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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1915.

VOLUME XCVIII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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By Harry C. Lindsay, Reporter of the Supreme Court,
For the benefit of the State of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

73316

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WILLIAM B. ROSE, ASSOCIATE JUSTICE.
JACOB FAWCETT, ASSOCIATE JUSTICE.
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HENRY P. STODDART.....Deputy Reporter
VICTOR SEYMOUR.....Deputy Clerk [1]
PHILIP F. GREENE.....Deputy Clerk [2]

[1] Resigned October 15, 1915.
[2] Appointed October 16, 1915.

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NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
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Second	Cass, Otoe and Sarpy	James T. Begley	Papillion.
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		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, Dakota, Dixon and Thurston.	Guy T. Graves	Pender.
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne	Andrew R. Oleson	Wisner,
		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, Brown, Holt, Keya Paha and Rock.	R. R. Dickson	O'Neill.
Sixteenth	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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IN MEMORIAM

CONRAD HOLLENBECK

At the session of the Supreme Court of the State of Nebraska, April 5, 1915, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable John B. Barnes, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Jacob Fawcett, Honorable Samuel H. Sedgwick, and Honorable Francis G. Hamer, Associate Justices, the following proceedings were had:

May It Please the Court:

Your committee, appointed to prepare and report resolutions in memory of the late Chief Justice Conrad Hollenbeck, respectfully submit the following:

Whereas, on the 21st day of January, 1915, the Honorable Conrad Hollenbeck, who less than a month before had taken the oath of office and entered upon the duties of Chief Justice, was removed from the scene of his earthly activities, and

Whereas, it is fitting that his learning as a lawyer, his fidelity and efficiency as a public servant, and his rugged virtues as a man should receive formal and solemn recognition by this Court, therefore,

Resolved, That we profoundly regret that the Honorable Conrad Hollenbeck was permitted to wear for so short a time the honors pertaining to the office of Chief Justice of this Court, which he had well earned by a life of rectitude and devotion to duty:

That in his death the bar lost an able and honorable member; the bench, a learned and just judge; and the state, a useful and exemplary citizen.

That these resolutions be entered at length on the records of this court, and that the clerk be directed to transmit a copy of the same to the widow of the deceased.

I. L. Albert,
A. M. Post,
George L. Loomis.

JUDGE I. L. ALBERT:

May It Please the Court: In presenting the foregoing resolutions in memory of the late Chief Justice Hollenbeck, it would seem proper to present therewith a short sketch of his life and character.

Conrad Hollenbeck was born at Hebron, Potter county, Pennsylvania, on the 19th day of November, 1847. In the spring of 1864, at the age of sixteen, he enlisted as a private in the Two-hundred Seventh regiment of Pennsylvania volunteers, and with his regiment participated in all the battles of the army of the Potomac, from the Battle of the Wilderness to the surrender at Appomattox. After his discharge from the army, he entered Mansfield College, Pennsylvania, from which he graduated in 1869. He then took up the study of law, and was admitted to the bar in 1871, and for about six years practiced his profession in Coudersport, Pennsylvania. He was a member of the Legislature of Pennsylvania in 1874 and 1876. On the 9th day of May, 1877, he was married to Miss Janett Knox, and, leaving his native state, took up his residence in the same month at Fremont, Nebraska, where he continued to reside until his death. In 1890 he was elected County Attorney of Dodge county and served in that capacity until 1895. In 1898 he was elected Judge of the Sixth Judicial District of Nebraska and held that office continuously thereafter until January, 1915, when he resigned to take the office of Chief Justice of this Court, to which he had been elected at the general election in 1914. He died January 21, 1915, having served but three weeks of his term.

As a soldier, he was brave and ever ready to respond to the call of duty. As a legislator, he was reckoned among those who could be depended upon to act wisely, uninfluenced by personal considerations. As a practitioner, he was able and conscientious and true to the best ideals of the profession. Through all the mazes and intricacies of the relations of the attorney to his clients and the court, he threaded his way without once finding his feet on doubtful ground. As a judge, he was fearless and impartial. He weighed carefully, but, when the time for decision came,

moved confidently. While seemingly slow in his mental processes, few could grasp more readily or discern more accurately the real points in a controversy. He was more of a student than a reader; more given to reflection than to research. But his record as a judge leaves no room for doubt that he had drank deeply at the fountain heads of the law. He was a man of broad sympathies, kindly in his dealings with his fellow men, and charitable in his judgments. He was easy to approach, but there was that in his bearing which forbade undue familiarity. The people trusted him implicitly. While many litigants left his presence disappointed, no one ever went away with any doubt that he had received the benefit of his best judgment.

Fulsome praise and finely polished sentences, were they at my command, would be out of place in speaking of a man like Judge Hollenbeck. His is one of those fine characters that words of praise cannot embellish nor words of criticism mar.

The foregoing resolutions are offered as a slight tribute to the memory of Conrad Hollenbeck, late Chief Justice of this Court, who, in the course of his life, proved himself a gallant soldier, a wise lawmaker, a just judge, and a worthy man.

HONORABLE GRANT G. MARTIN:

May It Please the Court: I knew Judge Hollenbeck intimately for twenty-five years. I knew him as a man, a friend independent of and separate from his professional career. His was a genial, affable, generous nature. These characteristics seemed to draw to him all classes of men. His office was a sort of community Mecca where the young lawyer and law student went for encouragement; where the poor and downtrodden went for help and advice in personal matters; where the more fortunate of the community sought counsel on questions of public welfare. In him they found one devoid of impetuous, dictatorial, and domineering qualities, but they also found a man wonderfully gifted with mental equipoise, one cool and deliberate, yet open and sympathetic. I have never known another

who, seemingly without effort, made so many friends in the circle in which he moved and who held his friends to the last. In his private practice he was pre-eminently the poor man's lawyer.

I knew him as a public prosecutor for four years. In a county of over twenty thousand people he was vigilant and fearless in prosecuting offenders, but in the conduct of criminal cases he seemed to be guided by a determination to learn the guilt or innocence of those charged with crime. I do not think he ever asked for the conviction of a man whom he believed innocent, even when popular clamor or prejudice demanded it. This I regard as the highest duty of a public prosecutor.

I have heard some men characterized as natural trial judges. If such there are, he belonged to that class. Nature had abundantly endowed him with a judicial temperament, a powerful intellect. In judgment of men and things he excelled. In the business of the court, when possible, he called to his command those great equitable principles which are said to be the foundation and glory of our law.

JUDGE J. R. DEAN:

May It Please the Court: To your Honors and to the distinguished gentlemen of the Committee having in charge this memorial service, I am truly grateful for the opportunity your invitation gives me to join publicly in paying a brief tribute of respect to the high character of your late distinguished associate, a man whom in life we all loved, and whose memory a bowed and stricken state reveres.

For the second time in the history of our state death has removed a Chief Justice of the Supreme Court while holding that exhalted office. It is only in recent years that I came to know the late Chief Justice Conrad Hollenbeck at all intimately. But for almost twenty years I have known of the splendid reputation that he bore in his home county, and in his home judicial district, where he was so many times and so signally honored by election to public office; first as public prosecutor, an office that among law-

yers often marks the beginning of a public career; and then as district judge for sixteen consecutive years. In both capacities he served his constituents with that distinguished ability that marked all of his public service. But it was on the bench that his genius found its best expression, and it is on the work he did there that his fame securely rests.

The popular conception of a judge is that he is a relic of the past. Indeed there are some who would have you believe that he is an individual who has survived the ages from remotest antiquity. It is believed by many that in his interpretation of the law the judge is governed by its letter, and that he altogether ignores its spirit; that he so delights in the laws' technicalities, out of which have grown in part its delays and many unjust oppressions, that he loses sight of the substantial rights of men, whether those rights pertain to life, liberty or property. It has come to be believed by some that to be in good and regular standing as a judge the gaze must be fixed for the most part backward; that the judge's horizon is at his back; that he must live and move and have his being in the murky mists of the lower ground and among the tombstones of the past; that a lookhout ahead is to be desired in every calling and in every legitimate human activity, except in the practice of the law and in its interpretation and in its application to human affairs; that man was made for the law; that the early interpretations placed thereon under conditions differing vastly from present conditions are unchangeable, and that it is sacrilegious, and perhaps treasonable, to hold to any other view. I have not said these views express the true conception of the judicial office, but merely the popular conception. But how far removed from the popular conception of the judicial office, as here depicted, was the late Chief Justice Hollenbeck.

In the long ago there was a philosophic observer who said: "Four things belong to a judge: To hear courteously, to answer wisely, to consider soberly, and decide impartially." I submit your Honors, and my brethren of the bar, that the judicial career of the man whose memory

today we honor met these requirements in full and heaping measure.

Conrad Hollenbeck was a just Judge. But he was more than a judge. He was a man who did not wander aimlessly about in the winding pathway of legal lore. He looked to see where justice led, and that determined direction for him. He humbly followed in the footsteps of the Master, whom we are taught to believe was touched with a feeling of our infirmities. Judge Hollenbeck was learned in the law. And he was not only learned in the law, but he was a master in the interpretation and in the application of the spirit of the law. He did not seek asylum in the laws technicalities, nor did he tolerate them in those who practiced before him. He was in entire accord with the pronouncement of that greatest advocate of the ages who, in speaking of the law, said: "The letter killeth, but the spirit giveth life."

A few weeks before his untimely death, if in the Divine plan there be such a thing as untimely death, I met the Judge by appointment at a neighboring town. It was in December of last year, and it was the last time that we met. The object of our meeting was soon accomplished. We then engaged for a little while in social converse. He talked a little about some of the plans he had in view with respect to his work that was about to begin as one of the judges of the Supreme Court. He then became reminiscent, and he talked tenderly about his friends and those who were endeared to him by the ties of many years. He dwelt upon his close relationship with the good people of his district among whom he had lived and labored for so long a time, and, as he talked, I thought I could detect a tone of sadness in his expressed thought that those relationships were soon in part to be severed. As I listened to his voice and looked into his kindly face, his words seemed to me like a benediction.

This man was a veteran of the Civil War. At its close he was an honorably discharged soldier, and he was then only nineteen. In my home town lives Melvin Hagadorn, a veteran and a comrade of the late Chief Justice in that

war. He told me only a few days ago that when Conrad Hollenbeck enlisted there were those who urged him, on account of his extreme youth, to remain at home. To all entreaties he replied: "Lincoln has called me to the front. There is a place for me on the firing line that I must fill. If I remain at home it will be vacant. No man can take the place of another when duty calls to fight in defense of the flag." How well the soldier boy bespoke the man matured. But Conrad Hollenbeck was more than a soldier; he ruled his own spirit, and we are told that a man who can do that is greater than a man who takes a city. It has been said of him that in a marked degree he was strong-willed. He was strong-willed, but that strength of will he nobly exercised in control of himself. It is for us to emulate his virtues and glory in the strength that was perfected in him.

We are assembled, not alone to mourn, nor alone to bestow fulsome praise upon the departed, but to learn lessons from his life of service, to the end that we too may make our lives worth living. The career of Conrad Hollenbeck is an inspiration; it ought to be; it is an incentive to honorable achievement. As he is now recalled to memory, I know I saw in him some of the qualities that are common to men who have become honorably prominent in the world's work. He was a modest man. He exercised the virtue of patience. The trumpeting of the noisy egotist, vain glorious and self-centered, was to him distasteful. He was plain in speech, in manner, in appearance, and even in the garb he wore. Here was a man lacking in lavish outward adornment, whom the people delighted to honor. The people always delight to honor a man who honors himself and his position by keeping faith with them. The trickster, the tinseled charlatan, may by caprice or by accident attain to high position, but the people do not honor them. They merely endure them.

What a living mystery is man! Some one has said his span of life is compassed in this brief expression: "He lived, he loved, he toiled, he disappeared." We know that mortal man is here today, tomorrow he is but a memory,

may be of good report, may be of ill. So true it is: "Their works do follow them."

When Judge Hollenbeck was in his prime, how strong and massive he appeared, in mind how vigorous. And yet so gentle was his nature that often he was moved to tears by the story of distress. But he was not content alone to give the outward sign of sympathy, the spoken word of cold condolence. He was not of those who looked on the plight of the unfortunate, and, shaking the head, passed by on the other side. He was of those who are compassionate, and give of their time and of their means to relieve the distress of those who fall by the wayside. Time fails me to speak of all the virtues of this manly man. The few that in a faltering manner are here recounted were known to me while yet he lived, but through all the years I maintained a stoic silence, and now that God's finger has touched his heart and it is still, I bring at this late hour a feeble tribute to his memory and reverently lay it on his tomb.

It is altogether fitting that this grateful service should be held during the Easter season when the silent miracle of life springing from the bosom of apparent death appeals to our every sense. The annual resurrection that we observe in nature in the springtide of the year leads our minds to meditate upon the influence that brings this phenomena to pass, and, as one has said, we "look through nature up to nature's God." We are led, then, to believe that, if for bud and blade and leaf there is life after death, for man, with all his hope, his aspiration, and his longing to live again, there too is a resurrection. Let this be the thought of our minds, the language of our hearts: "I know that my Redeemer liveth."

To human sight, to human sense, the passing of the beloved Chief Justice bears almost the mark of tragedy. But can the finite mind fathom the Infinite? "Canst thou by searching find out God?" Let us not forget there is a Divine hand that holds in its grasp the destinies of men and of worlds. Let us be content. Let us be reconciled to the Divine decree. Let us believe that, when the light of his life went out in the deepening darkness of dissolution, on

the further shore the light of the eternal morning rested on his wasted brow.

HONORABLE FRANK D. WILLIAMS:

May It Please the Court: Judge Conrad Hollenbeck began his public career with his election as District Judge of the Sixth Judicial District of Nebraska in 1898. It was in that position that he developed those qualities that later qualified him for the highest judicial position in the State. When he retired from the actual practice of the law and entered upon his duties as District Judge, he was in the prime of his vigorous manhood, a strong and sturdy character. Nature had done much for him. He was large of stature, had great mental power, and a fine sense of justice, inherently honest, and endowed with a full measure of common sense. He was unusually well-grounded in legal principles, and early gave evidence of having read with understanding the fundamental principles of the law. He was blessed with retentive memory, given much to reflection, fine mental poise, and of a judicial bent of mind. He soon learned that his place was of the judiciary, and, with singleness of purpose, he devoted many of the best years of his life to that work. He was not a bookish man, but he was a good judge of men, and possessed of unusual power of analysis, and had the rare faculty of being able to eliminate nonessentials, and with almost unerring judgment point out with clearness and precision the vital issues in the controversy. It was in the District Court work that he was his best. Modest, unassuming, and soft-spoken, yet coupled with an ever present dignity, the work moved smoothly along in an orderly manner, and with accuracy and dispatch. While District Judge he presided at many important trials, impressing those with whom he came in contact with his power to grasp the matters in controversy. When these contests were at their height he never failed to retain full command of the situation. And in the tensest moments, when life, liberty or property hung in the balance, he was the same patient, kindly Judge, free from bias and free from prejudice. Among the older members of the

bar of his District are some of the most capable lawyers of the middle west. These men often met as opposing counsel in his Court. On their part they were outspoken in admiration of his ability. On his part he took a personal interest in their success and was proud they were of his District. Lawyers of learning and experience say it is very doubtful whether his superior as a District Judge has occupied that position in this State. Men intuitively trusted him. The Legislature of 1911 attached Boone county to his District, and he was so well received that when the next general election took place he was elected without opposition.

For some time he had under advisement the wisdom of being a candidate for Chief Justice of this Honorable Court. Ill health deterred him in the early part of 1914, but he finally filed for the place in the state-wide primary campaign, and was chosen as one of the two candidates in the general election of 1914. The result of that contest was his election. In the counties of Boone, Platte, Colfax, Dodge, Nance, and Merrick, comprising his Judicial District, he received 11,764 votes, and his opponent received 3,357 votes. This expression of confidence on the part of his voters was a wonderful tribute to the man, and touched him deeply. Few men in this state have lived to receive such a gratifying testimonial at the hands of the voters. It was indeed a refutation of the too oft-heard statement that the electorate is ungrateful for the services rendered it by its public men.

In his intercourse with men he was uniformly kind and courteous. He never indulged in senseless criticism of his fellow men, but was quick to recognize the worth of those who may have differed from him. Judge Hollenbeck's life was like an open book. His friendship was wholesome and radiated good cheer, and he was in truth a manly man. In person, he had few of the graces of the courtier or of the frequenter of the drawing room, but he was rich in his love for his home, his family, and his friends.

On being elected Chief Justice, he viewed its duties with grave concern, and appreciated its responsibilities. He

brought to it the benefit of his long experience and ripened judgment, which would have been of real and lasting value to this Court. A few days before he took his seat he came to the capitol, weakened in body, but strong in the hope that he might be spared to do his work; but the change in his simple habits, together with the strain incident to his assuming his official duties, was too great a burden, and a higher Judge decreed that the silver cord should be loosed, and on the 21st day of January, 1915, Chief Justice Conrad Hollenbeck, like a tired child, passed into a peaceful sleep from which there was no awakening. By his death, his beautiful home life was broken. By it, the State lost a valuable citizen, and this Court one of its strong members.

We bid the good friend, the kindly Judge, farewell, and leave him, with an abiding faith that he has returned to the Creator who gave him life.

HONORABLE T. J. MAHONEY:

May It Please Your Honors: The occasion suggests reflection upon life, upon fame, upon service to mankind. The conspicuous place one may occupy in life, or the importance which history may attach to his career, is not always a true measure of his work or his service. Fame is often the outgrowth of accident, while worth and really meritorious service are ofttimes unnoticed. Against the few who are placed upon the pinnacle are the many who build the eminence. But the so-called "mute inglorious Milton," though often mute, is likewise often really glorious. We are prone to worship him who has wrought in the spot-light and whose achievements have redounded to the glory of the state, but we are all too apt to forget one whose life has been wanting in notoriety, though his labors may have yielded a greater contribution to the welfare of his fellows.

In some parts of the world, the power, the prestige, the glory of the state is everything, to which all considerations of personal happiness and individual well-being must be subordinated. Under such a régime, the function of

the people is the aggrandizement of the state. With us the function of the state is the individual well-being of its inhabitants, and whoever, in the discharge of public duty, contributes to that end is great, though he may not be famous.

Though he died the occupant of the highest position in the judicial system of our commonwealth, Conrad Hollenbeck's place in the history of the Nebraska judiciary must depend upon the discharge of his duties on the *nisi prius* bench. And, let it be remembered, the duties of that position are not mean. Whoever is called upon to administer justice between man and man, to vindicate the majesty of the state in the enforcement of her laws, but, most of all, to shield the unfortunate, and even the criminal, against a wrongful exercise of the state's great power—to that man are committed prerogatives so nearly approaching the authority of Omniscience that, if the necessities of human government did not compel the vesting of such power, we would stand aghast at its assumption by any mortal. Yet such is the power that organized society has found it necessary to commit, not merely to the courts of last resort, but to the *nisi prius* judges. Some parts of their work are subject to review, to modification, to correction, by the reviewing court, but justice without delay, justice that is free from bias, from considerations of person, justice tempered by mercy and unmixed with vengeance must depend in great measure on the trial court.

Whoever performs well the duties of such an office may not be conspicuous, but he is truly great. Such a man was Conrad Hollenbeck. He possessed a powerful intellect, a broad and true grasp of the law, an acumen that penetrated the subtle sophistries of the casuist, and, above all, a moral sense that is so often an unerring guide to a result that is just as well as lawful. He possessed the judicial temperament and remained serene and undisturbed in the midst of forensic battles that sometimes threatened to convert the temple of justice into an arena of oratorical gladiators. His impulses were generous and kindly. His voice was mellow and his speech deliberate. He bowed

without reluctance to the mandates of the law, but he always regarded the judicial tribunal as an institution for the furtherance of justice, rather than as affording an opportunity for the triumph of the most skilful.

By his career as a district judge, he inculcated reverence for the law and respect for individual rights. He cultivated a moral tone in the profession and among the people of his district. The impulses for good that sprang from his career do not end with his life, but will be perpetuated and multiplied and will continue to bring forth good fruit among many who did not have the happiness of his acquaintance. In this way, his influence is immortal. Such men do not die. What they wrought in their day, and according to their opportunities, will continue from generation to generation to enrich humanity, to purify and sweeten life, to mitigate the sorrows of the afflicted, and to lighten the burdens of those who are weary and heavy laden.

HONORABLE GEORGE L. LOOMIS:

May It Please the Court: I came here without a thought of attempting to add anything to the report of the committee, or to what might be more eloquently said by other members of the bar, and yet it is suggested to me that, inasmuch as I enjoyed a longer, and perhaps more intimate, acquaintance with Judge Hollenbeck than any other attorney, I ought not to let the occasion pass without adding something of perhaps a more intimate and personal nature.

It was my good fortune to locate at Fremont in August, 1876. The same fall came Judge William Marshall, and the spring following, Judge Hollenbeck. For one or two years after his coming, Judge Hollenbeck officed with me; we were office-mates, daily associates, and soon warm friends. Being both newcomers, and to some extent inexperienced, we were not overburdened with legal business, and had plenty of time to talk politics and law. Naturally we soon became familiar with each other's manner of thought, reasoning and investigation concerning legal questions.

In January, 1887, I became county attorney, and served four years, to be followed by Judge Hollenbeck for the next succeeding four years. I was both associated with him, and opposed to him, in the trial of important cases, as well civil as criminal. In practice he was eminently fair. I never saw about him even a suggestion of anything in the nature of trickery or sharp practice; nor did I ever know him to try to cover or suppress any feature of a case that court or jury ought to know as an aid to reaching a just decision. His ideas of the duty and responsibility of an attorney were in harmony with the best ideals of the profession.

To Judge Albert belongs the credit of placing Judge Hollenbeck on the bench. Judge Albert was serving as district judge by appointment, and was a candidate for the nomination and election to succeed himself. The two conventions—that of the People's Independent party of which he was a member, and that of the Democratic party of which Judge Hollenbeck was a member—met on the same evening at Columbus. A majority of each was in favor of uniting on a candidate. For some reason—I never knew why—his convention refused to honor itself by nominating Judge Albert, although he had proved himself an able and satisfactory judge. The Democratic convention favored Judge Albert. The contest continued until long after midnight, when Judge Albert, seeing that he could not win, threw his strength to Judge Hollenbeck and gave him the nomination, which was quickly and unanimously concurred in by the other convention. It was greatly to the credit of Judge Albert that he made such an unerring choice of a successor on the bench, and equally to the credit of Judge Hollenbeck that as able a judge as Albert should select him from among the many able lawyers of the district as the one best fitted for the place, even though his home was in the same city with Judge Marshall, who was then the other district judge.

I well remember an incident that occurred the next forenoon while standing with others in the street near the depot at Columbus waiting for a train home. A sturdy

farmer—I never knew his name, I wish I did—came up to me and asked whom we had nominated. I pointed out Judge Hollenbeck, who stood half the street's width away. He walked around to where he could get a good, unobstructed view of Hollenbeck's face, stood and studied him for a little until apparently satisfied, then came back to me and said: "Well, he looks to me like an honest man." And that is the way he looked to every one. There was something about him that impressed people with the conviction that he was honest. Lawyer and litigant, winner and loser, all left his court with the feeling that they had at least had the benefit of his honest, unbiased judgment.

I have heard the most groundless and unjust criticism of our courts. I have heard it from laymen, and, I regret to say, attorneys as well go to the extent of questioning, not only the ability, but the very integrity, of the court itself; but I have never known the miasmatic breath of cruel suspicion to be breathed against the personal or judicial probity of Judge Hollenbeck.

In these days when criticism of our courts is altogether too common and popular, when it strikes at the very life of our judicial system by tending to breed distrust in the minds of the people, and shake their confidence in the integrity of the courts, it is an armor of defense if we can point to the personnel of the court, to the judges, individually and collectively, and say the blighting breath of suspicion has never been, and cannot be, breathed against them.

It has been said of Judge Hollenbeck that he was not a great student. This depends upon the sense in which we use the word "student." If we restrict its meaning to the study of books and exclude every other means of study and source of information, I grant you he was not a great student. But, if used in its broader and truer sense as including original investigation, observation, thought, and the pursuit of information through sources other than printed pages, then Judge Hollenbeck was a student. One who arrives at the truth through the exercise of his own mental faculties, power of concentrated thought, clear an-

alytical reasoning, correct deduction, is certainly no less a student than one who reaches the same goal by following a printed guide. One may study nature in the fields and forest, he may study chemistry in the laboratory, astronomy under the starry canopy of the heavens, or complex questions in the solitude of his office, in the workshop of his own mentality, and if he discover the truth, if he reach a true and just conclusion, who would deny that he was in fact a student.

Judge Hollenbeck was more of a thinker than a reader. He would sit for hours with his mind intently fixed upon some question under consideration. He would examine it from every point of view suggested by attorneys; but he would study it in the light of accepted principles of law and justice, and his decision, when reached, must, in his mind, square with them. Given a correct premise from which to start, he could "think without confusion, clearly," in other words, could think along a straight line, could draw correct deductions from conceded facts, and he seldom failed to reach a correct conclusion.

I regarded Judge Hollenbeck as one of the greatest equity judges I have ever known. In this, his great strength lay in his deep sense of right and wrong, his thorough grounding in the fundamental principles of equity, his mental and moral integrity, and, by no means the least, his power to judge of men, to look through a witness, so to speak, and determine with almost unerring certainty whether he was telling the truth. Any purpose of a witness to evade the truth, or to testify otherwise than with perfect frankness and sincerity, could not escape detection by him. In his power to judge of the truthfulness of a witness, and of the weight that his testimony was entitled to, I have never seen his superior. To say that a man is infallible in any field is to ascribe to him more than human powers, but in this particular I think Judge Hollenbeck was as nearly infallible as it is reasonably possible for a judge to be. His ability to trace the thread of truth through a maze of contradictory evidence was indeed remarkable.

As a lawyer he was a credit to the profession; as a judge he was an honor to the bench. In his death, which seems

too untimely, the state has lost an experienced jurist of unquestioned ability and integrity just as he had entered upon the broadest field of usefulness open to a member of the bar—that which lies before the Chief Justice of our highest court. We who knew him best will remember him longest, and most keenly regret his loss.

HONORABLE ANDREW M. MORRISSEY, C. J.:

While yet a young man at the bar, it was my good fortune to become acquainted with Judge Hollenbeck. From the beginning of that acquaintance till the close of his life I knew him intimately and well. He was a man of unimpeachable character, faithful, earnest, honest. He indulged neither frills nor foibles. He was gentle, affable, and easy of approach, but, notwithstanding his simplicity and modesty, as a judge he was firm, forceful, and efficient. He reasoned accurately, ruled firmly, and in his court justice ever held the lighted torch. Of him it may well be said:

"None knew thee but to love thee
Nor named thee but to praise."

BY THE COURT:

As a tribute to his memory, it is ordered that the resolutions presented and remarks made be spread upon the records of the court, and published in the reports.

ANDREW M. MORRISSEY,
CHIEF JUSTICE.

IN MEMORIAM

ALLEN WESCOTT FIELD.

At the session of the Supreme Court of the State of Nebraska, November 1, 1915, there being present Honorable Andrew M. Morrissey, Chief Justice, Honorable John B. Barnes, Honorable Charles B. Letton, Honorable William B. Rose, Honorable Samuel H. Sedgwick, and Honorable Francis G. Hamer, Associate Justices, the following proceedings were had:

May It Please the Court: The undersigned, members of the committee to whom was assigned the duty of preparing and presenting resolutions in memory of Honorable Allen Wescott Field, deceased, beg leave to submit the following report:

On June 9, 1915, all that was mortal of Allen Wescott Field passed from among us, but his life remains as a comfort and inspiration to all who knew him.

In 1864, when but a lad, he settled with his parents on a homestead overlooking this city, in the then territory of Nebraska. The privations of a primitive life aroused his youthful ambition, and excited a longing for a broader field of work and influence. He hungered for mental equipment and training, qualifying him to participate in moulding and shaping the development of the new state. Thus inspired, he was among the first to enter the University of Nebraska. Here he won honors and was recognized as a leader in the various activities of college life. He graduated with the class of 1877, and was subsequently awarded honorary degrees.

He chose the legal profession, for which he immediately began careful preparation, and soon made a practical application of the knowledge acquired by serving acceptably as a Justice of the Peace. He was admitted to the bar in

1878, and at once entered upon active practice of his profession. Possessed of an active mind and strong convictions, with an energetic delivery as a speaker, he made rapid progress. From 1882 to 1886, while yet on the threshold of his profession, he was elected to the lower house of the state legislature, where his pronounced leadership won for him the distinction of speaker during his second term.

Following his legislative service he was called to the position of City Attorney of Lincoln. In 1887 a vacancy occurred on the district bench of the Second Judicial District of our state, then comprising the counties of Lancaster, Otoe and Cass. The district had many able and experienced jurists, but the Governor selected Mr. Field as the most available and promising to fill the vacancy. The appointment was approved by the voters of the district at the ensuing election. His administration of the office met with general approval, both by the bar and the general public, and he was re-elected in 1891 as one of the three judges of the Third Judicial District, then, as now, comprised of Lancaster county alone.

As a judge he was cool, deliberate, conscientious and courageous. He swept aside the element of influence. The merits of the controversy alone appealed to him. Personally he was courteous, unassuming and approachable, but demanded absolute respect for the dignity of the court, and unquestioned obedience to its orders and decrees. From the bench he gave forth decisions, not doubts.

In 1892 he resigned his place on the bench to accept the republican nomination for congress from the First Nebraska District. While he was defeated at the polls by a small majority, the campaign is still remembered as one of the most vigorous and spectacular in the history of the district, if not of the state. After this campaign, and until his death, he devoted his energies to the practice of his profession, and refused to be lured therefrom, though often tempted.

He was a safe and able lawyer, one of the strongest in the state, and a good counselor. He won a large and in-

fluential clientage; participated in much important litigation; was frank and courteous to the court and to his adversaries. He never misled nor deceived; was always cool and under self-control; he was never ruffled except under extreme provocation. He possessed the confidence of the courts and the profession to an unusual degree. He never encouraged litigation, and did not hesitate to refuse a retainer when the merits of the question involved did not appeal to him. He possessed that rugged common sense to which men turn for guidance in the affairs of life, and his advice on legal, educational and legislative questions was, until his death, in great and growing demand. The influence of his life is impressed on much that now is, and will continue as an inspiration in shaping and moulding much that is yet to be.

Be It Therefore Resolved:

1. That the Supreme Court and bar of the State of Nebraska unite in expressing sincere and deep regret for the loss which the state and its people have suffered in the untimely death of Allen Wescott Field. He served them faithfully and well, in private and public station, without fear or reproach. In the two score years of his active life, he did much to preserve the standards of sane, useful conduct and work in the every-day walks of life, as well as in the halls of legislation and in the courts. The influence of his life and the result of his work have contributed largely to promote confidence in, and respect for, the fixed rules of order and stability so essential to the preservation of the fundamental institutions of our country.

2. That in his death the state has lost one of its strongest, most useful and dependable citizens, the bar a highly esteemed and able member, his colleagues one of their most valued and respected fellow citizens.

3. That we request these resolutions be entered upon the records of this court, and the clerk thereof be directed to send a copy of the same to the family of the deceased

as an expression of our unfeigned sympathy for them in the loss they have sustained, and in which we share.

A. C. Ricketts,
E. J. Hainer,
Edward P. Holmes,
A. J. Sawyer,
J. B. Strode,
F. M. Hall,
Edward P. Brown.

BY THE COURT:

The resolutions presented and the remarks so aptly express the sentiments of the court, it is ordered that they be spread upon the records and printed in the reports, as a lasting tribute to his memory.

A. M. Morrissey,
Chief Justice.

During the period covered by these reports, in addition to the cases reported in this volume, there were 34 cases affirmed by the court without opinion, and 24 cases disposed of by the supreme court commission.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1915,

LOUIS FINK, APPELLEE, V. CHARLES M. MURDOCK ET AL., APPELLANTS.

FILED MARCH 13, 1915. No. 17994.

Mortgages: FORECLOSURE: SALE: APPRAISEMENT. Record examined, and its substance set out in the opinion. *Held* free from error.

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

E. O. Kretsinger and *Ernest L. Kretsinger,* for appellants.

A. D. McCandless, contra.

FAWCETT, J.

Appeal by defendant from a judgment of district court for Gage county confirming a sale in a suit for the foreclosure of a mortgage.

The errors assigned are: (1), that the judgment was not sustained by sufficient evidence; (2) that the appraisers were not disinterested and impartial appraisers; (3) the published notice of the time and place of sale was not given by publication for 30 days before the time of the sale; (4) the property sold for a sum grossly less than its fair market value, so much so as to make it appear to have been the result of fraud on the part of the appraisers; (5) that the appraisers were not selected by the coroner who made the sale, but by outside parties.

The first and fourth assignments are practically the same and will be considered together. The decree of foreclosure was for $1,052.38. After a nine months' stay taken by defendant had expired the property was appraised at $1,825. At this sale plaintiff bid two-thirds of the appraisement, and the property was declared sold to him. This sale was set aside. A second order of sale was issued and the property appraised by two new appraisers at $2,305. Under this appraisement the property was twice advertised and offered for sale, and not sold for want of bidders. A third order of sale was then issued, and the property appraised by two new appraisers at $1,920. It was twice offered under this appraisal, and not sold for want of bidders. A fourth order of sale was then issued to the coroner, plaintiff having filed objections to the sheriff and his deputy. Under this order the property was appraised by two business men of Wymore, neither of whom had acted under either of the other appraisements, at the sum of $2,000, and the property was sold to plaintiff for $1,337. This sale was the one confirmed by the lower court. It will be seen that the property had been appraised four times, and offered for sale six times. Plaintiff was the only bidder at any of these sales. The amount of the highest appraisement, under which there were no bidders, was $2,305. Defendant filed his own affidavit fixing the value of the property at $5,000, and the affidavit of three freeholders fixing the value at $4,800. This affidavit was sworn to before defendant himself as a notary public, and is not entitled to be considered. Even if the affidavit of the three freeholders could be considered in connection with the affidavit of defendant, it would not justify a reversal of this case on the ground of inadequacy of the valuation fixed by the appraisers. The fact that the property had been offered for sale six different times, under four different appraisals, in none of which the value was fixed above $2,305, and that no person other than plaintiff ever made a bid of any amount, even at such valuations, constitutes a complete refutation of the value of the property as fixed by defendant and his three freehold-

ers. The rule is well settled in this state that, to justify the setting aside of a sale on the ground that the property was appraised too low, the actual value of the property must so greatly exceed the appraised value as of itself to raise a presumption of fraud in the making of the appraisement. We think the facts above outlined clearly indictate that the property was appraised by the appraisers called by the sheriff and coroner under the several orders of sale at substantially its fair value.

The second assignment is without merit. There is no competent evidence in the record to show that the appraisers Huston and Jeffrey were not disinterested and impartial appraisers.

The third assignment is also without merit. The sale was made September 16, 1912. The proof of publication shows that the notice was published in the "Weekly Wymorean" for five consecutive weeks, the first publication being on August 15, 1912. It appears, therefore, that there was a strict compliance with the settled rule in this state, as announced in *Cuyler v. Tate,* 67 Neb. 317: "Notice of a judicial sale published in every issue of a weekly newspaper for thirty days before the day of sale is sufficient."

The fifth assignment is likewise without merit. The only ground which we can discover for the complaint set out under this assignment is that the coroner made inquiries as to who would make suitable appraisers, and in the course of his inquiries talked to Jesse S. Newton and the appraiser Huston. An attempt is made to show that Newton was prejudiced against the defendant, but there is no competent evidence to show that the appraisers Huston and Jeffrey were not reputable business men in the city of Wymore, and disinterested and impartial appraisers. That the appraisal which they actually made was a fair appraisal is fully established by what has already been said.

Finding no error in the record, the judgment is

AFFIRMED.

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

ETHEL BURGE, APPELLEE, V. C. F. ADAMS COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 17995.

Appeal: REVERSAL. "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin*, 90 Neb. 122.

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

Morsman, Maxwell & Thompson, for appellant.

Lambert, Shotwell & Shotwell, contra.

FAWCETT, J.

This action was instituted in the district court for Douglas county to recover damages which plaintiff claims to have sustained as the result of fright occasioned by an assault with a revolver. The jury returned a verdict in favor of plaintiff for $1,933, upon which judgment was entered, and defendant appeals.

The record shows that defendant is a corporation engaged in the sale of household goods upon the instalment plan. Plaintiff purchased some quilts on that plan, agreeing to pay 25 cents a week on the purchase price. At the time of the alleged assault she was in arrears for three or four weeks' payments. One Grabill, a collector for defendant, called at her apartments to collect her past-due payments. The house appears to have been a duplex house, plaintiff's mother and sister living on the first floor, and plaintiff, with her husband and family, occupying the second floor. Plaintiff testified that she saw Grabill ascending the stairs, and met him at the top and before he had quite reached the landing. Being told by him the purpose of his call, she told him that she did not have the money that week on account of the recent death and burial

of the baby. Grabill told her that he had to have payments on the things, "and I says, 'You won't.'" This precipitated an altercation between them. Grabill said he must have the payments or the quilts. She replied, "No; you won't take the goods," and started away from him. She says he told her to "halt," and that when she turned around he pulled a revolver, pointed it at her and said "he would fix" her. Grabill denied this, and testified that he did not have a revolver, but that when she had called him the name which, when used between men, usually results in a fight, and her mother and sister appeared at the foot of the stairs, he placed his hand upon his hip pocket as a bluff so as to enable him to make his escape. The above is a very brief statement of what transpired at the time the assault is alleged to have been made, but it is sufficient to show the character and extent of the assault, if one were made. When both sides had rested, defendant requested the court to instruct the jury to return a verdict for defendant, which request was overruled.

Conceding, without deciding, that the evidence was sufficient to take the case to the jury on the question of whether or not an assault had been committed as alleged, we are next confronted with defendant's assignment of error that "the verdict of the jury is so excessive as to clearly show that it was the result of passion and prejudice." The testimony as to the extent of plaintiff's injury was given by herself, her mother and her husband. Plaintiff testified that when Grabill "pulled the gun on her" she thought he was going to kill her and became very nervous; that immediately after he left she went to bed; that after lying down she was jerking, crying and nervous; that she was frightened; that she remained in bed for a week, nervous and weak; that a physician attended her during the week; that after a week she was able to be up for a while; was up and down; that this condition continued for four or five days; that the nervous condition was still with her at the time of the trial; that she had not been well since the assault; that she had not been nervous prior thereto. Her mother testified that after

Grabill left she went up stairs and found plaintiff in bed; that she attended her; that she was "awfully" nervous and was crying; that she quieted her down as much as she could; that she sent for a doctor twice that evening; the first time they were unable to get him, so they made the second call; that she was "awfully bad," and remained in bed for about eight days; "of course, she would sit up, but she could not stay up for quite a while at a time, because she was so nervous;" that she had nervous headaches all the time; that she shook pretty near all the time except when they would be talking to her; that she cried off and on; had spells of crying all the evening, all the rest of the day and all the evening; after she got up from bed she was still nervous; that she called plaintiff's husband about 4 or 5 o'clock that afternoon. The husband testified that he was called home about 5 o'clock; when he got there his wife was lying in the apartment; was nervous and seemed to be in pretty bad shape; was crying and said she came pretty near getting shot; her condition was a nervous breakdown; summoned a physician; she was confined to her bed for over a week; she suffered a nervous breakdown; had headaches; before that her health had been good; "she never was right after that, or hasn't been up to the present time; * * * she was a little better at times, of course, and then, if she would have any excitement or other thing, it would cause her another breakdown; she would have to go back to bed again."

This is all of the testimony offered as to the nature and extent of plaintiff's injuries. It shows that they called a physician, who, plaintiff testified, attended her for a week. This physician was not called as a witness, nor any reason assigned why he was not called. There is no evidence to show that after plaintiff left her bed, about eight days after the alleged assault, she was not able to perform all of her regular duties, or that she suffered in any way except from occasional spells of nervousness. Plaintiff testified that at the time of the trial (December, 1912) she was 20 years of age; that she had three children living; one, a babe born October 26, another three, and the

other six years old; that about ten days before the time of the assault, on February 13 of that same year, they had buried still another child, who at that time was six months old. This testimony shows that when plaintiff gave birth to her first child she was only 14 years of age; that at the time of burying the six months' old child on February 3, 1912, she was pregnant with the babe born October 26. We think it is not surprising that she may have had spells of nervousness during those eight months. The jury returned a verdict in favor of plaintiff for $1,933. This verdict, under the evidence above outlined, is so grossly excessive that we see no escape from appellant's contention that it was not based upon the evidence in the case, but was the result of passion and prejudice. This appears to us to be so clearly a case where passion, prejudice, mistake, or some means not appearing in the record controlled the jury that we cannot permit the verdict to stand. Our conclusion upon this point renders it unnecessary for us to consider any of the other questions presented and argued.

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

REVERSED.

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

MARY C. LEGAN, APPELLANT, V. FRANK SMITH, APPELLEE.*

FILED MARCH 13, 1915. No. 18002.

1. **Appearance.** "An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not." *Perrine v. Knights Templar's & Masons' Life Indemnity Co.*, 71 Neb. 273.

2. **Wills:** CONSTRUCTION: VESTING OF BEQUEST. The fifth clause of the will, set out in the opinion, examined, and *held* to have vested in

* Modified. See opinion, p. 682, *post*.

defendant, immediately upon the death of the testatrix, an unconditional title to and interest in the bequest therein expressed, and that the only office of the demand specified in the proviso in such clause would be to prevent a forfeiture of such bequest at the end of one year.

3. **Garnishment:** DEMAND. Where a debtor has funds in the possession or under the control of another under such circumstances that he cannot institute an action therefor without previous demand, such funds, if otherwise liable to be subjected to garnishment, cannot be exempt for want of preliminary action on the part of such debtor. In such case the creditor would have the right to make the demand and reach such fund by garnishment.

4. ———: DISCHARGE OF GARNISHEE: SUFFICIENCY OF EVIDENCE. The evidence examined and partially set out in the opinion, when considered together with the facts and circumstances surrounding the parties, *held* insufficient to sustain the judgment discharging the garnishees.

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

W. S. Morlan and *Lewis C. Paulson,* for appellant.

Tibbets, Morey, Fuller & Tibbets, contra.

FAWCETT, J.

In 1902 defendant left his home in Kearney county for parts unknown, abandoning his four minor children, who since that time have lived with and been cared for and supported by their grandmother on their mother's side. The petition alleges that when defendant departed he left the children with plaintiff, with the request that she care for and look after them; that she has done as requested, but that defendant has failed and refused to provide any support for the children or to pay her any part of the sum reasonably due plaintiff therefor, which she alleges is the sum of $4,304, for which the petition prays judgment. In April, 1912, Sarah Smith, mother of defendant, departed this life, leaving a last will and testament by which she disposed of all of her property to her three children, consisting of defendant, a sister, Edna B. Milbourn, and a brother, Arthur H. Smith. The will was duly probated in

May, 1912. By the third and fourth clauses in the will Mrs. Smith devised the south half of a quarter section of land in Kearney county to her son Arthur, and the north half thereof to her daughter Edna. The fifth clause is as follows: "I give, devise and bequeath to my son Frank Smith the sum of thirty-five hundred dollars ($3,500) to be paid to him within one year after my death, my said legatees above each to be charged with the one-half thereof and the said share hereby made chargeable to the said respective legatees is hereby made a lien upon the land herein respectively bequeathed to each to wit: $1,750 shall be a lien on the south half and $1,750 on the north half of said quarter section. Provided, however, that if the said Frank Smith shall fail to call for and demand said legacy hereby bequeathed to him within one year after my death then he shall not be entitled to receive the same nor any portion thereof but the same shall be void and of no effect as to him and every person who may claim under him." On July 13, 1912, plaintiff commenced this action to recover the sum due from the defendant, and sought to subject to the payment of her claim, by attachment and garnishment, the money which she claimed was payable to defendant from his brother and sister, under the will, and they were duly summoned as garnishees. From a judgment discharging the garnishees and sustaining an alleged special appearance of defendant and dismissing plaintiff's action, she appeals.

Some time shortly prior to the death of Mrs. Smith, it was learned by the family that Frank was living in the state of Oregon. Service was made on him in that state. He filed the following special appearance: "Comes now the above named defendant and appears specially for the sole and only purpose of objecting to the jurisdiction of the court on the following grounds: (1) The summons was not returned within the time fixed therefor. (2) The affidavit for service by publication is false in the following particular: The legacy to defendant in the will therein mentioned was not unqualified as stated in said affidavit, but was conditioned upon demand therefor by said lega-

tee within one year, which demand has never been made by defendant. (3) The copy of said summons alleged by the return to have been served on defendant was not certified by the deputy who made such return to be a true copy. (4) The garnishees served in said action are not indebted to defendant in any amount whatever, and have no property of defendant in their possession, and defendant has no property or credits within said Kearney county or state of Nebraska, and the allegations of the said affidavit to that effect are false and untrue. (5) The alleged copy of summons, which is hereto attached, contained no description of any property attached or credits garnished. (6) The affidavit for attachment is false and untrue for the same reasons set out in paragraph four hereof. (7) No notice to defendant was ever published and no process was ever served upon defendant, either personally or constructively, notifying him of any attachment or garnishment. (8) That at the time of the attempted service of process upon defendant no property, rights or credits of defendant had been attempted to be taken or seized in said state of Nebraska, and such attempted service of process was therefore void, defendant being at such time a nonresident of Nebraska, and no service of process having been attempted except by the copy of summons hereto attached." The trial court sustained this special appearance and dismissed plaintiff's action. This was clearly erroneous. The attempted special appearance of defendant was a general appearance and gave the court full jurisdiction over his person. *Perrine v. Knights Templar's and Masons' Life Indemnity Co.*, 71 Neb. 267, and, on rehearing, 273.

We infer from the record that Arthur H. Smith and Mrs. Milbourn, who were served as garnishees, filed with the clerk of the district court some sort of an answer, but such answer does not appear in the record. The record simply shows that they appeared and answered questions propounded to them by court and counsel. From their testimony it appears that from the time Frank left home, until shortly before the death of their mother, his where-

abouts were unknown, but that shortly before the death of their mother, as stated, it was learned by the family that he was living in the state of Oregon. When the will was filed for probate Arthur wrote defendant and explained to him the conditions of the will, especially that portion that Frank was interested in, and also sent him a waiver of notice of the probating of the will, which Frank signed and returned to him. Thereupon he and his sister both joined in the waiver, and the same was filed in the probate court, and the will was duly probated. Arthur and Mrs. Milbourn each testified to having received several letters from Frank after the death of their mother, but, when asked if they had the letters, Mrs. Milbourn answered: "No, sir; I didn't make it a point to keep them." Arthur answered that he did not have any of the letters which he had received. When asked what he did with them, he answered: "Burned them up." They each testified that Frank had not made any demand on them for the amount bequeathed him in the will. Mrs. Milbourn answered that she never intended to send Frank any of the money unless he demanded it, and that she never would do so. Arthur was asked: "Q. Will you ever send it to him if he does not? A. I don't think I will; no, sir." The testimony of both shows that there had been some talk with the attorney for the executor about obtaining from Frank a release of the lien upon their land before sending him the money. Arthur testified: "Mr. King suggested it. Q. You got the suggestion from Judge King about getting a release before sending the money to your brother in Oregon? A. We didn't ask Mr. King for the release; Mr. King suggested that we do certain things. Q. Why would he suggest doing certain things? A. I don't know what his reason was; I didn't ask him for the information." Taking the testimony as a whole, we think the court erred in discharging the garnishees. It is too great a tax upon our credulity to ask us to believe that there was not a perfect understanding between Frank and his brother and sister in relation to the money coming to him under his mother's will, or that he would allow a

$3,500 well-secured bequest to go unclaimed. If, by a secret agreement with his brother and sister, he can so manipulate the matter that his mother-in-law may be defrauded of her just compensation for taking care of his children, he evidently is ready to perpetrate that fraud. Why is it that after ten years' absence a correspondence suddenly springs up between these brothers and sister? Why is it that Arthur has "burned up" the letters which he received from Frank, and that Mrs. Milbourn "didn't make it a point to keep them?" How does it happen that the three are all appearing in this action by the same counsel? There is only one reasonable answer—that they are acting in concert to enable Frank to obtain this money in fraud of the right of plaintiff to reasonable compensation for the board, clothes, care and medical attention bestowed upon his children for ten years. Circumstances speak louder than words ofttimes, and the circumstances in this case indicate, we think, that Frank has signified to his brother and sister his intention to call for the money, and that they are so regarding the matter. The district court has misconstrued the proviso in the will. A demand by Frank was not necessary to vest the bequest in him or to fasten a liability upon the garnishees therefor. Frank's interest vested immediately upon the death of his mother. The only office of a demand upon his brother and sister for the payment of the bequest was to prevent a forfeiture of the bequest at the end of one year. Hence, we think it is clear that the proviso is a condition subsequent and should be so treated. Being such at the time this action was commenced and process in garnishment served upon the brother and sister, who by the terms of the will were made liable for the payment of the bequest, the garnishees owed Frank $3,500 absolutely and unconditionally. It is true, he could, *subsequently,* release them from that liability by failing to call for it, but that did not alter the fact that at the time the action was commenced there was an indebtedness coming to him from his brother and sister which could be reached by his creditors by garnishment. This being so, he could not prevent his creditors from obtaining, out of

this fund, payment of money due them, by simply sitting back and failing to make a demand. They would have a right to make the demand for him; and, by instituting the present action, the plaintiff must be held to have made such demand. As stated by counsel for plaintiff, where a debtor has property or funds in the possession or under the control of another, "under such circumstances that he cannot institute an action therefor without previous notice or demand, such property or funds, if otherwise liable to be subjected to garnishment, cannot be exempt for want of such preliminary action on the part of the defendant; for, if so, he might foil the thrust of the creditor by purposely avoiding the giving of the notice or the making of the demand." Such dishonest conduct the courts will not sanction.

The judgment of the district court is reversed, with directions to overrule the special appearance of defendant Frank Smith and permit plaintiff to prove her debt against him, and to require the garnishees to appear and make further answer, and for further proceedings in harmony with this opinion.

REVERSED AND REMANDED.

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

SAMUEL S. HALSTED, APPELLANT, V. WILLIAM SHACKELTON, APPELLEE.

FILED MARCH 13, 1915. No. 18005.

Trial: DIRECTION OF VERDICT. Where the evidence offered by plaintiff in an action at law is insufficient to sustain the cause of action set out in his petition, it is not error for the court to end the trial by directing a verdict for the defendant.

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

Allen G. Fisher, for appellant.

Albert W. Crites, contra.

FAWCETT, J.

Action in the district court for Sheridan county to recover upon an oral contract for the sale of an undivided one-half interest in a twenty-horse power gasoline engine and a number of smaller articles in the way of appliances to be used in connection therewith.

The answer alleged that the property was in fact purchased by the defendant jointly with the plaintiff upon a written order signed by them and sent to the Harvester Company, which was the real seller of the same; that when plaintiff received the engine he delivered it to one Snodgrass, without the knowledge or consent of the defendant; that defendant in joining in the purchase of the engine relied upon warranties made by the plaintiff and printed upon the written order; that the engine did not in any respect comply with the warranties; that plaintiff, after repeated attempts to do so, was unable to put the engine in condition so that it would do the work for which it was sold and in accordance with the warranties under which the sale was made. The reply was a general denial.

Upon the trial to the court and a jury, when plaintiff had completed the giving of his testimony, defendant moved for a directed verdict, on the ground that the testimony of plaintiff shows that the purchase and operation of the engine was a joint transaction between himself and one Snodgrass, amounting to a joint liability and a joint adventure, the accounts whereof had not been determined, and that no action at law could be maintained by plaintiff "at the present time for any recovery on account of the machine in question." Thereupon the court asked counsel for plaintiff if he had any other or different evidence than that already given to establish the case between plaintiff and defendant as alleged in his petition, to which counsel for plaintiff replied: "We have no different evidence. We have some admissions of the defendant, but they would not change the effect of defendant's exhibit A." Thereupon the court sustained the motion and di-

rected a verdict for defendant, upon which judgment was entered. Plaintiff appeals.

The evidence of plaintiff himself shows that the engine was purchased from the Harvester Company on an order signed by himself and Snodgrass, at a time when defendant was not present. Subsequently, and after this order had been sent to the Harvester Company, defendant joined in the order, by signing a copy of the same, prepared by plaintiff. When the engine arrived it was delivered by plaintiff to Snodgrass, and there is no escape from the evidence that thereafter Snodgrass and defendant used and operated it, with its accessories, as a copartnership. The books of plaintiff show that purchases made of gasoline and repairs for the engine were sometimes charged by him to Snodgrass, and sometimes to "Snodgrass and Shackelton." He was asked: "Q. Now, if Mr. Shackelton sent for it (oil), why did you charge it to Snodgrass? A. Because they were considered a firm. Q. Snodgrass wasn't a firm was he? A. He was one of them."

It would serve no good purpose to review in detail the testimony given by plaintiff. Taken as a whole, and in connection with his own books of account, it fails to establish any right of recovery by plaintiff against the defendant individually. The district court did right therefore in directing the verdict.

AFFIRMED.

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

STATE, EX REL. EDWIN DAVIS, APPELLANT, V. THOMAS HOCTOR, MAYOR, ET AL., APPELLEES.

FILED MARCH 13, 1915. No. 18864.

Mandamus: CONTROL OF DISCRETION. While the writ of mandamus may be issued to require an inferior tribunal or board to exercise its judgment, or proceed to the discharge of any of its functions, it cannot control its judicial discretion. Rev. St. 1913, sec. 8271.

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

A. H. Murdock and *C. J. Southard,* for appellant.

Murphy & Winters, contra.

FAWCETT, J.

As stated by relator in his brief, this is an action in mandamus to compel the mayor and city council of the city of South Omaha "to designate a particular kind of material to be used in paving, curbing and guttering a certain street, and award the contract therefor to the lowest bidder." A peremptory writ was denied by the district court for Douglas county, and relator has appealed.

An improvement district for the paving, curbing and guttering of a certain street was created by the city council of the city of South Omaha upon a petition signed by the owners of a majority of the taxable foot frontage, all as required by section 4716, Rev. St. 1913. The regularity of the proceeding establishing the improvement district is not questioned. Thereafter the council advertised for bids for the different kinds of material designated, as required by section 4718. The alternative writ recites that Abel & Roberts filed a bid, accompanied by a certified check, offering to pave the street with Egyptian vitrified brick block, class B; that M. B. Jensen filed a bid, accompanied by a certified check, for curbing and guttering with "Cowboy brand, Kansas cement, Louisville stone, Platte river sand, plan C;" that, within the time specified in section 4719 of the act, relator filed with the city clerk a petition designating Egyptian brick block, class B, as the material to be used in paving the street, and designating Cowboy brand, Kansas cement, etc., as the material to be used in curbing and guttering. There was also filed a bid for paving with "Buffalo brick block, class B, with combined curb and gutter, plan B." The petition designating the material, as originally filed by the relator, contained the names of the owners of a majority of the taxable foot frontage of the district. Before the 20 days for designating material had

expired, Theodore L. Phelps, who had signed the first-named petition for five lots, notified the council that he had elected to withdraw from that petition and desired his name to be counted on the petition for Buffalo brick block, and the father of Charles Ladd Thomas, who had signed the petition for two lots, in the absence of his son from the state, took like action in the name of and for his son. When Charles Ladd Thomas returned home he, on August 3, filed a written ratification of the act of his father as his agent. With these two names withdrawn from the petition which relator had filed, that petition would be insufficient in amount. With them remaining on the petition, it was sufficient. The relator contends that the Phelps name could not be withdrawn, for the reason that his act in making such withdrawal was induced by an agreement on the part of the representative of the Buffalo brick block bidder that, if he would so withdraw his name, the James J. Parks Company, who were the bidders for the Buffalo brick block, would refund and pay to Phelps the sum of eight cents per square yard of the cost of paving, assessed and taxed against the lots owned by Phelps; that such agreement was unlawful and fraudulent, and the attempted withdrawal of Phelps was therefore null and void. The record shows that this offer on the part of the Parks Company was to refund or remit to all of the property owners in the district eight cents per square yard, which would be one-half of the difference between the Parks bid and the bids of Abel & Roberts, and Jensen. Relator further argues that the attempted withdrawal of Charles Ladd Thomas was void, for the reason that his father had no authority to sign his name to such withdrawal, and that his attempted ratification, on August 3, of the act of his father was unavailing, for the reason that the 20 days allowed the lot owners to designate material, had expired on July 27; that the rights of the parties all became fixed on that date and his attempted ratification at a later date would not relate back to and legalize the act of his unauthorized agent on July 27. At

the meeting of the city council on August 10, the mayor and council, on consideration of all of the matters, found that the record owners of a majority of the foot frontage of taxable property in the district "have failed to file a sufficient petition with the city clerk as by law permitted, and hence it becomes the duty of the mayor and council to select and designate from those bids upon the kind and class of paving material to be used upon said street in said district." It thereupon designated "Buffalo brick block, class B, with combined curb and gutter plan B," as the material with which the street should be paved, and awarded the contract therefor to the James J. Parks Company. On the same day, August 10, the relator demanded of the mayor and council that they reconsider and rescind the resolution adopted by them on that date, designating Buffalo brick block, and awarding the contract for the work to the Parks Company, and further demanded that they designate Egyptian brick block as the material to be used for paving, and award the contract therefor to Abel & Roberts, and that they designate the Cowboy brand, Kansas cement, etc., as the material to be used as curbing and guttering, and award the contract therefor to M. B. Jensen. This demand not being complied with, relator, on the next day, commenced this action in mandamus to compel the city council, as recited in the alternative writ, to rescind the resolution, passed by them on August 10, designating Buffalo brick block; rescind their action awarding the contract to the Parks Company; to designate Egyptian brick block as the material for paving, and award the contract therefor to Abel & Roberts; to designate the Coyboy brand, Kansas cement, for curbing and guttering, and award the contract therefor to Jensen; or show cause why the same was not done. On a full hearing the district court held that both of the petitions involved in the controversy were insufficient, and rejected the same; that relator was not entitled to the peremptory writ as prayed, and ordered that the application for the writ be denied and the action dismissed at relator's cost.

We are now asked, in this action, to review the action of the mayor and city council in passing upon the sufficiency of the petitions in controversy. This we must decline to do. The duty of examining the petitions rested upon them, and the determination of their sufficiency was a judicial discretion vested in them. They have already exercised that discretion. They have passed upon the question of the sufficiency of the petitions presented, and held them insufficient, and have awarded the contract for the paving, curbing and guttering to the Parks Company. If their action was wrong, it was an error which relator could have had corrected by the ordinary methods in such cases. That it was wrong is, to say the least, not entirely clear; but, whether so or not, their judgment cannot be reviewed by mandamus. As said in *State v. Nemaha County*, 10 Neb. 32: "But whatever errors may have been committed by the board of commissioners in rejecting the names of signers of said petition (for the calling of a special election for the relocation of the county seat) they cannot be considered in this case. Such alleged errors may be reviewed by a proper proceeding, but cannot be corrected in an application of this kind by mandamus."

This well-settled rule is decisive of this case. The fact that the district court decided the case on the merits, is immaterial, as the result reached—viz., the dismissal of relator's action—properly disposed of the case.

AFFIRMED.

MORRISSEY, C. J., BARNES and LETTON, JJ., not sitting.

JAMES S. REED, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 17993.

1. **Damages: PERSONAL PROPERTY: MEASURE OF DAMAGES: EVIDENCE.** In an action to recover damages to personal property, if there is substantial evidence that the whole damage was caused by the

defendant's negligence, the plaintiff should be allowed to prove the value of the property before and its value after the injury complained of, since this would be the true measure of damage if the jury find that the defendant's negligence caused the entire damage.

2. **Contributory negligence** is an affirmative defense, and cannot be proved unless alleged in the pleadings.

3. **Appeal:** MISCONDUCT OF JURY. When a case has been submitted to the jury for a verdict, it is improper for them to separate without permission of the court, and if some of the jurors leave the officer in whose care the jury has been placed, and go to a saloon and drink liquors, it is misconduct; but if it appears that such jurors were within view of the officer, that they conversed with no one, and did not become intoxicated, and there is nothing to show prejudice to the party complaining by such misconduct, or that the other party was aware thereof, it will not require a reversal of the judgment.

4. **Eminent Domain:** RAILROADS: CONSTRUCTION: DAMAGE TO REALTY. Damages to real estate caused by the proper and necessary construction of a railroad accrue when the road is built; but if the road is improperly and negligently constructed, and property is injured because of such negligence, the action for such damage accrues when the damage occurs.

5. **Damages:** SUFFICIENCY OF EVIDENCE. The evidence is found to support the verdict and judgment.

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

Byron Clark, W. S. Morlan, R. L. Keester and *E. E. Whitted,* for appellant.

John Everson and *O. E. Shelburn, contra.*

SEDGWICK, J.

Some of the matters discussed in the briefs in this case were decided in a former action between the same parties. *Reed v. Chicago, B. & Q. R. Co.,* 86 Neb. 54. That action was for damages caused by high water in 1905, and as in this case the damages, it was alleged, resulted from the negligence of the defendant in the construction of its road. The situation of the premises and the location and construction of the road are stated in that opinion and will

therefore not be repeated here. The damage then done by the flood to the railroad grade and culvert were repaired by defendant, and in August, 1911, the plaintiff's crops and personal property were again damaged, and he brought this action in the district court for Harlan county, again alleging the negligent construction of the road as the cause of the injury. There was a verdict and judgment in his favor, and the defendant has appealed.

The first objection is that the court erred in allowing plaintiff, in proving his damages, to give evidence as to the value of his property before and after the injury. It is said that this was not the proper measure of damages, because the property would have been damaged to some extent by the natural action of the flood if no railroad had been there. The plaintiff offered evidence tending to prove that the whole damage was caused by the negligent construction of the road. The proof was sufficient to require that his theory of the case be submitted to the jury, and the evidence objected to was therefore competent. It does not appear that the construction of the road has been substantially changed since the damages occurred which were considered in *Reed v. Chicago, B. & Q. R. Co., supra.* The reasons there stated for supporting a finding that the negligent construction was the cause of the injury need not now be repeated.

When the plaintiff had rested and the defendant was introducing evidence, the plaintiff asked leave to withdraw his rest and introduce in evidence a map which he produced. The defendant objected to this for several reasons: First, because it was not proper rebuttal testimony, and should have been offered, if competent, in chief; second, because it is not sufficiently identified and authenticated, and that no foundation had been laid for its introduction. The court overruled this objection and the map was received in evidence. This map purports upon its face to be published by a disinterested publishing house. It relates to the physical conformation of the territory involved, a matter that could be established readily without question. It does not appear from the record that the de-

fendant was unprepared to meet such testimony, and it seems clear that the court did not err in receiving the evidence.

The defendant contends that the storm was so unusual and the rain fell so excessively that it must be considered as the "act of God," and that the damage would have occurred without regard to the construction or existence of the railroad. But that question was satisfactorily submitted to the jury upon substantially conflicting evidence, and must be considered as determined by their verdict. There was no allegation of contributory negligence in the answer, and the defendant was not at liberty, therefore, to rely upon such defense.

The defendant insists that there was misconduct of the jury which requires a reversal. It appears that there was misconduct both of some members of the jury and the officer who had the jury in charge. After the case had been submitted to the jury for their verdict, the officer in charge, while conducting the jury to their hotel, permitted two of the jurors to go some distance from the care of the officer to a saloon for the purpose of obtaining intoxicating liquors. It appears that they entered a saloon and did obtain and drink the liquors there. The question is whether it sufficiently appears from this record that this misconduct of the officer and jurors was so prejudicial to the cause of the defendant as to require a reversal. It appears that these jurors were not in the saloon but a very few minutes; that they could be seen and were watched by the officer while there; that they had no conversation with any persons; that they did not become intoxicated or under the influence of the liquors which they drank; and that the plaintiff had no knowledge of this misconduct and did not participate in it. We cannot say that the trial court abused its discretion in holding that it did not sufficiently appear that the defendant's cause was prejudiced by this misconduct.

It is contended that the court erred in allowing the plaintiff to testify as to the effects of the flood on his buildings, fences, lands, and improvements. Of course, dam-

ages to the land itself caused by the necessary and proper construction of the railroad would accrue when the road was built, and not from time to time as those damages might appear; but if the road is improperly and negligently constructed, and property is injured because of such negligence, the action for such damage accrues when the damage occurs. Moreover, it seems that this evidence, if incompetent, was not prejudicial to the defendant. The jury were required to find the damages to personal property and the damages to the land and dwelling house separately. They did so in their verdict, and found that there was no damage by this flood to the land and dwelling house, and that the damage to the personal property was $1,000, and assessed the plaintiff's recovery in that sum accordingly. The recovery was limited to damages caused by the improper and negligent construction of the road.

It is not contended that there was error in the instruction of the court. The evidence supporting the issues so presented is not so deficient as to require a reversal.

The judgment of the district court is therefore

AFFIRMED.

MORRISSEY, C. J., not sitting.

SEDGWICK, J.

There is another question presented in this case which the writer of the opinion thinks ought to be discussed and determined. In its discussion I speak for myself alone, and not for the court.

The plaintiff contends in the brief that the question of the competency of the map above referred to as evidence is not properly presented, because he says no objection was made to its reception and no exception was taken to the ruling of the court. If this contention of plaintiff was sustained, it would not be necessary to determine the competency of this evidence, since the error, if any, in receiving it would have been waived by failure to make objection. Naturally, we would first determine whether the question of its competency was presented before passing upon that question. It was therefore a question essential to the de-

termination of the case and was fully presented in the briefs. I do not think we ought to evade this matter now. We ought to determine whether the objection of defendant to the reception of this evidence was sufficient to raise and have determined the question of its competency. This is the more important, it seems to me, because the records that come before us show that there is a general misapprehension among the members of the bar, and perhaps also among the trial courts, as to the construction that this court has put upon the statute. We must not allow useless technicalities to prevent justice, nor even to occupy the time of the courts to the exclusion of matters of importance. The record in this case shows the following: "Plaintiff asks leave to withdraw rest and introduce exhibit (the map) on examination in chief. Defendant objects to the plaintiff withdrawing his rest for the purpose of introducing his exhibit 1 at this time, as incompetent, irrelevant, immaterial and no foundation laid. Objection overruled. Defendant excepts. Plaintiff's exhibit 1 was thereupon offered in evidence." If the evidence was incompetent, the court would not, of course, allow the rest to be withdrawn for the purpose of putting the exhibit in evidence. The court, therefore, passed upon the competency of the evidence over the objection of defendant, and the evidence was admitted. To again make the same objection, and then enter a formal exception to the ruling of the court, would not make it any clearer that the defendant objected to this evidence as incompetent and the court admitted it notwithstanding the defendant's objections.

The plaintiff cites *Moore v. Jacobs*, 64 Neb. 72, in which the correct rule is stated as follows: "The objections argued in the brief * * * were in nowise presented to the trial court, and therefore we cannot consider them on this appeal." The rule that objections will not be considered here, unless they are presented to the trial court, necessarily follows from the universally applied rule that this court will not consider and determine questions that were not before the trial court and by it tried and determined. The ruling, if rightly understood and applied, is

necessary to the proper administration of justice, and cannot be abandoned without impairing the efficiency of the trial courts, to the great injury of litigants. No established form of words is indispensable in presenting to the trial court those questions which may materially affect the rights of the parties in the trial of the case. If it appears from the record that the trial court did in fact, against the wish of the party injured, allow incompetent evidence, the verdict so obtained would not be allowed to stand, unless it also appears upon the record that the party complaining was not materially injured thereby. If one party to the litigation offers incompetent evidence, and the other party by silence and failure to object does not in any way acquaint the court with the fact that he considers it objectionable and desires it excluded—that is, if objection is in nowise presented in the trial court—he will not be allowed afterwards to assert that he has been prejudiced by such testimony. Under such circumstances the court is justified in presuming that both parties desire to have the evidence in the record. The necessity of taking exception and of entering objections upon the record arises entirely from this rule of law, and when it plainly appears from the record that the court has intentionally ruled upon the question, knowing that the party injured is contending that the ruling is erroneous and prejudicial, the failure to formally note the word "exception" upon the record would be immaterial. It appears from this record that the court was aware that the defendant objected to this evidence as incompetent, and that the evidence was allowed over the objection of the defendant.

The case of *Dunbier v. Day,* 12 Neb. 596, decided more than 30 years ago, is perhaps the leading case on this subject. In the opinion the court say: "As to the witness Inglehart, no exception appears to have been taken to the overruling of the objection to the admission of this testimony." This was an unfortunate expression. It implies that there is a difference between an objection and an exception, and that when an objection is made upon sufficient ground, and the same is overruled, there must also

be an exception. The statute says: "An 'exception' is an objection taken to a decision of the court upon a matter of law." Rev. St. 1913, sec. 7876. "No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible." Section 7878. An exception is an objection and the objection to the ruling of the court is the exception that the statute requires. Judge Lake shows in the opinion that he realized this, for he says: "For aught that appears in the bill of exceptions, counsel was entirely content with the ruling against him." This statement is the key to the situation. The object of the exception or objection, by whatever name it may be called, is to show to the court that the litigant believes that a certain proposed procedure would be prejudicial to his rights; that it would be unlawful, and the reason for supposing it to be unlawful and that he protests against it. If the record shows this, and that the court nevertheless determines the matter against the party so objecting, the court on review should consider whether such ruling was erroneous and prejudicial. Of course, counsel should not leave his position in doubt. It should appear without equivocation whether counsel objected to the ruling at the time or acquiesced therein.

The next case is *Pettit v. Black,* 13 Neb. 142. The rule is stated in the syllabus: "Unless exceptions have been taken in the trial court to the admission or refusal to admit testimony, no error can be predicated thereon." And in the opinion Judge Maxwell said: "We find no exceptions taken on behalf of Mrs. Pettit to any of the evidence introduced"—which shows that he was referring to the exception defined in the statute, which is an objection. If a party allows evidence to be given without challenge, he cannot afterwards complain. This was the condition that Judge Maxwell was speaking of.

In *Wheeler v. Van Sickle,* 37 Neb. 651, objection was made to the admission of a writing on the ground that no foundation had been laid. After the objection was made, "counsel * * * interrogated the witness at some

length," with the view to laying a sufficient foundation. Then the writing was again offered. Of course, if the objecting party did not concede that his objection had been obviated by this additional evidence, he would have so informed the court by renewing his objection. There are many other decisions in which the question is mentioned, but these are perhaps sufficient to illustrate my meaning. I think that the following should have been included in the syllabus of the opinion:

When objections argued in the brief have been "in no-wise presented to the trial court," they cannot be considered in this court. But no established form of words is indispensable in presenting to the trial court those questions which may materially affect the rights of the parties in the trial of the case. If it appears from the whole record that the trial court did in fact, against the wish of the party injured, allow incompetent evidence, the verdict so obtained would not be allowed to stand, unless it also appears upon the whole record that the party complaining was not materially injured thereby.

When it plainly appears from the record that the court has intentionally ruled upon the question, knowing that the party injured is contending that the ruling is erroneous and prejudicial, the failure to formally note the word "exception" or "objection" upon the record would be immaterial.

NYE-SCHNEIDER-FOWLER COMPANY, APPELLANT, V. BRIDGES, HOYE & COMPANY, APPELLEE; LION BONDING & SURETY COMPANY, APPELLANT.*

FILED MARCH 13, 1915. No. 18890.

1. **Appeal: CASE STATED.** These cases are presented in a "case stated" under rule 14 (94 Neb. XIII), and were, at the request of the parties, advanced for hearing as that rule provides. This practice facilitates the work of the court, and saves time and expense for litigants

*Modified so as to allow attorney's fees. See opinion, p. ——, *post.*

2. **Insurance:** ACTION: COSTS: ATTORNEY'S FEES. Chapter 234, Laws 1913, providing for attorney's fees in actions of this kind, has no application to contracts entered into before that act took effect.

3. **Schools and School Districts:** BUILDING CONTRACT: BOND: LIABILITY OF SURETY. Chapter 28, Laws 1889, secured payment of mechanics' and laborers' wages "for labor that shall be performed in the erecting, furnishing or repairing of the building, or in performing the contract," with the public authorities. It must be construed to protect a subcontractor and laborers employed by him, as did the general mechanic's lien law then in force. The surety on the contractor's bond was liable for all labor necessarily employed in performing the contract. *Des Moines Bridge & Iron Works v. Marxen & Rokahr*, 87 Neb. 684, followed. *Fidelity & Deposit Co. v. Parkinson*, 68 Neb. 319, distinguished.

4. ———: ———: ———: ———: MATERIALMEN. The act of 1913 (Laws 1913, ch. 170) for the first time extended like security to materialmen. The contracts in these cases were entered into before that act took effect, and as to materials furnished the bond must be considered a common-law contract.

5. ———: ———: ———: ———. The undertaking in the bond to guarantee "all liability of the first party for all bills for work, labor and materials to be incurred in connection with the contract herein referred to," and that he "shall promptly pay all bills for work, labor and materials performed or furnished in and about said work," must be construed to include all labor and materials involved in the work specified in the contract; that is, that enter into the structure or are consumed in and about the work, but not for tools and appliances which are the property of the contractors and may be used from time to time in other works and upon other contracts, and which are not consumed in the work or which do not go as a part of the building or improvement and necessarily enter therein. The use of an engine for hoisting materials, the repairs on such engine, and oil and fuel used in operating the same are not guaranteed by the surety. Lumber for concrete forms, if consumed in constructing the building, and a small proportion of sacks, of little comparative value, in which the cement for such concrete was sold, without proof that it was practicable, and contemplated by the parties, that all sacks would be returned to the materialman, are allowed to be recovered for in these cases.

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

Courtright, Sidner & Lee, for plaintiffs.

Sullivan & Rait and *George B. Thummel, contra.*

SEDGWICK, J.

The attorneys for the parties in this case have made good use of rule 14 (94 Neb. XIII) of this court. By so doing they have saved themselves and the court much labor and their clients much expense. It appears that there were pending in the district court for Dodge county four several cases, all involving the same legal questions. These questions were determined by the district court in each of the four cases, and thereupon the counsel representing the respective parties entered into a stipulation under rule 14, which provides for a case stated. The case stated begins with these words: "In the District and Supreme Courts of the state of Nebraska. First Case: Nye-Schneider-Fowler Co., plaintiff, Appellant and Appellee, v. Bridges, Hoye & Co., Defendant and Appellee; Lion Bonding & Surety Co., Defendant, Appellant and Appellee." Then follows the title of each of the other three cases, and the statement proceeds as follows: "Stipulation for Consolidation, Joint Appeal and 'Case Stated' under Supreme Court Rule No. 14. Come now the parties to the four actions above mentioned, and both plaintiffs and the surety company, defendant, intending to appeal to the supreme court, do hereby stipulate as follows: 1. The first and second cases were commenced in the district court for Dodge county, and the third and fourth cases were commenced in a justice court, and by agreement stipulated to said district court for trial. Issues were properly joined in all four of said cases so as to properly present for adjudication the matters now in dispute and to be determined by the supreme court, and said matters were adjudicated by the district court. 2. This stipulation contains a fair abstract or statement of the essential questions, of the pleadings, findings and rulings of the court, exceptions, and of the facts in all of said four cases; and this stipulation when signed and approved by the trial judge and filed with the clerk of the district court and then certified to the supreme court, together with a transcript of the final judg-

ments in said actions, shall constitute a complete 'case stated' under rule fourteen of the supreme court. Said four actions shall be docketed and determined as one case in the supreme court." Then follows so much of the pleadings and agreed facts in the case as are necessary for presentation of the questions of law relied on by the respective parties, and an agreed statement of the law questions involved and controverted. In each case there is also a transcript of the record containing the final judgment.

It appears from the case stated that a school district of Dodge county entered into a contract for the erection of a high school building in Fremont. The contractor agreed "to furnish the work and material and to clear and level the grounds." The contractor entered into a bond with the Lion Bonding & Surety Company as surety, in which the contractor and the bonding company are "held and firmly bound unto the school district of Fremont, in the county of Dodge, in the state of Nebraska, second party, for all liability of the first party for all bills for work, labor and materials to be incurred in connection with the contract." The suits were prosecuted upon the bond. The plaintiffs asked that attorney's fees be taxed in their favor, which the court refused. The defendants contend that the court allowed items of recovery which are not properly allowed in such actions. These are the two questions presented.

1. Should the court have taxed the attorney's fees as costs in the case? Section 1, ch. 234, Laws 1913, provides for such fees. It appears to be conceded that the bond upon which these actions are brought is, as between the school district and the contractor, within the terms of this statute. The bonding company contends that this statute has no application to bonds entered into before the statute took effect, and in this we think that the bonding company is correct. The statute of 1873 provided for the allowance and recovery of attorney's fees in certain actions. This statute was repealed in 1879. In *White v. Rourke*, 11 Neb. 519, it was held that "the repeal did not affect contracts entered into prior to" the repeal, and in *Bond v.*

Dolby, 17 Neb. 491, it was held that an attorney's fee was properly allowed upon the foreclosure of a mortgage which provided for such attorney's fee and was executed before the repealing act of 1879 took effect. The act of 1913 is quite analogous to the act of 1873, and by those decisions the allowance of attorney's fees under the statute depends upon the existence of the statute at the time of entering into the contract. It seems clear that the legislature by the act of 1913 did not intend to impair the obligations of existing contracts.

2. It appears from the case stated that the decree of the court included various items of credit for lumber and material, some of which the defendant contends were improperly allowed. The nature of these items, so far as is necessary to an understanding of the controversy, will be stated in connection with the discussion thereof. In *Fidelity & Deposit Co. v. Parkinson,* 68 Neb. 319, the petition of the plaintiff alleged that he furnished to the defendant, "for the construction of said building, material and labor to the amount and value of $921.78," and alleged that there was a balance due the plaintiff "for the work and labor so furnished." The judgment of the court was for $127.70 "for material and labor furnished by the plaintiff." The statute, as it existed then, did not include materialmen, and because the judgment was for both material and labor, instead of being for labor exclusively, it was reversed. The reversal is expressly put upon that ground. In the syllabus, however, it is said: "It is doubtful if the subcontractor who furnishes work and material in the construction of such building is within the terms of the statute." And in the opinion, after quoting from New York cases, it is said: "These cases, with which we are inclined to agree, seem to imply that a statute like the one under consideration is intended for the protection of the laborer who does the manual labor on the building, and not for the contractor who furnishes both labor and material in the construction of the work embraced within the contract." But it is expressly said that the court does not pass upon that question, both because it was not argued

on the submission of the case, and because the case "will have to be reversed for the reason that the judgment was given for labor and material, while the suit was brought for labor alone." The doubt in the opinion as to whether a contractor who furnishes labor in the construction of the work is entitled to a lien is derived from the opinion of the court of appeals of New York in *McCluskey v. Cromwell,* 11 N. Y. 593; but upon examination of that case it will be found that it does not justify such doubt. In that case the contract of sureties, which follows substantially the language of their statute, guaranteed that the contractor "shall and do well and truly pay or cause to be paid in full the wages stipulated and agreed to be paid to each and every laborer employed by him or his agent or agents, in the construction of the work." The court held that the subcontractor and the laborers employed by the subcontractor were not employed by the contractor himself, and therefore were not within the terms of the contract and the bond. This proposition is reasoned extensively by the court, and in conclusion the court said: "The courts can neither usurp the functions of the legislature, by doing or assuming as done what they may think should have been done in the way of legislation, or take the place of contracting parties, and vary the terms of their agreements to meet any supposed equities."

The statute in force when the contracts in the cases at bar were made was enacted in 1889. Laws 1889, ch. 28. The act is entitled "An act to secure the payment of mechanics' and laborers' wages on all public buildings where the provisions of the general mechanics' lien laws do not apply." It requires the public officers to take from the contractor a bond "conditioned for the payment of all laborers and mechanics for labor that shall be performed in the erecting, furnishing or repairing of the building, *or in performing the contract.*" When this statute was enacted the general mechanics' lien law provided: "Any person or subcontractor who shall perform any labor for or furnish any material or machinery or fixtures for any of the purposes mentioned in the first section of this act, to the

contractor or any subcontractor, who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement, * * * and, if the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such labor or material, machinery and fixtures." Comp. St. 1881, ch. 54, sec. 2. This statute gave the subcontractor and the laborers employed by him a lien for the material furnished and labor performed, and it seems clear that the statute now under consideration intended to furnish laborers with equivalent security for labor performed on public buildings where no lien was allowed. It expressly guaranteed compensation for labor "performed in the erecting, furnishing or repairing the building, or in performing the contract." To give the proper force and effect to the words "or in performing the contract," they must be construed to include all labor required to perform the contract with the proper authorities.

In *Des Moines Bridge & Iron Works v. Marxen & Rokahr*, 87 Neb. 684, it is held that, when the contractor has "agreed to furnish the material, machinery, appliances and labor necessary for the construction of, and construct, equip and fully build, a courthouse," and the bond of the surety is conditioned "that if the said Marxen & Rokahr shall well and truly keep and perform all the conditions of this contract on their part to be kept and performed, and shall indemnify and make payment and save the said Seward county harmless as therein stipulated, then this obligation shall be of no effect," the bond is a common-law contract, and the surety assumes "an obligation to pay the subcontractors and materialmen, as well as the laborers and mechanics engaged in constructing the courthouse referred to." That case recognizes a conflict in the authorities, citing some of them, and bases the conclusion upon our own decisions, some of which are also cited with approval, and others distinguished.

The act of 1913 (Laws 1913, ch. 170; Rev. St. 1913, sec. 3840) for the first time extended like security to material-

men. We conclude, then, that in these actions the surety company was by virtue of the statute liable for all labor necessarily employed in performing the contract entered into with the public authorities. These contracts were entered into before the act of 1913 took effect, and, as to the material furnished, the bond is exclusively a common-law contract, and is to be construed as such, The condition in this bond is that the company is bound "for all liability of the first party for all bills for work, labor and materials to be incurred in connection with the contract herein referred to." The liability of the surety is also stated in this contract in the following words: "Shall promptly pay all bills for work, labor and materials performed or furnished in and about said work." This contract covers labor performed, and, as we have said, is not regarded as in conflict with the statutes.

Plaintiff's counsel insists that the words "in connection with the contract" must be construed to protect "all parties becoming creditors of the contractor." Of course, he means creditors "in connection with the contract," but he does not state any plain rule by which it can be determined with certainty what creditors must be considered as having become such in connection with the contract with the school district. The necessity of such a plain distinction is obvious. If the contractor whose business was to take such contracts from time to time should, while engaged in this particular work, purchase wagons with which to deliver his materials, with the expectation of using them similarly in other work for years afterwards, the bill for such wagons might in some sense, perhaps, be said to be in connection with this contract, but surely not within the contemplation of the parties. What, then, might be reasonably contemplated by the parties from a fair construction of the language used? The surety guarantees that the contractor will pay for all work and labor performed and for all material furnished "in and about said work." This is the last expression of that matter in the contract, and it is agreed that if this is complied with the bond shall be void. The "work" is the construction of the building

and removal of the debris. The labor and materials involved in that "work" were evidently what was contemplated by the parties to the contract. If the contractor bought his materials in Chicago and paid the freight charges thereon to Fremont, the cost to him of the materials at Fremont would include the freight charges, and likewise, if he paid drayage to the building site, the cost of the materials that went into the building would include drayage also. Labor and materials that enter into the structure or are consumed in or about the work may be recovered for in such action, but not "for tools and appliances which are the property of the contractors and may be used from time to time in other works and upon other contracts, and which are not consumed in the work or which do not go as a part of the building or improvement and necessarily enter therein." *Ninneman v. City of Lewiston,* 23 Idaho, 169. Such tools and appliances would, of course, include machinery and rope used for hoisting, and, as the use of such tools and machinery cannot be recovered for, neither can repairs or oil or fuel used in operating such machinery. Lumber for concrete forms, if consumed in constructing the building, would constitute material used.

In these cases such lumber to the value of $6,874.65 was used and consumed, except the comparatively insignificant amount of $70. The court allowed for the full value of the lumber so used which had not been paid for, making no reduction for the $70 which was realized by the contractor and was not consumed in the work. This item was so small in comparison with the whole amount of lumber furnished that it may be said that the lumber furnished was practically consumed in the work. And, for the same reason, the court was right in not deducting 10 cents for each cement sack. The case stated shows that cement was furnished in sacks, and that by agreement the contractor was to be allowed 10 cents for each sack returned. There were 279 sacks not returned. There is no presumption that it is practicable to return all the sacks in which the cement is furnished, and, as this mate-

rial could not be furnished without the sacks, they are practically a part of the material furnished and consumed in the work.

The judgment in the case of the Nye-Schneider-Fowler Company included an item of $44.05 for coal used in running the hoisting engine. This was erroneous, and that judgment will be reversed, unless the plaintiff files in this court a remittitur in that amount within 30 days. If such remittitur is filed, the judgment will be affirmed. A similar item of $12.70 was allowed in the judgment of Hotchkiss et al., and the same order will be entered. In the judgment of Thomas & Courtright Hardware Company was improperly included $26.36 and $17.55 for articles used by the contractor, but which were not consumed and did not enter into the structure. The same order, therefore, will be entered as to those items. The judgment of Orvis Clark was wholly for drayage properly included. That judgment is therefore affirmed, with costs. In the other three cases, the costs in this court will be taxed to the party incurring the same.

JUDGMENT ACCORDINGLY.

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

STATE, EX REL. ANTON PINKOS ET AL., APPELLANTS, V. ROBERT H. RICE, APPELLEE.

FILED MARCH 13, 1915. No. 18903.

1. **Mandamus: OFFICERS: PERFORMANCE OF DUTIES.** The discretion of a public officer cannot be controlled by mandamus, but when a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus.

2. **Appeal: SUPERSEDEAS: CONDITIONS: FORECLOSURE.** Upon decree of strict foreclosure of a contract of sale of real estate, the supersedeas bond upon appeal to this court should contain the condition that the defendant will pay the reasonable value of the use of the premises pending the appeal if the decree is finally affirmed.

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

B. F. Good, E. D. Kilbourn and *A. M. Bunting,* for appellants.

Ralph M. Kryger, Lyle E. Jackson and *O. A. Williams, contra.*

SEDGWICK, J.

Harry Thissen obtained a judgment in the district court for Antelope county against these plaintiffs, Anton Pinkos et al., foreclosing a contract of sale of real estate. The decree of strict foreclosure found the amount due Mr. Thissen and directed its payment on or before a day fixed in the decree, with interest, and continued: "If said payment is made as above provided, said plaintiff to convey to defendants the above described premises, by a good and sufficient deed." But, if payment was not made as directed, then the defendants "shall be forever barred and foreclosed of all interest, either vested or contingent, and all equity of redemption, in said premises, and final writ of ouster to issue and plaintiff be put in possession of said premises." The defendants applied to the court for a supersedeas and to fix the amount of the bond. The court allowed the supersedeas and directed that the bond be "conditioned that defendants will prosecute appeal without unreasonable delay; will not, during pendency of appeal, commit, or suffer to be committed, on said premises, waste of any character whatsoever; that defendants will pay all costs, and also pay to plaintiff the reasonable value of the use and occupation of said premises from December 1, 1914, until delivery of possession of said premises to plaintiff, if this decree be affirmed." The defendants in that case tendered to the clerk of the court a bond for his approval, and the clerk refused to approve the same because it did not contain the condition to "pay to plaintiff the reasonable value of the use and occupation of said premises," as directed by the court. The defendants in that case then brought this action in mandamus against

the clerk to require him to approve the bond. The district court found in favor of the defendant and dismissed the proceedings, and the plaintiffs herein have appealed.

1. The first contention is that mandamus is not the proper remedy. It is, of course, well settled that mandamus cannot be used to control the discretion of a public officer. The plaintiffs however, insist that the statute fixes the bond, and that the order of the court requiring this additional condition was without jurisdiction and of no effect, so that the clerk had no discretion in the matter. Under such circumstances mandamus would be the proper remedy.

2. The principal question in this case is as to whether the court had jurisdiction to direct that the bond contain this condition, to pay the reasonable value for the use and occupation of the premises while the case was pending if the decree of foreclosure was affirmed. The statute formerly provided for a supersedeas in such case without this condition, but chapter 126, Laws 1903, amended this statute in this regard, and provided that, when the decree "directs the sale or delivery of possession of real estate, * * * and if the appeal be from an order of confirmation of sale the bond shall be further conditioned, if the appellant will pay to the purchaser the value of the use and occupation of the property from the date of the undertaking until the delivery of the possession if the order appealed from be affirmed." The decree of strict foreclosure is equivalent to the confirmation of sale in an ordinary foreclosure and comes within the meaning of this section. The court, therefore, did right in requiring this condition in the bond, and the clerk was not required to approve the bond without that condition. See *Escritt v. Michaelson*, 73 Neb. 634, and on rehearing, 640, where a somewhat similar question is considered.

The judgment of the district court is therefore

AFFIRMED.

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

JOSEPH MATICKA, APPELLEE, V. EDWARD E. JENSEN, APPELLANT.

FILED MARCH 13, 1915. No. 17859.

Highways: ESTABLISHMENT BY USER. Where, after an attempt has been made to lay out a public road across open prairie land, which, through failure to comply with statutory requirements, fails to legally establish such road, the public enters upon and uses the same as a public road, and the owner of the land traversed thereby fences his land on each side of the road along the entire line thereof, cultivating the land on one side, and using that on the other side as a pasture, and these conditions continue to exist for ten years or more, the irregularity in the original proceeding will be *held* cured, and such land thereby becomes and will remain a public road until vacated or abandoned, as provided by law.

APPEAL from the district court for Howard county: JAMES N. PAUL, JUDGE. *Affirmed.*

W. H. Thompson, for appellant.

T. T. Bell, contra.

HAMER, J.

The plaintiff is the road overseer. He brought an action in Howard county, seeking to enjoin the defendant from fencing in and plowing up an alleged highway. The cause was tried before the Honorable James N. Paul, one of the judges of the district court. The defendant had filed a motion to dissolve the injunction granted at the commencement of the case. The case came on for trial on the petition and answer in the main case. There was an effort to punish the defendant for contempt. The court reserved his decision on the order to show cause why the defendant should not be attached for contempt until a full hearing should be had. The trial was on May 10, 1912. The journal entry of the trial recites: "The court, after hearing the evidence and argument of counsel, and after consideration, and being fully advised in the premises, finds on the issues joined that a county road exists on and across the

northeast quarter of section twenty-nine (29) township sixteen (16) north of range ten (10) west, of the sixth P. M., in Howard county, Nebraska, near the northeast corner thereof, cutting off about twelve acres in said corner; that said road was established in the year 1883, and the same has been in continuous use by the public generally from said date up to November, 1911; that said road has been unlawfully closed and fenced by the defendant, Edward E. Jensen, and said fences are now across, upon and obstructing public travel along and on said road. On the main cause in this case, it is considered and adjudged by the court that a mandatory injunction issue commanding Edward E. Jensen, defendant herein, to remove any and all obstructions of whatever nature or kind, either in, on, over, or across said road, and that he open said road 66 feet wide over and across said land, and that he do so within five days after notice of this injunction and order; and the said defendant is enjoined from (in) any manner obstructing said road or interfering with public travel on, along and over said road henceforth." There was a further finding that the defendant was not guilty of contempt in disobeying the temporary injunction. From the order made the defendant appeals.

On May 17, 1912, a further order was made: "That the defendant, Edward E. Jensen, take down and remove all fences and other obstructions in, on, over and across the public highway running across the northeast quarter of section 29, in township 16, range 10, in Howard county, Nebraska, near the northeast corner of said quarter section, and he, the said Edward E. Jensen, is further enjoined from erecting, placing upon or causing to be erected or placed upon, or in, by himself, his agents, attorneys or employees, any fence or obstruction in, over or upon said highway, and from digging, plowing or in any manner damaging said highway, and from in any manner interfering with public travel on and along said highway; and the said Edward E. Jensen is further ordered to remove all such obstructions and keep said highway clear there-

from for a width of 66 feet at all points across the said northeast corner of said quarter section."

The evidence shows that in 1883 a petition was filed by 13 resident taxpayers in the vicinity of the road in question, asking for the laying out of the road. The evidence does not show that any of the statutory requirements for the laying out of public roads was subsequently complied with. The only other evidence of any action that was taken is an entry in the commissioners' record as follows: "On motion, the road petition, filed by Michael Chmielecki et al. was granted as prayed for." After these informal proceedings were had the public continued to travel across defendant's land by substantially the same route as theretofore; the only variation being a slight change of a few rods at one end of the road caused by the construction of a fence. This change was made about 21 years prior to the time of the trial of this suit. Therefore the public gradually used the road in question as a public road, and the owner of the land traversed thereby fenced his land on each side of the road along the entire line thereof, cultivating the land to crop on one side, and using the land on the other side as a pasture. These conditions continued to exist for at least 15 or 20 years prior to the time defendant attempted to close the road.

The defendant relies upon two defenses: (1) That no road was ever legally laid out across his land, which is true. (2) That he closed the road by permission of the county commissioners under an agreement made with them that if he would grade the road on the section line around the northeast corner of his land, so as to connect the section line road at the point where the road in controversy left the east line of his land with the section line road where the road in question connected therewith on the north line of his section, and put a culvert over a draw which would have to be crossed by the grade mentioned, all at his own expense, except as to the material for the culvert, which the commissioners agreed to furnish, they would waive and relinquish the right to use the road in controversy; that he performed the work as agreed, at an

expense of about $300, and gave a roadway around the northeast corner of his land for the purpose of connecting up with the section line roads; that when the work was completed the commissioners examined it and found it to be in accordance with the agreement, approved it, and then told him that he could close up the road in question; that the traveling public knew he was doing this work at the time it was being done and the purpose for which he was doing it, and that the plaintiff, as road overseer, and the public are now estopped to his closing the road. This contention, of course, must fail. The irregularity in the proceedings for laying out the road, in 1883, was cured by the subsequent use of the public for more than ten years, the right to which use was recognized and acquiesced in by the owner of the land in the construction of the fences along both sides of the road as above shown, and in permitting the use of the road by the public without objection for so long a period of time. The road having been thus established, it will remain a public road until vacated or abandoned, as provided by law. The judgment of the district court was right, and it is

AFFIRMED.

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

EDITH B. COPELAND, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 17929.

1. **Appeal**: FINDINGS: EVIDENCE. On a controverted question of fact, the finding of the jury will not be disturbed if there is evidence tending to support it, unless it is clearly wrong.

2. **Carriers**: INJURY TO PASSENGER: NEGLIGENCE: PRESUMPTION. When it appears in an action against a common carrier for personal injury caused by the negligence of the carrier that some defect in the appliances of the carrier, or some act of its employees in the conduct of its business, contributed to the accident which caused

the injury complained of, a presumption of negligence on the part of the carrier arises, and, unless there is evidence against the presumption, it will be sufficient to establish the allegation of negligence of the carrier.

3. **Trial:** INSTRUCTIONS. The defendant is not entitled to an instruction that the jury should not be governed by sympathy for the plaintiff, nothing having transpired to indicate that the jurors were unmindful of their sworn duty.

4. ———: ———: DISCRETION. The giving of such an instruction is within the discretion of the trial court.

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

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

Wymer Dressler, contra.

HAMER, J.

This action was brought by the plaintiff in the district court for Douglas county, Nebraska, to recover damages for personal injuries alleged to have been sustained while the plaintiff was a passenger on a street car in Omaha on the 11th day of November, 1907. The plaintiff claims that the injury was sustained because of the careless and sudden starting of the car while the plaintiff was alighting therefrom. The basis of the plaintiff's claim is negligence upon the part of the street car company. The case was tried before Judge Sutton and a jury. There was a verdict for the plaintiff, assessing her damages at $2,000, and on this verdict a judgment was rendered, from which an appeal is taken to this court.

The plaintiff, Edith B. Copeland, claims to have been injured while alighting from one of the cars of the defendant company. She claims that she sustained a fracture of the coccyx by reason of the sudden starting of the car while she was in the act of alighting at Fourteenth and Douglas streets, Omaha. She claims to have boarded the car at Seventeenth and Nicholas streets. She was on her way to the Burlington headquarters. It was necessary for

her to alight from a car south-bound on Fourteenth street at Dodge street, and to transfer to a car going east on Dodge street, known as the "Dodge" car. Mrs. Copeland claims that the car known as the "South Omaha" car, from which she was in the habit of transferring at Fourteenth and Dodge streets to the Dodge street car, stopped on this particular morning at the southwest corner of the intersection. She says that she generally left her home on the 7:30 A. M. car, which takes about 10 to 15 minutes to get to Fourteenth and Dodge streets, and that it would not have been more than 8 minutes at the most either way from 7:45 A. M. when she alighted that morning from the South Omaha car at Fourteenth and Dodge streets. She further claims that she got to work that morning by 8 o'clock at the auditor's office in the Burlington headquarters at the corner of Tenth and Farnam streets. She testified that there were several persons, men and women, who alighted from the car at the time she got off, and that she was the last person to get off; that as she was in the act of getting off the conductor rang the bell and caused the car to start forward. She claims that she was stepping from the lower step at the rear of the car to the street; that she released her hand just as the car started; and that the sudden movement of the car caused her to fall and to strike the end of her spine upon the edge of the car steps. In her testimony she claims that the conductor paid no attention to her, except to laugh at her, and that he went on without stopping his car. She appears to have been unable to get the number of the car. She could not remember whether either of the four conductors brought before her at the trial was the conductor who had charge of the car. A gentleman passenger came to her assistance, but she did not know this gentleman, and has not since seen him. She testified that she arose to her feet and proceeded to the southeast corner of the intersection, where she boarded an east-bound car, and thereafter alighted at Tenth and Farnam streets, from which she proceeded directly to the auditor's office in the Burlington headquarters building. She worked as usual that day.

She sat at her desk, and at night took a car and transferred at Fourteenth and Dodge streets. Plaintiff testified that prior to her injury she was not nervous; that she did not suffer from pains in her back; that she did not have headaches; that she did not have any shooting pains up and down her spinal column; that she had no ailments of the back and spine. She testified that after she received the injury she suffered in that way; that she often had headaches; that she had shooting pains up and down her spine all the time; that she could not sit comfortably, except on one side, and that if she attempted to sit straight she could not get up; that her hips were affected by the changes of the weather, and that she had pains in her hips whenever the weather changed; that she had soreness along her spine; that she had pain all the time; that the pain crept up the spine from the place of injury. She seems to have been unable to sleep well at night, and her husband would massage the muscles with alcohol; that he did this for the purpose of relieving the pain; that she had not been free from pain since she received the injury up to the day she testified. She is shown to have one child.

Dr. Alonzo E. Mack, her physician, testified that he had been practicing medicine in Omaha for 16 years; that he had known the plaintiff for 20 years; that when he first became acquainted with her she was 7 or 8 years old; that he had been her physician 16 years; that he was acquainted with her general physical condition prior to November 11, 1907, and that her condition was good before that time. He then testified that in the latter part of December, 1907, she came to his office and complained of a pain in her back and referred to the lower part of the spine; that he examined her back and lower part of her spine, and found a fracture of the coccyx. He then describes the coccyx as composed usually of four small bones, called vertebrae, set at the end of the spine; that the usual length is from three to four inches; that these small vertebrae may be three, or, four or five, but four is the usual number. He then further describes the coccyx as being slightly curved with the point forward; that in the case of the plaintiff

it was pointing directly forward, and that it was fractured at the middle joint, and therefore, that there were two vertebrae dislocated or broken off. He then testified that the coccyx serves as an attachment for muscles and is a protection to the nerves; that there are important nerves in the vicinity; that these nerves come to a sort of a center at the coccyx, and that a fracture of the bones causes pain; that, if the support for the muscles which control the bowels should be broken, every movement of the bowels would cause pain to the patient; that the natural and necessary result of a fracture of the coccyx would be pain more or less constant and continuous; that it would be a constant irritant, and that its effect would become best marked as time went on; that unless one should be informed by some competent person he might not know that the coccyx bone was fractured, and might not at once rush to a physician. He testified that he had observed Mrs. Copeland's physical condition from time to time since 1907, and that she was nervous; that she was more nervous at the time of the trial than she was a year prior to that time; that she was growing more and more nervous; that her fractured coccyx bone remains the same, and that the ultimate result must be "a physical and nervous breakdown." "Q. What do you say as to whether Mrs. Copeland's present condition—that is, her fractured coccyx bone—is a temporary or permanent injury? A. Permanent." On cross-examination he testified that the plaintiff was married; that she had the care of a little child at night and also in the day time, and that this, with her present condition, would be one of the natural contributing causes to her nervousness; that nervousness and nervous collapse are so frequent that a large number of specialists have for years engaged in the special practice in Omaha; that besides these specialists every reputable physician and surgeon has cases of this kind; that the witness himself had quite a number of these cases at the time he testified. The witness could not tell how long the injury had occurred to the plaintiff before she came to his office. He did not seem to think that it would be difficult to treat the

plaintiff for the injury, and that treatment could be an efficient remedy. "Q. Would you say that her condition, as induced by the fractured coccyx, is at this time aggravated, or not? A. Yes, sir." He further testified that after a number of years the patient would have decreased vitality and loss of resistance, and that there was an element of greater danger now than at the time the injury was received. The husband of the plaintiff testified that many times he massaged Mrs. Copeland with alcohol.

It is the contention of the defendant that the injury claimed by the plaintiff never occurred. It is also claimed that the court erred in excluding the rule or custom of defendant's employees in reporting accidents. We are unable to see that there was any prejudice to the defendant in this ruling. The particular conductor in charge of the car would not know whether the plaintiff was injured, unless she complained then and there of the injury. Merely slipping and falling in the snow would not of itself be a serious matter in the mind of the conductor, unless attended with apparent serious consequences. That the conductor made no report was probably due to the fact that he did not consider the plaintiff was injured. In any event the ruling of the court was not a bar to any fact sought to be proved by the defendant.

It is claimed that the court erred in refusing to give instruction No. 4, requested by the defendant, cautioning the jury against being influenced by sympathy for the plaintiff. It is claimed that there was no instruction of this character in the court's charge, and therefore that the failure of the court to give an instruction upon this point was prejudicial. We think this matter was one of discretion. It does not follow that the jury were about to be improperly influenced because of the testimony of the plaintiff and of witnesses whose testimony tended to corroborate her. "The trial judge 'is in a position to observe and know whether the situation is such as to render such cautionary instruction necessary to a due administration of justice, and if, in his opinion, they are not, his refusal to give them cannot ordinarily be assigned for error.'" Blashfield, In-

structions to Juries, sec. 344. See, also, *Birmingham Fire Ins. Co. v. Pulver,* 126 Ill. 329; *Central Branch Union P. R. Co. v. Andrews,* 41 Kan. 370. The parties are certainly not entitled to a cautionary instruction of this character, in the absence of special circumstances connected with the trial which would make such instruction essential to a fair trial. The defendant is not entitled to an instruction that the jury must be guided solely by the evidence, and should not be governed by sympathy for the plaintiff, nothing having transpired to indicate that the jurors were unmindful of their sworn duty. *Johnson v. St. Louis & S. R. Co.,* 173 Mo. 307. We are unable to see anything in the case of a pitiful character or which would be calculated to excite unusual sympathy in the jury. There was, so far as we are able to see, no abuse of discretion on the part of the trial court because he failed to give such an instruction, or the instruction requested.

The next point urged by the appellant is that the court did not give sufficient prominence to the contention of the defendant that the plaintiff's story was false, and that no such accident had ever occurred. We are unable to see any error upon the part of the trial court because of anything shown in this contention. When the plaintiff has shown that she was a passenger on the defendant's street car, and that she was injured by the sudden starting of the car while in the act of alighting therefrom, such a situation would seem to raise the presumption that the defendant was negligent. In *Lincoln Traction Co. v. Shepherd,* 74 Neb. 374, it is said in the body of the opinion: "When a passenger is injured through some defect in the appliances of the carrier, or some act that is done by its employees in the conduct of the business, a presumption of negligence on the part of the carrier arises, and this presumption is sufficient, in the absence of any other evidence upon the subject, to supply the proof demanded of the plaintiff upon that point and establishes *prima facie* the negligence of the carrier."

The serious contention of the defendant would seem to be that the accident never happened. The plaintiff has

testified that it did happen. That matter has been submitted to the jury. They have found against the contention of the defendant. Apparently the defendant had a fair trial. We are unable to see any good reason for disturbing the verdict. The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

LOGAN VALLEY BANK, APPELLEE, V. MARTIN CHRISTENSEN ET AL., APPELLANTS.

FILED MARCH 13, 1915. No. 17978.

1. **Parol Evidence:** DEEDS: CONSIDERATION. The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration.
2. **Appeal in Equity:** TRIAL DE NOVO. Upon appeal to this court, an equity cause is tried *de novo*, without reference to the decision in the district court; but, when the trial court has evidently relied upon the testimony of a witness examined before him orally, this court will regard that fact in weighing the testimony of such witness.
3. **Contracts:** CONSIDERATION: SUFFICIENCY OF EVIDENCE. The evidence indicated in the opinion is found sufficient to support the findings and decree of the trial court.

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

Baldrige, Keller & Keller, for appellants.

C. E. Abbott, contra.

HAMER, J.

Martin Christensen, appellee, carried on a general merchandise business at Uehling, in Dodge county, Nebraska, prior to September 5, 1911. About that time he had difficulty in realizing money out of his assets. Freeman P.

Kirkendall & Company of Omaha were his principal creditors. Christensen's stock and fixtures invoiced between $8,000 and $9,000, and he had accounts and bills receivable amounting to about $1,800. He also had his store building and lot in Uehling (lot 15, in block 9). He also had a dwelling-house and two lots, being lots 6 and 7, in block 18, Uehling, and worth about $1,700. This dwelling-house and the lots on which the same was situate constituted his homestead. Christensen borrowed sums of money from the plaintiff, the Logan Valley Bank, and paid the same to merchandise creditors. He owed the bank $2,000. Christensen's total indebtedness was about $10,000, of which the sum of $8,000 was due to his commercial creditors. The sum of $2,000 due to the Logan Valley Bank was secured by a real estate mortgage on the homestead and store building. Christensen met the appellant Kirkendall in Omaha and talked over the facts with him. On September 5 they together agreed orally that Kirkendall would take over Christensen's business, his stock, fixtures, bills, and accounts receivable, and also his business real estate. Kirkendall was to discharge Christensen's wholesale obligations. A bill of sale of Christensen's personal property to Kirkendall as trustee was drawn up that day and signed, witnessed and acknowledged in Douglas county. A mercantile adjuster named Pearson went up to Uehling to invoice the stock. The stock was invoiced and the bills and accounts receivable were examined. A deed was executed by Christensen and his wife to Freeman P. Kirkendall as grantee. Kirkendall took over the stock, the fixtures, the bills, and accounts receivable, and the business real estate. In the bill of sale the consideration named is "one dollar and other valuable consideration." The only instruments executed seem to have been the bill of sale and the deed. There was no written agreement nor any written evidence of what constituted the "other valuable consideration."

The bank commenced foreclosure proceedings on its mortgage. Mr. Christensen and wife and Mr. Kirkendall were made parties defendant. Mr. Christensen answered

and alleged that, in consideration of the transfer of the property to Kirkendall, Mr. Kirkendall agreed to pay the bank's mortgage of $2,000. This Mr. Kirkendall denied. The court found the issues in favor of Mr. and Mrs. Christensen. The decree in the foreclosure suit, after finding the amount due upon the bank's mortgage, provided: "It is further considered, ordered, and decreed that lot 15, in block 9, of the village of Uehling, Nebraska, aforesaid, be first sold by said sheriff, and that if the same be sufficient to pay the amount aforesaid, with interest and costs, that lots 6 and 7, in block 18, aforesaid, be not sold; and that if the money arising from the sale of lot 15, block 9, aforesaid, shall be insufficient to pay the amount due to the plaintiff, with interest and costs, that lots 6 and 7, block 18, aforesaid, be sold, that upon the confirmation of such sale the defendant Martin Christensen will be entitled to apply to the court for an order and judgment that the defendant Freeman P. Kirkendall shall pay to the said defendant Martin Christensen the amount of such deficiency so satisfied out of lots 6 and 7, in block 18, the homestead of the said Martin Christensen and Magrehte Christensen, together with interest thereon from date of such report."

It appears to have been stipulated at the commencement of the trial that Kirkendall agreed to pay the mercantile creditors. Whether he also agreed to pay the secured claims to the bank was by stipulation left open for proof. At the trial Mr. Kirkendall did not appear and did not testify. Christensen testified that he voluntarily went down to Omaha; that Kirkendall, after hearing a full statement of the facts, agreed to pay all of Christensen's indebtedness; that he agreed to turn over to Kirkendall all of his property; that he explained to Kirkendall how much he owed the bank and how much he owed the building and loan association on the store building. He said that he had a slip of everything, and that everything was laid before the creditors; that Kirkendall agreed to pay everything. Christensen ran the store three months for Kirkendall for $50 a month. He testified that he was

to get all his debts paid; that Kirkendall was to pay the indebtedness to the Logan Valley Bank.

Christensen is positive in his evidence that Kirkendall said he would settle with all the creditors; that he also said that he would pay the $2,000 mortgage. He also testified that Kirkendall and himself made out the "whole thing," meaning the arrangement; that the $2,000 debt owing to the bank had not all been incurred at one time; that he got the money from the bank, and that he paid it to the parties from whom he got the stock of merchandise; that this whole $2,000 was "merchandise debt;" that Kirkendall sent Pearson up to Uehling to take over the property and get the deed.

Pearson testified that the agreement was made between Christensen and Kirkendall before he (Pearson) went up to Uehling, and that he closed up the deal between them when he went up there. Pearson said that he had been given instructions by Kirkendall as to what the agreement was: "Q. You were to go up there and take it over? A. Yes, sir. * * * Q. And you had instructions from Mr. Kirkendall, at the time you went up there, that in taking it over to take an invoice? A. To take an invoice; yes, sir. Q. And report that invoice to him? You stated that your business at that time was that of mercantile adjustments. You mean by that, do you, that you go out for wholesale houses and take over stocks for creditors; that's your business? A. Yes, sir. Q. And then, in line with that, you exercise extreme care to get all that is coming to the creditors? A. I try to."

Christensen told Pearson at Uehling, when Pearson came up, that the agreement with Kirkendall was that Kirkendall was to pay the mortgage. When Pearson prepared the deed, Christensen wanted it fixed so that Kirkendall would be required to pay the mortgage. Christensen testified: "Q. And did you have some difficulty with him (Pearson) as to how the deed was to be drawn? A. Yes, sir; I had a conversation about it, I asked him—I had seen one subject to a mortgage for so much, and I thought that that would be sufficient—and I asked Mr. Pearson if

that was sufficient, that they would sure pay the $2,000; and he said, 'yes.' "

On the other side, it is contended in the briefs of appellants that "it is inconceivable that Mr. Kirkendall would agree to pay all of Christensen's debts, regardless of what they might have been, having only Christensen's word that they amounted to $8,473. Yet Christensen said that the deal was made between himself and Mr. Kirkendall, and claims that Mr. Kirkendall then agreed to pay all his debts."

It is also said in the brief of appellants: "It is inconceivable that Mr. Kirkendall—who is not in the real estate business—would agree to pay a $2,000 mortgage on property that was not worth to exceed $2,000, and that Christensen did not claim was worth more than $2,000, and that, too, without ever having seen the property or learned anything of its value, except from the mere statement of Christensen. Yet Christensen says: 'Q. Mr. Christensen, when was it that you had this conversation with Mr. Kirkendall, in which he said that he would take care of the $2,000 mortgage? Was that the first time you were in Omaha? A. First time I was there; yes, sir.' "

On the trial of the case it was admitted, through Mr. Kirkendall's counsel, that he did what counsel argued was incredible. It was stipulated in open court on the commencement of the trial: "That on September 5, 1911, Kirkendall received said property in full satisfaction of all indebtedness of said Martin Christensen to the creditors scheduled and receipted in exhibit A in defendant Kirkendall's cross-petition filed in this action, and that said Kirkendall agreed that he would discharge all of said indebtedness against Martin Christensen to said creditors as recited, and stated in exhibit A attached to said Kirkendall's cross-petition filed herein." It was also stipulated: "This stipulation is without prejudice to the right or rights of said Martin Christensen and Magrehte Christensen, the defendants, to prove by the evidence that said Kirkendall agreed, as part of the consideration for said deed and bill of sale and transfer so made to him, that he

would pay to said bank said mortgage debt and interest, and discharge the indebtedness of said Martin Christensen and Magrehte Christensen to said bank." Kirkendall appears to have admitted that his obligation was to pay the other creditors. By this admission the stipulation narrowed down to whether he also agreed to pay the bank. The thing, therefore, which appellants argued to be unreasonable was the very thing which they stipulated. It might be said that Kirkendall needed the store building to do business in. It was also possible that he might have a surplus after paying the bank. While it was not especially important to Christensen that his wholesale merchandise bills should be paid in full, except perhaps his desire to be fair and to have his liabilities cleaned up, yet it was important to him that the mortgage which covered his homestead should be paid. This mortgage on the homestead was incurred in business. Because of that fact it was proper to consider that it should be satisfied if the parties so agreed.

The following question and answer relate to the conversation which Pearson had with Christensen up at Uehling: "Q. What, if anything, was said about the indebtedness to the Logan Valley Bank, the corporation plaintiff in this action (referring to his conversation with Mr. Kirkendall in regard to this transaction)? A. That was stated in the mortgage, that it was subject to $2,000, when the property was turned over to him."

At the time Kirkendall bargained for and took a deed to the store building and lot, it may have been worth enough to pay the mortgage to the bank. The apparent object of Kirkendall is claimed by the appellee to be to use it in connection with handling the stock and for what profit there might be in buying and selling it. Pearson seems to have estimated the excess over the amount required to pay the mortgage to amount to $200 or $300. Of course, the principal concern of Mr. and Mrs. Christensen was to have the mortgage debt paid when it fell due and to protect the homestead.

Counsel for Kirkendall make an argument that, because the bank did not hear any conversation between Christensen and Pearson about the mortgage, and because Pearson says that Christensen did not have a conversation with him about Kirkendall paying the mortgage, therefore the probabilities were that there was no such conversation. Kuhlman testified that he did not hear the conversation between Christensen and Pearson, or pay any attention to it. Both Christensen and Pearson testified that there was a long conversation between them about the mortgage and the wording of the deed, both in the store building and also in the bank. Pearson testified directly: "There was at that time quite a conversation in reference to this mortgage." While Pearson disagrees with Christensen as to just what the conversation was, he fully admits the conversation. He also testified that part of the conversation was in the store and part of it was in the bank. Pearson testified: "Q. As you originally drew the deed you left out that clause subject to the mortgage; you put that in after you and he had the conversation? A. There were two deeds drawn, the one of them was worded that they did not like it, the wording in reference to this mortgage. The fact that I had placed in the deed where the mortgage notation was, it was a blanket mortgage, and I described two properties, while it was covering this one property, and then the banker and Mr. Christensen advised that we make the notation subject to the mortgage of $2,000, not designating the other property in the deed." It will be seen that the Christensens did everything that they could to have their agreement with Kirkendall carried out and the home property protected. The putting in of the wording "subject to the mortgage" was not by the advice of Mr. Kuhlman or Mr. Christensen. Pearson put it in himself. The facts and circumstances show that there was an agreement that Kirkendall should pay the mortgage. Pearson drew the deed and handled the wording of it. He said "subject to the mortgage" was enough, and that they were going to pay the mortgage out of the stock. Christensen testified: "I asked him if that was

sufficient to put in, *'subject to the mortgage for $2,000?'* Q. You asked him what? A. I asked him if that would cover it, and he said it would, that that was understood that it was to come out of the stock that he was to pay the bank with. Q. What did he say about paying the bank? A. He said they would pay the bank. Q. You asked him whether the recital in the deed or papers was sufficient to show that they would be compelled to pay that money to the bank? A. Yes, sir. Q. And he said that it was? A. Yes, sir. Q. Who said that? A. Mr. Pearson."

Pearson seems to be mistaken about some of the details of the transaction. He testified to drawing the bill of sale in Uehling after the taking of the invoice. It appears to have been drawn in Omaha and to have been acknowledged there.

The case of *Lexington Bank v. Salling,* 66 Neb. 180, lays down the rule: "The conveyance of land subject to an outstanding incumbrance imposes upon the purchaser no personal obligation to pay such incumbrance." That is undoubtedly true, but the case does not seem to be in point. The question was not in that case whether the consideration could be shown by parol testimony. *Mowry v. Mowry,* 137 Mich. 277; *Herrin v. Abbe,* 55 Fla. 769, 18 L. R. A. n. s. 907; *Magill Lumber Co. v. Lane-White Lumber Co.,* 90 Ark. 426; *Langan v. Iverson,* 78 Minn. 299; *Wiltrout v. Showers,* 82 Neb. 777; 17 Cyc. 653.

"The true consideration for a deed of conveyance of real estate may be shown by parol evidence, although the deed recites a consideration." *Goodman v. Smith,* 94 Neb. 227.

The reason for the rule last above stated is that a change in or contradiction of the express consideration does not in any manner affect the covenants of the grantor or grantee, and neither enlarges nor limits the grant. The real question to be determined is: "What was the actual consideration?" In the instant case there is no written evidence of what the consideration for the deed actually was. It must be proved by parol, or not at all. The language of the deed in reference to the consideration is "and other

valuable consideration." This necessitates oral evidence of what the consideration actually was.

There can be no marshaling of assets as against a homestead. *Mitchelson v. Smith,* 28 Neb. 583; *Cooper Wagon & Buggy Co. v. Irvin,* 83 Neb. 832.

We do not think that the appellants should be permitted to take the homestead of the Christensens away from them. This case was tried before the judge of the district court, Conrad Hollenbeck, who heard the evidence himself without referring the case to a referee. He saw the witnesses and heard them testify. He believed the evidence of Christensen, and we cannot say under the circumstances that he was wrong in so doing.

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

AFFIRMED.

MORRISSEY, C. J., BARNES and LETTON, JJ., not sitting.

WALTER W. WESTROPE, APPELLANT, V. W. F. ANDERSON ET AL., APPELLEES.

FILED MARCH 13, 1915. No. 17986.

1. **Pleading:** AMENDMENT. Amendments of pleading should be allowed whenever such amendments appear to be "in furtherance of justice." When such amendments make a continuance necessary, or otherwise increase the costs, such terms should be imposed as are just under the circumstances.
2. **Evidence** is examined, and considered sufficient to support the judgment, and no error is found in admitting or rejecting evidence.

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

M. H. Leamy, for appellant.

Fred H. Free and *K. W. McDonald, contra.*

HAMER, J.

This is an appeal from the district court for Pierce county. The case was heard before Judge Welch and a

jury. The jury returned a verdict for the defendants, and the plaintiff has appealed.

The action was upon a promissory note given as the purchase price for land. The defense was fraud in the sale of the land, and failure of consideration. The plaintiff denied those allegations, and alleged that he was an innocent purchaser of the note for full value, before due, in the regular course of business.

The plaintiff in the brief has discussed quite at large the sufficiency of the evidence as to the fraud and failure of consideration. He has quoted largely from the evidence upon that point. We cannot undertake to analyze the evidence within reasonable limits in this opinion. It is substantially conflicting, and the finding of the jury is not so clearly wrong as to require a reversal for that reason. The plaintiff has not complied with rule 12 which requires: "Each proposition must be numbered and separately stated, concisely and without argument or elaboration, and authorities relied upon as supporting them must be cited with each proposition, respectively."

In the course of his argument upon the sufficiency of evidence, it is suggested that the court ought not to have allowed so many amendments to the pleading. The rule of the statute in regard to amendment of pleadings is very liberal, and provides that the court may, "in furtherance of justice, and on such terms as may be proper, amend any pleading." Code, sec. 144. When such amendments make a continuance necessary, or otherwise increase the costs, it is very important that amendments should be allowed upon just terms, and usually, when such amendments are allowed, the only question of difficulty is as to the terms that should be required.

In the same manner plaintiff suggests that the court erred in admitting testimony, but we have not observed any such error in that regard as to require a reversal.

The judgment of the district court is therefore

AFFIRMED.

MORRISSEY, C. J., LETTON and FAWCETT, JJ., not sitting.

STATE, EX REL. PETER ELSASSER, APPELLANT, V. HENRY S. MCDONALD, APPELLEE.

FILED MARCH 13, 1915. No. 18703.

County Commissioners: TERM OF OFFICE. Chapter 46, Laws 1905, is not invalid. Under it and subsequent acts of the legislature, the term of county commissioners of Douglas county is four years.

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

John J. Sullivan and *B. S. Baker,* for appellant.

Stout, Rose & Wells, contra.

HAMER, J.

This is in the nature of *quo warranto* proceedings brought to obtain possession of the office of county commissioner of Douglas county. A demurrer to the information was sustained. The ruling on this demurrer is the only question presented by the record. The information alleged in substance, the organization of Douglas county; that it was without township organization; that it had a population of 125,000; that at a general election in November, 1909, John A. Scott was elected county commissioner for district No. 1, in said county, for a period of four years ending January 8, 1914; also the death of said John A. Scott in 1910, after having qualified and entered upon the discharge of the duties of the office; the election of the relator at the November, 1910, election to fill the unexpired portion of said Scott's term; that the relator duly qualified and entered upon the discharge of his duties as commissioner; that "at the general election in 1912, the defendant, claiming that the term of office of the county commissioner of said county is three years, and not four, became a candidate for county commissioner of said district No. 1, and having received the highest number of votes cast at said election, received a document purporting to be

a certificate of election. He thereupon filed the oath and bond required in cases where there is a lawful election, and on the 14th day of January, 1913, intruded himself into the office of county commissioner for district No. 1, of said county, and, with the aid and assistance of the other county commissioners of said county, did on the 15th day of January, 1913, unlawfully and forcibly exclude the relator from his said office, and still continues to so exclude him therefrom;" and that the only ground or reason upon which defendant became a candidate or assumed to qualify for said office is that the term of said office is three years, and not four years.

The question presented by the record is: Is the term of county commissioner in Douglas county three or four years? If for three years, the judgment is right. If for four years, the judgment is wrong. The question presented requires the construction of statutes which were construed by us in the case of *Best v. Moorhead,* 96 Neb. 602. It was there decided that chapter 46, Laws 1905, fixes the term of county commissioners of counties having a population of not less than 125,000 to be four years, and that commissioners elected under and pursuant to that act, as amended, hold their office for four years and until their successors are elected and qualified. The holding of this court in the case just cited is conclusive in the case now before us. In the opinion cited it is said: "We therefore conclude that chapter 46, Laws 1905, is not wholly invalid. It and subsequent acts of the legislature fix the term of county commissioners of Douglas county at four years, and plaintiffs were elected under and pursuant thereto. It follows that the plaintiffs' terms of office are four years and will not expire until January, 1916."

The judgment of the district court is

REVERSED.

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

ANNA SCHMIDT, APPELLEE, V. WILLIAMSBURGH CITY FIRE INSURANCE COMPANY, APPELLANT.

FILED MARCH 13, 1915. No. 18783.

1. **Insurance:** FIRE POLICY: VACANCY CLAUSE: BREACH. After a partial loss under a fire policy which renders the building untenantable, the insured is not guilty of a breach of the vacancy clause of the contract where he permits the property to remain unoccupied with the knowledge of the insurer.
2. ———: ———: CONSTRUCTION. It is not within the contemplation of the parties that an insured building shall be occupied by a tenant or otherwise when, as a result of its partial destruction by fire, it becomes unfit for occupancy.
3. ———: ———: AMOUNT RECOVERABLE. Where insured property is totally destroyed as the result of three fires, the measure of recovery for the final loss is the amount written in the contract, where the insured has complied in good faith with the terms of the policy.
4. ———: ———: NOTICE: SUFFICIENCY OF EVIDENCE. The evidence examined and *held* to sustain the verdict of the jury.

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

Greene, Breckenridge, Gurley & Woodrough, for appellant.

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

HAMER, J.

This case comes from Douglas county on a second appeal. The former opinion is reported in 95 Neb. 43.

Anna Schmidt owned a building in South Omaha, which was occupied as a rooming house by colored people. It was insured in the defendant company "to an amount not exceeding eight hundred and no-hundredths dollars." Attached to the insurance policy is a clause which says: "Loss or damage, if any, under this policy, shall be payable to Lion Bond & Surety Company, as mortgagee (or trustee), as interest may appear, and this insurance, as

to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same, "provided, also, that the mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee), and, unless permitted by this policy it shall be noted thereon, and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof, otherwise this policy shall be null and void."

The policy contains a proviso that, if the building insured shall become vacant or unoccupied and shall so remain for ten days, then the entire policy shall be void. The provision reads: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, * * * or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." The policy also provides that no person shall be deemed the agent of the company in any matter relating to the insurance, unless duly authorized in writing. About March 20, 1910, there was a fire in the insured building which burned a hole around the roof. The tenant moved out. There was a second fire on March 30, 1910, and a third fire April 17, 1910. This last fire seems to have completely destroyed the building, except slight remains of the foundation. The building was vacant and unoccupied from March 20, the time of the first fire, until the last fire, April 17, 1910.

It is claimed that N. P. Dodge & Company preceded Gallagher & Nelson in charge of the insured property.

Gallagher & Nelson were the agents of Anna Schmidt, and had charge of the rental of her houses at the time the building was destroyed.

W. G. Dickey testified that he was associated with N. P. Dodge & Company on the 20th day of March, 1910; that their place of business was the Withnell Block in room 206; that he knew the firm of Gallagher & Nelson, who were in business in the Brandeis Building; that he knew Miss Nelson; that at that time he received word from Miss Nelson in reference to a fire in certain property in South Omaha; that he knew Mrs. Anna Schmidt; that he had been in charge of her property; that he got acquainted with her by being in charge of her property; that Gallagher & Nelson succeeded him in charge of her property; that on the 20th day of March, 1910, Miss Nelson called him up by telephone and told him of the fire which occurred in this property in South Omaha; that it had sustained a loss by fire; that Miss Nelson referred to Mrs. Schmidt's property, and that the witness knew what property it was; that it was the property which N. P. Dodge & Company had had charge of previous to this time; that Miss Nelson had said to the witness that the property had sustained a small loss. She "didn't think it would be very much, and if we would agree to it they would go on and have it repaired."

Dickey testified that he called up Mr. Gibson and told him that Miss Nelson had reported a fire loss on this certain property—Mrs. Schmidt's property; that as he wrote the business, and it was "brokered" through his office, "we wanted him to look after it;" that Gibson said he would look after the matter; that the talk with Gibson was quite soon after he first learned about the fire. The witness testified: "I always look after these things quite promptly, you know."

Miss Nelson testified that Gallagher & Nelson had charge of the business of renting houses for Anna Schmidt; that the property was a two-story rooming house; that she was a member of the firm of Gallagher & Nelson; that the firm had charge of Mrs. Anna Schmidt's business; that she per-

sonally knew the house that was burned; that it was on lot 2, in block 75, South Omaha; that it was a two-story frame building; that about the 20th of March, 1910, it was occupied by a man by the name of Palm; that a fire occurred there, and that she saw the premises shortly after the fire; that it might have been a week afterwards; that "there was a large hole burned in the roof of the building," that it was around the chimney; that on the 21st of March she told Mr. Dickey about it; that she told Mr. Dickey "it was a small loss, a small fire on Mrs. Schmidt's property."

A. N. Gallagher testified that he knew of the fire which occurred on the premises March 20; that he saw the premises on Monday morning, the day after the fire; that there was quite a large hole burned through the roof; that the mortar was all out of the flue, and that mortar and water had dropped down from the top floor, and that the fire had communicated to the top floor, and there was dirt and rubbish around in there; that the premises were then occupied by William Palm; that the premises after this fire of March 20 were not tenantable; that the water from the fire department had dripped down through the ceiling and down the stairway, and that the bedding and beds were all wet, and the plastering, and that the firemen going up there and the people going in had tramped all over the stairs, and plastering and pieces of board and things were all up and down the stairs and floor and very dirty; that the motar was absolutely all out of the flue; that the flue had to be repaired before the house could be used again; that the hole in the roof was seven or eight feet square, and that it was burned up along the flue; that the hole was large enough to admit the rain, if there was any rain, and that anybody occupying the premises would be sure to get wet with that hole in the roof; that Mr. Palm's stove was all covered with water and mortar; that part of it remained and part of it was removed.

Mr. Gallagher testified that Palm had removed all of his effects from the building before the fire of April 17 occurred, or nearly so; that he removed his furniture on the

17th of April; that on the 21st of March it had been snowing; that there was snow on the roof when the witness went down in the morning; that the premises could not be used by a tenant without making a fire; that the night before the last fire, being on the 16th of April, the premises had been repaired; that the repairs were finished. Gallagher talked with Wilken, who said he was an adjuster for the Williamsburgh City Fire Insurance Company, and that he wanted to make an adjustment of the loss of Anna Schmidt; that he had viewed the property and had made a tender of $150—not a tender, but an offer, of $150; that Gallagher told him the offer of $150 was not acceptable; that nothing less than the full amount of the fire would be considered; that Wilken waited around, and the witness told him that it was no use "taking up his time or mine; that if he did not care to meet us on that basis we might as well close it; he picked up his grip and left the office." It was Gallagher who testified that there was nothing left of the house after the third fire, except some bricks in the foundation, worth about $25.

A contractor and builder named Farrell testified that he saw the building about a week or ten days after April 17, 1910; that at that time the woodwork was practically all destroyed, and the foundation was the principal thing remaining; that there was a part of the south side standing, but that it was badly charred, and that the woodwork was worth nothing except for kindling wood.

The chief of the fire department testified that there were people living in the house at the time of the first fire, but that it was vacant on March 30, and also on April 17; that the cause of the first fire was sparks from the chimney; this first fire was telephoned at 10:25 A. M., and the second fire was reported at 5:52 P. M. on March 30; that the fire of April 17 was reported at 1:45 A. M.; that the record of the fire on March 20 showed that there were three companies present and the fire lasted 30 minutes; that the record of the third fire showed that the building was a vacant house.

Arthur All testified that he was a fireman; that he was present at the first fire; that at that time the house was occupied, but that it was vacant at the second and third fires. On March 30 he noticed a mattress, and he believed that was the cause of the fire; that there might have been two mattresses.

O'Laughlin testified that he attended all three of the fires; that the house was occupied on March 20 by colored people; that there was nobody living there on March 30; that he saw one mattress in the basement, and that there was a fire there; that on April 17 there was nothing in the building that he could see, and that no one was living there, and there was no furniture and no sign of occupancy.

Mr. Gibson testified for the defendant, that his office issued the insurance policy sued on; that notice of the fire of April 17 was given to him in a letter from Gallagher & Nelson; that it is the only notice he ever got; that it makes no mention of any other fires than that of April 17; that he was authorized to solicit insurance and to issue policies and to represent the company in matters affecting the execution and delivery of insurance contracts, although he was not authorized to represent the company with regard to the adjustment of losses.

It seems to have been admitted that after the fire of April 17, 1910, the policy had a year and a month, or thereabouts, to run, and that the unearned premium would have amounted to about $8.

Exhibit 2 contains the proofs of loss. They refer to the fire of April 17. These proofs were sent to the home office, and were referred to Mr. Wilken, the company's adjuster, and he went to South Omaha about May 17 or 18 and saw Gallagher & Nelson, and claimed to them that the policy was void; that the company was not liable, but it was willing to pay something rather than litigate the matter. On the foregoing facts of the case the district court on the first trial gave the jury a peremptory instruction to return a verdict for the plaintiff and against the defendant

in the amount of the policy. It seems to be conceded that the evidence in each trial is along the same line.

It was held by this court at the former hearing (95 Neb. 43), as stated in the syllabus: "Notice and knowledge of the existence of a vacancy in the insured premises, or of the occurrence of a fire in the same, to such an extent as to make them uninhabitable, communicated to the local agent of the defendant, authorized to issue policies and transact the usual business of a recording agency, is the knowledge of the insurance company." The above holding would seem to be important in determining the law applicable. It determines that branch of it at least. The case was reversed, because it was the view of this court, as stated in the body of the opinion, that the case should have been sent to the jury to pass upon the question of fact as to whether notice of the former fire was given to the agent of the defendant. It was also said "that the district court erred in instructing the jury, as a matter of law, that 'the insurance contract * * * was still in force, and recognized at all times afterward as being in force, between the parties,' and in directing it to return a verdict for the plaintiff."

In *Hunt v. State Ins. Co.*, 66 Neb. 125, this court held on rehearing, as stated in the syllabus: "Where a tenant has removed from the insured premises and a loss occurs the same day, within a few hours, whether there was a vacancy, or a mere temporary cessation of occupancy until the tenant could fully remove his effects and some one else could be put in, is a question for the jury." It was further said in the syllabus: "If, with knowledge of the facts by reason whereof it is entitled to claim a forfeiture, the insurer continues to treat the policy as in force, or does any act inconsistent with an intention to insist upon the forfeiture, the forfeiture is waived." In the body of the opinion it is said: "If the insurer, with knowledge of the facts by reason whereof it is entitled to insist upon forfeiture, continues to recognize the policy as in force, or does any act inconsistent with insistence upon the for-

feiture, the forfeiture is waived, and may not be relied upon thereafter"—citing *Slobodisky v. Phœnix Ins. Co.*, 52 Neb. 395; *Phœnix Ins. Co. v. Holcombe*, 57 Neb. 622; *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488.

In *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, this court held, as stated in the syllabus: "After a partial loss under a fire policy which renders the building untenantable, the insured is not guilty of a breach of the vacancy clause of the contract where he permits the property to remain unoccupied pending the period during which the insurer is authorized to exercise his option to repair the damaged building." In the body of the opinion it is said: "It could not have been contemplated by the parties that the building should be occupied, when, as a result of its partial destruction by fire, it became unfit for occupancy."

And, as we view the matter, the insurance company had notice of the condition of the building after the conversation of Miss Nelson, of Gallagher & Nelson, with Mr. Dickey, who testified that he called up Senator Gibson of South Omaha, the agent of the insurance company and who wrote the policy, and told him about the fire, and Gibson said "he would look after the matter." This was knowledge imparted to the insurance company.

An examination of the instructions appears to call for a review of the alleged error concerning the giving of instruction No. 2 on the court's own motion. In that instruction the court told the jury: "The one question for the jury to decide in this case is whether or not notice of the fire of March 20, 1910, was given to the said L. C. Gibson, at or shortly after the time of said fire of March 20, 1910, occurred, and the burden of proof is upon the plaintiff to show by a preponderance of the evidence that said notice was given to the said Gibson, and, if she (the plaintiff) has so shown, she will be entitled to recover." The foregoing instruction seems appropriate to the evidence given. It is without error.

The verdict of the jury is fully sustained by the evidence. We believe that the instructions given by the court

are properly applicable to the case. The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., LETTON and FAWCETT, JJ., not sitting.

WENDOLIN GERWICK V. STATE OF NEBRASKA.

FILED MARCH 13, 1915. No. 18929.

1. **Criminal Law**: APPEAL: FINDINGS: EVIDENCE. Where a jury has decided a question of fact properly submitted, and the trial judge has overruled a motion for a new trial, if the record discloses competent evidence on which the finding is based, such finding should not be disturbed by the supreme court, unless upon the whole record it is clearly wrong.
2. **Assault and Battery**: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* sufficient to sustain the verdict.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

H. A. Lambert and *Edwin Falloon,* for plaintiff in error.

Willis E. Reed, Attorney General, and *C. F. Reavis, contra.*

HAMER, J.

The plaintiff in error, Wendolin Gerwick, and hereafter called the defendant, was on the 11th day of November, 1913, charged with making an assault upon Clifford Duerfeldt. The complaint was filed in the office of John D. Spragins, a justice of the peace of Richardson county, where the defendant was found guilty. He appealed to the district court for Richardson county, where, on the 26th day of February, 1914, he was tried on the original charge before Judge Raper and a jury, and was again convicted. He was sentenced to pay a fine of $20 and costs. The case comes here on a petition in error.

It is strenuously contended that the evidence is insufficient to sustain the verdict, and that the verdict is the result of bias and prejudice on the part of the jury.

Clifford Duerfeldt was a boy between 15 and 16 years old. He went with his father, Gus Duerfeldt, and William Rusch to the farm of the defendant Wendolin Gerwick. The father and his son and the hired man were looking for a hog which had strayed from the Duerfeldt premises and was supposed to be on the Gerwick farm. The Gerwick and Duerfeldt places are adjoining farms. The evidence shows ill will between the elder Duerfeldt and the defendant. On the day in question, when the Duerfeldts and the hired man, Rusch, reached the fence between the farms, the elder Duerfeldt and Rusch stopped at the fence, and the boy went inside of the fence a few rods until he reached the defendant's hog house. Gerwick and his two daughters were at work in the hog house separating sows and pigs and shutting them up in separate pens.

The boy testified: "Q. After you got to the fence that marked the beginning of the Gerwick land, who, if any one, went from the fence toward the Gerwick house? A. I did. Q. Where did you go? A. North, towards the house. Q. What were you going for? A. To ask where our hog was? * * * Q. When you got to the hog house, what happened? A. He was in the hog house when I got there. Q. Who? A. Mr. Gerwick. Q. Wendolin Gerwick? A. Yes, sir; and he asked, 'What are you doing here?' I said, I wanted to know where the hog was at, and he said, 'You damn thief,' and he hit me over the head, and I run. Q. What did he hit you with? A. A club, like a broomstick. Q. Which way did you run? A. South. Q. What did you do, if anything, toward screaming or making a noise? A. I cried. Q. What did your father and the hired man do? A. They asked, and I told them. Q. What did they do, stand by the fence or go over? A. They came and got me. Q. How close were you to the fence? A. Half way between the hog house and the fence. Q. When they spoke to you what did you say? A. I said, 'They hit me on the head.' * * * Where was Gerwick when you were run-

ning away? A. He came out of the hog house. Q. What did he have in his hand? A. A club. Q. What did you do when your father and the hired man came to you, if anything? A. He cussed all he could." (It is unnecessary to recite the abusive and vulgar language used. We will therefore omit it.) "Q. On what portion of your body did Gerwick strike you with a club? A. On the left side of my head. Q. What effect, if any, did that have on the left side of your head? A. I had a lump there over two months." The boy testified that the lump was as big as a hen's egg, but he probably exaggerated it, because the other witnesses testified that it was about half as big as a hen's egg.

A photograph of the south and north ends of the hog house was taken and was introduced in evidence by the defendant. The south end shows a window or opening. The heads of the two daughters of the defendant are shown at this opening. There seems to have been an impression that there was a door there, instead of a window, and the witnesses testified that the defendant came out through that door. He could not have come through the door in the natural way. Of course, he could have jumped out of the window, but he could not have walked out of it. There was a door in the north end of the hog house. It was a double door, but if the defendant came out of that door he would necessarily be compelled to walk around the hog house to the south and before he would be visible there. The defendant contends that the boy and his father and the hired man were mistaken as to whether the defendant walked out of the door and then hit the boy with the stick. The witnesses all agree that the boy was hurt. He had a lump on his head. He ran toward his father crying. It is immaterial whether the defendant reached out of that window and hit the boy over the head or whether he came out of the north door and went around to the south end and then struck him. The main question is did he strike him. This question was submitted to a jury under instructions which do not seem to be objection-

able in any way. Apparently the defendant had a fair trial and was properly convicted by sufficient evidence.

Counsel for the defendant make a vigorous contention in their brief that the evidence tending to show that there was bad blood between the defendant and Duerfeldt was objectionable and prejudicial. There is evidence that the defendant threatened Gus Duerfeldt, and said to him, "I will get you yet;" that when he did this he held a club over the elder Duerfeldt's head; that some two years before that the defendant had said, "I will get you one time or the other," and at that time he was threatening the elder Duerfeldt with a club. It is claimed that this sort of evidence was likely to inflame the minds of the jurors and to make them accept the view that the defendant had actually struck the boy with the club as charged. There can be no question under the evidence that there was ill will between these people.

Clifford Duerfeldt testified at one time in his evidence that the defendant stuck a stick out of the door first and then struck him. Of course, he might have stuck the stick out of the window, and could then have hit the boy, if he was standing by the window. We do not have to determine the question of fact. That was determined by the jury. They heard the evidence and saw the witnesses. After hearing the evidence they could not well have been in doubt that the boy was struck. He was struck on the head and rather severely injured. In his normal condition the defendant is probably ashamed of what he did, and perhaps regrets it, but the evidence fully justifies the verdict, and we are unable to discover any reason for setting it aside. It should be remembered that, when a motion for a new trial was heard, the question was submitted to the court as to whether the evidence sustained the verdict. The supreme court is reluctant to order a reversal where there is evidence which tends to sustain the verdict. When the jury has decided a question of fact properly submitted, and the trial judge has overruled a motion for a new trial, then, if the record discloses competent evidence on which the finding may have been based, such finding should not

be disturbed by the supreme court, unless upon the whole record the verdict is clearly wrong. We have examined the bill of exceptions and find the evidence sustains the verdict.

The judgment of the district court is

AFFIRMED.

LETTON and FAWCETT, JJ., not sitting.

PAUL SACCA, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 3, 1915. No. 17702.

1. **Appeal:** WITHDRAWAL OF ISSUE OF NEGLIGENCE. Under all the circumstances of this case, the action of the trial court in withdrawing the question of the child's negligence from the jury was not prejudicial.
2. **Street Railways:** INJURIES TO INFANT: SUFFICIENCY OF EVIDENCE. Evidence reexamined, its substance stated in this opinion and in our former opinion in 96 Neb. 447, *held* sufficient to sustain the verdict and judgment.

REHEARING of case reported in 96 Neb. 447. *Former judgment of reversal set aside, and judgment of district court affirmed.*

MORRISSEY, C. J.

This case is now before us on rehearing. The original opinion, which contains a sufficient statement of the issues, may be found in 96 Neb. 447. Counsel for defendant contended on the original hearing, and still contend, that the pleadings and evidence are insufficient to support the verdict and judgment. On the former hearing the judgment was reversed because, in the view taken of the evidence, it did not show actionable negligence on the part of the defendant. Counsel for plaintiff in a well-written brief now undertake to point out material portions of the evidence which had not been urged upon the attention of the court heretofore.

Plaintiff bases his right to recover on two grounds: First, that the car was being operated at too great a speed under the circumstances; second, that the defendant failed to have its car under proper control.

The schoolhouse was located on a *quasi* business street, and the grounds occupied the entire space between Seventeenth avenue and Seventeenth street, being a short block. The steps leading from the sidewalk to the schoolhouse are near the center of this block, and the children had been in the habit of crossing the street in front of the schoolhouse in place of using the regular foot crossings at each end of the block. This was the custom which had long prevailed and must have been known to the defendant. The school board had adopted no rule governing the action of the children in crossing this street, but the teacher, recognizing the danger, had attempted to establish a rule under which she would restrain the children, and keep them in a body upon the sidewalk until she gave them permission to cross the street car tracks. Her testimony indicates that this rule, or custom, was not always obeyed by the children. The day this accident occurred was the first day of school after vacation; the children were dismissed about 11 o'clock, and at the time there was a car on the north line of track, being the line nearest the schoolhouse, going west, and two cars on the south line of track, one traveling some distance behind the other, going east. The teacher did not give the customary signal for the children to cross, but it appears that one little boy, referred to in the evidence as the "Hungarian boy," ran across the street after the first east-bound car had gone by, and immediately in the rear of the west-bound car. This boy got across the street without injury. The Sacca boy, no doubt inspired by the action of the little Hungarian boy, broke away from the group and attempted also to cross the street, but he was struck by the second east-bound car and severely injured. Defendant contends that the west-bound car and the second east-bound car passed one another almost immediately in front of the schoolhouse steps, and that this little Sacca boy darted

across the street so close to the rear end of the west-bound car that he was not seen, and could not be seen, by the motorman on the east-bound car until the car was within two feet of him, and the motorman so testified. We think, however, that the weight of the testimony shows clearly that the boy did not pass so close to the rear end of the west-bound car as contended for by the defendant. The Hungarian boy left the group on the north side of the street, passed behind the west-bound car, and safely reached the south side. The west-bound car was moving at the usual rate of speed, and it is evident that it must have passed several feet to the west between the time the Hungarian boy crossed the tracks and the time the Sacca boy crossed. The west-bound car having proceeded a considerable distance, there was nothing to obstruct the view of the motorman. Had he been as watchful as the circumstances would appear to require, he would have seen this little Hungarian boy running across the tracks, and this would have put him on his guard and suggested the likelihood of other children following. Whatever may have been the custom of the teacher in keeping the children together until she gave them the signal to cross, it is clear that on this occasion she did not succeed in doing so.

The motorman testified: "When I was proceeding down grade, coming east, before I met the west-bound car, I saw the children standing out on the sidewalk. This was an everyday occurrence. They had been in the habit of standing there every day when I made that trip." The witnesses who have attempted to estimate the speed of the car place it at from five to seven miles an hour, and this, it is contended, negatives a finding that it was running at a high and dangerous rate of speed, or was not under proper control. While this testimony is not orally contradicted, it is shown to be incorrect by the facts surrounding the accident. Witnesses can rarely estimate accurately the speed of a moving vehicle. In this case there was nothing to direct their attention to the speed of the car until the accident became imminent, and then their attention would naturally be fastened upon the boy, and

not upon the speed of the car. The proof discloses that the air brakes were in good order, and that they carried between 70 and 80 pounds of air, and, notwithstanding the fact that the motorman applied the emergency brake, the car traveled, according to the testimony of the motorman, over 40 feet, and, according to the testimony of other witnesses, 80 or 100 feet before it was brought to a stop. There is a slight downgrade at this point, but nevertheless it must have been the speed of the car that prevented the motorman from bringing it to an earlier stop after he applied the emergency brake.

In the condition of this record, the maxim *res ipsa loquitur* may well be applied. This accident occurred at a point on the street which had long been used as a crossing by children of tender years. The motorman had seen them assembled upon the sidewalk. He ought to have seen one of their number run across the street in front of his car. The conditions were such as to put him upon his guard, and he might well have anticipated when the first child crossed that others would attempt to follow him. Under these circumstances, we believe the evidence going to show a high and dangerous rate of speed and lack of control is sufficient to sustain the finding of the jury.

It is urged that the court erred in taking away from the jury the question of contributory negligence on the part of the child. Without attempting to fix the exact age at which a child may be said to be responsible for his acts, and capable of being guilty of negligence, we believe that this child, who was under six years of age, cannot, under all of the circumstances of the case, be charged with negligence, and that the action of the court in withdrawing this question from the jury was not prejudicial. The child was of such tender years that it cannot be deemed in law possessed of sufficient discretion to make it guilty of negligence for its failure to exercise due care for its safety.

Error is assigned for the giving and refusal to give other instructions, but, in the view we take of the case, it would serve no useful purpose to discuss them. Considering the charge as a whole, we are satisfied that the is-

sues were fairly stated to the jury, and submitted to them under a correct rule of the law.

No error being found in the record, the former opinion in this case is set aside, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissenting.

If there was negligence of defendant which was the proximate cause of the boy's injury, plaintiff should recover; otherwise not. The majority opinion disposes of the question whether the defendant was negligent, in these words: "Under these circumstances we believe the evidence going to show a high and dangerous rate of speed and lack of control is sufficient to sustain the finding of the jury." That is, the speed of the car was "high" and there was "lack of control." It is indicated in the opinion that the speed was more than seven miles an hour, but how much more or what the probable rate of speed was, as shown by the evidence, is not stated. This seems a little indefinite as a basis of a charge of negligence. The opinion says that the car traveled, "according to the testimony of the motorman, over 40 feet, and, according to the testimony of other witnesses, 80 or 100 feet before it was brought to a stop." The evidence is greatly strained to derive such a conclusion. A witness who was so near that he could have touched the boy says the car ran about 40 feet after the boy ran against it. He is supported by many witnesses. One witness makes a guess that the car may have run 100 feet, and this overthrows the evidence of many other witnesses, both for plaintiff and defendant, who say the car was running at a rate of from three to five miles an hour. But this is the only reason given for supposing that the speed was great or that the car was not "under control." It is conceded that the boy ran against the car. When he saw the car he was running so fast, and the car was so near, that he could not avoid "running into it." Then the motorman stopped the car within 100 feet. This does not seem to prove that he was not in proper control of his car. Such an allegation must be established

affirmatively if it is to be made a ground for applying the "last clear chance" doctrine. There must be evidence that the boy was in a place of danger, and the motorman saw him, or ought to have seen him, while so situated, and that the motorman failed to use such means to avoid injuring him as an ordinarily prudent person so situated would have used. There is no such evidence.

The opinion says: "We think, however, that the weight of the testimony shows clearly that the boy did not pass so close to the rear end of the west-bound car as contended for by the defendant. * * * The west-bound car having proceeded a considerable distance, there was nothing to obstruct the view of the motorman." The conclusion is that he was not "as watchful as the circumstances would appear to require." If the motorman could have seen the boy, the boy could, of course, have seen the approaching car. That the boy did not see the car is certain. He could not stop himself, but ran right against the car. And so we see the opinion makes an unusual application of the "last clear chance" doctrine. The boy ran against the car and hurt himself. The motorman ought to have seen him and stopped the car, so that the boy could cross the tracks in safety. The boy did not see the car, but he was too young to see cars, and the motorman was old enough to see the boy. And, in explanation of this legal principle, we have in the opinion the statement that the boy was too young to be charged with negligence. This seems to me to be a strange misunderstanding of the legal principle which it seeks to apply in this case. If the defendant is negligent, and that is the proximate cause of the injury, and the plaintiff has arrived at the age of discretion, and was also negligent, which contributed to the injury, his negligence is said to be contributory, and he cannot recover. But if the party injured has not arrived at the age of discretion, and the defendant's negligence was sufficient to cause the injury, the defendant is liable, because in such case the plaintiff cannot be held responsible for contributory negligence. That question, however, was not in this case. The defense was solely that the defendant was not negligent.

To support that defense it is alleged that the boy ran against the car; that the injury was caused solely by the act of the boy, and not by any act or neglect of the defendant. So young a boy may not be guilty of contributory negligence in the technical legal sense of the word, but such a boy could hurt himself by running against a street car. To say that a young boy cannot be careless or negligent and so hurt himself seems very wide of the mark, and an instruction that the jury must not regard the carelessness or negligence of the boy in running into the car would virtually be an instruction to find for the plaintiff. It would be construed to mean that, no matter what the boy did, the defendant must avoid injuring him or pay damages; that is, they must insure the boy against hurting himself, and he not a passenger, but a trespasser.

The opinion does not attempt to explain how the speed of the car could have been the cause of the accident. Of course, if the car had run faster, it would have passed before the boy desired to cross the tracks, and no accident would have occurred; but it is not suggested that it was not running fast enough. To say that, if it had run slower, no accident would have occurred is predicated upon a similar mode of reasoning. If the car had remained at the street crossing, the boy would not have found any obstacle in his way. He ran so near the west-bound train that he did not see the car he ran against until it was too late to stop his momentum. If the car had been moving at two miles an hour, or standing, the result would have been the same. The company owes a duty to the persons who patronize the cars as well as to others, and, if a reckless boy can make his own cause of action by running against a car, we will have such restrictions as will make the service useless, or the cost of maintaining it prohibitive.

BARNES, J., concurs in this dissent.

AGNES PIER, APPELLANT, V. ANTHONY CAULEY ET AL., APPELLEES.

FILED APRIL 3, 1915. No. 18023.

Pleading: PETITION: JOINT DEMURRER. A petition which charges concurrent and inseparable acts of negligence, which result in injury to the patient, against two physicians charged with the care and treatment of the patient, *held* good as against a joint demurrer.

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

R. P. Drake and *Allen & Dowling,* for appellant.

A. M. Post and *Albert & Wagner, contra.*

MORRISSEY, C. J.

From the judgment of the district court for Platte county sustaining a demurrer to her petition and dismissing her action, plaintiff appeals. Plaintiff alleges that at all of the dates mentioned in her petition defendant Cauley was a practicing physician and surgeon at Humphrey, Nebraska, and the defendant Allenberger was a practicing physician and surgeon at Columbus, Nebraska; that there was an arrangement, agreement and understanding between the two whereby Cauley, when called in surgical cases, should call Allenberger to aid and co-operate with him in the treatment and care of his patient, and he should charge his patient for the services of each; that on August 3, 1911, the plaintiff, a young woman 18 years of age, met with an accident whereby her leg was broken below the knee; that the fracture caused an incision of the skin to such an extent that the bones protruded from the wound, and dirt and foreign substances were admitted therein. She being young and inexperienced, and so disabled that she was unable to act for herself, her parents on her behalf called the defendant Cauley in his professional capacity, as the petition alleged, "to treat and care for said wound and in-

jury, and the said Anthony Cauley for reward within an hour after said injury arrived at the home of the plaintiff and entered upon and took charge of the plaintiff as his patient with reference to her treatment for said injury; but that said Anthony Cauley negligently and unskilfully omitted to cleanse or remove from said wound said dirt and foreign substances, and negligently and unskilfully failed to properly care for or treat said wound or injury, or reset said broken bones, but on the contrary, and without the knowledge of the plaintiff or of her said parents, negligently and unskilfully permitted said dirt and foreign substances to accumulate and remain in said wound or injury, and, in addition thereto, insisted and urged the plaintiff's parents to cause the removal of the plaintiff at once to a hospital in the city of Columbus, Nebraska, where the defendant Christian A. Allenberger pursuant to said arrangement, agreement and understanding between himself and the said Anthony Cauley, was, by the said Anthony Cauley, called to and came to the bed-side of the plaintiff to care for and aid the said Anthony Cauley in the care of and the treatment for the said injury, and the plaintiff and her parents, being desirous of having a successful treatment of said wound and injury and having confidence in said Anthony Cauley, at once accompanied the plaintiff and the said Anthony Cauley to said city of Columbus, and then and there consented to the said Christian A. Allenberger so coming into the case to treat or aid in the treatment thereof and to perform or aid in the performance of such medical and surgical attendance and treatment as seemed to be necessary, and the said Christian A. Allenberger, did then, pursuant to said arrangement, agreement and understanding between himself and the said Anthony Cauley, assist in the treatment of said case at said time, with the knowledge and consent of the said Anthony Cauley, and pretended to treat and care for the same. * * * That the defendant Christian A. Allenberger with the knowledge and consent of the defendant Anthony Cauley, and pursuant to said arrangement, agree-

ment and understanding with him, continued to unskilfully and negligently treat the plaintiff for said injury for a period of over nine weeks." It is further alleged that, as soon as plaintiff's parents learned her true condition, and of the alleged negligent, unskilful, careless and incompetent treatment, they took her to another surgeon, who amputated her leg, said amputation being necessary to save her life, and that this step was made necessary by the "negligence, unskilfulness and carelessness of said defendant." The petition contains the usual allegations of damages and prays judgment.

To this petition defendants filed a joint demurrer on the following grounds: "The several causes of action therein stated are improperly joined. There is a misjoinder of parties defendant. There is a defect of parties defendant." The demurrer was sustained and the action dismissed.

It is contended by defendants that the petition states two causes of action, one for alleged wrongful acts and omissions of Dr. Cauley, for which he alone is liable, and another for alleged wrongful acts and omissions of Dr. Allenberger, for which he is liable, either exclusively, or jointly with Dr. Cauley.

Our Code provides that its provisions and all proceedings under it shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice. The demurrer in effect admits the truth of all of the allegations of the petition, and it will be noted that the petition alleges that each defendant at the time of the injury was a physician and surgeon; that they "had an arrangement, agreement and understanding with each other whereby in cases where the defendant Anthony Cauley was called in his professional capacity to attend and treat a patient for a wound or physical injury of any kind, and particularly where he was called in a case which needed or required a surgical operation or treatment, he was to call the said defendant Christian A. Allenberger in consultation and to aid and co-operate with him in said treatment and operation and was to charge his patient for the serv-

ices of each of said defendants." The effect of this agreement was to create a limited partnership. No separate cause of action is necessarily stated against Cauley, because the acts of negligence charged were continuing acts, beginning with his first failure to cleanse the wound, and extending throughout the time that the patient was under the care of himself and his special partner, Allenberger. It is clearly alleged that the damage resulted from the unskilful and negligent care and treatment furnished by these defendants.

Counsel for defendants have cited a number of authorities in support of their contention that the petition states two causes of action, one for the wrongful acts and omissions of Dr. Cauley while acting alone, and another for the acts and omissions of the two doctors while acting jointly; but in the cases cited there was no concerted action between the different defendants, but each of the wrongdoers acted independently of all others, although the effect of what they did merged and produced the injury. If defendants acted separately, each independently of the other, there being no concert of action between the two, there would be no joint liability; but if their acts are concurrent and inseparable, and, taken together produced the injury alleged, they are jointly liable therefor.

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

REVERSED.

LETTON, J., dissents.

SEDGWICK, J., not sitting.

A. J. EDMISTON, APPELLEE, V. L. U. HUPP ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18047.

Specific performance is not generally a legal right, but is directed to the sound legal discretion of the court, and it will not be granted where its enforcement would be unjust.

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

B. E. Hendricks and *Charles H. Slama,* for appellants.

Herman N. Mattley, F. H. Mizera and *C. M. Skiles, contra.*

MORRISSEY, C. J.

May 23, 1910, the parties entered into the following contract, which is partly printed and partly written:

"CONTRACT FOR CLOSING SALES.

"This agreement, entered into by and between A. J. Edmiston, as party of the first part, and L. U. Hupp and Richard McCluhan, as party of the second part, WITNESSETH: That said party of the first part has this day bargained and sold, and by these presents does bargain, sell and agree to convey by a good and sufficient warranty deed, January 1, 1911, * * * the following real estate in Sully county, state of South Dakota, to wit: The southeast quarter of section twenty-one in township one hundred thirteen, range seventy-eight.

"It is hereby agreed that said party of the second part is to pay to said party of the first part, as the purchase price of said real estate, the sum of forty-six hundred forty dollars, payable as follows: Two hundred dollars cash, the receipt of which is hereby acknowledged. Three thousand dollars payable January 1, 1911. The parties of the second part hereby assume a mortgage of fourteen hundred forty dollars drawing six per cent. per annum from May

23, 1910. Said party of the first part hereby reserves the following crops now growing on said real estate: "Possession of said real estate to be given on or before the 1st day of January, 1911. Deed to be made and delivered at Morse Bluff, Nebraska, on or before the 1st day of January, 1911.

"Said party of the first part hereby agrees to furnish said party of the second part an abstract of title showing perfect title thereto. Should said abstract show perfect title, said purchase price is to be paid in the manner aforesaid. Should abstract not show perfect title, party of the first part is granted two months in which to perfect the same. Should the abstract disclose a title so defective that same cannot be made perfect, then this contract shall be void, and any and all sums of money paid hereunder shall be repaid to party of the second part. Should either party to this contract fail, neglect or refuse to comply with each and every material agreement herein contained, on his part to be performed, the party so in default shall forfeit and pay over to the party not in default as liquidated damages the sum of one hundred dollars. In witness whereof, said parties have hereunto set their hands this 23d day of May, 1910."

It is claimed by Edmiston, the plaintiff, to be a contract for the sale of the land described. It is claimed by the defendants to be merely an option to purchase; but they insist that if the contract, strictly construed, amounts to a contract for the sale and purchase of the land, nevertheless they understood, it to be a mere option contract, and that it should be so construed, in order that it may meet the mutual intentions of the parties. At the time the contract was made the defendant McCluhan paid the plaintiff $100 in cash, and the defendant Hupp paid him $50 in cash and gave his promissory note for $50. In December following the execution of the contract the plaintiff and his wife executed a warranty deed in due form for the premises, and deposited it, together with an abstract of title, in the bank at Morse Bluff, for delivery to the defendants, with instructions to deliver these papers to the defendants up-

on the payment of the balance stipulated in the contract. The bank notified the defendants of the deposit of the papers, but no money was paid and nothing further was done to complete the transfer. August, 13, 1912, plaintiff brought this action in the district court for Saunders county, praying for specific performance of contract. Trial was had to the court, and a decree entered, holding that the contract was one for the sale and purchase of the real estate described, and entering a decree in favor of plaintiff for specific performance. Defendants appeal.

For some time prior to the making of this contract, the plaintiff was the station agent at Morse Bluff, Nebraksa, and the defendant Hupp was the village barber, but conducted a real estate business as a side line, while the defendant McCluhan was a well-to-do farmer living close to the village. In the spring of that year McCluhan arranged to go to Blunt, South Dakota, near which town this land is located, with a real estate dealer who was offering land in that vicinity for sale. He bought his railroad ticket from plaintiff, and plaintiff gave him the numbers of his land and suggested that he look it over. However, McCluhan did not inspect the land on that occasion. Shortly after the return of McCluhan from South Dakota, Hupp and the plaintiff entered into negotiations, but McCluhan and plaintiff never had any conversation in relation to the agreement. The contract was drawn, at the bank on blanks furnished by Hupp. The defendants testified that they thought they were signing an option contract, and that if they failed to complete the deal they would simply lose $100 each as provided in the final paragraph, or the stipulation in the contract. It is conceded that the defendant Hupp was, and is, insolvent, and his lack of means was, without doubt, known to the plaintiff. Defendants claim that they entered into this agreement, hoping that before the expiration of their option they might be able to sell the land at a profit, and with this in view risked the small payment which they made, but that they never understood that they were bound to pay the balance of the purchase price unless they might so elect. In December following

McCluhan made a second journey to Blunt, South Dakota. The purpose of this second trip is not made entirely plain, but it appears that he inspected this land. He describes it as grazing land, located 16 miles from Blunt, with considerable surface rock, and worth from $18 to $20 an acre. Soon after his return he and plaintiff met and talked over the trip. The full conversation is not given, but plaintiff testifies that he asked Mr. McCluhan to go ahead and complete the deal. He admits, however, that he did not ask him for any money. The evidence also discloses that in December, 1910, before the time for the delivery of the deed, the plaintiff had a talk with one Raitt, in which he told Raitt that he had sold the land to McCluhan and Hupp, and that they had paid him $200, but he did not know whether they were going to lose this money, or whether they would go through and complete the deal; that he needed money, and asked Raitt if he thought there would be any chance of disposing of it, and said he wanted to sell it. The testimony of witness Bucholz is also to the effect that Edmiston told him in December, 1910, that he would like to sell the land.

The issues appear to be narrowed down to the one question: What kind of an agreement did these parties believe they were making? Section 341 of the Code provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Did the plaintiff have the right to suppose that the defendants thought they were entering into a contract which bound them irrevocably to the purchase of the land? He knew that Hupp had little, if any, means. He also had reason to believe that neither of the parties had inspected the land. The clause in the contract providing that, if either party defaulted, he should pay liquidated damages in the sum of $100 might well be understood by men who are not learned in the law to mean that, by forfeiting this amount, they would be relieved from all liability. It stands to reason that the defendant Hupp, who was without means, would

not have made the contract, had he understood it in any other light, nor would the defendant McCluhan have bound himself for the full purchase price without having first inspected the real estate. Men of ordinary prudence do not buy farms without seeing them. We believe the subsequent conduct of the plaintiff indicates that he understood the contract as an option, and knew that the defendants so understood it. Before the time for the final payment had expired, he is shown to have remarked that they might not complete the deal, but might elect to lose the money they had paid, and offered to sell the land to other parties. If he had believed that he had an enforceable contract under which he could compel these people to pay him the balance of the purchase price, he would not have been likely to say that they might conclude to abandon the contract and lose the money they had paid.

Specific performance is not generally a legal right, but is directed to the sound legal discretion of the court, and it will not be granted where its enforcement would be unjust. The plaintiff waited more than two years before bringing this action. It is not necessary to decide, and we do not decide, that by this delay he is barred of any remedy he might have; but it is a circumstance which we feel at liberty to consider in determining the view which the parties themselves took of the contract. Even assuming that the plaintiff believed he had made a contract for the sale of the property, we are constrained to believe that the defendants understood it in quite a different way; that they believed they had taken an option only, and that the plaintiff was aware of the view taken by the defendants.

The decree of the district court is

REVERSED.

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

NEBRASKA SEED COMPANY, APPELLEE, V. H. F. HARSH, APPELLANT.

FILED APRIL 3, 1915. No. 18051.

1. **Sales: CONTRACT: NEGOTIATIONS.** A valid contract of sale may be made by correspondence, but courts will not construe as a binding agreement letters which the parties intended only as a preliminary negotiation.

2. **———: OFFER.** The mere statement of the price at which property is held cannot be understood as an offer to sell.

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

Hague & Anderbery and *F. L. Carrico*, for appellant.

Ralph E. Adams and *J. L. McPheely, contra.*

MORRISSEY, C. J.

Plaintiff, a corporation, engaged in buying and selling seed in the city of Omaha, Nebraska, brought this action against the defendant, a farmer, residing at Lowell, Kearney county, Nebraska. The petition alleges: "That on the 26th day of April, 1912, the plaintiff purchased of and from the defendant 1,800 bushels of millet seed at the agreed price of $2.25 per hundred-weight, f. o. b. Lowell, Nebraska, which said purchase and contract was evidenced by writing and correspondence passing between the respective parties, of which the following is a copy:

" 'Lowell, Nebraska, 4-24-1912.

" 'Neb. Seed Co., Omaha, Neb. Gentlemen: I have about 1,800 bu. or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want $2.25 per cwt. for this seed f. o. b. Lowell. Yours truly, H. F. Harsh.'

"Said letter was received by the plaintiff at its place of business in Omaha, Nebraska, on the 26th day of April, 1912, and immediately thereafter the plaintiff telegraphed

to the defendant at Lowell, Nebraska, a copy of which is as follows:

"'4-26-12.

"'H. F. Harsh, Lowell, Neb. Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load. The Nebraska Seed Co.'

"On the same day, to wit, April 26, 1912, the plaintiff, in answer to the letter of the said defendant, wrote to him a letter and deposited the same in the United States mail, directed to the said defendant at Lowell, Nebraska, which said letter was duly stamped, and which the plaintiff charges the defendant in due course of mail received; that a copy of said letter is as follows:

"'4-26-12.

"'Mr. H. F. Harsh, Lowell, Neb. Dear Sir: We received your letter and sample of millet seed this morning and at once wired you as follows: "Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load." We confirm this message. Have booked purchase of you 1,800 bushels of millet seed to be fully equal to sample you sent us at $2.25 per cwt., your track. Please be so kind as to load this seed at once and ship to us at Omaha. We thank you in advance for prompt attention. When anything further in the line of millet to offer, let us have samples. Yours truly, Nebraska Seed Co.'"

It alleges that defendant refused to deliver the seed, after due demand and tender of the purchase price, and prays judgment in the sum of $900. Defendant filed a demurrer, which was overruled. He saved an exception to the ruling, and answered, denying that the petition stated a cause of action; that the correspondence set out constituted a contract, etc. There was a trial to a jury, with verdict and judgment for plaintiff, and defendant appeals.

In our opinion, the letter of defendant cannot be fairly construed into an offer to sell to the plaintiff. After describing the seed, the writer says: "I want $2.25 per cwt.

for this seed f. o. b. Lowell." He does not say I offer to sell to you. The language used is general, and such as may be used in an advertisement, or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted by any or all of the persons addressed.

"If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases." 9 Cyc. 278*e*.

The letter as a whole shows that it was not intended as a final proposition, but as a request for bids. It did not fix a time for delivery, and this seems to have been regarded as one of the essentials by plaintiff, for in his telegram he requests defendant to "wire how soon can load."

"The mere statement of the price at which property is held cannot be understood as an offer to sell." *Knight v. Cooley*, 34 Ia. 218.

The letter of acceptance is not in the terms of the offer. Defendant stated that he had 1,800 bushels or thereabouts. He did not fix a definite and certain amount. It might be 1,800 bushels; it might be more; it might be less; but plaintiff undertook to make an acceptance for 1,800 bushels—no more, no less. Defendant might not have this amount, and therefore be unable to deliver, or he might have a greater amount, and, after filling plaintiff's order, have a quantity of seed left for which he might find no market. We may assume that when he wrote the letter he did not contemplate the sale of more seed than he had, and that he fixed the price on the whole lot, whether it was more or less than 1,800 bushels.

We do not think the correspondence made a complete contract. To so hold where a party sends out letters to a number of dealers would subject him to a suit by each one receiving a letter, or invitation to bid, even though his supply of seed were exhausted. In *Lyman v. Robinson*, 14 Allen (Mass.) 242, 254, the supreme court of Massachusetts has sounded the warning: "Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation."

Holding as we do, that there was no binding contract between the parties, it is unnecessary to discuss the other questions presented. The judgment of the district court is

REVERSED.

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

GEORGE P. MCENTIRE ET AL., APPELLEES, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, APPELLANT.*

FILED APRIL 3, 1915. No. 18057.

Carriers: SHIPMENT: LOSS BY FIRE: LIABILITY. When a railroad company has transported a car of freight to the point designated by the shipper, has notified the consignee of the arrival of the car, and given consignee permission to unload the same, and consignee has broken the seal thereon, and locked the door with its own lock, and retained the key, and later a fire occurs in the car and the goods therein are thereby destroyed, *held* that the railroad company is not liable, and it is error for the court to submit the question of liability, negligence being neither alleged nor shown, to the jury.

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

Paul E. Walker and *Holmes & De Lacy*, for appellant.

Stewart, Williams & Brown, contra.

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* On rehearing, judgment sustained. See opinion, p. 828, *post*.

MORRISSEY, C. J.

The plaintiffs, McEntire Brothers, doing business at Topeka, Kansas, brought this action in the district court for Lancaster County, Nebraska, against the defendant, as the initial carrier, for the loss of a car of furniture shipped by plaintiff from Topeka, Kansas, July 21, 1909, over defendant's line of railroad, and destroyed by fire while still in the car standing on a sidetrack of defendant's connecting line at Blackfoot, Idaho, July 30, 1909. Plaintiffs allege that the furniture was destroyed by fire while in the possession of the defendant as a common carrier, and attach to and make a part of their petition the shipping contract, which contains, among others, the following provisions:

"Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided. No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request

of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession."

"Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman, only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage. The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage."

The answer admits the receipt and destruction of the car, but alleges that the car had been delivered to the consignee and accepted by it while in good condition and before any damage by fire had occurred. A number of other allegations are contained in the answer, but in the view we take of the case they are not material to its determination. There was a trial to a jury, and a verdict and judgment in favor of the plaintiffs for $2,019.53, and defendant appeals.

In making up the car lot, goods belonging to two other parties were included in the shipment; but for the purpose of this case they may be treated as a single shipment

made by the plaintiffs. The goods were consigned to the Brown-Eldrege Furniture Company, a corporation, doing business at Blackfoot, Idaho. The car arrived safely at its destination in the forenoon of July 30, 1909. In the same train also arrived a car of iron bedsteads shipped by a different house to the Brown-Eldrege Furniture Company. Before the arrival of the cars the consignee had received a card from the agent of the railroad company giving notice that the cars were in transit and were about to arrive, and giving the numbers of the cars. Upon the arrival of the cars an agent of the railroad company called the furniture company on the telephone, and notified the secretary of the company that the cars had arrived. The secretary, however, testifies that he understood that only one car had arrived. He asked and received permission to unload the goods and pay the freight later. The car arrived in good order and was spotted on the team siding where convenient for unloading. This was the usual practice and method of delivering freight in car lots. About 1:30 that afternoon, Mr. Peck, a member of the Brown-Eldrege Furniture Company, in company with a drayman, went to the cars, broke the seal and opened the door a foot or eighteen inches on the car containing the Kansas shipment, and left the door standing open the remainder of the afternoon. They then broke the seal and opened the other car and proceeded to unload it. About 6 o'clock that evening Mr. Wilson, secretary of the furniture company, called the railroad office on the telephone and inquired for the agent. The agent being absent, he talked to the operator, and told him that they had broken the seal and opened the door by mistake, and asked him to seal it. The operator replied that "he didn't know anything about the seals." Mr. Wilson says: "I asked him if it would be all right to lock it? He said: 'Yes; go ahead and lock it up." The furniture company then purchased a padlock and sent one of its employees to close and lock the door. This employee closed and locked the door, and retained the key. Within an hour after the door was locked the car was discovered to be burning on the inside. No charge of

negligence is made against the carrier, and the origin of the fire is unknown. It is claimed that the consignee had not taken possession of the goods, and the trial court permitted a member of the firm to testify that they did not intend to accept the shipment until the president of the company, who was absent on the day of the arrival of the car, returned home. Under the court's instructions the jury were told to determine the intention of the consignee. This testimony was incompetent, and the question of intent ought not to have been submitted to the jury. The parties are bound by what they did, and after the loss occurred they cannot be permitted to come in and say they meant to do something different. Had they taken the goods to their warehouse and there the fire broke out and destroyed them, they would not be permitted to say that they were taken by mistake, or that they were to have been left in the car until the president of the company returned home.

Plaintiff insists that, under the shipping contract set out, an absolute liability rests on the carrier for 48 hours after notice of the arrival of the car, or until the consignee has taken actual physical possession of the property by removing it from the car, and that after the 48-hour period the liability of warehouseman exists. But we do not believe the contract susceptible of this construction. A more reasonable construction seems to be that property not removed by the consignee within 48 hours after notice of its arrival may be left in the car, subject to a reasonable charge for storage, and that the liability of the carrier shall be that of warehouseman only. Had the consignee in this case not opened the car or taken possession thereof, but had left it upon the side-track in the condition in which it was received, the carrier would be liable as carrier for the first 48 hours after consignee had notice of its arrival, and for any time it so remained after the expiration of the 48-hour period the carrier would be liable as a warehouseman. Under these conditions and circumstances, the property would be in the possession and under the control of the carrier. But when the consignee broke the lock, put

its own lock on the door, and kept the key, it thereby excluded the carrier from possession of the car, it took possession of the goods, and they were in its possession at the time of the destruction by the fire. The property was so bulky that it did not reasonably admit of an actual, physical transfer, but the carrier, by giving permission to unload, surrendered its control and dominion, there was nothing further for it to do, and the consignee, by breaking the seal and locking the door with its own lock, and retaining the key, assumed control and dominion, and the transfer and delivery was complete. *Rothchild Bros. v. Northern P. R. Co.*, 68 Wash. 527; *Kenny Co. v. Atlantic & W. P. R. Co.*, 122 Ga. 365; *Whitney Mfg. Co. v. Richmond & D. R. Co.*, 38 S. Car. 365, 37 Am. St. Rep. 767; *Kingman St. Louis Implement Co. v. Southern R. Co.*, 133 Mo. App. 317; *Vaughn v. New York, N. H. & H. R. Co.*, 27 R. I. 235. It was error for the trial court to refuse to direct a verdict for the defendant, and the cause is

REVERSED AND DISMISSED.

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

JOHN J. DINNEEN, ADMINISTRATOR, APPELLANT, V. AMERICAN INSURANCE COMPANY, APPELLEE.

JOHN J. DINNEEN, ADMINISTRATOR, APPELLANT, V. DELAWARE INSURANCE COMPANY, APPELLEE.

FILED APRIL 3, 1915. No. 17922.

1. **Insurance:** CONTRACT: LAWS AND ORDINANCES. When writing insurance on a building situated within the fire limits of a city, the insurance company is bound by the laws and ordinances of the city, and such laws and ordinances should be considered as a part of the policy.

2. ———: ———: AMOUNT OF RECOVERY: VALUED POLICY LAW: CONSTITUTIONALITY. When an insured building is injured by fire to such an extent as to destroy its use as a building and require it to be demolished or removed, the insured will be entitled to recover as

for a total loss. Such construction of the valued policy law does not deprive the insurance company of its property without due process of law.

3. ———: ———: VOID CONDITIONS. In such case any condition in the policy providing for the payment of a less sum than the amount of the insurance as written therein is void under the provisions of the valued policy law. Rev. St. 1913, sec. 3210.

4. **New Trial**: MOTION: TIME FOR MAKING. On the trial the jury made special findings of fact without rendering a general verdict. The court discharged the jury, with consent of the parties, and took the case under advisement. The plaintiff excepted to the special findings, and immediately filed a motion to set them aside and for a new trial. After considering the matters of law for some days, the court rendered a judgment in substance as requested by the defendant. Plaintiff, within three days, filed a motion for a new trial. *Held*, that such motion was in time and was a sufficient compliance with the rule.

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

James B. Kelkenney and *John E. Quinn*, for appellant.

Baldrige, Keller & Keller, contra.

BARNES, J.

John Kennelly brought two suits in the district court for Douglas county on separate fire insurance policies, but died before the cases were tried. The actions were revived in the name of John J. Dinneen, administrator, and were subsequently consolidated.

It appears that each of the two defendants insured Kennelly against loss by fire to the extent of $1,500 on a three-story frame building situated within the fire limits of the city of Omaha. The insured property was damaged by fire on March 19, 1908. The city of Omaha, pursuant to an ordinance, prevented the repair of the building, and the owner was required to demolish it. Out of what remained after the fire, insured realized $210. Allowing credit for that sum, he demanded from each of the defendants $1,395. Before the loss occurred the value of the building was $5,000. The fire damaged the insured property to the ex-

tent of $1,200. Each of the policies contained the following provisions: "This company shall not be liable for loss caused * * * by order of any civil authority." "This company shall not be liable * * * for loss * * * beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings." In giving effect to these provisions of the policy, the district court rendered judgment against each of the defendants for $640.81, and from those judgments the plaintiff has appealed, claiming that, within the meaning of the contract of insurance and the valued policy act, the property was wholly destroyed, and that he was entitled to recover as for a total loss. Rev. St. 1913, sec. 3210.

Plaintiff contends that, where the property insured is realty, and is wholly destroyed without criminal fault on the part of the owner, the amount of the insurance written in the policy should be taken conclusively to be the true value of the property insured and the true amount and measure of damages. He argues that the statute eliminates from the insurance contract in controversy the conditions of the policies relating to loss occasioned by city ordinances regulating the construction or repair of buildings. It is also argued that existing laws and ordinances are parts of the insurance policies; that the building was damaged by fire beyond repair; and that as a result the insured property was totally destroyed. There is a stipulation in the record which recites, among other things, the following:

"That on the 19th day of March, 1908, while said contracts of insurance were in full force and effect, said building was burned and damaged by fire to such an extent as to require that it should be repaired before being fit for habitation; that said building was located within the fire limits of the city of Omaha; that Charles H. Withnell, building inspector of the city of Omaha, refused to grant plaintiff's application for a permit to repair said building, because, by reason of said fire, he claimed said building had depreciated in value to an extent greater than 50 per cent. of its original value, said building being a frame

structure and within the fire limits of the city of Omaha; that the said building inspector recommended to the city council of the city of Omaha that said building be torn down, and on the 17th day of July, 1908, upon a hearing on said recommendation, said building was condemned and ordered torn down by said city council because, in its opinion, said building was in bad condition and depreciated in value to an extent greater than 50 per cent. of value of similar buildings above foundation by reason of said fire; that plaintiff obeyed the order of the council, and notified defendants of this fact; that plaintiff notified defendants of the refusal of the building inspector to grant a permit to repair said building, and of the condemnation proceedings of the city council."

It was further stipulated, in substance, that the city ordinances pertaining to buildings within fire limits, as published in Thomas' Revised Ordinances 1905, were in effect at the time of the issuance of the policies herein, at the time of the said fire, at the time of the building inspector's refusal to grant said permit to repair and the condemnation proceedings of the city council. It is a well-established rule that a policy insuring against loss or damages by fire covers loss occasioned by a law prohibiting the repair of a building partially destroyed by fire. *Hewins v. London Assurance Corporation*, 184 Mass. 177; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527; *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563, 56 L. R. A. 784; *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 103; *Palatine Ins. Co. v. Nunn*, 99 Miss. 493.

In *Larkin v. Glens Falls Ins. Co., supra*, it was said: "The parties are presumed to know of the ordinances. They directly and materially affect their rights in case of a loss under the policy, and should govern and control in the adjustment and settlement of such loss. 4 Joyce, Insurance, sec. 3170."

In *Hamburg-Bremen Fire Ins. Co. v. Garlington, supra*, it was held: "That the parties having contracted in view

of the ordinance, the fire must be deemed the proximate cause of the loss, and the loss total."

In *Palatine Ins. Co. v. Nunn,* 55 So. 44 (99 Miss. 493), it was said: "A building insured against fire is a 'total loss' where, though only partly burned, it is rendered unfit for the purpose for which it was constructed, and there is an ordinance or law prohibiting reconstruction."

In the note to *Monteleone v. Royal Ins. Co., supra,* as reported in 56 L. R. A. 784, 793, it is said: "Whenever, by reason of the existence of local ordinances or regulations, it is rendered impossible to repair a partially destroyed building, the insured is liable as for a total loss."

Such is the rule in this state. *German Ins. Co. v. Eddy,* 36 Neb. 461; *Home Fire Ins. Co. v. Bean,* 42 Neb. 537; *Insurance Company of North America v. Bachler,* 44 Neb. 549. In the two cases last cited it was said: "Where real property is wholly destroyed by fire, any provision of a policy of insurance covering such property which in any manner attempts to limit the amount of the loss to less than the sum written in the policy is in conflict with the statutory rule, invalid, and will not be enforced."

The principal question in dispute in this case is whether an insurance company may embody provisions in the policy which provide that it shall not be liable for loss occurring by reason of any ordinance regulating the construction or repair of buildings. This precise point was considered and determined in *New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co.,* 128 La. 45, and in *Palatine Ins. Co. v. Nunn, supra,* and it was held that such provisions were invalid under a valued policy law. Considering the effect of our former decisions as to what constitutes a total loss, and also giving the valued policy law the weight and effect it seems to us that the legislature intended it to have, we must hold that the conditions of the policy limiting the amount of loss are invalid, and that the building was a total loss to the insured. The Massachusetts case (*Hewins v. London Assurance Corporation, supra*), relied upon is not based upon a valued policy law, and is not applicable.

It appears that a jury was impaneled to try the case, and at the conclusion of the testimony the plaintiff requested the court to direct a verdict in his favor for the amounts prayed for in his petitions. The court refused the request, and thereupon the jury were required to answer the following interrogatories: (1) To what extent was the property in dispute injured or damaged by reason of the fire itself of March 19, 1908? The jury answered: $1,200. (2) What was the value of the building insured immediately prior to the fire of March 19, 1908? The jury answered: $5,000. Thereupon they were discharged without having rendered a general verdict. The parties then agreed that the legal questions should be reserved for the decision of the court. The plaintiff at once filed a motion to set aside the findings of the jury and for a new trial, and the court took the case under advisement. On May 27, 1912, the court rendered the judgments of which the plaintiff complains. On the 29th day of May a motion for a new trial was filed and overruled, and the plaintiff thereupon perfected his appeal. As we view the record, the court erred in refusing plaintiff's request for a directed verdict as prayed for in his petitions, and defendants' contention that plaintiff failed to file his motion for a new trial within the time provided by statute cannot be sustained.

Finally, it is contended by the defendants that they were not brought before the building inspector or the city council at the time the orders were made refusing the plaintiff the right to repair the building and requiring the same to be demolished. Therefore to require them to pay the amount of the insurance named in the policies is, in effect, taking their property without due process of law. The stipulation shows that defendants had knowledge of the proceedings, but it is true that no summons or other written notice was ever served upon them requiring them to appear and defend against said finding and order. The ordinance contains no provisions for the service of such a notice. At most, the findings and order were mere ministerial or administrative acts, and were within the reason-

able discretion of the city authorities. If the injury to the building by the fire was so slight, and the repairs necessary so trifling that the action of the authorities in condemning the property was beyond all reason, they might have been restrained by a court of equity. Therefore this contention is not well founded.

It follows from what has been said that the conditions contained in the policies limiting the recovery to an amount less than is provided by the valued policy law are void. The trial court should have rendered judgment for the amounts claimed in plaintiff's petitions.

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

REVERSED.

LETTON, J., concurring.

We have held in this state repeatedly that it is not essential that a structure be totally destroyed in order to make the company liable for a total loss; it is enough that it be destroyed as a building. Other courts, upon good reason, have held that, when it was destroyed as a building by reason of the restrictions of building ordinances, it was a total loss. Our valued policy act provides: "The amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured *and the true amount of loss and measure of damages.*" Rev. St. 1913, sec. 3210. The insurance company had knowledge of this act when it made the contract, and might have adjusted, and perhaps did adjust, its premium rate to meet the liability. It seems to me that the provision written in the policy to the effect that the amount of insurance shall not be taken to be the true amount of loss violates this statute.

FAWCETT, J., dissenting.

I have no quarrel with the rule announced in the first paragraph of the syllabus of the majority opinion, that, "when writing insurance on a building situated within the fire limits of a city, the insurance company is bound by the laws and ordinances of the city, and such laws and ordi-

nances should be considered as a part of the policy," but I think the rule should work both ways, and hold that the owner of a building situated within such fire limits should also be bound by the ordinances of the city, and that such ordinances should be considered as a part of the policy he accepts from the insurance company. He knows, as well as the company, that, when a frame building situate within the fire limits is damaged 50 per cent. of its value, it cannot be repaired, but will be ordered torn down and removed. Both the insurance company and the assured, therefore, in entering into a contract of insurance, have the ordinance before them, and the simple question in this case is: May they enter into a contract, binding upon both, that the assured will assume the risk of having his building torn down after it has suffered a partial loss by fire, and that the insurance company will assume the risk of loss actually caused by the fire, but will not assume the risk of loss or damage to the building over and above that caused thereby, which may be occasioned by the action of the city authorities in ordering the building destroyed? Each of the contracting parties understands fully the part which fire may play in the destruction of such a building, and the part which the ordinance of the city may play in causing such destruction. The company assumes the risk of the former, and the assured of the latter. Is such a contract prohibited by the valued policy act? I think not. In such cases I think the rule is, and should be, that insurance against damage by fire protects the insured against loss resulting from the enforcement of an ordinance prohibiting the repair of his building after its partial destruction by fire, in the absence, and *only* in the absence, of an agreement to the contrary. *Hewins v. London Assurance Corporation,* 184 Mass. 177, 182. The provision in controversy relates to the causes of loss and the character, as well as the extent, of the insurer's risk or liability. On these matters parties may make their own agreements, unless they are hampered by valid legislation. A statute restricting the right of contract, as the valued policy law, should not be extended by implication or con-

struction beyond its import and purposes as disclosed by the language of the lawmakers. The purpose of the valued policy act is to prevent insurance at an overvaluation, and to deter insurers from taking reckless risks, by prohibiting them, after a total loss, from claiming that, at the time of issuing the policy, the value of the insured property was not equal to the amount of the insurance. Here the value of the property when the policy was issued and when the fire started is not questioned. The question here is the character of the risk assumed by the company. The statute by its own terms applies to insurance on property wholly destroyed. Where there is only a partial loss by fire, and the damaged building is for that reason demolished under police ordinances, enacted to protect the public against future fires, the character of the risk to be assumed by an insurance company is a lawful subject of contract. If a property owner desires insurance, limited to fire alone, intending to carry his own risk in so far as a city may prevent him from repairing a building partially destroyed by fire, how can he procure such indemnity if he cannot make a lawful contract including those terms? They are not inconsistent with the valued policy act, and there is nothing in the policy indicating a purpose to violate the law or to mislead or defraud the insured. It is a plain, straightforward, honest contract, voluntarily entered into between the parties, and the district court was right in enforcing it as the parties had made it.

ROSE, J., joins in dissent.

EDWARD P. HOLMES, APPELLEE, V. JOSEPH R. WEBSTER ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18018.

1. **Creditors' Suit.** There must be a valid and enforceable judgment as a basis for a creditor's suit to set aside an alleged fraudulent transfer of real estate.

2. **Judgment:** REVIVOR. A judgment of the federal court, when dormant, can only be revived in the court where it was rendered.

3. **Limitation of Actions:** DOMESTIC JUDGMENT. No action can be maintained on a domestic judgment which is dormant and has not been properly revived, unless commenced within five years after the judgment was rendered.

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

H. F. Rose, and *C. S. Allen,* for appellants.

J. A. Brown, contra.

BARNES, J.

Appeal from a decree of the district court for Lancaster county in a creditor's suit to subject certain real estate to the payment of a judgment or decree of the federal court for the district of Nebraska.

The record discloses that the judgment of the federal court, which is the basis of the decree herein, was rendered on April 16, 1894. Fourteen years after the judgment was rendered in the federal court, the plaintiff in this case procured a certified transcript thereof from the clerk of that court and caused it to be filed in the office of the clerk of the district court for Lancaster county. Thereafter the plaintiff commenced proceedings in the state court to revive the judgment. The defendant Joseph R. Webster entered a special appearance objecting to the jurisdiction of the court. His objections were overruled, and he did not further appear. The state court entered an order reviving the judgment, and on the 20th day of May, 1909, Holmes filed his petition in this case, setting forth, in substance, the foregoing facts, and alleging the facts which he claimed enabled him to enforce the judgment, and further alleging that defendant Joseph R. Webster had fraudulently conveyed his property. He prayed for a decree setting aside the deeds and subjecting the real estate to sale for the purpose of paying the amount due him upon the judgment rendered by the federal court. To the petition the defendants, Joseph R. Webster and Joy L. Web-

ster, filed separate answers challenging the validity of the judgment of the federal court, the order of revivor entered by the state court, denying fraud in the conveyance, and all of the other allegations of plaintiff's petition. A trial resulted in a finding and judgment for the plaintiff, and the defendants have appealed.

Appellants strenuously contend that the decree is not sustained by the evidence and is contrary to law. As a basis for a creditor's suit, the plaintiff must have a valid and enforceable judgment against the principal defendant, and without the existence of such a judgment his action must fail. The judgment of the federal court, which is the basis of this suit, was rendered more than 14 years before it was transcribed to the district court for Lancaster county. No execution had ever been issued thereon, and no proceedings had ever been instituted to revive it. After it was transcribed to the state court, there was an attempt, in that court, to revive the judgment. The defendant objected to the jurisdiction of the court to make an order of revivor, and, as we view the question the objection should have been sustained. In *Case Threshing Machine Co. v. Edmisten,* 85 Neb. 272, it was said: "A district court in which the transcript of a judgment of another district court has been filed is without authority to revive the judgment by the statutory method of revival created by section 473 of the Code, such power remaining in the court of original jurisdiction." We have recently overruled *Snell v. Rue,* 72 Neb. 571 (see *Armstrong v. Patterson,* 97 Neb. 229), and held that a judgment is barred by the statute of limitations after five years, and no action can be maintained on such a judgment. It follows that, the judgment not having been revived, the action thereon is barred by the statute of limitations, and the decree complained of cannot be sustained.

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

REVERSED AND DISMISSED.

LETTON and ROSE, JJ., not sitting.

ANGUS CATTLE COMPANY, APPELLANT, V. GILMORE MCLEOD ET AL., APPELLEES.

FILED APRIL 3, 1915. No. 18067.

1. **Animals: TRESPASS: LIABILITY.** Section 109, Rev. St. 1913, provides, among other things, that "the owners of cattle, horses, mules, swine and sheep in this state, shall hereafter be liable for all damages done by such stock upon the cultivated lands" of another.
2. ———: ———: ———: **LIEN.** An action will not lie in this state for damages done by cattle, mules, swine or sheep ranging at large upon uncultivated lands; but, if the owner of such stock drives them upon the lands of another, he is liable for all the damages done by them while there, and the owner of the land who takes up and impounds such trespassing animals has a lien on them to the amount of the damages done by them and for the value of the care and feed of such animals while they are impounded.
3. ———: ———: ———. A cornfield is cultivated land within the meaning of the statute, and the owner of live stock is liable for the damages caused by such live stock while they are trespassing upon such cultivated land.

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

A. W. Scattergood, John N. Tucker and *J. H. Broady,* for appellant.

Switzler, Goss & Switzler and *Walcott & Walcott, contra.*

BARNES, J.

Appeal from a judgment of the district court for Cherry county in an action of replevin.

It appears that the plaintiff and the defendant John W. Collins are the owners of adjoining cattle ranches in Cherry county, and Gilmore McLeod is Collins' foreman; that defendant's ranch was inclosed by a fence, but the plaintiff, having purchased a tract of land adjoining the defendant's premises on the east, had removed a line of fence about three-eighths of a mile in length along or near

the east side of defendant's meadow. On the 11th day of April, 1912, plaintiff turned its stock out to graze on its own land adjoining defendant's meadow. About 200 head of the cattle came onto the meadow, which was soft, tramped it up, and otherwise injured the land. Defendants notified plaintiff of that fact, and asked it to keep its cattle away from their premises. Plaintiff refused to comply with the request, and there is evidence in the record tending to show that its cattle were driven onto defendant's land. This course continued from day to day until the 17th of April, 1912, when defendants found some of plaintiff's cattle in their cornfield feeding on their cornstalks. The defendants thereupon took up 54 head of plaintiff's cattle, confined them in their corral, and drove the rest of the herd away in the direction of plaintiff's ranch buildings. The defendants thereupon served a written notice on plaintiff that they had impounded the 54 head of cattle and claimed damages for and on account of the trespass. Plaintiff received the notice, and went to defendant's premises, where certain negotiations took place. The defendants named an arbitrator to assess their damages, but the plaintiff failed to complete the negotiations, and on the 22d day of April, 1912, replevied its cattle. Issues were joined, a jury was waived, and the case was tried to the court. The result of the trial was a finding that defendants were entitled to the possession of the cattle and had a lien on them for $100. The usual judgment in replevin was awarded defendants, and plaintiff has appealed.

The appellant contends that the findings and judgment are not supported by the evidence and are contrary to law. In support of this contention the appellant cites *Delaney v. Errickson,* 10 Neb. 492, and *Meyers v. Menter,* 63 Neb. 427, where it is said: "An action will not lie in this state for damages done by cattle, mules, swine or sheep ranging at large upon uncultivated land." As we view these cases, they are not decisive of the question presented by this appeal. There was a motion for a rehearing in *Delaney v. Errickson,* and the opinion on the rehearing is reported

in 11 Neb. 533. It was there said: "While the owner of domestic animals may lawfully permit them to *wander* upon and depasture the uninclosed, uncultivated lands of others, he has no right to drive them there without the owner's permission, and if he do so he is answerable for whatever damage they may do while there." In *Meyers v. Menter, supra,* it was held that plaintiff was entitled to recover because a part of the land upon which defendant's cattle trespassed was cultivated land on which certain crops were growing which were not spontaneous products of the soil. It clearly appears in the instant case that defendants had between 20 and 30 acres of their land which had been planted to corn, and the stalks, still standing thereon, were used as feed for their stock; that at the time defendants took up the plaintiff's cattle they were trespassing upon this cultivated field. Again, it is shown by the testimony of some of defendants' witnesses that the plaintiff's cattle were driven upon defendant's meadow, which had been used for cutting hay for many years, and defendants had some stacks of hay thereon from which plaintiff's cattle were feeding. Section 109, Rev. St. 1913, provides: "The owners of cattle, horses, mules, swine and sheep in this state, shall hereafter be liable for all damages done by such stock upon the cultivated lands in this state." we are therefore of opinion that the evidence was sufficient to sustain the findings. It also appears that after defendants impounded plaintiff's cattle they fed them hay and cared for them until they were taken upon the writ of replevin. The defendants were clearly entitled to a lien for the value of feed and care, together with the damages to the meadow and cultivated land.

It follows that the judgment of the district court was right, and should be affirmed.

JUDGMENT ACCORDINGLY.

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

MINNIE WARNER METTLER ET AL., APPELLEES, V. ISABELLA R. WARNER, APPELLANT; VESPASIAN WARNER ET AL., APPELLEES.

FILED APRIL 3, 1915. No. 18075.

1. **Wills:** ELECTION. A widow of one who dies testate in a sister state, and who has in the courts of the state of his domicile elected to renounce the provisions of his will made for her benefit and take her dower in his estate, the election having been held valid, is entitled to claim dower in the estate of her deceased husband which is situated in this state.
2. ———: ———: LIMITATIONS. Her election in the courts of the state of his domicile is, in effect, the commencement of proceedings to recover dower, and an action may be brought by her to assign the same in the courts of this state when her right of dower in the estate situated here is challenged by the heirs of the testator.
3. **Judgment:** COMITY: ANTENUPTIAL AGREEMENT. Where the courts of the state in which the testator was domiciled at the time of his death have disregarded an antenuptial agreement and have assigned dower to the widow, the courts of this state will disregard such agreement.

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

Tibbets, Anderson & Baylor, for appellant.

Burkett, Wilson & Brown, contra.

BARNES, J.

This appeal involves the right of Isabella R. Warner, the widow of John Warner, who died testate at his home in Clinton, Illinois, to a dower interest in certain real estate situated in Lancaster county, Nebraska. At the time of the death of John Warner he was the owner of a large estate, consisting of land and personal property situated in Dewitt county, Illinois, where he then resided, and where he had resided during all of his life. He was also the owner of real estate in Iowa, Ohio, California and Nebraska. The deceased left surviving him two children

by a former wife, his widow, and two children by her. By the terms of his will he devised to his widow the family homestead, situated in the city of Clinton, and $10,000 in money, to be paid to her by the executor of the will. When the will was presented for probate in Dewitt county, Illinois, the widow filed her election to renounce the provisions of the will made in her favor, and claimed the right to take a dower interest in her deceased husband's estate, which amounted at the time of his death to $1,650,000. The circuit court of Dewitt county held that she had made her election within one year after her husband's death and established her right of dower. The executor appealed to the supreme court of Illinois, where the judgment of the circuit court was affirmed. Afterwards the widow established her right to dower in the lands of her deceased husband situated in the states of Iowa and Ohio in the courts of those states. Three years and two months after the death of John Warner his children by his first wife commenced an action to partition that part of his estate situated in Nebraska in the district court for Lancaster county. The widow appeared and filed an answer and cross-bill, claiming her right of dower therein. Thereupon the plaintiffs withdrew their petitions and filed answers to her cross-bill. The cause was tried on issues thus joined, and the district court held that the widow's claim was barred by the provisions of section 18, ch. 23, Comp. St. 1905, and dismissed her action. The widow has appealed, and contends that her election to renounce the provisions of the will and take her dower in the estate of her deceased husband, made in the state of Illinois, and the confirmation by the courts of that state, was a sufficient election and fixed her status as to her husband's estate wherever situated; that her election was seasonably made in point of time; and that the court erred in dismissing her cross-petition.

In *Hawley & King v. James,* 5 Paige Ch. (N. Y.) 318, 446, the court said: "The object of the legislature undoubtedly was to compel the widow to make her election to take her dower, instead of the jointure or other provi-

sion made in lieu thereof, within a limited period after the death of the husband, and by some open and notorious act which could not be misunderstood. * * * Neither is it necessary, by the statute, that the widow should make an entry upon or commence proceedings for the recovery or assignment of her dower in every separate and distinct parcel of the lands in which she is entitled to claim dower, in order to constitute a valid election on her part to reject the provision made by her husband in lieu of such dower. But it will be sufficient, where she has taken no part of such provision made for her in lieu of dower, if she actually commences proceedings within the year, for the recovery or assignment of her dower in any part of the lands as to which the right of election exists, or enters upon any part of such lands, claiming her dower therein." In *Wilson v. Cox,* 49 Miss. 538, the eighth paragraph of the syllabus is: "A will disposing of property, in two or more jurisdictions, ought to have uniform effect as to all the beneficiaries under it. That cannot be done unless it pertains to the forum of the domicile, to give to the widow the election to accept under the will or to abandon it, and take under the law." It is held in the opinion that no other election is necessary than at the domicile. There are several other cases that hold the same, and we think these are reasonable rules and a reasonable construction of our statute. *Washburn v. Van Steenwyk,* 32 Minn. 336, and *Slaughter v. Garland,* 40 Miss. 172, are in point upon this question. In the last cited case it is said (p. 180); "But the right of renunciation is available only in the proper tribunal of the testator's domicile. It is an incident to the jurisdiction of the tribunal which has the exclusive power to admit the will to probate, and proceeds from the jurisdiction over the matter of probate. Otherwise there might be a renunciation of the will in a foreign state, while it would be in full force in the state of the domicile; which would be absurd. The tribunal having jurisdiction, both of the probate and of the incident of revocation, is manifestly the proper court of the domicile of the testator."

It seems clear that the provisions of our statutes are not in conflict with the foregoing authorities. The section on which the decision appealed from is based is found in the chapter providing for the distribution of estates of deceased persons domiciled in this state, and was not intended to apply to the estates of persons domiciled in other states. The legislature did not intend to limit the widow, in such cases, to one year in which to assert her rights in this state. We think that, where the widow has renounced the will and has established her right of dower in the courts of her deceased husband's domicile within one year, her election thus made is a sufficient commencement of proceedings to recover dower, and entitles her to maintain an action for that purpose in the real estate of which her husband died seized, whenever the heirs attempt to claim all the estate in the courts of this state.

The trial court found, among other things, that an antenuptial agreement was made between the widow and her husband at the time of their marriage, but the decision was not based on that agreement. It appears that the agreement had been disregarded by the parties to it for more than 30 years of their married life, and the courts of the state of their domicile had disregarded it. As a matter of comity, the courts of this state should take the same view of that agreement. The appellees have cited *Apperson v. Bolton*, 29 Ark. 418, and seem to rely upon that decision. By the statutes of that state the widow, in order to claim dower, is required, first, to make an entry upon the land situated in that state; and, second, to commence proceedings for the recovery of assignment of her dower therein. It was said in the opinion that she would not be permitted to claim against a will and accept its provisions at the same time, and that an acceptance of the provisions of the will in Tennessee, the state of the domicile, would bind her everywhere. The statutes of Arkansas are so different from ours that we think the decision is not in point.

It follows that the judgment of the district court should be reversed and the cause remanded for further proceed-

ings in accordance with the views expressed in this opinion.

JUDGMENT ACCORDINGLY.

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

ISAAC R. SINCLAIR, APPELLANT, V. WILLIAM E. DUNNING, APPELLEE.

FILED APRIL 3, 1915. No. 18083.

1. **Appeal:** CONFLICTING EVIDENCE. The verdict of a jury rendered on conflicting evidence, where the issues have been submitted under proper instructions, will not be set aside by a reviewing court unless it appears to be clearly wrong.
2. **Instruction** complained of, set forth in the opinion, and *held* to have been properly given.

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

Dravo & Dilworth, for appellant.

G. Norberg and *Ralph E. Adams, contra.*

BARNES, J.

Action to recover damages alleged to have been sustained by plaintiff by reason of the fraud and deceit of defendant in the exchange of 148 acres of land situated in Nance county, Nebraska, for a stock of merchandise in Eustis in said state. The cause was tried to a jury in the district court for Phelps county. The defendant had a verdict and judgment, and plaintiff has appealed.

The plaintiff alleged in his petition that in the negotiations leading up to the trade the defendant told him that his land was worth $100 an acre, and that he had been offered $95 an acre for it; that plaintiff could obtain a loan on it for $6,000 from a widow in St. Edwards, Nebraska, by the name of Elberta Cain. Plaintiff alleged

that he had no knowledge of the value of the land and relied on the defendant's statements, which induced him to make the trade; that said statements were false and untrue, which fact was well known to defendant at the time they were made; that the land was not worth more than $35 an acre; that after plaintiff traded for the land he was unable to obtain a loan of $6,000 thereon, and that, by reason of the fraud and deceit practiced on him by defendant, he had been damaged in the sum of $10,061, for which he prayed judgment.

The defendant, by his answer, admitted that he traded the land in question for the stock of merchandise mentioned in plaintiff's petition, but denied that he made the representations set forth therein, and alleged that the trade was made after plaintiff had visited the land and had examined it to his own satisfaction, and after he had made inquiries of other persons who resided in the vicinity where the land lay. He further alleged that the stock of merchandise which he took in trade for the land was what is known as "trading stock;" that he told plaintiff that he wanted $14,800 for his land, and that plaintiff must allow him that amount in case they made the trade. He denied that he ever told plaintiff that Elberta Cain would loan him $6,000 on the land, and alleged that he informed plaintiff that he probably could obtain a loan from a widow named Cain, living at St. Edwards, Nebraska, for 40 per cent. of the actual value of the land. Further answering, defendant denied all of the other allegations of the petition.

Plaintiff, by his reply, denied the material allegations of the answer.

The appellant contends that the verdict of the jury is not sustained by the evidence. The bill of exceptions discloses that in the latter part of April, 1910, the parties, who both appear to have been traders of land for stocks of merchandise, met, and negotiations were entered into which led up to the trade out of which this action afterwards arose. Plaintiff wanted to know if defendant had land which he would trade for a stock of goods. It appears

that defendant had a fractional quarter section of land, containing 148 acres, in Nance county, which he was willing to trade for plaintiff's stock of goods. He told plaintiff to go down there and examine it. They thereupon fixed a date when they should go to Nance county for that purpose. When they arrived at Palmer, which is a small town in Merrick county near the tract of land in question, they drove out and examined it. The plaintiff was satisfied with the appearance of the land, and on the trial testified that defendant told him it was well worth $100 an acre, while the defendant just as positively testified that he never said it was worth that or any other sum; that he did say that he wanted $14,800 in trade, and that plaintiff could take it or let it alone. Plaintiff testified that defendant told him he could get a loan of $6,000 on the land; that defendant referred him to Elberta Cain, who, it appears, was the mother-in-law of defendant's daughter. Defendant testified positively that he never told plaintiff he could get a loan of $6,000 on the land, but that he told plaintiff that he could probably get a loan of 40 per cent. of the actual value of the land, and referred plaintiff to a widow by the name of Elberta Cain, living at St. Edwards, Nebraska, who was loaning money on real estate,

It appears that when the parties returned from inspecting the land plaintiff made inquiries regarding it of a Mr. Templin, a banker at Palmer who owned land adjoining it, and thereafter requested that he be given a little time to consider the matter of the trade. This was agreeable to the defendant. It also appears that the plaintiff wrote to Elberta Cain and received an answer as follows:

"May 9, 1910. Dear Sir: Yours of May 6 received and think the land you asked about is fully worth what Mr. Dunning asked as it is a great hay producer. I know where all the land is located but do not know the numbers. I would be pleased to make a loan on the land. Would loan 40% of actual purchase price at 6% annually. However, if there is already some incumbrance I would have

to pay it off and deduct from the amount. Mrs. Elberta Cain. P. S. If I could do anything for you in way of a loan let me know as soon as possible."

There is another letter in the record from Mrs. Cain, which reads as follows: "St. Edwards, Neb., May 25, 10. Mr. Sinclair, Smithfield, Neb. Dear Sir: Yours rec'd. Will look over the land and write you as soon as possible. Most Resp., Mrs. Elberta Cain."

Plaintiff testified that after the receipt of these letters he wrote again to Mrs. Cain and received no answer, but it is not shown that he ever made any application for a loan on the land after he procured it.

In the latter part of May, 1910, the parties got together and completed the trade. The defendant's land was considered to be worth $14,800 in the trade. An inventory of the stock of goods was taken, with the result that it was considered to be worth $17,509.99. Defendant gave a note to the plaintiff for the difference, less the amount of certain bills of wholesalers which he assumed and agreed to pay, and the plaintiff gave the defendant a bill of sale for the stock of merchandise, and defendant deeded the land to L. L. Sinclair, who is a son of the plaintiff. Later on the plaintiff sold the note to a bank in Bertrand, and nothing further was heard about the transaction until the commencement of this suit, which was something like two years after the trade was completed.

At the trial the plaintiff produced a writing, signed by the defendant, which contained a statement of the bills which the defendant assumed and agreed to pay, all of which were entered on the left-hand side of the double line on a page of a double-entry ledger and amounted in all to $748.48. This list of accounts the defendant assumed and agreed to pay and appended his signature thereto. When this writing was introduced in evidence, there appeared on the right-hand side of the double-entry column the following:

"Assumed by W. E. Dunning. I hereby agree to give clear title to said land and guarantee a loan of $6,000 on said land by Alberta Cain of St. Edwards, Neb. And also

guarantee full face at First National Bank at Bertrand for difference on note given on said stock of merchandise and I hereby assume the above bills."

The defendant contended that the writing on the right-hand side of the double-entry column was not there when he appended his signature to the bills which he had assumed and agreed to pay. He testified to this positively, and several other witnesses who were present when the writing was signed testified that the writing at the right of the double-entry column was not there when the defendant signed it. The plaintiff denied this, and claimed that it was all written and signed at the same time. It is quite probable that the jury believed the defendant's testimony, and, if so, the belief would go far to sustain the verdict which they rendered. The evidence shows that the land was not worth to exceed $35 or $40 an acre at the time the trade was made. It was good hay land and afforded a hay crop amounting from year to year to from 90 to 180 tons. The testimony as to the value of the stock of goods was conflicting. There was considerable evidence which showed that the bulk of the stock was old and considerably shelf worn. The note which defendant gave to the plaintiff at the time of the completion of the trade, and which amounted to $2,071, was cashed by the plaintiff. There is no evidence in the record from which the jury could conclude that the plaintiff had ever offered to rescind the trade. On the other hand, it seems clear that plaintiff induced the defendant to make the deed, not to himself, but to his son, who took possession of the land, and, so far as the record shows, still owns it. There is a sharp conflict in the evidence as to the representations alleged to have been made by the defendant relating to the condition and value of the land, and also as to the facts relating to the whole transaction. The cause having been properly submitted to the jury upon such conflicting evidence, we are unable to say that it was not sufficient to sustain the verdict.

It is further contended that the trial court erred in excluding the evidence offered by plaintiff in relation to his

offer to rescind the contract. When it is considered that this was not an action for rescission, but was one affirming the contract and seeking to recover damages for fraud and deceit, it must be apparent that such offer was wholly immaterial, and this evidence was properly excluded.

It is also contended that the court erred in giving the eighth paragraph of his instructions to the jury, which reads as follows: "The court instructs you, gentlemen of the jury, that no evidence has been offered by plaintiff tending to show any damages he may have sustained by reason of not having obtained a loan on the real estate in question for $6,000, which plaintiff claims he is entitled to recover. In determining the amount of his recovery you will not take into consideration any damages resulting from the failure of the plaintiff to secure said loan." It clearly appears from the record that the plaintiff never applied to any one for a loan on the land in question. As above stated, he induced the defendant to deed the land to his son, who, so far as the record shows, still owns it, and who has never made any complaint in regard to the transaction. The instruction complained of was properly given.

As we view the record, the cause was fairly tried and submitted to the jury under proper instructions. The judgment of the district court is therefore

AFFIRMED.

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

ALLIE W. PIERCE, APPELLEE, V. ANTOINETTE DOMON, APPELLANT.

FILED APRIL 3, 1915. No. 18045.

1. **Briefs** in this court should be prepared in accordance with rule 12 (94 Neb. XI), otherwise the court may refuse to consider them.

2. **Brokers: CONTRACT: VALIDITY.** When an oral contract is made with an agent for the sale of real estate upon commission, and after-

wards, in order to satisfy the requirements of section 2628, Rev. St. 1913, the contract is reduced to writing before suit is brought, such written contract furnishes the legal evidence necessary that the contract may be enforced.

3. ———: ———: PAROL EVIDENCE. Where it is claimed that such contract was signed by the defendant without knowledge of its contents, evidence of the oral contract previously made is admissible as tending to show the consideration for the writing and the probability that the signer knew its contents.

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

A. Norman, for appellant.

Claude A. Davis, contra.

LETTON, J.

Action by a real estate agent to recover a commission for the sale of land due him under the terms of a written contract. The answer was a general denial, with a a plea that defendant signed the written contract in ignorance of its contents. The jury found for plaintiff, and defendant appeals.

The testimony on behalf of plaintiff tends to prove that the defendant, in a conversation with him at her home, employed him as her agent to sell 70 acres of land; that on the same day he tried to make a sale of the land to one Steinwart, who did not then buy, but who a short time afterwards completed negotiations with the defendant herself. After they had reached an agreement, but before any papers were executed, plaintiff procured defendant to execute the written contract on the same terms as the oral one had been entered into. Defendant afterwards refused to comply with its terms and pay the stipulated commission.

The defendant denies that any oral agreement was entered into, and says that she signed the written contract under a misconception of its contents; that it was not read to her, and she could not read it on account of not having her glasses with her. But it was signed at the office of her

attorney in the presence of one of her granddaughters and husband, and after it had been read and an amendment made by her counsel, who testified that Mrs. Domon came to his office before plaintiff and talked to him about it.

The jury evidently believed the plaintiff's witnesses and found accordingly. There were only two material facts in dispute: (1) Whether plaintiff was ever employed to sell the land; (2) whether Mrs. Domon signed the written contract with knowledge of its contents. As to both of these questions the evidence supports the verdict.

It is difficult to tell what errors are relied upon for reversal, since the brief of defendant is not prepared in accordance with rule 12. The work of this court is expedited by an adherence to this rule, and the court may refuse to consider briefs not prepared in accordance therewith. But the brief and the record in this case are short, and will be considered as if the rule had been observed. It is said that, if the verdict is not supported by the evidence with respect to the oral contract, there is no evidence to support it, and it is argued that, if the appellant made the verbal contract, then she knowingly made the written one, but that, if she did not make the verbal contract and had never employed plaintiff to sell her land, then she would not knowingly enter into the written agreement. The conclusion is drawn that the whole case rests solely upon the oral testimony, and that this is inadmissible under the statute. The answer admits the execution of the written instrument, but denies that defendant knew she was signing a contract for the sale of land and to pay a commission. The evidence was admissible as tending to show that she executed the instrument with knowledge of its contents. The introduction of evidence did not follow the logical order, but this was not prejudicial, and does not seem to have been complained of at the trial.

The trial court instructed the jury, in substance, that the oral evidence was admitted only for its bearing upon the question of a consideration for the alleged written contract; that such a contract is unenforceable unless re-

duced to writing, but that a verbal contract of this nature is not contrary to public policy, and the parties may carry it out if they wish, and in case it is reduced to writing before suit is brought the object of the statute is fulfilled, and the written contract becomes admissible in evidence and may be enforced in a proper proceeding. This states the law correctly. *Sheehy v. Fulton,* 38 Neb. 691. We have said that the act of 1897 which requires a contract of this nature to be in writing is virtually an extension and enlargement of the statute of frauds, and that its object is to prevent an obligation or liability from being imposed upon a defendant by false testimony. *Baker v. Gillan,* 68 Neb. 368; *Covey v. Henry,* 71 Neb. 118. We have also held that where a defendant, after receiving the benefit of such services, executes a written promissory note in payment thereof, the reason of the law is fulfilled, because his contract is established by his own signature. *Mohr v. Rickgauer,* 82 Neb. 398. And so in this case, unless the defendant had signed the written instrument, plaintiff would not have been in possession of legal evidence with which to prove the existence of the contract; but, having furnished by her own act the legal evidence necessary, she placed plaintiff in a position to enforce the remedy.

On the whole case, we are satisfied that the contract was sufficiently proved by the written instrument, and that the defendant would not have signed the same if she or her attorney had not been advised of the contents of the paper. We have found no error to the prejudice of defendant either in the reception of evidence or in the instructions to the jury.

The judgment of the district court is

AFFIRMED.

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

JANE M. FLOOD, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 3, 1915. No. 18046.

1. **Instructions** set forth in the opinion, when considered in connection with the testimony, *held* respectively properly given or refused.
2. **Carriers: INJURY TO PASSENGER: DAMAGES: REVIEW.** Where, in answering a question as to her loss of earnings, the plaintiff probably misunderstood its purport and may have included some of the profits from her investment in the sum she stated, while an objection and a motion to strike the answer should have been sustained, the judgment will not be reversed upon that ground alone; the verdict, as reduced by the district court, not being in excess of what would be a fair compensation for the injuries the plaintiff sustained, and the defendant not having attempted to elicit the actual facts by cross-examination.

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

John L. Webster and *W. J. Connell,* for appellant.

Brome & Brome and *Fisher & Rooney, contra.*

LETTON, J.

Action for damages resulting from personal injuries. Plaintiff recovered, and defendant appeals.

The petition charges that the plaintiff was a passenger on one of defendant's street cars in Council Bluffs, Iowa; that the car stopped at Hafer's stopping place for the purpose of allowing passengers to alight; that the plaintiff attempted to alight, and, when in the act of stepping to the street, the defendant's employees in charge of the car carelessly and negligently started the car forward, and negligently failed to warn or advise her; and that by the sudden start she was thrown violently to the street and injured. The answer pleads that the defendant stepped off while the car was slowing up in order to stop, while running at a rate of speed not to exceed four miles an hour; that the

employees were without warning that the plaintiff was about to alight; and that whatever injuries she sustained were due to her own negligence in stepping off a moving car.

The plaintiff is a single woman engaged in the furniture business at Battle Creek, Nebraska. She was accompanying her brother, who was taking his little girl to a hospital in Council Bluffs. The evidence on behalf of plaintiff tended to prove that she was unfamiliar with the locality; that the car stopped about 75 or 80 feet west of the usual stopping place, which was not at a street intersection, but at a point known as Hafer's stopping place; that a man left his seat, went forward, and alighted from the car; that the plaintiff followed him, and, when in the act of stepping down, the car was suddenly started, and she was thrown to the pavement and suffered the injuries complained of; and that car then moved a little more than its own length forward and stopped at the usual place.

The testimony for defendant was substantially to the effect that the car only made one stop, which was at the usual stopping place, and that as it was slowing down the plaintiff arose from her seat, walked to the front end of the car, and stepped off while it was in motion.

It is first assigned that the court erred in refusing to give defendant's request No. 6: "You are instructed that the only actionable negligence alleged in the petition in this case is that the car upon which plaintiff was a passenger, having stopped at Hafer's stopping place while plaintiff was in the act of alighting therefrom, was started forward suddenly, and threw plaintiff to the pavement, causing the injuries complained of. You are further instructed that you would not have the right in this case to declare or determine that the defendant was guilty of negligence in any other respect." The court by instruction No. 2 told the jury: "Before the plaintiff would be entitled to recover against the defendant, she must establish by a preponderance of the evidence that, while she was in the act of alighting from the car, it then standing still, the car was suddenly started forward, proximately being the

cause of her being thrown to the pavement. Should she establish such fact by preponderance of the evidence, you will find for plaintiff. But should she fail to establish such fact, to such degree, then you will find against her."

This instruction correctly stated the principal issue in the case. But it is argued that, since the petition alleged that the accident happened "at Hafer's stopping place," the plaintiff would not be entitled to recover unless she proved that defendant stopped the car at that spot, and started it then and there. Defendant suffered no prejudice by the omission to mention the precise point at which the accident happened. Where the plaintiff fell was only a short distance—not much more than a car length—from Hafer's stopping place. The defendant was in nowise misled by the testimony. Neither was there a fatal variance between the pleadings and the evidence, as defendant urges. Rev. St. 1913, secs. 7706, 7713. The argument that, "if the car stops at some place other than the regular stopping place, and for some purpose other than for receiving and discharging passengers, the defendant is not liable, * * * unless the trainmen knew * * * or should have known, that a passenger was in the act of stepping off the car when the car was started," is not persuasive, for the reason that the car was practically at the usual stopping place, another passenger alighted, and the conductor admits that he saw plaintiff leave her seat and walk to the front platform of the car apparently with the intention of alighting.

It is next urged that the court erred in giving to the jury that part of instruction No. 1 reading as follows: "If she started to leave the car while it was standing still, and the defendant's servants, while she was in the act of stepping from the car, started the same, then she is entitled to recover such damages as will work full compensation to her for her injuries."

It is urged that this instruction is inapplicable to the facts, and is an improper statement of the law, because the plaintiff did not leave the car at a regular stopping

place, but stepped or fell off before it reached the regular stopping place. This instruction should be read in connection with No. 2. Since the jury evidently believed the evidence in behalf of plaintiff that the car made a temporary stop just in front of the drug store on account of the track being blocked by other cars ahead of it, and afterwards moved up a short distance to the stopping place, the instruction was properly given. What has already been said as to instruction No. 2 also applies.

It is next urged that the court erred in receiving testimony as to the measure of damages, and in its instruction to the jury on the rule of damages. The testimony shows that plaintiff was taken to the hospital; was in bed there for about two weeks; that her health was good before the accident; that apparently two of her ribs were broken; that she suffered a sever concussion of the brain; that she was in intense pain during the whole time she was in the hospital and for months afterwards, the broken ribs hurting her every time she breathed. She was confined to her bed on account of the injuries after she got home. Her physician testified she suffered from traumatic neurasthenia, is very nervous, and will never fully recover from the injuries. She testifies that she was unable to take care of and manage her business until May, 1912, and that her ability to conduct her business since has been much impaired. Upon being asked what she was able to earn per month or year in the conduct of the furniture business prior to the time she received the injury, she answered, over defendant's objection: "Well, per month I would imagine from $100 to $200. Of course, I hadn't been in it a year, and hadn't made a yearly." Here she was interrupted by defendant's counsel, who moved to strike out the answer for the reasons urged in the objection, among which were that no foundation had been laid; that it was a mere conclusion; that it did not involve the true rule of damages; and was too remote, uncertain, and speculative, and did not state facts. The objection and motion were overruled.

The instruction complained of tells the jury: "Should you find for plaintiff, you will award her such sum of money as will compensate her for her injuries; therein considering the nature and extent of her injuries, and value of time lost by her, and the extent of incapacity, if any, resulting to her, and, if so, its fair value, the amount of pain and suffering endured, and what will compensate her for the same," etc. It is urged that when this instruction was given the jury only had before it speculative, conjectural and incompetent evidence with respect to the value of plaintiff's loss of time and services; that evidence of loss of profits is not proper for the purpose of enhancing damages. The testimony set forth seems to be the only evidence with regard to the value of plaintiff's time. The question did not call for a statement as to profits, but merely as to her earning capacity. The witness evidently misapprehended its purport. Her answer was vague and indefinite, and probably included the element of profits. It should have been stricken. But the defendant made no effort upon cross-examination to ascertain the true facts or to inquire as to what elements entered into this approximation. The question is now presented whether the evidence as to the injuries plaintiff suffered, without taking into consideration the evidence as to her probable earnings in the furniture business, is sufficient to sustain the verdict. It is clear that the plaintiff's time is of some value, and the jury would be justified in considering it worth at least as much as that of an ordinary clerk.

The verdict was for $5,500. At the hearing on the motion for a new trial the court ordered a remittitur of all in excess of $4,000, and entered judgment accordingly. This sum will not do more than fairly compensate the plaintiff for her injuries according to the undisputed testimony as to their severity.

We are of the opinion that the remittitur ordered by the district court operated to remedy the prejudice to defendant, if any, and that a new trial should not be ordered

on account of the reception of the testimony and the giving of the instruction last complained of.

The judgment of the district court is

AFFIRMED.

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

WILLIAM F. TORBITT, APPELLEE, V. VILLAGE OF BENNETT ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18048.

1. **Easements:** STREETS: ADVERSE POSSESSION. An easement in a city street could be acquired by open, notorious and uninterrupted adverse possession for ten years prior to the enactment of the statute of 1899 (Laws 1899, ch. 79).
2. **Courts:** OPINIONS: OVERRULING. "Before overruling a former decision deliberately made, the court should be convinced, not merely that the case was wrongly decided, but that less injury will result from overruling than from following it." *McEvoy v. City of Sault Ste. Marie*, 136 Mich. 172.

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

Jesse B. Strode and *G. E. Hager*, for appellants.

T. J. Doyle, contra.

LETTON, J.

Action to enjoin village authorities from tearing down and removing an outside stairway to a building in the village of Bennett. A perpetual injunction was allowed, and the defendants appeal.

Plaintiff is the owner of a two-story frame building in the village of Bennett, which was erected in 1879, and of which he became the owner in 1887. There is an open outside stairway about four feet wide, extending from the sidewalk to the second floor of the building. This stairway

was erected with the building, and furnishes the sole means of access to the second story. The lower end of the stairway rests upon the street close to the building, and occupies a portion of the sidewalk space. In September, 1910, a written notice was served on plaintiff by the village trustees directing him to remove the stairway, and that, unless he did so within ten days, it would be removed by them and the cost of so doing assessed against the property. This action was then begun. There seems to be no dispute about the facts.

The question presented is whether an easement in a city street could be acquired by adverse possession for more than ten years prior to the passage of the act of 1899 (Laws 1899, ch. 79), and we are asked to review and overrule our former decision on this point. This question was first squarely presented in this court in the case of *Meyer v. City of Lincoln,* 33 Neb. 566, where it was held: "When a person has been in the actual, visible, exclusive, and uninterrupted possession of a portion of a street in a city, under a claim of right, for ten years, the title thereto vests absolutely in such occupant." This was followed in *Lewis v. Baker,* 39 Neb. 636, *Webster v. City of Lincoln,* 56 Neb. 502, and *City of Wahoo v. Nethaway,* 73 Neb. 54. The question is also considered in *Krueger v. Jenkins,* 59 Neb. 641.

In the *Wahoo* case, as in this, an earnest attempt was made by counsel to procure a modification of the rule laid down in the former cases, but the court refused to do so, quoting from a Michigan opinion: "Before overruling a former decision deliberately made, the court should be convinced, not merely that the case was wrongly decided, but that less injury will result from overruling than from following it"—saying that further injury, if any, to municipalities had been removed by the act of 1899, and concluding: "Nothing of good could be accomplished by now changing our former rule." *McEvoy v. City of Sault Ste. Marie,* 136 Mich. 172.

Agnew v. City of Pawnee City, 79 Neb. 603, was a case very similar to this, since it involved the right to remove

a stairway in a similar situation. After reviewing former decisions, the court say: "It seems clear from this reasoning, and the cases above cited, not only that title may be acquired by adverse possession in a city street, but that the title in the street is such that it may become servient to an abutting lot by the establishment of an easement therein."

In *Ryan v. City of Lincoln*, 85 Neb. 539, the court was again requested to review and overrule *Meyer v. City of Lincoln*, 33 Neb. 566, and cases following it. It said: "From our standpoint it will not be necessary to consider this branch of the case, and, while we shall not do so, we have no disposition to disparage the opinions referred to."

It may be true, as defendant argues, that the trend of modern opinion is contrary to our decisions, and that the early cases in this state were not well considered (though we do not so concede); but, since the legislature settled the question in 1899, and no possessory right can have been acquired in the streets since 1899 or 1900, it seems clear that greater injustice would result from setting aside our former adjudications than from abiding by them. The rule that adverse possession for ten years before 1899 constituted a perfect title now amounts to a rule of property, and vested rights, such as those in the *Agnew* case, would be interfered with by a change in the law. We are content to let well enough alone and to abide by the established rule.

It is also contended that Torbitt never claimed that portion of the sidewalk space on which the stairway rested. This is based upon testimony that in a conversation between Torbitt and a member of the village board he said he would remove it. There is a direct conflict with respect to this conversation, and there is so much doubt about it that we cannot allow this evidence to weigh against actual possession held for 30 years.

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

AFFIRMED.

BARNES and FAWCETT, JJ., not sitting.

WILLIS R. WATT, APPELLEE, V. GEORGE D. GOLAY, APPELLANT.

FILED APRIL 3, 1915. NO. 18050.

Record examined, and its substance set out in the opinion, *held* free from error.

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

Ralph E. Adams and *J. L. McPheely,* for appellant.

Hague & Anderbery and *F. L. Carrico, contra.*

LETTON, J.

This was an action for money paid to defendant's use. The answer was a general denial. Plaintiff recovered judgment, and defendant appeals.

The evidence for plaintiff seems to establish the following facts: Plaintiff is a dealer in horses in Minden. He is a stockholder and officer in the Denver Horse & Mule Commission Company, a corporation engaged in buying and selling horses and mules in Denver, Colorado. Gordon Hollis is president of that company, and lives in Denver. In 1911 Emery Golay, a young man living in Kearney county, Nebraska, had taken some horses to Denver to sell. While there he exchanged these horses with Hollis for an undivided half interest in an automobile. The young man, with one Oberg, who was with him, believing they had a right to the possession of the machine, started homeward with it. They had reached North Platte when they were arrested upon the charge of larceny of the automobile, preferred by Hollis in Denver. Golay notified his father, the defendant in this case. Golay senior procured the assistance of Mr. Watt, with whom he had been acquainted many years, to secure the release of Emery, and, after some negotiations, Hollis authorized Watt to sell his interest in the automobile to defendant for $750. The fa-

ther did not have the money on hand, and Watt agreed to advance it to Hollis, Golay agreeing to repay it in a few days. The money was paid by proper charge to Watt and credit to Hollis on the books of the corporation. Thenceforward Hollis made no claim to any interest in the automobile, and defendant admits that he paid the garage charges at North Platte, procured the machine there, and ran it home. Defendant refused to pay Watt the money which he had advanced, and this action followed.

For the defense, Mr. Golay testified that he purchased the automobile for $750, on condition that "they would release this suit at North Platte and withdraw the papers from the Governor," but that neither the suit nor the requisition papers were withdrawn at that time, and it was necessary for him and Mr. Watt to go to North Platte and to Lincoln before the matter was settled. He denies that he ever authorized Watt to pay for the one-half interest in the automobile, or that he agreed to pay Watt if he did so.

It is contended that the court erred in excluding a written agreement drawn up at the time plaintiff says the contract was made, signed by Emery Golay, and Hollis, by Willis R. Watt, that, in consideration of the settlement, Hollis would dismiss the prosecution. We cannot see the relevancy of this testimony. The defense is a general denial. Whether a contract was made between Emery Golay and Hollis to dismiss the prosecution could throw no light on the question whether the elder Golay agreed that Watt should pay Hollis for the automobile and that he would pay Watt thereafter, which is the only disputed matter in the case.

It is also objected that the court admitted in evidence a letter to Watt from Hollis. This letter states, among other things: "I have deducted from the amount of your sales the $750 for the automobile, as you requested in your last letter." This tended to prove that Watt had made the payment for the automobile to Hollis, and was properly received. The mere fact that the letter contained reference to other matters is immaterial, and did not prejudice defendant.

We find no error in the instructions, and the evidence is sufficient to sustain the verdict. The judgment of the district court is

AFFIRMED.

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

IN RE NICK ARRIGO.
NICK ARRIGO, APPELLEE, V. GUS A. HYERS, SHERIFF, APPELLANT.

FILED APRIL 3, 1915. No. 18437.

1. **Statutes:** DEFINITIONS: LEGISLATIVE POWER. The legislature may define words used in a statute so that their meaning is extended.
2. ———: ———: CONSTRUCTION. A legislative definition or an interpretative provision in a statute designed to extend a particular word so as to include more than its usual meaning should be construed reasonably and in accordance with the intent and purpose of the whole act.
3. **Food:** PURE FOOD LAW: DEFINITIONS: POLICE POWER. It is within the police power of the state to provide that certain food products sold in package form shall be deemed "misbranded" if there be contained in the package any gifts, premiums, or prizes.
4. ———: ———: VALIDITY: FEDERAL LAWS. The fact that congress has declared when a package of food shall be deemed misbranded does not prevent a state from making other requirements not inconsistent with the act of congress respecting the sale of food products in package form.

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

Grant G. Martin, Attorney General, Frank E. Edgerton and *J. B. Strode,* for appellant.

T. S. Allen and *E. G. Maggi, contra.*

LETTON, J.

A criminal complaint was filed against the relator, charging that on the 9th day of October, 1913, he unlaw-

fully sold one package of "Souvenir Checkers Popcorn Confection" to one E. L. Redfern, in which package was unlawfully contained a certain gift, premium and prize, to wit: One toy tin butterfly with pin affixed. He was found guilty and required to pay a fine of $10 and costs. Having failed to pay his fine, he was committed to jail until discharged. He brought these proceedings in habeas corpus to obtain his release. A hearing was had, and relator discharged. The state has prosecuted an appeal.

The question presented is whether the relator was guilty of a violation of the pure food act. Rev. St. 1913, ch. 24. He asserts that, since there was no food product in the package but popcorn confection, and this was plainly marked upon the outside thereof, the package was not misbranded, and that subdivision 6, section 2537, Rev. St. 1913, relating to food products in package form, is not within the police power of the state. The state asserts that, since the package sold contained an object in the nature of "a gift, premium or prize," to sell it was a violation of the law. Section 2537 provides that the term "misbranded" shall apply to drugs, liquors and articles of food under certain conditions. It also provides: "For the purpose of this chapter an article shall also be deemed to be misbranded. * * * Sixth. In case of food products if there be contained in the package any gifts, premiums or prizes."

The act in question, while commonly known as the "Pure Food Law," is entitled, "An act to create and maintain a food, drug, dairy and oil commission for the state of Nebraska, to define its powers and duties, to provide for the inspection of foods, drugs, dairy products and oils, to regulate the manufacture and sale of drugs, food products, dairy products, petroleum product and oils," etc. Laws 1913, ch. 109. The general purpose of the act is to protect the public from the adulteration of food products, the unsanitary operation of creameries, dairies, cheese factories, or other places where food products are manufactured or offered for sale, the prevention of fraud upon the public in the sale of food products put up in packages as to

quality and weight, by requiring a correct statement clearly printed on the outside of the main label of the contents, and also of the net weight of the contents exclusive of the container. Many provisions, regulations and restrictions are contained in the act in order to carry out these general purposes. Among these is found the clause upon which this prosecution is based, declaring a package of food products misbranded if there be contained in the package any gifts, premiums or prizes. The evident purpose of the provision as to misbranding is to protect the public by requiring a full disclosure of the contents of each package, and to promote fair and honest competition in the sale of food products by eliminating any act or element designed to conceal the true nature or value of the article packed. These general objects are clearly within the police power of the state. The legislation relates to one of the most essential functions of the government. It treats of the public health, pure foods, and honest weights and measures, which are all matters pertaining to the general welfare and for the protection of the public. For the purpose of enforcing the law, provision is made for a food commission and for inspectors.

The principal arguments of relator are that, unless there is a false statement upon the label, a package is not misbranded, and the legislature has no power to declare it so; "that appellee's business cannot be outlawed because the legislature has defined misbranding to be something that is not misbranding." A number of decisions are cited to the effect that it cannot "make that a party wall which is not a party wall," nor a child born out of lawful wedlock into "a lawfully begotten" one, nor make that a lottery which is not a lottery. We agree in the main with this contention, and also with relator's contention that statutes enacted in the exercise of the police power must have relation to a proper public purpose, and must not arbitrarily invade rights guaranteed by the constitution. Has the legislature power to declare a package so marked "misbranded"? It is an elementary principle of statutory interpretation that, where the legislature expressly states

the meaning which is to be given to a term used in an act, it is the duty of the courts to give it such meaning, and thus carry out the evident intent and purpose of the legislature.

The enforcement of some of the most important provisions of the pure food act depends upon the definition given in the act to many of the words used therein. Unless the words "person," "drug," "adulteration," "misbranded," "blend," and other words therein defined are interpreted to mean that which the legislature declares, the force of the act is practically nullified. Several of these words as used in the act contain ideas not quite within their ordinary meaning. Take the word "drug" as an instance. Many substances may be embraced within the statutory definition which are not ordinarily termed drugs. Also in the statutory definition of "adulteration" a drug is deemed to be adulterated "if its strength or purity fall below the professed standard or quality under which it is sold" (Rev. St. sec. 2536, subd. II), even though no other substances be added to it. Ice cream is deemed "adulterated" if it does not contain at least 14 per cent. butter fat, and fruit cream if it contains less than 12 per cent. butter fat; and yet pure milk varies widely in its content of butter fat, and until this act took effect ice cream in which pure milk and cream were used could not be said to be adulterated merely because its fat content fell below this standard.

The concept which a word conveys is that which custom has accorded it. There is no reason why a legislature may not expand the definition of a word to a reasonable degree and include within the circle of its definition for the purpose of an act, ideas which are related to that concept, but not ordinarily included therein. A definition in a statute is as effective and forceful as any other part of the act. This court has so held in *Herold v. State,* 21 Neb. 50, speaking of a legislative definition of "fraudulent transfer of property:" "This definition is furnished by the act itself, and the definition is as much a part of the act as any other portion. The right of the legislature to prescribe

the legal definitions of its own language must be conceded." *State v. American Surety Co.*, 91 Neb. 22; *Farmers Bank v. Hale*, 59 N. Y. 62. This is the general rule. "Any provision in a statute which declares its meaning or purpose is authoritative. Whether it relates to the object of a whole act, or of a single section or of a word, it is a declaration having the force of law. It is binding on the courts, though otherwise they would have understood the language to mean something different." 2 Sutherland (Lewis) Statutory Construction (2d ed.) sec. 576. See, also, cases cited in note to sec. 358. "The court is sometimes obliged by the legislature to put an interpretation on a word which it does not ordinarily bear when it has been enacted that something *'shall be deemed' to be* something else." *Brooks v. Baker*, 1 K. B. Div. (1906, Eng.) 11, 15; *McElhone v. Philadelphia Quartette Club*, 53 Pa. Sup. Ct. 262; *Commonwealth v. Crowl*, 245 Pa. St. 554; *State v. Standard Oil Co.*, 61 Or. 438; *State v. Harrison*, 116 Ind. 300; *Chicago & E. I. R. Co. v. State*, 153 Ind. 134; *State v. Allison*, 155 Mo. 325; *People v. Henning Co.*, 260 Ill. 554, 49 L. R. A. n. s. 1206, and note; Beal, Cardinal Rules of Legal Interpretation (2d ed.) 301.

The legislature evidently intended to prevent the label upon such a package from doing otherwise than speaking the exact truth. A package may with reason be said to be misbranded if the label does not accurately describe its contents. It is reasonable to presume that it believed it to be a wise provision for the public welfare to enact that packages of food offered for sale should not contain tin butterflies, toy savings banks, or printed coupons offered as prizes. The act contemplates the inspection of dairies, packing houses, and other sources of food supplies, to the end that cleanliness and sanitary conditions shall prevail; but there is no provision for the inspection of places where prizes and gifts are made or handled, however dirty or unsanitary they may be. If this provision is not in effect, these articles, brought from whatever germ-laden source, may be placed in contact with the food. Another evident purpose was the regulation of the weight of the

food contents, so as to prevent fraud, and so that the purchaser should know the quantity of food he was buying. The law requires the weight of the "contents" to be stated on the label. Among the contents in this case was a tin butterfly; in another case it was a toy savings bank. The net weight of the contents is stated, but it is left uncertain how much is food. The weight of the article within the package may be greater than that of the food product. It may be of less value, pound for pound, and thus defraud. The purchaser is left in the dark as to the weight of the food he is buying.

It is also argued that since, under the terms of the statute of the United States, this package is not misbranded, that law controls, and the state act cannot be held to apply. A similar question was raised in *Savage v. Jones*, 225 U. S. 501, 32 Sup. Ct. Rep. 715, with respect to the statute of Indiana. It was held that the intent to supersede the police power of the state is not to be implied, unless the act of congress, fairly interpreted, is in actual conflict with the law of the state. We find no such conflict here, and both acts may stand and be enforced.

The act is a beneficent one. It is continually exposed to the assaults of those endeavoring to cut down its provisions, and by a process of elimination to fritter away its value to the public. This should not be done, unless the legislature has failed to speak so that, with the aid afforded by its own definitions, its purpose can be understood. It is a sound rule that, where the intent of the legislature and the object and purpose of a law are obvious, and such manifest purpose and intent are not inconsistent with or outside the terms of the law, it is not allowable to permit the intent and purpose to be defeated merely because not defined and declared in the most complete and accurate language. Black, Interpretation of Laws (2d ed.) sec. 151.

We are of opinion the district court erred in discharging the relator, and its judgment is therefore

REVERSED.

BARNES, J., dissents.

IN RE JOSEPH DEKLOTZ.*

JOSEPH DEKLOTZ, APPELLEE, V. GUS A. HYERS, SHERIFF, APPELLANT.

FILED APRIL 3, 1915. No. 18391.

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

Grant G. Martin, Attorney General, Frank E. Edgerton and *J. B. Strode,* for appellant.

T. S. Allen and *E. G. Maggi, contra.*

LETTON, J.

The facts in this case are similar to those in *In re Arrigo, ante,* p. 134, except that the package was properly labeled to show it contained cocoa, and on one side in small type the words, "Save the Hamilton Coupon in This Package," were printed on the label. A printed slip or coupon was packed with the food in the can or package, stating that the coupon would be accepted by the Hamilton corporation in exchange for certain goods.

For the reasons set forth in the *Arrigo* case, the judgment of the district court is

REVERSED.

BARNES, J., dissents.

IN RE MIKE INDOVINA.

MIKE INDOVINA, APPELLEE, V. GUS A. HYERS, SHERIFF, APPELLANT.

FILED APRIL 3, 1915. No. 18438.

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

*On rehearing, judgment of district court affirmed. See opinion, p. —, *post.*

Grant G. Martin, Attorney General, Frank E. Edgerton and *J. B. Strode,* for appellant.

T. S. Allen and *E. G. Maggi, contra.*

LETTON, J.

The facts in this case are similar to those in *In re Arrigo, ante,* p. 134, except that the package was labeled to show that it contained crackerjack, the net weight was given as 2 ounces, and on one side of the package was printed: "PRIZE. This package contains a pleasing novelty or toy to delight the children, in addition to the famous confection, crackerjack." The package contained a toy bank in addition to the food.

For the reasons set forth in the opinion in that case, the judgment of the district court is

REVERSED.

BARNES, J., dissents.

MCCOOK IRRIGATION & WATER POWER COMPANY, APPELLEE, V. PAULINE BURTLESS ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18965.

1. Waters: IRRIGATION COMPANY: REGULATION OF RATES. An irrigation company is a common carrier of water to a limited degree, and its rates and charges are subject to regulation and control.
2. ———: ———: ———: JURISDICTION: STATE RAILWAY COMMISSION. Jurisdiction to inquire into the reasonableness of water rates and to regulate and fix the same has by the constitution and statutes been conferred upon the state railway commission.
3. ———: ———: ———. Contracts between an irrigation company and water users under its ditch, providing for the use of water and for the maintenance of the ditch, are entered into with the law as to the right of the state to regulate rates forming a part of the contract, and such rates are subject to control.
4. ———: STATE RAILWAY COMMISSION: JURISDICTION. The railway commission is not vested with jurisdiction to settle disputed property rights as to the ownership of an irrigation canal.

APPEAL from the State Railway Commission. *Affirmed.*

W. S. Morlan, for appellants.

C. E. Eldred, contra.

LETTON, J.

A complaint was filed by the McCook Irrigation & Water Power Company before the state railway commission against 18 holders of water-right contracts under its canal, setting forth that the annual maintenance fee due from water-right holders to the company under the contracts was $1 an acre per annum; that complainant has not sufficient income therefrom to enable it to keep up and properly maintain the canal; that an increased charge is necessary and that a charge of $2 an acre would be a reasonable rate, which it is entitled to receive. The prayer is that a hearing may be had and complainant be authorized to charge consumers an annual maintenance fee of $2 an acre, to be made to apply for water furnished for the year 1913.

The respondents filed an answer denying the jurisdiction of the railway commission of the subject-matter of the complaint, which it is said is within the jurisdiction of the courts. The answer also pleads the failure of complainant to furnish sufficient water in the irrigation season of 1913; that it carelessly and negligently allowed the canal to become filled with weeds and debris, and to be obstructed, so that it failed to carry the amount of water to which the respondents' lands were entitled. It also pleads a number of acts of misconduct on the part of certain directors of the corporation whereby it is alleged they obtained special privileges and advantages, and charges general mismanagement.

A hearing was had, and an order made allowing the complainant to increase its maintenance charges to $2 an acre per annum. The company was also required to set apart each year $4,500 for the operation, maintenance and betterment of the ditch and to place any unexpended portion of this amount in a reserve fund for use in emergen-

cies. It was also ordered that a new set of books be opened containing certain specified entries, and that a daily record be kept during the irrigation season of the flow in the main canal and the distribution of water to the users. From this order respondents have appealed.

The principal contention of respondents is that the commission has no authority to make an order releasing complainant from the provisions of the contracts; that the order deprives the defendants of their property without due process of law, and impairs the obligation of their contracts contrary to the provisions of the Constitution of Nebraska, the Constitution of the United States, and of the fourteenth amendment thereof. It is also said that the order is not supported by the evidence, and that under the covenants in the water deeds the title to the canal was and should be in its customers, since the whole amount of available water rights had been sold. These contentions will be considered in different order than presented.

1. The evidence conclusively shows that the rate of $1 an acre per annum is insufficient to maintain the canal, even after deducting certain charges criticised by the respondents, and that unless the complainant is allowed to increase the rate it will be impossible to maintain the canal in a condition so that it will deliver water. The computations made by respondents and set forth in the reply brief, showing that the income is more than sufficient to meet expenses, are not accurate, since they include hundreds of dollars received from the sale of water rights. Such sums are no part of maintenance charges. The plan of the corporation, expressed in its deeds or contracts with holders of water rights, provides that, when the water rights to the capacity of the canal have been sold and paid for, the canal becomes, by certain acts of its officers therein specified, the property of the water-right holders. Under such provision the money paid for a water right represents *pro tanto* a portion of the capital of the corporation. When the rights have all been sold the title to the canal passes, but the title to the money remains in the corporation. It may not therefore be taken from the

corporation without its consent to be used for maintenance. This is said, assuming, of course, that the prices paid have been fair and reasonable and not padded to such an extent that it is seen that at least a portion of the cost of maintenance should be met from the excess charge. In this case, however, no such condition appears as to any of the respondents. Under the order made by the railway commission complainant is not allowed to squander or dissipate any sum realized from the increase in rates in excess of that actually expended each year for the maintenance of the ditch. Its books are subject to inspection, and if it should prove when further repairs have been made to the canal, or a more specific and detailed system of bookkeeping used, that the rate now fixed is excessive, it can be reduced upon proper application being made to that body.

2. It is strongly insisted that the evidence shows that all the available water which could be furnished has been disposed of under existing water-right contracts; that for that reason the consumers own the canal, and the complainant as a stock corporation has no interest in the property. This question involves the ownership of the property, and is one which the railway commission has no jurisdiction to hear or determine. If the facts warrant, proper relief may be afforded by appropriate proceedings in a court of equity.

3. Respondents insist that if the existing rate is unsatisfactory to the company it cannot complain because it was competent, and under no restriction, when it fixed the rate, and that regulation can only apply on the complaint of waters users when they show the agreed rate is unreasonable. This involves the constitutional questions raised.

The crucial question is whether the rate of $1 an acre a year fixed in the contract is a property right with which the state in the exercise of its regulatory power cannot interfere. At the time the canal was built the practice of irrigation in this state was in its infancy, but from the very first the legislature recognized the public interest in the use of water from the streams of the state for irriga-

tion purposes. It placed canal companies in the same class as railways and other common carriers, and it has uniformly been considered that their rates were subject to regulation and control. *Cummings v. Hyatt,* 54 Neb. 35; *Castle Rock Irrigation, Canal & Water Power Co. v. Jurisch,* 67 Neb. 377; *Farmers Canal Co. v. Frank,* 72 Neb. 136; *Fenton v. Tri-State Land Co.,* 89 Neb. 479, 492. At first no tribunal was provided which had the power to fix and establish rates, and the only remedy the consumer had was to apply to the courts to restrain unjust exactions or unreasonable charges, but afterwards by constitutional amendment and statute the state railway commission was vested with full power and authority to regulate and fix rates and charges, so that they would be fair and equitable both to the consumer and to the corporation supplying the water. Const., art. V, sec. 19*a*; Rev. St. 1913, secs. 3382-3384.

The question involved is an important one, and one as to which there has been some difference of opinion; but we believe the larger and broader view, that most consistent with the spirit in which the law of irrigation should be administered, and that to which courts are more and more tending, is that any contracts entered into between the irrigation company and consumers under the ditch, with reference to the annual rates which should be charged for the use of water, were entered into with the law forming a part of the contract, and were subject to legislative control. *Tampa Water Works Co. v. Tampa,* 199 U. S. 241, 26 Sup. Ct. Rep. 23; *Spring Valley Water Works Co., v. Schottler,* 110 U. S. 347, 4 Sup. Ct. Rep. 48; *City of Manitowoc v. Manitowoc & Northern Traction Co.,* 145 Wis. 13; *Stanislaus County v. San Joaquin & King's River Canal & Irrigation Co.,* 192 U. S. 201, 24 Sup. Ct. Rep. 241; *White v. Farmers Highline Canal & Reservoir Co.,* 22 Colo. 191. An interesting discussion of this topic with cases cited may be found in 2 Wiel, Water Rights in the Western States (3d ed.) secs. 1315-1321.

If the canal company cannot receive sufficient money to keep the canal intact, the water supply must fail. The

consumers will be direct sufferers from such a condition of affairs, but the state, which has granted the franchise to cross the lands of others and has allowed the appropriation of public waters for the advancement of agriculture and the building up of prosperous agricultural communities, would also be injuriously affected by the failure of the enterprise. It is also worthy of consideration that, if these contract holders are entitled to be supplied at the rate of $1 an acre, subsequent purchasers of water rights, if any, may be compelled to pay excessive rates in order to provide the necessary funds for maintenance. If the company should attempt to exact such rates, the question might arise whether such discriminatory charges could be upheld.

Osborne v. San Diego Land & Town Co., 178 U. S. 22, 20 Sup. Ct. Rep. 860, was a case brought by an irrigation company to settle the question whether it had authority to increase its water rates. The case was tried in the United States circuit court and appealed to the supreme court of the United States. The contract provided that the annual rate should be fixed by the company "as allowed by law." The company had for many years collected $3.50 an acre, and was now seeking to raise the rate to $7. The defendants claimed that the $3.50 rate had been fixed by contract, under the provisions of a statute which provided that, until the rates "shall have been abrogated by such board of supervisors, as in this act provided, the actual rates established and collected by each of the persons, companies, associations and corporations now furnishing, or that shall hereinafter furnish, appropriated waters for sale, rental or distribution to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legally established rates thereof." The circuit court held that the question whether an increase to the proposed rate of $7 an acre was reasonable was not open to its decision, and that resort must first be had to the board of supervisors of San Diego county, the only body with power to fix rates. The supreme court affirmed this decree. In the opinion, speaking of the claim that the contract rates thus estab-

lished could not be altered at the desire of the company, that they were property rights, and to change them would be violative of constitutional rights, the court said: "The purpose of the act rejects such view. Its purpose is regulation, deliberate and judicial and periodical regulation by a selected tribunal, and we cannot believe that the legislature intends by an absolute and peremptory provision to fix rates upon the water companies unalterable by them, no matter what change in conditions might supervene. Against rates which may become unreasonably high, the statute gives relief to consumers through petition to the board of supervisors. Rates which may become unreasonably low it surely does not intend to impose on the companies forever, except as relief may come from the voluntary justice of its customers or by a violation of the statute and appeal to the courts."

We are aware that there are cases, in which the point was not directly involved, which seem to indicate that if the question were before it the court would have taken a contrary view to that taken here, but there are at least an equal number of cases, better reasoned, as we view the matter, holding practically in conformity herewith.

Holding the view that the contracts were entered into subject to the right of the state in the exercise of its police power to regulate and fix reasonable rates to be charged for the use of the water, the order of the railway commission does not take property without due process of law, and is not in violation of the Constitution of the United States, the fourteenth amendment, or the Constitution of the state of Nebraska.

Many complaints of mismanagement and of undue preferences in the sale of water rights and of other irregularities are made. For these a remedy exists in equity, and the railway commission is not vested with the power to settle and adjust the property rights involved.

The order of the commissioners is reasonable, and is

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

MARGARET WELSH, APPELLEE, V. CITY OF SOUTH OMAHA ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18017.

1. **Municipal Corporations:** EXCAVATION IN SIDEWALK: INJURY TO PEDESTRIAN: CONTRIBUTORY NEGLIGENCE. A traveler who knows of a dangerous excavation in a sidewalk is not guilty of contributory negligence, as a matter of law, because, remembering conditions, he attempts in the darkness to pass around such excavation, but, misjudging the distance, falls into it when it is unguarded.
2. ———: EXCAVATIONS IN STREETS: DUTY TO SAFEGUARD. A city should exercise ordinary care to protect the public from the dangers incident to grading and paving, and this duty extends to guarding street and alley excavations dangerously near sidewalks or paths to which traffic is diverted by the making of the improvements.
3. **Appeal:** VARIANCE. On appeal a judgment will not be reversed for an immaterial variance between the pleadings and proof.
4. **Trial:** REFUSAL OF INSTRUCTIONS. It is not error to refuse a requested instruction if the legal principle therein announced is correctly stated to the jury in another form.

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

H. C. Murphy, W. J. Connell and *W. H. Herdman,* for appellants.

Smyth, Smith & Schall, contra.

ROSE, J.

In South Omaha plaintiff fell into an excavation in a public alley, running north and south midway between and parallel to Twenty-seventh and Twenty-eighth streets, and sprained her ankle. The accident occurred near the south lot line of E street where the alley crosses it at right angles. This is an action to recover damages in the sum of $5,000 for personal injuries resulting from plaintiff's fall. Defendants are the city of South Omaha and Hugh Murphy. The latter was a paving contractor and made

the excavation while performing a contract to pave E street and the alley intersection at or near the place of the injury. The sidewalk across the alley had been removed with a view to lowering the surface of the sidewalk space to grade. The contractor's duties and liabilities were the same as the city's. Plaintiff charged that defendants were negligent in failing to construct barricades, or to give warning of danger, and in allowing the crossing at the alley to remain in an unprotected and unguarded condition. Defendants denied negligence, and pleaded contributory negligence on the part of plaintiff. From a judgment on a verdict in favor of plaintiff for $1,000, defendants have appealed.

The principal argument of defendants is directed to the assignment that the trial court erred in refusing to direct a verdict in their favor. They insist that the testimony of plaintiff shows she was injured through want of care on her part. She lived at the southwest corner of the intersection. The east side of her lot is adjacent to the alley, and her house fronts north on E street. She had opportunity to observe the progress of the work and she knew the conditions as they existed. After the sidewalk had been removed, the alley was graded south from E street to the lot line. The excavation was at least two feet deep, and turned the traffic over adjacent lots, crossing the alley on comparatively level ground and wearing a path around the graded space. There is evidence tending to show that the sidewalk travel had taken this course for a week or more at the time of the accident. During the afternoon of July 10, 1909, plaintiff left her home and followed the path described, walking east on the south side of E street. In returning after dark she attempted to retrace her course around the excavation and, according to her testimony, fell into it. She was not guilty of contributory negligence, as a matter of law, because she attempted to follow the path and thus avoid known danger. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. A traveler who knows of a dangerous excavation in a sidewalk is not guilty of con-

tributory negligence, as a matter of law, because, remembering conditions, he attempts in the darkness to pass around such excavation, but, misjudging the distance, falls into it when it is unguarded. *Orleans Village v. Perry,* 24 Neb. 831; *City of Beatrice v. Reid,* 41 Neb. 214; *City of South Omaha v. Taylor,* 4 Neb. (Unof.) 757; *City of Beatrice v. Forbes,* 74 Neb. 125.

It is further argued that there should have been a peremptory instruction in favor of defendants, because, as they assert, plaintiff, according to her own testimony, fell into the excavation from a private lot. There being proof that the public was not protected by barricades or danger signals, defendants state their position as follows:

"A city owes no duty or obligation, where it has excavated a street or alley to erect barriers or signals for the protection of persons approaching such street or alley from private property, or to prevent such persons from falling from such private property into such street or alley."

For the purpose of the argument, it will be assumed that plaintiff approached the alley from private property. Starting from that premise, did she make a case for the determination of the jury? She testified positively that in the darkness she fell into the excavation. It did not end at a perpendicular wall along the lot line across the alley. From the bottom of the excavation at the south end the ground sloped southward to the original surface of the alley. The dangerous conditions, therefore, did not terminate at the south lot line of E street, but extended farther into the alley adjacent to private property. The sloping area south of the street line was part of the excavation itself. Around it the traffic, by the acts of defendants, was turned from the sidewalk to the path. These facts and conclusions may fairly be inferred from the evidence. Under such circumstances, the duty to protect the public extended to the southern extremity of the excavation. Injury could reasonably have been foreseen. The alley was a public way to which defendants had access. They could have given protection from the alley without trespassing on private property. A city should exercise ordinary care to

protect the public from the dangers incident to grading and paving, and this duty extends to guarding street and alley excavations dangerously near sidewalks or paths to which traffic is diverted by the making of the improvements. *City of Lincoln v. Beckman,* 23 Neb. 677; *City of South Omaha v. Cunningham,* 31 Neb. 316; *City of Lincoln v. Calvert,* 39 Neb. 305; *Manderschid v. City of Dubuque,* 29 Ia. 73; *Alger v. City of Lowell,* 3 Allen (Mass.) 402; *City of Oklahoma City v. Meyers,* 4 Okla. 686; *Niblett v. Nashville,* 12 Heisk. (Tenn.) 684. In the case last cited the court said: "We think the true rule may be stated to be that if an obstruction or excavation be permitted which renders the alley, street, or highway, unsafe or dangerous to persons or vehicles—whether it lie immediately in or on the alley, street, or highway, or so near it as to produce the danger to the passer at any time when he shall properly desire to use such highway—it is such a nuisance as renders the corporation liable. * * * A party bound to keep a highway in repair and open for the passage of the public in a city by night or by day certainly cannot be held to perform that duty by simply keeping the area of the highway free, while along its edge there is a well or excavation uninclosed, into which the passenger, by an inadvertent step or an accidental stumble, might fall at any time. Such an excavation might be all the more dangerous by being immediately on the side of an alley or street rather than in it, as in the latter case it would be notorious as dangerous, and would be shunned by all; while in the former case no such attention might be directed to it, and the unsuspecting passenger, by a mere accidental step, would be liable to be precipitated into it and thus seriously injured."

The issues of negligence and contributory negligence were questions for the jury. It follows that the refusal to give a peremptory instruction in favor of defendants was not erroneous.

Defendants also insist that there is a material variance between the pleadings and the proofs. They argue that proof of plaintiff's having fallen into the alley from pri-

vate property south of the sidewalk space is a variance from the plea that plaintiff was injured through their negligent failure to protect the sidewalk space on the south side of E street. The refinement is too subtle for the practical application of the law. There was only one excavation. It was made by defendants. Their duty to exercise reasonable care to protect the public from the danger thus created was not limited to the sidewalk space. The excavated area south of it was close to the dividing line. Plaintiff was injured in the darkness, and she was unable to point out the exact spot where she fell. Under these circumstances, defendants could not have been misled to their injury. The rule of the statute is:

"No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits." Rev. St. 1913, sec. 7706.

The point is not well taken. *Niblett v. Nashville,* 12 Heisk. (Tenn.) 684; *Rea v. Sioux City,* 127 Ia. 615.

Another assignment of error challenges the trial court's refusal to give a requested instruction that plaintiff is not entitled to recover damages, if proper and sufficient barricades and lights, provided by defendants, had been removed by an unknown person before the accident. Under the evidence defendants were entitled to an instruction on this phase of the defense; but their rights were protected by another direction that defendants would not be liable, if they used ordinary care in placing and maintaining barriers and signals.

If there is no mistake in the views already expressed, there is no prejudicial error in the record.

AFFIRMED.

BARNES and SEDGWICK, JJ., not sitting.

G. A. CRANCER COMPANY, APPELLANT, V. PARIS G. COOPER, APPELLEE.

FILED APRIL 3, 1915. No. 18060.

1. **Sales: CONTRACT: DESCRIPTION OF PROPERTY.** In a contract of conditional sale duly filed of record, a description which will enable a third person, aided by inquiries suggested by the instrument itself, to identify the property is sufficient.
2. **———: ———: FILING: NOTICE.** The public filing of a contract of conditional sale, in the county wherein the purchaser resides, protects the seller, though the former removes the property to another county.

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

E. M. Slattery, Stewart, Williams & Brown and *Field, Ricketts & Ricketts,* for appellant.

Fisher & Rooney and *Earl McDowell, contra.*

ROSE, J.

The action is replevin, and the property in controversy is a piano which had been conditionally sold by plaintiff to Herman Springer under a contract retaining title in the seller until all instalments of the purchase price were paid. A renewal contract containing the same condition and disclosing an unpaid balance of $373.89 was filed February 22, 1910, with the county clerk of Cheyenne county, where the purchaser resided. Thereafter Springer moved to Dawes county, took the piano with him without plaintiff's knowledge or consent, and there sold it to defendant, who claims to be a purchaser for full value without notice of plaintiff's rights. At the close of the testimony the trial court directed a verdict for defendant. Plaintiff has appealed.

The property is a "Henry F. Miller Grand Piano. Style, Lyric. No. 36,571." In the renewal contract filed in Cheyenne county the number was given as "39,371," or

as "39,571." It is argued by defendant that the description containing the erroneous number was insufficient to charge him with notice of plaintiff's title. The rule is: "A description * * * which will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property is sufficiently definite." *Farmers & Merchants State Bank v. Sutherlin,* 93 Neb. 707. Though the description is erroneous in part, it suggests inquiries which might have enabled defendant to identify the piano in Springer's possession as the one to which plaintiff had retained title. In that event defendant had constructive notice of plaintiff's rights. *Lamar v. Coleman, Ray & Co.,* 88 Ga. 417; *Harris v. Kennedy,* 48 Wis. 500; *Yant v. Harvey,* 55 Ia. 421. The question was one for the jury. *Iowa Savings Bank v. Dunning & Harston,* 37 Neb. 322; *Livingston & Schaller v. Stevens,* 122 Ia. 62.

The filing of the renewal contract in Cheyenne county was constructive notice of plaintiff's title in Dawes county after Springer moved the piano thereto. *Grand Island Banking Co. v. Frey,* 25 Neb. 66; *Cool v. Roche, Hall & Ray,* 20 Neb. 550.

For these reasons, there was error in directing a verdict in favor of defendant.

REVERSED AND REMANDED.

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

JAMES E. JUDGE, SR., APPELLEE, V. JAMES E. WALLEN ET AL., APPELLANTS.

RUTH JUDGE, APPELLEE, V. JAMES E. WALLEN ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18061.

1. **Automobile Accident: JOINT LIABILITY.** While two traveling salesmen are engaged in the joint enterprise of transporting themselves by automobile over the territory canvassed by both for different merchants, one of the salesmen owning and operating the auto-

mobile and the other paying sums about equal to the cost of gasoline and oil consumed, the latter, if possessing joint control over the automobile, may be liable for the negligence of the other in operating it; both being occupants at the time.

2. ———: COMMON ENTERPRISE: QUESTION FOR JURY. Whether a person riding in the automobile of another is engaged in a common enterprise with the latter is a question for the jury, where it is an issuable fact in the case.

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

T. J. Doyle, for appellants.

Berge & McCarty, contra.

ROSE, J.

James E. Judge, Sr., and two minor daughters, seated in a buggy drawn by a horse, were traveling north on the east side of Eleventh street in the city of Lincoln about 7 o'clock in the evening of August 31, 1911. Between Wood and Washington streets they were struck violently by an automobile which had approached from the rear. James E. Wallen and Benedict E. Binger were occupants of the automobile, and they are the defendants. It is charged in the petition that the automobile was negligently operated, that it was driven at an unlawful rate of speed, about 40 miles an hour, and that the lights were defective. The negligence thus imputed to defendants was denied by them. James E. Judge, Sr., recovered a judgment of $600 for personal injuries and for damages to his horse and buggy. His infant daughter, Ruth Judge, recovered a judgment of $2,000 for personal injuries. The two cases were consolidated for the purposes of trial. Defendants have appealed.

The decisive point arises on a challenge to the jurisdiction of the district court for Lancaster county. Wallen was a resident of Gage county and was therein served with notice of the suit. He was not properly brought into court, unless he and Binger were jointly liable for negligence resulting in the collision. Binger denies responsibility for the accident, and insists that the automobile was

owned and operated by Wallen who had it in his exclusive control. There is convincing proof that the proximate cause of the injuries was negligence in the operation of the automobile. The trial court permitted the jury to find that defendants were jointly liable. Is the ruling correct? There is evidence from which the following facts or conclusions may be inferred: Defendants were traveling salesmen for different wholesale merchants and canvassed practically the same territory. Several weeks before the accident Wallen invited Binger to ride with him over the territory canvassed in common and the invitation was accepted. Binger paid sums about equal to the cost of gasoline and oil consumed, Wallen owning and operating the automobile. Binger shared the seat with him. For their mutual benefit they were engaged in the joint enterprise of transporting themselves over the territory canvassed by both. Binger was not a mere passenger or a gratuitous guest. The facts and conclusions stated may fairly be inferred from the proofs. The dangers and liabilities incident to the joint enterprise, the instinct of self-preservation, the demands of business in canvassing territory for a wholesale merchant, safety and comfort in traveling, the furnishing of gasoline, the joint occupancy of the seat in the conveyance, and the obvious rights growing out of the mutual undertaking may imply that Binger had joint authority to control the means of transportation and the right to demand ordinary care and observance of the law in operating the automobile. As a reasonably prudent person he must have been familiar with the danger of driving a motor car with defective lights at an unlawful speed along a busy street in the dusk of the evening. The circumstances were such that the negligence of one may be imputed to the other. While it was held in *Loso v. Lancaster County*, 77 Neb. 466, that the doctrine of imputed negligence is not in force in this state, "except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like," the law applicable to the exceptions has been stated as follows:

"Negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. If, however, two or more persons unite in the joint prosecution of a common purpose, under such circumstances that each has authority, express or implied, to act for all in respect to the conduct or the means or agencies employed to execute such common purpose, the negligence of any one of them in the management thereof will be imputed to all of the others." *Koplitz v. City of St. Paul,* 86 Minn. 373, 58 L. R. A. 74.

To the same effect: *Ward v. Meeds,* 114 Minn. 18; *Beaucage v. Mercer,* 206 Mass. 492; *Adams v. Swift,* 172 Mass. 521; *New York, C. & St. L. R. Co. v. Kistler,* 66 Ohio St. 326; *Christopherson v. Minneapolis, St. P. & S. S. M. R. Co.,* 28 N. Dak. 128; *Schron v. Staten Island Electric R. Co.,* 45 N. Y. Supp. 124; *Nesbit v. Town of Garner,* 75 Ia. 314; *McBride v. Des Moines City R. Co.,* 134 Ia. 398.

Whether defendants were engaged in a joint enterprise was a question for the jury. *Nesbit v. Town of Garner,* 75 Ia. 314; *Ward v. Meeds,* 114 Minn. 18.

In the view thus taken of the evidence and the law applicable thereto, the trial court acquired jurisdiction, and the findings of the jury are justified by the proofs.

The verdicts are assailed as excessive, but sufficient reasons for interference on that ground have not been given.

AFFIRMED.

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

DAVID MCCLINTOCK V. STATE OF NEBRASKA.

FILED APRIL 3, 1915. No. 18919.

1. **False Pretenses:** INDICTMENT: SUFFICIENCY. An indictment for obtaining money by false pretenses is not fatally defective merely because the ownership of the money is not alleged in direct terms, if that fact is clearly shown by the indictment as a whole.
2. ———: PLEADING AND PROOF. Under an indictment charging that accused obtained money by falsely pretending that he was the owner of specifically described property, proof that he did not then own such property is essential to a conviction.

ERROR to the district court for Antelope county: ANSON A. WELCH, JUDGE. *Reversed.*

E. D. Kilbourn, for plaintiff in error.

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

ROSE, J.

Defendant was convicted of obtaining money by false pretenses, and for that offense was sentenced to serve in the penitentiary a term of not less than one nor more than five years. As plaintiff in error he presents for review the record of his conviction.

The Royal State Bank gave defendant a credit of $1,498.45, December 8, 1911. The money was paid out on his check December 11, 1911. For the sum named he executed in favor of the bank a note and a chattel mortgage December 18, 1911. In the indictment it is charged that he obtained the money by false pretenses. It is argued that the indictment is fatally defective in failing to charge that the money obtained was the money of the Royal State Bank. After specifically charging false pretenses the indictment proceeds: "Relying upon said false representations of said David McClintock, the said Royal State Bank, by and through said R. L. Drayton, its cashier aforesaid, then and there loaned said David McClintock the sum of

$1,498.45." It is further charged that defendant made the false representations "with intent to cheat and defraud said Royal State Bank." While the ownership is not stated in direct terms, the indictment as a whole shows that the money obtained belonged to the Royal State Bank. Authority is divided, but the modern view, the rule subserving the ends of justice without prejudicing accused, is that the failure to allege in direct terms the name of the owner of the property obtained by false pretenses is not a fatal defect, if the indictment as a whole clearly discloses that fact. *State v. Knowlton,* 11 Wash. 512; *Griggs v. United States,* 158 Fed. 572; *State v. Balliet,* 63 Kan. 707; *People v. Skidmore,* 123 Cal. 267; *State v. Boon,* 49 N. Car. 463. The conviction will not be reversed for informality in the indictment.

Insufficiency of the evidence to sustain the conviction is also urged as a ground for setting aside the judgment. The indictment specifically charges that defendant falsely pretended to be the owner of 64 definitely described steers, and that they were in the possession of Joe Steinker in Antelope county. It is further charged that, relying on both of these false representations, the Royal State Bank loaned defendant $1,498.45. In an instruction the trial court required proof beyond a reasonable doubt that defendant, when he made the representations, was not the owner of the steers. There is no evidence in the record that defendant, when he made the representations, or when he obtained the credit, or when he drew out the money, or when he executed and delivered the note and chattel mortgage, did not own the steers described in the indictment. It is clear, therefore, that the verdict of guilty is not supported by the evidence and that it is contrary to the instruction of the court. For these reasons, the judgment is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON and FAWCETT, JJ., not sitting.

GEORGE J. FLORY, APPELLEE, V. SUPREME TRIBE OF BEN HUR, APPELLANT.

FILED APRIL 3, 1915. No. 18022.

Contracts: CONSTRUCTION. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would give to it, or such a construction as the other party would be fairly justified in giving to it.

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

E. J. Clements, for appellant.

T. J. Doyle, contra.

FAWCETT, J.

From a judgment of the district court for Lancaster county, upon a certificate of membership issued by defendant to plaintiff's wife, defendant appeals.

The petition is in the usual form. That Mrs. Flory was a member in good standing at the time of her death, and that plaintiff was the beneficiary named in her certificate, is not controverted. The defense is predicated upon the allegation that the certificate of membership issued to Mrs. Flory was based upon a written application duly signed and delivered by her to defendant; that the application is, by the terms of the certificate of membership, expressly made a part of the contract of insurance, and that it contains the following provision: "I hereby waive all right for myself and all beneficiaries who claim indemnity from this order on account of disability or death occurring to me as a result of abortion or attempt to produce abortion." The allegation in the answer is that Mrs. Flory's death "occurred to her as a result of abortion and an attempt to produce abortion." The reply is a general denial.

The evidence entirely fails to show any attempt on the part of Mrs. Flory to produce an abortion upon herself. On the contrary, it leaves scarcely any room for doubt that the death of the fetus, which caused her death, was the result of an assault made upon her by her brother-in-law about two weeks prior to the date of her death. The district court correctly construed the waiver, above set out, to mean that the act must be done intentionally and unnecessarily, for the purpose of procuring an abortion, and so instructed the jury. That Mrs. Flory so understood the words when she signed the application, and that defendant had no just reason to believe that she would otherwise understand them, is the only reasonable construction that can be put upon the words used. It would be doing violence to every settled rule of construction to hold that she understood the words used in any other sense than that in which they are ordinarily used and understood. As ordinarily used among laymen and among married women, miscarriage is understood to mean failure on the part of a woman, from causes beyond her control, to carry a fetus to maturity; while abortion is understood to mean the intentional causing of a miscarriage. We think it is clear that section 7909, Rev. St. 1913, applies, viz.: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." See, also, *Harbach v. Miller*, 14 Neb. 9, where *Gunnison v. Bancroft,* 11 Vt. 490, is quoted from with approval.

The case is too plain to require further discussion. The trial court properly construed the contract between the parties, and its judgment is.

AFFIRMED.

BARNES and ROSE, JJ., not sitting.

STATE OF NEBRASKA, APPELLEE, V. THOMAS MULLALLY ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 18065.

Judgment: REDUCTION: FORFEITED RECOGNIZANCE. The action of the trial court in reducing a judgment rendered upon a forfeited recognizance, where the accused has subsequently been arrested and surrendered to the proper court for trial, will not be disturbed unless an abuse of discretion is clearly shown. Rev. St. 1913, secs. 9017, 9018.

Appeal from the district court for Harlan county: HARRY S. DUNGAN, JUDGE. *Affirmed.*

John Everson, for appellants.

O. E. Shelburn, contra.

FAWCETT, J.

One Neff was arrested and informed against on the charge of grand larceny committed in Harlan county. November 15, 1910, he made application for continuance to the next term of court, which was granted. Defendants entered into a recognizance in the sum of $1,000 for Neff's appearance on the first day of the next term of court, which convened on March 2, 1911. Neff failing to appear at that time, the recognizance was on the next day declared forfeited. On the 20th of the same month action was instituted in the district court for Harlan county against the defendants as sureties for the penalty of the bond. A year later that action came on for hearing, and, after evidence taken, judgment was rendered against the defendants for $1,000 and costs. On the 23d of September following defendants filed in the district court an application to be relieved from the judgment, for the reason that after the rendition of the judgment they had captured the accused in Arizona and surrendered him to the sheriff of Harlan county, at an expense to them of about $300, and that the accused had pleaded guilty to the charge against him, and

is now confined in the penitentiary under sentence of from one to seven years. The journal entry of the judgment recites: That the cause came on to be heard upon the motion of the defendants to have the judgment, entered against them on the forfeited recognizance, remitted and set aside; that the state appeared by the county attorney and the defendants by their attorney; that, "upon consideration of said motion and of the showing made by the defendants in support thereof and by the plaintiff in opposition thereto, the court finds that after the rendition of said judgment, Albert Neff, the principal in the recognizance upon which said judgment is based, was arrested and brought to trial; the court further finds that, by reason of the failure of said Neff to appear in accordance with the condition of his recognizance, the state and county were put to an expense of $250, and that said amount should be paid by the defendants herein, as sureties, on said recognizance, and the court finds that the judgment heretofore rendered against the defendants herein on said recognizance should be reduced to $250." Judgment was rendered accordingly, and defendants have appealed.

There is no bill of exceptions in the record. Counsel for defendants in his brief says: "There was no testimony given by either side, though the journal entry apparently might lead the court to infer that there was. The facts were all within the personal knowledge of the court." Counsel for the state in his brief says that the matter came on for hearing before the court upon the application of defendants to have the judgment remitted, "and on this application witnesses were sworn and testified, and evidence was introduced." The judgment against the sureties was entered under the provisions of section 9017, Rev. St. 1913, which provides: "The court in which the action for the penalty of any forfeited recognizance is brought may remit or reduce any part of (or) the whole of such penalty, and may render judgment thereon according to the circumstances of the case and the situation of the party, and upon such terms and conditions as to such court shall seem just and reasonable." The subsequent application

by the defendants to have the judgment remitted is based on section 9018, which provides: "Whenever any judgment shall have been rendered against the defendants for the whole or any part of the penalty of a forfeited recognizance, as aforesaid, the court rendering said judgment shall have power to remit or reduce the amount thereof, when it shall be made to appear that after the rendition thereof the accused had been arrested and surrendered to the proper court, to be tried on such charge." It will be seen that these two sections of the statute vests a large discretion in the court, and action taken by the court in cases arising under them should not be disturbed unless a clear abuse of the discretion thus vested has been shown. The record before us does not show any abuse of discretion. The recital by the court in its journal entry, that its findings are based upon a consideration of the motion "and of the showing made by the defendants in support thereof and by the plaintiff in opposition thereto" must, in the absence of a bill of exceptions, be treated as a verity and as meaning just what it says. The term "showing," as used in the journal entry, clearly indicates that each of the parties had, respectively, supported and resisted the motion by oral testimony, affidavits or documentary evidence, which in either case could only be preserved by a bill of exceptions.

AFFIRMED.

JOSEPH KITTO V. STATE OF NEBRASKA.

FILED APRIL 3, 1915. No. 18883.

1. **Indians: CITIZENSHIP.** By the provisions of the act of congress approved February 8, 1887 (24 U. S. St. at Large, ch. 119, pp. 388, 390), all Indians born within the territorial limits of the United States, to whom allotments of land in severalty have been made under the provisions of said act, or other law or treaty, and all Indians, born as aforesaid, who have voluntarily taken up their residence in the United States separate and apart from any tribe of Indians therein, and adopted the habits of civilized life, are

made citizens of the United States, and such Indians residing in this state are citizens thereof.

2. ———: OFFENSES: JURISDICTION. As to such Indians, congress, by an act approved March 3, 1885 (23 U. S. St. at Large, ch. 341, p. 385), has expressly reserved to the federal courts jurisdiction over certain offenses specially enumerated in section 9 of such act, committed against the person or property of another Indian or other person within the boundaries of any state and within the limits of any Indian reservation. *Held*, that all crimes and misdemeanors not so expressly reserved, or not subsequently reserved by act of congress, are within the jurisdiction of the state courts of the state in which such allottee Indians may reside, as provided in the acts of congress approved March 3, 1863 (12 U. S. St. at Large, ch. 119, p. 819), and February 8, 1887, *supra*.

3. ———: ———: ———. The crime of assault by defendant, an allottee Indian, upon another allottee Indian in this state, and within the limits of an Indian reservation, not being one reserved by any act of congress to the jurisdiction of the federal courts, is within the jurisdiction of the courts of this state.

ERROR to the district court for Knox county: ANSON A. WELCH, JUDGE. *Affirmed.*

W .A. Meserve, for plaintiff in error.

Willis E. Reed, Attorney General, and *George W. Ayres, contra.*

FAWCETT, J.

Plaintiff in error, who was defendant in the court below and will be designated as such herein, is a Santee Sioux Indian. He is an allottee of land in Knox county, under the provisions of the act of congress of March 3, 1863, (12 U. S. St. at Large, ch. 119, p. 819), and of the act of congress of July 1, 1898 (30 U. S. St. at Large, ch. 545, p. 583). He became a citizen of the United States under section 6 of the act of congress of February 8, 1887 (24 U. S. St. at Large, ch. 119, pp. 388, 390). He was charged in the district court for Knox county with an assault upon one John Henry, who is also a Santee Sioux Indian and a like allottee. The assault was committed upon the allotment of one Simon Kitto, also a Santee Sioux Indian, who received his allotment under and by virtue of article

VI of the treaty proclaimed February 24, 1869 (15 U. S. St. at Large, p. 635), and the act of congress of March 1, 1883 (22 U. S. St. at Large, ch. 61, p. 444). It appears, therefore, that the assault was committed by one Indian upon another on land of an allottee and within the limits of a reservation. Defendant filed a plea in abatement, praying judgment, that the information be quashed for the reason that the court is wholly lacking in jurisdiction to determine the information or to hold the defendant for trial thereon or to impose any sentence, should he be found guilty, for the reason that defendant now is, and was at the time of committing said offense, an Indian belonging to the Santee Sioux tribe of Indians, and for over ten years last past has been a Santee Sioux Indian allottee, holding and owning "upon" a conditional patent of allotment from the United States (certain land described), which allotment was made to defendant under the act of March 3, 1863, *supra,* and the act of congress of July 1, 1898, *supra;* that the said John Henry, on whom the assault was alleged to have been committed, was on the date of the alleged assault, now is, and always has been a Santee Sioux Indian of the Santee Sioux tribe of Indians, and was at the time of the assault an Indian allottee, owning 80 acres of land under a patent of allotment from the United States under the same laws as above set out; that the alleged assault was committed upon certain land described, which land was at said time, and now is, and for over 20 years has been the allotment of Simon Kitto, who for over 30 years has been a member of the Santee Sioux tribe of Indians, under article VI of the treaty of the United States and the Santee Sioux Indians, proclaimed February 24, 1869, *supra,* and the act of congress of March 1, 1883, *supra,* which said land now is, was on the date of the alleged assault, and for the last 20 years has been a reservation of the United States of and belonging to the said Simon Kitto, a Santee Sioux Indian, and is not within the criminal jurisdiction of the courts of this state. To this plea the state interposed a demurrer on the ground that it does not state facts sufficient to quash the informa-

tion or to state any defense thereto. Thereupon the defendant demurred to the information, the ground of the demurrer being that the information does not state facts sufficient to constitute an offense punishable by the laws of the state because the information on its face shows that the state court has no jurisdiction over the person of defendant, "or to hold, try, sentence or punish him under said information," and that the information on its face shows that whatever crime was committed "was an offense within the exclusive jurisdiction of the courts of the United States, and not within the jurisdiction of this court." There was also a motion in arrest of judgment, covering substantially the same grounds as the plea in abatement and demurrer. The district court sustained the demurrer to the plea in abatement, and, defendant not electing to plead further, the plea was dismissed. The court overruled both the demurrer to the information and the motion in arrest of judgment. Defendant was arraigned, pleaded guilty, and was sentenced to pay a fine of $50 and costs of prosecution and stand committed to the county jail until the fine and costs were paid. From this judgment defendant appeals.

The question to be determined is one of jurisdiction. Can a Santee Sioux Indian, who is an allottee of land from the United States government, be punished in the state courts for an assault, of the character that makes it a misdemeanor, upon another Indian, who is also an allottee, within the limits of a reservation? In our judgment, the district court properly answered the question in the affirmative. This holding does not in any manner impinge upon the right of the United States government to make rules and regulations in the interest of the Indians; nor do we desire to be understood as holding that, by reason of the fact that, by its several acts providing for allotment of lands to the various tribes of Indians and conferring upon them the right of citizenship, congress has relinquished its right, so long as the government holds the title to the lands allotted to the Indians in trust for them, to place limitations upon the control of the Indians over such al-

lotments or to prescribe the extent to which such allottees (who until the final patents are issued are still wards of the government) may be subject to the laws, either civil or criminal, of the state in which the lands allotted to them are situate. That the United States government has full and absolute control of its territories, reservations and Indian wards cannot be questioned. If, therefore, the offense with which the defendant stands charged is one which congress has reserved to the United States government the right to punish, and the jurisdiction over which it has reserved to the federal courts, then the district court was without jurisdiction. Otherwise its jurisdiction must be upheld.

The act of congress approved March 3, 1863, *supra,* authorized and directed the president to assign and set apart for the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux Indians unoccupied lands outside of the limits of any state, sufficient in extent to enable him to assign to each member of said bands, who was willing to adopt the pursuit of agriculture, 80 acres "of good agricultural land." In section 5 of the act (p. 820), it is provided: "Said Indians shall be subject to the laws of the United States, and to the criminal laws of the state or territory in which they may happen to reside."

The act of July 1, 1898, *supra,* which was an act referring to various tribes of Indians, provides: "That the Secretary shall cause patents to issue to the Santee Sioux Indians who were assigned lands in the state of Nebraska under the act approved March third, eighteen hundred and sixty-three, entitled 'An act for the removal of the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux or Dakota Indians, and for the disposition of their lands in Minnesota and Dakota,' which assignments were approved by the President May eleventh, eighteen hundred and eighty-five. Said patent shall be of the form and legal effect prescribed by the fifth section of the act approved February eighth, eighteen hundred and eighty-seven, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reserva-

tions, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes.' "

The act of February 8, 1887, *supra,* referred to in the act of July 1, 1898, in section 6 provides: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The act of March 1, 1883, *supra,* provides that the patents issued to the allottees should be of the legal effect and should declare that the United States holds the allotted lands for the period of 25 years in trust for the sole use and benefit of the Indian to whom such allotment should be made, or in case of his decease, for the benefit of his heirs, "according to the laws of the state or territory where such land is located," and that at the expiration of that period the United States would convey the land by patent to such Indian or his heirs in fee discharged of the trust and free of all charge or incumbrance whatsoever, and that no contract by any such Indian creating

any charge or incumbrance on the lands so allotted or liability of such land for payment thereof should be valid.

The act of March 3, 1885 (23 U. S. St. at Large, ch. 341, sec. 9, p. 385), provides: "That immediately upon and after the date of the passage of this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

Our attention has not been called to, nor have we by an independent examination been able to find, any act of congress or rule or regulation of the interior department, which reserves to the federal courts either the exclusive or concurrent jurisdiction over crimes or misdemeanors, other than the specific crimes above named, when committed by an Indian allottee within the boundaries of a state, whether committed within or without the limits of a reservation in such state, except the act of January 30, 1897 (29 U. S. St. at Large, ch. 109, p. 506), considered in *Matter of Heff*, 197 U. S. 488, and *Hallowell v. United States*, 221 U. S. 317. This act was one to regulate the introduction of liquor into lands of allottee Indians. Under somewhat different facts one case denied the jurisdiction of the federal

courts and the other sustained it. Both opinions show that the controlling question was the best interests of the Indians as "a dependable people." As said by Mr. Justice Day, in the *Hallowell* case: "It is a result of the recently decided cases in this court (citing four cases) that the mere fact that citizenship has been conferred upon Indians does not necessarily end the right or duty of the United States to pass laws in their interest as a dependable people." See page 324 for the entire paragraph containing this quotation. It seems to us that if any meaning whatever is to be given to section 5 of the act of March 3, 1863, that "said Indians shall be subject to the laws of the United States, and to the criminal laws of the state or territory in which they may happen to reside," and to the language of section 6 of the act of February 8, 1887, that "upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law," the conclusion we have reached must be right. The defendant and other allottees of his tribe within the state of Nebraska are given the full protection of its laws. They are citizens of the state. They are electors. They are entitled to hold office. They are competent to serve on juries, thereby participating in the enforcement of the laws, both civil and criminal, of the state. They have accepted allotments of land and with it citizenship. They have adopted the habits of civilized life. They are residing upon their allotments, to all intents and purposes separate and apart from any tribe. They are no longer bound by the laws or customs of their tribe. Congress has not reserved to the federal courts the jurisdiction to punish for misdemeanors. If such jurisdiction is not vested in the state courts, it is not vested anywhere, and the perpetrators of misdemeanors of all kinds on an Indian reservation may go, unpunished. Such

clearly, was not the intention of congress. It is not to be found within any of its enactments. It is against public policy, and contrary to the laws of this state, which extend to all, both Indians and white men, within or without the limits of a reservation, the equal protection of the law. *United States v. Celestine,* 215 U. S. 278; *United States v. Sutton,* 215 U. S. 291; *Tiger v. Western Investment Co.,* 221 U. S. 286; and *Hallowell v. United States, supra,* are relied upon by defendant to sustain his contention. The state cites, *contra, United States v. Kiya,* 126 Fed. 879, and *Matter of Heff, supra.* We think an examination of these cases cited on both sides will show that they in no manner conflict with our holding herein. In support of the views herein expressed, we cite *State v. Norris,* 37 Neb. 299, *In re Now-ge-zhuck,* 69 Kan. 410, and *State v. Denoyer,* 6 N. Dak. 586.

A consideration of the various acts of congress in relation to the wards of the government, and of the various decisions of the supreme court of the United States construing them, is interesting, and much space might be used in discussing the same. The writer has read them with keen interest, but is unable to see where any benefit would accrue to the profession by further extending this opinion.

AFFIRMED.

BARNES and SEDGWICK, JJ., not sitting.

JOSEPH A. RANKIN, APPELLEE, V. NORTHERN ASSURANCE COMPANY, APPELLANT.

FILED APRIL 3, 1915. No. 18036.

1. **Evidence: REFUSAL TO PRODUCE WRITINGS: INSTRUCTIONS.** When the plaintiff in an action has complied with section 7960, Rev. St. 1913, and the other party refuses to produce the instrument called for when so ordered by the court, it is the duty of the court to "direct the jury to presume it to be such as the party (desiring it as evidence) by affidavit alleges it to be."

2. ———: ———: ———: INDORSEMENTS: COMPETENCY. This section also applies to indorsements on the writing called for. The question as to the competency of such indorsements in evidence would be the same as if the writing itself had been produced in evidence.

3. ———: PAROL EVIDENCE: RECEIPT. When a receipt given for payment of premium for insurance fails to state upon which of two pending applications the payment is made, parol evidence is competent upon that question.

4. **Insurance:** CONTRACTS OF LOCAL AGENTS. The contracts of a local agent of an insurance company are binding upon the company if within the apparent authority of the agent and are entered into in good faith by the insured.

5. ———: LOCAL AGENT: COLLECTION OF PREMIUMS. If such agent has authority to collect the first year's premium and accepts payment of the same partly in cash and partly by note on short time, and no objection is made on that ground when known by the company, such payment will be binding upon the company.

6. **Trial:** INSTRUCTIONS. No reversible error is found in instructions complained of, nor in the refusal of requested instructions.

7. **Insurance:** CONTRACT. A contract of insurance "may be in writing or may be verbal, or partly in writing and partly oral."

8. **Trial:** ARGUMENT. Mere statements of opinion or conclusions in argument of counsel, even though in themselves objectionable, will not require a reversal, unless it appears that the jury might have been misled or prejudiced thereby.

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

Will H. Thompson and *Fred H. Aldrich,* for appellant.

G. W. Shields & Sons, contra.

SEDGWICK, J.

The plaintiff in his amended petition alleges that the defendant is an insurance company doing a general life insurance business, and that on the 1st day of June, 1910, the defendant entered into a contract, partly verbal and partly in writing, with the plaintiff's wife, Mabel Rankin, whereby the defendant insured the life of Mabel Rankin in the sum of $1,000, payable to the plaintiff upon the death of Mabel Rankin. A copy of the alleged written portion of

the contract is attached to the amended petition. It is further alleged in the amended petition that Mabel Rankin departed this life on the 24th day of June, 1910; that the defendant was duly notified thereof and payment demanded, which was refused. The defendant admitted that a written application was made to the defendant for insurance upon the life of Mabel Rankin, which was signed by her, and that a payment of $5 was made to the agent taking application, and that it was agreed that a written policy of insurance would upon the payment of the remainder of the premium be issued "if the said application should be accepted by the said company." The answer further alleged that the application contained a provision that there should be no contract of insurance and no policy should be in effect until the first premium should be paid by the said Mabel Rankin during her lifetime and while she was in good health, and that said premium had not been paid, and denied that there was any verbal contract or any other contract than as admitted in the answer. There was a verdict and judgment in favor of the plaintiff, and the defendant has appealed.

The principal issue presented by the pleadings was as to the contents and proper construction of the application for insurance. After the action was begun, and before the amendment of pleadings, the plaintiff demanded of the defendant an inspection and copy, or opportunity to obtain a copy, of the application. The defendant offered to allow an inspection of the application at its office in Detroit, Michigan, but refused to present the application for inspection at the office of the plaintiff's attorney, and afterwards failed to bring the same into court. The court, upon motion of plaintiff, ordered the defendant "to produce said written application for inspection." The plaintiff offered in evidence his affidavit alleging the contents of the application and the indorsements thereon. The defendant objecting thereto, the plaintiff's attorney, having been sworn as a witness, testified that when the order to produce the application was made by the judge then presiding, attorneys for both parties being present in open court, the de-

fendant's attorney said that "no matter what the consequence might be he would refuse to produce that document." The defendant's motion to strike out this evidence was overruled. This ruling was clearly right. The order to produce the document had not been complied with, and this evidence showed conclusively that the refusal was wilful and without justification, and such refusal required the court to "direct the jury to presume it to be such as the party (desiring it as evidence) by affidavit alleges it to be." Rev. St. 1913, sec. 7960. The plaintiff's affidavit is in the record and must be considered as correctly stating the contents of the application. This, of course, also applies to the indorsements on the application. Such indorsements must be considered to be as alleged in the affidavit. The question as to the competency of such indorsements in evidence would be the same as if the application itself had been produced in evidence.

The defendant asked the court to instruct the jury to return a verdict for the defendant, which the court refused. This question is discussed at large in the briefs, and many special assignments of error are predicated upon it.

It appears that two applications were made and were pending together, one upon the life of Mr. Rankin, and one upon the life of his wife, Mabel Rankin. Mr. Rankin paid $5 and gave his note for the remainder of one year's premium on one of these applications. He contends that the payment was made on Mrs. Rankin's application, but the defendant contends that it was upon the application of Mr. Rankin, and that no premium was paid for the insurance here sued for. The receipt in evidence shows that the $5 was paid by Mr. Rankin; but he testifies that it was paid for Mrs. Rankin, and he is well supported in this. He produced another witness who so testified, and also the company's agent himself testified upon cross-examination: "Did you receive any cash upon the policy of insurance—upon the application on the life of Joseph A. Rankin? A. No, sir. Q. Did you receive any cash upon the application of Mrs. Rankin? A. Yes, sir. Q. That is

the only money that you received as a matter of fact? A. Yes, sir." The receipt above referred to and the application of Mrs. Rankin as stated in the plaintiff's affidavit constitute the contract between the parties. The receipt is called by both parties "the binding receipt." It contained the provision: "The assurance will be in force from the date of the medical examination; provided, the risk is accepted by the medical directors of the company * * * provided, a medical examination and complete application is made and submitted to the company at its home office, in Detroit, Michigan, and that the applicant, if he shall not receive his policy within thirty days from the date thereof, shall notify the company." It specified that the agent had authority to collect the first year's premium. The $5 in cash and note on short time were received by him as such payment, and no objection was made by the company on that ground. It was therefore sufficient payment.

The defendant appears to rely upon certain clauses in the rate book of the company and in other documents not called to the attention of the assured. The agent acted within his apparent authority in disregarding such provisions, and the defendant is bound by such acts of its agent.

There was some conflict in the evidence as to the time of the commencement of Mrs. Rankin's fatal illness, and defendant contends that the examining physician was deceived as to her condition. But this and similar questions were for the jury and appear to have been fairly submitted.

The defendant's assignments of error, 3 to 8, inclusive, are upon the refusal of the court to give instructions requested. Some of these requested instructions were substantially given by the court; others relate to the sufficiency of the evidence upon points discussed. We find no reversible error in refusing these requested instructions.

In the condition of this record, there was no reversible error in instructing the jury that a contract of insurance

"may be in writing or may be verbal, or partly in writing and partly oral." The defendant's assignments, 10 to 14, inclusive, complaining of instructions given by the court, relate to matters already sufficiently discussed.

The contract was made with defendant's local agent, and it was immaterial who the general agent of the company might be.

Remarks of plaintiff's counsel in argument are objected to as misconduct; but these remarks were generally expressions of opinion, and we have not observed that the record shows that counsel made such statements of fact as require a reversal.

We have not found any error in the record requiring a reversal, and the judgment of the district court is

AFFIRMED.

BARNES and ROSE, JJ., not sitting.

ROMAN WOJECK, APPELLEE, V. JOHN NICKLES, APPELLANT.

FILED APRIL 3, 1915. No. 18041.

Appeal: COURTS: PRESUMPTION. It is the duty of the trial courts to cause a defendant who appears without counsel to be informed of his rights. In the absence of evidence to the contrary, this court will presume that the trial court has performed that duty.

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

Wayne E. Sawtell and *Edward Simon,* for appellant.

Arthur C. Pancoast, contra.

SEDGWICK, J.

This action was begun in the district court for Douglas county in May, 1911. It was alleged in the petition that defendant had kept a vicious dog which attacked and injured plaintiff. The defendant appeared by attorneys and

filed a motion to strike out of the petition various matters alleged to be redundant and immaterial. Afterwards, on October 9, 1912, and while the motion was pending, defendant's attorneys withdrew from the case. The court at once overruled the motion, and the defendant was called by telephone. Defendant is a foreign-born citizen, with very imperfect knowledge and use of our language. Upon his appearance in court in obedience to the telephone call, a jury was impaneled, and the plaintiff's attorney announced: "I desire the record to show that we waived peremptory challenges, and Mr. Nickles said he was satisfied with the jury." The defendant replied: "I aint satisfied with the jury. I want to tell the jury what was happening. I want my witnesses here." Why the plaintiff allowed a year and five months to elapse without obtaining a ruling on the motion attacking his petition, or taking any action to advance his case to a hearing, does not appear from the record. On the same day that the motion was passed upon the case was put upon trial; the defendant was called, but he evidently did not know anything about his rights, nor about the procedure in the courts. The court ought, under such circumstances, to carefully instruct him as to the situation, and of the necessity of counsel. The jury returned a verdict in favor of the plaintiff. Judgment was entered thereon, and defendant has appealed.

After the trial and judgment defendant employed counsel, who filed a motion for new trial, but the allegations of the motion were not supported by any evidence. The presumption is so strong that the trial court would perform every duty that we must assume that everything was fully explained to the defendant, and that he desired the case to proceed without any answer on file and without the assistance of counsel. We cannot presume otherwise in the absence of affirmative showing in the record.

The judgment of the district court is therefore

AFFIRMED

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

STATE, EX REL. ANTELOPE COUNTY, APPELLEE, V. JOHN D. MILLER, APPELLANT.

FILED APRIL 3, 1915. No. 18062.

Sheriffs: FEES: REPORTS. A sheriff is required to report all fees earned by him by virtue of his office, which are not especially excepted from his report by statute. His salary is in lieu of fees.

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

O. A. Williams and *Kelsey & Rice,* for appellant.

J. F. Boyd, contra.

SEDGWICK, J.

The respondent, as sheriff of Antelope county, collected fees for his services attending on district court and summoning juries. He neglected to enter these items upon his fee book or report them to the county commissioners. The county brought this action in mandamus in the district court for Antelope county to compel the respondent to report these fees. The district court found the issues in favor of the county and issued the peremptory writ of mandamus as prayed, and the respondent has appealed.

The action was rightly brought in the name of the county. *State v. Kelly,* 30 Neb. 574; *State v. Russell,* 51 Neb. 774.

The respondent filed an answer in which he alleged "that the relator is without capacity to sue in this court." He now insists that the counsel who brought the action was not authorized to bring it. The above allegation was not sufficient to present such question. The presumption is that the counsel was duly authorized by the county, and, as the evidence is not preserved in a bill of exceptions, the presumption would be, if necessary, that there was ample proof of the authority of the attorney who brought this action for the county.

These fees were earned in the performance of his duties as sheriff, and the law of 1907 (Laws 1907, ch. 54) provides that the compensation of the sheriff shall be a salary which is fixed by law and is in full of all services rendered by virtue of his office. In *Red Willow County v. Peterson,* 91 Neb. 750, it was decided that the sheriff was not required to report certain mileage fees which the statute (Laws 1907, ch. 53) expressly provided should not be reported; and in *Dunkel v. Hall County,* 89 Neb. 585, it was held that the sheriff, by virtue of his office, is not required to act as jailor, and that when he employs a jailor the county is liable for the jailor's fees. These two cases, relied upon by the respondent, are not in point in this case, since the statute makes no exception of fees for services of this character.

The judgment of the district court is

AFFIRMED.

FAWCETT and LETTON, JJ., not sitting.

ALDEN A. BARDEN V. STATE OF NEBRASKA.

FILED APRIL 3, 1915. No. 18751.

1. **Judges: ACTING JUDGE: FAILURE TO GIVE BOND: PLEA IN ABATEMENT.** When a county judge is disqualified to act in a case pending before him, and county commissioners appoint a person to act as judge in such case, and by virtue of such appointment he holds a preliminary examination of a person accused of crime, objection to his qualification to so act on the ground that he failed to give the bond required by statute, made for the first time by plea in abatement in the district court, is properly overruled. As against such objection, such acting county judge must be regarded as an officer *de facto.*

2. **Highways: ESTABLISHMENT: OBSTRUCTION: PROOF.** A public highway may be established by dedication and use, or by adverse user for ten years. But when a defendant is prosecuted for obstruction of a highway by encroaching upon the alleged limits of the right of way, but not upon the line of travel, it must be proved

with some degree of certainty that the encroachment complained of is within the limits of the land dedicated, or adversely used.

3. ———: OBSTRUCTION: PROSECUTION. If the county commissioners by regular proceedings establish a public highway with definite location and boundaries, one who wilfully obstructs such road may be prosecuted under the statute for nuisance in obstructing a public highway.

4. ———: LOCATION: CRIMINAL PROCEEDINGS. It is not the policy of our law to determine the locality of public roads, when indefinitely located, by criminal proceedings.

5. ———: OBSTRUCTION: PROSECUTION: LOCATION: PROOF. In a prosecution for obstructing a highway by the adjoining landowner by placing a fence along the side of his land, but which it is alleged is so placed as to encroach upon the highway, the location and boundaries of the highway as extending to and including the locality of such fence must be proved beyond a reasonable doubt.

6. ———: ———: ———: ———: SUFFICIENCY OF EVIDENCE. In such case, if the evidence of the locality and boundaries of the highway is so indefinite and uncertain that it cannot be determined beyond a reasonable doubt that such fence is within the limits of such highway, a conviction cannot be sustained.

7. ———: ———: SUFFICIENCY OF EVIDENCE. The judgment in this case is clearly wrong because the evidence fails to establish the locality and limits of the alleged highway with any certainty, and does not prove that the fence complained of is within the limits of a pubic highway.

ERROR to the district court for Otoe county: JAMES T. BEGLEY, JUDGE. *Reversed.*

A. L. Tidd and *Livingston & Heinke,* for plaintiff in error.

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

SEDGWICK, J.

The defendant, who is plaintiff in error here, was found guilty in the district court for Otoe county on the charge of nuisance by obstructing a public highway, and has brought the case to this court by petition in error.

1. The defendant filed a plea in abatement in which he alleged that he had no preliminary hearing on the com-

plaint filed against him in the county court, for the reason that the appointment of W. W. Wilson as special acting county judge of Otoe county, Nebraska, "is void, for the reason that no bond was required of him as required by law, and that he did not qualify as required by law by giving a bond." It is not stated in the brief, and we have not observed, that the record shows that any objection was made to the qualification of this special county judge at the preliminary or until this plea in abatement was filed in the district court. The statute requires such specially appointed officers to give bond, but it is not necessary in this case to determine whether the failure to give such bond would disqualify him to act if timely objection had been made. It seems clear under the authorities that, unless such objection is made before the conclusion of the hearing, the judge so appointed must be regarded as an officer *de facto*. Constantineau, Public Officers and the De-Facto Doctrine, sec. 137; *In re Hewes,* 62 Kan. 288; *Tower v. Whip,* 53 W. Va. 158.

2. There are several assignments of error in the brief, but we find it necessary only to consider one of them. The record shows that in 1871 a petition was filed with the county board of Otoe county asking for the opening of a road on the section line east of the land now owned by the defendant. The county board appointed a commissioner to locate the road. The commissioner reported to the county board that he had surveyed the location of the road, and the field notes of his survey are included in his report. These field notes show a bend in the road surveyed encroaching upon the lands in question then owned by the defendant's grantor. There was no hearing before the county board, no order made opening the road and defining its limits, and, of course, no damages paid the owner of this land. The evidence also shows that the road was thereafter used by the traveling public and has continued to be a much traveled road until the present time. About a year before this prosecution was begun, the defendant built the fence along the east side of his land, and it is charged in the information that this fence infringed

upon the public highway. A bend of a creek extended across the section line, and the commissioner had made the survey around this bend along the plaintiff's land. The defendant contended that he had placed this fence well within his own land so as to leave the whole of the public highway unobstructed, and this is the question of fact upon which his guilt or innocence depends.

It would seem that if the field notes of the commissioner are intelligible, as they are alleged by the prosecution to be, there would have been no difficulty in establishing beyond question how far the road, which was surveyed by the commissioner and adopted by the public, extended from the section line into the defendant's land. The distance from the section line of the fence which the defendant erected could also be established by actual measurement. There was no attempt at definite and exact evidence upon these points. The prosecution would ask a witness whether the defendant's fence infringed upon the road, and when the witness answered that he had been along there some years before, but paid no attention to the matter and could not state how far, he was asked and allowed to give his best judgment. Under such circumstances we have all manner of estimates in regard to the distance.

Mr. Fritz Hillman was a witness for the prosecution. His evidence is perhaps as definite and reliable as any. He had been acquainted with the road for 40 years, and had traveled over it "thousands of times." He testified: "When I first knew it, I didn't know exactly where it was. Afterwards it was farther west, probably six or eight or ten rods, something in that neighborhood, from one back to another. That was prairie at that time, as near as I can recollect. Then the man that owned it broke up that bottom, and he naturally crowded the road back to the creek. Whether he did that or the neighbors, I don't know. Whoever traveled it there at that time crowded the road back to the creek where this little bend comes now. As long as I can recollect, there has been trouble right there. At that time it was sloping down towards the creek. Whoever did it, I don't know; somebody worked it and leveled that off

so that it went slanting pretty close to the edge of the creek. When first I knew it, it was kind of slanting. We always had to watch out or our wagons would slide down into the creek. Q. Now, how has it been as to slant since the road has been worked? A. It is pretty much level. Q. Now, state where the road was from the time you knew it up to the present time with reference to the section line at this bend. A. The section line that runs straight through—why, the edge of the bank, the west edge from the creek bank, was probably eight or ten feet farther west, about two rods that would be in the road, about two rods that left belonging to the road; it was probably eight or ten feet, in my judgment, from the edge of the bank up farther west. * * * Q. State the condition of the road about 30 years ago, and what it was three or four years ago with reference to this bend. A. It was just the same, only it was worked a little—made it a little smoother and leveler. Three or four years ago it was just the same as it was 30 years ago, only in a little better condition. Q. State as to the locations 20 years ago and three or four years ago. A. I said it was about the same. I didn't see any difference; if there was any difference it was very little. I didn't notice it. Q. Now, state if there is any difference in the west bank of this bend; state if there is any difference in the west bank of this bend now and 30 years ago. A. Yes; it had been worked down. Q. Tell the jury the difference in the location. A. There is no difference in the location, only that the bank is worked down, that I know of. Q. State whether or not the edge of the bank along this bend is where it was 30 years ago, or whether it is farther east than it was 30 years ago. A. I think it's practically the same, only it's been worked down now; that's all the difference I could see." On cross-examination he testified: "Q. The road now is on the section line, is it not? A. Well, somebody worked it. The last couple of years they drove through the ditch; they have filled that up now, and it's on the section line now. Q. How long have they been working on it, you say a couple of years on the section line? A. No; I didn't

say that. Q. Well, about how long? A. A week or two ago. Q. They drove through on the section line a couple of years ago? A. Yes, sir. (The remainder of the answer to this question was stricken out.) Q. When was the first time you traveled over this road? A. In the fall of 1873. Q. Was the road on the section line then? A. No, sir; there was no bend there, it was on both ends where the two banks, these two creeks were. Q. But not at the bank? A. Not where that bend was in the road, no. Q. When did that bend get back to the bank? A. Several years afterwards. At that time it was farther west. Q. Farther west than the bank? A. Six or seven rods, something like that. Q. There was no fence there to shut off driving across the prairie? A. Yes, sir. Q. When was it that you drove over and noticed it was slanting the first time? A. I don't recollect just when. Q. How long was it after you were over it the first time, about? A. I drove over that road probably two or three times a week. I don't know just when that was. Q. How much farther west was it at that time than when you first knew the road? A. I don't recollect that exactly. I think from six to eight rods, maybe ten. Q. There is a bridge farther north, is there not, on the section line? A. No. Q. It's east of the section line? A. Yes; I believe it's east. Q. And has been for some time? A. Yes, sir. Q. It's a little hard to locate the section line there exactly? A. No; I don't think so. Q. You don't think so? A. No, sir. Q. Isn't it hard to locate the section line there where the road runs eight or ten rods west of the curve? A. I don't know whether it is or not. Q. As a matter of fact, you don't know of your own knowledge that any part of this road is on the section line? A. No, sir; I never measured it out. Q. So far as it being a section line or not a section line is simply a guess of yours? A. Yes, sir. Q. Now, at the point of this curve, didn't the water, the flood water, wash the dirt away? A. I don't think so, not to amount to anything. Q. Wasn't it that that caused the slant in the road? A. No; the slant in the road was where it was crowded pretty well toward the creek bank, that gradually

pushed the dirt in. Q. When was it first leveled off to your knowledge? A. That I don't know." On redirect examination he testified: "Q. In answer to Mr. Livingston's question, you said that about a year or more than a year ago they drove through this ditch? A. Yes, sir. Q. Explain to the jury why it was necessary to drive through this ditch. A. Well, somebody worked that bank of the curve there in the road—worked it and left it in such poor condition that hardly anybody could drive along there. They took the fence down, I did myself, and drove right straight through." He was asked as to the condition of the road along the section line across the creek, and answered: "I went through them holes there myself. It was a break-neck job. Q. Those that went through had to go through this ditch because of the fence that was there at that time? A. Yes, sir. Q. Now, state whether or not people went through there after this fence was removed, through this ditch? A. They did. I say the bank on the west side was worked, but left in such poor condition that people drove through below. Q. Was that before a year ago? A. Well, before a year ago, I guess."

From this and other similar evidence the jury were asked to find the location of the public highway and determine whether the defendant's fence obstructed the same.

There is also evidence that the creek at this point has continually washed away its banks in the defendant's lands during the 40 or more years since the county board procured their commissioner's field notes as to the location of the road. If this is true, and the place of travel was moved from time to time, still, if the washing was irregular so that the line of travel remained permanently in any one locality for the space of ten years, the public, if their use of the line of travel excluded the defendant's use of the land, might acquire a right of way by prescription. Even under such circumstances a serious question might arise as to how far beyond the line of travel the public right extended. Under the evidence in this case it is impossible to find with any degree of certainty how far this erosion of the banks of the creek extended, or even whether

it extended so far into the defendant's land as to be worthy of consideration in this case. Many witnesses were questioned upon this point, but, generally speaking, they all showed that they had no definite knowledge upon the point, and no measurements were taken. It would be difficult to say whether there is a preponderance of evidence as to any particular locality of the highway, but it is certain that this evidence does not establish beyond a reasonable doubt that the public highway extended beyond, so as to include the line upon which defendant's fence was constructed. The location of this highway is, of course, the basis upon which defendant's guilt is predicated, and he cannot be convicted of crime unless this location of the highway can be proved beyond a reasonable doubt.

Formerly criminal law was used as a method of determining the locality of roads under doubtful circumstances, But that is not the policy of our law. It appears to be conceded that the road extends farther into defendant's land than it did as it was formerly traveled by the public. As to how much farther it extends into defendant's land is, so far as this evidence goes, entirely indefinite. It is manifest from this evidence that the defendant and county authorities disagree in good faith as to where this road actually is. Under such circumstances, if the county authorities had proceeded to establish the road and have its boundaries definitely determined and located and made a matter of public record, and the defendant had thereafter wilfully obstructed the road so established, he might, under our statute, have been prosecuted for nuisance in obstructing a public highway; but there is no evidence in this record from which it might be found, beyond a reasonable doubt, or even with any plausibility, where the limits of this road really are. Under such circumstances, it cannot be said that the defendant has been shown to be guilty of crime beyond a reasonable doubt.

The judgment of the district court is therefore

REVERSED.

MORRISSEY, C. J., not sitting.

HAMER, J., concurring.

I am obliged to vote for the majority opinion, although I regret to do so. The trouble is that it is a criminal case, and, of course, the rule is that the defendant may not be found guilty unless the evidence shows his guilt beyond a reasonable doubt. I do not think any one ought to be allowed to exercise his guess as to where the road is and then be permitted to fence it up. If there is a road there which people travel, then that fact alone ought to be enough to establish the "road" and require its maintenance. It should then be the business of the landowner and everybody else to keep out of the road with any sort of obstruction until there is an adjudication in a civil case to the effect that it is *not the road.* It is a technical rule that permits the defendant to get in and occupy the road and crowd the public out of it and make it dangerous to travel, and yet not be punished for it. I am in favor of the adoption of a rule that, no difference where the boundaries of the road may be actually shown to be by a survey, it is the duty of everybody to keep off the road with any sort of fence or obstruction. I would have every road a "road" as long as it was traveled and until the court in some sort of civil case got in and said that it *really was not a road.* I would make a road "a sacred institution" and have everybody keep hands off of it. As it is presented, this is a criminal case, and the inexorable rule is that in a criminal case, before the defendant can be found guilty, the evidence must show his guilt beyond a reasonable doubt. I do not like to make a criminal case out of it, but it is a criminal case, and there is no help for it. Every road should be a road to *Rome,* and it should be kept open alike to the citizen and the soldier. I would make it sacred.

ROSE, J., dissenting.

Defendant was accused by the state of unlawfully obstructing a highway by means of a fence. The jury found him guilty beyond a reasonable doubt. The conviction should be affirmed. The existence and continuous use of the highway since 1873 is established beyond reasonable

controversy. There is convincing proof that defendant fenced part of the traveled roadway. A credible witness testified that he was familiar with the road. He said that he had worked on it at the place in controversy 20 years ago, had since traveled it, had torn down the fence, and that he thought there was in the meantime little or no difference in the location. Another witness said the road was in the place it occupied in 1879. There is more testimony of like import. The conviction rests on facts established according to the usual methods of making proof in similar cases. In *Daniels v. People,* 21 Ill. *439, there was a dispute whether a road had been located at the point of obstruction or on a line lateral to it. The prosecution was maintained on evidence tending to prove that the road at the place of obstruction had been located and used for the statutory period. In *State v. Davis,* 27 Mo. App. 624, the rule is stated as follows: "In an indictment for unlawfully obstructing a public highway, proof that the part of the road obstructed by defendant had been in use for more than ten years preceding the act of interference, as a public highway, is sufficient to support the indictment without any record proof of the establishment of the road by an order of the county court." There is abundant authority to the same effect. It was unnecessary to inquire into the original proceedings even in a criminal prosecution. *Lydick v. State,* 61 Neb. 309. In condemning the case made by the state, the majority, in my opinion, have departed from recognized rules of law and evidence.

The doctrine of the majority that it is not the policy of the law to determine in criminal proceedings the location of indefinitely located roads is a radical departure from the statutes and from the former decisions of this court. When the legislature speaks by means of a valid enactment, it declares the policy of the law, and in that respect leaves nothing for the determination of the courts. Obstruction of highways is repeatedly denounced by the Criminal Code as unlawful. Violators of the statute "shall be fined in any sum not exceeding five hundred dollars,"

said the lawmakers. Rev. St. 1913, sec. 8845. No distinction or exception is made in regard to "roads when indefinitely located." It is the duty of the courts to enforce the law as written. The state should not be ordered into the civil courts to redress criminal acts, nor should proper rules of evidence be relaxed in criminal prosecutions for obstructing highways.

In my opinion the county attorney, the trial court and the jury performed their duties in this case.

BARNES, J., concurs in this dissent.

E. Z. ALBRIGHT, APPELLEE, V. JOHN SCHWABLAND ET AL., APPELLANTS.

FILED APRIL 3, 1915. No. 17930.

Deeds: GENERAL WARRANTY: BREACH. The covenant in a deed of general warranty of title, and for quiet enjoyment, made by one having obtained only a final receiver's receipt for the premises conveyed, is broken when the government reasserts title and cancels the final receiver's receipt, at which time a right of action accrues to the grantee.

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

J. C. Robinson and *B. Ready*, for appellants.

French & Orvis, contra.

HAMER, J.

This is an appeal from the district court for Cedar county. The plaintiff sued John and Ella Schwabland upon a breach of covenants of general warranty and quiet enjoyment in a deed by which they undertook to convey the title to certain real estate to plaintiff and another, who later conveyed to plaintiff. There was a verdict and judgment in the sum of $1,920, with interest at 7 per cent. from June 12, 1909, to March 4, 1912, amounting to $365.86,

making a total of $2,285.86. The evidence shows that the title failed. There was a cancelation of the claims, and the title which was based on final receiver's receipt was reasserted by the United States government.

In *Shattuck v. Lamb,* 65 N. Y. 499, it was held: "Where, at the time of the execution of a deed, the premises are in the possession of a third person holding under paramount title, and the grantee in consequence is defeated in legal proceedings to obtain possession, and is kept out of possession, this is a breach of a covenant of quiet enjoyment contained in the deed, and the grantee may maintain an action thereon."

The following case tends to support the decision in the New York case: *Kramer v. Carter,* 136 Mass. 504. In May, 1909, the United States government re-established its title to the land and conveyed it to others, and at that time the covenants were broken.

When the title failed the plaintiff's action accrued, or at least there was evidence of its existence which could not be successfully controverted. If the claims were canceled in favor of the government, then it should be presumed that the government had the paramount title, and that any time it asserted the same the plaintiff had a right to commence his action, which he did within the time fixed by the statute of limitations. The evidence sustains the verdict. The judgment of the district court is

AFFIRMED.

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

SEDGWICK, J., concurring.

Our statute for some purposes regards a final receiver's receipt of the United States government as conveying title. I understand that in this case when this deed was made, containing the covenant relied upon, all parties knew that the grantor held the final receiver's receipt and had possession of the land. This was the title relied upon by the parties. It was presumed that the patent would follow, as it ordinarily does. The covenant in the deed, then, should

be construed with reference to this condition, and when the government canceled the final receiver's receipt, and the grantor was no longer able to convey title, the covenant was broken within its meaning, as understood by the parties. When a covenant of title is broken the right of action thereon accrues. It is not necessary to cite authorities on that question. I think, therefore, the defense of the statute of limitations in this case fails.

P. J. POSTLE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED APRIL 3, 1915. No. 18555.

1. **Railroads: PRIVATE CROSSING: DUTY TO CONSTRUCT OVERHEAD CROSSING.** Where 27 years have intervened between the date of an agreement made by the owner of land with a railroad company concerning the construction of a private farm crossing, and the railroad company, in compliance with the agreement, has constructed and maintained an adequate grade crossing, there is no obligation upon it to build an overhead crossing merely for the convenience of the landowner, unless changed physical conditions require such overhead crossing.
2. ———: ———: ———. Where, under such circumstances, it is shown that the railroad company is willing to construct the overhead crossing if the complainant will pay the cost of construction and maintenance, there is no sufficient ground of complaint against the railroad company.
3. ———: ———: ———: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* insufficient to sustain the complaint of the landowner against the railroad company.

APPEAL from the State Railway Commission. *Reversed and dismissed.*

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

Grant G. Martin, Attorney General, and *W. T. Thompson, contra.*

HAMER, J.

Appeal from an order of the state railway commission in response to a complaint of one P. J. Postle to compel the relocation of a private farm crossing and substitute an overhead for a grade crossing. It was alleged in the complaint that Postle is a live stock dealer and farmer; that he is the owner of 160 acres of land described in the complaint, and across the corner of his land the railroad company has constructed and now operates a railway; that the present farm crossing over the railway is situated at the east end of a deep cut where it is impossible to properly observe the approach of trains; that its use is dangerous to man and beast, and, although he has requested the railway company to establish an overhead railway crossing, it refuses to do so. The railroad company, among other things, denied the allegations of the complaint, and alleged that the complainant purchased his farm long subsequent to the construction of its railway; that at the time its line was built the railroad company constructed a grade crossing over its railway for the use of the then owner of the land at a place and in a manner satisfactory to him. Therefore the complainant is estopped to contend for another or different crossing. It was further alleged in the answer that, notwithstanding the foregoing facts, the railroad company is willing to construct another grade crossing for complainant at a point easterly and more distant from the cut; that the construction of an overhead crossing will require the expenditure of a large sum of money, and will give the complainant a benefit and advantage not enjoyed by landowners generally in the state of Nebraska along the defendant's railway; will discriminate in his favor, and will amount to the taking of the railroad company's property without compensation, without due process of law, and in violation of section 3, art. I, of the Constitution of the state of Nebraska, and in violation of section 1 of the fourteenth amendment to the Constitution of the United States. The commission investigated the questions presented by the pleadings and made an order requiring the

railway company to construct and maintain an overhead crossing as prayed for by the complainant.

Appellant contends that the commission erred in assuming jurisdiction of the complaint, for the reason that its determination involved the adjudication of private rights, and therefore is an exercise of judicial power, with which the commission is not vested. There is some force in this contention, but we do not find it necessary to determine that question.

It is further contended, among other things, that the facts, as shown by the evidence, do not authorize the commission to require the railroad company to construct and maintain an overhead crossing for the exclusive accommodation of the complainant. Section 6042, Rev. St. 1913, provides: "When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same." In *Omaha & R. V. R. Co.* v. *Severin*, 30 Neb. 318, the court stated what an adequate crossing is, as contemplated by the statute. It appears that a crossing, as thus defined, had been constructed by the railroad company under an agreement entered into with the owner of the farm, when it obtained its right of way, and, so far as the record shows, that crossing has been maintained by the company and has been used by the complainant and his grantors for about 27 years without injury to any person. It also appears that the company obtained its right of way by condemnation proceedings in which it paid the owner of the land at that early date the sum of $1,900. This, of course, included the value of the land taken and the incidental damages to the rest of the farm, such as inconvenient use, and all other elements of damages. At that time the owner agreed with the railroad company on the location and construction of a private farm crossing. This crossing was constructed, and since that time there has been no substantial change of physical conditions. The present owner, being dissatisfied with the crossing, now insists that the railroad company construct for him an overhead crossing

at a cost of $1,000 and with a maintenance charge of at least $1,500. The present crossing does not in any way affect the public interest, but the crossing asked for simply suits the owner's private convenience. As we view the record, the order made by the commission was unjust, unreasonable, and oppressive, and may amount to taking the property of the railroad company without due process of law, and in violation of the Constitution of this state and of the United States. Again, to require the company to construct such a crossing as the commission has ordered in this case would discriminate unjustly in favor of the complainant and against all other persons similarly situated.

Finally, the evidence is not sufficient, as we believe, to sustain the order of the Commission. The railroad company contracted for this crossing and agreed with the former owner with respect to its location. It offers to construct a grade crossing easterly from the present location, to grade a wagon road for the plaintiff's benefit parallel to its railway, and to grade the approaches for that crossing without cost to the complainant. Nevertheless he insists that the railroad company should construct and maintain an overhead crossing for his private benefit. It would seem that the construction of such a grade crossing as we have described is sufficient, and that the evidence fails to show that the complainant is entitled to the overhead crossing which he demands.

The order of the commission is reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

ROSE, J., not sitting.

O. M. ROBISON, APPELLANT, V. JULIUS GEBAUER ET AL., APPELLEES.

FILED APRIL 3, 1915. No. 18766.

Highways: DEDICATION. Where a landowner has placed fences on each side of a traveled way across his land, leaving an intervening space of the width of a public highway, and the public has entered upon and used the intervening space as a highway for nearly ten years with the owner's acquiescence, dedication may be inferred, though such use has not continued for the entire statutory period of ten years.

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

Williams & Williams, for appellant.

G. J .Hunt, contra.

HAMER, J.

This is an action by a road overseer in Morrill county to enjoin defendants from fencing up a road across their premises. The district court refused to grant the injunction, and plaintiff has appealed.

Defendants took up their land as a homestead in May, 1903. The roadway in controversy crosses it. In the fall of 1903 defendants built a fence north of the roadway. In the spring of 1905 they built a fence further south, leaving a roadway about four rods in width. The public has used this open strip as a highway for a little less than ten years. The evidence tends to show a dedication to the public use and an acceptance by the public, though defendants deny that they intended to dedicate the roadway to that purpose.

In *Rube v. Sullivan,* 23 Neb. 779, it was said: "The authorities are not entirely in accord as to what length of time is necessary to create a presumption of the dedication of private property to the use of the public for a street or highway, for the reason, probably, that the presumption does not depend alone on the length of time,

other circumstances being necessary to be considered. Ten years' uninterrupted use will create the presumption, but a much shorter period will be sufficient, where the act of the owner from which the dedication is inferred is clear and unequivocal, and accompanied or immediately followed by public use. *Denning v. Roome,* 6 Wend. (N. Y.) 651; *Regina v. Petrie,* 30 Eng. Law. & Eq. 207. But unless there is some clear and unequivocal manifestation of an intention to dedicate, there will be no presumption of dedication until after the lapse of ten years."

The user by the public in this case is less than ten years, but acts of defendants evidencing their intent create a presumption of dedication. The space left between the two fences built by the defendants was about four rods, the width of a legal highway. Defendants' statement of intention is not conclusive. A text-writer says: "There is no reason why the ordinary rules of presumptive evidence should not apply to cases of dedication as well as to other cases where the title to real property is in controversy, and, if this be correct, it must follow that the person against whom the dedication is asserted should be held to intend the reasonable and necessary consequences of his act." 1 Elliott, Roads and Streets (3d ed.) sec. 175.

"The confusion in the authorities can, in a great measure, be cleared away by holding that the extent and character of the use may furnish evidence of intention to dedicate, although it has not continued for the statutory period, and that, when the user has been such as would indicate to prudent men that the public claim is, as of right, to the way as a street or road, and the owner is fully aware of the extent and character of the use and makes no objection, it will be presumed that he intended to throw the way open to the public. This rule does not dispense with the necessity of proving the *animus dedicandi,* but allows it to be inferred from legitimate evidence, and thus secures public and private interests from injury. It is, of course, generally essential that the use should be with the knowledge of the owner and without interruption from him, and that it should not be under a mere license, but that it

should be such a use as in its nature and extent asserts, by necessary implication, a claim of right. If the user falls short of this, it cannot be considered as supplying evidence sufficient, of itself, to authorize, as against the owner, the presumption of an intention to dedicate, although it may be material when connected with other evidence upon that question." 1 Elliott, Roads and Streets (3d ed.) sec. 179.

The rule stated in 13 Cyc. 482, is as follows: "Where land has been used continuously by the public with the owner's acquiescence for such a length of time that private rights and the public convenience and accommodation will be materially affected by an interruption of the enjoyment, a dedication will be presumed. Under these circumstances no specific length of user is necessary to constitute a valid dedication. It is not necessary that the use should be for the term of years necessary to presume a grant, but may be for a less term. But the length of time of enjoyment is a fact for the jury to consider as tending to prove an actual dedication and an acceptance by the public."

Under all the evidence in this case, it may fairly be said that defendants have dedicated the strip of land in controversy for a highway and the same has been accepted by the public. For this reason, the judgment of the trial court is reversed and the cause remanded, with directions to enter judgment for a permanent injunction in favor of plaintiff.

REVERSED.

MORRISSEY, C. J., not sitting.

STATE, EX REL. JOHN FITCH, APPELLEE, V. SAMUEL R. MCFARLAND, COUNTY CLERK, ET AL., APPELLANTS.*

FILED APRIL 3, 1915. No. 19025.

1. **County Commissioners: TERM OF OFFICE.** The term of office of county commissioners, in counties not under township organization, is four years. *Saling v. Bahensky*, 97 Neb. 789; *Calling v. Gilland*, 97 Neb. 788.

* On rehearing, judgment sustained. See opinion, p. 854, *post*.

2. **Mandamus: COUNTY COMMISSIONER: ELECTION.** Where it appears that there was no election to be held for the office of county commissioner of the first commissioner district of a county in the year 1914, it was error to award a writ of mandamus compelling the board of canvassers to count the votes for that office, and the county clerk to issue a certificate of election to a person whose name was written on the official ballot by some of the electors.

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

Reed & Gill and *M. S. McDuffee,* for appellants.

Allen & Dowling and *H. Halderson, contra.*

Reese, Reese & Stout, amici curiæ.

HAMER, J.

This is an appeal from a judgment of the district court for Madison county, awarding the relator a peremptory writ of mandamus to compel the county clerk and the members of the board of canvassers to count the votes cast for him as commissioner of the first commissioner district of said county, at the general election of 1914, and to issue to him a certificate of election to that office. The petition for the writ set forth, in substance, that at the election of 1914 certain electors of the county wrote the relator's name on their ballots and thus cast their votes for him for that office; that there was no other candidate voted for by the electors of the county, and that therefore the relator was duly elected and was entitled to have the votes cast for him counted, and that he was entitled to a certificate of election. By the return to the alternative writ it was alleged, among other things, that there was no vacancy in the office of commissioner of said district No. 1, in said county, at the election of 1914, and no election was held for that office. The trial court, on the hearing, allowed the peremptory writ, and the respondents have appealed.

It appears from the record that one Watson L. Purdy was elected at the general election in 1911 commissioner for the first district of Madison county, for the full term of four years, commencing the first Thursday after the first

Tuesday in January of 1912; and at said election the relator and Purdy were rival candidates. In *Saling v. Bahensky*, 97 Neb. 789, and in *Calling v. Gilland*, 97 Neb. 788, it was held that in counties, like Madison, which are not under township organization, the term of county commissioner is four years. It follows that there was no election for the office of county commissioner in commissioner district No. 1 in 1914. The writ of mandamus should therefore have been denied.

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

REVERSED AND DISMISSED.

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

JOSEPH H. TRAVIS, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED APRIL 16, 1915. No. 18056.

1. **Appeal:** TESTIMONY OF EXPERT. When, in an action for personal injuries, the attending physician is called as a witness and gives evidence, which is improper in form, as to the permanent character of the injuries complained of, the irregularity will be *held* not prejudicial, where the witness explains his answers by giving a clear and detailed explanation of the objectionable testimony, and other evidence in the case, standing alone, justifies the verdict.

2. **Trial:** INSTRUCTIONS. "The true meaning of instructions is to be determined, not by a separate phrase or paragraph, but by considering all that is said on each particular subject or branch of the case." *Lincoln Traction Co. v. Brookover*, 77 Neb. 221.

3. ———: REFUSAL OF INSTRUCTION. It is not error to refuse to give a requested instruction, when the court on its own motion gives to the jury the substance of the instruction requested.

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

John L. Webster and *W. J. Connell*, for appellant.

Weaver & Giller, contra.

MORRISSEY, C. J.

While alighting from one of defendant's cars, in the city of Omaha, plaintiff fell and sustained injuries, and brought this action to recover damages, alleging that the plaintiff had notified the conductor that he wished to alight from the car at Seventeenth and Cass streets, but, upon arriving at said point, the conductor failed to bring the car to a stop at its usual stopping place; that the car continued until it had passed at least 100 feet beyond its usual stopping place, when the plaintiff again asked the conductor to bring the car to a stop and permit him to alight. The car was then brought to a stop, and while plaintiff was in the act of alighting therefrom, but before he had sufficient time to do so, the defendant negligently and carelessly caused the car "to start suddenly with a jerk, and thereby threw plaintiff to the pavement," causing the injuries of which he complains.

The answer denies the allegations of the plaintiff's petition, and alleges that, as the car approached Seventeenth street traveling west, the conductor gave the signal for a stop at the next regular stopping place; that immediately thereafter the plaintiff stepped to the edge of the rear platform and down upon the step of the car; that the conductor warned the plaintiff not to alight until the car had stopped, but that plaintiff, in disregard of the warning, negligently stepped from the car to the street before the car had been brought to a stop; that the street was at that time covered with ice, making it especially dangerous to step from a moving car, and the plaintiff had full knowledge of this condition; that the car stopped in the usual way about ten feet beyond the point where the plaintiff stepped from the car to the street; and alleges that whatever injuries plaintiff received were due to his own negligence in stepping from the moving car before it had come to a stop. The case was tried to a jury, there was a verdict for the plaintiff, and defendant appeals.

The proof shows that in falling upon, or being thrown to, the pavement, plaintiff sustained a fracture of the el-

bow of the right arm, an injury to his back and hips, which is fully described in the testimony of Dr. Lee, hereinafter quoted, and a cut and bruise on the back of his head, which the doctor describes as: "It was simply a cut, but the trouble seemed to be more in the bone * * * than in the cut itself." Of this the doctor testified: "He complained of pain in the head, all through the head, particularly over the bone. * * * He complained of that a long time, even after the elbow and the skin had healed up and everything of that kind after he was up and around." The injury occurred March 13, 1912, and the trial was had in February, 1913. Plaintiff testified that he was still suffering much pain; that his arm was not so strong as before the injury; that his back still troubled him; that "if I will walk for very long at a time, an hour or more, I get an ache and pain in my hip and back, and I go and sit down." He testified to a pain in his head from time to time, and said he still had a roaring in his head and ear, and could not hear so well as before the accident. He was 42 years old, and prior to his injury had been earning $100 a month, or more, as a chauffeur, but he had not been able to work since the accident.

Complaint is made because the trial court permitted Dr. Lee, over the objections of defendant, to answer the following questions: "Q. Just tell the jury, the court and jury, Doctor, what is the probability of his ultimate recovery as to these injuries, especially to the arm and back and the head. * * * A. Well, it would be impossible for me to say whether they were permanent or not, any one of them; but they are injuries that could be permanent. Q. Just state now, Doctor, how the injury to the back could become a permanent injury. A. Well, the injury consisted in a wrenching and bruising of the muscles and ligaments and tendons, or muscles surrounding the spine and surrounding the muscles of the hips, and it would be impossible to say to what extent that would remain, and that was the reason I said it was impossible to state whether it would be permanent or not, but it would be liable to be on that account, because I couldn't

restore them to their former condition. Q. Now state, Doctor, how about his arm—the injury to the arm. Explain to the jury how that can be a permanent injury. A. Well, the arm could be injured to that extent for the reason that every broken bone leaves more or less of a weakness or defect in the bone which cannot be restored, and it always leaves—affects the structures, muscles, etc., surrounding the part that is broken, by the swelling, by the long continued disuse, and by the position which you are compelled to keep it in to form the knitting of the bones. Q. Then an injury to the head, such as the plaintiff in this case sustained, could produce that rumbling in the ear? A. Yes, sir; it could."

This line of testimony is properly subject to criticism. In place of stating what could happen and could result, he ought to have stated what in his opinion would be the natural or probable result. But this witness was cross-examined at length upon each question herein set out, and he described in detail the character and extent of each injury received. It will be noted, too, that he stated to the jury: "It would be impossible for me to say whether they were permanent or not, any one of them." It is true that he follows this by saying they could be permanent, and that part of the answer ought to have been stricken out. But he follows that answer by fully explaining the character of the injuries, and again stating that it is impossible for him to state whether the injuries would be permanent, but states that they would be liable to be permanent because he was unable to restore the muscles, ligaments and tendons to their former condition. Again, in explanation of the injuries to the arm, and his answer that the injuries to that member could be permanent, he gives his reason for the answer by stating: "Every broken bone leaves more or less of a weakness or defect in the bone which cannot be restored, and it always leaves—affects the structures, muscles, etc., surrounding the part that is broken, by the swelling, by the long continued disuse, and by the position which you are compelled to keep it in to form the knitting of the bones." The plaintiff had testified to a

rumbling in his head, and the doctor, in his testimony on that question, merely stated that this rumbling could be produced from the injuries. He did not say that it was so produced, and the most that can be said is that the testimony fails to show a permanent injury to the head or to the ear. The witness was subjected to an exhaustive cross-examination touching these injuries. He appears to have been an intelligent, candid witness, and we cannot find that the jury was misled as to the extent of the injuries received.

Eleven months had elapsed between the time of the injury and the trial, and plaintiff was earning over $100 a month prior to the injury; but from that time to the time of the trial he had been unable to follow his usual avocation or to earn anything. The loss of time alone would amount to $1,100. He alleges the disbursement of $100 for medical attention and nursing, which amount seems very small under the circumstances, and his total recovery was only $2,250. This does not indicate that much, if anything, was allowed for permanent injuries. The verdict rather indicates that the jury did not regard the injuries as of a permanent character, and we think it may be said that he was not allowed more than a reasonable amount for the loss of time, expenses incurred, and for the pain and suffering endured.

Error is assigned for the giving of certain instructions, and paragraphs therein are singled out for criticism. In *Lincoln Traction Co. v. Brookover,* 77 Neb. 221, and cases therein cited, this court has disposed of the question in the following language: "It is a well-established rule that instructions must be construed together, and if, when taken as a whole, they correctly announce the rules applicable to the issues and the evidence, they will be upheld, even though a single paragraph standing alone may be faulty. *Bartley v. State,* 53 Neb. 310; *Love v. Putnam,* 41 Neb. 86. The true meaning of instructions is to be determined, not by a separate phrase or paragraph, but by considering all that is said on each particular subject

or branch of the case." When this test is applied, we find no error in the charge of the court to the jury.

Again, error is assigned in the court's refusal to give an instruction requested by defendant; but the court, on its own motion, had given the substance of the instruction asked, and it was, therefore, properly refused.

The record being found free from error, the judgment of the district court is

AFFIRMED.

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

EMMA F. COOK, APPELLEE, V. CITY OF NEBRASKA CITY, APPELLANT.

FILED APRIL 16, 1915. No. 18068.

Municipal Corporations: EXCAVATIONS IN STREETS: PERSONAL INJURIES: LIABILITY. The municipality of Nebraska City, in grading one of its streets, made a cut or execavation from three to five feet deep at the intersection of the street with a road or driveway, which led across private property and had been traveled as a road by the public for more than 20 years, but placed no barriers or danger signals at or near the intersection. Without knowledge of the excavation, plaintiff drove over the bank in the darkness and was injured. *Held*, that the city was liable for the injury.

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

Andrew P. Moran and *W. W. Wilson*, for appellant.

Livingston & Heinke, contra.

MORRISSEY, C. J.

Plaintiff brought this action against the municipality of Nebraska City to recover for injuries alleged to have been sustained August 17, 1912. It is alleged that some time prior to that date the defendant city graded down a portion of Ninth street, on the east side of block 41, four or

five feet below the natural surface of the ground, and that there was then, and for many years prior thereto, a road or public way leading across block 41 onto Ninth street; that, after changing the grade of Ninth street, the defendant and its officers negligently left the intersection of the road across block 41 unprotected and without lights or danger signals; that on the evening of that day, and after it had become dark, the plaintiff, while passing down this road across block 41 with a horse and buggy, drove over the bank and was thrown to the bottom of the grade, receiving severe and permanent injuries.

The defendant denies that there was a public road or street across block 41, and alleges that plaintiff turned aside from the traveled streets and alleys and drove into the cut from private premises, and that whatever injuries she received were caused by her own carelessness and negligence. There was a judgment for plaintiff, and defendant appeals.

The testimony shows that for over 20 years the public had used the road across block 41, although it had never been laid out as a street or highway, and no work had ever been done thereon. But the testimony shows that it required no work to fit it for travel, and one witness says: "It looked like a street; in fact, it was better than the street was." It is therefore essential to determine whether any legal obligation rested upon the city to erect barriers or place danger signals where this driveway intersected with Ninth street.

The facts in *City of Omaha v. Randolph,* 30 Neb. 699, are closely analogous to the case at bar. There the court said: "While a municipal corporation is not required to erect barriers or place danger signals to prevent persons from receiving injuries in entering its streets by private ways, yet it is bound to provide such guards or signal lights in the streets at dangerous places to prevent travelers from receiving injuries in entering such street by a usually traveled public road, although such road was never laid out as a highway or street."

When this doctrine is applied to the facts in this case, it must be held that the city was guilty of negligence in not erecting barriers or placing danger signals at the intersection of this highway with Ninth street.

Complaint is made for the giving, and refusing to give, instructions, but, having reached the conclusion that the city was bound to erect barriers, or maintain danger signals at the point where the accident occurred, the rulings of the court are found to be without prejudice to the defendant, and the judgment of the district court is

AFFIRMED.

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

REBECCA SCHLAIFER, APPELLANT, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED APRIL 16, 1915. No. 18077.

1. **Appeal:** NEW TRIAL: DISCRETION. A motion for a new trial is addressed to the sound discretion of the court, and a decision of the district court in setting aside a verdict of the jury and granting a new trial will not be reversed unless it clearly appears that there has been an abuse of discretion.
2. ———: EXCLUSION OF EVIDENCE. In an action for personal injuries, where the injuries are not denied, or the proof thereof is clear and uncontradicted, the exclusion of evidence relating to the extent of the injuries and going only to the measure of recovery is not reversible error, where the jury finds plaintiff is not entitled to recover anything for the injuries.

APPEAL from the district court for Douglas county: LEE S. ESTELLE and WILLIS G. SEARS, JUDGES. *Affirmed.*

DeBord, Fradenburg & VanOrsdel, for appellant.

John L. Webster and *W. J. Connell, contra.*

MORRISSEY, C. J.

Plaintiff brought this action, alleging that, November 20, 1910, she was a passenger on one of defendant's street

cars in the city of Omaha, and, while attempting to alight therefrom, at the regular stopping place at the intersection of Sixteenth street and Clark street, the car was suddenly started forward with a jerk, and she was thereby thrown violently to the pavement, suffering severe injuries, which are set out in detail in the petition. The answer denies that the car was started while plaintiff was in the act of alighting, but avers that after the car had passed beyond the regular stopping place the plaintiff voluntarily stepped from the car to the street while the car was moving, and that whatever injuries she sustained were the result of her own negligence, and denies all negligence or carelessness on its part. There was a verdict for plaintiff. A motion for new trial containing 21 separate assignments of error was filed. On hearing, this motion was sustained, the verdict set aside, and the cause set down for retrial. By leave of court plaintiff filed an amended petition, and the cause was again tried to a jury, and there was a verdict for defendant. Plaintiff then filed an alternative motion, praying: First, for judgment upon the verdict of the jury returned on the first trial, notwithstanding the order of the court granting a new trial; second, should the court refuse to enter a judgment on the first verdict, that it set aside the last verdict and grant a new trial of the case, assigning the usual grounds for new trial in causes of this character. This motion was overruled, judgment entered upon the last verdict, and the plaintiff appeals.

The errors relied upon are: First, setting aside the verdict and granting a new trial; second, refusal of the court to sustain plaintiff's motion for judgment upon the first verdict; and overruling the alternative motion to set aside the second verdict and grant a new trial. Taking up these assignments in their order: Did the court err in setting aside the first verdict?

The Code provides for the granting of a new trial by trial courts, and this provision is made for the purpose of affording the court an opportunity to correct errors in

its own proceedings without subjecting the parties to the necessity of an appeal.

The record is silent as to the special reason for setting aside the verdict. The court has great latitude in the exercise of its discretion, and the universal holdings of this court are to the effect that this discretion will not be interfered with where it sets aside a verdict and grants a new trial, unless it is clearly shown that some legal right of the party against whom the order is made has been disregarded. *Missouri P. R. Co. v. Hays*, 15 Neb. 224; *Sang v. Beers*, 20 Neb. 365.

"The granting of a new trial is largely within the discretion of the trial court. A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it." *School District v. Bishop*, 46 Neb. 850.

Again, in *Wells v. Cochran*, 84 Neb. 278, this court has said that an order setting aside a verdict and granting a new trial will not be set aside "unless it clearly and unequivocally appears that there did not exist any tenable ground to support said order, but that the court thereby abused its discretion."

Abuse of discretion in the trial court is not disclosed by the record. Reasonable minds might draw different conclusions from the testimony, and, indeed, the second jury on substantially the same evidence reached a different conclusion from that reached by the first jury, and the ruling of the trial court on this question will not be disturbed.

The sole complaint made as to the second trial is directed to the rulings of the court on the introduction of evidence. In the main this criticism goes to the exclusion of testimony bearing on the extent of the injuries received. There was clear proof of the injuries; in fact, the injuries were conceded, but the liability of the defendant was denied. The extent of the injuries could be material only as to the amount of recovery, and, the jury having absolved the defendant from all liability, the severity of the injuries was immaterial, and the exclusion of this evidence was not prejudicial. *Price v. Grzyll*, 133 Wis. 623;

Fraser v. California Street Cable R. Co., 146 Cal. 714; *Bierce v. Sharon Electric Light Co.*, 73 Conn. 300.

The other rulings on the introduction of evidence complained of have been examined, but, considering the form of the questions asked and the state of the record at the time they were propounded, they are found to have been without prejudice. The verdict is fully sustained by the evidence, and, as there are no errors appearing, the judgment of the district court is

AFFIRMED.

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

C. B. NASH COMPANY, APPELLEE, V. WESTERN UNION TELEGRAPH COMPANY, APPELLANT.

FILED APRIL 16, 1915. No. 18081.

1. **Telegraphs: DELAYED MESSAGE: DAMAGES.** For a breach of its contract to promptly transmit and deliver a message over its lines, a telegraph company is liable for such damages as may reasonably be supposed to have been in the contemplation of both parties at the time when the contract was made.
2. ———: ———: ———: **PROOF.** Such damages being dependent upon the knowledge of the parties, proof of such knowledge, where the message is in cipher, may be made by evidence of facts and circumstances additional to such as are disclosed by the message itself.
3. ———: ———: ———: **SUFFICIENCY OF EVIDENCE.** Substance of the evidence set out in the opinion, and *held* sufficient to sustain the verdict.

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

Brogan & Raymond, for appellant.

Crofoot & Scott and *W. C. Fraser, contra.*

BARNES, J.

Appeal from a judgment of the district court for Douglas county, in an action for damages for a failure to transmit and deliver a telegram. The facts alleged in plaintiff's petition may be briefly stated as follows: At 10:10 o'clock A. M., on Thursday, January 30, 1908, the plaintiff, the C. B. Nash Company, delivered to the Western Union Telegraph Company at its main office in the city of Omaha the following telegram: "Shearson, Hammill & Co., 71 Broadway, New York, N. Y. Outbreak tapestry preternatural. Collect. (Signed) The C. B. Nash Company." Across the face of the telegram was written in red ink "Rush." The message when translated reads: "Sell 300 American Smelting & Refining Company common stock at 68 1/8." At the time when the message was delivered to the telegraph company, the plaintiff had on deposit with Shearson, Hammill & Company 300 shares of the stock designated, and wished its brokers to sell the same as directed by the telegram. Had the defendant promptly transmitted and delivered the message, Shearson, Hammill & Company would have sold the stock at a price equal to or greater than that named. On February 1, 1908, plaintiff telegraphed Shearson, Hammill & Company to ascertain if the sale had been made, and was informed that the order to sell had not been received. On the 3d of February, 1908, plaintiff sent them a duplicate of the original message, which was received by them on the 5th day of February, 1908. Meanwhile the price of said stock had declined to $62.50 a share, at which price the stock was sold, and plaintiff was damaged, by the failure of the telegraph company to promptly transmit and deliver the message, in the sum of $1,986, for which, with interest, the plaintiff prayed judgment. The defendant's answer was a general denial. On the trial the court limited the measure of damages to the difference between the price at which the stock would have sold on January 30, 1908, had the telegram been duly transmitted and delivered, and the price at which the plaintiff could have sold the stock on February 3, 1908. The jury returned a verdict for the plaintiff for $600, with interest amount-

ing to $199, or a total of $799. Judgment was rendered on the verdict, and the defendant has appealed.

It appears that before the introduction of the evidence the defendant objected to the introduction of any testimony, because the petition failed to state a cause of action, the message in question being in cipher, and because its contents were not disclosed or made known to defendant. The objection was overruled. At the close of all of the evidence the defendant moved the court to direct the jury to return a verdict in its favor, claiming that there was no evidence before the court tending to show that defendant had notice of the nature and extent of the business covered by the telegram which would make defendant liable for the special damages claimed. The motion was overruled. The court also refused to instruct the jury that defendant would be liable for nominal damages only. These rulings constitute the defendant's assignments of error.

It appears that at the trial L. F. Crofoot, a witness for plaintiff, testified that he was the secretary, treasurer and director of the C. B. Nash Company; that the company maintained its office in the Omaha National Bank building since January 1, 1907; that the defendant company has maintained its office in the basement of the same building; that the business of the plaintiff, among other things, was the purchase and sale of stocks listed on the New York stock exchange; that such transactions were carried on by telegrams, wholly or partly in cipher, and open, sent and received by the Western Union Telegraph Company, through its office in the Omaha National Bank building; that such telegrams were sent to and received by Henry Clews & Company, Clark Dodge & Company, Shearson, Hammill & Company, W. P. Bonbright & Company, all New York stock brokers; that the plaintiff company used the same cipher code in messages sent to and received by Shearson, Hammill & Company, and the object in using the code was to save tolls; that Henry Clews & Company is one of the oldest brokerage houses in New York, and has had an extensive business for many years; that Clark

Dodge & Company have also been in business for many years and are prominent brokers; that Shearson, Hammill & Company have been in business a shorter period, but are prominently known as stock brokers; that the method of sending the telegrams was to have them written in the plaintiff company's office and sent down to the telegraph company's office for transmission, or delivered to a messenger of the telegraph company.

W. W. Umsted testified that for many years he had been manager of the Western Union Telegraph Company in Omaha; that the telegraph company and the C. B. Nash Company maintained offices in the same building; that, as manager of the telegraph company, he had charge of all of the business transacted in its general office in that building; that three or four clerks received the messages filed by the public for transmission at the counter in the general office; that he knew the C. B. Nash Company, and the business in which it was engaged; that its interests were large, and that it was frequently sending and receiving business messages through the telegraph company's main office; that he knew L. F. Crofoot was in charge of the plaintiff's business, and knew the C. B. Nash Company's interests were varied, and that telegrams sent and received by it related to business transactions, but he did not know whether it referred to smelter, or street railway, or to what it referred; that he could not say that any of plaintiff's messages did not relate to business transactions; that he knew that more or less of plaintiff's messages, received and sent, related to business transactions of importance; that cipher messages are common in the larger portion of all branches of important business, and are extensively used by brokers in all lines of commodities; that, knowing the business in which a concern is engaged, when a message is tendered to the telegraph company, written in cipher, he knew it related to a business transaction; that when such messages are received from a business concern it is assumed that they relate to business transactions; that stock brokers use cipher messages in transacting their business in buying and selling to a large extent; and it

was a common practice for stock brokers to send and receive messages in cipher relating to their business; that he would regard the message in suit as an important message, and that it was so classed, partly because it was the C. B. Nash Company's business and partly because of the word "Rush" written in red ink across the face of the message.

The following is the substance of a stipulation of facts introduced in evidence on the trial: For more than five years past Shearson, Hammill & Company have been engaged in business as stock brokers, buying and selling bonds and stocks on the New York stock exchange. During that time the said firm has maintained its New York office at 71 Broadway, also branch offices in the cities of Chicago and Denver. In conducting the business, said firm has seven private wires for transmission of telegrams in connection with its business, which wires are leased from the defendant. Said firm sends and receives daily by its own operators numerous telegrams over said wires relating to the purchase and sale of bonds and stocks on the New York stock exchange. Shearson, Hammill & Company had in use during the period mentioned a telegraphic cipher code for sending messages to and receiving messages from its customers. A copy of the code was attached to the stipulation and made a part thereof. Messages written in said code relating to the purchase and sale of bonds and stocks were frequently sent and received over defendant's wires during the period mentioned in paragraph 1, by Shearson, Hammill & Company and its customers, including plaintiff. Prior to January 30, 1908, plaintiff frequently sent to and received from Shearson, Hammill & Company messages in said code which were transmitted over defendant's lines between New York and Omaha, relating to purchases and sales of stocks. It was stipulated, however, that defendant did not admit by the stipulation, or by anything contained therein, that the defendant had knowledge or notice that any of the messages written in said code and sent and received over defendant's wires during the period mentioned did in fact relate to the pur-

chase and sale of bonds and stocks or that defendant had any knowledge or notice to what said messages related. A long list of messages, sent and received by the plaintiff company to different stock brokers at different points, but more especially in New York City, was received in evidence. It appears from a translation of the code that the word "outbound" means "sell for our account and risk." The stipulation also contains the statement that William W. Remey, manager of Shearson, Hammill & Company, would testify, if permitted to do so over defendant's objection, that, had the aforesaid telegram been promptly transmitted and delivered by defendant to Shearson, Hammill & Company, his firm would have sold 300 shares of the stock in question at $68 1/8 a share; that the New York stock exchange closed at 12 o'clock noon, Eastern time, on Saturday, February 1, and next opened for the transaction of business at 10 o'clock A. M., Eastern time, on Monday, February 3, 1908. The foregoing is, in substance, the evidence on which the cause was tried.

Defendant's first contention is that damages for loss of an expected sale or purchase, caused by a failure to deliver a purely cipher telegram, cannot be recovered; and, second, that if any recovery could be had the damages would be only nominal. Appellant supports these contentions by a long list of authorities, commencing with *Hadley v. Baxendale,* 9 Exch. (Eng.) *341, 26 Eng. Law & Eq. 398; and it may be conceded that, if the facts justified the application of the rules invoked by the defendant, these contentions should be sustained. From an examination of the record, we are constrained to hold that the rule contended for by the defendant should not be applied in this case. Section 7406, Rev. St. 1913, provides, among other things, that a telegraph company shall be liable for the nondelivery of and for all mistakes in transmitting messages by any person in its employ. This statute was construed in *Kemp v. Western Union Telegraph Co.,* 28 Neb. 661, *Western Union Telegraph Co. v. Kemp,* 44 Neb. 194, and again in *American Express Co. v. Postal Telegraph-Cable Co.,* 97 Neb. 701.

In our opinion the evidence in this case is sufficient to bring it within the rule announced in *Smith v. Western Union Telegraph Co.*, 80 Neb. 395, *Western Union Telegraph Co. v. Church*, 3 Neb. (Unof.) 22, *Baldwin v. United States Telegraph Co.*, 45 N. Y. 744, and *Brooks & Son v. Western Union Telegraph Co.*, 26 Utah, 147. In the case last cited it was said: "But the authorities hold, almost uniformly, that it is sufficient to create a liability on the part of a company for all damages directly and proximately resulting from the negligent acts of its agents in failing to transmit a message in the form in which it is delivered, or in omitting to send it at all, provided the message discloses enough of its nature and importance to put an ordinary and prudent person upon inquiry. * * * The first message herein showed on its face that it referred to a commercial transaction. This fact, together with the fact that respondent B. B. Brooks endeavored to send a second message relating to the same matter, with the word 'RUSH' written conspicuously thereon, was notice to the appellant that these messages were important, and, if appellant had desired any further information on this point, it no doubt could have obtained it by inquiring of Brooks when he delivered the message to appellant for transmission over its wires."

The message in question in this case on its face, though in cipher, would furnish a person of ordinary prudence notice that it was important; and this fact, taken together with the course of business that had obtained between the plaintiff and the defendant company for many years, was sufficient notice to the defendant that substantial loss might follow its failure to promptly transmit and deliver the message to Shearson, Hammill & Company. We are therefore of opinion that the district court did not err in refusing to sustain the defendant's motions and in submitting the case to the jury. A verdict having been rendered in favor of the plaintiff upon this evidence and the instructions of the court, we feel constrained to sustain the verdict. We are aware that the question is a close one; but, on an examination of the whole record, we are of

opinion that the defendant had a fair trial, that it was chargeable with notice of the importance of the plaintiff's message, and that substantial loss would follow a failure to promptly transmit and deliver it.

The record being without reversible error, the judgment of the district court is

AFFIRMED.

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

JOHN HEROLD, APPELLEE, V. UNITED STATES EXPRESS COMPANY, APPELLANT.

FILED APRIL 16, 1915. No. 18096.

1. **Carriers:** SHIPMENT OF LIVE STOCK: LIABILITY. While a common carrier of live stock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, yet, where animals are shipped, it is its duty to exercise such care as the circumstances indicate is reasonably necessary in order to safely transport them, and if, on account of a failure to exercise such care, the animals are injured, are lost, or die, the carrier may be liable in damages.
2. ———: ———: REASONABLE CARE: QUESTION FOR JURY. Where the evidence shows that, where a large hog is shipped in a crate in hot weather, reasonable care requires that it be cooled at intervals by wetting the animal and the bedding in the crate, and that it be furnished plenty of water, the question whether such care was exercised by the carrier, taking into consideration the size of the animal, the heat of the day, the manner of crating, and all the surrounding circumstances, is one for the jury.
3. **Evidence** examined, and *held* to support the verdict.

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

Hazlett & Jack and *Walter Vasey*, for appellant.

J. C. Dort, contra.

LETTON, J.

On May 26, 1911, the plaintiff delivered to defendant two brood sows properly crated for transportation to Newton, Mississippi, which were never delivered. This action is brought to recover the value of the sows and crates. The jury found for plaintiff, and defendant appeals.

The principal error relied on is that the evidence is not sufficient to sustain the verdict. Receipt of the hogs and failure to deliver them was admitted by the defendant. Defendant insists that the evidence conclusively shows that the loss of the sows was caused by the excessive heat and the inherent nature and propensities of the animals. On the other hand, the plaintiff, insists that, the defendant having accepted the animals for shipment, it was bound to provide food and water, and exercise such other care as was reasonably necessary under the conditions and circumstances for their safe transportation; that the evidence failed to show the exercise of such care, and shows neglect to see that the hogs were properly fed, watered and cooled.

The testimony for the defense shows that the sows were loaded at Lewiston, Nebraska, about 1:30 P. M.; that the thermometer stood about 90 degrees; that they were properly cooled at Horton, where they were loaded on a train bound for Topeka, where they were again changed to a train running to Kansas City. The agent at Topeka testified that when they were received they were apparently pretty warm and when unloaded were left upon the platform so as to receive as much air as possible; that they appeared to cool down and were in good condition when loaded for Kansas City, which was reached at 1:40 A. M. next morning. The messenger in charge to Kansas City said that when they reached there the hogs appeared to be in good condition, but that he did not feed nor water them. At Kansas City they were placed in an express car for St. Louis about 8 A. M., and were then in good condition. Mr. Moritz, the express messenger between Kansas City and St. Louis, testified that the crates were placed opposite open doors in an express car; that he observed at a certain point that the two sows were very warm and restless; that they

ate a little food, and that he offered them water about 35 or 40 miles east of Kansas City, but they refused it and rooted the basin away; that they were not in the car where he worked; and that about an hour or an hour and a half afterwards, 3½ hours after they left Kansas City, he noticed, at a point a few miles east of Winslow, that a slat at the head end of one of the crates had been gnawed, and that one of the hogs was gone; that he wired the loss of the hog to the route agent, and a search was made, but she could not be found; that the end slats were nailed to the ends of the side slats of the crates; that the other sow was overheated; that he offered it water, which it refused, but did not offer it food; that it was frothing and bleeding at the mouth; that she jumped around in the crate and seemed wild and ferocious; that he turned this sow and the empty crate over to the agent at St. Louis about 8 o'clock in the evening. On cross-examination he said he noticed the hog was frothing at the mouth about three-quarters of an hour after leaving Kansas City, but did not water it then or try to cool it off, and that he offered water one-half or three-quarters of an hour afterwards, and that he threw no water on the hogs nor watered them, except as stated, though he saw they were getting hot; that he took all the straw out of the crates because he thought they would be cooler without it. He had handled a great many hogs. The crate was in good condition when it left Kansas City. The agent at St. Louis and another witness testified the sow was very hot when she came in, was panting, and had been gnawing the crate. He thought the crate was large enough; that the sow was offered food and water three or four times after arrival at St. Louis, and she was placed in the basement of the express office, where it was cooler, but she died about 11 P. M. The temperature was about 92 degrees. The agent also testified, as an expert, that it was extremely dangerous to carry a hog by express when the temperature was so high.

The plaintiff testified that the sows were due to pig in about two weeks; that the two of them weighed about 640 pounds; and that they were full-blooded, registered

Poland-China; that they were in the very pink of condition; that they were placed in strong crates with attached feed troughs and water buckets so that they could be fed and watered; that they had been washed off and crates bedded with wet alfalfa a few minutes before they were loaded; that he had been in the hog shipping business for about 8 years; that these crates were in standard form, and he had shipped and received a great many hogs in crates of this kind without any trouble. The slats on the front end of the crate were of seven-eighths inch lumber and were nailed to oak corner posts. On rebuttal the plaintiff testified, as an expert that he heard the testimony of Moritz that he removed the bedding from under the hogs when it became too hot in the car; that what should have been done was that the bedding should have been wet around the belly and lower sides of the hog until the hog cooled down. Other expert witnesses testified that the proper method is to have the bedding wet down at proper intervals, and the legs and lower part of the body cooled; that a bucket full of water would pretty thoroughly wet the hog and the bedding, and this would be required from one to two hours apart on such a day.

We think defendant has not definitely proved that the sows were watered or cooled off at Kansas City, the two witnesses each saying that the sows had been watered; but, when pressed on cross-examination, each said that he did not see them watered and did not know that they had been fed or watered, but he saw water about the pan in the crates.

From the time the sows were cooled down at Horton and watered at Holton, Kansas, in the early evening of the 26th, no attempt was ever made to cool them by the use of water, which the evidence shows was plainly necessary in such weather, to the knowledge of the employees of the express company. After Moritz took the bedding away, even this could not have been effectively done. When offered water that forenoon, they had become so restless and uneasy that they refused it. It was an hour or an hour and a half afterwards before the first sow was missed.

Its escape was in all probability due to its frantic efforts to procure relief. Apparently no attempt was made to water or cool the other sow until after she reached St. Louis. It seems to us that, if the sows had been watered and cooled down at Kansas City, they would not have shown the symptoms they did so soon after leaving there. How often they should have been cooled depended on the temperature of the day and of the hogs. Moritz knew they suffered from heat, but did nothing that whole day but offer them a little food and water, which is shown to be ineffective care. We are also of the opinion that the crates were sufficient. Under these circumstances, the evidence fails to show that reasonable care was taken for the safe carriage of these animals.

An inspection of the instructions shows that the principles of law governing the case were properly laid down, and the defendant makes no complaint that the jury were misdirected.

The evidence sustains the verdict, and the judgment of the district court is

AFFIRMED.

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

H. E. BULLOCK, APPELLEE, V. POWER-HEAFEY COAL COMPANY, APPELLANT.

FILED APRIL 16, 1915. No. 18054.

1. **Evidence:** CONTRACT: DATE OF EXECUTION. A contract reciting the date of its execution is *prima facie* evidence that it was executed at that time.
2. **Partnership:** FIRM PROPERTY: APPLICATION TO INDIVIDUAL DEBTS. In the absence of fraud or conduct constituting an estoppel, a partner, without the consent of his copartners, cannot apply firm property to the payment of his individual indebtedness.
3. **Trial:** DIRECTION OF VERDICT. It is not error to direct a verdict for plaintiff, where the evidence is sufficient to support his cause of action, but is insufficient to sustain the only defense pleaded.

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

Smyth, Smith & Schall, for appellant.

Brown, Baxter & Van Dusen, contra.

ROSE, J.

This is an action to recover $1,783.95 for coal sold to defendant and delivered in Omaha, Nebraska. The fuel was furnished by Bullock & Hickey, a partnership having its place of business at Fort Smith, Arkansas. The firm was composed of H. E. Bullock and E. G. Hickey, but the former succeeded to the rights of both, and is plaintiff herein. It is admitted that Bullock & Hickey shipped the coal and that it was received by defendant, but the following defense is pleaded: Prior to May, 1911, Hickey was indebted to the Hart-Williams Coal Company in a sum exceeding $1,600. As surety, defendant incurred liability for the debt, and Hickey agreed to furnish coal to pay it. Plaintiff had consented to the arrangement thus made, and the coal was shipped and received with that understanding. The proceeds of the shipments were applied to the payment of the debt for which defendant had become liable as surety for Hickey. At the close of the testimony the trial court directed a verdict for plaintiff. From a judgment in his favor for $1,860.28, defendant has appealed.

Defendant contends that the evidence is sufficient to establish the defense pleaded, and that therefore there was error in the peremptory instruction for plaintiff. Is the evidence sufficient to sustain a finding that plaintiff consented to the payment of his partner's individual debt with partnership property? No witness testified that Bullock gave his consent to such an arrangement. There is no writing to that effect. Hickey intimated in his oral testimony that a purpose on his part to pay in coal an individual debt owing by him to defendant had been communicated to plaintiff, but proof of this character is inconsistent with a letter written by Hickey to Bullock. Is consent implied from proved facts or circumstances? In

testifying in regard to plaintiff's knowledge, to the time it is said to have been obtained and to its relation to the partnership, Hickey, as a witness for defendant, in referring to plaintiff, said: "The only conversation I had with him was this one conversation. As to whether that was immediately before or immediately after signing the papers, I say I do not remember." The partnership contract is in the record, and error in admitting it is not shown. It recites its execution March 31, 1911. This is *prima facie* evidence of that fact. 4 Wigmore, Evidence, sec. 2520; 2 Chamberlayne, Modern Law of Evidence, sec. 1055; 1 Jones, Commentaries on Evidence, sec. 51; *Sinclair v. Baggaley,* 4 Mees. & Wels. (Eng.) *312; *McFarlane v. Louden,* 99 Wis. 620; *Hauerwas v. Goodloe,* 101 Ala. 162; *Leonard v. Fleming,* 13 N. Dak. 629. The presumption is not destroyed by other proof. Hickey's indebtedness to Hart-Williams Coal Company is evidenced by a note for $1,498.51, dated May 4, 1911. Defendant then became liable as indorser. Its manager testified he was told by Hickey, after the execution and indorsement of the note, that hard coal would be delivered to defendant to cover the indebtedness evidenced by the note to Hart-Williams Coal Company. The consent pleaded by defendant applied alone to hard coal. The first coal shipped was soft coal. It came from Bullock & Hickey. Defendant's manager admitted on the witness-stand that he knew where it came from shortly after it was received. The amount of capital to be contributed to the partnership business was $2,000, each partner to pay $1,000. The evidence is uncontradicted that Hickey paid no money, but that Bullock accepted his note for his share of the capital and agreed to allow him a salary of $125 a month. In the bill of Bullock & Hickey for coal shipped to defendant, the first item is dated May 11, 1911, and the last August 8, 1911. Plaintiff testified positively that he had no knowledge of Hickey's purpose to pay an individual debt with firm property, until after the coal had been delivered.

As already stated, there is no proof of a written or oral promise on the part of plaintiff to apply partnership prop-

erty to the payment of his partner's individual debt. The evidence tends to show that defendant's liability as an indorser was incurred long after plaintiff gave his alleged consent to the application of partnership property to the payment of the individual debt of his partner. Defendant, in buying and in receiving soft coal through Hickey, knew the seller was the firm of Bullock & Hickey. Considering that no cash was invested in the partnership business except $1,000 contributed by plaintiff, that Hickey's partnership note for $1,000 remained unpaid, and that the firm had obligated itself to pay Hickey $125 a month for his services, it is too much to assume, without proof, when all of the circumstances are considered, that plaintiff impliedly consented to turn over to a creditor of Hickey firm property worth more than $1,600. In making reference to some of the controlling facts of which there is proof, no item of evidence adduced by defendant has been overlooked. The issue is controlled by the rules: "That a partner cannot, without the consent of his copartners, apply the firm property in satisfaction of his individual liabilities; and that the burden is cast upon the person receiving the property to prove either consent of the other partners or facts creating an equitable estoppel." *Columbia Nat. Bank v. Rice,* 48 Neb. 428.

Estoppel is not pleaded nor proved. Fraud is not shown. The evidence would not support a judgment in favor of defendant. The trial court made no mistake in directing a verdict for plaintiff.

AFFIRMED.

FAWCETT, J., not sitting.

FARMERS LOAN & TRUST COMPANY, APPELLANT, V. WALTER PLANCK, APPELLEE.

FILED APRIL 16, 1915. No. 18059.

Bills and Notes: NEGOTIABILITY. A promissory note is not rendered nonnegotiable by the insertion of the following provision: "A discount of 6 per cent. will be allowed, if paid in full within fifteen days from date."

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

M. S. McDuffee, for appellant.

William V. Allen and *William L. Dowling, contra.*

ROSE, J.

This is an action on a promissory note for $587, dated August 30, 1909. The principal is payable in six instalments maturing at different times within 13 months. The Equitable Manufacturing Company is named as payee and defendant is maker. By mesne assignments plaintiff, September 1, 1909, became the holder of the note as collateral security for a loan. The instrument, when executed, was attached to a contract for the purchase of jewelry and it was given for the price thereof. Under the terms of sale defendant was entitled to the possession of a piano to be given as a prize to the holder of the largest number of jewelry certificates issued by defendant to purchasers of goods from him. Plaintiff claims to be a holder of the note for value before maturity. In his answer defendant pleaded that the note was obtained by fraudulent representations; that he immediately rescinded the contract of purchase; and that he never received the jewelry or the piano. Upon a trial of the issues the district court directed a verdict in favor of defendant, and plaintiff has appealed.

Defendant contends that, under the rule in *Bothell v. Schweitzer,* 84 Neb. 271, the note in controversy is not ne-

gotiable, and that even a *bona fide* holder cannot recover in an action thereon. When Planck signed the note it was attached to the order for goods to be shipped, but was separated therefrom by a perforated line, above which were these words: "The instalment note below to be detached by Equitable Mfg. Co." The contract of sale also contained the following: "If goods are shipped, detach and credit my account with attached instalment note which I hereby give in payment of this bill. If goods are not shipped, note is to be returned to me." In the *Bothell* case the note was glued to the contract of sale and was unlawfully detached. In the present case, when the goods were shipped, the note was detached according to agreement. The rule in the *Bothell* case is correct, but is inapplicable here.

The note executed by defendant contained the following provision: "A discount of 6 per cent. will be allowed, if paid in full within fifteen days from date." Is the negotiability of the note thus destroyed? Under the statute an instrument, to be negotiable, "must contain an unconditional promise or order to pay a sum certain in money." Rev. St. 1913, sec. 5319. The act of the legislature defines what a "sum certain" is, but does not mention discount. Rev. St. 1913, sec. 5320. The authorities upon this point are in conflict. In the following cases it is held that such a note is nonnegotiable: *Fralick v. Norton,* 2 Mich. 130; *Story v. Lamb,* 52 Mich. 525; *Way v. Smith,* 111 Mass. 523; *National Bank of Commerce v. Feeney,* 12 S. Dak. 156; *Farmers Loan & Trust Co. v. McCoy & Spivey Bros.,* 32 Okla. 277, 40 L. R. A. n. s. 177.

Story v. Lamb, 52 Mich. 525, follows the holding in *Lamb v. Story,* 45 Mich. 488. In *Kirkwood v. First Nat. Bank,* 40 Neb. 484, this court said: "In *Lamb v. Story,* 45 Mich. 488, it was held that the negotiability of a note payable on or before two years from date was destroyed by a memorandum attached, providing that if paid within one year there should be no interest, and that case is cited by Mr. Daniel in support of a similar statement, and is the only authority cited. We are not satisfied with that doctrine. In *Hope v. Barker,* 112 Mo. 338, the provision was 'with-

out interest thereon if paid at maturity; if not paid at maturity, to bear interest from date.' It was held that that provision did not destroy the negotiability of the note, the note on its face showing what should be paid at any particular time, and being therefore certain in its terms."

In *Farmers Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 40 L. R. A. n. s. 177, it is held that a provision in a note similar to the one now in controversy impairs its negotiability. This decision rests upon *Randolph v. Hudson,* 12 Okla. 516, and South Dakota cases therein cited.

In *Randolph v. Hudson,* 12 Okla. 516, it was held that a provision, "with interest at the rate of 12 per cent. from date, if not paid at maturity," destroyed the negotiable character of the note. This is contrary to *Hope v. Barker,* 112 Mo. 338, cited with approval in *Kirkwood v. First Nat. Bank,* 40 Neb. 484.

Oklahoma also holds that a provision for an attorney's fee, if the debt is not paid at maturity, renders the note nonnegotiable. This is contrary to the holding in *Stark v. Olsen,* 44 Neb. 646, and is inconsistent with the negotiable instruments law. The Oklahoma cases were decided under local statutes in force when the notes were executed, and in the *McCoy* case the court says that it does not decide what the result would be under the negotiable instruments law subsequently adopted by that state. The Oklahoma decisions were rendered under the following statutory provisions: "A negotiable instrument must be made payable in money, only, and without any condition not certain of fulfilment," and "must not contain any other contract than such as is specified" in the statute. These provisions were adopted from South Dakota, and the Oklahoma cases follow the South Dakota construction.

In *National Bank of Commerce v. Feeney,* 46 L. R. A. 732, 737 (12 S. Dak. 156), it is held that "a stipulation for a discount of 12 per cent., if a note is paid before maturity, renders it nonnegotiable because of the uncertainty as to the amount to be paid," and the court quotes an earlier decision containing the following language: "While, in the opinion of the writer, a promissory note,

otherwise unobjectionable, meets the requirements, and stands the test of negotiability, when there is no date at which the exact amount then due cannot be ascertained by inspection and computation, this court has placed itself in line with a class of authorities which require such a degree of certainty that the exact amount to become due and payable at any future time is clearly ascertainable at the date of the note, uninfluenced by any conditions not certain of fulfilment; and the rule thus established must control cases subsequently arising, where the facts are substantially the same."

The doctrine thus stated is in conflict with some of the Nebraska decisions and with the negotiable instruments law. *Kirkwood v. First Nat. Bank,* 40 Neb. 484; *Stark v. Olsen,* 44 Neb. 646; *Fisher v. O'Hanlon,* 93 Neb. 529; Rev. St. 1913, secs. 5320, 5322.

In *Loring v. Anderson,* 95 Minn. 101, it is held that a note providing for a discount of 6 per cent., if the debt is paid on or before maturity, does not make the instrument nonnegotiable, as the amount of the deduction is readily ascertainable from the face of the paper. To the same effect is *Harrison v. Hunter,* 168 S. W. (Tex. Civ. App.) 1036. This is in harmony with the statutory and the general rule that a note is negotiable, though payable on or before a certain date. Rev. St. 1913, sec. 5322. The amount of the discount and the amount due on the note in controversy, if paid within 15 days from date, are sums readily ascertainable.

With the question of negotiability determined in favor of plaintiff, the peremptory instruction for defendant is erroneous. Whether plaintiff is a "holder in due course," within the meaning of the statute, and whether there was fraud on the part of the original payee are issues not determined on this appeal. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

F. F. MCELHINNEY, APPELLANT, V. JOHN H. HARTE, APPELLEE.

FILED APRIL 16, 1915. No. 18009.

1. **Bills and Notes**: FAILURE OF CONSIDERATION: SALE OF STOCK. Where a promissory note is given for stock in a corporation then being organized by the payee, in reliance upon the promise of the payee to place in the treasury of the corporation it is organizing a certain sum of money and a bond of indemnity guaranteeing the legality of the patents under which the corporation being organized is to operate, and the payee fails to either deposit the said sum of money or furnish the said bond of indemnity, and the evidence shows that such failure on the part of the payee renders the stock in said corporation valueless, the consideration for the note will be held to have totally failed.
2. ———: ———: ———. And where it further appears that, on account of such failure, the maker of the note has refused to take the stock, a judgment in his favor in an action on the note will, in the absence of other reasons to the contrary, be affirmed.
3. **Evidence** examined and set out in the opinion *held* to sustain the verdict and judgment.

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

William Baird & Sons, for appellant.

Myron L. Learned and *Matters & Matters, contra.*

FAWCETT, J.

From a verdict and judgment of the district court for Douglas county, in favor of defendant, in an action upon three promissory notes, plaintiff appeals.

The three notes involved were for $6,500 each, maturing on different dates. As each note matured, an action was commenced thereon. After the commencement of the third action, the three were combined and tried as one, and will be referred to in the singular number as one action. The petition alleges that defendant, being indebted to Thomas H. Matters, of Omaha, executed and delivered to him the

notes in suit; that the notes were by Matters duly and legally assigned to plaintiff prior to their maturity; and that plaintiff is now the legal owner and holder thereof. The answer denies generally all allegations not expressly admitted; admits the making and delivery of the notes; but alleges that they were given for stock in the Nebraska Mausoleum Company, "a corporation promoted and organized by the plaintiff herein and the Iowa Mausoleum Company, of which this plaintiff is president;" that at the time the notes were given it was agreed by and between plaintiff, through his legal representative, and the defendant that plaintiff would on or before the 1st day of February, 1911, place in the treasury of the Nebraska company the sum of $49,000 in cash, for the use and benefit of the Nebraska company; that, in addition thereto, plaintiff agreed with defendant that the Iowa company and plaintiff would give an indemnity bond to the Nebraska company, protecting the latter against infringement of the patents purchased by it from plaintiff and the Iowa company; that defendant relied on these representations and agreements, and was thereby induced to subscribe for such stock and execute the notes; that "without the indemnity bond furnished, and without the amount of money deposited in the treasury of the company in accordance with the contract of the plaintiff, said stock is without value;" that with the said sum placed in the treasury and the indemnity bond furnished, the stock would be worth one hundred cents on the dollar. The reply denies the allegation that it agreed to place the sum of money named in the treasury and agreed to give the Nebraska company an indemnity bond; avers that the Iowa company sold the right to the use of the patent in the state of Nebraska to the Nebraska company and assigned the same to such company, and in the assignment agreed to indemnify the Nebraska company against any infringement of the patent right so sold and assigned to it; that said provision in the deed of assignment was the only agreement made by plaintiff or the Iowa company, and is full and complete indemnity to the Nebraska company against any and all liability

on account of attempted infringement of its patent right so assigned; that the Iowa company is fully solvent and financially responsible and able to make good its contract of indemnity; denies that plaintiff agreed to deposit the sum of money named; "and, by leave of court, for further reply to the answer as amended avers that said notes were given to Thomas H. Matters for stock of the Nebraska Mausoleum Company on representations made by Matters, and assigned by said Matters in payment of $17,800 which he owed the plaintiff, and the defendant is estopped to deny their validity." It is admitted that plaintiff holds the notes for the Iowa company, and that any defense which could be urged against that company can be urged against him.

The errors assigned are: (1) The court erred in refusing plaintiff's request for an instruction for judgment, for the reason that the only defense pleaded is failure of consideration, which was not sustained by any evidence; (2) the court erred in giving instruction No. 6; (3) the court erred in giving instruction No. 7; and (4) "the court erred in assuming by his instructions that the defense pleaded consisted of fraudulent statements of facts by which the defendant was induced to sign the notes, while, as shown by the pleading itself, as well as by the evidence, the defense was not that there was any fraudulent statement of fact which induced the making of the notes, but promises which had not been performed; and, there being no dispute as to the solvency and financial responsibility of the Iowa company, but abundant evidence of its financial ability, the court manifestly misconceived the defense pleaded." A consideration of the first assignment practically disposes of all. The evidence shows that the Iowa company was the owner for Iowa, Nebraska, and a number of other states, of patents 858,070 and 915,000; that it desired to dispose of its rights under those patents for the state of Nebraska, and in order to accomplish that purpose it undertook the organization of a Nebraska company. With this purpose in view, it sent its representative, a Mr. Little, to Nebraska to undertake such organization.

After arriving at Omaha, Mr. Little called at the office of Thomas H. Matters and took the matter up with him. The result of these negotiations was that Mr. Matters' co-operation was secured, and a contract was entered into between him and the Iowa company that he should enter into the management and incorporation of the Nebraska Mausoleum Company, with its headquarters at Omaha, and with a capital of $200,000. The contract (Exhibit 7) recites that the Iowa company is the owner of the patent rights for Nebraska, and that "the object of the organization of the Nebraska Mausoleum Company is to take over or purchase from the second party (the Iowa company) said territory, and to pay to the second party fifty-one (51) per cent. of its stock for all of the rights" in and to the patents for Nebraska. "And the first party (Matters) will also manage and control the sale of said stock in the state of Nebraska, and the second party has this day paid to the first party twenty-five hundred dollars ($2,500) as advance expenses in and about the organization of the said company and sale of said stock; and first party has agreed to sell said stock at par value, to the amount of one hundred and fifty thousand dollars ($150,000) within ninety (90) days from this date, and, in case he fails to do so, he agrees to return twenty-five hundred dollars without interest to the second party, in full cancelation of this agreement on his part. The question of commission for the sale of said stock is to be made by E. E. Little, representative of the party of the second part, and the party of the first part; it being fully agreed and understood between the parties hereto that fifty thousand dollars ($50,000) of stock shall be placed in the treasury and not sold, and the proceeds of forty-nine thousand dollars ($49,000) worth of said stock, so sold, shall be placed in the treasury. The balance of said money shall be paid to the parties of the second part for their fifty-one (51) per cent. of the said stock."

Little either had with him, or within a few days thereafter received from the Iowa company, a paper known as "Nebraska Prospectus" (Exhibit 13). This document contained the following language: "A mausoleum com-

pany is to be organized in the state of Nebraska by the Iowa Mausoleum Company with a capital stock of $200,000. The Iowa company will furnish two men experienced in the business, who will be capable of looking after the details of the business, and are experienced salesmen for crypts. The Iowa company controls three patents covering this mode of interment, and the use of the same in the state of Nebraska will be turned over to the Nebraska company." This prospectus was used by Little, in conjunction with Matters, in their efforts to secure subscribers for stock in the Nebraska company. Matters and Little discussed the question of commission for the sale of stock, which, by the terms of the contract between Matters and the Iowa company, they were to adjust, and agreed between themselves upon $30,000 as the amount which they ought to receive for such commission, $10,000 of which was to go for expenses, and the remaining $20,000 divided equally between them. $150,000 worth of stock was not sold within 90 days, as provided by the contract, and thereupon Matters returned to the Iowa company the $2,500 which had been advanced him for expenses. Mr. Little remained in Omaha, assisting Matters in securing subscriptions for stock. A little later on, Doctor Shallenbarger appeared upon the scene, and was introduced to defendant as the treasurer of the Iowa company. Defendant testified that he had a talk with Mr. Little and Doctor Shallenbarger, and that they represented to him that there would be put in the Nebraska company treasury $50,000 in cash for working capital, and another $50,000 of the stock of the Nebraska company which would be treasury stock, and also told him that they would put up an indemnifying bond; that he never received any stock in the Nebraska company from either the Nebraska or the Iowa company for his notes, and that he would not have executed the notes if the representations, to which he testified, had not been made; that he did not know Mr. Matters until he met him at the time of the interview to which he testified. Mr. H. K. Burket, president of the Nebraska company, testified, corroborating the testimony of defendant as to his interview with Little and

Doctor Shallenbarger; that Shallenbarger was treasurer of the Iowa company; that Shallenbarger represented to defendant, before he subscribed for his stock, that they were going to organize a Nebraska company with $200,000 capital; that $50,000 cash was to go to the Nebraska company for working capital, and $50,000 was to be put in the treasury as treasury stock, and $100,000 was to go to the Iowa company for their patent, and that they were to give an indemnity bond; that the Iowa company did not place the $50,000 in the treasury, nor furnish an indemnity bond. He also testified that Mr. Matters was not a subscriber for stock in the Nebraska company, but that he was assisting Mr. Little of the Iowa company in promoting the Nebraska company. Mr. Little testified that he visited Omaha with the intention of promoting a company for the Iowa company, as their representative, and that he came to Omaha under the Iowa company's direction. In every essential detail he corroborates the testimony of defendant. Mr. Burket also testified, as did Mr. Pinney, secretary of the Nebraska company, and Mr. Goodell, and defendant himself, that, without the $50,000 in cash in the treasury for operating expenses, and the indemnity bond for the protection of the patents, the stock of the Nebraska company was valueless. Mr. Little also testified that he said to defendant that he and Matters were to sell $49,000 or $50,000 of stock, and the money was to go into the treasury of the Nebraska company; that they were employed to sell the stock, and that he told the persons to whom he sought to sell stock in the Nebraska company that he came to Omaha to organize a company for the Iowa company; that the Iowa company sent him $50 a week; that his purpose in coming to Omaha originally was to organize a company on behalf of the Iowa company, and that he supposed he showed the prospectus to defendant, and that he talked with defendant, prior to the time of his subscription, respecting the prospectus.

In the light of the above testimony, it is idle to claim that Mr. Matters was not the duly authorized agent and representative of the Iowa company in everything he did

in relation to the organization of the Nebraska company and the soliciting of sales of stock in such company. In taking the notes from defendant, payable to himself, he was taking them for the Iowa company. This being true, all transactions between the Iowa company and Matters, in relation thereto, were matters with which defendant had no concern. He gave the notes in controversy for his subscription to stock in the Nebraska company, under the statement made by the Iowa company's representatives that the Nebraska company was being organized by the Iowa company, and that the Iowa company would place in the treasury of the Nebraska company for operating expenses $50,000 in cash and $50,000 worth of treasury stock, and furnish the Nebraska company an indemnifying bond as a guaranty of the validity of their patents and a protection against infringement thereof. It failed to deposit either the money or the bond. That failure, under the testimony of the witnesses, rendered the stock in the Nebraska company valueless. This testimony is not controverted. There was, therefore, a total failure of consideration for the notes. But it is urged by plaintiff that the general principle is that the failure to perform promises which relate to future obligations does not constitute failure of consideration of a note. There are cases which, under certain circumstances, so hold; but, as applied to the facts shown in the case at bar, we do not think a case can, or ever will be found, to sustain plaintiff's contention. It has been held that, if the consideration paid for a note is of the value of a peppercorn, it will support the note. If I sell, and deliver the thing sold, the value may not be material; but, if I fail to deliver part of the thing sold, and the nondelivery of that part renders the part which I do deliver valueless, the consideration fails. I must deliver the whole of the "peppercorn." If the mere promise to put the money in the treasury and furnish an indemnity bond is a sufficient consideration to entitle plaintiff to recover upon the notes, then, if A gives his note to B for $1,000, relying upon B's promise to send him the money the next day, and B never sends it, his *promise* to send it

would be sufficient to entitle him to recover on the note. This is not the law. Nor will it aid B in an attempt to recover upon the note that he is a man of large means, and that A could therefore recover the $1,000 from him in an action therefor. The consideration which defendant was to receive for the note has never been paid or furnished, and, if he is now compelled to pay the notes, the Iowa company will receive $18,500, plus interest, for nothing. It is interesting to note that the necessity for requiring an indemnity bond will appear from an examination of *International Mausoleum Co.* (under whom the Iowa company held its rights under the patents involved) *v. Sievert*, 197 Fed. 936, where the United States district court for the northern district of Ohio held one of the patents, under which the Iowa company was operating, viz., No. 858,070, void.

In the light of the views above expressed, the court did not err in giving instructions 6 and 7, covered by the second, third and fourth assignments. We are unable to discover any theory under the law, or in harmony with honesty and fair dealing, which would support any other judgment than that rendered.

AFFIRMED.

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

DE FOREST D. JOHNSON ET AL., APPELLEES, V. HERMAN P. BUHMAN ET AL., APPELLANTS.

FILED APRIL 16, 1915. No. 18026.

Municipal Corporations: VACATION OF ALLEY. The syllabus in *Hart* v. *Village of Ainsworth*, 89 Neb. 418, re-examined and approved, and the law as therein announced *held* applicable to and decisive of this case.

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

Courtright & Sidner and *George W. Wertz,* for appellants.

William V. Allen and *William L. Dowling, contra.*

FAWCETT, J.

The controversy in this case is over a strip of ground 20 feet wide, running east and west in block 7, Railroad addition to the village of Leigh, bounded on the north by lots 1 to 6, inclusive, and on the south by lot 7, all in said block 7. The east end of the strip connects with Elm street, and the west end with an alley running north and south through the middle of the block. Plaintiffs instituted this suit in the district court for Colfax county to restrain the defendants Buhman, Hahn and Glandt, as trustees, defendant Lee, as village marshal, and defendant McMullen, as street commissioner, from trespassing upon the strip named, or in any manner interfering with plaintiffs in their exclusive possession thereof. From a judgment granting an injunction as prayed, defendants appeal.

Block 7 was platted July 2, 1886. Subsequently plaintiffs became the owners of the seven lots above referred to, through which the strip in controversy, designated on the plat as an alley, runs. Their contention is that the village never accepted the dedication of this alley, that the public never entered upon the use of it, but that at all times until 1909 the strip had been used by the owners of lots 1 to 7, inclusive, in connection therewith, as one entire body of land, and as such had been improved and built upon; that in June, 1909, the village authorities, by the performance of certain acts, specifically set out, attempted to take possession of and assume control over the strip, which attempt was resisted by plaintiffs; that in April, 1910, the plaintiffs duly executed and filed, in accordance with the provisions of statute, a deed vacating the plat, so far as it affected the seven lots and strip of land in controversy; that thereafter and until December, 1910, defendants desisted from further trespassing upon the

premises, and that plaintiffs restored their fences around the same, and otherwise repaired the injury which defendants had previously done; that on the last-named date defendants unlawfully broke and entered upon the premises, and forcibly removed the fences; and that, if not restrained, they will continue their attempts to open the strip of ground in question as an alley. This last allegation is admitted. The district court, at the close of the trial, June 5, 1912, took the case under advisement, and the parties were given leave to file briefs in support of their respective contentions. October 23 the court entered its findings that the strip of ground in controversy is the property of plaintiffs as owners of the lots adjoining and abutting thereon, that it is not and never has been any part of the public streets or alleys of the village, that neither the defendants nor their successors in office have any right to disturb or molest plaintiffs in the peaceable possession and occupancy of said strip, by trespassing thereon or threatening to open the same as a public street or alley, and perpetually enjoined defendants and their successors in office from so doing.

Defendants' principal contentions are that the deed of vacation was not operative, for the reason that it abridged and destroyed the rights and privileges of other proprietors in the plat; that it seeks to close and obstruct a highway laid out according to law; that it should have been signed by all the owners of the plat, and was not sufficient when signed by only the owners of the tract sought to be vacated. The evidence clearly sustains the judgment of the district court. It shows to our entire satisfaction that the vacation of this strip of land or alley did not in any manner abridge or destroy any of the rights or privileges of other proprietors in the plat. Conceding that the strip of land had been laid out as an alley by the original plat, the village officers and other proprietors within the plat had by their laches become estopped to claim any right to enter upon and take possession of this strip as an alley. For over 20 years after the filing of the plat they had stood by and seen plaintiffs and their grantors in possession

of and using this strip of land in connection with their lots on each side thereof as one tract, in a manner which clearly indicated an intention to hold possession by plaintiffs under a claim of ownership. Moreover, if plaintiffs had not inclosed and used this strip of ground prior to the time of filing their deed of vacation, and during all of those years the strip had been separated from plaintiffs' lots on the north and on the south by fences, but had never been used by the public nor any act done by the village authorities indicating an intention to open and use the same as an alley, the deed of vacation would have been effectual to vest in plaintiffs the absolute ownership of and control over the strip in question. *Hart v. Village of Ainsworth,* 89 Neb. 418.

We think further discussion is really unnecessary. First street and Short street on the south, Second street on the north, Main street on the west, Elm street on the east, and the alley running north and south through the middle of block 7, afford every proprietor of lots in block 7 access to his property.

We are unable to discover any theory upon which we would be justified in interfering with the judgment of the district court. It is therefore

AFFIRMED.

ROSE and SEDGWICK, JJ., not sitting.

STATE, EX REL. PETER O'SHEA, APPELLANT, V. FARMERS IRRIGATION DISTRICT ET AL., APPELLEES.

FILED APRIL 16, 1915. No. 18880.

1. **Statutes:** CONSTRUCTION. A statute which is not uncertain or ambiguous will be construed according to its terms.

2. **Waters:** IRRIGATION CANALS: MAINTENANCE OF BRIDGES. Section 3438, Rev. St. 1913, which requires the owner, or those in control, of an irrigation ditch or canal to construct and maintain a bridge across the same, for the free and convenient use of the owner of lands lying on both sides of such ditch or canal, applies in all cases.

whether the owner owned it at the time the ditch or canal was built, or subsequently acquired by purchase tracts lying on different sides which together constitute one farm.

3. **Eminent Domain:** WATERS: IRRIGATION CANALS: MAINTENANCE OF BRIDGES. And such statute is not void as authorizing the taking of the property of the ditch company without compensation. The burden so imposed upon ditch companies constitutes a part of the consideration for the valuable right of eminent domain given to such companies by other provisions of the statute.

APPEAL from the district court for Scott's Bluff county: RALPH W. HOBART, JUDGE. *Reversed with directions.*

William Morrow, for appellant.

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

FAWCETT, J.

Relator is the owner of land in the south half of section 18, township 22, range 53, in Scott's Bluff county, which land is traversed by the irrigation canal of respondent. About 120 acres lie north and about 26 acres south of the canal. Relator brought this action in the district court for Scott's Bluff county to compel respondent to construct a bridge across the canal so as to connect the two tracts of land. From a judgment denying a writ and dismissing his action, he appeals.

The action is based on the provisions of section 3438, Rev. St. 1913, viz.: "Any person, company, corporation, or association constructing a ditch or canal through the lands of any person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any inclosed field." The case turns upon the construction to be given to the words

"in all cases" immediately following the semicolon. Does the requirement of the section, beginning with those words, relate to lands owned by one person and located on both sides of the ditch at the time the ditch was constructed, or does it relate as well to cases subsequently arising where one person becomes the owner of lands on both sides? In 1906 the Tri-State Land Company, being the then owner of the entire tract of land, constructed the irrigation canal through the same. In 1909 it sold the canal, together with the right of way, to the Farmers Mutual Canal Company. After the construction of the canal, and after the sale of the same to the Farmers Mutual Canal Company, the Tri-State Land Company sold the lands in controversy to relator; and at a still later date the Farmers Mutual Canal Company conveyed the canal and right of way to the respondent Farmers Irrigation District. It is contended by respondent, in support of the judgment of the district court, that, the canal having been built by the Tri-State Land Company while it owned the land, the canal was constructed through the lands of a corporation having an interest in the canal, and that, such being the fact, the land, by virtue of such interest in its owner at that time, was thereby excluded from the provisions of the statute, and, hence, the statute does not apply to the present case; that the statute does not apply where the canal is constructed over the land with the consent of the landowner, and does not apply to cases where the necessity for a bridge occurs at a time subsequent to the building of the canal. We are unable to concur in this construction. The statute is not ambiguous, and must therefore be construed according to its terms. It provides, first, the manner in which the ditch or canal shall be constructed, viz., "in a substantial manner so as to prevent damage to such land." This provision relates solely to the manner of construction. The words "through the lands of any person, company, or corporation" do not limit the statute to cases where the ditch cuts *through* the land of some individual owner, leaving land on both sides thereof. They apply as

well to lands abutting on a ditch. As to all such lands, as well as those actually penetrated or cut in two by a ditch, it must be constructed "in a substantial manner so as to prevent damage to such land." The statute then proceeds to say what shall be done so as to enable owners of lands on both sides of the ditch to have "the free and convenient use" of such lands, and provides that, where it is necessary for the free and convenient use of lands on both sides of the ditch, the owner of the ditch shall erect substantial and convenient bridges across its canal or ditch "in all cases." The words, "in all cases," mean precisely the same, whether they be used, as in the statute, immediately preceding the requirement for the construction of bridges, or immediately following such requirement. If the legislature had intended this requirement to relate only to conditions as they existed at the time the ditch was constructed, it would have been an easy matter to have said so. We see no difference between the rule which should be applied in construing this statute and that applied to the statute requiring railway companies to construct farm crossings across their roads. The principle involved is the same in each.

This question is fully and very ably discussed in *Quantock v. Missouri, K. & T. R. Co.*, 117 Mo. App. 469, where, in construing the section of the Missouri statute providing for farm crossings by railroads, it is held that the statute "was not intended to apply only to farms which the road divided by its original construction, but should apply where farming lands on both sides of the road are afterwards owned by a single proprietor." This decision was by the Kansas City court of appeals and being in conflict with a construction of the same statute by the St. Louis court of appeals in *Stumpe v. Missouri P. R. Co.*, 61 Mo. App. 357, the case was transferred to the supreme court for final determination. That court, in 197 Mo. 93, expressly disapproved the holding of the St. Louis court of appeals, and affirmed the holding of the Kansas City court. The syllabus reads: "The statute, requiring a railroad which cuts a farm in two to construct a crossing for the benefit of the

owner, applies in all cases where the farm lies on both sides of the railroad, whether the owner owned it at the time the railroad was built, or subsequently acquired by purchase tracts lying on different sides which together constitute one farm." The supreme court cuts its own opinion short, thus (p. 96): "We do not deem it necessary to enter upon a further discussion of this subject, because in the opinion of our Kansas City court of appeals, by Ellison, J., in this case, reported in 117 Mo. App. 469, everything is said that is necessary to be said, and we adopt that as our opinion." Emulating the example of the Missouri supreme court, we adopt the reasoning of Ellison, J., of the Kansas City court, as being applicable to the case at bar, and sound in principle.

Franklin County v. Wilt & Polly, 87 Neb. 132, strongly relied upon by respondent, does not sustain its contention. In that case the county sought to compel the respondents, who were the owners of a private mill, to construct a bridge over their mill race at a point on their private grounds where it was intersected by a public road laid out seven years after the construction of the mill race. That such a case is clearly distinguishable from the one at bar is shown by the language of Judge Root, as follows (p. 134): "There is nothing in the record to indicate that the mill to which the raceway is appurtenant is a toll mill, that any right exercised in operating it was acquired by the exercise of the right of eminent domain, or that the respondents' business is affected in any manner with a public interest."

It is next urged that, if the statute under consideration applies to a case like the one at bar, it is unconstitutional, for the reason that it is class legislation in that it does not apply to all waterways, but only to irrigation ditches, and *State v. Farmers & Merchants Irrigation Co.,* 59 Neb. 1, is cited in support of the contention. We think counsel are in error. The cited case holds that section 58, art. II, ch. 93*a,* Comp. St. 1897, is void, but also holds that the section is not so intimately connected with the remainder of the act as to be incapable of separation from it, and

announces the oft-repeated rule that, when a separable part of a statute is adjudged to be null, the remainder continues in force, unless the unconstitutional part was an inducement to the adoption of the measure, which the opinion holds was not true in that case. Turning then to chapter 93*a*, *supra*, and eliminating from it section 58, thus held void, we find that section 51 is in the exact language of the section of the statute we are now considering, and under which the present action was instituted. We are unable to see how section 51, *supra*, is vulnerable to the holding made as to section 58.

It is next said that the section under consideration is void, for the reason that respondent is given no compensation for the taking of its property for the purpose of a bridge, and that it would take the property of respondent for private purposes. The answer to this contention is that the burden thus imposed upon a ditch company constitutes a part of the consideration for the valuable right of eminent domain given it by the statute. Without such right it could not build its ditch through a man's farm. Having accepted the right to build, regardless of the wish of the landowner, it must take that right burdened with the conditions imposed by the legislature. The question of the weight of the burden is one for the consideration of that body, and not for the court.

The judgment of the district court is reversed and the cause remanded, with directions to grant a peremptory writ of mandamus, as prayed in relator's petition.

REVERSED.

ROSE and SEDGWICK, JJ., not sitting.

G. A. ENOS ET AL., APPELLANTS, V. A. L. HANFF, APPELLEE.

FILED APRIL 16, 1915. No. 18195.

1. **Fraudulent Conveyances:** LEASES FOR SALOON PURPOSES. Section 2643, Rev. St. 1913, is not limited to conveyances to defraud creditors. It expressly provides that conveyances made to defraud creditors "or persons" are void. The language is broad enough, in the light of the common law, to include transfers made with the intent and purpose to evade the provision of the "Gibson act" (Laws 1907, ch. 82) forbidding the leasing of a building for saloon purposes by or from manufacturers of liquors.

2. ———: HUSBAND AND WIFE: CORPORATIONS. If a husband, who owns substantially all of the stock in a corporation, procures another corporation to be organized and substantially all of its stock to be issued to his wife, and thereupon the first corporation transfers its property to the new corporation, the transfer is equivalent to the transfer of property directly from husband to wife, within the meaning of section 2643, Rev. St. 1913.

3. ———: CORPORATIONS: DISSOLUTION. If such transfer is made for the purpose of enabling the first corporation, a brewing company, to continue to control buildings for the purpose of leasing them as saloons, the purpose would be illegal, and, if known by the stockholders of the new corporation, such corporation might be dissolved by *quo warranto*.

4. **Statutes:** CONSTRUCTION. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter." *United States v. Delaware & Hudson Co.*, 213 U. S. 366.

5. ———: ———: CONSTITUTIONAL LAW. While the legislature is not without power to enact a statute in the legitimate exercise of its police power, although it might result in injury to some private interest, it is also undoubtedly true that a statute, the purpose of which was primarily and principally the destruction of property, would violate our fundamental law, and we ought not to assume that in enacting such statute the legislature intended a construction which, although unnecessary to the furtherance of the main purpose of the statute, might result in the arbitrary confiscation of property, if the statute will admit of a more reasonable construction.

6. ———: ———: "GIBSON ACT." The so-called "Gibson act" (Laws 1907, ch. 82) should not be construed so that it might result in the

unnecessary destruction of property values, if it is capable of other construction which would serve the purpose evidently aimed at.

7. ———: ———: FRAUDULENT CONVEYANCES. Questions of fraudulent conveyance of property are generally investigated by courts which are clothed with ample equity powers. They are usually complicated and difficult questions. This statute provides no adequate means of determining such complicated and important and far-reaching questions.

8. **Intoxicating Liquors:** LICENSE: POWER OF BOARD: FRAUDULENT CONVEYANCES. There is no direct provision in the statute requiring the licensing board to investigate such questions, or to refuse a license because of doubts in regard to the good faith of the title of the apparent owner of the property where the applicant expects to operate his saloon.

9. ———: ———: ———: ———. Under such circumstances, if the legislature had intended that such investigations must be made by this board, and that no license should be issued where the licensing board should find that there was fraud or other infirmity in the title of the party from whom the applicant proposed to lease when that title appeared to be fair and regular upon the record, it seems probable that the legislature would not have left such intention in doubt. It is a more reasonable construction of this statute that the intention was to leave such inquiries to the ordinary process of the law.

10. **Municipal Corporations:** POWER OF MAYOR: DECIDING VOTE. The mayor of a city of the second class having less than 5,000 inhabitants may cast the deciding vote when the council is equally divided.

11. **Intoxicating Liquors:** LOCATION OF SALOON: DISCRETION OF BOARD. It is confided to the discretion of the city council to determine the location of a saloon licensed by the council.

12. ———: BOND: REMONSTRANCE: BURDEN OF PROOF. If, upon application for saloon license, the remonstrants allege that the surety company executing the bond tendered was not licensed to do business in this state, or that becoming such surety was not within the powers of such bonding company, the burden is upon them to make such proof.

13. ———: LICENSE: CHARACTER OF APPLICANT: EVIDENCE. The fact that the applicant for license declines to answer incriminating questions is not conclusive that he is not a man of respectable character and standing. The evidence in this case establishes that the applicant is qualified.

14. ———: ———: FORCE OF ORDER. The order of the licensing board granting the license is not an ordinance as defined in section 5227,

Rev. St. 1913. It does not have "the force and effect of law." The provision of section 5237, Rev. St. 1913, that "no ordinance for the government of any city * * * shall go into effect until thirty days after the passage of the same" does not apply.

15. ———: ———: ORDINANCE: INITIATIVE AND REFERENDUM. An ordinance regulating the licensing of the sale of liquors must be enacted before such license can be granted, and the adoption or rejection of such an ordinance is within the initiative and referendum act.

16. Municipal Corporations: INITIATIVE AND REFERENDUM ACT: VALIDITY. The initiative and referendum act of 1897 (Laws 1897, ch. 32) is not invalid as an attempt to regulate the administration of the affairs of cities and other municipalities.

17. Statutes: CONSTRUCTION. If section 10 of the act (Laws 1897, ch. 32) is incapable of a construction in harmony with section 22, art. I of the Constitution, which we do not decide, it may be disregarded without invalidating the whole act.

Rehearing of case reported in 95 Neb. 184. *Former judgment of reversal vacated, and judgment of district court affirmed.*

Smyth, Smith & Schall appeared on rehearing as additional counsel, *amici curiæ.*

SEDGWICK, J.

After our former opinion in this case (95 Neb. 184), a reargument was ordered upon the following propositions: First, Who has the burden of proof as to the good faith of the organization of the realty company and Mrs. Storz' ownership of the stock? Second, Is the question involved in this case analogous to a transfer between relatives when creditors are interested? Additional briefs have been presented and argument had upon these propositions both in behalf of the parties themselves and in behalf of the Independent Realty Company. The facts necessary to an understanding of the questions presented are sufficiently stated in our former opinion.

It is suggested that the statute of frauds (Rev. St. 1913, sec. 2643), relates only to transfers to defraud creditors. The statutes of the different states vary considerably in the terms used. They are, of course, suggested by, if not mod-

eled upon, the English statute of 13 Elizabeth, ch. 5. That act made any conveyance of lands or personal property "devised and contrived of malice, fraud, covin, collusion or guile * * * to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs * * * clearly and utterly void, frustrate and of none effect." Some of the statutes of the different states are expressly limited to conveyances to defraud creditors. Others are limited to conveyances to defraud creditors or purchasers. Ours follows more nearly the English act and the statute of New York, which include conveyances to hinder, delay, or defraud creditors or other persons. The words "or persons" are in our statute, so that our statute is not limited to creditors only. The statute, however, "is merely declaratory of the common law. * * * The principles of the common law, as now understood, are so strong against fraud in every shape that they will attain every end proposed by the statute. * * * As the act is merely declaratory, resort may always be had to the principles of the common law whenever the statute fails to reach a case of fraud. * * * The common law supplements the statute, to the end that justice may be done and every species of fraud suppressed." Bump, Fraudulent Conveyances (4th ed.) pp. 8, 9.

The transaction in this case, conveying this property to the corporation and issuing substantially all of the stock in the new corporation to Mrs. Storz when Mr. Storz himself held substantially all of the stock in the other corporation, would be regarded in an action by creditors of Mr. Storz to subject this stock to the payment of his debts as though his stock held in the name of Mr. Storz had been by him transferred to his wife. This precise point was decided by this court in *Lusk v. Riggs,* 65 Neb. 258, 70 Neb. 713. If this transaction was intended to result in delaying creditors of the Storz Brewing Company and Mrs. Storz took the stock with knowledge of that fact, there is of course no doubt that it would be held to be void as against such creditors.

Many decisions of this court are cited as holding that "the rule that the burden of proof is upon the wife to sustain her title where property is transferred to her by her husband applies only where the rights of creditors are affected." The earliest case cited is *German Ins. Co. v. Hyman,* 34 Neb. 704, in which Judge Post states the law correctly as follows: "A gift to a married woman by her husband of money or property is valid except as against the creditors of the latter and those having the equities of creditors." This decision has nothing to do with the above proposition contended for. It decides merely that the property itself passes to the donee, under the conditions named, and that only creditors of the donee and *those having the equities of creditors* can claim the property. It contains no intimation as to who has the burden of proof when it is asserted that the conveyance was made to defeat the established policy of the state. In *Dayton Spice-Mills Co. v. Sloan,* 49 Neb. 622, *Lavigne v. Tobin,* 52 Neb. 686, and *Boldt v. First Nat. Bank,* 59 Neb. 283, the question was whether a gift from husband to wife before he had incurred or contemplated any indebtedness was valid as against claims of creditors for liabilities afterwards incurred. In *Veeder v. McKinley-Lanning Loan & Trust Co.,* 61 Neb. 892, 910, the point involved is stated in the opinion: "If made to defraud the creditors of the grantor, the instrument (deed from husband to wife) would be valid as between the parties, and a court of equity would not lend itself to grant relief to the parties from the consequence of their fraudulent acts. This could only be accomplished by the creditors of the grantor who were such at the time of the making of such fraudulent conveyances." In *Doane v. Dunham,* 64 Neb. 135, and *Van Etten v. Passumpsic Savings Bank,* 79 Neb. 632, it was decided that a deed from husband to wife without consideration will be presumed to be a gift as against the claim of a resulting trust from the grantor to his heirs. The question raised here was not presented or considered in any of these cases.

If the Storz Brewing Company organized or promoted this company and transferred this property for the purpose

of enabling the brewing company to continue to control these properties for the purpose of leasing them as saloons, there can be no doubt that the company so formed would be for an illegal purpose and might be dissolved by *quo warranto*. It is not necessary to consider here what evidence would be necessary in such an action to justify the dissolution of the corporation. The question is whether the Gibson act (Laws 1907, ch. 82) controls the license board and prevents the granting of a license to be used in a building owned by the Independent Realty Company. In *United States v. Delaware & Hudson Co.*, 213 U. S., 366, the supreme court of the United States construed the "commodities clause" of the Hepburn act. The clause provided: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." The court, by the present Chief Justice, said: "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which

such questions are avoided, our duty is to adopt the latter." It was contended in that case that "the commodities clause is unconstitutional because its penalties are so prescribed as practically to amount to a denial of an opportunity by railroad companies to obtain a judicial determination of the questions involved," and that "even if abstractly considered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the fifth amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of the property which the corporations possessed and had long enjoyed under the sanction of valid state laws." The court quoted from the opinion of the lower court: "The general situation is that for a half century or more it has been the policy of the state of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to market in Pennsylvania and other states. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania; one of them three-quarters of a century ago and the other half a century ago, for the express purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and other states. It is not questioned that, pursuant to this general policy, investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different states of the Union and Canada for the year of 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was

transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other states and Canada, and of this four-fifths, from 70 to 75 per cent. was produced either directly by the defendant companies or through the agency of their subsidiary coal companies. It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the state of Pennsylvania, and that their right to enjoyment of the same has never been doubted or questioned by the courts or people of that commonwealth, but has been fully recognized and protected by both."

The court then stated some of the constitutional questions which might arise from the foregoing considerations, and did not find it necessary to determine them. Two of the constitutional questions that necessarily arose from the construction and application of the statute are then stated by the court and thought to be of such importance as to require the court to so construe the statute, if possible, as to avoid such constitutional questions. We think that similar considerations require us to examine the statute in question very closely in ascertaining the intention of the legislature. It will be seen from the facts stated in our former opinion that the question is of far-reaching importance to the Independent Realty Company. These properties in different parts of the state, valued at several hundred thousands of dollars, were, before the enactment of this statute, rented to saloon keepers, and saloons were being operated in them. They were in many instances constructed for that purpose and were not adapted to any other. The statute was in force within 90 days after it was enacted, and imposed very severe penalties upon the

brewing company if it leased these properties for saloon purposes, and also imposed very severe penalties upon the saloon keeper if he leased a building for saloon purposes from the brewing company. It is, of course, true that the legislature is not without power to enact a statute in the legitimate exercise of its police power, although it might result in injury to some private interest; but it is also undoubtedly true that a statute, the purpose of which was primarily and principally the destruction of property, would violate our fundamental law, and we ought not to assume that, in enacting a statute in the legitimate exercise of police power, the legislature has intended a construction which, although unnecessary to the furtherance of the main purpose of the statute, might result in the arbitrary confiscation of property. We ought not, therefore, to give this statute such a construction as might result in the unnecessary destruction of property values, if it is capable of other construction which would serve the purpose evidently aimed at.

Section 5 of the act (Laws 1907, ch. 82) makes it unlawful for any person "to lease, occupy or use * * * any building * * * owned or controlled by any * * * corporation * * * engaged in the manufacture" of liquors. The Independent Realty Company was not engaged in the manufacture of liquors. Whatever may have been the motives of those in control of the Storz Brewing Company in organizing the Independent Realty Company and transferring property, it does not necessarily follow that this applicant participated in those motives. He apparently had no means of knowing as to the organization of these companies and what the motives of their promoters may have been. Questions of fraudulent conveyance of property are generally investigated by courts which are clothed with ample equity powers. They are usually complicated and difficult questions. The construction of the statute contended for by the remonstrants would imply that the legislature intended that the applicant for saloon license must determine the question of the good faith of the organizers of these companies at his peril, and, if he made a

mistake in that regard, would subject himself to a penalty of from $1,000 to $10,000. This statute provides no adequate means of determining such complicated and important and far-reaching questions. The licensing board is an administrative body. Their hearings are informal. They are not supposed to be familiar with legal proceedings or the rules of evidence. Their investigation of such questions must necessarily be inadequate and superficial. If they admit incompetent evidence, it may be disregarded upon appeal, but their rulings upon the exclusion of evidence are final; no further evidence is taken by the court upon appeal. The district court determines the matter upon the record made and the evidence taken by the licensing board, and, when the case comes to this court, we are likewise limited. Such an investigation is generally imperfect and incomplete. The court not having all of the facts before it, it would be unable to determine the truth of the matter, and its conclusion might be unjust. There is no direct provision in the statute requiring the licensing board to investigate such questions, or to refuse a license because of doubts in regard to the good faith of the title of the apparent owner of the property where the applicant expects to operate his saloon. Under such circumstances, if the legislature had intended that such investigations must be made by this board, and that no license should be issued where the licensing board should find that there was fraud or other infirmity in the title of the party from whom the applicant proposed to lease when that title appeared to be fair and regular upon the record, it seems probable that the legislature would not have left such intention in doubt. We think that it is a more reasonable construction of this statute that the intention was to leave such inquiries to the ordinary process of the law. The licensing board may exercise its discretion, and is not required to grant a license if a doubt is entertained as to the good faith in the proceedings in any respect. On the other hand, it seems clear that the legislature never intended that the licensing board should be compelled to enter upon such investigations as are suggested by this objection.

Having reached the conclusion that the judgment of the district court ought not to be reversed for the reason formerly given, we proceed to an examination of the other grounds urged for reversal. It is objected that the mayor did not possess power to cast the deciding vote when the council was equally divided, and therefore no license has been legally granted to defendant. *Rohrer v. Hastings Brewing Co.,* 83 Neb. 111, is conclusive against remonstrants upon this point. It also disposes of assignment No. 2.

The objection that the "location of this saloon building in the city of Stanton in itself was such as, considered with reference to the business, constituted a business nuisance" is answered in *Fraser v. Hunter,* 96 Neb. 134, where it was held: "The determination of the locality in which a saloon may be conducted is one which is committed to the good judgment of the licensing body, and not to the discretion of the courts."

It is objected that "no proper liquor bond appears to have been offered to and approved by the mayor and council." It will be seen that the objection is not that no liquor bond was offered and approved, but that no "proper" bond was offered. It is conceded that a bond was tendered, signed by the American Surety Company, and the real contention seems to be: First, that the applicant did not furnish proof that executing saloon keepers' bonds was within the powers conferred upon the company by its charter; and, second, that it is not shown that the surety company is authorized to do business in the state of Nebraska. In *Lambert v. Stevens,* 29 Neb. 283, 287, it was said: "When the remonstrance denies any matter necessary to confer jurisdiction upon the granting power, as that certain signers to the petition are freeholders, the burden is on the applicant to establish that they are qualified petitioners. Where the remonstrance sets up new matter, such as that certain signers to the petition were made freeholders for the purpose of signing the same, or that the applicant has been guilty of a violation of any provisions of the liquor law within a year, or that any former license

has been revoked, the burden is upon the remonstrators to establish such new matter." It follows that the burden was upon the remonstrants to establish the facts which they now urge for the rejection of this bond.

The applicant was questioned in regard to violation of the law by him and declined to answer. It is argued from this that he has conceded that he was not a man of good moral character, but this conclusion does not follow. The evidence shows that the applicant had never engaged in the saloon business prior to the time of making this application; that he was 59 years old, was a retired farmer, had resided in Stanton county since 1874, and had held the offices of precinct assessor and county assessor of Stanton county. At the hearing he introduced as witnesses the county judge of the county, who had known him since 1906, Chris Selle, who had known him for 40 years, and H. D. Miller, vice-president of the First National Bank of Stanton, who had known him for 20 years, all of whom testified as to his good character and standing in the community. It is clear that this assignment is without merit. *Shank v. Lee*, 90 Neb. 732; *In re Phillips*, 93 Neb. 152.

It is urged that, assuming that ordinance No. 94 and the law of 1897, under which it was passed, are valid and all proceedings of the mayor and council "up to and including the adoption of the order granting license in this case, still, under the plain provision of the 'Act of 1897,' the action of the council directing that the license issue and the action of the district court directing that the license issue 'forthwith' were both premature and erroneous." The order of the licensing board granting the license is not an ordinance as defined in sec. 5227, Rev. St. 1913. It does not have "the force and effect of law." The provision of section 5237, Rev. St. 1913, that "no ordinance for the government of any city * * * shall go into effect until thirty days after the passage of the same" does not apply. An ordinance regulating the licensing of the sale of liquors must be enacted before such license can be granted, and the adoption or rejection of such an ordinance is within the initiative and referendum act.

The initiative and referendum act of 1897 is not invalid as an attempt to regulate the administration of the affairs of cities and other municipalities. It provides for the reference to the voters of such measures as the legislative authorities of such municipalities have power to "give the force and effect of law." It does not violate section 11, art. III of the Constitution, nor that provision of the federal Constitution that guarantees to the people representative form of government.

If section 10 of the act (Laws 1897, ch. 32) is incapable of a construction in harmony with section 22, art I of the Constitution, which we do not decide, it may be disregarded without invalidating the whole act.

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

AFFIRMED.

BARNES, J., concurring.

It is stated in the majority opinion, in substance, that we ought not to assume that, in enacting the so-called Gibson act, the legislature intended that it should be so construed as to result in the confiscation of the vast amount of property which at one time was owned by the brewing company, if such construction can reasonably be avoided. As I understand the question, such would be the effect of the act if we should hold that the licensing board had the power and was required to determine the rights of the Independent Realty Company to own, hold and control such real estate. This question is a judicial one, and should be determined by a court of equity in a case brought directly for that purpose, and in which the Independent Realty Company is a party. This question should not be decided by an administrative body, such as a city council or village board. It is shown by the record that the title to the realty once owned by the Storz Brewing Company is now of record in the Independent Realty Company. It is regular and fair upon its face. Its title has not been assailed by the state in any proceeding in a court having jurisdiction to determine the *bona fides* of its title. As I under-

stand the question, the title of the realty company should not be determined by an administrative body upon the mere suggestion that the property still belongs to the brewing company. This question cannot properly be disposed of by saying that the statute is so plain that a village board or city council is bound to refuse a license to sell malt, spirituous or vinous liquors to an applicant, upon the suggestion that the building in which the applicant proposes to conduct his business is owned and controlled by a brewing company, in a proceeding to which the owner of the title is not a party. It is not a proper disposition of this far-reaching and important question to say that the statute is too plain for misinterpretation or misconstruction. The question should be determined in an action for that purpose, brought in a court competent to determine it, and its judgment should be such that a licensing board would have no difficulty in following the rule announced by the court. Otherwise we might have the good faith of the Independent Realty Company's title upheld in one village and denied in others.

I therefore concur in the majority opinion.

ROSE, J., dissenting.

The controlling question presented by the record is very simple, and its proper solution is free from difficulty. Can a village board issue a valid license authorizing the sale of intoxicating liquors in a building controlled by a manufacturer of beer? The statute says, "No," in language too plain for misinterpretation or misconstruction. Rev. St. 1913, sec. 3892. The power of the legislature to pass such a law and to make it applicable to present owners of property devoted to saloon purposes has been affirmed by the supreme court of the United States as follows: "Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented, or other intoxicating liquors, to be used as a beverage, may be enforced against persons who, at the time, happen to own property whose chief value consists in its fitness for such

manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments." *Mugler v. Kansas*, 123 U. S. 623.

The arm of sovereignty created by law to withhold from an applicant a license to sell intoxicating liquors in a building controlled by a manufacturer of beer is the licensing board. Contrary to the pronouncement of the majority, the legislature has in unmistakable terms clothed that board with the machinery and the power to investigate and determine whether a proposed site for a saloon is owned or controlled by a brewer. If the licensing board makes a mistake in exercising such authority, the courts may correct it by means of an appeal. Rev. St. 1913, ch. 40. In the present case, under rules of evidence recognized by the courts of Christendom, it is shown that the licensing board, in violation of law, granted an illegal license to conduct a saloon in a building controlled by a manufacturer of beer. The legislature had power to authorize the licensing board to investigate and determine the ownership or control of a building for the purpose of granting or refusing a saloonkeeper's license. In passing upon the sufficiency of a petition for a license to sell intoxicating liquors, the licensing boards, under legislative power recognized by this court, have, for many years, investigated and passed upon the petitioner's title to real estate. Administrative bodies like the county board, the state board of irrigation and the state railway commission are now performing duties which affect property rights. The former judgment pronounced by this court would enforce the statute as written. The evidence is correctly stated and the law is properly applied in the first opinion. The license was canceled according to both the spirit and the letter of the statute. *Enos v. Hanff*, 95 Neb. 184. For these reasons, I adhere to the former decision, and dissent from that of the majority.

LETTON, J., concurs in this dissent.

FRED GRIMM ET AL., APPELLEES, V. ELKHORN VALLEY DRAINAGE DISTRICT, APPELLANT.

FILED APRIL 16, 1915. No. 17943.

1. **Eminent Domain:** AWARD: AFFIRMANCE. Where a drainage district was established, and the commissioners appointed by the county court condemned the land sought to be taken for the purpose of the ditch, and determined its value as appropriated, and to what extent the remainder of the land of the appellees was damaged by the taking of the strip and the putting in of the ditch, and assessed the damages sustained at $600, and subsequently, on an appeal to the district court, the jury assessed the damages at $3,310.63, and judgment was rendered on such verdict, such verdict and judgment will be allowed to stand, unless it is shown that they are clearly wrong.
2. ———: CONDEMNATION PROCEEDINGS: DRAINAGE. The irrigation of arid lands, the straightening of water courses, and the drainage of swamp and overflowed lands are subjects of public concern, not to be condemned by the courts, where the constitution and the legislature have provided that the acts contemplated may be done.
3. **Evidence** examined, and *held* to sustain the verdict.
4. **Eminent Domain:** TRIAL: INSTRUCTIONS. The request for instructions refused and the instructions given, examined in the body of the opinion, and *held* to be without prejudice.

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

Courtright & Sidner, for appellant.

Myron L. Learned, contra.

HAMER, J.

This is an appeal from the judgment of the district court for Douglas county. The petitioner, the Elkhorn Valley Drainage District, in August, 1909, filed a petition in the county court of Douglas county seeking to condemn certain land within the limits of the said drainage district, and on November 24, 1909, filed a supplemental petition alleging that the defendants were the owners of the south-

west quarter of the northeast quarter, the south half of the northwest quarter, the north half of the southwest quarter, and the southeast quarter of the southwest quarter, all in section 23, township 15, range 10, Douglas county, Nebraska. The defendants became the owner of this land in 1904 or 1905 through the death of their uncle. The petitioner is a corporation organized under the provisions of ch. 153, Laws 1907, and later laws amendatory thereof and supplemental thereto for the purpose of draining lands, etc., within a certain drainage district of which the lands of the defendants is a part. The petition alleges that the corporation is organized under the law above referred to and other laws amendatory thereof and supplemental thereto, and alleges that it is authorized under and by virtue of said laws to locate, construct, excavate and maintain a system of drainage within the said district, and to take and appropriate real estate by the right of eminent domain for the purposes of said drainage district and for the purpose of locating, constructing, excavating and maintaining such system of drainage.

It is further alleged in the petition that the Elkhorn Valley Drainage District embraces territory in Douglas and Sarpy counties, Nebraska, and that it is bounded on the north by the north line of Douglas county, on the west by the Platte river, and on the east and south by certain lines attempted to be shown by certain blue prints filed in connection with the petition marked exhibits A, B, C, D, E and F, and made a part of the petition. The petition alleges that, in furtherance of the projects of the petitioner and appellant, the appellant found it necessary to take a strip of land 100 feet wide on each side of the center line of a ditch to be constructed as then surveyed, and extending across from the east line to the south line of the said southeast quarter of the southwest quarter, and that said ditch would contain about 4.2 acres. The land of the appellees affected and damaged by the putting in of the ditch lies in the east half of the southwest quarter of said section 23, most of the land so affected being in the southeast quarter of the southwest quarter. The ditch leaves the

river in the northeast quarter of the northeast quarter of section 26, on land belonging to C. F. Backhus, and runs northeasterly across the southeast corner of the southeast quarter of the southwest quarter of section 23, belonging to the defendants, and thence onto and through land belonging to James B. Rodgers, until it strikes the river near the center of the northwest quarter of the southeast quarter of said section 23.

Two of the appellees have lived on the land for several years, their house being on the southeast quarter of the northwest quarter of section 23. They got at that part of their land lying on the east or south side of the Elkhorn river by crossing a bridge northeast of their houses, and thence continued northeasterly on the road to a point where it intersected a road running south and thence south along that road until they got to the southwest quarter of the southeast quarter of section 23, which belonged to James B. Rodgers, and thence across that land over a roadway which had been used for 35 or 40 years to their own land.

The commissioners appointed by the county court under the petition for condemnation made an award condemning the land sought to be taken and allowing $600 damages, from which award the appellees appealed to the district court.

The issues involved were: What was the value of the strip of land appropriated by the appellant? And to what extent was the remainder of the land of the appellees damaged by the taking of the strip and the putting in of the ditch? There was a trial to a jury in the district court, and this jury, under the supervision of the court, inspected the land and its surroundings at the request of the appellant. After making this inspection, listening to the evidence and the instructions of the court, the jury returned a verdict for appellees for $3,310.63.

The first assignment of error alleged by appellant is: "The court erred in giving instruction No. 7 on its own motion with reference to a road across the Rodgers land." The instruction complained of reads: "As bearing upon

the question of the value of the land, testimony was introduced as to the means of access to the land over a road running through the Rodgers' land. In this connection you are instructed that, if you believe that for a period of ten years immediately preceding the construction of the ditch the plaintiffs and others having occasion to use the road were permitted by Mr. Rodgers to use the road in question without objection or protest for the full period of ten years, such usage by plaintiffs and others would create an easement or right of way across the Rodgers land."

There is also a second assignment, which may be considered along with the first. It is that the court erred in refusing to give instruction No. 3, asked by appellant, with reference to a right to travel across the Rodgers land. It reads as follows: "You are instructed that the plaintiffs Grimm had no legal right to travel across the Rodgers land for any time in the future, and that their prevention from travel across the Rodgers land by the digging of the cut-off ditch is not to be considered by you as an element of damage to them."

Adolph Grimm, one of the appellees, testified that he understood that the appellees had a legal right to travel the road across the Rodgers land; that it had been traveled for the last 30 or 40 years; that Mr. Rodgers had a piece of land on the north side of the river, and that the appellee testifying always considered he had a legal right to go over their land to get to his land. Mr. Courtright, for the petitioner, asked the witness, Adolph Grimm: "Q. Then, as a matter of fact, in the working of this land in the past, and before the drainage ditch was dug, you went from your home around on the highway northeast, and then in a southerly direction, and then went across the Rodgers land, just crossing it because he permitted you to do so, and made no objection—is that it? A. I understand that we have a legal right to travel this road, and it has been traveled for the last 30 years—30 or 40 years; and, another thing, he has a piece of land on the north side of the river, and we always considered it a legal right for

him to go through our land to get to his land." Mr. Courtright then said to the witness: "Q. Tell us on what you base your opinion." And the witness answered: "For the simple fact that there never was any objection to it; and another thing, Mr. Rodgers himself, while I was on the farm, gave me notice to come and help to work the road and maintain it down this hill." He then testified that nearly every year they fixed up the road; that during all the time they traveled the same course; that last year four of them worked half a day; that pretty nearly every year they farmed the land they fixed the road; that the uncle of the witness and the people who rented the land in controversy from his uncle had gone over the road across the Rodgers land for 30 or 40 years; that Mr. Rodgers never made any objection to him or to any one else, so far as he knew; that no objection was ever made to Rodgers going across the land of the appellees; that other people used the road going across Rodgers land, and had for many years, to get to land which they owned on that side of the river; that they helped to maintain and repair the road.

Fred Grimm, one of the appellees, testified that he went down the road across Rodgers land while working for his uncle in 1884; that it had been used every year since then; that he understood that it had been used four to six years before 1884.

Earnest Grimm, one of the appellees, testified that he had known the road across the Rodgers land since 1895; that people had been going over that road to get to the land in controversy during all the years since 1895; that it was used for many years prior to 1895 as he understood it.

The evidence shows that the appellees and their grantor had used the road across Mr. Rodgers' land under a claim of right and without objection or protest on his part for more than ten years. In *Majerus v. Barton,* 92 Neb. 685, this court held: "Where there has been an open, visible, continuous and unmolested use of a roadway across the premises of another for a period exceeding ten years, it

will be presumed to be under a claim of right, and not by the license of the owner; and, where one seeks to close a way over his land which has been enjoyed by his neighbor for such period, he has the burden of showing that the use was permissive, and not under a claim of right, and, if he fails to overcome such presumption by a preponderance of the evidence, his case must fail."

It would not seem that the appellant should be permitted to question the right of continuation of the use which had existed for 30 or 40 years, as the evidence shows.

The third assignment of error is that the court erred in refusing to give instruction No. 1, which is as follows: "You are instructed that the fact that there is a section line at the south side of the land involved in this action is wholly immaterial, and not to be considered by you in any way."

Adolph Grimm, one of the appellees, testified that he had walked the section line from the public highway west to the ditch; that the section line is between 200 and 300 feet south of where you leave the highway to take the road through the Rodgers land; that the natural contour of the land along the section line is practically the same as on the Rodgers land; that just as good a road or better could be put in on the section line as the road on Mr. Rodgers' land. We think the proximity of a section line over which a road might be located was proper for the jury to consider in connection with the question of the accessibility of the land involved.

The fourth assignment of error is that the court erred in giving instruction No. 1, requested by the plaintiffs, as follows: "You are instructed that all the damages which the plaintiffs sustained by reason of the condemnation of the 200-foot strip, and any and all damages which the adjoining land of the plaintiffs sustained by reason of the taking of the 200-foot strip, based on a proper use of the tract so condemned, should be allowed in this case, under the specific instructions heretofore given you by the court. In other words, the plaintiffs cannot bring another action for damages based on the taking of the 200-foot strip and

damages to adjoining land, unless it be that the strip of land condemned is used in an improper and illegal manner." We are unable to discover any prejudicial error in the instruction quoted.

In connection with the above alleged error, it is insisted that the affidavit of Mr. Courtright, of counsel for the petitioner, should be considered. Mr. Courtright's affidavit attempts to allege prejudicial conduct on the part of the attorney for the appellees. It states that Mr. Courtright was the attorney for the petitioner in the trial held in the district court, and that in the closing argument the attorney for the appellees "repeatedly stated that the drainage district had been three years in diverting the Elkhorn river into the cut-off ditch; that it had not yet succeeded; that as yet it was at the most only a theory; that it was doubtful if the water ever would be diverted; that the land was taken by the defendant without the consent of the plaintiffs, and that all doubts in the case should be resolved in favor of the plaintiffs; and that no subsequent action could be brought for any damages if the water never was diverted; and that if the jury did not find for the plaintiffs for the full value of the 44-acre tract, and the district never did divert the water into the cut-off ditch, the plaintiffs would lose without hope or possibility of future recovery."

It is not shown by the record that any objection was made to the argument of Mr. Learned. If Mr. Courtright desired to avail himself of his contention, he should have made an objection then, and the matter should have been ruled upon by the court.

The fifth assignment of error reads: "The court erred in refusing to give instruction No. 4, asked by defendant, as follows: 'You are instructed that it is the legal duty of the defendant to in good faith proceed with all reasonable expedition and to use all reasonable methods to wholly divert the channel and water of the Elkhorn river from its present channel into the cut-off across the land of the plaintiffs.'" It is not clear how the refusal to give this instruction was prejudicial to the drainage district.

The good faith of the appellant in proceeding with expedition to divert the channel would certainly not relieve it from any legal liability incurred.

The sixth assignment of error reads: "The court erred in refusing to give instruction No. 8, asked by defendant, as follows: 'You are instructed that it is the legal duty of a party suffering or about to suffer injury or damage at the hands of another, for which that other may be liable, to use all reasonable effort to make the injury or damage as small as possible, and that a party may not needlessly abandon property or the use of it and recover the damage caused by such abandonment from another.' "

Our attention is not called to the evidence which is claimed to sustain and justify this contention. In the comments of counsel for appellant on this question they say: "It was undisputed in the proof that for some years pending these court proceedings, and before the trial, the landowners had allowed the 44-acre tract to remain idle. The drainage district contended that it could have been and should have been used, and that it was allowed to remain idle for the sole purpose of influencing the jury which might try this case in increasing the amount of the damage. They could have used a ferry to advantage." Counsel for appellant said: "The failure to give this instruction shows that the scheme was successful. There was abundance of proof that it (the land) could have been used, and that they had an offer from the president of the drainage district to rent it at $4 an acre cash rent for two years, which they refused. * * * They claimed, however, that this offer was simply a bluff, and not made in good faith. The president said it was made in good faith." If it was contended before the jury and the court that this offer of $4 was only a "bluff," and the jury found against the appellant on that fact, then it is the end of that controversy. It was for the jury to determine.

The seventh assignment of error is: "The court erred in giving instruction No. 10, on its own motion, relating to interest, as follows: 'You are instructed that while this appeal has been pending there has been paid to the

plaintiffs by the defendant $600 on Oct. 16, 1911. If you find that plaintiffs' damages did not exceed this sum, then your verdict should be that plaintiffs' damages have been fully paid, and you should find for the defendant. If you find that the damages exceed $600 then you should return a verdict for plaintiffs for such sum in excess of $600, on which you should compute interest at 7 per cent. from December 23, 1909, to the present time, and, in addition thereto, interest on $600 at 7 per cent. from December 23, 1909, to October 16, 1911, the date on which the $600 was paid to plaintiffs, and return a verdict for plaintiffs for such sum.'"

If the appellees were entitled to interest, then there was no error in giving the instruction complained of. In *Chicago, R. I. & P. R. Co. v. Buel,* 56 Neb. 205, this court held: "Where, on an appeal from an award of damages for land taken for right of way purposes, the damages are found to exceed the award of the commissioners, it is proper to instruct the jury to allow interest from the time of the condemnation at the rate of 7 per cent. interest per annum." We think the principle laid down in the case cited is applicable to the instant case. In *Nemaha Valley Drainage District v. Marconnit,* 90 Neb. 514, this court held: "In the taking or damaging of private property by a drainage district corporation in carrying out the purposes of its organization, the same principles apply as to the ascertainment of damages as in the exercise of the right of eminent domain for the location of a highway, the construction of a railroad, or like instances where private property is taken or damaged for public use." The appellees appear to have been entitled to the application of this rule, and also entitled to interest upon the damages sustained. We see no error in that assignment.

The eighth assignment of error reads: "The court erred in overruling defendant's motion for a new trial." It is claimed that the verdict was excessive and unconscionable.

George L. Campen, called as a witness for the appellees, testified that out of the land of the appellees on the

east side of the river the ditch took 4.28 acres; that 1.83 acres are on the east side of the ditch; that there were 14½ acres of timber, and 26.74 acres of corn land.

Adolph Grimm testified that the land had been in corn before the appellee got it; that it was better than the high land for corn, and usually yielded 5 to 10 bushels an acre more corn than the high land did; that the timber land was mostly in ash, running from 8 to 12 inches in thickness; that a team hitched to a wagon could not be driven across the ditch; that the sides of the ditch were from 16 to 14 feet high; that the ditch was from 25 to 40 feet wide at the top; that at the bottom it ran down to a point only a few inches wide; that the fair market value of the appellees' land on the east side of the river before the ditch was put in was $100 an acre; that the old river bed was at times so that they could not drive a team across it; that the old river bed was usually overflowed in the spring; that sometimes the water would stand two or three months.

D. L. Hopper testified that the land in controversy was a rich soil and would produce about one-third more than upland; that prior to putting in the ditch the land in controversy, except the timber land, was worth $100 an acre, and the timber land $85 or $90 an acre; that after the ditch was put in the land was worthless, because you could not get at it.

John Burt testified that the land in dispute would produce from 10 to 15 bushels an acre more than the upland; that it was not safe to ford the river with a team; that the river had only frozen over once in ten years so that it would be safe to cross it with a team; that a farm wagon could not be driven across the ditch; that the fair market value of the land, outside of the timber, was $100 an acre, and that the timber was worth $85 to $90 an acre; that after the ditch was put in the land was practically worth nothing; that the two-acre tract east of the ditch was of no value, because it was too small for practical purposes, taking into consideration the fact that the appellees had to go away around to get at it.

Fred Grimm testified that the value of the land was $100 an acre before the ditch was put in, except the timber land, which was worth $90 an acre; that after the ditch went in the land was not worth anything; that the value of the two-acre tract east of the ditch was $20 an acre; that the land in controversy before the ditch was put in got the benefit of the silt that was drained from the upland every year, and was enriched thereby; that Compton never made appellees an offer of $4 an acre for the use of the land.

Ernest Grimm testified that the value of the land before the ditch was put in was $100 an acre; that the Elkhorn river goes out of its banks in the spring and fills the old cut-off, and the water remains there six or eight weeks, and during that time it is not safe to drive across it; that there is also a June rise, and the water fills the cut-off then and stays a long time before it seeps away, and during that time you cannot drive across; that after the ditch was put in the land was worth only from $5 to $10 an acre.

This court has held that when the evidence is conflicting the verdict of the jury will not be set aside, unless it is shown to be clearly wrong. *Davis v. Clark,* 94 Neb. 573; *Cushing State Bank v. Saling,* 94 Neb. 594. Along the same line is the decision of this court in *Franklin State Bank v. Chaney,* 94 Neb. 1.

There appears to be sufficient competent evidence to sustain the verdict. We are unable to discover any prejudicial error. The judgment of the district court is

AFFIRMED.

MORRISSEY, C. J., not sitting.

SEDGWICK, J., dissenting.

The question in this case is as to the measure of damages; that is, how much has this land been damaged by straightening the course of the creek? Incidentally there are questions as to whether this issue was properly submitted to the jury.

The land taken by the ditch was 4.2 acres. The land that was claimed was damaged, though not taken, was 44.3 acres, besides two acres, which they say is isolated, and therefore damaged, making 46.3 acres. The verdict of the jury was for $3,910.63, which includes $600 that had already been paid by the defendant, and also includes interest. It might be a debatable question whether this land is damaged or benefited by this work; but that question, of course, was for the jury, and we must conclude that it was damaged. The question is whether, under any reasonable view of the evidence, it has been damaged as much as the jury has found. The plaintiffs figure out in the brief that this verdict allows $100 an acre for the land actually taken, and allows damages of $60 an acre for the land that was not taken, and insists that this is reasonable. The evidence in regard to the value of the land was conflicting, ranging somewhere from $60 to $100 an acre, and some perhaps a little higher. This damage of $60 an acre to the land not taken is wholly on account of the ditch rendering the land, as they claim, inaccessible. If we take the defendant's figures for it, they have allowed a great deal more than $60 an acre damages to the land not taken. The plaintiffs live on the north side of the Elkhorn river. The land in question was on the south side. Before this cut-off was made, to get to this land the plaintiffs went north about 100 rods, crossing a bridge over the river, and then south not quite a mile, and then west across Mr. Rodgers' land, 80 rods, to the land in question. This ditch is on the east side of the land in question, and they claim stops them from going that road. If the defendant succeeds in turning the water through this ditch so that the plaintiffs can cross the old bed of the river, they can go to their land directly in less than a half mile, but it is claimed that the water still stands in the old bed of the river and they cannot get across there now. If the defendant's claims in regard to the value of the land are somewhere near correct, then the jury has allowed the plaintiffs as damages more than the land was ever worth. It seems incredible that this tract of land is rendered

permanently inaccessible by this ditch, so as to entirely destroy its value. One hundred dollars an acre is a very high estimate of the value of any part of this land before the creek was straightened. The plaintiff, Fred Grimm, himself conceded that a large part of it was worth much less than that amount. He says that now it has no value, and so estimates that on the average it was damaged $60 an acre, and justifies the verdict. It cannot be found from this evidence that the land, or any part of it, was ever worth $100 an acre. It cannot be found that it is now worthless. It might be found that it has been rendered less valuable, at least temporarily, but reasonable men would seriously differ from that proposition. The judgment ought to be substantially reduced.

LETTON, J., concurs in this dissent.

LEO KLUG, ADMINISTRATOR, APPELLEE, V. ALBERT A. SEEGABARTH ET AL., APPELLANTS.

FILED APRIL 16, 1915. No. 18076.

1. **Wills: BEQUEST: LIEN: JURISDICTION.** The district court has original jurisdiction of an action to have a specific bequest of money declared a lien upon, and enforced against, real estate in the hands of the residuary legatee, though the construction of the will is involved.
2. ———: CONSTRUCTION: BEQUEST: LIEN. The intention of the testator to make a bequest a charge upon real estate may be inferred, where the bequest is followed by the gift of the residue of real and personal property in one mass.
3. **Limitation of Actions: BEQUEST: SUIT TO ENFORCE LIEN.** An action to enforce the lien of a specific money bequest upon real estate in the hands of the residuary legatee is not barred until ten years from the time payment becomes due.

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

Isaac Powers, for appellants.

C. H. Stewart and *M. H. Leamy, contra.*

HAMER, J.

This action was brought in the district court for Pierce county for the purpose of having a specific bequest of money declared a lien upon real estate in the hands of a residuary legatee.

Ferdinand Seegabarth died in 1883, seized of certain real estate in Pierce county, and leaving a will which was admitted to probate, and which provided, first, for the payment of his funeral charges, the expense of administering his estate, and contained this provision: "Second. I give and bequeath to my beloved wife, Emelie C. A. Seegabarth, the sum of $500 in lieu of her dower, and of any distributive share in my estate to which she would be otherwise entitled. The said $500 to be paid over to the said Emelie Seegabarth, my beloved wife, upon the arrival of my eldest son at the age of 21, provided should my wife aforesaid marry before said eldest son arrives at the above mentioned age then this money to be paid to her by my executor provided she move off the farm now occupied by me, otherwise the money to remain in the estate until such time as my eldest son, Albert A. Seegabarth, arrive at the age of 21. It is my wish and desire that my said wife shall have the use of and profits of my farm after paying interest on mortgage and taxes which may become due from time to time, and which may be due and unpaid at the time of my decease, until such time as my son shall become of age.

"Third. I give and bequeath all the residue of my estate, real and personal, to my son Albert A. Seegabarth, to be paid to him as he becomes of age.

"In case he should not live to reach that age, then the said property to be divided among the rest of my children share and share alike, to be paid to them respectively as they become of age. In case they should die before becoming of age the said property to revert to my beloved wife, Emelie C. A. Seegabarth, provided that the said Al-

bert A. Seegabarth shall pay to each of my surviving children the sum of $300 upon their becoming of age respectively."

Ferdinand Seegabarth left as his heirs his wife, Emelie, his son, Albert, who is an appellant, and a daughter, Anna. Emelie Seegabarth elected to take under the will. In 1884 the widow of Ferdinand Seegabarth married Leo Klug. She continued to live on the farm until her death in 1897. She paid the interest and taxes as required by the will. No dower was ever assigned to her. The bequest of $500 was never paid to her. She died testate, leaving four children by her marriage with Klug. Her will, which was admitted to probate and under which Klug was administrator, contains a provision as follows: "I bequeath, devise and give away my personal and individual property as follows: The $500 coming to me from my first husband Ferdinand Seegabarth I wish divided between my children as follows." Then follow the terms of division. A decree was rendered in the district court in favor of the administrator of Mrs. Klug, finding the bequest to her by Seegabarth a lien upon the real estate which passed by his will, and foreclosing this lien.

The first objection urged is that the district court did not have original jurisdiction to entertain the action. In this connection it is now well settled that the county courts have exclusive jurisdiction of all matters of probate and plenary powers for the exercise of that jurisdiction. *Reischick v. Rieger,* 68 Neb. 348; *Williams v. Miles,* 63 Neb. 859. In the first of these cases it is said, among other things, in the syllabus: "The county court has exclusive original jurisdiction of all probate matters, and where the relief sought by an action is such as the county court, in the exercise of its probate jurisdiction, might grant, the district court has no original jurisdiction."

Section 16, art. VI of the Constitution, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, and settlement of their accounts; in all matters relating

to apprentices; and such other jurisdiction as may be given by general law."

The county court is the court having exclusive original jurisdiction over all matters of the probate of wills, the appointment of administrators and executors, the administration of estates, etc.; but this does not operate to exclude the jurisdiction of the district court in a case where the construction or consideration of a will is incidentally involved and the relief demanded does not call for a direct exercise of probate power. *St. James Orphan Asylum v. Shelby,* 75 Neb. 591. Where the purpose of the proceeding is to further administration or settlement of the estate, to construe a will for the guidance of the executor or administrator, then the only court having original jurisdiction is the county court; but in the present case the purpose of the suit is not to further administration, but it calls for the exercise of power not connected with the probate of the will or administration of the estate of Seegabarth. In the case last cited it is said in the syllabus: "The original jurisdiction of the district court over an action to quiet the title to real estate is not affected by the fact that incident thereto there is involved the construction of a will." In such a case as this, the fact that the construction of a will is involved does not exclude the jurisdiction of the district court. In *Youngson v. Bond,* 69 Neb. 356, this court considered the question. A construction of a will by the county court is for the information and benefit of the executor and administrator only. It does not affect the controversies between adverse claimants.

In *Andersen v. Andersen,* 69 Neb. 565, it was said in the syllabus: "The county court has jurisdiction to construe wills for the purposes of the administration and settlement of estates. But the construction of a will, in such a case, is for the information and benefit of the executor or administrator only, in order to advise him what course to pursue. It will protect him from any charge of maladministration of the estate, but it adjudicates nothing beyond his rights and liabilities in the execution of his of-

fice; controversies between adverse claimants, under the devise, will not be affected thereby."

It is also contended that the legacy could not be held a charge against the real estate unless such intention could be gathered from the will; but it is generally held that such intention must be inferred from the gift of a legacy followed by the gift of the residue, real and personal, in one mass, since otherwise there could be no residue of the real estate. 3 Pomeroy, Equity Jurisprudence (3d ed.) sec. 1247.

It is next urged that the suit is barred by the statute of limitations. The suit was brought less than ten years after defendant became of age, at which time the legacy was payable. It follows that, if the intent of the testator was to make the legacy a charge upon his real estate, it became a lien thereon, and the period within which it could be enforced is controlled by that section of the statute providing for the recovery of real estate, and which is ten years.

It follows that the judgment of the district court is right, and it is

AFFIRMED.

LETTON and SEDGWICK, JJ., not sitting.

ROBERT Y. LISCO, APPELLEE, V. WILLIAM HUSMANN ET AL., APPELLANTS.

FILED APRIL 16, 1915. No. 18389.

Partnership: DISSOLUTION. Where the defendants held possession of a farm under a farm contract and also of certain live stock and farming implements, and the evidence shows a breach of the contract because the live stock is neglected and mistreated, and farm implements unnecessarily injured, and a farm building destroyed, there is a sufficient reason for the dissolution of the partnership by the judgment of a court.

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

Albert & Wagner, for appellants.

Garlow & Long, contra.

HAMER, J.

The plaintiff and appellee, Robert Y. Lisco, was the owner of a farm, a lot of live stock, and farming implements. He entered into a farm contract with the defendants William and Albert Husmann. After the defendants had been in possession of the farm, live stock and implements for about a year, the plaintiff sued them, seeking a dissolution of the contract, a division of the profits, and such relief as the contract contemplated might be given. There was a finding and judgment for the plaintiff in the district court for Platte county, and from this finding and judgment the defendants appeal.

The contract was entered into on the 28th day of August, 1911. Omitting the signatures, it is as follows:

"This lease, made and entered into this 28th day of August, A. D. 1911, by and between Robert Y. Lisco, of Columbus, Nebraska, party of the first part, and William Husmann and Albert Husmann, both of Platte county, Nebraska, parties of the second part, Witnesseth: That the said party of the first part has this day leased unto the said parties of the second part the following described real estate, to wit: the southwest quarter of section 26, and lots numbered 6 and 7 of said section 26, all in township 17, range one west of the 6th P. M. in Platte county, Nebraska, from the first day of September to the first day of March, 1917.

"In consideration of the leasing of the premises as aforesaid, the said parties of the second part covenant and agree to pay said party of the first part one-half of all the receipts from the grain, hay, stock, etc., raised on said premises during the term of this lease, said payments to be made at the time of the sale of any such products.

"The party of the first part and the parties of the second part are each to provide one-half of all machinery and agricultural implements needed to properly work said

place; one-half of all seed needed for seeding purposes; one-half of all the horses needed to properly till said land; it being the intention of the parties hereto that said first party is to furnish the land, and said second parties are to furnish and perform the labor necessary to properly care for the stock on said farm and to properly till said land, and each to share equally in the net proceeds thereof, i. e., said Lisco is to receive fifty per cent. of the net proceeds and said Husmanns are to receive fifty per cent. of the net proceeds.

"The personal property which is now upon said premises, and in which both first and second parties have an equal share, is contained in a list hereto attached and which is made a part of this contract and marked exhibit A. Also the terms noted on said exhibit regarding the hay, corn, oats and potatoes is hereby made a part of this contract and is so considered by the parties hereto.

"Should fences need repair, first party is to furnish all wire necessary therefor, and second parties are to perform all labor and furnish all fence posts; said posts, however, to be cut from the above premises.

"First party reserves one bedroom in the house now on said premises, and also reserves the small garden patch lying east of the house and inclosed by a fence.

"It is made the duty of the second parties hereto to keep a strict account of the sales of all products of every kind and description raised on said farm, and a strict account of the sales of all stock sold therefrom, and report same to said first party. It is agreed between the parties hereto that all money received from the sale of any property from said farm shall be deposited in the German National Bank in the name of Husmann Brothers, and all expenses in connection with the operation of said farm shall be paid by checks drawn by said Husmann Brothers on said bank.

"All materials needed for the repair of the buildings on said place shall be furnished by said first party; the labor, however, to be performed by second parties.

"Second parties are privileged to cut sufficient wood on said premises to properly heat the house thereon, and said first party is also privileged to go upon said place to cut wood for his use.

"Second parties agree that at the expiration of this lease to yield up possession of the place in as good condition as it now is, the usual wear, inevitable accidents and loss by fire excepted. In case of the nonfulfilment of any of the terms and conditions of this lease, first party may at his election declare this lease at an end. Signed in duplicate the day and year first above written."

The paper referred to in the contract as exhibit A contains a list of 5 horses, 1 colt, 22 cows, 8 yearling heifers, 20 calves, 132 sheep, 1 boar, 3 brood sows, and 5 gilts; also, a manure spreader, 2 mowers, a hay rake, a hay stacker, a hay sweep, 2 hay racks, 1 hay loader, 1 disc, 1 plow, 1 cultivator, 1 harrow, 1 weeder, 1 potato planter, a potato digger, a potato sprayer, 2 potato shovels, a grindstone, a cream separator, a cream scale, and 5 sets of work harness. Each article is valued at a specified price, and together all the animals and the machinery and implements named are valued at $3,240. There is a further provision that the hay is to be measured October 1 at $10 a ton, and the oats to be at the market price when threshed, and the corn to be at the market price when husked, and the potatoes to be at the market price when put in the cellar. It is claimed by the appellants that the parties acted upon the theory that the contract was to begin on the 1st day of September, 1911; that the defendants took charge of the premises and stock at that time.

The trial took place July 2, 1913, and the case was taken under advisement until October 14, 1913, when the court found and decreed as follows: "(1) That a valid copartnership existed between the plaintiff and the defendants. (2) That the plaintiff is entitled to a dissolution of the copartnership agreement and forfeiture of the lease as prayed in his petition. (3) That the plaintiff is entitled to receive one-half of the assets, and the defendants are entitled to receive one-half of the assets, of the copartner-

ship. (4) That, in case the plaintiff and defendants fail within 60 days to make a division and adjustment of the partnership assets, then plaintiff is entitled to have a receiver appointed to wind up and adjust the copartnership affairs. It is therefore considered, adjudged and decreed by the court that the contract of copartnership heretofore existing between the plaintiff and the defendants be and the same hereby is dissolved and terminated; that the lease set forth in the petition be and the same hereby is declared forfeited and terminated; that the defendants shall render to the plaintiff a strict account of their doings in relation to the copartnership, and a complete statement of all personal property disposed of and the proceeds therefrom, together with an inventory of all copartnership property on hand; that the copartnership assets be equally divided between the plaintiff and the defendants, and, in case they fail to effect a full settlement within 60 days from this date, a receiver shall be appointed by the court, with power to reduce the copartnership assets to cash and wind up and adjust the affairs of the copartnership; that the defendants be adjudged to pay the costs of this action."

The finding is for the dissolution of the agreement and the forfeiture of the farm contract; that the plaintiff should receive one-half of the assets and the defendants one-half of the assets of the copartnership, and, in case of failure to make a division that a receiver shall be appointed to wind up the affairs. The decree forfeits and terminates the contract, provides that the defendants shall render a strict account in relation to the doings of the business, a complete statement of all personal property disposed of and all "copartnership property on hand," that the copartnership assets be equally divided; that, in case plaintiff and defendants fail to effect a full settlement within 60 days, a receiver be appointed, "with power to reduce the copartnership assets to cash and wind up and adjust the affairs of the copartnership."

The petition alleges the failure to comply with the contract which is set out in the findings and decree of the dis-

trict court. An examination of the evidence seems to sustain the judgment of the district court.

One horse got an abscess on his shoulder. This resulted in the sweeny. This horse had not been taken care of according to the directions of the veterinary surgeon, and the injury was claimed to be permanent because of neglect. A colt that was castrated was also neglected and suffered because of the neglect. The three mares were worked down until they were very thin in flesh and their shoulders "were all galded." These animals seem to have been fat and healthy when they were turned over to the defendants. It seems that they agreed orally to milk at least 12 of the cows. They never did so. They got down to milking just one cow. The udders of the cows were injured because they were not milked. These cows were in good condition when turned over to the defendants. There were also 20 calves. There is testimony tending to show that the calves were nearly starved. They were kept in a lot where there was insufficient grass, and were not given alfalfa to eat, although there was plenty there out of which they might have been fed. These were all high-grade cattle. There were 132 sheep also in good condition when turned over to the defendants. They were high-grade Shropshire sheep. They were not taken care of, and the result was a failure of a crop of lambs. There was a sheep shed in which to shelter them, but the defendants tore it down. They neglected to give the hogs fresh water, and compelled them to drink manure water down by the barn. An examination of the evidence shows that the farm implements were badly treated.

It is claimed by the attorneys for the appellants that the evidence fails to sustain the finding and judgment of the district court. There is something of an attempt to show that the defendants complied with their contract, but we are not able to say that the findings and judgment of the district court are wrong. The facts alleged in the petition all have testimony tending to support them.

In *Veith v. Ress,* 60 Neb. 52, it is said: "It is next contended that the petition does not state facts sufficient to

warrant the court in taking cognizance of the cause. We think it does. It shows insolvency, dissension between the partners, probability of waste, and necessity for an accounting and dissolution."

In *Carroll v. Cunningham*, 73 Neb. 295, there was a demurrer to the petition because it did not state a cause of action. It set out that defendant had large "accumulations of and belonging to the partnership, which he refuses to account for or make division of in compliance with the agreement and the request of plaintiffs * * * and which he threatens to sell and dispose of." There is a similarity in that case to this one, except the specific acts of extreme negligence set forth in the instant case. The judgment of the district court is affirmed. Plaintiff not being entirely without fault, each party is required to pay his own costs.

AFFIRMED.

MORRISSEY, C. J., LETTON and FAWCETT, JJ., not sitting.

STORZ BREWING COMPANY, APPELLEE, V. CARL F. HANSEN ET AL., APPELLANTS.

FILED APRIL 16, 1915. No. 18958.

EXECUTION: APPLICATION OF SURPLUS. Plaintiff had foreclosed a mortgage upon a tract of real estate belonging to defendant, and was also the owner of a judgment rendered in the same court. An execution was issued on the judgment and levied upon the real estate. The premises were sold to the plaintiff at the execution sale; no deduction of liens being made. There was a surplus of the proceeds of the sale after paying the execution debt. An application was made by plaintiff to apply the surplus upon the foreclosure decree *pro tanto*, upon which issues were made up and a hearing had. *Held*, that the district court properly decided that in equity the creditor was entitled to have the surplus applied upon the foreclosure decree.

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

F. Dolezal, for appellants.

George W. Wertz and *James W. Hamilton, contra.*

HAMER, J.

The facts in this case are stated in the former opinion, *Storz Brewing Co. v. Hansen,* 89 Neb. 685. The judgment was reversed and the case remanded to the district court, so as to allow the plaintiff to make a proper application to apply the surplus proceeds of the sale upon the foreclosure decree and to try any issues raised upon such application. Issues were framed and the cause tried accordingly.

The court found generally for the plaintiff on the motion, that there was due upon the judgment at the time of the sale $576.60, together with costs amounting to $27.35, and that at the time of such sale the plaintiff was the owner of a judgment of foreclosure against the defendant in the sum of $1,886.53, which constituted a second lien upon the premises sold under the execution, and that no part of the said amount had been paid. It was also found that Carl F. Hansen was insolvent, and that the portion of the sum bid at the execution sale which was not consumed by the judgment and costs amounted to $657.35, and that this sum should be applied by the plaintiff upon its judgment and decree of foreclosure, the costs of the proceeding to be taxed against the defendant Carl F. Hansen.

The proceeding was of the nature of an equitable garnishment. The mortgage was a lien on all of Hansen's interest in the property, including his homestead interest, and the surplus proceeds. Hansen is insolvent. He owes the brewing company more than $1,800. It would be grossly inequitable to allow him to retain the surplus arising from the sale.

The judgment of the district court is

AFFIRMED.

TONY N. MAROOSIS, APPELLANT, V. PETER CATALANO, APPELLEE.

FILED MAY 1, 1915. No. 18073.

1. **Affidavit:** ACKNOWLEDGMENT. A notary public who is an attorney of record in a pending suit is not a proper officer to take an affidavit to be used as evidence on a hearing in the cause.
2. **Garnishment:** ACTION AGAINST GARNISHEE: GENERAL DENIAL. Where suit is brought under section 8385, Rev. St. 1913, for alleged unsatisfactory answer in garnishment, a general denial is a sufficient answer.
3. **New Trial:** MOTION: TIME. When a party against whom a judgment has been entered in the district court files a motion for a new trial within three days after the entry of the judgment, and during the same term at which the judgment was recovered, but the term is adjourned before the court rules thereon, he is entitled to a ruling at a subsequent term.

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

John S. Bishop, for appellant.

E. G. Maggi, T. S. Allen and *H. L. Wilson, contra.*

MORRISSEY, C. J.

Plaintiff recovered judgment in justice court on two promissory notes executed by one Will Catalano, the son of this defendant. He then caused summons in garnishment to be served on defendant in this action, who appeared before the justice, made his answer in garnishment, and was discharged. Subsequently plaintiff brought this suit under section 8385, Rev. St. 1913, for alleged unsatisfactory answer in garnishment. Judgment went in favor of defendant, and the plaintiff appealed to the district court. On May 7, 1912, judgment was entered by default in favor of plaintiff. Within three days thereafter, and at the same term, defendant filed a motion to set aside the judgment. This motion was supported by the affidavits of E. G. Maggi and Mrs. C. Blanche Stevens.

Defendant also tendered an answer constituting a general denial. Plaintiff filed a motion to strike the affidavit of Mr. Maggi because it was sworn to before T. S. Allen, one of defendant's attorneys of record, and to strike the affidavit of Mrs. Stevens because it was sworn to before her husband, and to strike the answer because filed out of time, that it was a sham pleading, and did not set up a meritorious defense. These motions were not ruled on by the trial court until the succeeding term, when the motion of plaintiff to strike was sustained, and the motion to set aside the default judgment was overruled. Defendant then filed a motion for rehearing, which the court sustained. The motion of plaintiff to strike was overruled, and the motion of defendant to set aside the default judgment was sustained. The cause was subsequently tried to a jury, and there was a verdict and judgment in favor of the defendant. Motion for new trial was overruled, and plaintiff appeals.

A number of errors are relied upon for reversal, but special stress is laid upon the rulings of the court in refusing to strike from the files the affidavits of Mr. Maggi and Mrs. Stevens. The record shows that Maggi, who subscribed to the affidavit, and Allen, the notary public before whom the same was made, were attorneys of record for the defendant. Under sections 371-376 of the Code (Rev. St. 1913, secs. 7937-7942) and the construction thereof in *Collins v. Stewart,* 16 Neb. 52, *Horkey v. Kendall,* 53 Neb. 522, and *Malcolm Savings Bank v. Cronin,* 80 Neb. 228, a notary public who is also an attorney of record in the case is not a proper party before whom affidavits of this kind may be taken, and the affidavit of Maggi ought to have been stricken from the files. Mrs. Stevens' affidavit is attacked because she subscribed the same before her husband, who is a justice of the peace, and it is contended that it was inadmissible under section 376 of the Code. This section provides: "The officer before whom depositions are taken must not be a relative of either party," etc. It does not appear that the justice is related to either party, and this objection is without merit.

With the affidavit of Maggi out of the record, the affidavit of Mrs. Stevens remains to support the motion if, indeed, it be necessary to support it by affidavit.

"The vacation of a judgment by default during the term at which it is rendered is largely within the discretion of the trial court, and presents no grounds for reversal unless there appears to have been a clear abuse of discretion." *Bigler v. Baker,* 40 Neb. 325. The motion to set aside the default judgment was made in due season, it was directed to the sound judicial discretion of the court, and the affidavit of Mr. Maggi may be entirely disregarded, and still the action of the court be sustained.

Plaintiff also complains that the answer, which is a general denial, is insufficient; but there was only one question to determine, and that was whether the defendant had made a complete and truthful answer in garnishment. In fact, we find in the record an affidavit of plaintiff's attorney in which he states that this is the only question. The petition alleged that he did not. By the general denial defendant put this question squarely in issue, and it must be said to be a sufficient answer.

It is also contended that the court is without jurisdiction to vacate a judgment and grant a new trial after the term at which it is entered, and a number of authorities are cited. These authorities, however, are not in point, and it is not necessary to discuss them. In the instant case the motion was filed at the term at which the judgment was entered, and because the court deferred action until the subsequent term it did not lose jurisdiction. In *Hitchcock County v. Cole,* 87 Neb. 43, and other cases cited in the brief, the motion was not filed until after the adjournment of the term at which the judgment was entered, and this court has uniformly held that they came too late, while in the instant case the motion was duly filed during the term. The defendant had taken every step necessary to protect his rights, and the power of the court was not ended until it ruled on this motion, and it did not lose jurisdiction merely by the adjournment of the term.

Error is assigned on the giving and refusal to give instructions, but, in the view we take of the case, the jury were properly instructed, and the judgment is

AFFIRMED.

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

CHARLES A. STICKNEY COMPANY, APPELLANT, V. L. E. NICHOLAS, APPELLEE.

FILED MAY 1, 1915. No. 18079.

Conditional Sale: RIGHT TO RECOVER PRICE: DESTRUCTION BY FIRE. There may be a recovery of the purchase price of personal property which has been sold and delivered on condition that the title shall not pass until full payment is made, although, without the fault of the purchaser, the property is destroyed by fire, when the vendee's promise to pay is absolute, and the contract gives him the right to extinguish the vendor's title by payment of the stipulated price.

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

Elmer E. Ross, for appellant.

H. F. Allen, contra.

MORRISSEY, C. J.

Plaintiff, Charles A. Stickney Company, the manufacturer of a gas engine, April 5, 1911, shipped to defendant, a retail merchant, a gas engine, under a written contract containing the following provision: "Seventh. It is agreed that the title to and ownership of all goods shipped under this contract shall remain vested in the Charles A. Stickney Company, and the goods are to be held at all times subject to their order until paid for, and if sales are made before payment they shall be made only in the regular course of business, and the proceeds of all such sales, whether cash, book account or notes, are to be held as the property of Charles A. Stickney Company in trust as collateral security for their benefit, and subject to their

order until all obligations arising under this contract are fully paid in money, and it is agreed that notes taken by the company are not accepted as payment. And it is further agreed that nothing in this clause shall release the purchaser from making the payments as herein stipulated." The purchase price was not paid, but while the property was in the possession of the defendant, and without fault or negligence on his part, it was totally destroyed by fire. Plaintiff brought suit for the purchase price, and defendant by answer alleged that under the section of the contract above set out, at the time the property was destroyed, the title was in plaintiff, and he was holding it subject to its order. A jury was waived, the cause was tried to the court, and, from a judgment for the defendant, plaintiff appeals.

There was some correspondence between the parties which indicates that the engine did not prove satisfactory on a test, and that plaintiff had agreed to send an expert to adjust it. However, as each party relies upon that part of the contract quoted, the case must be determined solely on the construction thereof. The courts are not unanimous, but the weight of authority seems to favor the rule that, where goods are sold and delivered upon condition that the title is retained in the seller until the purchase price is paid, the reservation gives the seller only a lien upon the property for the amount of the debt. The rule is different where there is anything further for the seller to do; but where he has delivered the property, and he has no option to rescind his contract and retake possession, the mere reservation of title for the purpose of securing payment of the debt will not defeat his right to recover where the property is accidentally destroyed. In this case the vendee had possession with full right to sell, and any person dealing with him would have acquired good title to the property, and the reservation made in the contract between the parties merely gave the vendor the right to pursue the property until sold in the regular course of business, or, in case of sale, to have the funds arising therefrom held as a trust fund to secure the pay-

ment of the debt. He had no option to rescind, and there was nothing further for him to do but to accept payment, and it is expressly provided in the final sentence "that nothing in this clause shall release the purchaser from making the payments as herein stipulated." The parties were able to contract, and this defendant voluntarily assumed the risk of loss or damage. The loss of the article in no manner changes the character of the agreement, and the vendee must be held liable for the purchase price.

In *LaValley v. Ravenna*, 78 Vt. 152, 2 L. R. A. n. s. 97, the supreme court of Vermont had before it a similar question, and disposed of it in the following language: "The question presented, stated broadly, is this: Can there be a recovery for property sold and delivered on condition that the title shall not pass until full payment therefor has been made, when, without the fault of the purchaser, the property is destroyed before the price falls due? This question we answer in the affirmative. It is true that these contracts are sometimes spoken of as 'executory,' and the purchaser is termed a 'bailee,' * * * but these expressions have reference to the strict legal title to the property, and should not determine the present question, which is one pertaining to an absolute promise to pay. And the defendant's promise to pay was absolute, and was made upon a sufficient consideration; for he got just what he bargained for—the use, possession and enjoyment of the property, with the right to acquire the absolute title upon payment of the stipulated price—and this was the consideration for his promise. The seller had done all that he was to do to or with the property by the terms of the contract—all that he was to do at all, except to receive the price. And upon that the title passed without further action on the part of either party." For other cases in point, see note to *LaValley v. Ravenna*, 2 L. R. A. n. s. 97.

It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED.

LETTON and SEDGWICK, JJ., not sitting.

BALL ENGINE COMPANY, APPELLANT, V. BENNETT COMPANY, APPELLEE.

FILED MAY 1, 1915. No. 18089.

1. **Limitation of Actions: FOREIGN CORPORATIONS.** The statute of limitations of this state does not run in favor of a foreign corporation while service of summons cannot be had upon it in this state.
2. ———: **FOREIGN STATUTES: PLEADING AND PROOF.** If a party seeks to avail himself of the statute of limitations of a foreign state, he must both plead and prove the statute.

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

Greene, Breckenridge, Gurley & Woodrough, for appellant.

DeBord, Fradenburg & Van Orsdel, contra.

MORRISSEY, C. J.

Plaintiff, the Ball Engine Company, a Pennsylvania corporation, in December, 1905, furnished repairs for an engine to the defendant, the Bennett Company, a Delaware corporation, doing business in Omaha, Nebraska. On December 3, 1908, the engine was broken, and defendant again purchased repairs from the plaintiff, amounting to $606.50. The bill fell due on February 15, 1909, and, on defendant's failure to pay, plaintiff brought suit January 29, 1910. Defendant admitted receipt of the goods, but alleged that they were furnished to take the place of defective parts, and parts broken because of defective parts, of an engine manufactured and sold by plaintiff under its implied warranty, and that no amount was due thereon; and by way of counterclaim alleged that in December, 1905, an accident occurred to this engine whereby the crosshead was broken, and the defendant purchased a new crosshead from plaintiff, and that by implication the plaintiff warranted the same as being reasonably safe for the use for which it was to be put and free from defects, that

there was a latent defect in the crosshead, and that the defect was so covered up and hidden that it was not detected by defendant, and that as a result of this latent defect, on December 3, 1908, the engine was broken, and defendant suffered damage in the sum of $1,895.92; and there was a prayer for judgment. Among other allegations, plaintiff's reply contained the following: "For further reply, plaintiff avers that the alleged cause of action contained in defendant's answer as a counterclaim and set-off did not accrue within four years next before the commencement of this action, and therefore is barred by the statute of limitations of this state." The court instructed the jury to find for plaintiff for the full amount of its claim, but left the jury to determine what, if any, amount was due upon the set-off. After crediting plaintiff with the full amount sued for, the jury gave a verdict for $1,000 in favor of defendant. Plaintiff moved for judgment notwithstanding the verdict, and this motion was overruled.

The principal point contended for by the plaintiff is that the statute of limitations had run against defendant's counterclaim. The defective parts were purchased in December, 1905. Defendant's answer and cross petition was first filed in the county court June 7, 1910. It appears on the face of the pleadings that plaintiff was a Pennsylvania corporation, and the defendant a Delaware corporation doing business in Nebraska. The breach of warranty accrued more than four years before the counterclaim was asserted. By reply plaintiff pleaded the statute of limitations of Nebraska. The record shows the plaintiff was at all times a nonresident of this state and service of summons could not have been had upon it here. Defendant could not have brought suit against it on the cause of action pleaded, unless we are to hold that it was bound to go to Pennsylvania to institute a suit.

Section 20 of the Code (Rev. St. 1913, sec. 7577) provides: "If, when a cause of action accrues against a person, he be out of the state, * * * the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought." In

construing this section in *Hartley v. Crawford,* 12 Neb. 471, the court said: "'If, when a cause of action accrues against a person, he be out of the state, * * * the period limited for the commencement of the action shall not begin to run until he come into the state,' etc., applies to all personal causes of action, whether they accrue within or without this state, or in favor of a resident or a nonresident thereof."

In *Edgerton v. Wachter,* 9 Neb. 500, it is held that the statute commenced to run at the time of defendant's removal with his family into this state. This is followed and approved in *Minneapolis Harvester Works v. Smith,* 36 Neb. 616.

This question was before the supreme court of the United States in a Nebraska case (*Express Company v. Ware,* 20 Wall. (U. S.) 543), and an instruction, which told the jury that to bar the action the plaintiff must have been able for the full statutory period before suit was brought to have sued the defendant in this state, was approved.

The statute of Kansas is substantially like ours, and there it is held: "A foreign corporation is 'out of the state' within the meaning of section 21 of the Code (Gen. St. 1901, sec. 4449), and for that reason cannot avail itself of the statute of limitations of this state." *Williams v. Metropolitan Street R. Co.,* 68 Kan. 17, 1 Am. & Eng. Ann. Cas. 6.

It is not necessary to determine, and we do not determine, whether the statute of limitations of Pennsylvania was available as a defense to the counterclaim. Plaintiff did not plead nor prove that the statute of Pennsylvania had run against defendant's cause of action, and since it clearly appears that when the cause of action accrued plaintiff was not within the state of Nebraska, and that defendant asserted its claim before the statutory period had run after plaintiff came within our jurisdiction, the statute of limitations had not run against defendant. "Statutes of other states are regarded as matters of fact, and when relied on to support a cause of action or defense must be pleaded and proved." 36 Cyc. 1240. The statute of limi-

tations is an affirmative defense, and unless raised it is waived. If plaintiff intended to avail himself of the statute of a foreign state, it was essential that he both plead and prove that statute. He saw fit to plead only the statute of Nebraska; and, as it appears that by reason of plaintiff's absence from the state the statute had not run, it follows that the judgment of the district court is right, and must be

AFFIRMED.

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

MAUDE P. WARRINGTON, ADMINISTRATRIX, APPELLEE, V. WILLIAM A. STEWART, APPELLANT.

FILED MAY 1, 1915. No. 18102.

1. **Appeal:** FINDING: EXISTENCE OF PARTNERSHIP. In an action for a partnership accounting, where the existence of the partnership is denied by one of the alleged partners, the finding of the district court that there was a partnership, if supported by the evidence, will not be disturbed.
2. ———: ACCOUNTING: MODIFICATION OF DECREE. The findings of the district court in making the accounting, in so far as they appear to be correct, will not be disturbed; but, where it appears that one of the partners has not been given a credit for certain sums of money paid by him for the benefit of his deceased partner, such credit will be given, and the judgment of the district court, as thus modified, should be affirmed.

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

H. M. Sinclair and *E. A. Cook*, for appellant.

Niles E. Olson and *Wilcox & Halligan, contra.*

BARNES, J.

Appeal from a judgment in an action for a partnership accounting. The cause was tried in the district court

for Dawson county before Honorable Ralph W. Hobart, judge of the Seventeenth judicial district, sitting for Judge Grimes, of the Thirteenth judicial district, and resulted in a judgment against the defendant for $3,749.89. From that judgment defendant has appealed.

It appears that the defendant and Theodore L. Warrington in the year 1892 became equal partners in the practice of the law at Lexington, Nebraska, and continued in business until the 17th day of January, 1906, at which time there was an accounting between them and a settlement of their partnership business; that at that time Warrington, who was in ill health, went with his wife and one of his daughters to the Pacific coast; that he returned some time in April, 1906, and from the date of his return until his death, which occurred in March, 1911, Warrington occupied a desk in their old office in Lexington, Nebraska. It was claimed by defendant, Stewart, that the partnership, which had existed between himself and Warrington, was dissolved and terminated at the time of their settlement in 1906, while it was insisted by the administratrix of Warrington's estate that the partnership was never dissolved until Warrington's death. That issue was resolved in favor of the administratrix, and, while the evidence on that question was somewhat conflicting, we are not disposed to disturb the finding and judgment of the trial court so far as that issue is concerned. We give full credit to the testimony of Judge Sinclair, and it is apparent that when Warrington went to the Pacific coast he never intended to return and engage in the practice of law; but it appears that, having in a measure recovered his health, he did return, and the partnership was apparently continued from the date of his return until his death, and we think there is sufficient evidence to sustain the finding of the trial court on that question.

As to the matter of the accounting, the evidence seems generally to sustain the findings of the trial judge that from January, 1906, until the time of Warrington's death, the firm earned $20,331.64, of which amount Warrington received $3,956.65 and Stewart received $16,374.99; that

Stewart paid all of the expenses of the business, amounting to $4,918.56, and that Warrington's estate should receive $7,706.54; that Warrington had received only the sum of $3,956.65, leaving a balance due his estate from the partnership of $3,749.89. We find, however, upon an examination of the record, that Stewart paid for and on account of debts owing by Warrington, and at his request, the sum of $1,967.10, consisting of the following items: To the First National Bank of Lexington, $505.15; to Mrs. Jane Wilder, $1,376.95; to cash by draft sent to Warrington at Dayton, Oregon, $85.

So far as we are able to discover from the record, the trial court failed to give Stewart that credit. This would leave a balance due from Stewart to the Warrington estate of $1,782.79. As we view the record, the judgment of the district court should be modified to that extent, and appellant should recover his costs in this suit.

As so modified, the judgment of the district court is

AFFIRMED.

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

The following opinion on motion to modify judgment was filed September 20, 1915. *Judgment modified.*

PER CURIAM.

The appellee has filed a motion asking the court to modify the judgment for the reason that the court in recasting the account failed to give her credit for an item of $750 which she claims was admitted by the appellant to be due her. The court permitted the appellant to file a brief in answer to this contention. In this brief it is conceded that the appellee was entitled to this credit. In addition, the brief argues that this court erred in its conclusions upon the evidence and in the amount of its judgment. The appellant filed no motion for a rehearing within the time fixed, challenging the correctness of the original judgment. The adjudication, therefore, became final as to him.

The evidence supports the appellees contention as to the $750 item. She is entitled to have the judgment increased to that extent.

JUDGMENT MODIFIED.

V. FRANKLIN V. CHARLES C. HESKETT, APPELLANT, JOHN S. CRANOR, APPELLEE.

FILED MAY 1, 1915. No. 18118.

Mortgage Foreclosure: DEFENSE: DEFECT OF TITLE. In an action to foreclose a purchase money mortgage, when it clearly appears that the mortgagor has obtained a good title to the mortgaged premises by reason of the fact that he and his grantors have been in the open, notorious, exclusive and uninterrupted possession of the premises for more than 22 years, claiming adverse to all the world, a defect in the paper title of his remote grantor is no defense to the foreclosure proceedings.

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

Eldred, Cordeal & McCarl, for appellant.

Lambe & Butler, contra.

BARNES, J.

This was an action of foreclosure. A judgment was rendered by the district court for Hitchcock county by which the defendant John S. Cranor obtained a decree foreclosing his mortgage for $1,000 on a certain tract of land in that county, and the defendant Heskett has appealed.

The facts as they appear from the record may be briefly stated as follows: One Steinhaus was the owner of the west half of the southeast quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section 32, in township 2 north, of range 31 west of the sixth P. M., in Hitchcock county, Nebraska. He died intestate, and the administrator of his estate sold and conveyed the land in question to August Anderson, whose deed was recorded April 4, 1888. It may be conceded that the deed by which he obtained his title was voidable for irregularities in the administrator's sale. Anderson went into possession when he obtained his deed, and in March, 1904, conveyed the land by warranty deed

to Cranor. In 1907 Cranor conveyed to Heskett, and his conveyance contained other lands. Heskett at the time gave Cranor a purchase money mortgage for $4,000, due September 4, 1910. In June, 1909, Heskett paid Cranor all but $1,000 of this indebtedness and gave him a new note and mortgage on the land in controversy, due September 16, 1910, which mortgage was recorded June 8, 1909. On December 22, 1909, Heskett and wife gave plaintiff, Franklin, a mortgage on this and other lands for $3,890.10. Franklin commenced foreclosure proceedings in February, 1911, making Heskett and wife and Cranor and wife parties defendant. Cranor, having moved to Wyoming, was served by publication, and a default decree of foreclosure was awarded Franklin on May 3, 1911. On November 18, 1911, Cranor was allowed by the court to open up the decree, and thereupon he filed an answer and cross-bill praying for a foreclosure of his prior mortgage on so much of the land as was described therein. The plaintiff, Franklin, and the defendant Heskett filed like replies to Cranor's answer and cross-bill, alleging that the title acquired by Anderson, who was Cranor's grantor, was void for irregularities; that plaintiff Franklin had obtained quitclaim deeds from the heirs of Steinhaus. Heskett alleged that Franklin had ousted him from possession, and that the title to the Steinhaus land conveyed by Cranor to him had failed. Both prayed that Cranor's mortgage be canceled. Cranor by his reply alleged, among other things, that he and his immediate grantor, Anderson, had been in the open, notorious, exclusive and adverse possession of the Steinhaus land from April 4, 1888, until he conveyed it to Heskett, and that the deed by him to Heskett conveyed a good and perfect title. The reply also contained an allegation of conspiracy on the part of Franklin and Heskett to deprive him of his rights under his mortgage. The cause was tried upon the issues thus joined, and resulted in findings and a decree in favor of Cranor foreclosing his mortgage.

It thus appears that the controlling issue in this case is one of fact, and the real question to be determined is:

Did Anderson and Cranor have the open, notorious, exclusive and adverse possession of the land in question a sufficient length of time before it was conveyed to Cranor to give him a good title thereto?

It appears from the testimony that August Anderson purchased the Steinhaus land at administrator's sale in the spring of 1888, and received a deed therefor, which was recorded in April of that year. The witnesses Phillips, Knobbs, Brennan, and Josephine Anderson, his widow, all testified that he took possession of the land and broke a part of it in the year 1888, and fenced all of it the following season; that he continued in uninterrupted possession of the land and paid the taxes thereon until he sold it to Cranor in 1904. The testimony also shows that Cranor took possession of this and other lands and remained in possession until he sold to defendant Heskett in 1907; that Heskett has remained in the uninterrupted possession of it ever since that date. While there were irregularities in the administrator's sale to Anderson, he took possession under color of title, and the evidence is clear and convincing that he and his grantees, Cranor and Heskett, have been in the open, notorious, adverse and exclusive possession of the Steinhaus farm for more than 22 years. It appears that plaintiff, Franklin, in the year 1911 obtained quitclaim deeds from the two Steinhaus heirs for the sum of $1 each, but Franklin has never disturbed Heskett in his possession. Such being the case, Heskett's allegation of disseizin was not sustained. It seems clear that the title which Heskett obtained from defendant Cranor is valid, and therefore he had no defense to the $1,000 mortgage given by him to Cranor.

The judgment of the district court was clearly right, and is

AFFIRMED.

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

CHARLES H. BROWN, APPELLANT, V. DOUGLAS COUNTY ET AL., APPELLEES.

FILED MAY 1, 1915. No. 18138.

1. **Taxation**: RAISE OF VALUATION. A county board of equalization cannot raise the assessed valuation of the real estate of an individual taxpayer without a complaint and without notice to the person affected thereby.
2. ———: ILLEGAL LEVY: INJUNCTION. So much of the taxes as are levied upon the valuation above that fixed by the county assessor is void, and its collection may be enjoined.

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

Francis A. Brogan, for appellant.

Benjamin S. Baker, George A. Magney, W. C. Lambert and *Charles Haffke, contra.*

William Baird & Sons, amici curiæ.

BARNES, J.

This was a suit in equity to enjoin the county treasurer of Douglas county from attempting to collect certain taxes alleged to have been assessed and levied upon the west half of lot 4, in block 118, in the city of Omaha. A demurrer to plaintiff's petition was sustained; he refused to further plead; his action was thereupon dismissed, and he has brought the case here by an appeal.

It was alleged in the petition, in substance, that the county assessor of Douglas county, on the second Monday in June, 1912, completed his assessment rolls of the taxable property in said county and filed the same with the county clerk, and by his assessment valued the west half of lot 4, block 118, in the city of Omaha, at the sum of $170,000; that thereupon said valuation became and was the only lawful valuation of said property for taxation unless and until the same was changed by the county board of

equalization in the manner provided by law. It was further alleged that the county board of equalization of Douglas county convened on the 11th day of June, 1912, adjourned from day to day, terminated its session on the 3d day of July of that year, and adjourned to await the action of the state board of equalization; that at the close of the said meeting the said county board of equalization immediately before adjournment pretended to adopt a resolution purporting to raise the valuation of the plaintiff's premises, for the purposes of assessment, from the sum of $170,000 to the sum of $180,000, thereby making an increase in the valuation of said property, for the purposes of assessment and taxation, of $10,000; that the action taken by the said board was taken without any notice to the plaintiff, although he resided in the city of Omaha and was actually in said city at the time, which fact was well known to the said board, and no attempt was made to give plaintiff notice of the action of the said board, and, without giving him any opportunity to appear before the board and show cause why said valuation was excessive, and by adjourning the said meeting, prevented a hearing on their said action. It was alleged that the action of the board of equalization was contrary to the terms of the statute and without authority of law, and was wholly null and void; that said increased valuation was reported to the state board of equalization; that said state board certified the increase to the county clerk of Douglas county; that taxes were levied on such increased valuation and were extended upon the tax lists of said county, and that the county treasurer was proceeding and attempting to collect the said taxes. Plaintiff offered to pay all taxes levied on the true valuation of $170,000, and prayed for an injunction restraining the county authorities from collecting or attempting to collect so much of the taxes as were assessed and levied upon the increased valuation of $10,000. In short, the petition stated sufficient facts to entitle the plaintiff to the relief prayed for, if the action of the board of equalization in increasing the valuation of plaintiff's property was void and was taken without authority of law.

The proceedings, of which complaint was made, were had under the provisions of the Compiled Statutes of 1911. By section 116, art. I, ch. 77, Comp. St. 1911, it was provided: "The precinct assessors shall complete their assessment rolls, schedules, lists and returns, and deliver the same to the county assessor for revision, not later than the last Monday of May in each year. The county assessor shall complete his revision of the same and shall file them with the county clerk on or before the second Monday of June of each year." It was provided by section 120: "The county board, the county assessor and county clerk, shall constitute the county board of equalization, and the county clerk shall be the clerk of said board." By section 121, it was further provided: "The county board shall hold a session of not less than three and not more than twenty days for the purpose contemplated in this section, commencing on the first Tuesday after the second Monday of June each year, and shall: First. Fairly and impartially equalize the valuation of the personal property of the county, and to that end shall, on the application of any person who may deem himself aggrieved, or who shall complain that another is assessed too low, review the assessment and correct the same as shall appear to be just. Second. At its meeting in 1912, and every second year thereafter, equalize the valuation of real property of (the county) by raising the valuation of such tracts and lots as are assessed too low, and by lowering the valuation of such tracts and lots as are assessed too high; but in cases of evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property the county board of equalization may at any of its annual meetings consider and correct the same by raising after due notice has been given to the interested party or parties or by lowering the assessed valuation of such real property. * * * Third. Ascertain whether the valuation in one township, precinct or district bears just relation to all townships, precincts, or districts in the county; and may increase or diminish the aggregate valuation of property in any township, precinct or district, by adding or deducting such sum upon the hun-

dred as may be necessary to produce a just relation between all the valuations of the property in the county. It may consider lands, village and city lots and personal property, and different classes of personal property, except property assessed or valued by the state board of equalization and assessment, separately and determine a separate rate per cent. of addition or reduction for each of said classes of property as may be necessary to adjust the equalization thereof. Fourth. Adjust assessments for the county by raising or lowering the assessment of any person as to any or all the items of his assessment in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value. But in no case shall the assessment of any person be raised by the board until such person, or his agent, shall be previously notified, if such person or his agent be found in the county. Fifth. Also add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof as the assessors should have done, but no personal property shall be so added unless the owner thereof is previously notified, if he be found in the county."

It appears that the assessed valuation of plaintiff's property was raised in the amount of $10,000, without any notice to him whatever, and without any complaint made by any one that his property was assessed too low. It also appears, and is admitted by the demurrer, that the board of equalization increased the valuation of the plaintiff's property as the last act performed by it before adjournment, and that plaintiff never had any notice of such increase until after such adjournment, and was afforded no opportunity to appear before the board and show cause why such increased valuation should not be made.

It is the plaintiff's contention that the district court erred in sustaining the demurrer to his petition and dismissing his cause of action. The county board of equalization can only exercise such powers as are expressly granted by statute, and when the law prescribes the mode they must pursue in the exercise of these powers, it excludes

all other modes of procedure. *Sioux City & P. R. Co. v. Washington County,* 3 Neb. 30. The board of equalization is simply what its name imports, a board for the equalization of values in certain cases. It possesses no powers save those conferred by statute. *State v. Dodge County,* 20 Neb. 595. A county board cannot change an assessment without notice having first been given to the party affected. *State v. Edwards,* 26 Neb. 701; *Grant v. Bartholomew,* 57 Neb. 673. In the case last cited it was said: "A board of county commissioners, sitting as a board of equalization, without notice to the landowner and without a complaint that his real estate was assessed too low, raised the value placed thereon by the assessor. Held, that the board was without jurisdiction and its action a nullity." Where an assessment has been duly made and returned, the property owner may rest securely upon such assessment, unless a complaint is filed against him before the board of equalization and evidence given in support of the complaint, tending to show that his assessment should be increased. *Dixon County v. Halstead,* 23 Neb. 697. The valuation of property made by the proper assessing officer is presumed to be correct, and the burden is upon those attacking the same before the board of equalization to show that it should be assessed at a higher rate. *Woods v. Lincoln Gas & Electric Light Co.,* 74 Neb. 526. In *Grant v. Bartholomew, supra,* it was held that, where a board of equalization illegally raised an assessment, "only so much of the tax as arose out of the difference between the valuation placed upon the property by the assessor and the value attempted to be placed thereon by the board of equalization is illegal." It was also held that the action of the board of equalization in raising the assessor's valuation without notice to the landowner does not vitiate the assessment made by the assessor. In *Spiech v. Tierney,* 56 Neb. 514, it was held: "Where a board of equalization, without authority, increases the valuation of real estate as fixed by the assessor, the taxes apportioned against such real estate will be valid only to the extent that they are based on the original assessment." Many other cases have been de-

cided by this court along the same line, which we deem it unnecessary to refer to.

It is contended by the appellee that plaintiff's remedy in this case was by appeal from the action of the board of equalization, and not by injunction. It is apparent from the allegations of the petition that an appeal would have afforded the plaintiff no remedy. No opportunity was given him to make complaint and have a hearing before the board of equalization. We have frequently held that, on appeal from an order of the board of equalization in the matter of assessment of property for taxation, the cause must be tried on the questions raised by the complaint before that tribunal. *Nebraska Telephone Co. v. Hall County,* 75 Neb. 405; *First Nat. Bank v. Webster County,* 77 Neb. 813; *State Bank v. Seward County,* 95 Neb. 665.

As we view this question, the contention that the Statutes of 1911 gave to the board of equalization the enlarged power which authorized it to increase the valuation of the property of the individual taxpayer without complaint and without notice is unsound. The court erred in sustaining the demurrer to plaintiff's petition and dismissing his action.

The judgment of the district court is reversed and the cause remanded, with directions to award the plaintiff the relief prayed for in his petition.

REVERSED.

SEDGWICK, J., concurs in the conclusion.

HAMER, J., not sitting.

ANNIE KUYKENDALL ET AL., APPELLANTS, V. DOUGLAS COUNTY ET AL., APPELLEES.

FILED MAY 1, 1915. No. 18147.

The opinion in *Brown v. Douglas County, ante,* p. 299, is followed and approved.

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

Brogan & Raymond, for appellants.

George A. Magney, Benjamin S. Baker, John A. Rine, W. C. Lambert, L. J. TePoel and *Charles Haffke, contra.*

BARNES, J.

This was an action to restrain the collection of that part of the taxes assessed and levied on an increased valuation of plaintiff's real estate in Douglas county, situated in the city of Omaha.

The facts alleged in the petition were identical with those contained in the opinion in *Brown v. Douglas county, ante,* p. 299, except as to the description of the premises and the amount of increased valuation. A demurrer to plaintiff's petition was sustained by the district court and plaintiff's action was dismissed. The appeal in this case is ruled by our opinion in *Brown v. Douglas County, ante,* p. 299.

The judgment of the district court is reversed, with directions to grant the plaintiff the relief prayed for in her petition.

REVERSED AND REMANDED.

HAMER, J., not sitting.

WILLIAM H. BEDELL ET AL., APPELLEES, V. WILLIAM BERGER ET AL., APPELLANTS.

FILED MAY 1, 1915. No. 18140.

Evidence examined, and found sufficient to sustain the judgment.

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

Rhea & Hanlen, for appellants.

E. A. Cook, contra.

BARNES, J.

This was an action in the district court for Dawson county for damages for a breach of defendants' contract to convey to plaintiff a good title to lot 3, in block 5, of Ehmens subdivision to the city of Gothenburg, in Dawson county, Nebraska. The plaintiff recovered judgment for $290.58, and the defendants have appealed.

It appears that the plaintiff and the defendants entered into a written contract by which the defendants, upon the payment of the purchase price, agreed to convey the lot above described to plaintiff. Plaintiff went into possession of the lot and made all of the payments but one, when it was discovered that defendants did not have title to the lot and could not make the conveyance. The evidence shows that plaintiff made frequent demands upon the defendants to complete their title and convey the lot to him, but defendants neglected and refused so to do; that thereupon the plaintiff proceeded to secure the outstanding title at an expense of over $300. The defendants refused to reimburse him for the money so expended.

There is no substantial conflict in the evidence, and the judgment of the district court is

AFFIRMED.

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

P. F. BROPHY, APPELLEE, V. FAIRMONT CREAMERY COMPANY, APPELLANT.

FILED MAY 1, 1915. No. 18042.

1. **Corporations:** SERVICE OF SUMMONS: "MANAGING AGENT." An agent of a domestic corporation, whose principal place of business is in another county in this state, whose contract of employment demands of him the exercise of judgment and discretion in the business affairs of his principal, and who has charge of the property and business of his principal in the locality where he is stationed, is "a managing agent," upon whom service of summons may be made.
2. **Landlord and Tenant:** DESTRUCTION OF PREMISES: LIABILITY OF TENANT. A tenant may, if guilty of negligence in their care, be liable to his landlord for the loss of the leased premises by fire, even though the lease contains a provision that at the end of the term he shall yield possession "subject to loss by fire."

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

Hainer & Craft, for appellant.

George W. Berge, contra.

LETTON, J.

Action for damages by a landlord against a tenant for the negligent destruction of the leased premises by fire. Plaintiff recovered, and defendant appeals.

Plaintiff was the owner of a one-story frame store building in Panama, Nebraska, which was leased to defendant for a year. Defendant was largely engaged in the business of purchasing butter, eggs, poultry and cream, and the building was used as one of its purchasing stations. The petition charges, in substance, that on account of the carelessness and negligence of the agents of the defendant while acting within the scope of their employment the building caught fire and was totally destroyed; that there was no insurance on the building, and that the same was a total

loss, and the plaintiff has been damaged in the sum of $1,000.

The first defense is that the court had no jurisdiction, for the reason that defendant is a Nebraska corporation having its principal place of business in Douglas county; that it has no place of business in Lancaster county nor managing agent therein; and that Samuel Johnson, upon whom the summons was served, was not its managing agent nor an officer of defendant, but a mere laborer.

For a second defense it pleads a provision of the lease by which it took the building subject "to the usual wear, inevitable accident, and loss by fire," and denies that it was guilty of negligence.

1. The evidence shows that the business at Panama was supervised by a manager at Crete, Nebraska. The duties of the person in charge at Panama were to purchase cream, butter, poultry and eggs, to pack or crate the purchases, and to ship according to defendant's directions. The prices to be paid were fixed at headquarters and communicated to the buyer at Panama. Poultry was graded as to age and size. When a farmer brought poultry to the substation, it was the duty of the buyer to fix the grades of the fowls tendered and to pay for them at the prices fixed. It was also his duty to test all cream taken in and to pay for it according to the result of the test. Payment was made by drafts drawn upon the Fairmont Creamery Company, payable to the seller, and signed by the person in charge "for the Fairmont Creamery Company." The drafts were usually cashed at the local bank. Under this state of facts the conduct of the business required judgment and discretion, and under our former holdings Johnson was the managing agent of defendant at Panama. Service was properly had upon him. *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 14; *Ord Hardware Co. v. Case Threshing Machine Co.*, 77 Neb. 847.

2. It is difficult to determine the cause of the fire. Plaintiff claims that there is sufficient circumstantial evidence to sustain a finding that the fire occurred on account of the carelessness of the agent of defendant in charge of its busi-

ness there, which, of course, defendant denies, and on its part insists that the evidence is not sufficient to sustain the verdict. It also contends that the court erred in admitting testimony as to various statements made before and after the fire by Baker, the man in charge of the business. It is argued that these statements were no part of the *res gestæ,* and therefore inadmissible. Our attention is called to the case of *Ohio & M. R. Co. v. Stein,* 133 Ind. 243, 19 L. R. A. 733, where it was held that, where certain evidence was erroneously admitted, it should be presumed to be prejudicial, and, unless this presumption was rebutted, the judgment should be reversed. This is not the rule in this state, and is directly opposed to section 7713 Rev. St. 1913. The statements of Baker as to which the most serious complaints are made are admissible, for the reason that they were declarations of the agent concerning his conduct, and were so closely connected in time with the acts charged as negligence that they must be considered as a part of the *res gestæ.*

The conversation had with the witness Snyder, which was had the day before the fire started, is relevant and material, not on account of its being an admission concerning any act of Baker's or a threat, but merely as indicating a negligent and careless state of mind on his part. Its value as evidence was for the jury.

The statement made to Johnson two or three days after the fire was in the main self-exculpatory and could not be prejudicial. The other part of the statement, that Baker remembered candling the eggs, could not be prejudicial, since it was undisputed that Baker had said at the time he left the store, a few minutes before the fire, that he had done so.

It is next assigned that plaintiff's counsel was guilty of improper conduct because he commented upon the absence of Mr. Baker as a witness. This was within the limits of legitimate argument. The absence of a material witness may usually be commented upon.

It is a close question whether the evidence is sufficient to sustain the verdict; and yet, when the whole testimony

is taken together, there are a number of circumstances which seem to justify the jury in finding that the negligence of Baker was the cause of the fire. We do not feel justified in setting aside the verdict for the reason that it is not sustained by the evidence.

The judgment of the district court is

AFFIRMED.

SEDGWICK, J., dissents.

FAWCETT, J., not sitting.

JOSEPH A. WYNEGAR, APPELLANT, V. GEORGE DOBSON ET AL., APPELLEES.

FILED MAY 1, 1915. No. 18103.

Appeal in Equity: AFFIRMANCE. In an action in equity, where the evidence is conflicting, the findings of the trial court, based upon the testimony of witnesses who appeared in person before it, are entitled to consideration, and may, in a doubtful case, determine whether the plaintiff has sustained the burden of proof necessary to entitle him to the relief prayed.

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

C. M. Skiles, for appellant.

Matt Miller, contra.

LETTON, J.

Action to quiet title. Defendants prevailed, and plaintiff appeals.

The petition, in substance, alleges that on July 1, 1902, one McCarty, a resident of Lincoln, owned five lots in the village of Ulysses, Butler county; that on that day he executed a quitclaim deed to Godfrey Rihart; that Rihart paid $5 down, and was to pay the balance of the purchase price, amounting to $10, within 60 days from date; that the deed was placed in the hands of one Lord, with the agree-

ment that if the balance was not paid within that time the deed was to be returned to the grantor, and the $5 paid considered as rent; that Rihart failed to pay the amount, and his interest in the property was thereby forfeited; that a long time afterwards, and after Rihart ceased to claim any interest in the lots, McCarty and his wife executed a warranty deed of the premises to Joseph A. Wynegar, the plaintiff, and delivered it to defendant Dobson, with instructions to deliver it to plaintiff; that Dobson failed so to do; that afterwards Dobson, without authority, obtained possession of the quitclaim deed to Rihart, and that Rihart executed and delivered to him a quitclaim deed on the 2d of January, 1908; that both of these were recorded, and both defendants knew at the time of these transactions that the plaintiff was the owner of the premises; that afterwards McCarty executed and delivered to plaintiff another warranty deed on the 28th day of April, 1909, which was recorded after the other deeds. The petition alleges that the plaintiff went into possession of the premises by virtue of the deeds made by McCarty and has ever since been in possession.

The answers deny that the deed to Rihart was placed in escrow with Lord, allege that Rihart purchased the lots for the sum of $25, and under the agreement made took possession of the same, fenced them, and continued in possession from 1897 till about the 2d of January, 1908; that the deed from McCarty to Rihart was placed in escrow in the hands of the First Bank of Ulysses, to be held until he paid the balance due; that Rihart paid $10 on the deed at the time of purchase, afterwards paid the balance, and the deed was delivered to him by the bank; that he afterwards conveyed the premises to defendant Dobson; that the conveyance from McCarty to Wynegar was made with full knowledge that Rihart was the owner and in possession of the lots, and that the recording of that deed creates a cloud upon defendants' title. There is a prayer for affirmative relief.

The evidence on behalf of each party sustains, in the main, his respective plea. There is a direct conflict in the

testimony, and there is very little evidence as to the surrounding circumstances which aids the court in determining the truth or falsity of the several stories. The evidence of Mr. Lord was not taken, and McCarty and Rihart flatly contradict each other as to the original agreement. Wynegar procured possession from Rihart by agreement. It was asserted that Rihart disclaimed ownership more than once, but this he denies. The trial court had the advantage of seeing the witnesses and hearing them testify, and its judgment as to their credibility is worthy of consideration.

It was for the plaintiff to sustain the burden of proof. We are unable to say that he has done so by a preponderance of the evidence, especially in view of the result reached by the district court. This being the case, the judgment of the district court should be, and is,

AFFIRMED.

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

WILLIAM HAUENSTINE, APPELLANT, V. FLORA I. BARNETT, APPELLEE.

FILED MAY 1, 1915. No. 18110.

1. **Appeal:** HARMLESS ERROR. One cannot complain of the giving or refusing of instructions upon an issue of settlement, where the finding of the jury that no settlement took place is in his favor.
2. ———: ISSUES. Where a general denial has been filed in a justice court to an action for wages, an answer in the district court on appeal alleging facts tending to contradict the allegations of the petition that there is a balance due does not change the issues tried below.

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

S. D. Killen, for appellant.

Sackett & Brewster, contra.

LETTON, J.

Action to recover a balance alleged to be due for wages. Plaintiff recovered a judgment for the sum of $1, and has appealed. The action was originally brought in justice court. In the bill of particulars plaintiff sued for $138.40 "as money due and unpaid on account of work and labor done and performed for defendant at defendant's request," attaching an itemized statement amounting to $678.45, and not itemizing any credits.

The answer in that court pleaded, first, a settlement; and next a general denial. When appealed to the district court a petition was filed which pleaded a specific agreement in detail. For answer the defendant denied that she entered into an agreement as set forth, but alleged that the plaintiff was employed by her from January 1, 1909, to February 15, 1909, at $50 a month; from February 15, 1909, to June 1, 1909, at $65 a month; from June 1, 1909, to November 11, 1909, at $50 a month; and that she had paid plaintiff $569.16 in full of all services, and pleaded a satisfaction and discharge.

The brief of appellant is not prepared in accordance with rule 12 (94 Neb. XI) of this court. The court is therefore under no duty to consider it; but it sufficiently appears that error is assigned upon the overruling of a motion to strike part of the allegations of the answer, because it sets up new issues from those tried below, and that complaint is made as to instructions of the court with reference to the plea of accord and satisfaction.

The evidence was in direct conflict; plaintiff testifying that he was to receive $65 a month until September 1, and $75 a month thereafter. Defendant testified he was to receive $65 indefinitely, and that on June 1 his wages were reduced to $50, at which wage he continued to work, and that he has been paid all that was due. The jury found for plaintiff, and assessed his recovery at the sum of $1. The instructions complained of relate to the matter of settlement. Since the jury found there was no settlement, no prejudice to the plaintiff could result from the giving of these instructions.

The only question presented of any moment is whether the court erred in refusing to strike part of the allegations in the answer as raising a new issue from that tried in justice court. The petition filed by plaintiff in the district court pleaded a contract in more specific terms than that filed in the justice court. The answer met the more specific allegations by entering into equal detail. No answer is required in justice court, and an answer in district court alleging facts tending to contradict the allegations of the petition that there is a balance due, though in greater detail than that filed below, does not change the issues.

The main issue was a question of veracity between the plaintiff and the defendant. This has been settled by the jury, and we are not entitled to interfere.

The judgment of the district court is

AFFIRMED.

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

LOUIS LOEB, ASSIGNEE, APPELLANT, V. ESTATE OF THOMAS HUSTON, APPELLEE.

FILED MAY 1, 1915. No. 18113.

1. **Partnership**: JUDGMENT: ASSIGNMENT BY SURVIVING PARTNER. On the dissolution of a partnership by the death of one of its members, the control of the assets vests in the surviving partner. He has power to assign a judgment belonging to the partnership, and the fact that the assignment is not executed in the name of the partnership, but only in the name of the individual partner, is not material.
2. **Executors and Administrators**: PAYMENT OF CLAIM: SUFFICIENCY OF EVIDENCE. Evidence set forth in the opinion *held* sufficient to sustain the defense of payment.

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

J. E. Willits, for appellant.

Snider & Bruckman, contra.

LETTON, J.

A claim was filed by Louis Loeb, assignee, in the county court of Adams county against the estate of Thomas Huston, deceased. The claim consisted of a judgment rendered against the deceased on October 10, 1888, for $229.57, including costs and interest, upon a note given by one Alexander Rutherford to Huston, and afterwards indorsed in blank by Huston. Rutherford was not made a party, and the judgment was against Huston as indorser. The action was brought by "Abraham Loeb and Emil Lindner, administrator of the estate of Samuel Hirsch, deceased, doing business under the firm name of Loeb & Hirsch." The assignment is as follows: "In the County Court of Adams County, Nebraska. Abraham Loeb and Emil Lindner, Adm'r of the Estate of Samuel Hirsch, deceased, Plaintiffs, v. Thomas Huston, Defendant. Assignment of Judgment. For a valuable consideration I hereby assign the judgment rendered in the above entitled case in the county court of Adams County, Neb., on the 10th day of Oct., 1888, the amount of said judgment being $229.57, and the costs being $4.25, and which said judgment is recorded in county court docket 3, at page 205, to Louis Loeb. Witness my hand this 26th day of March, 1900. Loeb & Lindner, by A. Loeb."

The claim was allowed in the county court, but an appeal was taken to the district court, where issues were properly framed. The petition alleged that Abraham Loeb is the surviving partner of Loeb & Hirsch, a copartnership, and that the judgment vested in him as such surviving partner, with power to dispose of the same; that Lindner was a nominal party only, and has since made his final report; that Abraham Loeb is the real party in interest; and pleads the assignment and the nonpayment of the judgment. The defendant denied the assignment of the judgment; pleaded that the judgment was dormant, that it is barred by the statute of limitations, and that it was fully paid. The case was tried to the court without the

intervention of a jury. The court found that the execution of the assignment was not sufficient to vest the title in Louis Loeb, and also found generally for the defendant and against the plaintiff. Judgment was rendered dismissing the case.

Plaintiff proved the judgment and the execution of the assignment by Abraham Loeb. For the defense it was shown that a claim was filed by Abraham Loeb against the estate of Alexander Rutherford for $275 upon the same note as that upon which the judgment is based; the note being for $200 with 10 per cent. interest from May 27, 1887. The judgment was rendered October 10, 1888. On the 12th day of October, 1889, Rutherford for a consideration of $275 executed a chattel mortgage on certain property, the name of the mortgagee being written as follows: "Loeb & Hirsch"—a line drawn through these words, and "Abraham Loeb" written directly thereafter. Rutherford on July 10, 1888, also executed another chattel mortgage to Loeb to secure $110 due the 1st day of November, 1889. There was also found among the papers of this estate a receipt dated August 19, 1890, as follows: "Received of F. J. Taylor, Adm'r of Rutherford Estate, the sum of $396.45 in notes as payment of mortgage debt. (Signed) A. Loeb." The final report of the executor shows that he was credited with this sum paid to "A. Loeb on chattel mortgage." This receipt is dated August 19, 1890, which is the day before the claim was filed, but it was not filed until August 29.

As to the question whether the assignment was sufficient to pass title to the assignee: The original judgment was in favor of Abraham Loeb and Emil Lindner, doing business under the firm name of Loeb & Hirsch. Loeb was the surviving partner of this firm, and he had the right to assign and dispose of the judgment. *Lindner v. Adams County Bank,* 49 Neb. 735. The mere fact that he also signed the name of Lindner to the assignment did not interfere with this right. Even if Lindner, as administrator, had not been entitled to do business in the name of Loeb & Hirsch, a third party cannot now complain.

We believe, however, that the evidence fails to show that this note has not been paid. The $275 claim filed against the estate of Rutherford was based upon this note. Rutherford had previously given a chattel mortgage for $275 without interest. Another chattel mortgage had been given by him to secure a note for $110. Chattel mortgages to the amount of $396.45 in favor of Abraham Loeb were paid by the administrator. The receipt, though dated before the filing of the claim, was filed afterward. Apparently the claim was dropped and the debt paid by paying the mortgages, which were not required to be filed or allowed as claims against the estate in order to warrant payment by the administrator.

No explanation of these transactions has been given by the plaintiff, though it was stated at the argument that Mr. Abraham Loeb is within reach, so that his deposition might have been taken. The amount of the first chattel mortgage does not correspond exactly with the amount due upon the note from Rutherford, but it nearly does so if interest to maturity was included, and since the note bears no interest this is probably what was done. It is worthy of remark that the claim filed by Loeb based upon the note is also for $275, and that this too exceeds the amount due at that time. When Huston died in 1911, the inventory of his estate showed that he was possessed of four lots in Hastings, a number of domestic animals in excess of his exemptions, over $1,500 in money, notes secured by real estate mortgages of record, and other tangible assets. Evidently the later executions against him had been issued and returned in a perfunctory manner in order to keep the judgment alive. No serious attempt seems to have been made to collect from Huston for many years.

Considering all the facts, we are convinced that the circumstantial evidence sustains the general finding of the district court. Its judgment is, therefore,

AFFIRMED.

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

CHRISTINA KRIEGER, APPELLEE, V. CHARLES VON BUSCH ET AL., APPELLANTS.

FILED MAY 1, 1915. No. 18086.

1. **Appeal:** CONFLICTING EVIDENCE. A verdict on substantially conflicting proof will not be set aside, where it is supported by sufficient competent evidence.
2. ———: EXCLUSION OF EVIDENCE: OFFER OF PROOF. "The ruling of the trial court in sustaining an objection to a question put to one's own witness cannot be reviewed where the complaining party has failed to make an offer of the testimony indicating what he expects to prove by the witness, in response to the question propounded and overruled." *Barr v. City of Omaha*, 42 Neb. 341.

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

C. R. Stasenka, B. V. Kohout and *McCreary & Danley*, for appellants.

J. W. James, contra.

ROSE, J.

This is an action to recover $172.26 for services performed by plaintiff as a domestic servant for defendants from October 8, 1908, until June 10, 1909, at $3.50 a week, including $20 for traveling expenses between plaintiff's home at Madison, South Dakota, and the home of defendants near Campbell, Nebraska. The answer contains a general denial and a plea of settlement and payment. Plaintiff recovered a verdict and a judgment for the full amount of her claim and interest. Defendants have appealed.

The principal controversy on appeal appears to involve the sufficiency of the evidence to sustain the verdict. It is established without controversy that plaintiff performed the services for which she claims compensation. There is evidence tending to show that defendants agreed to pay her $3.50 a week and her traveling expenses. On behalf

of defendants there is proof that plaintiff offered to make them a visit and to assist them for her railroad fare, and that they settled and paid her claims. On these issues there is a substantial conflict in the testimony, with sufficient evidence to sustain the verdict. The questions of fact were therefore settled by the jury.

One of the assignments relates to the exclusion of testimony in answer to questions propounded to a witness for defendants, but the record does not contain an offer of proof essential to an affirmative showing of error. It follows that the judgment cannot be reversed on this ground. *Barr v. City of Omaha,* 42 Neb. 341; *Blondel v. Bolander,* 80 Neb. 531.

Complaint is made of other rulings on evidence, but in these respects reversible error is not shown.

AFFIRMED.

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

SEDGWICK, J., concurring.

The rule stated in the second paragraph of the syllabus is apparently applicable in this case, because it does not appear from the record that the questions overruled call for evidence that is relevant and material to the issue that was being tried. The rule has been applied in many cases in this court, including *Mathews v. State,* 19 Neb. 330; *Masters v. Marsh,* 19 Neb. 458; *Lipscomb v. Lyon,* 19 Neb. 511; *Yates v. Kinney,* 25 Neb. 120; *Sellars v. Foster,* 27 Neb. 118; *Mordhorst v. Nebraska Telephone Co.,* 28 Neb. 610; *Barr v. City of Omaha,* 42 Neb. 341; *Blondel v. Bolander,* 80 Neb. 531, and perhaps others.

It is important to simplify the trial as far as possible. If incompetent evidence is allowed before the jury, there is always danger of an unjust verdict. When such evidence is inadvertently admitted by the court, the best that can be done is to strike it out and instruct the jury to disregard it. But this does not always remedy the error. The impression so wrongfully made upon the minds of the jurors may unconsciously influence their estimation of the competent evidence before them. If counsel are allowed

to put before the jury irrelevant or immaterial evidence, the real issue may be so incumbered as to confuse even trained and experienced minds. All such evidence tends to distract the mind and may cause neglect of the real question to be investigated. The trial court should allow only such evidence as tends legally to establish the issue presented. The examining attorney should make it appear to the trial court that the question he propounds to a witness calls for proper evidence. Unless this clearly appears, he cannot complain that the witness is not allowed to answer. But the rule should not be construed to mean that the testimony expected of the witness must necessarily be first detailed before the court.

In *Mathews v. State, supra,* the reason for the rule is correctly stated, to enable the court "to determine whether or not the evidence is pertinent." This is the only purpose of the rule, and the only justification for its existence. Opposing counsel cannot, by objecting, require the examining attorney to "make an offer of testimony indicating what he expects to prove" with each question asked of a witness. When the question itself shows that its answer would be proper evidence, that is, when the condition of the evidence is such that the court can see that the question is a proper one, under the issues, no offer of proof is necessary. The rule is more often applied in the direct than in the cross-examination of a witness. In cross-examination it will generally appear from the question itself whether the answer will be relevant to the direct examination, or will tend to explain or qualify the direct testimony of the witness, and in general more latitude is allowed in the cross-examination of a witness. When a rule of practice is announced in general terms, as in *Mathews v. State, supra,* care should be taken to limit it to its proper application. If improperly applied, such rules sometimes become more and more technical in application until they become a trap for the unwary, instead of beneficial for the promotion of justice. I think this has been the result in some of the later cases, and that the decisions in those cases ought to be explained and modified.

VIOLA KEUP, APPELLEE, V. FRED KEUP, APPELLANT.

FILED MAY 1, 1915. No. 18094.

Husband and Wife: SUIT FOR MAINTENANCE. Without seeking a divorce, a wife who has not violated any duty growing out of the marriage relation may maintain a suit in equity against her husband for separate maintenance, where he has violated his legal duty to support her and their children.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETTLER, JUDGE. *Affirmed.*

Joseph C. Saylor and *John A. Miller,* for appellant.

W. D. Oldham and *John W. Chapman, contra.*

ROSE, J.

This is a suit in equity commenced by Viola Keup against her husband, Fred Keup, for separate maintenance and for the custody of their infant son. Defendant filed a cross-petition, praying for a divorce. Each charged extreme cruelty on the part of the other. The trial court found the issues in favor of plaintiff, and required defendant to pay her $50 in cash and $15 a month until the further order of the court, or until such a time as he shall provide a suitable home for her and the child. Defendant has appealed.

On appeal it is contended that the evidence does not justify the relief granted to plaintiff, and that defendant is entitled to a divorce and the custody of his infant son. The parties lived together less than a year. Plaintiff took the child to the home of her parents and has since lived there. It is beyond question a suitable place. Nothing would be gained by recounting the unhappy incidents which resulted in the separation. The decree is sustained by the proofs. The trial court did not exact of defendant the performance of any duty beyond the marital obliga-

tions imposed upon him by law. The evidence does not show that plaintiff forfeited her right to the relief granted.

AFFIRMED.

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

RUDOLPH KROLL, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MAY 1, 1915. No. 18099.

Courts: JURISDICTION: INJURIES TO REAL PROPERTY. As a general rule, an action for injuries to real property situated in another state cannot be maintained in this state.

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

M. F. Harrington, for appellant.

Byron Clark, Jesse L. Root, L. C. Chapman and *J. W. Weingarten, contra.*

ROSE, J.

Plaintiff brought this action in the district court for Holt county to recover $8,520 for injuries to real estate and personal property situated in Lawrence county, South Dakota. Defendant demurred to the petition on the ground that the court had no jurisdiction of the subject matter of the suit. The demurrer was sustained. Plaintiff refused to plead further and elected to stand upon his petition. A dismissal of the action followed, and plaintiff has appealed.

The determining question is conceded to be: May an action for injury to real property situated in another state be maintained in this state? The courts of both England and America have generally answered this question in the negative. Practically the entire field of inquiry and discussion is covered by the opinions in the following cases:

British South Africa Co. v. Companhia De Mocambique, (1893) L. R. App. (Eng.) 602; *Ellenwood v. Marietta Chair Co.,* 158 U. S. 105; *Livingston v. Jefferson,* 1 Brock. (U. S. C. C.) 203; *Kentucky Coal Lands Co. v. Mineral Development Co.,* 191 Fed. 899. Many other cases are collected in 26 L. R. A. n. s. 933 *et seq.,* in a note to *Smith v. Southern R. Co.,* 136 Ky. 162. The reasons which have directed the course of adjudication generally on this subject are stated in the opinions in the cases cited. The question is not one of venue, but of jurisdiction. The action is local and is maintainable only in the state or country wherein the land is situated. In a few cases a contrary view has been expressed, the most noteworthy being *Little v. Chicago, St. P., M. & O. R. Co.,* 65 Minn. 48, 33 L. R. A. 423. According to the great weight of authority, however, the correct rule is, generally, that an action for injuries to real property situated in another state cannot be maintained in this state.

To overturn the ruling on the demurrer, plaintiff cites *Omaha & R. V. R. Co. v. Brown,* 29 Neb. 492. That was an action to recover damages for the flooding of lands situated in Nebraska. It was held, under the statute, that the action was maintainable in any county where service upon the defendant could be obtained. The decision follows *Genin v. Grier,* 10 Ohio, 209, a parallel case under the same statutory provisions. In both cases the cause of action accrued in the state in which the suit was brought. The ruling is not in conflict with the holding of the trial court in sustaining the demurrer in the present case. Notwithstanding the early Ohio case, the supreme court of that state in the later case of *Pittsburgh, C., C. & St. L. R. Co. v. Jackson,* 83 Ohio St. 13, held: "An action for trespass on lands situated in another state, or injury thereto, cannot be maintained in this state." *Genin v. Grier,* 10 Ohio, 209, and *City of Fostoria v. Fox,* 60 Ohio St. 340, were distinguished as follows: "The cases cited, like all others, should be interpreted with reference to the facts of each case and the questions presented to and considered by the court. In those cases the question now before this

court did not arise. In both cases the cause of action asserted accrued within this state, and the question of conflict of jurisdiction between the courts of this state and the courts of another state did not arise upon the record and was not considered by the court. In each case the question was: Which county in this state was the proper forum for the action." *Pittsburgh, C., C. & St. L. R. Co. v. Jackson*, 83 Ohio St. 13.

For the same reasons, *Omaha & R. V. R. Co. v. Brown*, 29 Neb. 492, on the subject of venue and jurisdiction, is distinguishable from the present case. The statute construed in the earlier case was amended in 1889 by inserting the following: "All actions to recover damages for any trespass upon, or any injury to, real estate shall be brought only in the county where such real estate is situated." Laws 1889, ch. 29. Under the statute as thus amended, it was held in *Dhooghe v. Chicago, R. I. & P. R. Co.*, 91 Neb. 613, that an action to recover damages caused by the flooding of real estate must be brought in the county in which the land is situated. While the legislature in 1911 provided that, if the defendant in such an action is a railroad corporation, the suit may be brought where summons can be served, the change relates to the venue, and not to the jurisdiction of the action. Laws 1911, ch. 167.

It follows that the judgment of the trial court is right and is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

RUDOLPH KROLL, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED MAY 1, 1915. No. 18100.

Courts: JURISDICTION: INJURIES TO REAL PROPERTY. As a general rule, an action for injuries to real property situated in another state cannot be maintained in this state. *Kroll v. Chicago, B. & Q. R. Co.*, *ante*, p. 322, followed.

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

M. F. Harrington, for appellant.

Byron Clark, Jesse L. Root, L. C. Chapman and *J. W. Weingarten, contra.*

ROSE, J.

Plaintiff brought this action in the district court for Holt county to recover $3,331 for injuries to real estate and personal property situated in Lawrence county, South Dakota. Defendant demurred to the petition on the ground, among others, that the court had no jurisdiction of the subject matter of the suit. The demurrer was sustained. Plaintiff refused to plead further and elected to stand upon his petition. A dismissal of the action followed, and plaintiff has appealed.

The decision is controlled by the case of *Kroll v. Chicago, B. & Q. R. Co., ante,* p. 322. For the reasons therein stated, the judgment is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

CHARLES S. FOSS, APPELLEE, V. ROY R. HAZEN, APPELLANT.

FILED MAY 1, 1915. No. 18115.

Appeal: CONFLICTING EVIDENCE. Where there is a substantial conflict in the proofs on controverted issues, a verdict responding thereto will not be set aside for insufficiency of the evidence, unless clearly wrong.

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

Burkett, Wilson & Brown and *D. A. Harrington,* for appellant.

John A. Davies, contra.

ROSE, J.

This is an action for money had and received, the amount demanded being $300 and interest from March 22, 1909. The answer is a general denial. A verdict was rendered in favor of plaintiff for $372.89, and from a judgment thereon defendant has appealed.

The principal assignment of error is that the verdict is not supported by the evidence. It is shown without dispute that defendant drew a sight draft on plaintiff March 22, 1909, for $600, and that it was presented and paid. Half of that sum was afterward returned to plaintiff. On his behalf there is testimony tending to prove that the parties, for his benefit, had been negotiating for an equity in a quarter section of land in Boyd county for $600; that he was called to the telephone March 22, 1909, from defendant's office, was told that the owner of the land wanted to close the deal, and was asked if a sight draft for $600 would be accepted; that plaintiff consented to honor it; that defendant afterward took the deed in his own name as grantee, and never transferred the title to plaintiff. On the other hand, there is testimony tending to show that the negotiations resulting in plaintiff's payment of the sight draft were conducted on behalf of defendant's brother; that it was the latter who had paid plaintiff $300, and that there had been subsequent demands upon him by plaintiff for the payment of the remainder. The evidence, though conflicting, is sufficient to sustain findings in favor of plaintiff on the issues of fact. They are therefore settled by the verdict.

Exclusion of a letter offered in evidence is challenged, but its relevancy and error in excluding it are not affirmatively shown.

AFFIRMED.

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

GEORGE W. BELL, APPELLEE, V. SAMUEL LOOKER, APPELLANT.

FILED MAY 1, 1915. No. 18135.

Estoppel: CONVEYANCES: PRIORITIES. An owner who conveys realty by metes and bounds and transfers machinery thereon by a separate bill of sale, taking from the purchaser a mortgage describing the property named in the deed, may be estopped to claim that the machinery is part of the real estate incumbered by the mortgage, as against mortgagor's purchaser who was led to believe that the machinery was free from incumbrance.

APPEAL from the district court for Boyd county: R. R. DICKSON, JUDGE. *Reversed and dismissed.*

John A. Davies and *H. F. Barnhart,* for appellant.

W. T. Wills, contra.

ROSE, J.

This is an application for an injunction to prevent defendant from removing electrical machinery from a flour-mill site at Lynch, and from selling property already removed therefrom. Plaintiff is the holder of a mortgage on the real estate constituting the mill property, and alleges that the electrical machinery is incumbered by his lien. After the execution of plaintiff's mortgage defendant purchased the mill and the property connected with it and removed part of the electrical machinery. He pleads in his answer that the machinery in controversy is personal property; that it is free from plaintiff's lien; that plaintiff treated it as personalty, having transferred it by bill of sale; that defendant acquired it as such; and that plaintiff is estopped to assert the contrary. From a decree granting an injunction, defendant has appealed.

The question presented by the appeal is whether the electrical machinery, as between the parties hereto, is part of the real estate upon which the mortgage is a lien. Plaintiff argues the affirmative, and defendant the negative.

Formerly the realty consisted of the mill site and a flour-mill operated by water power. Twelve years after the construction of the flour-mill the owner built an addition and equipped it with dynamos, switchboard, transformer, and other electrical devices. The electric plant was used for lighting purposes in Lynch. It also furnished light for the flour-mill. In 1909 the mill-owner by warranty deed conveyed the property to plaintiff's wife, describing the realty by metes and bounds. Later plaintiff demanded and secured for his wife a bill of sale covering the personalty, including the electrical apparatus. He and his wife, February 7, 1910, conveyed the mill property to C. A. Kurpgeweit, who subsequently executed in favor of plaintiff a purchase money mortgage; both instruments describing the realty by metes and bounds. As a part of the transaction resulting in the conveyance to Kurpgeweit, and for the same considération, plaintiff executed and delivered to the puchaser a bill of sale covering the personal property, including the electrical machinery. Subsequently Kurpgeweit by warranty deed and bill of sale transferred to defendant the mill property and electric plant. The evidence shows that the electrical machinery can be detached without material injury to the remaining property. The owners and lienors could by agreement or mutual understanding or conduct treat the movable property in controversy either as personal property or as real estate. The controversy in this case does not arise between mortgagor and mortgagee, but between the latter and a purchaser in good faith.

In the deeds the realty was described by metes and bounds and included appurtenances, but the electrical machinery was not specifically mentioned. The bills of sale described the property in the electric plant as personalty. Defendant testified without contradiction that Kurpgeweit had said he acquired title by bill of sale and by deed, and that the realty was conveyed by deed and the personalty by bill of sale. Plaintiff himself executed and delivered a bill of sale to Kurpgeweit, defendant's transferror. In it he asserted that the property described there-

in was personalty. There is nothing to show that defendant, when he purchased the mill, had any knowledge that plaintiff considered the electrical machinery to be realty, or that the bills of sale were not what they purported to be. Defendant's uncontradicted testimony shows that in making his purchase, he considered the value of the machinery separately. As such it was unincumbered. *Fortman v. Goepper,* 14 Ohio St. 558, is an analogous case in which the effect of a deed and a bill of sale was discussed, the court saying: "The real estate, in the deed from Fortman to Hipp & Brandt, was described merely by metes and bounds. The description in the mortgage from the latter to the former was the same. The deed, bill of sale, and mortgage were executed and delivered at the same time, and each must be held to have been designed by the parties to perform its appropriate office in consummating the sale. The mortgage therefore to Fortman must be held to cover no more property than was included in the deed, and the deed not to include the property sold by the bill of sale upon a distinct consideration."

Though the bill of sale in the present case stated it was executed for "one dollar and other valuable considerations," there was in reality only one consideration for it and the deed. Since there were two separate instruments, however, one purporting to transfer personalty and the other to convey realty, the single consideration could make no difference to a third person who was without knowledge of that fact. *Zeller v. Adam,* 30 N. J. Eq. 421.

To repeat, the electrical machinery could be detached without material injury to the remaining real estate. Owing to its nature it could properly be bought, sold and held as personalty. Defendant purchased it as such. The defense of estoppel is established by uncontradicted evidence. It follows that the mortgage on the real estate is not a lien on the machinery in the hands of defendant. The decree granting the injunction is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

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

DALBERT SIMPSON, APPELLEE, V. WILLIAM F. GERNANDT, APPELLANT.

FILED MAY 1, 1915. No. 18087.

1. **Partnership:** EXISTENCE OF PARTNERSHIP: PROOF. In an action alleging a partnership and for a dissolution and accounting, the burden of proof is upon the plaintiff. If the existence of a partnership is denied by defendant, and there is no proof that any certificate of partnership has been filed, nor any account or inventory taken of the assets or liabilities of the business, and the defendant has paid all expenses of the business, and the plaintiff was connected with the business for only a few weeks, such circumstances tend to support the positive testimony of defendant that there was no partnership agreement between them.
2. ———: ———: SUFFICIENCY OF EVIDENCE. Under the circumstances shown by the evidence, it is considered that the unsupported testimony of the plaintiff is not sufficient to establish an oral agreement of partnership.

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

W. H. Barnes and *Berge & McCarty,* for appellant.

Burr, Greene & Greene, contra.

SEDGWICK, J.

In 1910 the defendant was engaged in business at Fairbury, Nebraska, as an architect. He considered that his business was getting to be rather more extensive than he could manage alone, and decided to obtain some competent man to join him and assist in the business. Through a mutual acquaintance a correspondence was started between the plaintiff and defendant, and the plaintiff came to Fairbury and went to work in the defendant's office. They had some conversation in regard to the matter, and it was agreed between them that the plaintiff, from the time that he began work in the latter part of January, should be paid $24 a week. The plaintiff testified that it was agreed that they should be partners in this business,

and at the end of a year these payments of $24 a week which he would have received were to be deducted from his one-half of the net proceeds of the business, and he was to be paid the remainder. The defendant denies that there was any agreement of partnership, and says that the agreement was that the plaintiff should continue in the work, and if at the end of the year he was satisfactory to the defendant as a partner he should have one-half of the net proceeds of the year's work, from which the $24 weekly payments should be deducted. The plaintiff had been working in the office of a firm of architects in Kansas City, and had a family and no means. The defendant assisted him in obtaining $150 to pay the expense of removing his family to Fairbury and establishing them in housekeeping. After the plaintiff had been in the office several weeks, the defendant prepared a memorandum of contract in accordance with the terms of their agreement, as testified to by him. This was not satisfactory to the plaintiff, and the defendant then told the plaintiff that he was discharged, and the plaintiff insisted that there was a partnership between them and he could not be thus discharged. Afterwards the plaintiff brought this action in the district court for Lancaster county, alleging that there was a partnership between them, and asking an accounting and judgment for $3,000, as the value of his interest in the partnership. There was a trial, finding and judgment in favor of the plaintiff, which was afterwards set aside and a new trial granted, and upon the second trial there was a finding and judgment for the plaintiff, and the defendant has appealed.

The plaintiff insists that the action is for an accounting of the partnership business and for dissolution of the partnership, and for judgment for the balance due plaintiff upon such accounting. The amended petition alleges that the defendant wrongfully excluded the plaintiff from the business, and continues: "Plaintiff alleges that the partnership business and property of which defendant took exclusive possession, as hereinbefore alleged, consisted of a contract with the board of county commissioners of

Phelps county, Nebraska, for the furnishing of plans and specifications for the erection of a courthouse at Holdrege, Nebraska; a contract with E. B. Woods for the furnishing of plans and specifications for the erection of a store building at York, Nebraska; a contract with the school board of Osceola, Nebraska, for the furnishing of plans and specifications for the erection of a school building; a contract with Dr. Brewer for the furnishing of plans and specifications for a store building at Beloit, Kansas; completed and partially completed plans and specifications for the erection of the above-mentioned buildings; and other contracts and plans and specifications and personal property which plaintiff cannot more particularly describe, for the reason that the defendant has exclusive possession thereof and denies plaintiff access thereto. The accounts, property and business of said partnership are of the value of more than $6,000 over and above all debts and liabilities, and the plaintiff is the owner of a one-half interest therein."

None of the contracts alleged in the petition was obtained or entered into while the plaintiff was connected with the business, nor was anything realized on any of them during that time, except about $80. There is no evidence of any receipts, or of any value of anything connected with the business, except the commissions that would accrue upon two of the contracts that defendant had obtained before the arrangement with plaintiff, if those contracts were completed. There is evidence that the expense of the business would be considerable, but no evidence as to the amount of such expenses, nor as to the liabilities of the business, either when the plaintiff began or when his connection with the business was ended. The plaintiff received $246 from defendant while rendering his services. There is no evidence from which it could be found that he would be entitled to any such amount upon accounting of assets and liabilities.

The plaintiff testifies that there was a partnership between them. His testimony as to the facts from which he derives that conclusion is directly contradicted by the de-

fendant, and in most particulars also by the defendant's wife. No certificate of partnership was filed as the statute requires. There was no account taken of the assets or condition of the business. The defendant paid all expenses, including the amount agreed upon to be paid weekly to the plaintiff. No details were arranged, no inventories made or accounts kept. It seems clear that the minds of these parties never met upon any agreement of copartnership.

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

REVERSED AND DISMISSED.

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

STATE, EX REL. MILDRED PARMENTER, RELATOR, V. A. C. TROUP, DISTRICT JUDGE, RESPONDENT.

FILED MAY 1, 1915. No. 18930.

1. **Mandamus:** ALLOWANCE OF REMEDY. Although the common law writ of prohibition has been abolished in this state, the duty is still imposed upon this court to prevent violation of law by inferior tribunals, and, when there is no adequate remedy in the ordinary course of the law, mandamus is the appropriate remedy.
2. **Damages:** PERSONAL INJURIES: EXAMINATION OF PERSON. In an action for damages caused by injuries to the person, the trial courts have power to order an expert examination of the person of the party injured, when the circumstances of the trial make it necessary to do so and no substantial harm can result therefrom.
3. ———: ———: ———. Such examination will not be ordered unless it clearly appears that a condition exists that can be definitely determined by such examination and cannot be satisfactorily determined without.

Original proceeding in mandamus to compel respondent to reinstate a case. *Writ denied.*

John O. Yeiser, for relator.

W. H. Herdman, contra.

SEDGWICK, J.

The relator began an action in the district court for Douglas county to recover damages for personal injuries caused, as she alleged, by the negligence of the defendant in that action. After issue was joined, the defendant therein asked for an order that the plaintiff be required to submit her person to an examination by physicians to be appointed for that purpose. The court made the order, and the plaintiff refused to comply with it, and the court therefore dismissed her case without prejudice to another action. The plaintiff then applied to this court for a writ of mandamus against the judge who made the order requiring him to reinstate her case.

The first objection is that mandamus is not the proper remedy in such case. The common law writ of prohibition is abolished in this state, but the duty is still imposed upon this court to prevent violation of law by inferior tribunals, and, when there is no adequate remedy by the ordinary course of the law, mandamus is the appropriate remedy. *State v. Graves,* 66 Neb. 17. The plaintiff is entitled to a trial of her alleged cause of action upon its merits. She believes that the law is that she is entitled to such trial without submitting to the indignity to which she so strongly objects. If she is found to be wrong as to her rights in this regard, she may elect to submit to this requirement rather than to forego her claim entirely. An appeal from this order of dismissal, even if determined in her favor, might result in such delay as to practically defeat her action. Under such circumstances appeal is not an adequate remedy. This objection therefore must be overruled.

The relator contends that the trial court has no power under any circumstances to order a party to submit his or her person to expert examination. In her brief she says: "We waive all other questions, and counsel for the clients interested in sustaining such an order, who of such necessity represents defendant, waives all collateral questions

excepting the assertion of such a power." It is seldom that this court is called upon to determine a question of more importance or upon which there is so clear and determined difference of opinion among the courts of last resort in the several states. Each side of the controversy is ably supported by cogent and exhaustive reasoning of the many courts which have considered it. The supreme court of the United States has been divided upon the question, and has convincingly presented both sides of the controversy in an opinion and a dissenting opinion. *Union P. R. Co. v. Botsford,* 141 U. S. 250, which was decided in 1891. In general, the opinions of that court declaring principles of the common law are followed with confidence by this court. The majority opinion was prepared by Mr. Justice Gray, the dissenting opinion by Mr. Justice Brewer, and concurred in by Mr. Justice Brown. In the majority opinion it is said: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. * * * The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country"—with further strong reasoning and copious citations of authorities. The opinion also contains this language: "But this is not a question which is governed by the law or practice of the state in which the trial is had. It depends upon the power of the national courts under the constitution and laws of the United States." Although the opinion concludes with the

statement that "the order moved for, subjecting the plaintiff's person to examination by a surgeon, without her consent and in advance of the trial, was not according to the common law, to common usage, or to the statutes of the United States," still the statement that the federal courts are not given this power by the constitution or laws of the United States tends to relax the authority which this opinion otherwise would have as a precedent to be followed by the courts of the several states. It will also be observed that the proposition, strongly stated in this opinion, that the act of congress, which provides that "the practice, pleadings and forms and modes of proceeding in the courts of each state are to be followed in actions at law in the courts of the United States held within the same state, neither restricts nor enlarges the power of these courts to order the examination of parties out of court," has been overruled by later decisions of that court. *Camden & S. R. Co. v. Stetson,* 177 U. S. 172. This later decision is now followed by the inferior federal courts. *Chicago & N. W. R. Co. v. Kendall,* 167 Fed. 62.

Mr. Justice Brewer, in the dissenting opinion, says: "In this country the decisions of the highest courts of the various states are conflicting. This is the first time it has been presented to this court, and it is, therefore, an open question. * * * The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the courtroom, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled." This language is followed by further reasoning which is worthy of care-

ful examination. Some of the further reasoning of Mr. Justice Brewer we desire to adopt, and therefore quote as follows: "It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case, or stays the trial until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries in order that the jury may be informed thereof by other than the plaintiff and his friends, and that compliance with such an order may be enforced by staying the trial, or dismissing the case." While the courts of last resort of nearly a dozen of the states of the Union have refused to indorse this reasoning, and have given reasons of undoubted force and clearness for such refusal, the courts of at least 20 of the states have reached the conclusion of Mr. Justice Brewer. The reasoning of these several courts upon either side of this question is so comprehensive and complete as to make it unnecessary for us to enter upon an extensive discussion.

The supreme court of North Dakota said: "If a court is powerless, in a case like this, to require a plaintiff to submit her injuries to the inspection of physicians, to the end that the exact truth as to their nature, effect, and possible duration may be ascertained, when she, by her suit, has made them the subject of judicial investigation, then the law would permit her to put forward just so much and such parts of the facts as, in her judgment, would benefit her case, at the expense of her adversary, and to invoke the court's aid to compensate her for an injury, through a partial and one-sided investigation. The court, under such circumstances, would become a means of accomplishing the grossest injustice." *Brown v. Chicago, M. & St. P. R. Co.*, 12 N. Dak. 61.

The supreme court of Maryland said: "We cannot admit that the trial court has no such power in any case, for sometimes it may be apparent that a plaintiff is feigning, and has not suffered such injuries as he pretends he has sustained. Instances are not unknown to courts and counsel, who have had experience in such cases, in which jurors have been imposed on, and sometimes even reputable physicians, who have been called upon to testify on behalf of plaintiffs, have been deceived. When, therefore, the ends of justice seem to require it, there can be no valid reason why an examination should not be permitted, if seasonable application is made, and the court is satisfied that no serious physical or mental injury is likely to be done the plaintiff." *United Railways & Electric Co. v. Cloman,* 107 Md. 681.

And the supreme court of Michigan said: "The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the court, under proper restrictions; the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies a refusal to require the examination where the necessities of the case are not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, or where, in the judgment of the trial court, it would not materially aid the jury. The power has been exercised in Iowa, Alabama, Arkansas, Georgia, Ohio, Missouri, Nebraska, Texas, Minnesota, Kansas, Wisconsin, and Indiana. * * * Testimony which is open to one party ought logically to be open to his opponent, if it can be obtained with due regard to decency, and in the orderly conduct of the trial." *Graves v. City of Battle Creek,* 95 Mich. 266.

The supreme court of Kansas said: "The purpose of a trial is to mete out exact justice. This cannot be accomplished when the truth is suppressed, and this may be done, if the court has not the power to ascertain what the truth is. In an action for personal injuries, the injured party may call physicians, to whom he may expose his per-

son, not for the purpose of effecting a cure, but for the purpose of using this expert testimony to assist him in the trial of his case. He may also expose the injured portion of his person to the jury, observing the rules of decency. Should the litigant be permitted to withhold the truth or the means of ascertaining what the truth is simply because, in the ascertainment of the truth, he may conceive the idea that an indignity is being offered? That is not an indignity which is not so intended. May he be permitted to present so much of the truth as he desires and as he thinks to his interest and withhold the remainder? This would certainly be his privilege if the court does not possess the power to make an order that will develop the exact truth. It is suggested by some of the authorities, which hold contrary to the views herein expressed, that the rule would operate harshly upon delicate and modest females. We think such may safely rely upon the courts of this country. An examination should not be ordered needlessly, or where there might be a shock to one's modesty or feelings of delicacy. We only decide that the court has the power; it should be exercised according to the sound discretion of the presiding judge. It is safer in the administration of justice to trust to the courts to protect the sensibilities of the parties in such examinations, so far as it is possible to do so, and beyond that to hold them subordinate in importance and sacredness to the interest of justice, than to hold that a party to a litigation has it within his power to develop so much of the facts as may appear to be to his interest and then stop the investigation." *City of Ottawa v. Gilliland,* 63 Kan. 165.

The supreme court of Indiana said: "The cases above cited as affirming the existence of the power establish the following propositions: (1) That trial courts have the power to order the medical examination by experts of the injured parts of a plaintiff who is seeking to recover damages therefor; (2) that a defendant has no absolute right to demand the enforcement of such an order, but the motion therefor is addressed to the sound discretion of the trial court; (3) that the exercise of such discretion is

reviewable on appeal, and correctible in cases of abuse; (4) that the examination should be applied for and made before entering upon the trial, and should be ordered and conducted under the direction of the court, whenever it fairly appears that the ends of justice require a more certain ascertainment of important facts which can only be disclosed, or fully elucidated, by such an examination, and such an examination may be made without danger to the plaintiff's life or health, or the infliction of serious pain; (5) that the refusal of the motion, when the circumstances appearing in the record present a reasonably clear case for the examination under the rules stated, is such an abuse of discretion in the trial court as will operate to reverse a judgment for the plaintiff; (6) that such an order may be enforced, not by punishment as for a contempt, but by delaying or dismissing the proceeding." *City of South Bend v. Turner,* 156 Ind. 418.

Although the precise question here presented, whether the trial court has under any circumstances the power to order such an investigation, has perhaps never been directly and definitely considered and determined by this court, there are several cases in which expressions have been used that might be considered as indicating the opinion of the court as to the policy of our law. In *Stuart v. Havens,* 17 Neb. 211, it was stated in the syllabus that if the application is made during the trial it should be denied, and the third paragraph of the syllabus is: "If a personal examination is desired, the application should be made before the trial begins and experts agreed upon by the parties or appointed by the court." Upon the trial in that case the plaintiff was asked "to show his arm, which he claimed was injured by falling into the excavation, to the jury. This he did without objection and afterwards three physicians, who had treated the arm professionally, testified as to its condition without objection. Afterwards the defendant below asked the court below to make an order requiring Havens to exhibit his arm to four phyiscians called by him (the defendant). This the court refused to do." The opinion quotes *Sioux City & P. R. Co.*

v. Finlayson, 16 Neb. 578, as holding: "That where the request was made during the trial and it was sought to have the examination made by experts called by the adverse party, and not by those agreed upon by the parties, or appointed by the court, there was no error in denying the request." It then quotes a decision of the supreme court of Wisconsin, holding that an examination may be made during the trial, but adhering to the former decisions of the court in that regard. The opinion then says: "In any event the evidence partakes somewhat of a partisan character. To avoid this they should be agreed upon by the parties or appointed by the court, and an examination, if desired, should be made before the trial begins, although the court may permit it to be made during the progress of the trial." It was, perhaps, not necessary to determine in that case that the court may permit it to be made during the progress of the trial, or that the court has power under any circumstances to order such an examination, and yet this and other similar decisions of this court have been understood by the trial courts and by the profession generally to establish the right of the trial court to make such an order. *Stuart v. Havens, supra,* was decided 30 years ago, and since that time the trial courts have generally exercised such power. It has been understood by the courts of other states that this court has decided that our trial courts have such powers, and their decisions class Nebraska among the states so holding. In view of this long established practice in this state, and that there must otherwise often be a failure of justice, we conclude that we should recognize this power of the trial courts.

It is possible that, in some instances, a delicate and sensitive lady may suffer and endure a great wrong and injustice rather than present her cause to any court for a public investigation which would require her to allege in her petition and detail in her testimony facts in regard to the condition of her person which her sense of delicacy would forbid her doing. In such case she must elect before bringing her action whether she will bear the ills she has or fly to others that she knows not of. In bringing

her action she must declare in public fashion the conditions to be investigated, and the law requires that in any legal investigation of facts the best evidence available must be produced. She may decline to present such conditions for investigation; but, if she does bring them before the court, she cannot dictate the means of investigation by selecting such expert witnesses as she may have reason to suppose have opinions favorable to her cause, and rejecting those that might form contrary expert opinions upon ascertaining the facts. In modern times the medical profession has the benefit of skilful women physicians, and ordinarily, other things being equal, such physicians ought to be preferred when reasonably practicable, if desired by the woman to be examined.

If an application is made for the purpose of embarrassing or coercing the plaintiff, the trial court will be quick to discover that purpose, and will order it only under conditions above indicated, and when it clearly appears that a condition exists that can be definitely determined by such examination and cannot be satisfactorily determined without it.

WRIT DENIED.

WILLIAM WUNRATH, APPELLANT, V. PEOPLES FURNITURE & CARPET COMPANY, APELLEE.

FILED MAY 1, 1915. No. 18962.

1. **Appeal:** FINAL ORDER. An order vacating a judgment upon petition filed after the term at which the judgment was rendered, under subdivisions 4, 5, 6, 7, 8, 9, sec. 602, of the Code (Rev. St. 1913, sec. 8207), can only be made upon notice to the parties by service of summons or upon voluntary appearance and upon due proof. Such order is a final order and is appealable. *Johnson v. Parrotte*, 34 Neb. 26, followed. *Trimble & Blackman v. Corey & Son*, 86 Neb. 5, overruled.

2. **Judgment:** VACATION: PETITION: ALLEGATION OF DEFENSE. A petition to vacate a judgment on the ground of fraud and perjury of

the successful party in obtaining the judgment should allege that there is a meritorious defense of the action in which the judgment was obtained; but it is sufficient if there is a meritorious defense to a substantial part of the judgment.

3. **Tender:** ACTION FOR DAMAGES. When there is a definite sum justly due, notwithstanding the alleged defense, there must be a tender of the amount so due; but this rule cannot be applied in an action for damages in which there is no basis for ascertaining any definite amount that would be due if the defense pleaded is established.

4. **Appeal:** VACATION OF JUDGMENT. The trial court is given a large discretion to vacate a former judgment for fraud or perjury. This court cannot reverse such judgment unless it clearly appears that there has been an abuse of discretion by the trial court.

5. **Judgment:** VACATION: SUFFICIENCY OF EVIDENCE. The evidence is found sufficient to justify the trial court in exercising its discretion to vacate the judgment complained of.

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

A. H. Burnett, Brome & Brome and *William G. Stewart,* for appellant.

Mahoney & Kennedy and *Nolan & Woodland, contra.*

SEDGWICK, J.

This plaintiff obtained a judgment against this defendant in the district court for Douglas county for damages which he alleged he had suffered by reason of the negligence of the defendant. Afterwards the defendant filed a petition in the cause asking to vacate the judgment because of fraud and perjury on the part of the plaintiff in obtaining the same. The plaintiff filed an answer to this petition, to which the defendant, with leave of court, replied, and upon trial the district court granted the relief asked for and vacated the former judgment. From this decision vacating the former judgment the plaintiff has appealed to this court.

The first question presented is as to the right of the plaintiff to appeal in a proceeding of this kind. It is contended that this is not a judgment or final order and is not

appealable. There have been in this court very many decisions of this kind passing upon, or directly or indirectly connected with, this question or questions of this nature. Some of these decisions, it must be considered, are indefinite, and others will appear, possibly, if not carefully considered, to be inconsistent. It seems to be important that the question should be carefully examined and the true rule determined and stated.

Section 314 *et seq.* of the Code (Rev. St. 1913, sec. 7883 *et seq.*) relates to the subject of new trials and defines the terms and provides when a new trial may be granted. It defines a new trial as "a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court. * * * The application for a new trial must be made at the term the verdict, report, or decision is rendered." Section 602 *et seq.* of the Code (Rev. St. 1913, sec. 8207 *et seq.*) relates to the vacation or modification by the district courts of judgments and orders after the term at which they were rendered. Section 582 of the Code (Rev. St. 1913, sec. 8185) provides: "A judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court, for errors appearing on the record." Section 581 of the Code (Rev. St. 1913, sec. 8176) defines what is meant by a final order as distinguished from a judgment.

The trial court has a large discretion to grant a new trial of a case upon application made at the same term, if satisfied that an error has been committed prejudicial to a party, or that a manifest injustice has been the result of the first trial. The hearing upon the application is summary, and involves a re-examination of the facts upon which the rights of the parties ultimately depend. It may in some sense be regarded as a continuation of the hearing, and is in no sense a new action. In some states the order made upon such a motion is regarded as a final order, on the ground that it affects a substantial right of the parties. But in this state an order granting a new trial upon motion made at the term at which the judg-

ment was rendered is not appealable. It may be reviewed upon appeal after judgment therein. The proceeding to vacate a judgment at a subsequent term is entirely different from an application for new trial by motion at the term at which the judgment or order is rendered. This distinction is plainly indicated by this court in the earlier decisions.

In *Iler v. Darnell,* 5 Neb. 192, it is expressly held that an order of the district court vacating a judgment upon application made at a subsequent term is reviewable by this court. Before the present statute authorizing appeals in actions at law, the proceeding to reverse such final order was by petition in error. Now it is by appeal. In *Kruger v. Adams & French Harvester Co.,* 9 Neb. 526, decided in 1880, the court said: "This court has repeatedly held that error would lie to this court from the judgment of the district court granting a new trial on proceedings commenced after the adjournment of the term on the ground of newly discovered evidence"—citing *Iler v. Darnell,* 5 Neb. 192; *Axtell v. Warden,* 7 Neb. 186.

In *Estate of McKenna v. McCormick,* 60 Neb. 595, the law is stated in the syllabus: "An order of a probate court, entered under the provisions of subdivision 3 of section 602 of the Code of Civil Procedure, vacating an order allowing a claim against an estate made at a prior term, is appealable."

In *Johnson v. Parrotte,* 34 Neb. 26, the court said: "There is a preliminary contention raised by the defendants in error, viz., that the order setting aside the judgment and allowing a new trial on their petition is not a final order and will not be reviewed until after a second trial and judgment. This precise question was before this court in *Kruger v. Adams & French Harvester Co.,* 9 Neb. 526, in which it was held that the order allowing a new trial was a final order within the meaning of the Code. Counsel for defendants in error, however, assail the rule therein announced and ask us to overrule that case. The writer well remembers making the same contention in *Kruger v. Adams & French Harvester Co.,* but is satisfied

that the holding therein is correct and should be adhered to. The proceeding contemplated by section 318 is in the nature of an action. For instance, it is by petition filed as in other cases. Summons issues as in other cases, and the case is placed upon the trial docket and witnesses examined as in other cases. In short, it is a proceeding independent of the original action and its determination is a final order for the purpose of review by petition in error."

In *Thompson v. Sharp,* 17 Neb. 69; *Osborn v. Gehr,* 29 Neb. 661; *Lander v. Abrahamson,* 34 Neb. 553; *Janes v. Howell,* 37 Neb. 320; *Scott v. Wright,* 50 Neb. 849; *Munro v. Callahan,* 55 Neb. 75; *McGrew v. State Bank,* 60 Neb. 716; *Meyers v. Smith,* 59 Neb. 30; *Williams v. Miles,* 73 Neb. 193; *Godfrey v. Cunningham,* 77 Neb. 462; *Wagener v. Whitmore,* 79 Neb. 558; *State v. Merchants Bank,* 81 Neb. 704; *MacCall v. Looney,* 4 Neb. (Unof.) 715, and some other cases, appeals from judgments vacating former judgments, as in this case, were entertained and decided upon their merits. In some of them the judgment of the district court is reversed; in others it is affirmed; but in none of these many cases is the right to appeal before the final determination of the case in which the original judgment was rendered doubted. The fact that the former case had not been retried appeared upon the face of the record in each case and could not be overlooked. These cases must be considered as settling the question. 2 R. C. L. sec. 27, p. 44, and cases cited.

When a proceeding is begun by a petition to vacate or modify a judgment after the term at which that judgment was rendered, and evidence must be taken and a trial had upon that petition, the decision of the court is itself a judgment, within the meaning of section 582 of the Code. In such case it is not necessary to consider the definition of a final order as contained in section 581 of the Code. Moreover, the proceeding is in the nature of an action, within the meaning of section 582, and the decision therein is a final determination of that action.

The plaintiff cites several cases as holding that such judgment is not a final judgment and not appealable. In *Rose v. Dempster Mill Mfg. Co.,* 69 Neb. 27, it is said in the syllabus: "An order setting aside a judgment or decree, fixing the time for filing pleadings, and setting the cause down for a new trial, under section 602 of the Code, is not a final order from which appeal or error will lie before trial and a final judgment." It appears from the opinion that a deficiency judgment had been rendered in a mortgage foreclosure proceeding, and upon petition of the defendant the judgment was set aside, and defendant was allowed to answer. The plaintiff prosecuted a petition in error to this court, and the defendant moved to dismiss the petition in error. It is not stated whether the petition to vacate the judgment was filed during the term at which the judgment was entered, and the grounds upon which the petition was predicated are not stated in the opinion. It is, however, stated that the proceeding was under section 602 of the Code, but it is not stated under which subdivision of that section. If under the third subdivision, the proceeding is by motion, and, if the ground is that the judgment was rendered before the action regularly stood for trial, that motion must be made "in the first three days of the succeeding term." The decision in *Rose v. Dempster Mill Mfg. Co.,* is predicated on *Morse & Co. v. Engle,* 26 Neb. 247, and quotation is made from the opinion in that case. In *Morse & Co. v. Engle,* the appeal was taken from an order vacating the decree of foreclosure of mortgage. A motion was made to dismiss this appeal because the order appealed from was not final, and the motion to dismiss was overruled, and the appeal entertained. The decision was that an appeal was proper in an action in equity, and that in an action at law, under the statute as it then was, "the proper practice is by petition in error," thereby holding that, in any event, the order would be reviewable before the final determination of the main action. *Cockle Separator Mfg. Co. v. Clark,* 23 Neb. 702, is also cited in *Rose v. Dempster Mill Mfg. Co.* In that case the rule is stated to be: "An order of the district court setting aside

a decree and permitting a defendant to plead to an answer filed by a codefendant, by leave of court, but of which said defendant had no notice, is not a final order." The opinion attempts to distinguish *Spencer v. Thistle,* 13 Neb. 227, and attempts to show that the judgment vacated in *Spencer v. Thistle* was wrong, so that the district court in entering the original judgment exceeded its jurisdiction; its judgment was therefore void, and it did right in setting it aside. But the opinion concludes that when a decree is entered against a defendant without service, and a motion to vacate is made within two days thereafter, and is granted and issues then made up, such order vacating the judgment and making up the issues is not a final order. This case does not hold that every judgment vacating a former judgment under section 602 is interlocutory and unappealable. While the decision in *Rose v. Dempster Mill Mfg. Co.* is probably right, and the language of the syllabus is broad and comprehensive, it does not seem to be authority upon this question.

In *Merle & Heaney Mfg. Co. v. Wallace,* 48 Neb. 886, judgment was entered on a power of attorney. The attorney who appeared and answered for the defendants had no authority other than was conferred by the note itself. The motion to set aside the judgment was made at the same term at which the judgment was rendered. The proceeding in error to this court was dismissed because the cause had not been disposed of in the district court. The order of the district court having been made upon a motion at the same term at which the judgment was rendered, the decision follows the universal rule in this state. The language, however, of the syllabus and some parts of the opinion was so broad as to affect cases not before considered to be within the rule, and afterwards in *Browne v. Croft,* 3 Neb. (Unof.) 133, the syllabus was restated and not accurately applied to the facts in the case then considered. In *Browne v. Croft* there was a decree in the district court foreclosing certain tax liens. Afterwards, whether at the same term or the subsequent term does not appear from the opinion, a petition was filed in the district court

"for an order vacating the judgment and granting a new trial because of unavoidable casualty depriving the petitioner of an opportunity to defend." This petition was granted, and the plaintiff appealed from the order granting the petition. There was a motion in this court to dismiss the appeal, and in the first opinion by Mr. Commissioner Ames the appeal was dismissed because the proceeding to vacate the judgment "is purely statutory and presents no matter of equitable cognizance;" that is, the proceeding to vacate the judgment in the district court was considered as an independent action under a statutory provision, and therefore not equitable in its nature. Of course, if the petition to vacate the judgment was made at a term subsequent to the term at which the judgment was rendered, it was in its nature a new action brought for a specific purpose, and a rehearing was granted because it was considered as equitable in its nature; the judgment which it sought to vacate being in an equitable action. In the opinion by Mr. Commissioner Hastings, upon the rehearing, it was said that this rehearing was "allowed presumably on the authority of *Morse & Co. v. Engle*, 26 Neb. 247." In that case the rule was said to be that "an action in equity, or any special proceeding therein in the nature of a final order, may be reviewed on appeal." But, as we have already pointed out, in *Morse & Co. v. Engle,* the proceeding to vacate the decree in the district court was instituted at a term subsequent to the term at which the decree was entered, and the motion to dismiss the appeal was overruled, holding that such an order was appealable before the second trial of the case was had in the district court. This decision upholding the appeal in *Morse & Co. v. Engle* was approved and relied upon in the opinion of Mr. Commissioner Hastings in *Browne v. Croft,* and yet the appeal in *Browne v. Croft* was dismissed. This, of course, could be right only in case the petition to vacate the judgment of the district court was regarded as a motion or application made at the term in which the original judgment was entered. It appears that the only question considered by Mr. Commissioner Hastings was whether,

upon application made at the term at which the judgment was entered, an order which merely vacated the judgment and allows the defendant to answer is a final order. The question whether a proceeding begun at a subsequent term by petition and heard upon evidence as in an independent action is appealable was not considered.

In *Continental Trust Co. v. Peterson,* 76 Neb. 411, 417, the proceedings of the district court were quite complicated. It is said in the opinion upon rehearing that the order appealed from, "not only revived the judgment, but also assumed to set aside and nullify a judgment of the district court in another and independent case." Such an order, of course, would be without jurisdiction and of no effect. Perhaps it was largely for that reason that the appeal was finally dismissed.

In *Trimble & Blackman v. Corey & Son,* 78 Neb. 639, judgment was entered in the district court at a special term called for the hearing of specially assigned cases. At the next regular term the case was heard upon a petition of the defendants for a new trial. The district court vacated the judgment, and from that order an appeal was taken to this court. The order appears to have been vacated by this court because it was not supported by any evidence. The question whether an appeal would lie in such case does not appear to have been considered in this opinion. Afterwards, upon second appeal (86 Neb. 5), it was held that the order was not appealable. This was not in harmony with the former decisions of this court, and it is overruled.

So far as there are expressions in other opinions of such a general nature as would indicate that a judgment of the district court vacating a former judgment upon petition filed at a subsequent term, and trial thereon, as prescribed in the statute, is not appealable, those cases are disapproved. In the case at bar the petition to vacate the former judgment was filed at a subsequent term, a trial was had thereon, and a decree entered vacating the former judgment. Such decree is appealable.

A petition to vacate a judgment on the ground of fraud and perjury should allege that there is a meritorious defense of the suit in which the judgment is obtained. The plaintiff contends that, if only a partial defense is alleged, there must be an offer to pay the amount justly due. This rule obtains where it appears that there is a definite sum justly due, notwithstanding the alleged defense, but the rule cannot be applied in actions for damages of this nature. In *Kime v. Fenner,* 54 Neb. 476, this court said: "If the answer presented any defense, partial or complete, on which Kime could rely on a trial in the district court, it was sufficient."

The plaintiff cites *Wabash R. Co. v. Mirrielees,* 182 Mo. 126, 145, in which that court said: "But, as already said, the bill does not show any meritorious defense to the cause of action. It proceeds solely upon the ground that the alleged fraud and perjury was for the purpose of *increasing* plaintiff's damages. This court cannot assume that there was not sufficient evidence outside of said alleged perjury to sustain the verdict." That action was decided upon the pleadings therein. The evidence was not before the court, and, moreover, it was held in that case that "fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. It cannot be set aside on the ground that witnesses falsely testified as to issues settled by the judgment, unless the party obtaining the judgment by some trick or artifice or fraudulent conduct in some manner deceived the other as to what the witnesses would testify to." This court, as said in *Barr v. Post,* 59 Neb. 361, is committed to the doctrine that "the intentional production, by a litigant, of false testimony to establish a cause of action or defense amounts to such a fraud as will, in a proper case, entitle the adverse party, if unsuccessful, to the vacation of the judgment rendered against him."

It is also urged that the evidence is not sufficient to support the decree vacating the former judgment. The defendant answers this objection in the brief with the suggestion that, as no motion for new trial was filed in district

court, the question of the sufficiency of the evidence cannot be raised here. Without regard to this suggestion, we prefer to examine the evidence, which is not extensive, and which was examined and passed upon by the trial court. It appears that in his petition in the original action the plaintiff alleged various injuries to his person, and, among others, that his face was "bruised, cut and torn over his left eye, and his scalp torn." He alleged that these injuries were permanent. The case was tried twice in the district court, and upon the first trial the plaintiff was asked some question in regard to the effect of his injury upon the eye, and answered: "Why, I lost the sight of my left eye." The plaintiff then took leave to amend his petition, but afterwards, when the case came on for further hearing, the plaintiff having failed to amend his petition in that regard, he was asked: "How did that cut on your eye affect your eye?" He was not allowed to answer this question, but he produced his physician, Dr. Impey, as a witness who testified to the cut over his left eye, and that it had healed up, and that there was a scar left which had not completely healed. He was asked, "And no permanent effect from that, at all?" and answered: "The eye, I think, is permanently injured." The evidence was that some time prior to the injury complained of the plaintiff had suffered an injury from being thrown out of a buggy, and that in his claim for insurance Dr. Impey had testified that the plaintiff had lost the sight of his left eye by this former injury, and the plaintiff had recovered his insurance upon that basis. Upon the hearing in this case, Dr. Impey testified that he was the plaintiff's attending physician upon his former injury. Being asked what kind of an injury it was he treated him for, he answered: "I don't remember the exact nature of these injuries. I think he was hurt about the face and head, if I remember right." And when he was asked the nature of the injury he testified: "I don't remember the exact injury. He was thrown out or thrown over the dashboard, and I think he was kicked about the head and face at the time. * * * He was kicked by the horse, but I could not say where, ex-

actly. Q. Do you remember the result of that kick? A. I think he fully recovered. Q. Do you remember the result of it? Did you have to sew up the wounds, or what did you have to do with the wound that resulted from the kick? A. I don't remember what I did for him at that time? Q. How long was he in bed after that? A. I don't know that, either. Q. How long did you attend him? A. Could not say." When he was asked, "You have stated, have you, all you can remember about the injury that occurred at that time?" he answered: "Yes, sir, I have." After Dr. Impey had testified, the plaintiff was recalled, and was asked, "What was the nature of that injury?" and answered: "The eye was swollen quite bad. * * * Q. How long were you laid up from the effects of that injury? A. About two weeks, and I went to work again. Q. Did you ever experience any later effects from it after the two weeks? A. No; nobody else except Doctor Impey. Q. What I am asking you is, whether you recovered entirely from that, at the end of the two weeks? A. Yes, sir; I was a little weak for a while, but it gradually got better. Q. State whether or not, at the time you fell down this elevator shaft, and for years prior to that time, you had suffered from this injury, this prior injury, at all? A. Yes, sir. Q. What I want to know is whether you were suffering from this injury, after you got hurt, thrown out of the buggy? A. No, sir; no trouble and no pain at all. * * * Q. You have never called any specialist? A. No, sir. Q. What else did Dr. Impey do besides putting a poultice on the eye? A. Nothing. Q. Was the eye swollen up so you could not see? A. Yes, sir; a few days. Q. How many days do you think it was swollen up so you could not see? A. I don't quite remember; I think it was three or four days. Q. But still you were confined to the house something like two weeks from this? A. Yes, sir. Q. Were you hurt any place else? A. No, sir."

The trial court saw these witnesses and observed their manner and the effect of their testimony, and evidently concluded that they intended to and did deceive the court

and jury, probably leading them to believe that the plaintiff had lost the sight of his eye by reason of the accident for which he sued. The law necessarily trusts largely to the discretion of the trial court in such matters. This court cannot interfere, unless there is an abuse of discretion. Under such circumstances, the decision of the trial court in passing upon the application to vacate the former judgment ought not to be interfered with by this court.

It follows that the judgment of the district court is

AFFIRMED.

FAWCETT and HAMER, JJ., not sitting.

PACKERS NATIONAL BANK, APPELLANT, V. GEORGE F. RUSHART, APPELLEE.

FILED MAY 14, 1915. No. 18093.

Banks and Banking: COLLUSIVE LOAN BY CASHIER: LIABILITY. Where the maker of a promissory note and a bank cashier are engaged in a joint enterprise, in which each has a contingent beneficial interest, and the cashier, without the knowledge of any other officer of the bank, loans money of the bank to be used in furtherance of the enterprise, taking the note of his associate, payable to the bank, for the amount loaned, the maker of the note will be held liable therefor, notwithstanding the promise of the cashier to hold him harmless.

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

D. L. Johnson, for appellant.

Smyth, Smith & Schall, I. J. Dunn and *J. J. O'Connor, contra.*

MORRISSEY, C. J.

This is an appeal by the Packers National Bank of South Omaha from a judgment of the district court for Sarpy county in favor of the defendant, in an action on a promissory note. The note is made payable to plaintiff, is dated

November 22, 1909, and signed by the Mohawk Mining Company, George F. Rushart, and C. P. Moriarity, and is for $12,625 and interest. This note was given in renewal of a former note signed by the same parties for $11,500. The Mohawk Mining Company was a copartnership, and prior to the commencement of this action had been adjudicated a bankrupt in Oklahoma. C. P. Moriarity, the other maker, had also been discharged in bankruptcy prior to the commencement of this action.

There was service of summons on the defendant Rushart only. He admitted the execution of the note, but alleged want of consideration, claiming that he is a mere accommodation maker. He alleged that Frank J. Moriarity, who had been cashier of plaintiff bank for a long term of years, but who died before the making of the note in suit, had become interested in a coal mining property in Oklahoma, and that he was desirous of borrowing the money of the plaintiff bank without the knowledge of the other officers of the bank; that, beginning in 1907, from time to time, the cashier honored the drafts of the parties operating the mine, and this defendant gave his notes to the bank to cover the amounts thus advanced; that he had induced defendant to sign these notes on the express promise that he would not be held liable upon any note which he might sign; that the drafts were paid and the money advanced prior to the making of the note given to cover the amount of any draft; that at the time of the cashier's death these notes had all been merged into the one note of $11,500; that this note, like the notes preceding it, was made at the request of the cashier, and with the agreement that he would hold defendant harmless; that there was no consideration therefor, and that it was made for the accommodation of the plaintiff; that the plaintiff was in possession of all the facts at the time the note was signed, and the plaintiff advanced no sum whatever on account of said note or as a consideration therefor. By reply these matters were put in issue, and it is alleged that the money was loaned to defendant and C. P. Moriarity and the Mohawk Mining Company, a copartnership composed of defendant

and C. P. Moriarity. The case was submitted to the jury, and, from a verdict and judgment in favor of defendant, plaintiff brings the cause here for review.

It is insisted that the court ought to have directed a verdict in favor of plaintiff, and this makes it necessary to consider, somewhat at length, the evidence in the case.

The record discloses that, prior to the loaning of any money by plaintiff, one E. B. Rushart (also spelled Ruysschaert), a brother of defendant, and one Bonnert were operating a coal mine in Oklahoma, and this defendant was living at Fort Crook, Nebraska, and intimately acquainted with plaintiff's cashier. Through the efforts of defendant the cashier became interested in the mine, and he caused an investigation of the property to be made, with the result that, December 22, 1906, Rushart and Bonnert made a bill of sale conveying the mining property to defendant and Charles P. Moriarity, a brother of the cashier. January 2, 1907, defendant and his brother, E. B. Rushart, and plaintiff's cashier and his brother entered into a written agreement, whereby it was provided that when all indebtedness of every character whatsoever, existing against the old firm of Rushart & Bonnert, and when all indebtedness of every character whatsoever against the new firm, composed of George F. Rushart and Charles P. Moriarity, should be paid, and when all indebtedness existing by virtue of their operation of the mine, and the balance due to Fred Bonnert on account of his contract with plaintiff's cashier should be paid, all of the rights and privileges formerly held by the firm of Rushart & Bonnert, "and now temporarily held by Charles P. Moriarity and George F. Rushart, and all of the machinery and other personal property and assets of every description now being used in the mining of coal on the north half of northwest quarter, section 22, township 20 north, range 13 east, in Indian Territory, shall be held by Frank J. Moriarity of Omaha, Nebraska, and George F. Rushart of Omaha, Nebraska, and Edward B. Rushart (spelled Ruysschaert) of Tulsa, Indian Territory, owners in common, each of said parties owning an equal undivided one-third of all of the

aforementioned property. Provided, however, until the foregoing conditions arise, that is, until the time when all of the obligations of all the foregoing named firms shall have been satisfied in full, Edward B. Ruysschaert of Tulsa, Indian Territory, shall have equal right and authority, in the operation of the coal mining claim, * * * with Charles P. Moriarity, who is, at present, managing the coal mining operations. * * * In witness whereof, we have hereunto signed our names this 2d day of January, 1907. Edward B. Ruysschaert. George F. Rushart. F. J. Moriarity.

"The above facts and conditions admitted and accepted by me. Charles P. Moriarity."

It is undisputed that the only money that was ever put into this enterprise by the defendant or either of the Moriaritys belonged to the plaintiff bank, being advanced from time to time as needed, and that the whole sum was finally merged in the note in suit. Part of the time the notes were signed by George F. Rushart alone, and part of the time by George F. Rushart, C. P. Moriarity, and the Mohawk Mining Company, the firm name under which they operated. It is also undisputed that the cashier, one of the parties to this enterprise, was the only officer of the plaintiff bank in any way interested in the enterprise, and that no other officer of the plaintiff had any knowledge whatsoever of the transactions. Defendant evidently had good credit at the bank, for he testifies: "A. Well, Mr. Moriarity let the Mohawk Mining Company have the money. He wanted me to sign those notes so his people there in the bank wouldn't catch on to it." He says that he signed the notes at the request of the cashier; that he received no money at the time of signing; but it is conceded that the money went into this mining venture. "Mr. Moriarity told me there was drafts from Oklahoma on him direct; that is, my brother and his brother—he said he paid a couple of those drafts, and he wrote a letter to him not to draw that way any more—that he better draw on me; that the people in the bank had full confidence in me and would not question anything I done; that if the money was loaned through

him it might look bad for him, and he didn't want them to catch on. * * * He told me he wrote them (referring to the parties operating the mine) a letter that they had better draw on me for it. He said, 'I will have to use your name on this, George—not to let them people know anything about this. This will be paid in a little while, and I will have to use your name. I will take care of you.' And I told him 'All right.' * * * Why, he would take care of it, he said. My name would never be known. He said he would take care of the notes himself. The mine was to pay him back. Q. You knew when you signed the first note that Mr. Frank Moriarity was interested in the mining company, did you? A. I knew he owned it until it was paid for." The date of the first note is not given, but it is quite apparent that it was after the written agreement made January 2, 1907, under which defendant took an interest in the property. Defendant has never disclaimed the interest given him under the contract signed January 2, 1907, but affirmed it on the witness stand. On his cross-examination the following testimony was elicited: "Q. You knew at the time the contract was signed above the bank, did you, that Mr. Moriarity, Mr. Frank Moriarity, was to have an interest in the business after the debts were paid? A. Yes, sir; he was to furnish the money, all the money, and then he was to have interest. Q. What interest was he to have? A. One-third. Q. Who was to have the other two-thirds? A. My brother, myself, and when all the debts were paid Mr. Moriarity got his money back. Q. That is, after all the money the bank had loaned had been paid? A. Yes, sir. Q. Then the interest in the business was to be divided into three parts, of which Mr. Frank Moriarity was to have one, his brother one and you one; is that correct? A. Yes, sir; but this $5,000 to Mr. Bonnert was to be paid that Mr. Moriarity stood good for. Q. That is, after all the debts, either for the purchase of the plant and payment of the running expenses, were paid, then you three were to divide it up, were you? A. Yes, sir; one-third each."

This, we think, makes it clear that these parties were engaged in a joint venture. The defendant was a party in interest. He signed the notes in order to procure the money to engage in the business and to operate it, and the cashier, by virtue of his position in the bank, was able to loan plaintiff's money on the faith and credit of defendant's note. They believed at this time that the business would be profitable, and that out of the dividends they would be able to pay back to plaintiff bank all of the money borrowed, and ultimately they would possess this property free and clear of all incumbrances, and this they agreed should be equally divided, one-third to defendant, one-third to the cashier, and one-third to the brother. It is entirely probable that they never dreamed of a possible failure, and that when this money was borrowed all parties honestly intended to see it paid. But this defendant knew, as his testimony shows, that the money was advanced on the faith and credit of his note; he was informed by the cashier that the other officers would not know of the undertaking, that it was necessary to have this note in order to secure the money for this enterprise, and had the undertaking proved successful and the dividends been sufficient to meet the indebtedness, as was contemplated in their agreement between themselves, he would have received an undivided one-third interest in this business, which at the time probably appeared to all of the parties very valuable. But this, like many another mining venture, failed; the cashier died; the other maker of the note was declared a bankrupt, and the defendant's dream of easy money ended in a lawsuit.

"A corporation is not chargeable with the knowledge nor bound by the acts of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction." *Buffalo County Nat. Bank v. Sharpe,* 40 Neb. 123.

There is no disputed question of fact to submit to a jury.

In *Mendel v. Boyd,* 71 Neb. 657, this court said: "It is well settled that the general authority of the cashier of a bank does not authorize him to issue drafts of the bank for himself, or for his private business. *Lee v. Smith,* 84 Mo. 304, 54 Am. Rep. 101; *Anderson v. Kissam,* 35 Fed. 699; *Lamson v. Beard,* 36 C. C. A. 56, 45 L. R. A. 822; *West St. Louis Savings Bank v. Shawnee County Bank,* 5 Otto (U. S.) 557. This rule is founded on the familiar rule of the law of agency, which forbids that an agent shall act for himself and for his principal in one and the same transaction. It is founded on sound considerations of public policy, and the recognized inability of any person to faithfully serve two masters at the same time. Consequently, when the cashier issued these drafts, he did so without authority, and his conduct is to be viewed in no more favorable light than that of any other person who, without authority, appropriates the property of another to his own use."

Defendant knew at the time the money was borrowed that the cashier was making the loan without the knowledge or authority of any other officer of the bank. He knew that it was going into this private enterprise in which defendant and the cashier were interested, and plaintiff is not bound by the promises of the cashier to hold defendant harmless.

It being proved beyond question that the money loaned by the bank was received by the Mohawk Mining Company, of which this defendant was a copartner, and that this defendant knew at the time of making the various notes, and at the time the money was advanced, that the cashier of the plaintiff was engaged in a private enterprise which he was concealing from his principal, and this defendant having a contingent beneficial interest in the enterprise, he will not be permitted to offer the statements or promises of the cashier to defeat payment of the note. The court should have instructed a verdict for the plaintiff. The judgment of the district court is reversed, with directions to enter judgment for the plaintiff.

REVERSED.

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

EDWARD MILLER, ADMINISTRATOR, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED MAY 14, 1915. No. 18072.

1. **Master and Servant:** DEATH OF SERVANT: NEGLIGENCE: PROOF. In an action to recover for the death of a servant, alleged to have been caused by the negligence of the master, the plaintiff is required to prove at least one or more of the alleged negligent acts set forth in his petition.
2. **Evidence** examined, its substance stated in the opinion, and *held* to be insufficient to sustain a judgment for the plaintiff.

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

Byron Clark, Jesse L. Root and *E. C. Strode,* for appellant.

Mahoney & Kennedy, contra.

BARNES, J.

Action by the administrator of the estate of Frank J. Miller against the Chicago, Burlington & Quincy Railroad Company to recover for the pecuniary loss sustained by decedent's next of kin by reason of his death. It was alleged in plaintiff's petition that the defendant was guilty of negligence in allowing a heavy metal lamp to fall from the cab of the engine on which decedent was working as a fireman; that the lamp struck him on the head and knocked him off the engine, thereby causing his injuries and death. This ground of negligence was abandoned, and the negligence on which the cause was submitted to the jury was stated in plaintiff's petition, in substance, as follows: That Frank J. Miller was employed by the defendant as a locomotive fireman, and was discharging his duties on an engine operated by defendant in handling interstate commerce between Sioux City, Iowa, and Laketon, Nebraska; that prior to the 10th day of February, 1912, defendant had carelessly and negligently permitted its track and

roadbed, including the Y's and switches thereof, to be and become uneven, loose and unsafe, particularly in and about Laketon, Nebraska; that on that day, while plaintiff's decedent was engaged in the discharge of his usual duties as locomotive fireman on engine number 1236, and while exercising all due care and caution on his part, and wholly without negligence of any character whatsoever on his part, the defendant ran said engine at a high and dangerous rate of speed over its tracks, including the south Y switch at Laketon, Nebraska, which tracks, switches and Y's had been carelessly and negligently permitted to become uneven and unsound, loose and unsafe, thereby negligently rocking and jolting said engine so that said Miller was caused to fall from said engine, and by reason thereof was killed. The defendant by its answer denied the allegations of negligence contained in the petition, and alleged: "The injury to and the death of said Frank J. Miller were due wholly to and caused solely by his own carelessness and negligence, and without any carelessness and negligence on the part of the defendant." The reply was a general denial. Trial in the district court for Douglas county resulted in a verdict for the plaintiff, and the defendant has appealed.

Appellant contends, among other assignments of error, that the verdict and judgment are not sustained by the evidence, and this contention is the only one which will be considered. It appears that Frank J. Miller, while employed as a fireman on locomotive number 1236 belonging to the defendant railroad, which locomotive was pulling a train of empty ice cars going north to Sioux City, Iowa, fell from his engine near Laketon, Nebraska, and was killed. The head brakeman on the train was a witness for plaintiff, and described the accident, in substance, as follows: The last time I saw Miller before the accident he was standing in the gangway of the engine cab, which is the place where the fireman stands and does his work. This was about three or four minutes before he received his injury. I heard something crack, and I looked around and saw Miller fall out of the gangway. When I saw him he

was going out of the gangway between the engine and the cab. He seemed to be whirling. His left side was to the west and turned to the right. He just kind of slid out level. He tipped out and dropped level to the ground. His hands were not raised above his head. He struck the ground about the back end of the tank and about three or four feet from the rail. His head was south and his feet to the north, parallel to the track. He struck right on his face. The rails at that point were 75-pound rails. The roadbed was cinder or cinder ballast. The speed of the train was about 20 miles an hour. The train was stopped, and I went back and picked Miller up. He was unconscious, and was bleeding from the left side of his head.

One J. J. Sullivan, an old Union Pacific engineer, was called as a witness for the plaintiff, and, after qualifying himself as an expert engineer, testified that during his experience as an engineer in the early seventies or eighties, he had driven locomotives over rails of the weight of about 75 pounds; that such rails were considered light in comparison with the rails of to-day; that unless conditions were very good it would be serious to operate locomotives at a high rate of speed over switches when they were placed on a cinder roadbed; that in such case there would ordinarily be a sudden lurch; that the lurch would be at the highest speed and it would be on the side of a low joint; that cinder tracks are more or less spongy, and that a schedule on that sort of a road ought not to be over 15 miles an hour. On cross-examination the witness refused to say at what stations it would be dangerous, but said that in certain places it might be dangerous to run 20 miles an hour, because there is a certain moisture in the roadbed. The plaintiff's witness who saw the deceased fall out of the cab does not testify that there was at that time any lurch of the engine that caused him to fall, and there is no witness who so testified, and there is consequently no direct evidence that the lurching of the engine caused the deceased to fall. The plaintiff's contention is that if they show that there might be a lurching of the engine, and that there would naturally be some lurching,

and that this was caused by the negligence of the defendant, then the burden would be upon the defendant to show that the accident was caused in some other way. This would be true if the nature of the circumstances was such as to preclude any more accurate evidence, but if this engine was lurching excessively, and particularly if a sudden lurch of the engine at that time caused the deceased to fall, that fact might easily be proved by the witness who testified for plaintiff in the case, and the fact that he did not so testify would seem to negative the contention of the plaintiff that the accident was caused by a sudden lurch of the engine.

The foregoing is the substance of plaintiff's evidence. The defendant requested the court to direct a verdict in its favor. The motion was overruled. No evidence was introduced by the defendant, and the jury returned a verdict for plaintiff for $5,000, on which the court rendered judgment. There is no evidence in the record of the condition of the defendant's roadbed. There was no testimony introduced in any manner relating to the weight, condition or equipment of the defendant's engine. There was no evidence introduced showing or tending to show any defect in the defendant's track or switches, or that there was a low joint at the place where the accident occurred. As we view the record, the verdict of the jury must have been based on mere conjecture. It seems clear that the plaintiff failed to produce sufficient evidence to show actionable negligence. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

EMELIA WISENSTINE, APPELLEE, V. INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, APPELLANT.

FILED MAY 14, 1915. No. 18131.

1. **Insurance**: APPLICATION: FALSE STATEMENTS. Where the agent had inserted in the application for life insurance a representation of the age of the insured, which was untrue, but which the agent himself knew to be untrue, and at the same time stated to the insured that it was immaterial, and so procured the assent of the assured, this was the act of the company, and not of the assured, and would not invalidate the policy.
2. ———: ———: ———: ESTOPPEL. In such case the statement signed by the applicant, but which is prepared by the agent with full knowledge of the facts, is not the false statement of the insured, but is the representation of the agent of the company, and the company will be estopped to declare the policy void for such misstatement.
3. ———: SETTLEMENT: SETTING ASIDE: FRAUD. Where in such case an agent of the company, in order to effect a settlement with the beneficiary, makes a statement to her that the policy is void on account of a misstatement as to the age of the insured, that the courts have all so decided, that he is right, and that the company will not stand for it, and the beneficiary, having no opportunity to make a proper inquiry, relies on his statements, a settlement of her claim of $5,000 for $425 will be set aside, upon her return of the check given her to procure such settlement.

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

Dunshee & Haines and *John D. Ware,* for appellant.

Sullivan & Rait and *George B. Thummel, contra.*

BARNES, J.

This was an action at law upon a written certificate of membership in the defendant association issued to plaintiff's decedent, Frank B. Wisenstine, in which the plaintiff was named as his beneficiary. The plaintiff prayed for a judgment of $5,000, the amount specified in the certificate, and alleged, and the defendant admitted, that the

assured came to his death by accidental means. The defendant by its answer denied that the policy was in force at the time of the death of Frank B. Wisenstine, and denied that it was indebted to the plaintiff. The answer further alleged, in substance, that defendant was a mutual assessment association, organized under the laws of the state of Iowa, and was licensed to transact business in Nebraska. Its articles of incorporation and its by-laws were set out in the answer, and it was particularly alleged that the association could only insure persons within the ages of 21 and 55 years; that Frank B. Wisenstine, at the time he made his application for membership, was only a few days past 18 years of age, and that he fraudulently represented that he was of the age of 21 years, and signed an application to that effect; that therefore the certificate was obtained by fraud, and was nonenforceable and void. It was further alleged that, when the association ascertained the facts, it denied its liability, and thereupon a settlement and compromise was effected with the plaintiff by which the company delivered to her a check for the sum of $425, in full satisfaction of her claim. The plaintiff by her reply alleged, in substance, that the settlement was obtained by fraud and misrepresentation, and that as soon as she learned the facts she repudiated the alleged settlement and returned to the defendant the check which she had received. The cause was tried to a jury in the district court for Douglas county. Plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that two questions were submitted to the jury: First. Was the policy obtained by false representations on the part of Frank B. Wisenstine in regard to his age? Second. Is the release which plaintiff signed on July 8, 1912, binding upon her? It is appellant's contention that the court erred in submitting those questions to the jury, and that the court should have directed a verdict in defendant's favor. The evidence discloses that a Mr. Haas, an agent for the defendant company, was stopping at the hotel in Battle Creek, Nebraska, which was owned by Frank B. Wisenstine's father; that the agent was stren-

uously urging Frank to procure a policy in his company; that the assured made the usual objections to becoming a member, insisting, among other things, that he had no money to pay for the policy; that in the course of the conversation Frank's father offered to loan him the money for that purpose, and the agent thereupon wrote out the application; that nothing was said about the age of the assured at first. It appears, however, that before the application was written the agent informed Frank that, in order to become a member, he must be 21 years of age. There is no evidence in the record, however, which shows or tends to show that Frank ever saw any of the defendant's literature, or ever had any notice of the alleged age requirement, other than that stated by Mr. Haas. It further appears that Haas said to Frank that he was so near 21 years old that he would write his age in the application as 21 years, and that upon that statement Frank signed the application. It thus appears that the agent knew that Frank was not 21 years old when he signed the application. Having this knowledge, Haas sent in the application to his company without any statement discrediting it, and collected the premium, and the policy was at once issued.

As we view this question, the assured was not guilty of fraud in signing the application on which the policy was issued; that, as a matter of fact, the only fraud practiced was that of the agent in concealing from his company the age of the assured. In *Union Mutual Ins. Co. v. Wilkinson,* 80 U. S. 222, it was said that, where agents soliciting insurance undertake to prepare the application of the insured, or to make any representations to the insured of the character or effect of the statements of the application, they will be regarded as agents of the insurance companies, and not of the insured. In that case the agent had inserted in the application a representation of the age of the mother of the insured at the time of her death, which was untrue, and it was held not to invalidate the policy. The same rule is announced in *Hingston v. Ætna Ins. Co.,* 42 Ia. 46; *State Ins. Co. v. Jordan,* 29 Neb. 514. The agent of the defendant testified that, knowing that Frank was

ineligible to membership, he put his age in the application as 21. It is well settled that, where the agent is aware of conditions which, if concealed by the insured, would avoid the policy, but the agent, either by fraud or mistake, inserts incorrect or untrue answers, the company is responsible for the agent's conduct, and cannot repudiate the contract on that ground. *Eggleston v. Council Bluffs Ins. Co.*, 65 Ia. 308; *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304; *Taylor v. Anchor Mutual Fire Ins. Co.*, 116 Ia. 625; *Fidelity Mutual Fire Ins. Co. v. Lowe*, 4 Neb. (Unof.) 159. In *Jamison v. State Ins. Co.*, 85 Ia. 229, 234, it was said: "He (the agent) knew all material facts when he prepared the application, and, having undertaken to prepare it, his duty required him to state them correctly. Mrs. Jamison gave the required consideration for the insurance, and relied upon the agent, as she had a right to do, to discharge his duty in a proper manner. His failure in that respect was the fault of the defendant, and it will not now be permitted to escape liability by taking advantage of its own wrong." The same rule is announced in *Eckert v. Century Fire Ins. Co.*, 147 Ia. 507; *Roe v. National Life Ins. Ass'n*, 137 Ia. 696; *Pringle v. Modern Woodmen of America*, 76 Neb. 384. We are aware that the authorities on this question are somewhat conflicting, but we feel constrained to follow the recent and more equitable doctrine announced in the foregoing decisions.

It is further contended by the appellant that the court erred in submitting to the jury the question of fraud in the settlement, on which plaintiff relied to enable her to maintain her action, because there was no evidence which would support a verdict in her favor on that question. The plaintiff testified that Mr. Edson, the defendant's agent, when he called on her to adjust the matter, said to her: "I looked this application over in my room last night and I find that Frank misrepresented his age, and this makes the policy perfectly worthless." There was nothing on the face of the application which gave Edson any such information. The application did not show that Frank had made a false statement, and the agent must

have had independent knowledge of Frank's real age. If he had no such knowledge, he could not say that Frank had been guilty of fraud and that the policy was void. In addition to this, Edson stated to the plaintiff that she could consult any lawyer if she wanted to find out if he was right; that she could take his word for it, that he was right, and that his company would not stand for it. It appears that there was no lawyer in Battle Creek whom Mrs. Wisenstine could consult. She stated that the agent seemed fair, and that she finally took his word for it. It appears that Edson's statement that the company was not liable on the policy and that all the courts had so decided was not true. He must have known that this was not true, because very many of the courts have decided otherwise. The rule in such cases is that, when a person, falsely assuming knowledge of certain facts, makes representations thereto without knowledge of the truth or falsity thereof, he is subject to the same liability for injuries resulting therefrom as if they were made with full knowledge of the facts. Mrs. Wisenstine could not have found out for herself that what Edson had told her was untrue, and therefore she had a right to rely on his statements. *Perry v. Rogers,* 62 Neb. 898; *Foley v. Holtry,* 43 Neb. 133; *Martin v. Hutton,* 90 Neb. 34. As we view the record, the court did not err in submitting the question to the jury.

After a careful examination of the record, we are convinced that it contains no reversible error, and the judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

PHEBE J. PETERSON ET AL., APPELLEES, V. GEORGE E. DAMOUDE ET AL., APPELLANTS.

FILED MAY 14, 1915. No. 18088.

Partition: DEVISE: RESTRICTION ON PARTITION: VALIDITY. Involuntary partition of an estate devised in equal shares to the testator's children cannot be decreed contrary to a provision in the will which forbids division for a reasonable time fixed by testator in definite terms; the condition not being a void restraint on alienation nor a limitation repugnant to the fee.

APPEAL from the district court for Hamilton county: EDWARD E. GOOD, JUDGE. *Reversed and dismissed.*

Hainer, Craft & Aylsworth and *Frank E. Edgerton,* for appellants.

B. F. Good and *J. H. Grosvenor, contra.*

ROSE, J.

This is an action for partition. From a decree granting the relief prayed by plaintiffs, defendants have appealed.

Joseph Damoude died in Hamilton county, December 24, 1905, leaving a wife and 13 children. His widow died December 6, 1910. He left a will containing these words:

"I give devise and bequeath to my beloved wife, Wilhelmina Damoude, all of my real estate, to have and to hold for the term of her natural life, and to have all the rents and profits arising therefrom, and at her death said lands shall descend in absolute title and in equal shares among my children living, or their legal representatives. Providing, however, that said real estate shall not be disposed or divided among my said children prior to the 5th day of October 1921."

The real estate thus devised consists of a 480-acre tract in Hamilton county. Nine of the testator's children instituted this action against the others March 16, 1912. Partition was decreed on the ground that the proviso is repugnant to the devise. To uphold the trial court plain-

tiffs argue that the limitation violates the doctrine that a restraint on alienation cannot be attached to the fee, and cite *Loosing v. Loosing,* 85 Neb. 66, and similar cases. Did testator devise the fee in equal shares to his 13 children, and, by means of a subsequent provision, attempt to prevent each from selling or assigning the undivided one-thirteenth interest before October 5, 1921? The intention to prevent partition until that date, or until after the youngest child attains the age of 21 years, is clear: "Said real estate," reads the will, "shall not be disposed or divided among my said children prior to the 5th day of October, 1921." The word "divide," in the connection in which it is thus used, evinces a testamentary purpose to delay partition temporarily, or to postpone a division of the entire estate among the devisees. *Hill v. Hill,* 261 Mo. 55. The property which shall not be "disposed or divided" prior to the date fixed by testator is "said real estate." The reference is to all of the land devised to the 13 children. It is clear, therefore, from the terms of the entire will that the restriction in the proviso applies alone to the 480-acre tract. It follows that each devisee is left free to sell his individual estate at any time, and that cases cited to support the argument that a testator who devises the fee cannot impose restraints on alienation are not in point. The decisive question presented by the appeal may be stated thus: Is the provision temporarily suspending partition a reasonable and valid exercise of testamentary power? Authority is nearly unanimous in answering the question in the affirmative. *Hill v. Jones,* 65 Ala. 214; *Dee v. Dee,* 212 Ill. 338; *Heininger v. Meissmer,* 261 Ill. 105; *Hunt v. Wright,* 47 N. H. 396; *Roberts v. Wallace,* 100 Minn. 359; *Buschmann v. McDermott,* 139 N. Y. Supp. 314; *McInteer v. Gillespie,* 31 Okla. 644; *Greeney v. Greeney,* 155 Wis. 621.

In Gray, Restraints on Alienation of Property (2d ed.) sec. 30, it is said: "Whatever the true doctrine may be, a prohibition against partition is not a restraint on alienation, as the undivided share is always assignable."

In *Dee v. Dee,* 212 Ill. 338, 354, the report shows that the testator left a life estate to his widow, Hanorah Dee, and the remainder to his children. In discussing in that case the question here under consideration, the supreme court of Illinois said: "Is appellant entitled to partition prior to the death of Hanorah Dee? It is evident from the language of the will that it was the purpose of the testator to postpone a division of the estate until her death. The general rule is that an adult tenant in common may demand partition as a matter of right (*Martin v. Martin,* 170 Ill. 639); and the fact that he is a remainderman and that the particular estate has not expired is not a valid objection (*Drake v. Merkle,* 153 Ill. 318); but equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed upon the estate by one through whom he claims (21 Am. & Eng. Ency. Law (2d ed.) 1158; *Hill v. Reno,* 112 Ill. 154; *Ingraham v. Mariner,* 194 Ill. 269; *Brown v. Brown,* 43 Ind. 474; *Hunt v. Wright,* 47 N. H. 396); nor is such a condition or restriction in the instrument conveying the estate invalid as repugnant to the estate granted, or as against public policy (*Hunt v. Wright, supra*). We regard the language of the will fixing the time at which the estate shall be divided as an express condition against partition prior to that time. No partition can be had, therefore, until the particular estate of Hanorah Dee is extinguished."

In the present case the provision forbidding partition prior to October 5, 1921, being valid, the action was prematurely brought.

There is also a discussion of the meaning of the word "disposed" as it appears in the proviso that "said real estate shall not be disposed or divided among my said children prior to the 5th day of October, 1921." It is insisted that testator, by means of the language quoted, intended to prevent the devisees from mutually combining and selling the entire tract, and attempted to impose an invalid restraint on alienation. A determination of this question is not necessary to a decision. The provision re-

lating to partition is valid. Some of the children are resisting the action. The devisees have not agreed to sell the tract. In decreeing partition the trial court was in error. The judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

HAMER, J., not sitting.

NELSE SWANSON, APPELLEE, V. UNION PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MAY 14, 1915. No. 18035.

Master and Servant: RELEASE: CONSIDERATION: PAROL EVIDENCE. *Tylee v. Illinois C. R. Co.*, 97 Neb. 646, re-examined, and *held* decisive of the case at bar.

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

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

Sullivan & Rait, contra.

FAWCETT, J.

From a judgment of the district court for Douglas county, in favor of plaintiff, in an action for a breach of contract by defendant for life employment of plaintiff, defendant appeals.

In August, 1905, plaintiff, while in the employ of defendant, received an injury which resulted in the loss of a leg between the knee and ankle, which he claimed was the result of defendant's negligence, but which negligence the defendant did not concede. He was taken to a hospital and there treated, as we infer from the record, at defendant's expense. While in the hospital he was visited by his foreman, Henry D. Baldwin, with whom he claims to

have made a settlement, by the terms of which he was to release the defendant from all claim on account of the injury he had received, and was to receive in return therefor $500 in cash and employment for life, or for so long a time as he desired to work, at the same pay that he was receiving at the time of his injury. He received the $500 in cash through defendant's claim agent, S. J. Peterson, and executed a release, releasing the defendant from all liability. He was also given employment by Baldwin, his previous foreman, and continued to work for the defendant at lighter employment than that in which he had been engaged prior to his injury, for a period of about five years, and until after the death of his foreman, Baldwin. Baldwin was succeeded as foreman by his son-in-law, who shortly thereafter discharged plaintiff, and this action resulted.

The brief contains 12 assignments of error, which we shall not consider in detail, but will only refer to such portions as may seem necessary to a full determination of the case. Our labor has been much lightened by our recent consideration and determination of *Tylee v. Illinois C. R. Co.*, 97 Neb. 646. A motion for rehearing was filed in that case about the time the instant case was submitted, and, the cases being so similar, we have held that motion under consideration and have reconsidered the *Tylee* case in the light of the briefs and arguments presented in this case. Our re-examination of the questions has satisfied us that the reasoning and conclusion reached in the *Tylee* case are sound and should be adhered to. We have therefore at the present sitting of court overruled the motion for rehearing in that case. The *Tylee* case, therefore, becomes authority for and is decisive of every important question arising in this case. We shall not restate the points involved and discussed in the *Tylee* case, but will refer to the published opinion therefor.

In the case now under consideration, it appears that Mr. Peterson was the regular claim agent of the defendant, and the evidence satisfies us that he had full power to make a settlement such as is alleged by plaintiff. That he did

not in person negotiate the terms of the settlement, or personally make the agreement upon which plaintiff relies, must be conceded; but the evidence shows that Peterson had on numerous occasions referred to Baldwin the settlement of claims of men working under him. Plaintiff had knowledge of this custom. When, therefore, Baldwin took up the matter of a settlement with plaintiff, plaintiff had a right to assume that he was dealing with one duly authorized to make the agreement. He was warned by Baldwin, or Peterson, or both, not to employ a lawyer, as he could do better by settling with defendant direct, or words to that effect. Plaintiff testified that Baldwin told him the matter had been submitted to the officers of the company and that he expected an answer soon; that he finally called on plaintiff and told him that he had received full authority to make settlement with him; that they were going to give him $500 in money and a life job. He also testified that at the time he signed the release in Peterson's office he told Peterson about his agreement with Baldwin for a life job, and that Peterson answered, "So much the better for you," but told plaintiff that he must sign the release before he could receive the check. Peterson first testified that at the time the release was signed he expressly told plaintiff that no one had any authority to give him a life job, but he subsequently asked to change his testimony upon that point, and his final testimony was: "There was no talk about employment and nothing about a life job."

It would serve no good purpose to set out more of the testimony. Plaintiff's testimony was sufficient, if belived by the jury, to establish the making of the settlement as alleged by him. His testimony is strongly corroborated by one circumstance: Immediately upon his being able to go to work, he was given employment by Baldwin, and remained in the employ of the defendant for about five years, during which period of time, notwithstanding the fact of his crippled condition, he was paid by the defendant the same wages he was receiving at the time of his injury, viz., $3 a day. The period of this last employment

was from early in 1906 until November 1, 1911, during all of which time his age was beyond the limit resting upon Baldwin in the hiring of men working under him, the maximum of which was 45 years. There is no theory upon which to account for the fact that plaintiff, recently crippled to the extent of losing a limb, was retained in the employment of the defendant for so many years at the same wages then being paid for younger men engaged in much more arduous work than he, except that such employment was in accordance with the contract which had been made to give him life employment as a part of the consideration for the release of his claim for damages. The law in relation to contracts of this character and in relation to ratification is clearly set forth in *Tylee v. Illinois C. R. Co., supra,* and need not be restated. We would simply add that there is stronger reason for holding that plaintiff had a right to rely upon the apparent scope of Baldwin's authority than Tylee had to rely upon the authority of the employee with whom he dealt, and the evidence as to ratification is much stronger in this case than in that.

Objection is made to the ruling of the court in the giving of certain instructions, and in refusing certain others requested by defendant. We deem it unnecessary to set them out, as we think those given are in harmony with the facts in this case as applied to the law announced in the *Tylee* case, and those refused are in conflict herewith.

It is further urged that the damages are excessive and appear to have been given under the influence of passion, and prejudice. In this contention we cannot concur. According to defendant's own illustration, as given on page 28 of its brief, the damages are not so excessive as to warrant an appellate court in interfering. It will not do to urge that no allowance was made by the jury for anything that plaintiff might be able to earn at other employment. His testimony is that he made application to other railroads, but was denied employment of any kind, on account of his crippled condition. This same condition would be urged against him by any other corporation or person to whom he might apply for employment at manual labor.

which appears to be the only employment of which he is capable. Moreover, it must be borne in mind that he is utterly incapacitated for the line of work in which he had been engaged during substantially all of the time after he had reached the age of manhood. We find no error in the rulings of the court as to the admission and exclusion of evidence, which could have prejudiced the defendant, when considered in the light of the instructions in relation thereto given by the court.

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

AFFIRMED.

UNDERFEED STOKER COMPANY OF AMERICA, APPELLANT, V. FARMERS CO-OPERATIVE CREAMERY & SUPPLY COMPANY, APPELLEE.

FILED MAY 14, 1915. No. 18082.

1. **Sales: IMPLIED WARRANTY.** "Ordinarily where a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, for a particular purpose, of which he is aware, under such circumstances that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied warranty that the article supplied shall be reasonably fit for the purpose for which it is sold." *Toledo Computing Scale Co. v. Fredericksen*, 95 Neb. 689.
2. **Appeal: AFFIRMANCE.** "Where the verdict returned is clearly right and is the only one warranted by the evidence, the judgment will be affirmed, although errors may have intervened at the trial." *United States School-Furniture Co. v. School District*, 56 Neb. 645.

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

Montgomery, Hall & Young, for appellant.

Stout, Rose & Wells, contra.

FAWCETT, J.

This action was instituted by plaintiff in the district court for Douglas county, to recover the contract price claimed to be due from defendant under a written contract for the complete equipment of two 150 horse-power Kinney water tube boilers in defendants plant at Omaha, with "Jones underfeed mechanical stokers" and other accessories and attachments. Plaintiff is the manufacturer of the mechanical stokers referred to, and defendant is engaged in the manufacture of butter and ice cream. The answer admits the execution of the contract alleged in the petition, but alleges, among other things, that after the stokers were installed it was found that every attempt at practical use of them resulted in the filling of defendant's factory with smoke and soot to such an extent as to actually interfere with and prevent the making of butter and the operation of defendant's factory, all of which was open, obvious and well known to plaintiff and its engineer, or engineers, employed to install and test the same; that because of the premises defendant refused to accept or operate the stokers, and requested plaintiff to remove them; that plaintiff refused so to do, and in order to continue operation of its factory defendant was obliged to, and did, at its own cost remove the stokers from the boilers and install other equipment therein. For the expense of removal of the stokers and restoring the boilers to their original condition, defendant, by way of counterclaim, prayed judgment for $1,000. The reply denied all allegations in the answer and counterclaim, and specially alleged that, if smoke or soot accompanied the use of the stokers, the same was due to the fault or negligence of defendant in, or in connection with, the operation of the boilers and stokers. There was a trial to the court and jury, and a general verdict in favor of the defendant in the sum of $473.03. A motion for a new trial was overruled, and judgment entered upon the verdict, from which plaintiff appeals.

Several defenses, in addition to the one above set out, were interposed, litigated upon the trial, and are presented by the record in this court; but, for the reason to be here-

inafter stated, none of the questions presented and argued, except the one above noted, will be considered.

Plaintiff's brief contains 25 specific assignments of error, a number of which refer to the giving and refusal of instructions. Having reached the conclusion that the verdict is the only one which could properly have been returned, we do not deem it necessary to consider these assignments; nor do we deem it necessary to consider the assignments as to the rulings of the court in the admission or exclusion of evidence, as none of such rulings, if erroneous, is of such character as to be deemed material. The principal and controlling question involved in the case is the question of implied warranty by plaintiff that the stokers would be reasonably adaptable, suitable and fit for firing the boilers in defendant's butter and ice cream factory, for which they were sold; plaintiff knowing at the time of entering into the contract that the stokers which it was to manufacture and install were to be applied to this specific use. That plaintiff knew the use which the defendant intended to make of its boilers with the stoker attachment is beyond dispute. The evidence overwhelmingly shows that, when the stokers were used for the purpose of firing the boilers, the factory would become so filled with smoke and gas that it was hard for the employees to remain in the boiler room; that it was hard to get men to stay there; that some would stay a day only, and one or two remained only two or three hours, on account of the difficulties with the smoke and gas. Mr. Eldredge, vice-president of defendant, testified: "Q. How did this smoke affect your business in the factory? A. It simply put us out of business. We could not run that factory and run those stokers; that was an absolute impossibility. Q. What are the properties of butter in reference to its susceptibility to odors and smoke and gas? A. Probably one of the most susceptible products there is. Q. What do you say about ice cream? A. Same difficulty." He further testified that the smoke was so thick that it was almost impossible to keep a force in the office. The witness Fleming, who was sent by plaintiff to make a test of the boilers and stokers, sought to avoid this testi-

mony by designating what defendant's witnesses called "smoke" as "hopper gas." Call it what you will, it is well established that it was a serious detriment to defendant's business. The evidence also shows that, as soon as the stokers were taken out and hand-firing again resorted to, there was no further trouble from this smoke or gas. Nothing would be gained by further commenting on the evidence. The jury are well supported in finding that the use of the stokers would have been destructive to defendant's business, and that they therefore were not adapted to the use to which plaintiff knew defendant intended to apply them. That defendant had a right to rely upon the implied warranty is well sustained by *Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68; *Toledo Computing Scale Co. v. Fredericksen*, 95 Neb. 689; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *Kennebrew v. Southern Automatic Electric Shock Machine Co.*, 106 Ala. 377; *Fitzmaurice v. Puterbaugh*, 17 Ind. App. 318; and numerous other cases cited in defendant's brief.

The record does not disclose any prejudicial error. Paintiff appears to have had a fair trial. The judgment is fully sustained by the evidence, and is in harmony with well-settled principles of law. It is therefore

AFFIRMED.

SEDGWICK, J., not sitting.

BESSIE LACEY, APPELLEE, V. CHAUNCEY D. ZEIGLER ET AL., APPELLANTS.

FILED MAY 14, 1915. No. 18084.

1. **Courts: JURISDICTION: POWER OF LEGISLATURE.** Section 9, art. VI of the Constitution, confers on the district courts "both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide." The equitable jurisdiction of the district courts is, therefore, beyond the power of the legislature to limit or control. While it may grant such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad

and general jurisdiction which the constitution has conferred upon them.

2. **Wills:** ORAL CONTRACT: SPECIFIC PERFORMANCE. Where a party orally contracts to devise and bequeath to another certain real estate and money in consideration that the beneficiary shall assume a peculiar and domestic relation to the promisor, and render him services of a character to make it practically impossible to estimate their value by any pecuniary standard, and the beneficiary, in reliance upon the oral promise, in good faith assumes the relation and fully performs her part of the agreement, she will be entitled, in the event of a breach of the contract by the promisor, to a specific performance of the same as made.

3. **Specific Performance:** JURISDICTION: CONTRACT TO DEVISE. And when such contract and relation are established under a single and indivisible contract, and the promisor dies without having complied with the terms of his promise, the county court is without, and the district court has, jurisdiction of an action for the specific performance of such contract.

4. ———: ———: ———. Where a court of equity can afford complete and adequate relief and by one litigation and decree adjudicate the rights of the parties, it may take jurisdiction over the entire subject matter and order a specific performance of the entire contract.

5. ———: ———: ———: CERTIFICATION TO COUNTY COURT. And in such case, where it appears that the estate of the decedent promisor is solvent, it may certify its finding to the county court as to the amount which it has found due from the estate and direct that the same be allowed as an established claim against such estate.

6. **Wills:** CONTRACT TO DEVISE: SUFFICIENCY OF EVIDENCE. The evidence examined, and set out in the opinion, *held* sufficient to establish an indivisible contract on the part of defendants' decedent, for a single consideration on the part of plaintiff, consisting of unusual personal services performed by her for said decedent.

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

A. M. Post and *M. Whitmoyer,* for appellants.

Reeder & Lightner, contra.

FAWCETT, J.

From a decree of the district court for Platte county, awarding plaintiff specific performance of an alleged parol

agreement, by the terms of which Charles W. Zeigler agreed that he would at his death leave or give to plaintiff the sum of $5,000 in money and the home place in the city of Columbus, Nebraska, known as lots 5, 6, 7 and 8, in block 16, Gerrard's addition to that city, together with all household furniture and furnishings therein, in consideration that plaintiff would abandon any contract or claim she then had for past services, and would devote her time and attention to caring for and nursing said Zeigler, and to keeping house for him, so long as he should live, defendants appeal.

The above statement contains, substantially, the allegations in the petition as to the contract upon which plaintiff relies. She then alleges compliance on her part with the terms of the contract. Mr. Zeigler died without keeping his part of the agreement. Defendant Webster is the administrator of his estate, and the other defendants are brothers and sisters and children of a deceased sister of the decedent Zeigler. The substance of the answer of the defendant Webster, administrator, is that he admits the plaintiff performed services for the decedent and his wife within the period of three years preceding his death; that deceased left an estate of the value of about $60,000; that he is informed that his codefendants deny the rights asserted by plaintiff in her petition; that he is without knowledge as to the allegations of the petition, and therefore denies the same. The answering heirs allege, substantially, that the services rendered by plaintiff for the decedent, which formed the basis for the claim, if any, which plaintiff had, and which she alleges she abandoned at the time she made the parol agreement under which she seeks to recover, were rendered for plaintiff and one Edward A. Gerrard, a copartnership. They admit that plaintiff rendered service, under the direction of the decedent, as a nurse for his wife in her last illness and in nursing and caring for the decedent himself in his last illness; admit that they claim the entire estate of the decedent by virtue of the laws of descent of this state; admit that plaintiff is in possession of the home place above referred to, but

allege that such possession was acquired by fraud of plaintiff after the death of Mr. Zeigler, and is being maintained by force without authority of law. As to the contract relied upon by plaintiff, they allege that there is no note or memorandum in writing signed by the decedent or by any of the defendants; that the estate is solvent, and that the administrator and the several heirs are willing and anxious that plaintiff shall be amply compensated by said estate for all services rendered by her on account of the decedent or his wife, "and they hereby offer to pay and satisfy her lawful claims of every nature therefor." They then charge that by means of improper relations between plaintiff and decedent she acquired and exercised an undue influence over him, whereby she was enabled to and did dictate and control his actions in affairs of business; that early in or previous to 1909, and thereafter until his death, the decedent was afflicted with a mental disorder which greatly impaired and finally destroyed his power of mind, during which time he was under the influence and control of plaintiff, and if any promise was made by him to plaintiff, of the nature alleged by her, it was so made during the period of his aforesaid mental derangement, and was procured by means of plaintiff's undue influence and control, "and is unconscionable, illegal and void." They pray "that plaintiff's petition may be dismissed, and that they recover their costs herein expended, and for a decree quieting and confirming their title to the real property in said petition described as against the plaintiff and all parties claiming through or under her." The reply is a general denial. The court found generally for the plaintiff, quieted and confirmed her title as against the defendants to the real estate, and further ordered that defendant Webster, as administrator, pay to plaintiff from the assets of the estate the sum of $5,390, with interest from January 25, 1913, and costs; that a copy of the decree be certified by the clerk to the county court of Platte county, "wherein the said sum of $5,390, together with interest thereon from this date and costs of this suit, shall have the effect

of an established claim against the estate of said deceased."

The brief assigns eight specific errors for reversal, the second being that the judgment is unsupported by the evidence, and the seventh that the district court exceeded its power in allowing plaintiff's claim of $5,000 and interest, and assuming to distribute funds in the hands of the administrator and within the exclusive jurisdiction of the county court. A consideration of these two assignments involves sufficient of the record to dispose of the other six.

The witness Selzer testified that he had known decedent for 30 years and plaintiff since 1891; had worked on the ranch referred to during the last 21 years that it was operated; that, after the ranch was discontinued, decedent said he was going to move down to Columbus and have plaintiff keep house for him; "That he was going to give her this home property and $5,000. * * * Q. What was she to do for that? A. Maintain this house and take care of him." That plaintiff remained with and kept house for decedent until the time of his death, October 14, 1911; that decedent said he had never given plaintiff any money or paid her anything; that she had been responsible for his accumulating property; that he never had as good success as he had now. He further testified that the agreement to give plaintiff the home place and $5,000 in money was talked over by decedent in plaintiff's presence while they and the witness were "eating at the table, all three of us, after we moved down here;" that decedent told him he had traded off a house, which belonged to plaintiff, for lumber to put into his new house, and that he received $850 for it.

Mrs. Elizabeth Schmid testified that she was acquainted with the parties; that decedent sold off the stock on the ranch and moved to Columbus in 1909, after the death of his wife; that plaintiff went to Columbus and lived at the Zeigler residence thereafter; that she did the housework and cooking; took care of decedent and nursed him all through his sickness; that she (witness) frequently visited at the Zeigler home after plaintiff and Zeigler

moved there; that she was there just a week before Christmas, 1909; that at that time decedent seemed in good health; that she did not see anything wrong with him at all; that he then said that plaintiff was a good housekeeper and a good cook, and that he was going to "give her this house and property and $5,000 in cash. * * * He said the house and furniture and the lots. * * * Q. Did he say anything about what Miss Lacey (plaintiff) was to do in order to get this property? A. Why, to keep house and take care of him. Q. For how long? A. Until he died. Q. Do you know whether or not Miss Lacey did take care of him until he died? A. I do; she did. Q. Do you know, Mrs. Schmid, anything about how troublesome it was to take care of him during the last few months of his sickness? A. I do. Q. Just describe it to the court. A. I tell you I wouldn't stay there and take care of that man the way he is. * * * He was sick and he got nervous spells, and then she would have to go and put water on his head and doctor him like you would a sick person. Q. His mind wandered? A. Yes, sir. Q. Was he able to take care of himself during the last few months? A. No, sir."

Dan J. Echols testified that he knew decedent in his lifetime; knew the place where he lived in town; that in 1910 decedent told him that plaintiff had worked for him a number of years; had done her work well and was one of the best women to work he had ever known; that when he died he intended to name her in his will and give her $5,000 and the home place; that she was going to stay with him until he died.

Jacob Schmid testified that decedent talked to him about plaintiff, and said "he intended Miss Lacey to have $5,000 and the home place;" that at the time decedent told him that "we was washing him off, tending to his arms, and Miss Lacey went into the kitchen, and he told me that, and when he told me that he said she is an awful good woman;" that plaintiff remained at Zeigler's home until his death.

Mrs. Isabell Webber testified that she was well acquainted with the decedent, and was acquainted with plaintiff; that she was at the home in Columbus in April, 1910, when she heard he had been hurt in an automobile wreck, and stopped to see how he was; that decedent's health seemed pretty good, except that he had quite a serious breaking out on his arm; that on different times during the day or night she assisted in taking care of him by putting applications on his arm; that during that time decedent talked with her about plaintiff. "Q. What did he say about that—about what he had agreed to give Miss Lacey? A. Why, he said that he had agreed to give her $5,000, and after he came to town he was going to give her the home place and all of its belongings if she would stay with him until he got well, and if he got over his ailments he was going to give her $10,000 or better. He said, 'I have always agreed to give her $5,000, and I told her,' he says, 'if she will take good care of me as long as there is anything the matter with me I will give her $10,000.' Q. You say he told you he had agreed to give her $5,000 and the home place. Did he say that? A. Yes, sir. * * * Q. Did he say anything about whether or not he had paid her for her services on the ranch for taking care of him? A. He said he had never paid her anything, but had always used her money; used what she should have had to make money with; that she had also sold her house, and he had the money for that. Q. Did he mention that at this time? A. Yes; he mentioned that at the same time; that he had sold her property in town, and he had used the money. Q. Did he say whether or not he had told Miss Lacey of what he intended to do for her? A. Yes, sir. Q. What did he say about that? A. He said that he had promised her $5,000 and the home place, there. Q. He said he had told her that? A. He had told her that, and that he was going to make it $10,000 if she would stay and take care of him, but for me not to tell that part of it; he had already told her the other; he said that nobody else could take care of him as she did. Q. Just one other question, did he say anything about whether this arrangement

between him and Miss Lacey was in writing or not? A. No; it wasn't in writing; he said she knew that his word was good. Q. How is that? A. He said it wasn't in writing, but she knew his word was good, and he intended to put in some shape to make it so it would be good so she wouldn't have any trouble getting it if he should happen to drop off."

Fred Elias testified that decedent had told him he had received $800 for plaintiff's house, which he traded to lumbermen for lumber to go into his own new house.

The above testimony stands uncontradicted and unimpeached. It is strengthened by the admission in the answer of defendants that plaintiff rendered service under the direction of the decedent as a nurse for his wife in her last illness, and in nursing and taking care of the decedent himself in his last illness; and that they are willing and anxious that plaintiff should be amply compensated for all services rendered by her on account of the decedent or his wife. Mr. and Mrs. Zeigler died childless. The defendants are brothers and sisters and children of a deceased sister, all nonresidents of Nebraska during the time of the illness of Mr. and Mrs. Zeigler. Plaintiff in the hour of decedent's need was the one to whom he turned for services of a character which would have been hard to secure from strangers. The testimony of these witnesses clearly shows that she was faithful at every point; that she rendered services, the value of which it would be impossible to estimate in dollars and cents. Decedent knew plaintiff. She had been in his employ for 18 years at the ranch before he brought her to Columbus. He knew the kind of housekeeper and cook she was, and understood more than anyone else the character of the services which she would be able to render. He fixed the value of those services at $5,000 and the home place in Columbus. He was worth, as alleged in the petition, $80,000, and, as admitted by the administrator in his answer, about $60,000. Under such circumstances we certainly cannot say that the court erred in sustaining the value which decedent himself placed upon those services. We think the evidence

is ample to sustain the contract. The evidence to support the judgment is fully as strong, if not stronger, than that shown in *Kofka v. Rosicky,* 41 Neb. 328, *Harrison v. Harrison,* 80 Neb. 103, *Peterson v. Bauer,* 83 Neb. 405, *Hespin v. Wendeln,* 85 Neb. 172, and *O'Connor v. Waters,* 88 Neb. 224.

The question raised by the seventh assignment of error is not so difficult of solution as it might at first appear. Section 16, art. VI of the Constitution, provides: "County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointments of guardians, and settlement of their accounts; in all matters relating to apprentices; and such other jurisdiction as may be given by the general law. But they shall not have jurisdiction * * * in actions in which title to real estate is sought to be recovered, or may be drawn in question." It is urged by defendants that the district court was without jurisdiction to render judgment against the administrator on account of services rendered for deceased, for the amount of the money consideration to be paid therefor, and directing such judgment to operate "as an established claim against the estate of said deceased," and that the judgment to that extent is therefore void. It is argued that the county court is alone invested with the jurisdiction to determine such a matter; that the county court in this instance had actually acquired jurisdiction of the *res* by the appointment of the administrator. A number of decisions of this court are referred to in support of this contention. An examination of the cases cited will show that none of them is applicable to a case like the one under consideration. We have repeatedly held that the county court is the court of original jurisdiction in which claims against decedents' estates must be filed and adjudicated, but it will be found in every such case that there was involved a separate and distinct matter which the county court could in the exercise of its jurisdiction dispose of in its entirety. We have never held that where the matter involved is a single contract on the part of a claimant for

a consideration payable partly in money and partly by conveyance of real estate, the claimant must appeal to the county court for an enforcement of part of his contract and to the district court for an enforcement of the other part. That the district court alone could determine the contract sued upon in this case, so far as it applied to the real estate, is of course conceded. Having obtained jurisdiction for that purpose, then, under equally numerous decisions of this court, it has the power to retain it for all purposes. To hold otherwise, would be to encourage a multiplicity of suits and to require plaintiff in this case to commence her suit in equity in the district court to recover part of the consideration which she was to receive for the single agreement made and service rendered thereunder on her part, and file her claim in the county court for the other part of that consideration. This would have entailed upon her the expense of two trials, in separate courts, to establish the same fact, with the uncertainty that those courts would reach the same conclusion. Section 9, art. VI of the Constitution, provides: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide." The equitable jurisdiction of the district court is therefore beyond the power of the legislature to limit or control. It may give the district court "such other jurisdiction" as it may deem proper, but it cannot take away from such court its broad and general jurisdiction in chancery which the constitution has conferred upon it. We are not without authority to sustain us in this conclusion. In *Gilliam v. Chancellor & Murray,* 43 Miss. 437, it is held: "Where the chancery court can afford complete and adequate remedy, and, by one litigation and decree, adjudicate the rights of the parties, it may take jurisdiction over the entire subject matter, and if necessary, enjoin a party from proceeding in a suit in the probate court, when such suit only embraces part of the subject." In the opinion (p. 448) it is said: "Three important points are made by counsel: First, whether as claimed for the plaintiff in error, the jurisdiction of the

probate court, over the bequest to Mr. Gilliam is exclusive." In discussing this point the court say: "The argument is, that Mrs. Gilliam had instituted the proceeding in the probate court, against the executors to secure the legacy of $5,000; a tribunal which had, to the exclusion of the chancery court, jurisdiction to order its payment, and it was therefore an usurpation in the chancery court to stay that suit by injunction, and to withdraw from it, to itself, the subject matter in dispute. It was declared in *Blanton v. King,* 2 How. (Miss.) 856, and *Carmichael v. Browder,* 3 How. (Miss.) 252, followed by a long train of subsequent adjudications, that the jurisdiction conferred by the constitution on the probate court, was exclusive; so exclusive that the chancery court was ousted of cognizance over a large class of subjects which theretofore belonged to it. From 1832 to 1860, our books are full of cases attempting to define the boundary which separated the two courts. In truth, no subject has so much perplexed and embarrassed the appellate court as this. The chancery had unquestionably the cognizance of the rights of Mrs. Gilliam under the marriage contract, and would draw to itself all collateral subjects necessary and proper to be considered in order to a full, complete, and final adjudication of those rights. * * * The powers and jurisdiction of the chancery court were broader, more pliant, and flexible in its modes of redress, fully competent in one litigation, to adjudicate finally in respect to both the settlement and bequest, and could, therefore, well assume, as it did, entire cognizance over the subjects."

Doubtless, other authorities could be found, but the proposition appears to us so plain that we have not made further search therefor. We therefore hold that the district court had jurisdiction to hear and determine the controversy between the parties, in its entirety.

It was within its jurisdiction to order specific performance of the contract as to the money part of the consideration, to advise the county court, by the certificate which it ordered its clerk to send to that court, of the finding of the district court as to the amount which it had found due

plaintiff from the estate, which is concededly solvent, and to direct that the same be allowed as an established claim against the estate.

We deem it unnecessary to consider the assignment that the decedent was mentally incompetent, as there is an entire failure of evidence to show that his mental incompetency existed at the time he made his contract with plaintiff. At that time, and for many months thereafter, he was transacting his business as usual, and was clearly not in such mental condition as to render him incompetent to make a contract of the kind set out. Nor do we think there is any merit in the assignment that the service proved was not referable to any contract alleged. The fifth assignment, under which the defendants seek to cast a stain upon their brother, from whom they are inheriting this large estate which they did not help to earn, is not worthy of consideration. The proof utterly fails to establish it, and, even if it were established, that fact would not militate against the right of the decedent to make the contract alleged. The evidence fails to establish the sixth assignment, that the contract was the product of plaintiff's undue influence over decedent. The eighth assignment, that there was a defect of parties defendant, must fail, for the reason that it is immaterial that decedent may have been jointly interested with Mr. Gerrard in the ranch upon which plaintiff worked for 18 years before she rendered the services for which she now seeks to recover. We have limited our consideration to the services performed by plaintiff for decedent and his wife in the last illness of each. The amount which decedent agreed to pay plaintiff in money and property for those services was not, under the circumstances shown, "unconscionable." The compensation agreed to be paid for such services was not considered excessive by Mr. Zeigler, nor do we so consider it.

Fnding no error in the record, the judgment of the district court is

AFFIRMED.

LETTON and ROSE, JJ., not sitting.

JOHN A. MILLER, APPELLANT, V. GREAT WESTERN COMMISSION COMPANY, APPELLEE.

FILED MAY 14, 1915. No. 18090.

1. **Sales: CUSTOM: PRESUMPTION.** A principal who deals in a market must be presumed to deal according to the custom of that market, thus making that custom a part of his contract.
2. ———: ———: ———: **REBUTTAL.** This presumption may generally be rebutted, but not where the person with whom he deals, without knowing the other to be ignorant of the usage, has performed the contract in accordance therewith.
3. **Appeal: HARMLESS ERROR: ADMISSION OF INCOMPETENT EVIDENCE.** When under the competent evidence the defendant is entitled to a verdict in his favor, any error of the court in admitting incompetent evidence is immaterial.
4. **Evidence: SUFFICIENCY.** Under the evidence in this case the court should have instructed the jury to find a verdict in favor of defendant, and therefore a judgment in defendant's favor will not be reversed upon appeal.

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

C. W. De Lamatre, for appellant.

P. A. Wells, contra.

SEDGWICK, J.

This is an action to recover the net proceeds of a car-load of sheep transported from Kearney to South Omaha, March 14, 1911, for sale at the stock-yards. Cyrus A. Black, a stockman of Kearney, was consignor, and he transferred his claim to plaintiff, March 22, 1911. Defendant was the consignee, a corporation engaged in the live stock commission business at South Omaha. The validity and amount of the claim are admitted, but payment is pleaded as a defense. In 1910 Black bought from defendant two car-loads of sheep, and for the purchase price gave a note secured by a mortgage on the stock purchased. In Febru-

ary, 1911, he shipped a car-load of sheep to defendant for sale, and the net proceeds were applied on his note. Another car was consigned to defendant March 14, 1911, and with the proceeds from the sale of the sheep the note was paid in full, leaving a credit of $620.94 in Black's favor. To recover this sum the suit was brought. In the answer it is alleged, among other things, that defendant on March 14, 1911, through the Packers National Bank of South Omaha, remitted $620.94 to the Commercial National Bank of Kearney for the credit of Black, and that at his request it was applied upon a debt due from him to the Commercial National Bank of Kearney. Payment of the amount due Black was denied by plaintiff in a reply to the answer. There was a general verdict in favor of defendant, and from a judgment thereon plaintiff has appealed.

When the defendant had sold the sheep for Black and had this money in hand, the defendant sent the money to the Kearney bank as payment to Black. If this was good payment, the plaintiff of course cannot recover. The evidence was without contradiction that it was then, and had been for a long time, the custom of the commission men of South Omaha, when they made sales for parties in another town, to remit at once to the bank where the party entitled to the money transacted his business. There was no conflict in the evidence upon this point. The defendant sent the account sales to Black, showing that the money had been sent for him to the Kearney bank. Black went immediately to the bank, and was told that the money had been received and put to his credit, and had been applied upon a note which he owed at the bank. Black testified that he objected to the bank applying it on the note, but he does not testify that he made any objection to the sending of the money to the bank as payment by the defendant. Afterwards Black assigned his supposed claim against the defendant to the plaintiff, Miller. In the meantime he had made no demand upon the defendant, nor in any way questioned the right to pay him by sending the money to his bank. Miller paid $50 for the claim of nearly $700, and

then Miller brought this action against the defendant. Black testified in regard to the transaction. He admitted that there were three Black brothers, and that there was a firm entitled Black Brothers that had been doing business of this kind some years before and had shipped to these defendants. He testified that the other two brothers composed the firm, but admitted that he had worked with them, and also it appears in the evidence that the defendant supposed they were dealing with Black Brothers, as they had formerly dealt, when they sold these sheep to Black, and when they again sold them for him on the South Omaha market, and, although Black must have known of these transactions, he did not deny that he knew that the defendant supposed the dealing was with Black Brothers, as it had been before that time. Black did not deny that he knew of the custom of making remittances in this way. Under the circumstances, when the plaintiff knew that such a custom existed and used Black as a witness, if Black did not know of this custom the plaintiff should have proved that fact.

Professor Jones says: "A principal who deals in a market must be presumed to deal according to the custom of that market, thus making that custom a part of his contract." 2 Jones, Law of Evidence (1st ed.) sec. 465. In Encyclopedia of Evidence it is said: "Parties who are engaged in a particular trade or business, or persons accustomed to deal with those engaged in a particular business, may be presumed to have knowledge of the uniform course of such business; and one may be bound thereby, though ignorant, unless the other party be shown to have knowledge of his ignorance thereof." 3 Ency. of Evi. 953.

It would seem, then, that Black, in dealing with these commission men, was bound to know the custom, and if he did not want the money paid to him by remitting it to this bank he should have so instructed the defendant. He does not contend that he ever raised any such question with the defendant. Again, the defendant had a right to presume that Black knew of this custom, and, unless the defendant knew that he was ignorant of the custom, Black would be

bound by it, if the defendant performed the contract in accordance with the custom before they knew that Black was ignorant of it. "This presumption may generally be rebutted, but not where the person, without knowing the other to be ignorant of the usage, has performed the contract in concordance therewith." 3 Ency. of Evi. 954.

This defendant acted in good faith, and paid Black for this stock as there was reason to suppose he wanted to be paid, and as the law allowed payment to be made. He never questioned the right to do so until he found afterwards that this plaintiff would pay him a small sum for his supposed claim, and the court would be justified under this evidence in instructing the jury to find a verdict, as they did find, for the defendant. It is therefore not necessary to discuss the alleged error of the court in admitting the cashier's letter in evidence.

The judgment of the district court is

AFFIRMED.

HAMER, J., not sitting.

ROSE, J., dissenting.

One of the assignments of error assails a ruling admitting in evidence a letter containing these words:

"Replying to yours of March 22, relative to C. A. Black credit, will say that we received said credit March 16th, and applied it on Mr. Black's note by his request."

The letter was dated March 23, 1911. It was written by R. D. Garrison, cashier of the Commercial National Bank of Kearney, to the Packers National Bank of South Omaha. The writer of the letter died before it was offered at the trial. In attempting to justify the ruling of the trial court, it is argued by defendant that the evidence was properly admitted as a part of the *res gestæ*. The statement that the credit was applied on a note at the request of Black was hearsay. The application of the credit was made March 16, 1911. The letter was dated seven days later. In the absence of a statute, the death of a person who made the statement sought to be proved does not of itself make hearsay testimony admissible. *Shold v. Van*

Treeck, 88 Neb. 80; 2 Wigmore, Evidence, sec. 1576. The statement was clearly too remote in point of time to be admissible as a part of the *res gestæ. Union P. R. Co. v. Elliott,* 54 Neb. 299. Moreover, the duty of the cashier in receiving funds for Black, in giving him credit therefor, and in reporting what had been done in those respects, was limited to the transaction in hand. Subsequent statements about collateral matters concerning the funds, after the credit had been given, and what Black thereafter said to do with them were not elements of the settled transaction between the two banks, and are not parts of the *res gestæ.*

It is argued by defendant that it was the duty of the Commercial National Bank of Kearney in the regular course of business to acknowledge Black's credit, and that the acknowledgment is admissible as part of the *res gestæ.* Jones, Evidence (2d ed.) sec. 319, is cited on this point, but the text answers the argument as follows: "The entries to be thus admissible should be contemporaneous with the act to be proved; that is, within so short a time thereafter as reasonably to be considered a part of the transaction, in the due discharge of duty and by persons having knowledge of the facts."

I dissent from the proposition that, with this letter excluded, the evidence would have justified a peremptory instruction in favor of defendant. The commission company, after the sale of the sheep, owed the former owner, Cyrus A. Black, the net proceeds. Its duty and the law itself required payment to him. Payment is not shown by undisputed evidence as a matter of law. As between the parties defendant acted as a fiduciary. Its principal was not a member of the firm of Black Brothers. It is not shown, as a matter of law, that defendant had knowledge of the customs of that partnership. The manner of dealing with consignments at the stock-yards did not necessarily extend to transmitting the net proceeds of a sale to an individual shipper not shown to have had actual knowledge of existing customs or to have received a former payment in accordance therewith.

The rule of law applicable to this case was stated by Judge Van Fleet as follows: "A custom to avoid an otherwise controlling rule of law must be clearly established, and the party sought to be bound thereby must either have imparted to them actual knowledge of its existence, or it must be a usage so general and well-known in the community as to give rise to the presumption of such knowledge." *Smith v. National Bank of D. O. Mills & Co.,* 191 Fed. 226.

According to Judge McCormick, the principle controlling the vital question in this case is as follows: "Whether a trade custom or usage is established by the evidence in a case, and, if so, whether it was known to a party contracting, or was so general and well established that he must be presumed to have known of and contracted with reference to it, are questions for the jury." *New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co.,* 154 Fed. 296.

To the same effect: *Bacon Fruit Co. v. Blessing,* 122 Ga. 369; *Swern v. Churchill,* 155 Ill. App. 505; *Union Stock Yards Co. v. Westcott,* 47 Neb. 300; *Milwaukee & Wyoming Investment Co. v. Johnston,* 35 Neb. 554; *Bixby v. Bruce,* 69 Neb. 78. In the last case cited it was said: "One not shown to have knowledge of a trade usage confined to a particular business, which is not shown to be of such a general and notorious character that he must have been presumed to have contracted with reference to it, is not bound by such usage."

The opinion of the majority carries custom too far, allows a commission merchant to escape with too little responsibility, and invades the province of the jury. In the view most favorable to defendant, the defense of payment was an issue of fact for the determination of the jury. In the letter erroneously admitted, the hearsay statement of the cashier related to a vital issue. It may have been the controlling factor resulting in the verdict for defendant. The error was prejudicial to plaintiff, and he is entitled to a new trial. The judgment should be reversed.

JONAS MICHAEL MUSSER, APPELLANT, V. MICHAEL P. MUSSER, APPELLEE.

FILED MAY 14, 1915. No. 18603.

1. **Bills and Notes**: GENERAL DENIAL: ADMISSIBILITY OF EVIDENCE: CONDITION. In an action upon a promissory note, if the defendant alleges, and produces evidence tending to prove, that the note was given upon a certain specified condition, evidence that the condition related to another item, and not to the note in suit, is competent under a general denial.
2. ———: CONDITION: INSTRUCTION. In such case an instruction that the defendant must prove by a preponderance of the evidence that the note in suit was given upon the specified condition properly submits that question.
3. **Appeal**: LAW OF THE CASE. The decision of this court of a question of law becomes the law of the case, and will not ordinarily be changed upon a second appeal. The rule also applies to questions of fact, if the evidence is substantially the same on the second trial.
4. **Trial**: REFUSAL OF INSTRUCTIONS. The judgment of the trial court will not be reversed for refusing to give instructions which detail at length transactions between the parties and contain matters that might mislead the jury, or if they do not contain matters necessary to a proper understanding of the issues involved and not substantially included in the instructions given.

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

A. W. Crites and *J. E. E. Markley,* for appellant.

John J. Sullivan and *Louis Lightner, contra.*

SEDGWICK, J.

The facts in general are stated in our opinion upon a former appeal. 92 Neb. 387. There are many peculiar circumstances connected with this transaction. The defendant, then an elderly man, sold a farm in Iowa to his nephew, and took the note of plaintiff and his wife secured by mortgage upon the land for $10,500 on five years' time, interest at 5 per cent. The plaintiff and his wife took

possession of the land, and it is not suggested that they failed to get full value for their note and mortgage. The note was upon a printed blank, which recited the Citizens' National Bank, Charles City, Iowa, as the place of payment. When the mortgage became due five years later, it appears that a pen had been drawn through the words "National" and "Charles City, Iowa," and the words "Rushville, Nebraska," had been written in. Other words in the printed blank had been likewise changed, so as to make the interest 5 per cent. payable annually, instead of 8 per cent. payable semiannually. It is agreed that the alterations as to the interest were in accordance with the contract and were made before the execution of the note. But when the note was presented for payment this plaintiff protested that the place of payment had been changed after the execution and delivery of the note. He claimed that for this reason, and because this defendant had not forwarded the note and mortgage, together with a release thereof, to the bank at Charles City, he had lost a desirable sale of the land, and so had been damaged. This latter claim of this plaintiff led to a considerable controversy between the parties. Finally the defendant went to Charles City to adjust the matter, and the note in suit was given. The note and mortgage which this defendant held against the plaintiff and his wife then amounted to $11,281.55, and the plaintiff afterwards paid $11,000 on the same.

The plaintiff contends that the agreement of adjustment of the controversy between them was that this defendant should give him the note sued upon, $3,000, on one year's time, for the damages which the plaintiff had sustained because of the alteration of the note secured by mortgage, and defendant's failure to forward the release, and that the $281.55 balance of the mortgage note was to be paid by plaintiff, if the defendant found upon examination of his correspondence that he (the defendant) was not at fault in failing to forward the mortgage release to Charles City in time so that the plaintiff could complete his contract for the sale of the land. The defendant contends that the

$3,000 note in suit was conditioned that it should be paid only if the correspondence showed that this defendant was at fault. If the $3,000 note was to be paid at all events, it would seem to have been more usual to have indorsed that amount upon the note and mortgage which the defendant held. These were transactions between relatives, and they present many unusual features, if regarded as from a strictly business standpoint. To use a printed blank for a note of this magnitude that was to run for five years and make it show erasures and alterations on its face is perhaps unusual among business men, but some of these erasures, at least, were understood and agreed upon by the parties. Again, to give and receive a promissory note for so large an amount conditioned upon the existence of a fact which was left entirely to the maker of the note to determine is unusual, but perhaps not more so than to give an absolute agreement to pay at a future time damages of this nature, which, if justly due from defendant, would reduce the amount that he could fairly recover on the note and mortgage which he held. If he owed this plaintiff unconditionally $3,000 on account of his dealing with this note and mortgage, that amount should naturally have been allowed thereon. There are other peculiarities connected with these transactions which might well be left to the consideration of the jury.

The plaintiff does not explain very fully how he was damaged by defendant's failure to send a release. If the note and mortgage were payable at Charles City, as he supposed, and they could compute the exact amount of the incumbrance, why did they not deposit that amount in the bank at Charles City for defendant's mortgage? He does not explain why such a usual course of proceeding was not followed in this case. Why the defendant was under obligation to send a release before the mortgage was paid or the money deposited is not very fully explained.

The plaintiff requested the following instruction: "The defendant claims that the note in suit was given upon a condition, in substance to the effect that it should be payable only if defendant should on his return home find a

letter from plaintiff asking defendant to send such a release of the mortgage covering the $10,500 note, by January 1, 1903, to enable plaintiff to complete a sale he had contracted to make of a part of the mortgage land to one F. E. Raisty, on which a warranty deed was to be delivered on that day. Plaintiff claims that said condition only applied to the sum of $281.55, surplus of the $10,500 mortgage over and above the sum of $11,000; the plaintiff must show his claim that the condition applied to the note in suit, rather than to the $281.55 surplus, by a preponderance of the evidence in the case. If the evidence is equally balanced on this question, or preponderates in favor of plaintiff, your verdict must be in favor of the plaintiff."

The plaintiff now contends that the court erred in refusing to give this instruction, and also several other requests of the same nature. The defendant alleged in his answer, and testified as a witness, that the condition mentioned in this request for instruction applied to the $3,000 note in suit. To this allegation of the defendant the plaintiff replied with a general denial, and to support that general denial testified that the condition referred to related only to the $281.55 which was to remain unpaid on the note and mortgage. This evidence was of course competent under the general denial. It tended to prove that the condition did not relate to the note in suit, and therefore, when the court on its own motion instructed the jury that the plaintiff must prove by a preponderance of the evidence that the condition did relate to the note in suit, the issue was properly presented to the jury. Defendant was required by that instruction to prove that the condition related to the note in suit, and not to any other matter. This was the issue tendered by the general denial, and was presented by this instruction.

The court submitted to the jury the question as to whether there was any consideration for the note sued upon. This the plaintiff now complains of. The instruction complained of submits to the jury all of the contentions of the plaintiff as to the consideration of the note

sued upon, and the only ground upon which the instruction could be complained of is that the evidence of the consideration for the note as claimed by the plaintiff is so clear and uncontradicted that the court should have decided the question, and should not have submitted it to the jury.

In our former opinion we said: "The district court also committed no error in overruling a motion of plaintiff for a peremptory instruction to find in his favor. While the execution and delivery of the $3,000 note was admitted, the vital issue remained whether there was a consideration for the note, and whether it was executed and delivered upon the condition that it should only be payable in the event that defendant found a letter requesting him to send the release of mortgage before January 1, 1903. * * * There were really only two issues in the case: First. Was there a good consideration for the $3,000 note? Second. If there was such a consideration, was the note delivered upon a condition?" There is no such substantial change in the evidence upon either of these points as to require a different conclusion. The instructions relating to the question of a consideration for the note, which were requested by the plaintiff, are set out at length in the brief, and repeat quite at length many of the circumstances and transactions between the parties. Some of these requests contain statements that might have misled the jury, and we cannot find that any matters requested to be given to the jury, that are not contained in the instructions of the court, were so necessary to a proper understanding of the issue as to require a reversal because of their refusal.

As we have already indicated, a delicate and difficult duty was devolved upon the jury. The questions in dispute were peculiarly matters for the jury, and upon the whole instructions the case seems to have been fairly submitted. The judgment of the district court is therefore

AFFIRMED.

HAMER, J., not sitting.

VINNIE G. PARRISH, APPELLEE, v. RAY HODGES, APPELLANT.

FILED JUNE 5, 1915. No. 18122.

1. **Bastardy: APPEAL: OBJECTION.** In a bastardy proceeding, an objection which is so general in terms that the court's attention is not drawn to the point sought to be raised will be disregarded when urged upon appeal.
2. ———: ———: **CONFLICTING EVIDENCE.** In a bastardy proceeding, only a preponderance of the evidence is necessary to a conviction, and a verdict rendered on conflicting evidence will be sustained unless it is clearly wrong.
3. ———: ———: **HARMLESS ERROR.** An improper question asked in cross-examination of defendant in a bastardy proceeding, to which an objection is sustained, is not ground for reversal, unless it appears that prejudice resulted to defendant therefrom.

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

John A. Miller, for appellant.

J. M. Easterling and *J. E. Morrison, contra.*

MORRISSEY, C. J.

Plaintiff brought this action against defendant under sections 357-364, Rev. St. 1913, by filing a complaint before a justice of the peace, charging defendant with being the father of her bastard child. He was found guilty by the jury, and the court entered a judgment ordering him to pay, in instalments, for the support of the child $939, and defendant has appealed.

Omitting the formal parts, the complaint is as follows: "Vinnie G. Parrish * * * on her oath deposes and says that at all times herein stated she was and now is an unmarried woman and a resident of the said county and state; that on the 10th day of January, 1912, she was delivered of a bastard male child, and that said Ray Hodges is the father of said child. She further avers that said child is still alive."

Defendant points out that the complaint does not allege that at the time of conception plaintiff was unmarried. This precise matter was before the court in *Campion v. Lattimer*, 70 Neb. 245, and was decided adversely to the contention of the defendant. But defendant attempts to differentiate between *Campion v. Lattimer* and the instant case, because, in the former, objection to the complaint appears to have been made for the first time in this court, while in the instant case objection was made in the court below. The objection was in the following language: "Defendant * * * refuses to plead to said amended complaint and objects to the sufficiency thereof, and to the form of the amended complaint, and for the reason that the action is entirely changed from the original complaint filed herein." This objection was too general; it was not sufficient to challenge the court's attention to the point sought to be made. The proof shows that complainant had not been married at the date of the birth of the child, or the making of the complaint, and this assignment will not be considered further.

It is next contended that the evidence is insufficient to sustain the verdict. The defense was in the nature of an alibi, and several witnesses, mostly relatives, were called by defendant to sustain his theory; but, this being in the nature of a civil action, a preponderance of the evidence is all that is required to sustain the verdict. The jury passed upon the conflicting stories told, and the finding of the jury will not be disturbed.

Misconduct of plaintiff's attorney in the trial is assigned as error. But after a careful reading of the record we are not prepared to say that defendant was prejudiced in the matter of his defense by any act of plaintiff's counsel. The baby was in court during the trial, and this question was asked: "You say that little baby over there is not your child?" Objection was sustained, and the question was not answered. Defendant now contends that this was prejudicial. Jurors are not so easily influenced that a question of this kind will affect their verdict. The jury knew there was a baby, and its mere presence in the

courtroom and this reference to it cannot be said to be so prejudicial as to warrant a reversal of the judgment.

Complaint is made because plaintiff's counsel propounded certain questions to defendant and his witnesses on cross-examination, but objections to these questions were either sustained or the answer was adverse to plaintiff, and defendant was not prejudiced thereby.

It is next contended that the court erred in instructing the jury, but an examination of the record fails to show any error in this regard. Finally, it is said that the judgment is excessive. Defendant is now 21 years of age, and, so far as the record shows, is in good health. The judgment is to be paid in small semiannual instalments, without interest, if paid when due. There is no evidence to show that the mother has any means, yet she is charged with the care and education of this child. Her burden seems the greater of the two, and the judgment is

AFFIRMED.

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

BARTON BOLES, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18127.

Street Railways: PERSONAL INJURIES: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY. Where it is claimed that a would-be passenger signaled for a street car to stop at a regular stopping place, and that the car slowed down to such a degree as to constitute an invitation to get on, and he was injured while attempting to board the car, the question of negligence in so doing is one of fact for the jury.

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

C. S. Allen and *Field, Ricketts & Ricketts,* for appellant.

W. B. Comstock, John E. Lowe, George W. Miller and *Harry A. Reese, contra.*

MORRISSEY, C. J.

Plaintiff was injured while attempting to board one of defendant's street cars running between Lincoln and Havelock. He was then 14 years of age, and was employed in a drug store in the business section of Lincoln. Arriving at the intersection of Dudley and Twenty-seventh streets, he awaited the arrival of a car to take him to the place of his employment. In the petition it is alleged that, as one of defendant's cars approached this intersection, it slowed down and stopped, thereby giving him a tacit invitation to become a passenger; that in attempting to board the car he took hold of the handhold with one hand, and had stepped with one foot onto the running board, when the car was negligently and violently jerked forward, and he was thrown to the ground, and the rear wheels of the car passed over his right foot, crushing it so badly as to necessitate the amputation of the greater part thereof. The answer is in the nature of a general denial, coupled with an allegation of negligence on the part of the plaintiff.

On the trial the plaintiff did not attempt to prove that the car came to an absolute stop, but only that it slowed up to such a degree as to amount to a tacit invitation to the plaintiff to board it. There was a verdict and judgment for plaintiff, and defendant has appealed, assigning three separate grounds of error: First, that the *allegata et probata* do not agree. This point was not called to the attention of the trial court by any proper assignment in the motion for new trial. But, waiving this defect in the record, and considering the assignment on its merits, we do not find that there was such a variance between the pleadings and the proof as to prejudice the defendant, or as to warrant reversal of the judgment. The opening statement of counsel for each party is preserved in the record, and this shows that counsel for plaintiff made the following statement: "The evidence will show I think beyond question that the car either came to an absolute stop, or so

near it that a man could walk right along with it and keep up with it, and the evidence will show that under the circumstances it was a situation that would invite any man to attempt to board it." Counsel for defendant, in making his statement immediately following, told the jury that as the car passed this intersection it was probably moving at the rate of 8 to 12 miles an hour, and he produced several witnesses who testified that the car did not stop or slacken its speed. No complaint was made at the trial that defendant was taken by surprise or misled in the preparation of its defense. This court has repeatedly held that "a variance between *allegata et probata* will not be held to be prejudicial, requiring a reversal of the judgment, where it appears that the party complaining was not actually misled or surprised to his disadvantage." *Ittner Brick Co. v. Killian,* 67 Neb. 589; *Parker v. Omaha Packing Co.,* 85 Neb. 515.

It is next contended that the evidence is insufficient to sustain the verdict. The car causing the injury is claimed by defendant to have been a special car sent out in the early morning for the purpose of carrying workmen from the city of Lincoln to the Burlington shops in the city of Havelock; that it was on its return from Havelock when this accident occurred; and that it was not engaged in local business, but that there was a car running immediately behind it to handle the local traffic. However this may be, it is conclusively shown that this car had picked up passengers before arriving at Dudley street, and that only one block to the north, and within full view of the plaintiff, it picked up a passenger, Mr. Mayer. Plaintiff testified that when the car reached the intersection of Dudley and Twenty-seventh streets it slowed up until it was moving so slowly that he could walk along side of it and keep up with it. He says that when he saw the car coming he walked out from the curb to the car line, and stood two or three feet from the car line waiting for the car; that the motorman saw him and slowed up to a rate about as fast as he could walk; it was a summer car with open sides and a running-board along its entire length; that he

let about one-half of the car go by, and then, seeing an empty seat, he took hold of the rod and stepped up with his feet on the running-board, and as he went to step into the body of the car it was suddenly jerked and he was thrown off. In this he is corroborated by Mr. Mayer, who had boarded the car one block from where this accident occurred. Mayer says that plaintiff stepped upon the running-board opposite the seat which he occupied, and about one foot from him; that as plaintiff got on the conductor signaled the motorman to go ahead; that the car gave a lurch; that the acceleration of speed was so sudden that it threw witness a little from his seat; and that plaintiff was thrown off. There was other testimony going to show that the car slowed up, and that as plaintiff stepped upon the running-board it was suddenly jerked forward. There is a sharp conflict in the evidence as to the rate of speed the car was moving when it crossed Dudley street and at the time plaintiff attempted to board it, estimates running all the way from four or five miles an hour to eight or ten miles an hour, and there is also a conflict as to whether or not there was any sudden acceleration of the rate of speed. The motorman was a witness for defendant, and testified to having "heard a noise on the foot-board, and the very next instant I heard the hind wheel run over something." This "something" was the boy's foot. In this connection it may be remarked that the witness Mayer testified that when he boarded the car only a block from where plaintiff was injured "the car slowed up for me and I jumped on." This was in plain view of the plaintiff, and it illustrates the method employed in at least one instance in receiving a passenger.

We are asked to hold that it was negligence *per se* to attempt to board a moving car. *Hunterson v. Union Traction Co.*, 205 Pa. St. 568, is the leading case cited by defendant in support of this contention. This opinion was rendered by a divided court, and seems to be against the weight of authority. In *Cicero & Proviso Street R. Co. v. Meixner*, 160 Ill. 320, and a number of authorities therein cited, it is held: "To board or depart from an electric

car while in motion is not negligence *per se.*" This court has held in *Omaha Street R. Co. v. Craig,* 39 Neb. 601, that whether alighting from a moving car constitutes negligence or not is a fact to be determined by the jury, taking into consideration all of the circumstances in evidence in the case. In principle there is no difference between alighting from a moving car and attempting to board one, and, if the person is injured while attempting to board a slowly moving car at a regular stopping station, the question of negligence is one of fact for the jury.

Defendant contends that it was gross negligence to attempt to board the car while it was moving, but, if the testimony of the boy is correct, it was not the speed of the car at the time that he stepped upon the running-board that caused the accident, but the sudden application of power and the acceleration of speed before he was given an opportunity to enter.

The court instructed the jury on the "last clear chance doctrine," and this instruction is assigned as error. But in the state of the record before us this instruction seems to have been properly given. Even assuming that the boy was guilty of negligence in jumping upon the running-board while the car was moving, yet, if the motorman knew that he was there, and his testimony indicates that he did, it would be his duty, so far as consistent with the safe and practical operation of the car, to allow him to reach a place of safety, and if in place of doing this he suddenly and negligently threw on the power and caused the car to lurch forward, and plaintiff was thereby injured, defendant would be liable, and we think the instruction was properly given.

The record being free from error, the judgment is

AFFIRMED.

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

PATRICK RODDY, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18150.

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

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

Thomas F. Roddy and *Arthur A. Bischof, contra.*

BARNES, J.

This is the second appeal in this case. When the former appeal was considered, it was held that the judgment, so far as it related to the present cause of action, should be reversed because the evidence was insufficient to show that any freight train of the defendant company had passed plaintiff's premises prior to, or at the time, the fire started which destroyed plaintiff's trees or timber, and that *how* the fire originated was merely a conjecture. 91 Neb. 75. When the cause was remanded to the district court, further evidence was introduced on the second trial, which, if believed by the jury, was sufficient to sustain the present verdict. The judgment of the district court is therefore

AFFIRMED.

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

FRED GIERTS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18167.

Waters: DAMAGES. *Reed v. Chicago, B. & Q. R. Co.*, 86 Neb. 54, and *Reed v. Chicago, B. & Q. R. Co., ante*, p. 19, followed.

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

Byron Clark, E. E. Whitted and *W. S. Morlan,* for appellant.

O. E. Shelburn, contra.

BARNES, J.

This is an appeal from a judgment for damages by flood waters sustained by plaintiff on account of the negligent construction of the defendant's railroad grade in the valley of Sappa creek near plaintiff's farm in Harlan county, Nebraska.

The question of the negligent construction of defendant's railroad grade and embankment at the place in question was first decided in *Reed v. Chicago, B. & Q. R. Co.*, 86 Neb. 54. It was again determined in *Reed v. Chicago, B. & Q. R. Co., ante*, p. 19. The instant case was brought to recover damages sustained by the flood waters which caused the damages to Reed's property in the case last cited. Plaintiff and Reed owned adjoining farms. All of the questions raised by defendant in this case were disposed of by the opinions above referred to, which we are constrained to follow. The judgment of the district court is therefore affirmed without further discussion.

AFFIRMED.

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

LEO SHIMICK, APPELLEE, V. CUDAHY PACKING COMPANY, APPELLANT.

FILED JUNE 5, 1915. No. 18174.

1. **Appeal:** PERSONAL INJURIES: INSTRUCTIONS. Where the questions of the negligence of the defendant and the contributory negligence of the plaintiff in a personal injury suit are submitted to a jury under proper instructions, the verdict will not be set aside unless clearly wrong.
2. **Master and Servant:** INJURY TO SERVANT: QUESTIONS FOR JURY. Questions as to the nature and extent of the injury, the disability resulting to plaintiff from the accident, and the amount of the recovery, are ordinarily questions for the determination of the jury.
3. **Excessive Damages.** The evidence set out in the opinion examined, and *held* that a judgment for $7,500 based thereon is excessive.

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

Greene, Breckenridge, Gurley & Woodrough, for appellant.

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

BARNES, J.

Appeal from a judgment of the district court for Douglas county against the Cudahy Packing Company and Charles Rooney, in an action brought by Leo Shimick to recover damages for a personal injury sustained by him while employed by the packing company.

It appears that the plaintiff was working as a steam fitter in putting the glycerine plant of the company in working order. On the 4th day of January, 1912, plaintiff was ordered to repair the super-heater, which was located in a corner of the building used by the company as a glycerine plant. Plaintiff and his helper stripped off the asbestos covering of the super-heater in order to ascertain where it leaked. When the asbestos was removed it was found that it would be necessary to put pressure on

the heater in order to find the leaks. Plaintiff went out of the building in order to inform the foreman of that fact. The room was so full of steam that objects therein were not distinguishable. When plaintiff returned, in passing to the place where the heater was situated, he fell into an open trap or catch-basin in the floor of the building, and thus sustained the injuries for which he has brought suit.

It clearly appears from the evidence that plaintiff was familiar with the room, but there is no evidence that he had ever seen the catch-basin or knew of its location. It was ordinarily protected by a plank covering, over which one could pass without knowing what he was on or knowing that it was at all dangerous. It appears that defendant Rooney, who was the foreman in charge, had that morning ordered some of the workmen to clean out the catch-basin. The cover had been removed and set back against the wall, leaving the basin open. The hole thus left exposed in the floor was about four feet square and from five to six feet deep. The direction traversed by plaintiff in going to consult with Rooney did not require him to pass over or near the catch-basin, but in returning he took a little different course and walked directly into the hole. As he fell into the catch-basin he struck his right arm and forearm on the opposite cement edge of the hole, and thus received his injuries. It appears that the steam in the building was so dense that the hole could not be seen, and persons working near it could not be distinguished. It is claimed by appellant that when plaintiff started to find the foreman he was warned of the danger by one of the men. The testimony on that point, however, is somewhat conflicting and unsatisfactory. Witness Bowman claims to have said: "Look out for the hole, it is open;" and plaintiff, in reply, said, "I know." It appears, however, that there was an open sewer trench running along the side of the room from north to south about one foot wide and from one foot to 15 inches deep. It is plaintiff's contention that this is what he understood was meant by the warning; that this was the hole that he knew was

there. It seems fairly clear that the plaintiff had no knowledge of the existence of the catch-basin into which he fell.

The questions as to defendant's negligence and the alleged contributory negligence of the plaintiff were submitted to the jury under proper instructions and the verdict so far as these questions are concerned, must be held to be conclusive. It is contended that certain fixed objects near and surrounding the catch-basin rendered it practically impossible for plaintiff to have fallen into it without striking some of them, but it is sufficient to say that plaintiff walked into the open hole and was pulled out by the persons who were there present, and this question requires no further consideration.

It is strenuously urged by the appellant that plaintiff's injuries were slight and trivial, and that therefore the judgment is so excessive as to require a reversal. The record on this question is very voluminous and the evidence is somewhat conflicting. We think it clearly appears that plaintiff was quite severely injured. It was shown that in September, preceding the date of his fall into the catch-basin, plaintiff had received an injury to his right forearm or wrist, known as a Colle's fracture; that he had fully recovered from that injury, and went to work for the defendant company at his trade as a steam fitter on the 18th day of December, 1911; that he experienced no difficulty in performing his labors. It also appears that he was a first-class workman. When he fell into the catch-basin he struck his wrist and forearm on the cement edge of the hole. His arm and wrist were bruised and sprained; the skin was abraded, and the flesh was some swollen and discolored. He also received an injury to his arm and shoulder. The defendant's house physician considered that the injury was so severe as to require him to place the wrist and forearm in splints. The injury became more painful, and on the second day thereafter plaintiff called in Dr. Chaloupka, who was his family physician, to attend to the injuries and to relieve his pain. The doctor removed the splints and ascertained that the plaintiff's injuries had been properly treated. He also ascertained that

the arm was much swollen, bruised and discolored. He put new dressings and splints on the injured wrist and forearm, and continued to treat plaintiff for two or three times a week during the folowing ten weeks, after which time he only administered occasional treatment. The doctor testified that at the time of the trial, which was about 15 months after the injury was received, plaintiff's recovery was slow; that his arm did not seem to regain strength; that he could not shut his hand. The motion of his forearm was poor, and there was some considerable ankylosis of the shoulder joint; that plaintiff's wrist was stiff, and he cannot lift his arm to a height of over 45 degrees, so that the use of his hand and arm have been impaired to the extent of 50 or 60 per cent. of the normal; that there are adhesions of the tendons, and that plaintiff is not able to follow his occupation as a steam fitter. The testimony of Dr. Chaloupka was fully corroborated by the evidence of Dr. Koutsky and others. Some X-ray negatives of the plaintiff's injured hand and forearm were produced in evidence, which showed an ankylosis or fusion of the carpal bones of the hand, a fracture of the styloid process of the right ulna, and a partial severing of two of the tendons of the plaintiff's right wrist. In fact, it was made clear that plaintiff had sustained a severe injury. On the other hand, defendant availed itself of the testimony of medical experts whose evidence tended to show that plaintiff's injuries were slight, and one of the witnesses testified that in his opinion plaintiff was malingering, but the great weight of all of the evidence destroys that theory of the defense. It seems clear to us that plaintiff was entitled to a substantial judgment. It is contended, however, that the judgment, which was for $7,500, is grossly excessive, and, in view of the fact that there will be some improvement in plaintiff's use of his arm and hand, we think the judgment should be reduced to $5,000, with interest from the date of its rendition by the district court. As thus reduced, the judgment is

AFFIRMED.

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

RAYMOND VICTOR PETERSON, APPELLANT, V. CHARLES W. SPENCE ET AL., APPELLEES.

MORRIS KENNETH PETERSON, APPELLANT, V. CHARLES W. SPENCE ET AL., APPELLEES.

FLOYD BERT PETERSON, APPELLANT, V. CHARLES W. SPENCE ET AL., APPELLEES.

FILED JUNE 5, 1915. Nos. 18179, 18180, 18181.

Appeal: HARMLESS ERROR: INSTRUCTIONS. The giving of an erroneous instruction is error without prejudice, where it appears that the verdict of the jury is the only verdict sustainable under the evidence.

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

J. M. Stewart, T. F. A. Williams and *J. A. Brown*, for appellants.

T. J. Doyle, Morning & Ledwith and *A. G. Ellick, contra.*

BARNES, J.

The three minor sons of Charles Peterson commenced separate actions by their next friend, Emma O. Fosbury, against Charles W. Spence, a licensed saloon-keeper doing business in the village of Havelock, and his surety, the Bankers Surety Company of Cleveland, Ohio, to recover the sum of $5,000 damages alleged to have been sustained by each of the plaintiffs on account of the sale of intoxicating liquors to their father.

It was alleged in the petitions that on or about the 16th day of April, 1909, and thereafter every day continuously down to April 15, 1910, said defendant gave and furnished to said Charles Peterson intoxicating, malt, spirituous and vinous liquors, which were drunk by him, whereby they did debauch and induce and cause said Charles Peterson to become a habitual drunkard, and by reason of their said acts such habitual drunkenness and debauchery has continued to this time, and the said Charles Peterson is now,

by reason thereof, a confirmed drunkard, and he has thereby been permanently impaired in health, and rendered shiftless and indolent, and his capacity to labor and earn money thereby impaired, and has thereby been caused to squander his money in drinking and drunkenness, by reason of which he has failed and neglected to support, educate, nurture and care for his said sons during said period and down to the present time, and has abandoned them and left them without a home, maintenance or support, and without the parental care, nurture and education required by their tender years, for all of which they are compelled to rely upon the charity and benevolences of strangers. Plaintiffs prayed judgments for $5,000 in each case.

Defendant's answer in each case was a general denial. The three cases were consolidated. The trial in the district court for Lancaster county resulted in judgments for the defendant, and the plaintiffs have appealed. It is contended that the verdict of the jury is not sustained by the evidence, but is contrary thereto.

Mrs. Fosbury testified, in substance, that she had charge of the Peterson children; that Peterson paid regularly for their care and attention until after May 17, 1910. This was after the end of the license year in which it was alleged that defendant furnished liquor to Peterson. Her testimony tended to show that up to the end of the license year Peterson was attentive to the children; that he was very affectionate, and furnished whatever she desired for their education and support. She also testified that she never saw Peterson when he appeared to be under the influence of liquor.

The marshal of the village of Havelock was called as a witness for the plaintiffs, and testified that he had known Peterson for a good many years; that he knew him when he worked in the railroad shops at Havelock, and also observed him during the license year of 1909-1910; that he saw Peterson drink an occasional glass of beer; that he was always sober and attending to his business. It further appears from the testimony that Peterson had a lunch

counter in the corner of the saloon belonging to Spence; that he attended to his business well and made good money, some of the witnesses putting his earnings at $150 a month. The testimony of the other witnesses shows that Peterson was what was termed a moderate drinker, that is, that he took a glass of beer occasionally; but the whole trend of the testimony was that Peterson was not in the habit of getting intoxicated, and was always able to attend to his business. Witness Smith's testimony was to the same effect as that given by the village marshal. To the same effect also was the testimony of Earl Jones, who was called as a witness for the appellants. The testimony also shows that during the license year when he had a lunch counter in the saloon Peterson drank less than he ever had before; that he only took an occasional glass of beer. There is evidence in the record which shows that Peterson went to Omaha twice during that year, and once made a trip to Lincoln, and one of the plaintiffs' witnesses testified that at those times Peterson drank beer, and on one occasion he was accompanied by a woman. The witness testified that Peterson was a good fellow to be out with, and that he spent his money freely, and that he had a good time, but that Peterson only drank beer on those occasions.

It appears that, after the license year of 1909-1910 expired, no license was granted in Havelock, but that saloons were licensed in Lincoln. Of course, during the next license year Peterson obtained no liquor of any kind from the defendant.

After Peterson closed up his lunch counter business he was out of employment, and went to Horton, Kansas, Sedalia, Missouri and Norfolk, Nebraska, at which places he worked at his trade as boiler maker some considerable time. In 1911 he came back to Havelock and opened a restaurant in partnership with a man named Vanderventer. He attended to that business in an efficient and industrious manner, and ran the restaurant until about the 1st of January, when he sold out to a Mr. Curry. He afterwards left Havelock, and had only occasionally returned for a short time. It appears that at those times Peterson was

sober and in good physical condition. The testimony shows that Peterson could not obtain work at the Havelock shops for the reason that he had been a strike sympathizer, and hence he was obliged to go to other places in order to obtain employment at his trade as boiler maker.

As we view the record, there is nothing in the evidence which shows, or tends to show, that the liquor furnished and sold to Peterson by the defendant in any manner contributed to Peterson's failure to support his children. We are therefore of opinion that the verdict was sustained by sufficient evidence.

Appellants complain of the giving of instruction numbered 3, given by the court on his own motion, and particularly that part of the instruction which is, in substance, as follows: That plaintiff is required to prove that, by reason of the excessive use of intoxicating liquors, the said Charles Peterson contributed less toward the support of his boys, the plaintiffs in these cases, than he had previously done, and finally abandoned them, and wholly failed and neglected to support and provide for them. This part of the instruction is conceded to be wrong.

In a suit on a liquor dealer's bond, it is only necessary for the plaintiff to show that during the license year the person alleged to have been injured by the sale of liquor furnished less support to his children than he previously did, or that during the license year he deprived his children of any of the means of support they would have received from him but for his drinking during such period. Partial loss of support entitles a child to recover without proof of total loss of support from the father or of his abandonment of his child. The giving of this instruction would entitle the appellants to a reversal of the judgment, were it not for the fact that, as we view the case, there is no evidence in the record which would even tend to support a verdict in plaintiffs' favor. This being so, the giving of the instruction complained of was error without prejudice.

The judgments of the district court are therefore

AFFIRMED.

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

H. W. HUFF, APPELLANT, V. W. D. ARNETT, APPELLEE.

FILED JUNE 5, 1915. No. 18205.

1. **Justice of the Peace:** CHANGE OF VENUE. In a civil action before a justice of the peace, the filing of an affidavit by defendant for a change of venue for bias of the justice does not of itself deprive the court of jurisdiction, if there is no other justice of the peace in the county to whom the case can be transmitted.
2. ———: REFUSAL OF CHANGE OF VENUE: REMEDY. In such case, the defendant's remedy is not error to the district court, but is by appeal.

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

A. L. Bishop, for appellant.

T. D. Meese and *J. R. Swain, contra.*

BARNES, J.

One W. D. Arnett commenced an action in forcible entry and detainer against H. W. Huff before T. P. Hardesty, a justice of the peace of Wheeler county. On the return day of the summons both parties appeared, and the defendant filed an affidavit for a change of venue, alleging that he could not, as he verily believed, have a fair and impartial trial on account of the bias and prejudice of the justice. A change of venue was about to be granted, when, on inquiry, it was ascertained that there was no other qualified justice of the peace in Wheeler county. The defendant's motion for a change of venue was overruled, the cause was tried, the defendant making no defense, and the justice of the peace entered a judgment for the plaintiff. Huff prosecuted error to the district court, where the judgment of the justice was affirmed. Thereupon Huff brought the case to this court by a petition in error.

There is no provision in the statute for bringing a civil action from the district court to this court by a petition

in error. The case, however, will be treated as though it were brought here on appeal.

It is the appellant's contention that the justice was deprived of jurisdiction by the filing of the affidavit, and the district court erred in affirming the judgment of the justice of the peace. Section 8404, Rev. St. 1913, provides, among other things: "Any defendant may apply for and obtain a change of venue, by filing an affidavit in the case, made by the defendant, his or her agent, or attorney, stating that the defendant cannot as affiant believes have a fair and impartial trial before such justice, on account of the interest, bias and prejudice of such justice against the defendant, and by paying costs, * * * whereupon it shall be the duty of the justice immediately to transmit all of the papers in the case, together with a certified transcript of all the proceedings before him, to the next nearest justice in his county." For the reason that there was no other justice of the peace in Wheeler county, the motion was properly overruled, and the petition in error was dismissed by the district court. In this there was no reversible error. The appellant has mistaken his remedy. Under the circumstances, he should have gone to trial, and, if the judgment was adverse to him, he should have taken the case to the district court on appeal. The judgment of the district court is therefore

AFFIRMED.

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

JOHN E. DORSHIMER, APPELLEE, V. J. W. HERNDON, APPELLANT.

FILED JUNE 5, 1915. No. 18210.

1. **Continuance.** A litigant who is present in court when his case is set for trial, and departs without leave and goes to another state without informing his attorney where he may be found when his case is about to be tried, is not entitled to a continuance as a matter of right.

2. **Attorney and Client:** DISCHARGE: COMPENSATION. Where an attorney makes a contract with his client to perform certain services for an agreed sum, and performs a part of those services, and the client, without any valid excuse, discharges him or prevents the fulfilment of the contract, the attorney is entitled to recover the full contract price.

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

Martin & Bockes, for appellant.

Patterson & Patterson and *John E. Dorshimer, contra.*

BARNES, J.

Appeal from a judgment of the district court for Merrick county. The action was brought by John E. Dorshimer against the defendant, J. W. Herndon, to recover an attorney fee of $200. The suit was commenced in the county court, where the plaintiff had judgment, and the defendant appealed to the district court. On the trial in that court the plaintiff was again successful, and the defendant has appealed to this court.

The plaintiff's petition was based on an oral contract by which the defendant employed the plaintiff, who is a practising attorney, to assist him in the defense of a certain action brought against the defendant in the district court for Merrick county. The defendant was a resident of Maryville, Missouri. It was alleged in the petition that defendant agreed to pay plaintiff the sum of $200 for his services in defending the suit, and agreed to send the plaintiff one-half of that amount immediately on his return to his home in Missouri. The remainder was to be paid within a short time thereafter, or as the litigation progressed. It appears that the plaintiff entered upon the employment and prepared the necessary papers to remove the cause to the federal court in accordance with defendant's instructions; that the clerk of the district court required the defendant to pay the costs which had already accrued, and the clerk of the federal court required the payment of certain advanced costs before filing the case in

that court. The plaintiff wrote to the defendant asking him to remit the necessary fees, and also the $100 which defendant had agreed to send him on his return to Missouri. Defendant failed to comply with plaintiff's request, and, without any explanation for his conduct, employed another attorney. The plaintiff brought suit to recover the amount of his compensation according to the terms of the contract.

When the case came on for trial in the district court defendant was absent, although he was in court in person at the commencement of the term. His attorney filed an application for a continuance, supported by his own affidavit. The court refused to continue the case. To this the defendant's attorney excepted. On the trial the plaintiff made his proof, and, the defendant being absent and offering no testimony, the trial court instructed the jury to return a verdict for the plaintiff. It is defendant's contention that the court erred in overruling the motion for a continuance. The affidavit filed for that purpose will not be set forth in the opinion. It is sufficient to say that defendant knew the cause was set for trial during the term of court at which he was present, and that he understood the order, yet he left the court without leave, and, instead of going to his home, he went to South Dakota, without informing his attorney of that fact or leaving any information as to where he might be found when called upon to respond to a notice of the approaching trial. The district court, therefore, did not err in refusing to grant the continuance asked for.

It is also contended that the court erred in directing a verdict for the plaintiff. It is argued that the contract was abrogated, and the plaintiff could not recover the fee which defendant agreed to pay him; that, having sued upon an express oral contract, he could not recover as for a *quantum meruit*. It may be conceded that plaintiff was not entitled to recover on a *quantum meruit*, and that contention will receive no further consideration; but we cannot agree with defendant that plaintiff could not recover on the express contract. The agreement, as shown by the testimony, was clear and explicit. The plaintiff entered

upon the performance of his services, and the defendant, after part performance, without any excuse or cause whatsoever, refused and neglected to perform his part of the contract, and without any explanation employed another attorney. The plaintiff at all times was ready and willing to perform his part of the agreement. It has been often held that in such case the attorney is entitled to recover his agreed compensation. In 4 Cyc. 984, it is said: "When an attorney makes a contract to perform certain services for an agreed sum, and the client, without any valid excuse or reason, discharges him or prevents the fulfilment of the contract, the attorney is entitled to recover the full contract price." In the case of *City of Detroit v. Whittemore,* 27 Mich. 281, it was said by Judge Cooley: "An attorney employed to carry a suit through for an agreed sum has a vested right to the compensation when he accepts and begins the service, and he cannot be lawfully deprived of it except by his own consent or through his own default or misconduct. If he is discharged from the employment before the service is completed, he may recover the whole sum, * * * because of the manifest impossibility of making an apportionment of the services and compensation, when the parties themselves by their contract expressly abstained from making any, and may in fact be said to have agreed that none should be made." In *Moyer v. Cantieny,* 41 Minn. 242, it was held: "A recovery may be had of the stipulated price, although before the plaintiff's efforts were concluded the defendant assumed to discharge him from the service. The plaintiff was entitled to the benefit of the contract, and the entire compensation agreed upon for the entire service was not apportionable."

As we view the case, the trial court did not err in directing a verdict for the plaintiff for the full compensation of $200. The judgment of the district court is therefore

AFFIRMED.

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

The following opinion on motion for rehearing was filed September 20, 1915. *Rehearing denied.*

BARNES, J.

The appellant has filed a motion for rehearing, and contends that the opinion overlooks the fact that plaintiff unqualifiedly admitted that he had quit the service of the defendant. A re-examination of the record shows that the plaintiff testified that, when defendant paid him the fee agreed upon, he was still ready and willing to perform the services. He said: "When he pays me my fee, I am ready to serve him."

It is next contended that our opinion in this case is in direct conflict with the rule announced in *Shevalier v. Doyle,* 88 Neb. 560. Appellant insists that the rule in that case should be adhered to; that a different rule should not be announced without expressly overruling that case. In *Shevalier v. Doyle,* the contract of employment was terminated; Doyle had accepted his discharge; and, in the suit brought by Shevalier to cancel the mortgage given to secure Doyle's fee, the reasonable value of the service was alleged and the attorney was allowed to recover the same. In the case at bar the contract had not been abrogated. The defendant simply neglected and refused to pay plaintiff the fee agreed upon by him. In this case plaintiff sued to recover the compensation agreed upon. He manifested his willingness to perform the services if defendant would pay him his fee. The testimony shows that the defendant employed another attorney and ignored plaintiff. The cases are easily distinguishable, and the motion for a rehearing is

OVERRULED.

HAMER, J., not sitting.