the allegation that defendant was negligent in maintaining an unblocked frog, and that it was the custom of said defendant to maintain its frogs in a blocked condition, and that therefore the said defendant was responsible to the plaintiff; that the court stated and gave this defendant to believe that on this particular feature of the case the motion would be sustained, and the question as to whether or not the maintenance of the frog could be considered as negligence would be withdrawn from the jury. In passing upon the motion, however, the court intimated that there might be a question of fact as to whether or not there was a *negligent order given by the witness Boynton,* representing the master, to the decedent, Richelieu, but the consideration of this *particular feature* of the motion was left open until the *close of the case;* that the defendant, relying on this position assumed by the court, introduced evidence only on the question of whether or not there was a dangerous place at the point where the injury occurred, and whether or not there were circumstances justifying the proposition that there might be negligence in the giving of the directions by Boynton to Richelieu in the disposition of the train at Valley; that this testimony on the part of defendant took less than an hour to introduce, whereas such defendant had made preparations to introduce testimony as to the negligence of the defendant in maintaining the frog as contended, said defendant having witnesses from Denver and other distant

points to substantiate the proposition that there was no negligence in this record; that, upon the position taken by the court in leading the defendant to believe that this issue would be withdrawn from the jury, these witnesses were permitted to return to their homes; that the defendant had this very frog itself removed from the tracks at Valley and shipped to Omaha for the purpose of introducing it as an exhibit in this case, and, acting upon the assurance of the court, testimony of the defendant was limited to the question of a negligent order, and the witnesses aforesaid were permitted to leave on this assurance, and the frog in question, not being any longer needed, *on the issue of a negligent order,* was returned; that the case was finally closed, and this defendant renewed its motion and directed its argument and cited authorities to the single proposition of whether or not there was a question of fact to be submitted to the jury as to the presence in the case of a negligent order; that the consideration of the motion was postponed from Friday, May 26, to this A. M., Monday, May 29, 1911, when the court intimated that he found no facts to submit to the jury on a negligent order, *but had concluded to send the case to the jury on the question of whether or not the maintaining of the frog in an unblocked condition was negligent.* It is further set up in the affidavit that the defendant's witnesses, naming some of them, live at distant points; that their testimony is material, "under the theory as now adopted by the court, * * * and the defendant cannot safely proceed to trial under the new issues now injected into the lawsuit." The affidavit also alleged that the affiant is counsel for the Union Pacific in a case to be tried on the 31st of May, 1911, before Judge Hanna, at Greeley Center, Nebraska, and in another case to be tried June 2, before Judge Grimes, at Lexington; that both these cases required technical knowledge with reference to laws passed by congress affecting Union Pacific Railroad property and involving the width of its right of way, and not possessed by other counsel employed by the company, and that it is impossible for affiant to try the case on Wednesday.

In opposition to the contention of Mr. Sheean and his affidavit, there is the affidavit of Mr. Nelson C. Pratt, the attorney for the plaintiff, but the matters for which he contends do not seem to justify the ruling of the court in denying the continuance. It would seem from Judge Sutton's statement that he changed his views during the progress of the trial, and that he concluded that the alleged defective condition of the track was material, and for that reason he offered "to open up the case and give the defendant *two days* to produce any evidence defendant may have as to whether or not the unblocked switch was defective and dangerous, considering the orders that were made by the conductor or man in charge of the train, and the character and nature of the work that was required to be done by deceased." This leads to the conclusion that there *was* a change in the policy of the court, and, if the defendant actually had witnesses touching this question and they were ready to testify to these material matters and to testify in favor of the defendant, then the defendant suffered because of the refusal of the court to continue the case. The trial judge thought this change sufficiently material, so that the defendant should be allowed to produce its witnesses, and therefore he made the offer. The questions whether the defendant had adopted the custom of blocking frogs and had caused them all to be blocked in the yards at Valley, and whether it had allowed this particular frog where the accident occurred to become defective, so that such defective condition was the proximate cause of the injuries, were important questions, and the parties should have been allowed a full investigation.

Section 1, ch. 39, laws 1911, provides the grounds upon which a continuance shall be granted in the district court: (1) The motion shall set out the grounds on which the application is made. (2) It shall be supported by the affidavit or affidavits of persons competent to testify as witnesses. (3) The adverse party shall have the right to file counter-affidavits. (4) Upon obtaining leave of the court either party may introduce oral evidence. (5) There shall be no reversal by the supreme court on ac-

count of the action of the lower court in granting or refusing such application except "when there has been an *abuse of a sound legal discretion.*" As the witnesses had been permitted to separate and had returned to their homes, many miles distant from the place of the trial, it hardly seems practicable that they could have been secured upon the short notice of only *two days*. We believe the denial of the continuance to have been an abuse of a sound legal discretion. If there had been no showing that the defendant expected to be able to procure the attendance of the witnesses, there would have been no error in refusing the continuance, and the contrary must be true where a showing is made as in this case. *Johnson v. Dinsmore,* 11 Neb. 391. In that case this court endeavored to lay down a rule as follows: "It is said that an application for a continuance is addressed to the sound discretion of the court, and that its action thereon *cannot be reviewed.* But this is stating the rule too broadly. The object of the law is to administer justice, and where it clearly appears from all the facts and circumstances in the case that there has been an abuse of discretion operating to the prejudice of the party in the final determination of the case, the court, in a proper case, will grant a new trial. If it were not so, a party might be entirely defeated in his cause of action or defense for the lack of material testimony, which a continuance would enable him to procure."

Was the plaintiff dependent upon the deceased? She was 34 years old at the time of the accident, and was the owner of the old home in which the family had lived. While she got $1,000 in money from her father's estate, she expended it in fixing up this place. She had a total of about $5,000 in money in addition to the homestead. She rented the homestead for $30 a month, but out of this there were some expenses to pay, including taxes and water rent. At the time of her brother's death she was working for Dr. Lemere, for whom she began to work in 1909. She at first earned $5 a week, but was getting $9 a week when the brother died. She had worked 20 months in the doctor's office. The brother lived with her in the old house, giving

her an amount of money each month which was somewhat uncertain, but about $30 to $40. He also paid her board while she kept the house. They ate at the sister's next door. "Q. Who paid for your board? A. My brother Harry, and then he gave me $35 or $40 besides paying my board. * * * Q. What else, if anything, did he do for you in the way of maintaining you, besides giving you the money, Miss Richelieu? A. Why, if I would get a new dress he would help me pay for it. If I wanted a dollar at any time he would give it to me. * * * We lived there together and he paid the gas bill and telephone. * * * Q. Did he give you money to buy your clothes with? A. All the time; yes, sir. * * * Q. Now, how was your health then, and how is it now, Miss Richelieu? A. Well, I have never been very strong. Up to the time I was 18 years old they were afraid to have me even wipe the dishes. Q. Have you an impediment in your speech that affects your getting a position? A. I have. Up to the time I was 16 I could not move my tongue when I spoke. Q. And you have an impediment in your speech now? A. I have."

That her brother gave her substantial assistance is apparent from this testimony. She had a home and also about $5,000 in money, and she had a position which paid her $9 a week. She was dependent upon the assistance of her brother, although not without means. She could recover her pecuniary loss only. *Michigan C. R. Co. v. Vreeland,* 227 U. S. 59; *American R. Co. of Porto Rico v. Didricksen,* 227 U. S. 145; *Gulf, C. & S. F. R. Co. v. McGinnis,* 228 U. S. 173. In *Gulf, C. & S. F. R. Co. v. McGinnis,* it was said in the syllabus: "The employers' liability act of 1908, as heretofore construed by this court, is intended only to compensate the surviving relatives of a deceased employee for actual pecuniary loss sustained by his death." If we apply this doctrine to the instant case, it must be seen that the plaintiff has a meritorious case. The following cases seem to support the view we have expressed: *Goff v. Supreme Lodge Royal Achates,* 90 Neb. 578; *Illinois C. R. Co. v. Doherty's Adm'r,* 153 Ky. 363, 155 S. W.

1119; *Daly v. New Jersey Steel & Iron Co.*, 155 Mass. 1; *Martin v. Modern Woodmen of America*, 111 Ill. App. 99; *McDaniels v. Royle Mining Co.*, 110 Mo. App. 706; *Fitzgerald v. Union Stock Yards Co.*, 91 Neb. 493; *Welch v. New York, N. H. & H. R. Co.*, 176 Mass. 393; *McCarthy v. Supreme Lodge New England Order of Protection*, 153 Mass. 314; *Houlihan v. Connecticut R. R. Co.*, 164 Mass. 555; *Wilber v. Supreme Lodge New England Order of Protection*, 192 Mass. 477. The plaintiff was clearly dependent on the decedent.

Instruction No. 1, requested by the defendant, reads: "You are instructed that, if you find from the evidence the plaintiff, Charlotte H. Richelieu, was able to make her own living at the time of the death of the deceased, Harry E. Richelieu, she cannot recover in this case." It is contended by the defendant that it was error to refuse this instruction. We are unable to take that view of the matter. Whether she was dependent upon the brother depends upon the aid that he gave her. The evidence shows that he rendered her aid almost continuously.

The defendant should have been permitted to present to the jury its theory of the case. This was in effect denied by the refusal to grant the continuance. For the reasons stated, the judgment of the district court is reversed.

REVERSED AND REMANDED.

REESE, C. J., ROSE and FAWCETT, JJ., dissent.

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ROBERT W. BUCHANAN, APPELLEE, V. HENRY F. WILSON ET AL., APPELLANTS.

FILED DECEMBER 4, 1914. No. 17,829.

1. **Contracts: RESCISSION: EQUITABLE RELIEF.** Where the defendant represented to the plaintiff that the land he was about to trade to him for a valuable farm was of much greater value than it actually possessed, and the plaintiff was thereby induced to trade with the defendant, greatly to the plaintiff's disadvantage, and

to deliver to the defendant a property greatly exceeding in value the consideration received, and the plaintiff was dependent upon the defendant for the information upon which he relied in making the trade, such judgment should be rendered as in equity and good conscience the evidence demands.

2. ———: ———: FRAUD: MENTAL CAPACITY. The plaintiff, although not wholly insane, was shown to be mentally weak and a man of poor judgment, and in such case if the weak mental condition of the plaintiff enabled the defendant the better to take advantage of the plaintiff, and he did take advantage of him, and thereby fraudulently acquired the plaintiff's property for much less than its true value, the contract should be rescinded at the plaintiff's request, and the plaintiff should recover his property; and it will be immaterial whether the plaintiff was wholly insane at the time the trade was made.

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

*Genung & Genung, William H. Pitzer* and *Edwin Zimmerer,* for appellants.

*George W. Berge, contra.*

HAMER, J.

The defendant Henry F. Wilson, with the other defendants, appeals from a decree of the district court for Otoe county, entered August 31, 1912. On the 1st day of April, 1911, the defendant Henry F. Wilson entered into a contract in writing at Lincoln, Nebraska, with the plaintiff, Robert W. Buchanan, by which he undertook to convey to plaintiff 1,960 acres of land in Brown county, Nebraska, in exchange for 160 acres of land in Otoe county, Nebraska. The papers relating to the transaction were to be left at the City National Bank to be turned over to the respective parties on March 1, 1912. Each party to the contract was to have the right to sell the land which he was to receive, but was not to be allowed to give possession until the 1st day of March, 1912. On the same day that the said contract in writing was executed and delivered, the said plaintiff and his wife, Ida L. Buchanan, executed a warranty deed to Henry F. Wilson for 160 acres of land

in Otoe county, Nebraska. The defendant Henry F. Wilson and his wife, Loma C. Wilson, executed a warranty deed to the plaintiff, Robert W. Buchanan, for the 1,960 acres of land in Brown county, Nebraska, which was conveyed subject to a mortgage of $2,650 assumed by the said plaintiff, Robert W. Buchanan. The deeds executed by the respective parties and their wives were deposited in the City National Bank in Lincoln, Nebraska, for delivery March 1, 1912. In May, 1911, the defendant Henry F. Wilson and the plaintiff, Robert W. Buchanan, went together to the bank and withdrew the deeds. The defendant Henry F. Wilson took the deed which had been made to himself, and the plaintiff, Robert W. Buchanan, took the deed which had been made to himself. Wilson had the deed recorded for the Otoe county land in Otoe county, and the plaintiff Buchanan had the deed recorded for the Brown county land in Brown county. May 23, 1911, the plaintiff, Robert W. Buchanan, and his wife, Ida L. Buchanan, executed and delivered to the defendant Henry F. Wilson a warranty deed to the land in Otoe county without reservation of possession, and this deed was recorded May 25, 1911, in Otoe county, and on May 26, 1911, the defendant Henry F. Wilson and his wife gave a mortgage on the Otoe county land to the defendant J. G. Wadsworth, to secure the payment of a loan of $3,000 then made by said Wadsworth to said Wilson. This mortgage was on the same day assigned by the said Wadsworth to the defendant the Mutual Benefit Life Insurance Company. It is claimed by the plaintiff that the second deed above mentioned was executed and delivered by the plaintiff and his wife at the request of the defendant Henry F. Wilson, and for the purpose of relieving the record title of the Otoe county land from the reservation of possession during the time to elapse prior to March 1, 1912, and so that the defendant, Henry F. Wilson, could procure a loan of money from Wadsworth, using the land as security to obtain the same. The plaintiff, Buchanan, gave his note for $875, to become due March 1, 1913, with interest at 4 per cent. per annum after March 1, 1912. This note appears to have been paid

by the plaintiff, Robert W. Buchanan, to the defendant Henry F. Wilson; Wilson discounting it about $87. The delivery of the deeds before the time fixed by the contract and the execution and delivery of the second deed by the plaintiff, Robert W. Buchanan, to the defendant Henry F. Wilson did not change the rights of the parties. The original agreement was in any event carried out.

On October 26, 1911, the plaintiff commenced this action by filing his petition in the district court for Otoe county, Nebraska, against the defendants. Subsequently an amended petition was filed. It alleges that the said Wilson, for the purpose of inducing the said plaintiff to make the said trade, falsely stated that the said Brown county land had a market value of $12 an acre, and that it could be sold for that sum without difficulty; that land similar to this particular land was selling at from $10 to $15 an acre; that a large part of this land was fit for cultivation, and that there was little or no sand on it; that it could be used for both winter and summer pasture; that the soil was perfect, and that the land could be rented for $700 a year; that if it was not worth $12 an acre to the said plaintiff, Robert W. Buchanan, and could not be sold for that sum, the said defendant Henry F. Wilson would be willing to trade back; that the plaintiff had no knowledge of the quality or value of the land, and so told the said Wilson, and that the plaintiff relied upon the representations which were made to him by Wilson in reference to the land, and in reliance upon the representations of said Wilson the said plaintiff entered into the said contract; that the delivery of the deeds in advance of the time stated in the contract was fraudulently procured by the defendant Henry F. Wilson for the purpose of incumbering the Otoe county land before the plaintiff Buchanan could ascertain the character and value of the said Brown county land; that the defendant Wilson had given a mortgage upon the Otoe county land, and that this was done fraudulently, and the plaintiff was unable to state whether the mortgagee was an innocent holder of said mortgage, but, if he was an innocent holder, then

a personal judgment was asked against the defendant Wilson for the amount of the mortgage, $3,000; that the plaintiff, Robert W. Buchanan, tendered a deed of the Brown county land into court, whereby he proposed to place the defendant Henry F. Wilson in the same condition that he was before the trade was made. There was attached to the amended petition a prayer for a decree declaring the deeds of exchange and the mortgage on the Otoe county land fraudulent and void, and requiring a reconveyance by the defendant Wilson, or, in default thereof, judgment against him, the same to be a lien upon the Brown county land.

The original petition was filed by the plaintiff, Robert W. Buchanan, in his own name and upon his own account, but the amended petition was in the name of "Robert W. Buchanan, by Ida L. Buchanan, his guardian," and alleges, as additional grounds for maintaining the case, the incapacity of the plaintiff to transact business, and the appointment on December 2, 1911, of Ida L. Buchanan as the guardian of the plaintiff; that the said Ida L. Buchanan was appointed the guardian of the plaintiff by the county court of Lancaster county, Nebraska, on the 2d day of December, 1911; that during the months of March, April, and May the plaintiff evidenced a total want of reason and understanding in business affairs, and that his condition was perceptible to any one transacting business with him, and that he was of unsound mind. It was also alleged that the plaintiff, at the time of making said contract, stated to the defendant Henry F. Wilson his lack of knowledge of the Brown county land, and also told the said defendant that he was himself then incapable of contracting with him and of protecting himself in the transaction; that the Brown county land is not worth to exceed $3 an acre, and the rental value does not exceed $50 a year; and that, if the transaction be not annulled, the plaintiff must lose $15,000. It is also alleged that the title to said Brown county land was not merchantable, because the patent to a part of the same had not been delivered, and also because of a judgment which clouded the

title, and also because of an irregular foreclosure proceeding in which the complaint was that no notice of sale had been issued; that the plaintiff did not learn the true condition of things pertaining to said land until the defendant Henry F. Wilson had procured said deed and said money and had executed the said mortgage, and not until the entire matter was closed up. The amended petition makes J. G. Wadsworth and the Mutual Benefit Life Insurance Company parties defendant.

The prayer attached to the amended petition is for a decree declaring the contract mentioned, the deed of exchange, and the mortgage and its assignment to be fraudulent and null and void, that a reconveyance of the Otoe county land to the plaintiff be required, and for judgment for $787, the amount paid the defendant Henry F. Wilson by the said plaintiff, or, in the alternative, if it be found that said mortgage was valid, that judgment be entered in favor of the plaintiff and against the defendant Henry F. Wilson for the amount thereof, the same to be declared a lien upon the Brown county land.

An answer was filed on behalf of the defendants Henry F. Wilson and Loma C. Wilson. The defendants J. G. Wadsworth and the Mutual Benefit Life Insurance Company filed answers. The defendants Henry F. Wilson and Loma C. Wilson answered that they were husband and wife and alleged that the plaintiff and his wife, Ida L. Buchanan, entered into the contract, admitted that the defendant Henry F. Wilson had been the owner of the Brown county land, alleged that deeds were executed by the plaintiff and wife to the defendant Henry F. Wilson, conveying the plaintiff's Otoe county land to the said defendant Wilson, and also that deeds were executed to the plaintiff which conveyed the defendant's Brown county land to the said plaintiff, admitted that the deeds were by agreement left at the City National Bank in Lincoln, Nebraska, as alleged in the petition and as provided by the terms of said contract, and that later, in May, 1911, the deeds were delivered to the respective grantees; that later a second deed of conveyance was made by the said plaintiff and his wife

to the defendant Henry F. Wilson, for the plaintiff's Otoe county land, without reserving the right of possession of said land until March 1, 1912; that in the month of May, 1911, the defendants placed a mortgage upon the Otoe county land for $3,000 to the defendant, J. G. Wadsworth, and that the said mortgage and the note accompanying the same had been assigned to the defendant the Mutual Benefit Life Insurance Company; that the amount of the note given by the plaintiff for the remainder due the defendant on the contract was $875, and that the note was afterwards discounted about $80 and paid by the plaintiff. All allegations of fraud were denied. It was also alleged that the plaintiff Buchanan is a retired farmer, and from his observation and experience was well acquainted with the value of farm and ranch land in Nebraska; that prior to April 1, 1911, the plaintiff made a careful examination personally of every part of said Brown county land, and also made inquiry of disinterested men living in the neighborhood of the land, and who were acquainted with it, and that he took special pains to inform himself; that after this investigation was made, and the said defendant had also personally examined the plaintiff's Otoe county land, the transfer was made at the plaintiff's own solicitation; that both tracts of land were valued at *trading prices,* and that the price of the Otoe county land was more exaggerated than the price of the Brown county land; that the Otoe county land was worth less than $15,000 when the trade was made; that the delivery of the deeds in advance of the date fixed in the contract was by mutual agreement, and that the plaintiff Buchanan knew that the defendants were intending to borrow money on the Otoe county land, and the second deed was for the purpose of enabling them to do so, and that the plaintiff made no objection thereto, but assisted the defendants to make the arrangement to borrow the money; that no change of possession was in fact made, and that the plaintiff Buchanan, by his tenant, continued in possession of the Otoe county land and received the rents and profits therefrom for the year 1911,

and that the defendants took possession, by their tenant, March 1, 1912.

The defendants Wadsworth and the Mutual Benefit Life Insurance Company set up the good faith of the transaction, and deny any knowledge of any mental or physical condition on the part of the plaintiff affecting his power to contract and convey land. They deny that the loan on the land was fraudulently made or for any illegitimate purpose, and say that the transaction was in good faith. They also deny all infirmities of title. The reply filed by the plaintiff is a general denial.

The evidence tends to show that the Brown county land had been occupied and owned by a family named Brill, from whom the defendant Henry F. Wilson acquired it. It would seem that the cost of the land to the defendant Wilson was about $17,650 in trade. He put in some land near Lincoln at a valuation of $10,000, and a house and lot in Lincoln at $5,000, and gave a mortgage back on the land for $2,650. This evidence concerning the trade for the Brown county land by the defendant Wilson is not seriously controverted, but it is insisted that the values were fictitious. There were two dwelling-houses on the premises, a barn, a granary, a buggy shed, a concrete cave, and an inclosure fenced for an orchard, which was "hog tight." A creek ran through the land, and on this creek there was considerable timber growing, and that part of the track skirting the creek furnished excellent pasture. Some of the land is described as "pretty fair hay land." Most of the witnesses described the land as smooth, except the bluffs near the creek. The soil is described as sandy loam and capable of being farmed, and wholly without alkali. These facts are gathered from an examination of the bill of exceptions. The land is six miles from Johnstown, in Brown county, and five miles from Wood Lake.

The plaintiff Buchanan and the defendant Henry F. Wilson both lived in Lincoln, Nebraska, at the time the trade was made. Wilson had been a farmer in Iowa, and moved from there to Lincoln. The plaintiff had been a farmer in Otoe county, and lived in Syracuse, Nebraska. He had

bought and sold at least one farm before his trade with Wilson. The plaintiff's wife objected to disposing of the Otoe county farm. The plaintiff and the defendant Wilson went to see the Brown county land before they traded. They drove out to the ranch in company with Mr. A. G. Holt, a banker of Johnstown. The plaintiff talked with the banker Holt, and also with McDowell, who lived on an adjoining ranch, and with Mrs. McDowell. The talk was all about this particular land and about the country. Before that the plaintiff and the defendant Wilson had been to see the Otoe county farm. After the plaintiff and the defendant Wilson got back from the trip to see the Brown county land, they separated at Lincoln, and about a week afterwards they made the contract in writing relating to the proposed trade. The plaintiff and his wife met the defendant and his wife at a real estate office, when the trade was made. The parties then went together to the City National Bank, where the deeds were deposited. Buchanan had given a note to the defendant Wilson for "boot money" in the sum of $875. It was discounted, Buchanan paying the money. Wilson wanted to borrow money on the Otoe county land. The plaintiff and his wife, at the defendant's request, executed and delivered to him a deed for the Otoe county land. This was to make it satisfactory to Wadsworth, who was making the loan on that land.

The Brown county ranch was very unsatisfactory to plaintiff's wife. She left the next day after seeing it. The plaintiff stayed a while. Mr. Bell testified: "Q. Did he indicate what his plans were or anything like that? A. He thought he would go up there—move onto the ranch and run it himself—probably take the boys with him, if he didn't sell it." He also testified that the plaintiff listed the land with him. At the time he did so, he prepared a description of the land to be presented to proposed purchasers, in which the land is described as situated on Evergreen creek, six miles northwest of Johnstown, and four miles northeast of Wood Lake, and all under fence with barbed wire and burr oak posts.

On November 29, 1911, Mrs. Buchanan's application to the county court of Lancaster county for an appointment of herself as guardian of her husband was heard, and on the 2d day of December, 1911, the appointment was made.

The district court held that the papers were obtained from the plaintiff by fraud; that no lien was obtained by the defendant Wadsworth and none by the insurance company, but that Wadsworth loaned the money in good faith, and that the insurance company should have a mortgage lien upon the Brown county land to secure the payment of the loan, and that the amount paid by the plaintiff to Wilson, after deducting the discount made, was $787, which the plaintiff should recover from Wilson. The title to the Otoe county land was quieted in the plaintiff, and all interest of the plaintiff in the Brown county land was decreed to belong to the defendant Wilson, subject to the lien of the insurance company for the amount of the loan made upon the Otoe county land. The case was heard before Judge Travis July 8, 1912. The decree "finds the issues generally in favor of plaintiff and against the defendants, and that the allegations of plaintiff's amended petition are true." It was further found that the contract, deeds, the $875 note, the $3,000 note and mortgage to Wadsworth, and all the papers pertaining to the transaction "were each and all executed by the plaintiff, Robert W. Buchanan, and wife, Henry F. Wilson and wife, and J. G. Wadsworth, while Robert W. Buchanan was not able to appreciate the consequences of his acts and while of unsound mind, and are null and void, and that all of the transactions between the plaintiff and Henry F. Wilson were also fraudulent and null and void, and all of said instruments are canceled and set aside."

As we understand it, the plaintiff was not "insane," according to the usual acceptation of the term. Insanity is a mental symptom or manifestation of physical disease which impairs the understanding, so that one or more faculties of the mind is perverted, weakened, or destroyed. *In re Estate of Ayers,* 84 Neb. 16. This man does not appear to have been wholly insane, but the evidence justi-

fies the conclusion that he was weak-minded and had poor judgment, and that Wilson took an unconscionable advantage of him.

To review the finding of the district court, we may briefly say that there was evidence tending to show that the use of the land was not of greater value than $50 a year. The defendant Wilson claimed it was worth $700 a year. There were some improvements on the land, and a part of it at least appears to be capable of being farmed. Many witnesses testified as to its value, and their estimates were so different that it would be impossible to discriminate between them and to judge of the value of their opinions without seeing them upon the witness-stand and hearing their testimony. The trial court had this advantage, and has practically found that there was such a discrepancy between the values of these respective tracts as to justify a general finding for the plaintiff, in view of the whole evidence taken in the case, and we are satisfied that this finding is fully warranted by the evidence.

If the weak mental condition of the plaintiff enabled the defendant Wilson to take advantage of him, and he did so, and thereby fraudulently acquired the plaintiff's property for much less than its true value, the contract should be rescinded, and the plaintiff should recover his property. It is immaterial whether the plaintiff was wholly insane at the time the trade was made, if his condition mentally was such as to permit the defendant to take advantage of him and to acquire his property for an insufficient consideration. It is proper for us to remember that the trial judge saw the witnesses and had an opportunity to judge of them by what he saw of them, and he also heard them testify, and for that reason he had an opportunity to form his conclusion as to whether they were telling the truth and the force and effect of their evidence. In any event his opportunity was better than ours. While we are not bound by the findings and judgment of the district court, it is our duty to make such findings and to ren-

der such a judgment as the evidence sustains and the law demands. The judgment of the district court is

AFFIRMED.

REESE, C. J., and ROSE, J., not sitting.

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KATIE MAUDER ET AL. V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1914. No. 18,648.

1. **Criminal Law**: APPEAL: AFFIRMANCE. Where the evidence upon the trial of a case is in direct conflict upon every material controverted fact, the verdict of the jury should not be overturned if there is sufficient evidence to support it. *Witt v. Caldwell*, 95 Neb. 484; *First Nat. Bank v. Hedgecock*, 87 Neb. 220.
2. **Assault and Battery**: INSTRUCTIONS. Instructions given, examined and sustained, as also the refusal to grant requests for instructions.

ERROR to the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

*Berge & McCarty*, for plaintiffs in error.

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

HAMER, J.

The plaintiffs in error, Katie Mauder, Marie Greenamier, and Marie Folz, were charged with a simple assault and found guilty. They appeal from the district court for Lancaster county. The complaint was filed October 31, 1913, before W. T. Stevens, a justice of the peace in Lancaster county, charging an assault upon Paulina Schwint. There was a change of venue to John E. Lowe, a justice of the peace, and before him and a jury there was a trial in which the three plaintiffs in error were found guilty, along with Natalia Meisner; and Mrs. Folz and three other defendants, Jake Mauder, Peter Greenamier, and Conrad Beck were acquitted. On appeal to the district court the

three plaintiffs in error mentioned were tried before the court and a jury, and were again convicted. Each was sentenced to pay a fine of $1 and costs. The case has been given great consideration and much labor by counsel for the plaintiffs in error, whose printed brief covers 79 pages. The state also has been well represented by the attorney general's office. The bill of exceptions contains 368 pages of testimony. We have read the briefs and have given a good deal of careful study to the evidence.

The prosecutrix testified that she was in her back yard when she was surrounded by the defendants. There seem to have been five women and two men. One of these women, Mrs. Mauder, caught her by the shoulder. They were violent in their demonstrations. She says she was scared, and that she ran to the barn for protection. She opened the barn door and closed it behind her and hooked it fast on the inside. There is no dispute about the fact that these women, and at least one of the men, picked up clods, tin cans, bricks and stones and threw them against the barn. It is claimed they broke the window. They said, in substance: There is a man in there. Paulina Schwint has a man with her in the barn. They said it aloud, so that she could hear and that they had sent for the police, and would have them there in five minutes. They said this a great many times. Mrs. Schwint's testimony is corroborated by the testimony of numerous other witnesses who appeared on behalf of the prosecution. Her evidence is disputed in part by the four women who were tried and by one of the men. As there is a conflict of evidence, we do not feel justified in overturning the verdict of the jury. The verdict might have been the other way, but there is evidence sufficient to sustain it.

In *Witt v. Caldwell*, 95 Neb. 484, this court declared in the syllabus: "The evidence upon the trial of this case was in direct conflict upon every material controverted point of fact. In such case the verdict of the trial jury upon the conflicting evidence, if there is sufficient to support it, will not be molested."

In *First Nat. Bank v. Hedgecock,* 87 Neb. 220, this court said in the syllabus: "The verdict of a jury will not be set aside for want of evidence to support it, if there is a substantial conflict of evidence upon the issue presented."

Under the rule stated, we are bound to affirm the judgment of the court below, unless there is prejudicial error in the instructions given or in some other of the proceedings in the case.

We have carefully read the requests for instructions. We think that those refused were properly refused. Our attention is not called to any specific reason why these requests should have been given. They are as follows:

"Instruction No. 2. The court during the progress of the trial has allowed Mrs. Paulina Schwint, the complaining witness, to testify what she told other parties after she alleges she came out of the barn, concerning what the defendants said and did; also the court has permitted testimony of parties other than the defendants to testify what Mrs. Paulina Schwint told them after she says she came out of the barn. All of this conversation was had between the complaining witness and these parties in the absence of the defendants. This is undisputed in the record. Also, all of this conversation took place after all of the defendants had left the Schwint lot. The court now holds that these conversations are not a part of the *res gestæ,* and all of it is now withdrawn from the jury, and you are not to consider it in any way, and you are to consider this case just as though you had heard none of this testimony. Refused.

"Instruction No. 3. You are instructed that, before you can find defendants guilty, the evidence must establish their guilt beyond a reasonable doubt. Mere suspicion of guilt, however strong, or a preponderance of all the evidence in the case against the defendant, will not do upon which to base a verdict of guilty. A reasonable doubt is a term often used, probably well understood, but not easily defined. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot

say and feel that they have an abiding conviction to a moral certainty of the truth of the charge. If upon the proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal, for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the facts charged are more likely to be true than the contrary, but the evidence must establish the facts to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This is proof beyond a reasonable doubt. Refused.

"Instruction No. 4. You are instructed that, if the defendants, at the time and place charged in the complaint, believed that tramps or other trespassers had gone upon the property of their neighbor, Mrs. Schwint, and had gone into her barn, it was not unlawful for those defendants to go to the barn and upon the premises of Mrs. Schwint, for the purpose of extending to her friendly aid and protecting her property against marauders, and if in so doing the defendants, or those with them committed acts that otherwise might constitute an assault upon the complaining witness, Paulina Schwint, and did such acts before learning the identity of the person, and before knowing that their acts were directed against said Paulina Schwint, and that as soon as they became aware of the identity of said person, and that it was Paulina Schwint, the defendants desisted in their conduct and departed from said Paulina Schwint, and her premises, then the defendants were not guilty of any offense. Refused."

"Instruction No. 6. Should the jury believe beyond a reasonable doubt that the defendants gathered about Paulina Schwint, at the time and place alleged in the complaint, though the conduct of the defendants may have shown that they were laboring under excitement and may have frightened said Paulina Schwint, and at said time said Paulina Schwint may have believed the defendants intended to do her harm and injury, yet, unless the jury believe beyond a reasonable doubt that the defendants did

such acts with the intention of harming or injuring said Paulina Schwint, they must find the defendants not guilty. Refused."

We have also read the instructions given by the court upon its own motion. They seem to be justified by the facts as shown by the evidence. Each of the instructions given by the court upon its own motion is excepted to. We have read all of these instructions, and will briefly state the contents of such of them as we do not copy.

The first instruction is simply a description of the charge made, and the statement that the defendants made a plea of not guilty.

The second contains a definition of an assault. It defines it as "an attempt with unlawful force or threats made in a menacing manner to inflict bodily injury upon another accompanied with the present ability to give effect to the attempt." It also contains the idea that the person who attempts to strike, touch or do any violence to another must have the "intention and the apparent present ability to do such violence" before he can be guilty of the assault.

The third is concerning the presumption of innocence. It is stated in it "that the law presumes the defendants to be innocent until they are proved guilty beyond a reasonable doubt. The plea of not guilty casts upon the state the burden of establishing by evidence all the material allegations in the indictment beyond a reasonable doubt."

The fourth instruction tells the jury that they may find some of the defendants guilty and acquit others. It also tells the jury that, if they were all actuated by a common purpose to commit the assault, then they are all guilty, although only one of their number may have taken hold of the prosecuting witness.

The fifth contains a definition of reasonable doubt. The instruction as given might have been written in better and clearer language, but it does not appear to be prejudicial. It reads: "A reasonable doubt is that state of the mind which, after an entire comparison and consideration of all the evidence, giving due and proper weight and credibility

to it, leaves the mind in such condition that you cannot say that you feel an abiding conviction, to a moral certainty, of the guilt of the accused. By a reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against them, but it means some actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt reasonably arising from all the evidence or want of evidence in the case. Given."

We do not deem the sixth instruction prejudicial. If it is wrong, it is favorable to the accused. They may not complain of it, because its effect before the jury could not well be otherwise than to point toward an acquittal. It reads: "You are instructed that, to constitute the offense of assault with which these defendants are charged, an intent to do injury or harm or some other unlawful act toward the person assaulted is necessary. Acts which may be sufficient to constitute an assault, if done without any intent to do harm or injury to another, or, if not done in the perpetration of some other unlawful act, do not constitute an assault; and, before one can be found guilty of an assault, the jury must believe beyond a reasonable doubt that the acts constituting the assault were committed with such intent to do harm or injury to the person assaulted, or else done in the perpetration of some other unlawful act. Given."

The seventh tells the jury that the intent "with which an act is done is a mental process, and, as such, generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence." That may all be true, but it does not appear in what way it is material or prejudicial.

In the eighth instruction the jury are told that the testimony of any witness who wilfully testifies falsely as to a material fact may be disregarded, and that the credibility of the witnesses is for the jury. There are other statements in it concerning the consideration of the conduct, intelligence and fairness of the witnesses and the

reasonableness of the story told by them. This is a sort of stock instruction much used in the trial of cases, and we perceive nothing wrong in it.

The ninth instruction relates to the selection of a foreman.

Several affidavits were filed in support of an application for a new trial. They purport to be based upon newly discovered evidence. Apparently they aim to create the impression that the prosecutrix is an immoral person. That is not the thing to be determined in this case. The question is whether the parties charged are guilty of an assault on Paulina Schwint.

The brief prepared by counsel for plaintiffs in error shows a great deal of labor, but, as we understand it, section 8192, Rev. St. 1913, and the rule of this court which governs the preparation of briefs in such cases are disregarded. The brief wholly fails to make a specific statement of any of the errors sought to be complained of. There are four alleged assignments of error. They seem to be classifications of a subject, but they fail to tell us what is wrong with the proceedings in the case. *Witt v. Caldwell, supra.*

In *First Nat. Bank v. Hedgecock, supra,* it is said in the syllabus: "The statute requires that the brief in this court shall set out particularly the errors asserted, and assignments not so made and definitely discussed in the brief will not ordinarily be considered."

We quote what is offered in the brief. The heading is:

"Propositions of Law.

"1. Wherever an issue is suggested by the testimony which is favorable to accused, the court must instruct the jury on that issue, and a failure to do so is reversible error. * * *

"2. The court must give an affirmative instruction on every theory of the defense. A mere negative instruction will not answer. A failure to do so is reversible error. * * *

"3. If an instruction tendered is faulty or erroneous, yet, if it calls the attention of the court to any theory of the defense supported by evidence, it is erroneous for the court to fail to give a proper instruction covering such theory. * * *

"4. In a criminal case, where an issue is made in the evidence of a defensive character, it is reversible error where there is no instruction expressly authorizing an acquittal."

No specific error is charged in any one of the foregoing subdivisions. In another and different place these subdivisions might not be without merit, but we do not think they are applicable here. Notwithstanding that fact we have read the evidence and studied the case, and find the contention of plaintiffs in error to be without merit.

The judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

SEDGWICK, J., dissents.

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MARY YECHOUT ET AL., APPELLEES, V. CHARLES TESNOHLIDEK ET AL., APPELLANTS.

FILED DECEMBER 18, 1914. No. 17,860.

1. **Trial**: OPENING STATEMENT. Considerable latitude must be allowed counsel at the commencement of a trial in making the opening statement in which he states the evidence by which he expects to sustain his cause of action or defense. The mere fact that he fails to prove all he expected to prove, if true, does not necessarily establish the fact that the statement was intentionally false.

2. **Pleading**: ANSWER: NEW MATTER. "In order to be available in an action, new matter constituting a defense must be pleaded in the answer. It cannot be introduced under a general denial." *Gran v. Houston*, 45 Neb. 813.

3. **Intoxicating Liquors**: ACTION ON BOND: DEFENSE. In an action upon a saloon-keeper's bond for damages for a loss of means of support growing out of the sale of intoxicating liquors to the

husband and father of plaintiffs, the fact that such husband and father was a drinker, or even a drunkard, before the time charged as the beginning of the sales would not of itself defeat a recovery, if liquors sold to him after such time by defendant contributed to keeping him in that condition.

4. **Trial:** INSTRUCTIONS. The action of the court in refusing to give instructions asked by defendants, and which is assigned for error, is examined, and no prejudicial error found.

5. **Constitutional Law:** SLOCUMB ACT. The question of the constitutionality of the act of 1881, commonly known as the "Slocumb Law" (Rev. St. 1913, ch. 40) having been passed upon so often by the courts, and no special reason being assigned in the brief of defendants why or how the act is violative of the constitution, the question is not reexamined.

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

*Alfred G. Ellick* and *Albert S. Ritchie* for appellants.

*H. C. Murphy* and *S. L. Winters, contra.*

REESE, C. J.

This action was commenced by plaintiff, the wife of James Yechout, against defendant Tesnohlidek and one Macek, and the surety on their bonds, as saloon-keepers in the city of South Omaha, for damages growing out of the sale of intoxicating liquors to the husband of plaintiff. A jury trial was had, which resulted in a verdict in favor of defendant Macek and against plaintiff, and in favor of plaintiff and against Tesnohlidek and his surety for $2,000. Judgment of dismissal was rendered in favor of Macek, and judgment in favor of plaintiff and against defendant Tesnohlidek and his surety for the said sum of $2,000, from which he and his surety appeal.

The action was for loss of support and the debauching of plaintiff's husband and the father of their three minor children, who joined in the action as plaintiffs by their next friend, Mrs. Yechout. The petition sets out that from the 1st day of May, 1909, to May 1, 1910, and during the next year until May 1, 1911, defendant Tesnohlidek was a licensed saloon-keeper, with defendant, the Bankers

Surety Company, as his surety, upon the liquor dealer's bond. It is alleged that Yechout, the husband and father, prior to May 1, 1909, was capable of earning, and did earn, the sum of $5 a day, all of which he brought to his home and used, and caused to be used, for the maintenance and support of the family; that from that date until the time of the commencement of the suit defendant Tesnohlidek sold and gave to the said James Yechout intoxicating liquors in large quantities, and at frequent intervals, thereby causing him to be a confirmed and habitual drunkard, and for that reason he has failed to contribute to the support of the said family; that he has become an imbecile, a total wreck, mentally and physically, and that said condition has become permanent, etc. Damages in the sum of $25,000 are alleged, and judgment for that sum is demanded.

Defendant Tesnohlidek filed his separate answer, in which he admitted the allegations as to his being a duly licensed saloon-keeper during the time stated, and that he gave the bond with surety as alleged, and denied all other allegations of the petition. The Bankers Surety Company answered by way of a general denial, and alleged the unconstitutionality of the statute upon which the action is founded, for the reason that the statute violates the provisions of subdivision 3, sec. 8, art. I of the constitution of the United States, wherein it is provided that congress shall have power to regulate commerce among the several states, and also violates that portion of section 1, art. XIV of the constitution of the United States, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is also alleged that the law is unconstitutional for the reason that it violates section 3, art. I of the constitution of this state, also portions of section 15, art. III thereof.

1. Of the errors assigned by appellants, the first is that in the opening statement to the jury counsel indulged in inflammatory and baseless appeals to the jury in stating what facts plaintiff expected to prove by the testimony of witnesses thereafter to be introduced. These statements referred to a cupboard, a saw, and a pipe, which, it was claimed, defendants took and received from plaintiff's husband in payment for liquor bills, and also that plaintiff, on account of her husband's drunkenness, locked their children in their home and worked in a packing house in order to maintain the family. It may be remarked that there was some evidence submitted in support of these statements, though in some instances it was slight. In making the opening statements to a jury, the plaintiff is entitled to "briefly state his claim, and may briefly state the evidence by which he expects to sustain it." Rev. St. 1913, sec. 7846. In all cases considerable latitude must be allowed in the statement of what the party "expects" to prove. The fact that he may fail to establish the facts which he may have expected to prove does not necessarily establish the fact that the statement was intentionally false. The incidents referred to, even if not proved, were of a trivial matter, not material to a recovery, and we cannot conceive of any prejudice resulting therefrom.

2. It is next contended that the trial court erred in giving the eighth instruction to the jury. The instruction is as follows: "You are further instructed that it is not pleaded in any of the defendants' answers that plaintiffs consented or acquiesced in the sale or furnishing of liquor by defendant saloon-keepers to James Yechout, or that Mary Yechout herself furnished liquor to her husband, and you are therefore instructed that this would not be a defense to this action, and you are hereby directed to disregard all testimony upon this question." The law of this instruction is fully settled in *Gran* v. *Houston,* 45 Neb. 813, 830, wherein it is said: "The consent or acquiescence of Mrs. Houston to the giving or sale of liquors to her husband was matter constituting an affirmative defense, even if it could be allowed in any degree as a de-

fense, and to be available must have been pleaded, and this was not mentioned in the answer, and could not have been taken advantage of under general denial, hence this assignment is clearly without merit. New matter constituting an entire or partial defense to a cause of action must be pleaded in the answer and cannot be shown or made available under a general denial." As there was no defense of the kind pleaded, we need give no further attention to the subject. It may be said, however, that it was held in *Kliment v. Corcoran,* 51 Neb. 142, that the fact that plaintiff furnished liquor to and drank with her husband constituted no defense to the action. The instruction was correct even upon that theory.

3. It is next insisted that the court erred in refusing to give instruction numbered 5 asked by defendant insurance company. The instruction is as follows: "You are instructed that there can be no recovery by the plaintiffs herein for loss of means of support if you should find that there has been no diminution thereof since May 1, 1909." There was evidence that there was a loss of means of support after the date named in the instruction, but we think this could make no difference under the provisions of sections 3859 and 3862, Rev. St. 1913, of the act known as the "Slocumb Law." While it might be proper for the jury to consider all the circumstances of the case, the fact that the drinker was disqualified before a certain date could not justify the seller of the liquor in keeping him in that condition during a later time.

A number of errors are based upon the refusal to give instructions, all of which we have examined, but find that the questions presented have all been passed upon by this court, and are satisfied that there is no merit in the contentions.

There is no discussion in appellants' brief of why or how the law under which this action is brought is violative of either the constitution of the United States or of this state. Since both the supreme court of this state and of the United States have passed upon the question, we are not called upon to review the many decisions therein. The

law was enacted in 1881, and has been attacked upon every point since *Pleuler v. State,* 11 Neb. 547, decided at the July term of that year, and we must be excused from entering that field, in the absence of specific directions.

Finding no error in the record justifying a reversal of the judgment, it is

AFFIRMED.

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

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ELI H. COX, APPELLANT, V. C. C. ELLSWORTH ET AL., APPELLEES.

FILED DECEMBER 18, 1914. No. 17,890.

1. **Bills and Notes:** PRINCIPAL AND SURETY: PAROL EVIDENCE. In an action by an alleged assignee of two promissory notes, in which it is averred that defendant signed as principal and plaintiff as surety, and each had paid one-half of the debt, the suit being for the recovery of the one-half paid by plaintiff, and defendant answered that they each had signed as surety under an oral agreement that if the notes were not otherwise paid each was to pay one-half, and each had so paid, oral proof of such agreement was properly admitted for the purpose of ascertaining the rights of the parties as between themselves.
2. **Trial:** VERDICT: PRESUMPTION. Where two persons were sued as defendants and the verdict was in favor of plaintiff and against one of the defendants, and silent as to the other, and is received by the court, without objections or question by the parties, and there is sufficient proof to justify a verdict in favor of such defendant, the judgment rendered on such verdict will not be reversed on that ground; the presumption being that the jury found in favor of the defendant not referred to in the verdict.
3. **Instructions** examined, and no prejudicial error found in them.

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

*John C. Stevens,* for appellant.

*Tibbets, Morey & Fuller* and *J. E. Willits, contra.*

REESE, C. J.

This is an appeal from the district court for Adams county. Plaintiff, Eli H. Cox, brought suit against the defendants, C. C. Ellsworth and S. J. Boemer, and alleged in his petition that on the 28th day of June, 1907, the defendants made their two promissory notes to the Clark Implement Company in the sum of $708.50; that about the 1st day of December, 1907, the notes matured; that plaintiff signed said notes as surety at the request of defendants; that at their maturity the defendant Boemer paid one-half thereof, and agreed with plaintiff "to pay the other half as soon as he could;" that the notes were the joint notes of the defendants; that upon the maturity thereof plaintiff was compelled to pay the sum of $365, and took an assignment of said notes from the Clark Implement Company; that no part of said indebtedness had been paid; that said notes drew 6 per cent. interest from the dates thereof; and that there was due from defendants to plaintiff the sum of $365, and interest $93.99. Judgment was demanded for the sum of $458.99, with interest at the rate of 6 per cent. from the date of the petition, and for costs of suit.

Defendant Ellsworth answered by a general denial, and alleged that he was only a nominal party to the transaction; that the notes were given for a threshing outfit, with the express understanding that, if he failed to operate said threshing outfit, then and in that event, upon his return and surrender of the outfit, the transaction would be settled, and he would be relieved from all liability on said notes; that he had long since performed all on his part to be performed; that the consideration for said notes was satisfied and returned, and plaintiff had no cause of action against him; that he returned and duly surrendered said threshing outfit, and thereby satisfied and discharged his obligation on said notes, which are now and have been for the past several years paid and satisfied so far as he is concerned.

Defendant Boemer answered: (1) By a special appearance objecting to the jurisdiction of the court over

him, on the ground that he was not properly joined as a defendant, there being no joint liability between him and defendant Ellsworth to plaintiff on the averments of plaintiff's petition, he being a nonresident of Adams county, and the only service of summons being had upon him was in Nuckolls county, the place of his residence; (2) that, without confessing the jurisdiction of the court over him, he alleged that on June 21, 1907, he, as the local agent of the Clark Implement Company at Lawrence, Nuckolls county, took an order from C. C. Ellsworth for one complete Russell & Company threshing rig, including engine, separator and equipment, for the agreed price of $2,643; that said Clark Implement Company refused to deliver the property to Ellsworth without additional security on the two notes on which this suit is brought, being the first notes to mature, and it was agreed between plaintiff, who represented said company, and this defendant that they each would sign said notes with said Ellsworth as sureties to said company, and on account thereof plaintiff and the answering defendant, on the 28th day of June, 1907, on the delivery of said property to said Ellsworth, each signed said notes as sureties for said Ellsworth, one note thereof being for $125, due September 1, 1907, and one for $582.50, due December 1, 1907; that Ellsworth failed to pay the notes, and plaintiff and defendant on the 18th day of November, 1907, each paid to said Clark Implement Company the sum of $363.70, being the principal and interest on said notes, defendant paying to plaintiff the sum of $21.25, being one-half the commission on said notes. Plaintiff replied to both answers by a general denial.

A jury trial was had, which resulted in a verdict finding for plaintiff and against defendant Ellsworth for the sum of $461.54. There was no finding either in favor of or against defendant Boemer. Plaintiff filed a motion for a new trial, the grounds assigned being a defect in the verdict, because there was no finding in favor of or against Boemer; that the verdict was not sustained by sufficient evidence; that the verdict was contrary to law; for errors

of law occurring upon the trial; for erroneous instructions duly excepted to; and "because of conflicting instructions given by the court to the jury." The motion was overruled, judgment entered upon the verdict, and plaintiff appeals.

The evidence was substantially in harmony with the pleadings, each party testifying in support of the issues presented by him. That the evidence was conflicting may readily be surmised. The two notes described in the pleadings were signed by plaintiff and Boemer, as well as by Ellsworth, the alleged purchaser of the "threshing outfit." The contract of purchase and all the other notes were signed by Ellsworth and Boemer. Plaintiff claims that Ellsworth and Boemer were principals in the purchase, and that he signed the first two notes as surety for both the others, and that, having to pay one-half the amount due thereon, he was entitled to recover that amount from both the others. Boemer claims that he was only a cosurety with plaintiff on the two notes, and, having paid one-half the amount due, and plaintiff the other half, there was no further contribution required from him. Ellsworth seemed to think that he was only a nominal party to the purchase of the thresher, and that by returning it after using it for a time all obligation on his part terminated.

From the verdict it appears that Boemer's contention, as to his relation to the two notes, was found in his favor, viz., that he signed the two notes as surety, and as between himself and plaintiff he had paid all he was liable for, and therefore his name does not occur therein. It goes without saying that the court should not have received the verdict without correction; but it was received without objection from counsel, and we must presume that it was satisfactory to all concerned. We do not see that plaintiff is in any condition to complain. The verdict was a sufficient finding that plaintiff was entitled to a judgment against Ellsworth for the amount which he had paid. Had plaintiff desired a finding as to Boemer, he could have had it by objecting to the form of the verdict.

The court instructed the jury that, if they found from the evidence that, as to the two notes, plaintiff and Boemer agreed as between themselves to assume, each, equal liability, and that each paid one-half of the notes, their verdict should be in favor of defendant Boemer. There was evidence sufficient to justify such an instruction. The court also instructed the jury to return a verdict in favor of plaintiff and against Ellsworth for whatever plaintiff "may have paid as surety on the notes in question, if from the evidence you find that he signed them as surety." These instructions are both criticised as erroneous, on the ground that Ellsworth's contention was that he had nothing to do with the purchasing of the threshing outfit; but we are unable to see the force of the contention, when applied to the relations between plaintiff and Boemer. Whether Ellsworth was the principal on the notes or not, if, as between themselves, plaintiff and Boemer had signed as sureties and under the agreement had fully executed and carried out their plans, each paying one-half, that would end the matter as between them. We can see no objection to the instructions, which could prejudice plaintiff.

This question is propounded by plaintiff: "Did the court err in permitting oral testimony in evidence in relation to the capacity in which Boemer signed the contract and notes?" As between plaintiff and Boemer, we think not. We must remember that the contest in this case is not between the makers and the payee of the notes. So far as the payee is concerned, the notes were paid. The implement company had no further demands. The contest was between the two who had paid the notes in question. Oral proof of the agreement as between themselves was, we think, properly admitted and submitted to the jury.

We are unable to detect any prejudicial error in the judgment which was not waived.

The judgment of the district court is therefore

AFFIRMED.

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

## TOM CURTIS V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1914. No. 18,745.

1. **Criminal Law:** VERDICT: CONFLICTING EVIDENCE. Where the evidence is conflicting, it is the province of the trial jury to pass upon the testimony, and, unless the finding is clearly wrong, it is final. This rule applies with equal force to the testimony in a criminal prosecution as in a civil suit.
2. **Robbery:** SUFFICIENCY OF EVIDENCE. The evidence is *held* sufficient to sustain the verdict.
3. **Criminal Law:** INSTRUCTIONS: FAILURE TO DEFINE LESSER OFFENSE. "In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do." *Barr v. State*, 45 Neb. 458.
4. ———: ———: INTOXICATION OF ACCUSED. The same rule must be applied when the evidence establishes the fact of the intoxication of the accused and no instruction was requested upon that point.

ERROR to the district court for Dakota county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

*J. J. McAllister* and *George W. Leamer,* for plaintiff in error.

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

REESE, C. J.

Plaintiff in error, who, for convenience, will hereafter be referred to as defendant, was convicted in the district court for Dakota county of the crime of robbery. He alleges error, and brings the cause to this court for review by proceedings in error.

The information is in the usual form, charging that defendant and one John Gill on the 27th day of October, 1913, robbed John R. Deater of a purse, of the value of 25 cents, and four $20 bills, currency of the United States, the property of the said John R. Deater. The parties ac-

cused were granted separate trials, and defendant was first placed upon trial, which resulted in a verdict of guilty, with judgment and sentence as above indicated.

The theory of the prosecution, as shown by the testimony of witnesses on the part of the state, was that defendant and Gill met Deater in the city of Sioux City, Iowa, and all drank intoxicating liquors until all became highly intoxicated, when they, with one or two others, left Sioux City and came to South Sioux City, in this state, intending to engage in a more degrading debauch in the latter town in visiting houses of prostitution in that neighborhood; that they rode upon street cars to near where they desired to alight, but by some means they failed to leave the car at the desired place for leaving the street car line; that at South Sioux City they entered saloons and completed the filling up process until all were beastly drunk; that after leaving the street car they sought to reach their destination by walking on the public highway; that after following the road some distance defendant and Gill assaulted Deater, got him down, and robbed him of something like $80, left him lying in the road, jumped over a nearby fence, entered a cornfield, where they were soon out of sight, and temporarily made their escape, being captured that evening not far distant from the neighborhood of the alleged crime. It seems that Deater had succeeded in making the regulation fool of himself by his drinking, making himself obnoxious to the Sioux City saloon-keepers by singing in the saloons to such an extent that he, with his associates, had been requested to be less noisy or leave the saloon. It is said that in his intoxication he displayed quite a roll of bills, declared that he was the son of the late Jesse James, and indeed and in fact a wonderful character. He was about 22 years of age, while defendant was about 28 and Gill about 30.

It could serve no good purpose here to recount the facts testified to by the state's witnesses, as there was a conflict upon every material feature of the case, the state's witnesses being flatly contradicted in many particulars, yet, if the state's witnesses testified to the truth, there was

amply sufficient evidence to sustain the verdict. It is well understood by the profession that, where there is a conflict, it is the province of the jury to weigh the evidence and pass on the questions of fact presented. We are satisfied with the verdict, and cannot reverse the judgment on the ground of the insufficiency of the evidence.

Of the errors of law relied upon for a reversal of the judgment, the first is that the district court erred in not instructing the jury that they might find defendant guilty of larceny from the person, or of any one or more of the forms of criminal assault included in the crime charged in the information. It is scarcely necessary to examine this question, for the reason that error cannot be predicated thereon without having called the attention of the trial court to the subject by some form of request for such a charge, and that the better rule is that suitable instructions be prepared and submitted to the court, thereby obtaining a ruling thereon, which, if adverse, would constitute a foundation for review.

The second ground discussed in the brief is that the court erred in not giving an instruction advising the jury on the question of the intoxication of the defendant as affecting criminal intent or as affecting the degree of the offense charged and as an excuse for the crime alleged. Here we are met with the same objection as in the former assignment. No request for an instruction upon that subject was made. The rule is well settled in this state. *Barr v. State,* 45 Neb. 458, and cases there cited. Both contentions are without merit.

Finding no reversible error in the judgment and sentence of the district court, they are

AFFIRMED.

FAWCETT and SEDGWICK, JJ., not sitting.

WILLLIAM NORMAN ET AL., APPELLEES, V. WILLIAM T. KUSEL, APPELLANT.

FILED DECEMBER 18, 1914. No. 17,924.

1. **Waters:** OBSTRUCTION OF STREAM: RIGHT TO USE OF WATER. One whose premises are situated on a stream of water will not be permitted to obstruct the natural flow of the stream in such a manner as to deprive another, who is rightfully in possession of a tract of land situated on the stream below, of water for domestic use, including water for his stock, unless such use will deprive the upper proprietor of water necessary for his own use.
2. ———: ———: ———. Where the testimony clearly shows that the upper proprietor has obstructed the flow of the stream in such a manner as to wilfully deprive another of the use of water for the purposes above mentioned, and that the upper proprietor had no use for the water for irrigation or other purposes, he will be liable for all the damages occasioned thereby. The question of riparian rights does not arise in such a case.
3. **Appeal:** AFFIRMANCE. Where plaintiffs' claim for damages and defendant's counter-claim for trespass by plaintiffs' cattle are submitted to the jury under proper instructions, the verdict will not be set aside, unless, upon the whole record, it appears to be clearly wrong.
4. **Instructions** examined, and found to contain no reversible error.

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

*A. W. Crites* and *Dolezal & Johnson,* for appellant.

*Earl McDowell* and *Burkett, Wilson & Brown, contra.*

BARNES, J.

Action in the district court for Dawes county for damages alleged to have accrued to plaintiffs by depriving their cattle of water during the month of August, 1911.

The plaintiffs alleged, in substance, that they leased the southeast quarter of section 4, township 32, range 51 west, in said county, for the purpose of pasturing their cattle thereon; that a stream of water, called Little Cotton Wood

creek, ran through a corner of said tract of land, and afforded a sufficient amount of running water to supply plaintiffs' cattle, but for the wrongful acts of the defendant; that defendant owned a tract of land through which the Little Cotton Wood creek ran adjoining plaintiffs' land, which was situated up the stream from the plaintiffs' pasture; that defendant had constructed a dam in the said creek, on his own land, and had used some water out of the stream for the purpose of irrigation; that, as soon as plaintiffs turned their cattle into the pasture above mentioned, the defendant notified them to take them away, and put a slushboard on his dam, opened the headgate to his irrigation ditch, and entirely stopped the flow of the stream through plaintiffs' pasture, thereby depriving their cattle of water; that they were compelled to, and did, put up a windmill and tank, and constructed a well for the purpose of watering their stock; that, before they could complete their improvement and provide water for their stock, their cattle suffered for the want thereof, and fell off in weight and condition, to their damage in the sum of $2,160, for which they prayed judgment.

The defendant, by his answer, alleged that he had a lease on the southeast quarter of section 4, township 32, range 51 west, and that plaintiffs were trespassers thereon. Defendant denied the allegations of the petition, and set up a claim of right to the water taken by him. Defendant made a counter-claim of $250 for damages to his crop of hay, alfalfa and corn by the plaintiffs' cattle, which he alleged had trespassed on his premises. The allegations of the answer were denied by a reply. The cause was tried to a jury, and a verdict was rendered for plaintiffs for the sum of $397.50. A motion for a new trial was overruled, judgment was rendered on the verdict, and the defendant has appealed.

The appellant, by his brief, has presented the following questions for the consideration of the court: First. Is the verdict supported by the evidence? Second. Did the court err in his instructions to the jury?

As to the first assignment of error, the evidence discloses that plaintiffs produced a lease of the premises in question from the owner thereof, duly executed, which was introduced in evidence. The defendant, on this question, failed to introduce any testimony showing, or tending to show, that he had any right to the possession of the land in question. The testimony shows, that, acting under their lease, the plaintiffs commenced to turn their stock into the pasture about the first days of August, 1911, and by the middle of August had placed about 309 head of cattle therein; that at the time they turned their cattle into the pasture there was a sufficient amount of water flowing through the creek to supply their stock. As soon as defendant discovered that plaintiffs had turned the stock into the pasture, he nailed a slushboard on his dam, opened up the headgate to his irrigation ditch, and entirely stopped the flow of water in the stream through the plaintiffs' pasture. It appears that, when the flow of water in the stream through the pasture stopped, one of the plaintiffs went up to the defendant's dam and examined the condition of it. He testified that the slushboard was on the dam and was banked up with dirt; that he examined the head of water at the headgate of the defendant's irrigation ditch, which he found was opened, and the depth of water running through the ditch at that time was at least eight inches; that the water flowed out into the defendant's meadow and away from the creek; that there was practically no water flowing down the creek below the defendant's dam; that there was a little seepage through the dam, which was scarcely enough to be noticed; that this condition continued from about the 12th day of August until the 2d day of September; that during the meantime plaintiffs' cattle were simply famishing for want of water; that they broke through the fences, and would go tearing all around the pasture trying to get out; that plaintiffs then started to put in a windmill to supply water for the cattle, but it took ten days before they could get it in operation. During that time the cattle occasionally broke through the fences, and plaintiffs had

to repair them; that they were obliged to keep a watch upon the cattle day and night; that after the water was restored they had no further trouble; that they expended in constructing the windmill at least $200; that they had plenty of water after the improvement was completed, which was on the 2d day of September. It appears from the testimony that the slushboard was pounded down on defendant's dam so tight that no water could go through, except just the natural seepage; that the water was all running through the headgate to his irrigation ditch; that at that time defendant's crop was all made, and he had nothing to irrigate.

As to the condition of plaintiffs' cattle, the testimony shows that they had shrunk in weight; that they were just milling around the pasture all the time; and that they shrank from 65 to 75 pounds a head. The testimony also shows that plaintiffs complained to the state board of irrigation that the defendant was depriving them of water for their stock; that Mr. Francis, an assistant to the state engineer, and Mr. Cripps, a man he sometimes employed to do the work for him when he could not do it himself, went to the defendant's dam and lifted the slushboard so as to let the water flow down the channel of the stream, and adjusted the defendant's headgate to his irrigation ditch; that plaintiffs again complained, and the assistant engineer again visited the defendant's dam and found the slushboard nailed down and banked up with dirt, and that all the water was going through defendant's irrigation ditch; that he again raised the slushboard and adjusted the headgate. The testimony shows that before defendant nailed down the slushboard on his dam there was a good steady flow of water down the stream, sufficient for domestic use, and to supply water for the use of plaintiffs' cattle. The testimony also shows that the defendant was seen frequently at his dam with a shovel on his back.

Mr. Francis testified, in substance, that he was superintendent of the district where the defendant's dam was situated; that he was at the headgate of the defendant's irrigation project; that the defendant had a dam in the

creek, and had a box running out into the pond above his dam; that there was very little water going through the dam; that he told the defendant that the water was needed for domestic purposes, and he must put up a headgate that the witness could regulate; that defendant had a dam to begin with, and on top of the dam he had a slushboard so as to raise it and turn the volume of water into his irrigation ditch; that witness pried off the slushboard, but that he could not shut the defendant's headgate, and he therefore filled it with dirt so that he could turn some water down the creek; that his assistant, Mr. Cripps, was with him the second time when he visited the defendant's dam. Several witnesses testified as to the condition of the plaintiffs' cattle, and placed the shrinkage as high as 70 pounds a head.

Without further discussion of the evidence, it is sufficient to say that plaintiffs' cattle were damaged by being deprived of water during the month of August to a large amount.

The defendant, by his evidence, failed to deny any of the material facts testified to by plaintiffs' witnesses, and introduced no evidence showing, or tending to show, any right on his part to maintain the slushboard on his dam, and thus turn the water into his irrigation ditch and deprive the plaintiffs of a sufficient amount of water to supply their stock. In fact, the defendant admitted that his crop was all made at the time, and he had no use for the water for irrigation purposes.

The plaintiffs admitted that their cattle had trespassed upon the defendant's premises, and damaged him to some extent. The testimony as to the amount of damages varied from $79, as testified to by disinterested witnesses, up to $250, according to the defendant's own testimony. The questions as to the amount of plaintiffs' damages and as to the defendant's counter-claim were properly submitted to the jury. It appears that plaintiffs' cattle fell off from 50 to 75 pounds a head, and that the market value of the cattle was from 4 to 5 cents a pound, and the damage for that item alone was about $800. Giving the defendant

the benefit of the total amount of his claim, which was $250, it cannot be said that the evidence did not sustain the verdict, or that the amount of the verdict was excessive.

It is contended that the court erred in giving certain instructions to the jury upon his own motion, to wit, Nos. 4, 5, and 7. Instructions numbered 4 and 5 the appellant discussed together in his brief. By instructions 4 and 5 the jury were told, in substance, that if the defendant wrongfully and purposely diverted the water from Little Cotton Wood creek to such an extent that plaintiffs' live stock were deprived of sufficient water for their maintenance, and if defendant diverted the water from said stream and refused or neglected to permit sufficient water to flow down the channel of the stream to water plaintiffs' stock, then he would be liable for any damages which might result by reason thereof. It is insisted that these instructions were clearly wrong. It is argued that plaintiffs were not the owners of the quarter section through which the stream flowed, and were owners of large tracts of adjoining land; that they pastured 309 head of cattle upon this land, and that all of the 309 head of cattle obtained water at the watering place on the 160-acre tract, and it is insisted that plaintiffs had a right to water not to exceed 8 or 9 head of cattle, because those were all the cattle which the 160 acres of pasture would support that season; that by the instructions the court set at naught the rights of the defendant, and granted to the plaintiffs a greater right than was warranted by the law of riparian rights.

As we view the record, that question was not involved in this controversy. The defendant, by his testimony, made no claim that, by allowing the water to flow down the stream to the plaintiffs' watering place, he would be deprived of the use of the water to any extent whatever. On the other hand, he testified that he had no use for the water, because the irrigation season had terminated. This being true, no riparian right was in any manner involved in this controversy. The testimony shows that, if the defendant had not wrongfully interfered with the flow of the stream,

there would have been a sufficient amount of water to supply all of the plaintiffs' stock, and therefore the court did not err in giving the instructions complained of.

By instruction No. 7 the jury were told, as a matter of law, that on and after the 9th day of August, 1911, the defendant had no valid lease of the quarter section of land in question, and was not entitled to the possession and control of the same as against the plaintiffs. It is contended that this instruction was erroneous, because there was a conflict in the evidence upon this question. As we view the record, there was no conflict which would require a different instruction. The plaintiffs had a lease, properly executed, for the land, and all that the defendant's testimony shows is that he had been given an agency to lease the land, and that he had not leased the land to any one.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

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

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THOMAS HARRISON, APPELLEE, V. WILLIAM SHULTZ; CHARLES W. LEMONT ET AL., APPELLANTS.

FILED DECEMBER 18, 1914. No. 17,927.

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

*Mapes & Hazen,* for appellants.

*H. F. Barnhart* and *Isaac Powers, contra.*

BARNES, J.

This is an appeal from a judgment of the district court for Madison county, setting aside and canceling a sheriff's deed to lots 4 and 5, in Riverside Park addition to the city

of Norfolk. The appellants have filed no brief. The appellee filed no cross-appeal. The case was submitted on the brief of appellee. The evidence contained in the bill of exceptions appears to be sufficient to support the findings and decree.

The judgment of the district court is

AFFIRMED.

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

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PETER E. OLSON, APPELLANT, V. EDWARD T. FARNSWORTH, APPELLEE.

FILED DECEMBER 18, 1914. No. 17,941.

1. **Appeal:** NEW TRIAL: DISCRETION OF COURT. An order of the district court setting aside a verdict and granting a new trial will not be reversed, unless the record shows an abuse of discretion on the part of the trial court.
2. **Attorney and Client:** COMPENSATION. Under ordinary circumstances, an attorney who has contracted with his client as to the amount of his compensation for a specified service will not be allowed to contract for greater compensation for such service while the service is being rendered.
3. **Accord and Satisfaction.** When there is in good faith a controversy between the parties as to the amount due upon settlement, and a compromise is agreed upon by which each party yields a substantial part of the amount to which he in good faith claims he was entitled, and payment is made accordingly, which is received as full settlement, it will amount to an accord and satisfaction.
4. **Appeal:** CONFLICTING EVIDENCE. The verdict of a jury upon conflicting evidence is conclusive, unless upon the whole record it appears to be clearly wrong.

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

*McKenzie & Cox* and *Tinley, Mitchell & Pryor,* for appellant.

*Smyth, Smith & Schall, contra.*

BARNES, J.

This action was commenced in the district court for Douglas county to recover a balance alleged to be due to plaintiff from his former attorney in the division of a sum of money collected by the defendant on a judgment obtained against the Nebraska Telephone Company and the Omaha Electric Light & Power Company in favor of the plaintiff.

It was alleged by the plaintiff that he had a contract with the defendant to prosecute his case against the two companies above named for 35 per cent. of the amount recovered by him, and if he was defeated, then defendant should have nothing for his services; that defendant took 50 per cent. of the amount recovered by plaintiff. The plaintiff prayed for a judgment for $1,607.63.

The defendant admitted that, before he commenced plaintiff's action against the aforesaid companies, they entered into a contract by which he was to have 35 per cent. of the amount recovered, but alleged that, after the plaintiff's action was tried the first time in the district court for Douglas county, which trial resulted in verdicts and judgments against the plaintiff, it was agreed between them that, if defendant would loan plaintiff a sufficient amount of money to enable him to prosecute an appeal to the supreme court, and would perform the necessary legal services, and advance the expense for printing the briefs and other necessary expenses, defendant should have 50 per cent. of the amount recovered, and, if they were defeated, then the defendant should have nothing, and plaintiff should repay to him the amount of money loaned and advanced by him in prosecuting the action. Defendant further alleged that he recovered a judgment for plaintiff, and collected as payment thereof the sum of $10,717.50; that when they came to divide the money a dispute arose between them as to the amount defendant should retain for his services; that the dispute was settled, and plaintiff thereupon received and accepted from the defendant the sum of $5,358.75, and plaintiff gave the defendant a re-

ceipt for that amount in full settlement of their several claims.

Plaintiff, by his reply, denied the allegations of the answer, and upon the issues thus presented the cause was tried the first time to a jury, and the plaintiff had the verdict. A motion for a new trial was sustained, and on a second trial the jury disagreed. On the third trial the defendant had the verdict, on which a judgment was rendered in his favor, and the plaintiff has appealed.

Appellant's first contention is that the trial court erred and was guilty of an abuse of discretion in setting aside the verdict of the jury on the first trial of his cause, and it is argued that the evidence was amply sufficient to sustain the verdict in plaintiff's favor. The record, so far as it relates to this question, shows that the judge before whom the cause was tried the first time gave due consideration to the motion for a new trial, and in the exercise of a sound judicial discretion sustained it. It is a well-settled rule that the court has a large discretion in the matter of granting new trials, which will not be interfered with, unless it is clearly shown that some legal right of the party against whom the order for a new trial is made has been disregarded. *Sang v. Beers,* 20 Neb. 365; *Tingley v. Dolby,* 13 Neb. 371; *Bigler v. Baker,* 40 Neb. 325; *Hackney v. Raymond Bros. Clarke Co.,* 68 Neb. 624; *Weber v. Kirkendall,* 44 Neb. 766. As we view the record, plaintiff has failed to show that the court abused his discretion in sustaining the motion.

Plaintiff's second assignment of error is that the allegations in the defendant's answer were insufficient to constitute a defense to plaintiff's cause of action, and therefore the court erred on the third trial in overruling plaintiff's objection to the introduction of any evidence on behalf of the defendant. This assignment of error is argued at great length in the appellant's brief. It may be conceded that under ordinary circumstances an attorney will not be allowed to contract with his client for an increase of compensation for a specified service. The defendant's answer, however, contained a plea of accord and satisfac-

tion, and this was sufficient to require the trial court to overrule the objection, and, if the evidence was conflicting on that point, the court would be required to submit the cause to the jury.

The third and last assignment of error is that the evidence adduced by the defendant was insufficient, if true, to constitute any defense to plaintiff's cause of action, and the court erred in overruling plaintiff's motion for a directed verdict. The testimony discloses that, when the contract was first made between the parties, it was contemplated that a settlement of plaintiff's cause of action against the Telephone and Electric Light Companies would be made. No settlement was effected, and plaintiff's cause of action was twice tried in the district court for Douglas county. The first trial resulted adversely for the plaintiff. His motion for a new trial was overruled, and an appeal was taken to the supreme court, where the judgment was reversed. A second trial in the district court resulted in a verdict and judgment for the plaintiff, and on an appeal to the supreme court the judgment was affirmed. Thereafter the defendant collected the full amount of the judgment, with interest, amounting to $10,717.50. Afterwards, when the parties attempted to divide the proceeds of the litigation, they met at the United States National Bank, where the money was deposited, and the plaintiff claimed that under the terms of their contract he was to receive 65 per cent. of the whole amount collected. The defendant insisted that they had made a subsequent agreement; that after the plaintiff was defeated in the district court, and had informed the defendant that he had no money with which to continue the litigation, the defendant agreed to loan him the necessary funds, which plaintiff was to repay in any event, and defendant was to have 50 per cent. of the recovery. A dispute also arose between them as to the amount which should be paid to the physician who had treated the plaintiff for his injuries. Thereupon they went to the office of the physician, where the matter was adjusted, and plaintiff agreed that the defendant should pay the physician the sum of $100. This was

done, and the physician's receipt was taken therefor. They then returned to the bank, and after they had talked over the matter the defendant offered to pay the plaintiff one-half of the amount of the recovery, thereby waiving his right to the repayment of the money loaned to plaintiff, and also the amount that the plaintiff had authorized him to pay the physician. The amount the defendant tendered to the plaintiff was $5,358.75, or exactly 50 per cent. of the amount of money collected. It appears that the plaintiff accepted this amount, and gave the defendant the following receipt:

"Omaha, Neb. Jan. 14, 1911. Rec'd of E. T. Farnsworth the sum of fifty-three hundred fifty-eight 75/100 dollars in full proceeds of Olson v. Nebr. Tel. Co. P. E. Olson."

That thereupon the parties went to a restaurant, had their dinner, and afterwards walked some distance together upon the street, and, so far as the evidence discloses, they then parted in a friendly manner.

The plaintiff by his testimony denied that he ever entered into any agreement with the defendant by which defendant was to have 50 per cent. of the amount recovered in his case, but admitted that he was unable to provide the funds to carry on the litigation, and that defendant advanced the money to him for that purpose. He admitted, also, that when they came to divide the proceeds of the litigation a disagreement arose between them over the amount the defendant should retain, and also over amount to be paid to the physician. He testified, however, that defendant refused to pay him the money unless he would sign a receipt in full therefor, and that he signed the receipt without reading it; that he did not know what it contained, and that he never intended to accept the money paid him by the defendant as a full settlement. He made no explanation of why he did not read the receipt, except that it was poorly written and hard to read. He did not claim that he was not able to read writing, and his testimony on cross-examination disclosed that he well knew what the receipt contained.

The defendant, on the other hand, testified that he read the receipt in full to the plaintiff before the plaintiff signed it; that the plaintiff also read it, and after it was signed the defendant paid him the money; that nothing was said between them about withholding the money unless the plaintiff signed the receipt.

Upon this conflicting evidence, the cause was submitted to the jury, and a verdict was returned for the defendant. We are of opinion that the evidence sustains the verdict. The plaintiff at that time understood the situation fully, and was contending that the defendant proposed to withhold more of the proceeds of the litigation than he was entitled to. The defendant, on the other hand, was insisting that he was entitled, not only to 50 per cent. of the money collected, but should be reimbursed for the amount advanced to the plaintiff to enable him to carry on the litigation, and also for the amount which was paid by him to the physician. The result of that dispute was that defendant tendered to the plaintiff $5,358.75. The plaintiff took that amount, and gave his receipt therefor in full settlement. In this settlement the parties were dealing with each other at arm's length, and the transaction, if the jury believed the defendant, amounted to an accord and satisfaction.

The judgment of the district court is

AFFIRMED.

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

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FUNKE ESTATE, APPELLEE, V. LAW UNION & CROWN INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 18, 1914. No. 17,950.

**Insurance:** CONSTRUCTION OF POLICY. Where an insurance policy contains inconsistent provisions, the courts, in case of loss, will adopt the provision which is most favorable to the assured and offers the protection which a fair interpretation of the policy will give him.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed.*

*C. C. Flansburg* and *L. A. Flansburg,* for appellant.

*C. Petrus Peterson, contra.*

BARNES, J.

This was an action on an insurance policy, by which the Law Union & Crown Insurance Company of London, England, insured the Funke Estate for loss by fire of rents on its building situated on lots 1, 2 and 3, in block 56 of the city of Lincoln, to the amount of $3,000. The policy was attached to the plaintiff's petition, was made a part thereof, and was referred to as an exhibit.

It was alleged, among other things, that the defendant, for the sum of $45 paid by plaintiff as a premium, insured that plaintiff for the term of three years against loss of rents by fire, the defendant agreeing "that, in case the above named building, or any part thereof, shall be rendered untenantable by fire, this company shall be liable to the assured for the actual loss of rent ensuing therefrom, not exceeding the sum insured." The petition contained the following allegation: That plaintiff's loss by fire was $986.50, and of that loss the defendant is liable on its insurance policy for the sum of $246.62, for which sum, with an attorney's fee, the plaintiff prayed judgment. The petition contained all of the other averments necessary to recovery.

The defendant, by its answer, admitted that it issued its policy of insurance and delivered the same to plaintiff; that the policy was in writing, and was for the term of three years, from December 23, 1909, to December 23, 1912; and denied each and every other allegation contained in paragraph 3 of plaintiff's petition. Defendant alleged that the policy contained the express agreement that, in case of loss, the defendant should be liable only in the proportion that the sum insured under its policy should bear to the actual rental value of the premises at the time of the fire, but not exceeding, in any event, the sum of $3,000. It was

further alleged that the annual rentals arising out of plaintiff's building and premises for the 12 months immediately preceding the fire amounted to $25,584.92, and that other rental insurance was taken out by the defendant company in amounts as follows: In the Agricultural Insurance Company a policy for $2,500; in the North River Insurance Company a policy for $2,500; and in the National Union Fire Insurance Company a policy for $4,000, so that the total rental insurance on the 1st day of April, 1913, was the sum of $12,000, including the policy of the defendant.

Defendant admitted that, while the policy was in full force and effect, on the 1st day of April, 1912, the building so insured was damaged by fire, and parts of said building were rendered untenantable from the 1st day of April, 1912, to the 1st day of June, 1912, and that the amount of rentals under the leases on the rooms and portions of the building so rendered untenantable was in the aggregate sum of $986.50, and alleged that its policy limited the liability of the defendant company to the proportion that the sum of all of the insurance should bear to the actual rental value of the premises at the time of the fire, which was the sum of $115.67, which sum the defendant offered to pay the plaintiff.

The plaintiff demurred to the defendant's answer. The demurrer was sustained. The defendant refused to plead further, and judgment was rendered for the plaintiff for the sum of $246.62. The defendant has appealed.

It is contended that, by the terms of the policy, defendant is only liable to the plaintiff for the sum of $115.67 on account of the loss, while the plaintiff insists that the amount of the defendant's liability is $246.62, and, in our opinion, this question is fairly presented by the pleadings. The provisions of the policy, so far as they are material to this issue, are as follows:

"(1) Law Union & Crown Insurance Company, in consideration of the stipulations herein named, and of $45 premium, does insure the Funke Estate for a term of three years * * * against all direct loss or damage by fire,

except as hereinafter provided, to an amount not exceeding $3,000.

"(2) It is understood and agreed that, in case the above named building, or any part thereof, shall be rendered untenantable by fire, this company shall be liable to the assured for the actual loss in rent ensuing therefrom, not exceeding the sum insured.

"(3) Other concurrent insurance permitted.

"(4) It is understood and agreed that, in case of loss, this company shall only be liable in the proportion that the sum insured under this policy bears to the actual annual rental of the premises at the time of the fire.

"(5) This company shall not be liable under this policy for a greater *proportion of any loss* on the described property * * * than the amount hereby insured shall bear to the whole insurance * * * covering such property."

The first and fifth provisions appear in the printed part of the policy, and the second, third, and fourth in a typewritten slip attached thereto. It must be conceded that, if the defendant's liability is determined by the second and fifth provisions of the policy, the judgment of the district court is correct; but, if the liability is measured by the terms of subdivision four, the judgment must be reversed. The policy provides for other insurance, and it appears that at the time of the loss the total insurance on the building amounted to $12,000. By apportioning the loss between the companies according to the terms of the second and fifth subdivisions of the policy, the defendant would be required to pay three-twelfths of the $986.50. Two of the other companies would be required to pay five-twelfths, and the remaining company would pay four-twelfths of the total loss. If the defendant's contention is adopted, and the limitation contained in the printed povision of the policy prevails, defendant, instead of being liable for three-twelfths of the loss, would only be liable for such proportion thereof as the amount of its policy bears to the rental value, which defendant alleged

was $25,584.92, and the plaintiff would recover $130.95, less than the amount of his loss.

In 1 Phillips, Insurance (4th ed.) sec. 124, it is said: "The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view and favored in putting a construction upon the policy." "Having indemnity for its object, the contract is to be construed liberally to that end, and it is presumably the intention of the insurer that the insured shall understand in case of loss he is to be protected to the full extent which any fair interpretation will give." *Illinois Mutual Ins. Co. v. Hoffman,* 31 Ill. App. 295. See, also, *Sherman v. Madison Mutual Ins. Co.,* 39 Wis. 104. The provisions of subdivision two and subdivision four are inconsistent and cannot both be enforced. Where a policy contains two provisions on the same subject, and they are inconsistent and contradictory, that provision most favorable to the insured will be accepted, and the other disregarded. *Northwestern Mutual Life Ins. Co. v. Hazelett,* 105 Ind. 212; *First Nat. Bank v. Hartford Fire Ins. Co.,* 95 U. S. 673; *Illinois Mutual Ins. Co. v. Hoffman, supra; Connecticut Fire Ins. Co. v. Jeary,* 60 Neb. 338; *Imperial Shale Brick Co. v. Jewett,* 169 N. Y. 143.

The construction placed upon the policy by the district court accords with the rule announced in the cases above cited. By the terms of the policy sued on, the plaintiff did not agree to carry any insurance in addition to this policy. The paragraph of the policy on which the defendant relies does not provide for other insurance. It does not fix a percentage of insurance to be carried. It does not contain an agreement on the part of the assured to be a coinsurer. It does not limit the liability of the defendant to any particular percentage or proportion of the loss, where the loss is less than the amount insured. By the judgment of the district court the plaintiff has total indemnity up to the sum insured, and, the loss being less than the amount of the insurance, plaintiff was entitled to full indemnity as prayed in its petition. This construc-

tion of the provisions of the policy is more favorable to the insured than the one suggested by the defendant.

It follows that the judgment of the district court was right, and is

AFFIRMED.

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

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DANIEL BUCKLEY, APPELLEE, V. FRANK W. MAJOR ET AL., APPELLANTS.

FILED DECEMBER 18, 1914. No. 18,675.

1. **Intoxicating Liquors**: PETITION FOR LICENSE: NUMBER OF SIGNERS. A petition signed by 29 resident freeholders of a village which contains only 57 freeholders is sufficient to authorize the licensing board to publish the notice and grant a license, where no remonstrance or other objection is filed before the board prior to the hearing of the application.
2. ———: LICENSE: FORFEITURE. An applicant obtained a license without objection and prior to the filing of any remonstrance. He opened his saloon and sold intoxicating liquors until he received notice of the filing of a remonstrance. *Held*, That on the hearing of the remonstrance, he had not thereby forfeited his right to a license.

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

*John N. Dryden* and *Homer M. Sullivan*, for appellants.

*W. D. Oldham, contra.*

BARNES, J.

Appeal from a judgment of the district court for Custer county affirming the findings and order of the village board of the village of Oconto in said county, granting to one Daniel Buckley a license to sell intoxicating liquors in said village during the license year of 1914.

It appears from the stipulation and the evidence that on the 11th day of April, 1914, Daniel Buckley filed his petition for a license with the village board, which, when filed, contained the names of 29 resident freeholders of said village; that notice of the filing of the petition was published the first time on the 16th day of April, 1914; that on the 30th day of April, at 1 o'clock P. M., the board met, and, there being no remonstrance or objections of any kind before the board, a license was granted to the applicant. It further appears by the stipulation, which we find in the record, that at 6:30 P. M. of said 30th day of April a remonstrance was filed with the village clerk; that the applicant, on the 1st day of May, under color of the license which had been issued to him, and not otherwise, operated his saloon in said village, and sold intoxicating liquors in the usual course of business during said day; that on the evening of May 1 notice was served on the board of an application to the district court for a writ of mandamus requiring it to cancel the applicant's license; that thereupon the applicant closed his saloon, and did not reopen it, or again sell intoxicating liquors, until after a decision of the district court affirming the subsequent action of the village board, by which applicant was granted a license. It also appears that on the 2d day of May, 1914, the former order granting the applicant a license was canceled, and the village board set the remonstrance down for hearing on the 7th day of May, 1914; that on that day one of the original petitioners withdrew his name from the petition, and the name of four other freeholders of the village were signed to the petition with the consent of the board. It further appears from the stipulation that there were only 57 resident freeholders in the village of Oconto. At the hearing the remonstrance was overruled and the applicant was granted a license, but it was ordered that it should not be delivered to him pending an appeal to the district court, of which the remonstrators gave notice.

An appeal was perfected, and it was contended on the hearing in the district court that the petition of the applicant did not contain the requisite number of freeholders

to entitle him to a license, and the board had no authority for publishing the notice of his application. It was also contended that on the 1st day of May, 1914, the applicant opened a saloon and operated the same during that day, and sold intoxicating liquors without having a license therefor, contrary to the provisions of chapter 40, Rev. St. 1913. An ordinance of the village was introduced in evidence, by which it was provided, in substance, that it shall be unlawful for any person to sell or give away any intoxicating liquors within the village without having first complied with the provisions of this ordinance. By section 2 it was provided that any person or persons desiring to sell vinous, spirituous or malt liquor at retail shall procure a petition signed by 30 *bona fide* resident freeholders of the village of Oconto, and shall give notice of the filing of said petition by publication as required by the law of the state of Nebraska, commonly known as the "Slocumb Law." He shall file his bond in the sum of $5,000, as required by the statutes of the state of Nebraska, and conditioned as therein provided.

It is admitted by the stipulation that the applicant's petition was signed by a majority of the resident freeholders of the village at the time the notice was published, and it is contended by the applicant that the petition was sufficient according to the provisions of section 3869, Rev. St. 1913, and conferred jurisdiction upon the board to publish the notice and grant the license. It is not contended, and the remonstrance does not allege, a failure in any other respect to comply with the ordinance of the village, and consequently that question need not be considered.

Section 3869, Rev. St. 1913, contains the following provisions: "In granting licenses or permits such corporate authorities in cities and villages, and the board of fire and police commissioners in such other cities, shall comply with and be governed by *all* the provisions in this chapter in regard to the granting of license. * * * Provided, further, in granting any license the petition therefor shall be sufficient if signed by 30 of the resident freeholders, *or if there are less than 60,* of a majority of the freehold-

ers of the ward or village where the sale of such liquors is to take place."

In the case at bar it appears that there were but 57 resident freeholders in the village, and that a majority thereof had signed the applicant's petition, therefore the ordinance which provided for the signature of 30 freeholders residing in the village was to that extent in conflict with the general statute above quoted. It follows that the petition was sufficient in the first instance, and authorized the village board to publish the notice and grant the applicant a license. *Thompson v. Mt. Vernon,* 11 Ohio St. 688. *Maxwell v. Reisdorf,* 90 Neb. 374, is not in conflict with this view, because in that case the petition was not signed by the required number of freeholders when the notice was published.

As above stated, on the day set for the hearing of the remonstrance in this case, one of the petitioners withdrew his name from the petition. This did not deprive the board of the power to publish the notice, for at the time the notice was published the petition contained a sufficient number of names of persons qualified to sign the same, and authorized the board to grant a license; and we are of opinion that, when one of the signers withdrew his name from the petition on the day set for hearing the remonstrance, the board had authority to allow the petitioner to substitute the four other resident freeholders as signers to his petition. *State v. Weber,* 20 Neb. 467; *Zielke v. State,* 42 Neb. 750; *Thompson v. Eagan,* 70 Neb. 170. It was not necessary to republish the notice of the application for a license to sell intoxicating liquors after the additional names were added to the petition.

This brings us to the determination of the contention of counsel that the applicant had been guilty of a violation of the Slocumb act, by selling intoxicating liquors during the year previous to the time he sought to procure a license. We think this contention is without merit. The applicant is conceded by the stipulation to be a man of good character and standing, and it is conceded that he had not previously engaged in the sale of intoxicating liq-

uors. On the 30th day of April the village board granted him a license, and, acting in good faith and under the belief that his license was valid, he opened his saloon on the 1st day of May, which was the first day of the current license year, and sold intoxicating liquors until the evening of that day, when he was notified of the filing of the remonstrance; that he immediately closed his place of business, and did not again engage in the sale of intoxicating liquors until the appeal of the remonstrators was decided by the district court for Custer county.

It seems clear that, if the applicant was guilty of a violation of law, that violation occurred within the current year, and to our minds it is extremely doubtful if he violated the law in any respect. He had complied with all of the provisions of the Slocumb law, and with all of the valid provisions of the ordinance of the village. At the time the license was granted to him on the 30th day of April, 1914, there was no remonstrance or other objections on file against the issuance of his license, and it would seem that the license first issued was in all respects valid. The fact that one of the signers to the petition withdrew his name some seven days afterwards would not be sufficient to make the applicant a violator of the law.

As we view the record, it contains no reversible error, and the judgment of the district court is

AFFIRMED.

ROSE and FAWCETT, JJ., not sitting.

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STATE, EX REL. HENRY C. BITTENBENDER ET AL., APPELLANT, V. EXCISE BOARD OF CITY OF LINCOLN, APPELLEE.

FILED DECEMBER 18, 1914. No. 18,719.

**Intoxicating Liquors: PROHIBITION OF SALE: REPEAL OF STATUTE.** The act of the territorial legislature of 1855 (laws 1855, p. 158) prohibiting the manufacture and sale of intoxicating liquors was repealed by the legislative act of 1858 (laws 1858, p. 256).

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

*Henry C. Bittenbender* and *Ada M. Bittenbender,* for appellant.

*Fred C. Foster* and *D. H. McClenahan, contra.*

BARNES, J.

An application was presented to the district court for Lancaster county for a peremptory writ of mandamus to compel the excise board of the city of Lincoln to adopt rules prohibiting the manufacture and sale of malt, spirituous and vinous liquors in said city, except for mechanical and medicinal purposes. An alternative writ was allowed, which contained, among other things, the allegation that the act of the territorial legislature of 1855 prohibiting the manufacture and sale of such liquors had never been repealed and was in full force and effect. The respondents demurred to the alternative writ, the demurrer was sustained, the action was dismissed, and the relators have brought the case here by an appeal.

It appears that the territorial legislature, at its session of 1855, passed an act (laws 1855, p. 158) to prevent the sale or manufacture of intoxicating liquors. By section 1 of that act it was provided: "That from and after the first day of April, A. D. one thousand eight hundred fifty-five, it shall not be lawful for any person to manufacture, or give away, sell, or in any way, or by any manner of subterfuge, traffic, trade, exchange, or otherwise dispose of any intoxicating liquors within this territory, to be used as a beverage." By section 2 it was provided: "The places commonly known as 'dram shops' are hereby prohibited and declared public nuisances, and their establishment shall be presumptive evidence of a sale of intoxicating liquor within the provisions of the foregoing section." Section 3 provided: "The establishment or the keeping of a place of any description whatever, and whether within or without a building, coming within the spirit and intent of this act, and the establishment, or the keeping a place of

any description where other persons are accustomed to resort, providing their own liquors, of the prohibitory character purchased elsewhere, and drinking same there, shall be taken to be within the meaning of this act." The remainder of the act provided suitable penalties for its violation.

It is the contention of the relators that this act, which was approved March 16, 1855, is still in full force, and therefore it is the duty of the excise board to provide rules for carrying the same into effect. It appears, however, that the territorial legislature, at its session of 1858, passed an act entitled "An act to license and regulate the sale of malt, spirituous and vinous liquors in the territory of Nebraska." Laws 1858, p. 256. We find from an examination of that act, which was approved November 4, 1858, that it is complete in itself; that it disposes of the whole subject relating to the sale of such liquors. It provides, in substance, that the county commissioners of any county in the territory may at any regular session grant and issue a license for the sale of malt, spirituous and vinous liquors to any person or persons who shall comply with its conditions. It provides that the applicant for a license shall file with the county clerk the petition of at least 10 freeholders of the township in which he resides, signed and attested before a justice of the peace or other competent officer, setting forth that the applicant for a license is a man of respectable character and standing, and a resident of this territory, and praying that a license may issue to him. It further provides that the applicant shall at the same time file with the county clerk his bond to the county in the sum of not less than $500 nor more than $5,000, with a good and sufficient security to be approved by the county commissioners, conditioned that during the continuance of his license he will not keep a disorderly house; that he will not allow gambling with cards, dice or any other implements or devices used in gambling within his house, or within any outhouse, yard or other premises under his control. It provides for the payment of all damages, fines and forfeitures which may be adjudged against

him under its provisions. It provides that the applicant shall pay into the county treasury for the use of the school fund to be distributed as other moneys a sum not less than $25 nor more than $500, at the discretion of the county commissioners, and shall file the treasurer's receipt therefor in duplicate with the county clerk before such license shall be issued; and suitable penalties are provided for selling without such license. The act further provides that any person or persons so licensed who shall sell any intoxicating liquor to an Indian, insane person, or idiot shall be fined, etc.; and that the person or persons so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; that he shall support all paupers, widows, and orphans, and shall be liable for the expense of all civil and criminal prosecutions growing out of or justly attributable to his *retail traffic in intoxicating drinks*; that it shall be lawful for any married woman or other person at her request to maintain an action on the bond above mentioned for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children; that, when any person shall become a county or city charge by reason of *intemperance,* a suit may be instituted by proper authorities on the bond of any person licensed under the act who may have been in the habit of selling or giving intoxicating liquor to the person so becoming a public charge.

Without further description of the provisions of the act, it may be said to contain a complete course of procedure relating to the sale of intoxicating liquors, and provides penalties for sales made without a license, and concludes as follows: "Section 16. All acts or parts of acts now in force coming in conflict with the provisions of this act are hereby repealed; except, 'An act to prevent the use of intoxicating liquors among the Indians or half-breeds in this territory,' approved January 26, 1856. Section 17. This act to take effect and be in force from and after its passage. Approved November 4, 1858."

It is a matter of common knowledge that the act of 1858 was immediately treated as a repeal of the prohibitory act of 1855, and from the date of its passage to the present time the municipal authorities, the legislature, the courts, and the people of the state have acquiesced in the licensed sale of intoxicating liquors. The act of 1858 has been several times amended, and the legislature of 1881 (laws 1881, ch. 61) adopted what is called the "Slocumb Law," which contains the provisions of the act of 1858, and the Slocumb act, as amended, is now chapter 40, Rev. St. 1913. That law, in effect, provides for local option, and thereby the sale of intoxicating liquors may be prohibited in any municipality where prohibition is desired by a majority of the people. This court has repeatedly construed the provisions of chapter 40, Rev. St. 1913, as authorizing the licensing and sale of intoxicating liquors as a beverage. *Barrett v. Rickard,* 85 Neb. 769; *Luther v. State,* 83 Neb. 455. This construction, after having been acquiesced in for more than 40 years, should be adhered to. *Franklin v. Kelley,* 2 Neb. 79.

Again, it is our opinion that the act of 1858 directly repealed the prohibitory act of 1855. Relators, in their able and exhaustive brief, conceded that all of the provisions of that act, except those contained in sections 1 and 2, were repealed, but insist that those sections are unrepealed and are in full force. We are unable to sustain this contention. The act of 1855 amounted to absolute prohibition, while the act of 1858 provided for the licensing and sale of intoxicating liquors. The last mentioned act was comprehensive in its terms, and disposed of the whole subject relating to the sale of intoxicating liquors. It in terms repealed all acts or parts of acts then in force in conflict with its provisions, except the act prohibiting the sale of intoxicating liquors to Indians and half-breeds. Every part of the act of 1855 was in direct conflict with the provisions of the act of 1858, and all of its provisions were repealed.

It may be observed that at the time this legislation was enacted the territorial legislature was not restricted

by any constitutional provisions relating to titles to acts, or to any particular form of repealing clauses.

It follows that the judgment of the district court was right, and it is

AFFIRMED.

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ALVARADO W. CRAIG, ADMINISTRATOR, APPELLEE, V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILROAD COMPANY ET AL., APPELLANTS.

FILED DECEMBER 18, 1914. No. 17,877.

1. **Railroads:** GRADE CROSSINGS: CARE REQUIRED. At highway crossings at the same grade as the railroad, and at like street crossings in cities or villages, a railroad company must use such care and precaution as ordinary prudence indicates to avoid injury to travelers, and the degree of care which the law requires to be exercised must be commensurate with the probability of danger.
2. **Trial:** QUESTIONS OF LAW AND FACT. Where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to determine; but, where the evidence is undisputed, and but one reasonable inference can be drawn from the facts, the question is one of law for the court.

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

*Brome & Brome, James B. Sheean* and *George W. Peterson,* for appellants.

*Sullivan & Rait* and *W. T. Thompson, contra.*

LETTON, J.

Plaintiff's intestate was killed while driving over a railroad crossing in the village of Lyons. This action is for damages for the wrongful death of the deceased.

In substance, the petition alleges that there is a mill and elevator to the west of the railroad track in Lyons, Nebraska, near Main street; that a large number of teams

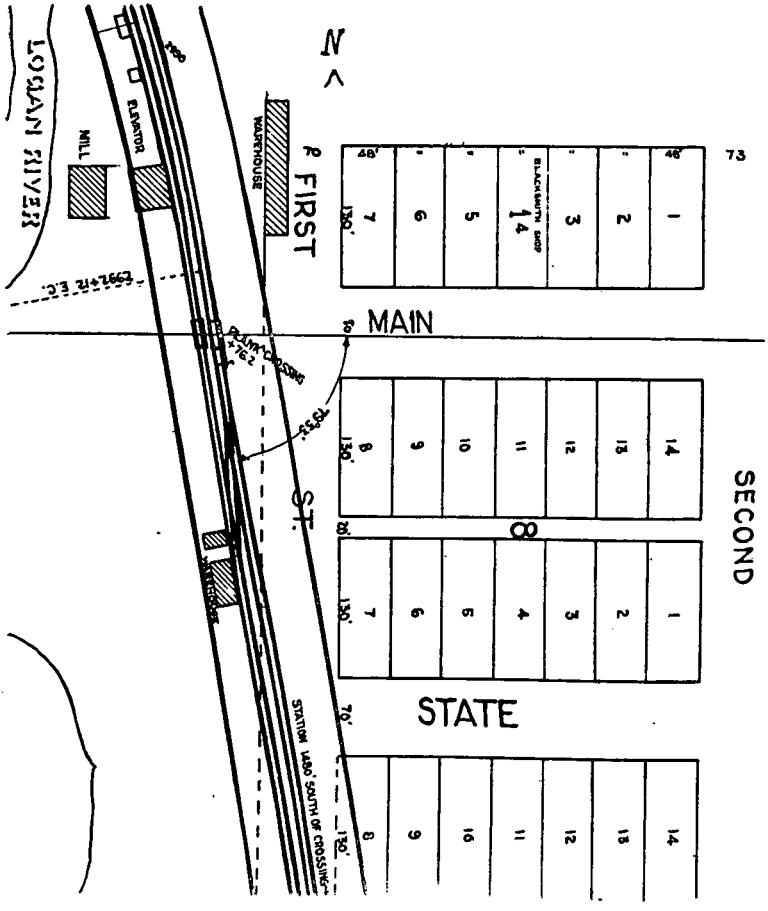
are constantly passing to and fro over the railroad crossing at that point; that on the 11th day of May, 1911, the plaintiff's son, Zell Craig, a young man about 18 years of age, and Catherine Craig, plaintiff's wife, while driving from the mill across the track, were struck and killed by a passenger train, of which defendant Murphy was the engineer; that the view was obstructed by buildings and erections close to the track, and there was no flagman stationed or signs given at the crossing. The negligence charged is that the defendant ran the train at a high, dangerous and unusual rate of speed, failure to ring a bell or blow the whistle when the train was at least 80 rods from the crossing, and to keep the same ringing or whistling until the crossing was passed, and the failure to stop the train after defendant railroad's servants knew that the team was upon the crossing.

The answer denies negligence, and pleads contributory negligence. It also pleads by way of counterclaim that, by the carelessness of the Craigs, the train was derailed and damages inflicted to the track, the cars and the engine in the sum of $1,015. A similar answer was filed by the engineer of the train, except that in his counter-claim he alleges personal injuries to himself caused by the derailment. Plaintiff had judgment against both defendants for $7,000, and defendants appeal.

The undisputed facts or those clearly proved will first be stated, and the testimony as to other material matters, narrated, omitting matter covered by the general statement.

Lyons is a village with a population of about 1,000 people. Main street, shown upon the accompanying plat, is the business street of the town, and the larger part of the business is transacted in the two blocks immediately east of the railroad crossing. The railroad station is 1,480 feet south of the crossing, and there is a slight upgrade from the crossing to the station. From 150 to 400 people cross the tracks at this crossing every day; a large number of them going to the mill, elevator and other buildings to the west of the track. A continuation of the street is also

the main highway to the well-settled farming country lying to the west of town. The mill and elevator are separated by a distance of from 20 to 23 feet, and this is narrowed by a platform on the side of the mill, used for load-




ing and unloading and for access to the building. Both the mill and elevator are operated by water power from the Logan river; the dam being close to the mill. There is a direct conflict in the testimony as to whether a box car was standing on the side-track near the south end of

the elevator, but the jury evidently found that the car was there and obstructed the view. From the center of the main line to the center of the side-track at the crossing is 14 feet, 10 inches. The ground slopes upward slightly from the driveway between the mill and elevator to the railway. Parties desiring to load or unload at the mill would drive north between the mill and elevator, but in order to return were compelled to drive beyond the mill and make a sharp turn, coming back through the driveway by which they entered. There is a sharp curve in the railroad north of the elevator, so that looking north from the mill platform, and from the turning place still further north, a view of the railroad can be had extending to the northwest for more than half a mile, and the view of the track from immediately west of the crossing is cut off by the elevator. There is a dam with an eight-foot fall close by the mill on the west, and this and the machinery of the mill made the locality of the driveway more or less noisy. On the morning of the accident Zell Craig, accompanied by his mother, Catherine Craig, drove to the mill with a grist, unloaded it upon the platform, drove north to the turn, and came back through the driveway. There was a strong wind blowing, but there is a conflict as to whether it was from the north or south. There is testimony that one of the horses that Craig was driving was a broncho which was not well broken, but this we think is not material, since there is no proof of fractious or unruly conduct on the part of this animal at this time. The estimates as to the speed of the train vary from 25 to 35 miles an hour, but we are satisfied from the proofs that it was running at least at the rate of 30 miles as it approached the crossing. The proof is that the statutory signals were given, and the court so instructed the jury.

The testimony on behalf of plaintiff as to other material facts is substantially as follows: One witness, who was in the blacksmith shop in the center of the block east of the crossing, on the north side of the street, said that he heard the train whistle for the crossing and afterwards

give a danger whistle before the team was struck, and that he did not see the team or wagon until after the collision.

The next witness was the plaintiff, who testified as to local surroundings, the age of his son, and his ability to labor. He also gave facts as to the other members of his family and the pecuniary loss sustained by the death. The third witness, who stood at the door of the blacksmith shop, testified that he saw the team come up over the railroad, and saw the wagon cut in two by the train; that at the time the team was being driven over the crossing it was "just coming over in a little trot."

On the part of the defendants, the miller, who helped Craig to unload the grist, testified that while he was on the mill platform, and after Craig had started the team north in order to turn, he heard the train coming south, whistle at the Logan bridge (which is half a mile north), and afterwards heard it whistle again for the crossing; that Craig turned and drove back between the mill and elevator with the team walking; that after he passed the mill, and just after he began to make the turn to the crossing, he used his whip on the horses, and continued to use it until he was struck by the engine. He also testified that there were no obstructions to the view north of the mill from the turn except a little clump of trees half way between the Logan bridge and the trestle bridge near the whistling post.

One Behn, who was driving a team for the mill-owner, was leaving the mill for the crossing just as Craig drove into the driveway. The witness drove his team to a point about 30 feet west of the side-track, when he heard the whistle and stopped. He waited for the train to pass. He testified that he saw Craig start to whip his horses as he turned to go up to the crossing; the horses were trotting; that he saw him look to the north as he went up the grade onto the crossing at about the switch track. The witness shouted as loudly as he could to him to stop as he passed him. Craig was then about 8 or 10 feet away from him. He did not see the train until it was east of the elevator.

Mr. Lyons, proprietor of the mill, was in the mill near an open window in the southeast corner. He testifies that he saw the team as it came south of the mill. As it approached the crossing Craig drove faster. He turned his head to the north as he cleared the side track, and as he turned back he applied the whip. He says, "the woman made a grab for his arm or the lines," and the horses passed onto the main line on a gallop. The team passed the engine, and it struck the wagon. There was no box car beside the elevator. Cross-examination: He first saw the train south of the elevator, and the whipping when Craig was going upon the switch track about 25 or 30 feet from the main line.

The engineer of the train testified that the bell was ringing continuously between the whistling post and the crossing; that he saw the team and wagon on the track when he was about 100 feet away and immediately applied the emergency air.

Another witness, the postmaster, who was 50 feet east and 60 or 70 feet south of the crossing, testified that he did not see the team until it was practically right upon the side track. Craig then was urging and whipping the horses and they were on a gallop.

The fireman testified that he rang the bell continuously from the whistling post until they reached the crossing, and that the train was going about 30 miles an hour.

Another witness was unloading garbage into the river southwest of the mill and about 100 feet west of the crossing. His attention was attracted by the manner in which Craig was driving past him toward the crossing; that he was whipping the horses and urging them on, driving right by the heads of the team of the witness. Witness heard the train when it whistled for the crossing, saw it through the driveway between the elevator and the mill, and saw it again as it came past the elevator. The Craigs were then just started to go across the track. He saw Craig look toward the train just as he was driving upon the track.

The city marshal was standing in the creamery building, which is situated a little more than 100 feet west of the railroad track, and south of the highway, a little farther west than the mill. He heard the train whistle, saw a team coming from the mill toward the crossing. The driver seemed to be hurrying his team to get across the railway track and the crossing ahead of the train. He heard the emergency whistle and heard the bell rung.

Four assignments of error are discussed in the appellants' brief. They are: (1) That the defendants were not guilty of negligence; (2) that the deceased was guilty of contributory negligence; (3) that the court erred in rejecting evidence in support of the counterclaim for damages; and (4) that the verdict is excessive.

Defendants claim that the evidence does not warrant the inference that the speed of the train exceeded 30 miles an hour at the time of the accident, and insist that, since the statutory warnings with bell and whistle were given, even though the actual speed was 35 miles an hour, as one witness testified, this alone is not evidence of negligence. It is also said that, since trains had been running at this rate of speed at that point for over 30 years, this was the customary and usual rate, and attention is called to the fact that there was no ordinance limiting or regulating the rate of speed within the corporate limits. It is insisted that a fast rate of speed cannot of itself be negligence, citing cases, and quoting the opinion of Judge Lake in *Burlington & M. R. R. Co. v. Wendt,* 12 Neb. 76, to the effect that "speed alone, unconnected with any other fact or circumstance, and more especially where it is not shown to have been unusual, has never, that we are aware of, been held sufficient to show gross negligence." This opinion, however, also states that a rate of speed entirely reasonable at some places and under some circumstances might evince a reckless disregard for the rights of persons and property at another. The latter principle is also stated by Judge Lake in his opinion in *Meyer v. Midland P. R. Co.,* 2 Neb. 319, 335. The Nebraska cases cited in support of the theory that the rate of speed is no evidence of negli-

gence show that in each case the facts were that the trains were running in the open country outside of the limits of any city or village, and the language used applies to such conditions.

Defendant railroad also contends that, since it complied with the terms of the statute with respect to sounding the whistle and ringing the bell, it must be held free from negligence. We cannot take this view. The fact that certain precautions have been deemed necessary at all public crossings is no indication that further precautions are not demanded by the exercise of ordinary care at other places where obstructions to the view or other circumstances render a crossing more dangerous. *Ellis v. Lake Shore & M. S. R. Co.,* 138 Pa. St. 506, 21 Am. St. Rep. 914. The true principle is that a railroad company must use such care and precaution as ordinary prudence indicates. They must exercise greater care and greater vigilance in cities or towns where crossings are frequently used by large numbers of people than at ordinary crossings in the open country. The degree of care which the law requires to be exercised must be commensurate with the probability of danger. In some instances in cities and villages, ordinary care and prudence demand that gates be erected or flagmen stationed or electric bells or signals installed, while in other cases all that would be necessary would be to lessen the speed of the train, or give continuous signals of its approach, or both. *Grand Trunk R. Co. v. Ives,* 144 U. S. 408.

The jury evidently found that the defendant railroad should have better safeguarded the crossing, or that the rate of speed, considered in connection with all the other circumstances, was a negligent one. We are satisfied that the latter conclusion is upheld by the evidence. There is no proof that the deceased knew of the customary rate of speed at which this train was run at that point, and, no matter how long the practice of so running the train over this dangerous crossing had existed, it would not justify the lack of ordinary care.

Defendant railroad next contends that the deceased was guilty of contributory negligence, and that consequently plaintiff has no right to recover. The question presented is whether, upon the undisputed evidence, it is clear that the deceased did not use ordinary care at the time and place, under all the circumstances. In this case we may start with the proposition settled and determined that the railway company was guilty of negligence in the operation of the train; but, as was said in *Chicago, B. & Q. R. Co. v. Schwanenfeldt,* 75 Neb. 80: "Individuals are required to have some regard for their own safety. Every person of mature years and in the possession of his faculties is bound to make a proper use of them to avoid danger, and we are all required to take notice of the fact that a railway crossing is a dangerous place, and he who makes use of it must exercise that degree of caution commensurate with the danger." See *Koester v. Chicago & N. W. R. Co.,* 106 Wis. 460. It is the settled rule in this court that, where upon the evidence different minds may draw different inferences or conclusions from the facts proved, or where there is a conflict in the evidence, the matter must be submitted to the jury to determine; but where there is no conflict, and but one reasonable inference can be drawn from the facts, the question is one for the court. *Guthrie v. Missouri P. R. Co.,* 51 Neb. 746, and cases cited; *Knapp v. Jones,* 50 Neb. 490.

We are of opinion that no unprejudiced mind can read the undisputed testimony without coming to the conclusion that the deceased heard the train coming, and that he rashly attempted to cross the track ahead of it. The fact that he was urging and whipping the team before he could see the train is of great importance as showing his knowledge that it was approaching. He must have seen the team driven by Behn which was waiting for the train to pass before it attempted to cross, even if he did not hear the shout. Laying aside all the testimony with reference to Craig's ability to have seen the train as he was passing north in the driveway or at the turn after the miller heard the whistle, we are fully convinced that, when he passed the witnesses to the south of the mill with his horses trot-

ting and continued to urge them forward, he must have known of the chance that he took, and that he took the chance with knowledge of the risk. It is said that the instinct of self-preservation would prevent such action on the part of the deceased, but experience teaches that the hot blood of youth will take risks that older men will shun. The law, however, draws no distinction, unless the reckless one is of such tender age that, by reason of his lack of knowledge and experience, he cannot be chargeable with the lack of ordinary prudence. The witness for the plaintiff who saw the team come upon the track stood at a distance of over 200 feet to the east and north of the crossing, while the other witnesses were within a few feet of the team when the driver was urging them to greater speed close to the danger point. Courts are reluctant to interfere with the verdict of a jury upon questions of fact; but, where the evidence is undisputed, it becomes their duty to apply the law, and, if it clearly appears that there is no cause of action, so to declare. The principles governing are so clear that it is useless to cite authorities upon these propositions, although scores of cases may be found. We are convinced that, if the deceased had used ordinary care, he would not have been struck by the train, and that he was guilty of such negligence that there is no cause of action.

Having reached this conclusion, it is unnecessary to consider the other assignments of error. The judgment of the district court is therefore

REVERSED.

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